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*Dec. 11-13.
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*Feb. 19.

JAMES HERBERT BARTLETT (PLAINTIFF) ..... } APPELLANT;

AND

THE NOVA SCOTIA STEEL COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to land—Plan of survey—Evidence—Onus of proof—Findings of jury—Error—New trial.

Where it appeared that in directing the jury, at the trial, the judge attached undue importance to the effect of a plan of survey referred to in a junior grant as against a much older plan upon which the original grants of the lands in dispute depended and that the findings were not based upon evidence sufficient in law to shift the onus of proof from the plaintiff and were, likewise, insufficient for the taking of accounts in respect to trespass and conversion of minerals complained of.

Held, affirming the order for a new trial made by the judgment appeal from (1 East. L.R. 293), that in the absence of evidence of error therein, the older grants and plan must govern the rights of the parties.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1), setting aside the judgment entered upon the findings of the jury at the trial by Russell J. and ordering a new trial.

The judgment appealed from was rendered on an appeal from the judgment at the third trial of the action upon an order for a new trial affirmed by the Supreme Court of Canada(2) upon a former appeal.

*PRESENT:—Fitzpatrick C.J. and Girouard, Idington, Maclennan and Duff JJ.

(1) 1 East. L.R. 293. (2) 35 Can. S.C.R. 527.

The circumstances of the case and questions in issue upon the present appeal are stated in the judgments now reported.

W. B. A. Ritchie K.C. and *J. J. Ritchie K.C.* for the appellant.

Newcombe K.C. and *Harris K.C.* for the respondents.

THE CHIEF JUSTICE.—This appeal must be dismissed with costs. I agree in the opinion of His Lordship Mr. Justice Maclennan.

GIROUARD J.—I concur in the judgment of Mr. Justice Maclennan.

IDINGTON J.—This case has been tried three times and the Supreme Court of Nova Scotia has directed a fourth trial and from that order the plaintiff, who secured last verdict, being his first success of the kind, appeals.

Thorough search for plans and proper means to produce them in evidence, and when produced, a supplementing of the evidence thus furnished by comprehensive surveys of river, side lines and rear lines, that would have applied, and so to speak, fitted the original plan to the ground, as it was settled upon, ought to have determined by one trial, once and for all, the questions in issue.

The angles and courses setting forth on this plan the many lots, are of such a character, and so varied, that the means of checking such surveys are abundant.

Unless the river is one of those that shifts its

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course every few years, the main courses of it furnish, I would suppose, a key to the whole.

It may be more amusing to follow the games of chance arising, from trying how little evidence, or what kind of evidence, may be available, admissible or effective in a case of this sort, than to settle down to a thorough investigation of the historical and mathematical problems I suggest.

The new trial has been granted because of misdirection by the learned trial judge in his charge to the jury.

It seems to me that the learned trial judge misunderstood the effect of what was said in the report of this case in 35 S.C.R. 527. All that this court had to do on that occasion was to dismiss an appeal against an order for a new trial. That duty done, and I conceive properly done, the court could not go further and direct anything. The remarks in doing so bound nobody. They might be considered of weight or not as an exposition of the law.

It is the decision of the case, and in that decision the determination of some point of law necessarily involved therein, that governs as a precedent, or binds in a new trial.

There was nothing of that kind in the remarks to which the learned trial judge attached so very much importance.

The parties were entitled to have had the new trial herein proceed as if the case had never been tried before. In such cases the less the jury hears of former trials or hints of former results, the better.

I am forced to conclude that the learned trial judge erred in referring to a part of the case, a possible turning point of the case, as decided here, and

as if the remarks made here on the point in question bound the jury unless and until the defendants had established something which might well have been impossible or inconvenient. It seems as if the learned trial judge detected the fallacy but felt bound, in a way he was not, by what transpired here.

Exception is taken also to the learned trial judge's charge relative to the north boundary of, or the location of the Finlay Cameron lot, and the alleged trespasses immediately north of it. The remarks made in regard to the river and Mount Horeb road as bearing on this branch of the case, certainly tend to produce an impression beyond what, after some consideration, I think is warranted by the evidence of McKenzie, which I will deal with later on.

Stripped of sophistries and needless verbiage, the mining lease in question here only attempts to give the right to minerals in the lands lying between Peter Grant's land on the north as granted to him, and the lands of James Fraser on the south, both being granted by the same patent, in the lease said to be in or of 1784, but in reality dated 3rd Nov., 1785.

This patent granted in all 3,400 acres to seventeen different grantees, but apportioned the land intended for each amongst the grantees, in quantities set forth in the habendum. The grant is expressly made of

> three thousand four hundred acres situate, lying and being on the East River emptying into Pictou Harbour, within the County of Halifax and province aforesaid and abutted and bounded according to the plan annexed, three thousand four hundred acres. And hath such shape, form and marks as appears by a plat thereof, hereunto.

The plan is thus incorporated with the deed. The width and area of each grant is marked on the plan corresponding to the area allotted by the patent to

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each grantee. As minerals, now in question, were not reserved to the Crown, the vacant space, appearing between the Peter Grant and James Fraser grants is all that was left for any miner's lease to operate on. In common with other vacant spaces, between the grants, according to this plan, it had not written across it anything to indicate the width or area.

According to the scale upon which this plan is drawn, there would be only thirty-five chains between these grants. And as by this plan appears, a grant ten chains wide, to Finlay Cameron, not so long as these grants in depth, from the river, but the same depth as plaintiff's lease, there would only be twenty-five chains width in this vacant space for this lease, though claiming 64.03 chains to operate upon.

I am unable to understand why, as suggested, but not proved, the measurement by scale of these vacant spaces should, necessarily, be unreliable.

The vacant spaces were doubtless left ungranted, as counsel conceded, because less desirable for settlement than others. It is hardly likely that such selection was left to the sole judgment of the surveyor. Each man would, for himself, by self or friends, I should say, judging from the greatly varying size of the grants, here laid out, have to decide that. No doubt there was much said and done in the way of investigating, and allotting before the settlement assumed the remarkable shape this plan indicates, and though the surveyor has not put down, on the plan, figures to indicate the areas of ungranted lands, it does not follow, he omitted to chain across them. It would be most remarkable, if the surveyor should have omitted to ascertain and report the width of these

intervening spaces, for the information of the Government, and the proposed settlers.

And when I apply the scale to the tier of parallel lots, on the west side of the river and the same scale to those opposite, and on the east side of the river, including vacant spaces in both cases, and in the latter case, going to the southerly line of the Fraser 350 acre grant, in making such a test, the results are such, after making allowances for the overlappings of the two blocks, on either side, as they appear on the plan, that I am convinced, that the whole plan was, *including vacant spaces,* worked out on a scale.

Such approaches to accuracy do not exist in some of the other numerous plans, before us, and such results are not merely accidental.

I am further unable to understand how the error, if error there be, in the width of this vacant space, can so enure to the plaintiff's benefit, as to entitle him on an investigation of the facts, as to the width, to have a jury told by the learned trial judge, at the close of the case, that a *primâ facie* case exists in plaintiff's favour.

I proceed to consider the story of this survey from the above mentioned grant down.

The improbable supposition that so wide an area would be passed, by those settlers, especially as we find it coveted, and settled afterwards, meets us at the first step in our investigation.

A vacant space at the north end of the same side was taken by one McDonald in 1803.

In 1811, John Holmes had granted to him the following part of the space now in question.

The lot described in the said plan number three on the said branch of the said East River, beginning at the upper bounds of lands

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claimed by a certain Alexander Grant, from thence to run north seventy degrees east, four hundred and seventy rods, along the line of Alexander Grant, thence south twenty degrees east sixty-eight rods or *until it comes to the farm lot of said Fraser*, thence south seventy degrees west *five hundred and twenty rods along the line of said James Fraser farm lot* until it comes to the river, thence following the several courses of said river down stream, until it meet the place of beginning containing in the whole two hundred acres.

And we find, at that time, no trace of any James Fraser farm lot, except the one which forms the southerly boundary of lands in this mining lease, unless we look at the deed in 1799 from the heirs of Finlay Cameron, to one James Fraser; the same man I imagine. Now it is as clear as anything possibly can be that the Holmes grant came south to one or other of these James Fraser lots. I will refer to this again presently, and possibly shew how an error occurred.

Who was the neighbor on the northerly side of Holmes? No one else than Alexander Grant, the son of Peter Grant, whose land was the northerly boundary of this vacant space and this mining lease.

And Alexander Grant is recognized, by this grant to Holmes, as a claimant in 1811, to the land next north of Holmes' grant, so much so, that his land was the northern boundary line of that surveyed out for Holmes. Nothing else happened until Alexander Grant, five years later, 25th January, 1816, got his claim finally recognized by the Crown granting him the following:—

Beginning on the eastern side of the east branch of the East River of Pictou, on the south eastern angle of Peter Grant's farm lot, from thence to run north seventy degrees east along the southern side line of said farm lot four hundred and seventy rods, thence south twenty degrees east on ungranted lands sixty-five rods, or until it *meets the north-eastern angle of John Holmes' lands*, thence south seventy degrees west along the northern side line of said lands *four hun-*

dred and eighty rods, or until it meets the river, thence by the different courses of the same down stream until it meets the place of beginning.

In an ordinary case, we would say that these two grants covered all the vacant space between the farm lot of James Fraser, the original grantee, and the southern line of Peter Grant now the subject of inquiry. But this is an extraordinary case.

If we take the farm lot of James Fraser to mean his own original grant, or the line of his acquisition from the heirs of Finlay Cameron, of his lot, the result is the same, for both had been granted by the Crown, without reserving such metals as now in question.

The two descriptions I copy clearly cover the vacant space. It is not a question of accuracy of measurements of width, for that is expressly provided against by the terms, in each case, used alternatively to the chains of distance; by the words in the first *"or until it comes to the farm lot of James Fraser";* and in the next grant "or until it meets the north eastern angle of John Holmes' lands." Generally speaking one would be unable to find any more space upon which there could be found anything for a further grant of the Crown to operate.

But here it is said, true that may be so, but we find there was according to the scaling of this plan only twenty-five chains to operate upon, and there must be an error, and as there was an error it must enure to the benefit of discoverers in a future century.

I think the ground of error can easily be found if we follow the surveyor along in the survey of Holmes' lot.

He ran along, as that shews, the south boundary

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of Alexander Grant's claim 470 rods. That took him seventy rods at least past the east end of Finlay Cameron's grant and, if allowance is to be made for the bend in the river, about fifty rods more. I say fifty rods, because there is that difference between the length of the north and south boundaries caused by the bend of the river. The surveyor crosses south to the farm lot of said Fraser. Being so far easterly beyond rear end of Finlay Cameron lot, are we to assume that he had in mind that lot? Fraser had acquired the lot from Finlay Cameron's heirs twelve years before. This is not expressed to be the line of *an extension of the north line* of Fraser farm lot, as assuming knowledge in the surveyor of the fact of this acquisition, it might have been well described to be. It is to the farm lot "or until it comes to the farm lot of said Fraser." Then he runs *from the extreme east point to which that had brought him* "along the line of said James Fraser's farm lot." How could he? Only one way, and that was *along the north line of the original James Fraser farm lot* which possibly shewed then blazed trees. And as he may not have known anything of the Finlay Cameron lot or Fraser's acquisition of it, he proceeded west in way he says. It is to be remembered there were only twenty-five chains between the Cameron and Alexander Grant lines and if the latter claimed two hundred acres, his southerly line would be only eighteen chains from James Fraser's original grant of farm lot. He sought a blazed line and found it, one chain further on. Instead of giving Holmes seventeen chains he would be giving him eighteen chains. That might appear as nothing in the woods, of any value.

Assuming such an error either discovered and rec-

tified or undiscovered, I cannot see how we can infer from either discovery and rectification or oversight of it, a widening of the space between Fraser and Peter Grant so as to find 64.03 chains to meet the needs of this lease.

The obvious thing is that two surveyors in 1811 and 1816, surveyed the very space in question and could not find even the width there previously supposed to exist.

It was only twenty-six years after the original survey was made and when the marks of that work could no doubt, in many places, if not in all, be traced on the ground, that this claim of Alexander Grant was recognized and this grant to Holmes shewing its recognition was made.

To discard evidence which all that, together with the grant, in 1816, confirming Alexander Grant's claim, furnishes because of an error of description, in one or other, that may involve at the worst a width of about eight chains and adopt another hypothesis that there was a width of 64.03 chains; enough for nearly four 200 acres farms of the length of Grant and Fraser farms; when the eyes, then looking on the ground, only found there a width for two at most, and not even that except by the error I refer to; seems to border on the absurd.

Yet we are told that there was the grant in this same patent, that gave Alexander Grant his land, of another part to James Fraser, and that it shews a width of eighteen chains including the Finlay Cameron lot. It plainly includes the latter. Its bounds are as follows:

That certain tract of land marked "B" on the annexed plan containing three hundred acres and is abutted and bounded as follows,

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viz., northerly and easterly by the said John Holmes' lands and ungranted lands, southerly by lands heretofore granted him, the said Fraser, and westerly by the said east branch of the East River.

I fail to see how being bounded by Holmes' land on the north, this explains anything, in a way to help plaintiff. I observe it comes in the patent next after Alexander Grant's grant, and by reason thereof, as well as by the Holmes land, lying between, it could not disturb Grant in any way. James Holmes says this Fraser was the son. The language above quoted, written before he was born, fails to confirm his statement.

The issue of a grant to Fraser, including the land already granted Cameron, and claimed by him (Fraser), through Cameron, suggests speculation as to what was meant by this.

These lands were all subject to settlement duties and he may have desired confirmation in view of possible lapses both on his own part and that of Cameron. Or the fact may be that he had located too far south, and that it only shews one or two more blunders in this world.

The utmost that can be said if the plan of 1816 be absolutely correct is that there was a space of forty-one chains and twenty links between the southerly line of Peter Grant's grant and the northerly line of Fraser's 1785 grant. And out of this comes ten chains granted Finlay Cameron, leaving thirty-one chains and twenty links. To get this result lots, as laid down in the original plan, and this later one of 1816, have to be transposed to conform to a theory.

Surely if ever Crown surveys and grants conclusively settled anything, the inference to be drawn from this grant and plan and measurements thereon

is against this lease. In any event, it is left only thirty-one chains and twenty links to operate upon, instead of sixty-four chains and three links. Eight of these chains would be in the undiscovered, perhaps undiscoverable territory south of Holmes' lot, more probably south of Finlay Cameron's grant as Holmes comes up to that at least, and the remainder would be in Holmes' and Alexander Grant's territory.

When we apply these facts and considerations to the charge in question, what foundation had the charge to rest upon?

Is it not, with the greatest respect, obviously unfair to the defendants to have presented to the jury a presumption, existing at the close of the case, as against them, upon facts which left little further, they could do at this distance of time to shew their rights, when upon these facts the presumption or *primâ facie* case if it ever existed, had thus been dispelled.

What are the facts upon which presumption for appellant rests? He got a mining lease of lands surveyed by Holmes in 1872. Nothing came of the project upon which that was initiated, save and except a survey by him; a placing of stones, a marking of a maple tree; and a *fir tree supposed to be in the southerly line of Peter Grant's land;* and a survey or inspection in 1875 for a similar purpose, of which nothing came. In 1875 the stones were gone, but the maple tree stood, as also the fir. In 1889 the plaintiff came, and re-survey or inspection took place. But the maple had passed. Yet there was a stump supposed to be its stump. The plaintiff got the lease then, which is now in question.

This action began on the 12th July, 1900, and hav-

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ing been tried, this Mr. Holmes, who conceived the idea that there was such a wide area of mining land, yet vested in the Crown, appeared as a witness and told, that when he went to survey in 1872 he met Mr. William Grant, the grandson of Peter Grant, and questioned him. One is tempted to ask, why he should have inquired of Grant, what he, Holmes, born and brought up so short a distance away and bred to the profession of a surveyor probably knew so much better than Grant.

However, the following is what he relates as taking place:—

> Q. How do you find this particular point No. 1, was it at random? A. I went to William Grant. He owned the land. He told me I knew the line as well as he did. William Grant shewed me his north line * * * Having found what Grant told us was the north line, we took a line from the main road and extended it up to the top of the hill a quarter of a mile. We came across at right angles, twenty chains, what the grant called for * * * When we came to the twenty chains, Peter Ross and I told Grant that was the complement his grant gave him, and if he shewed another line we would go there. He said he claimed up to the Holmes line * * * When I shewed Grant where the twenty chains were, we told him we would go where he chose; he would not give us any line. We gave him his complement, and ran from there to the maple tree down at the river.

In 1875 Grant was evidently determinedly hostile and nothing he said then can be construed as any admission of anything.

Holmes, having acted upon this alleged admission of William Grant, we are told defendants are *bound* by what he said.

The Crown cannot any more than a private individual can go, by means of a surveyor armed with such powers as the law gives a surveyor, to execute a commission given him, and planting stakes where he

sees fit, create a presumption in favour of such line as the surveyor sees fit to adopt.

It is said, however, that this proceeding rests upon the admission of William Grant made in disparagement of his title under which the defendants claim.

The land spoken of, is not confined to the original Peter Grant lot, and if he or William had encroached upon neighbouring land to the north of the original north line, this answer could in no way affect this title even if such loose expressions can be of value as to a boundary line.

In fairness the whole conversation must be considered. In effect it seems to say "that is my north line and Holmes' line is my south line." No regard is paid in the statement to what the space covered, and the difference of title in the several parts of it.

The cases of *Mountney* v. *Collier* (1853) (1), and *Crease* v. *Barrett* (2), at p. 931, are all I find in regard to statements of boundary lines and that presented by former is a clear cut case of fact, not shewn here, and latter case is not unlike this.

I do not think such admission as made here can be a safe basis to rest the *primâ facie* case the learned trial judge directed the jury had been made here, and required to be rebutted or displaced.

But in the last trial the witness Holmes shifted his ground, and said he really believed, from what Alexander Grant had told somebody, in his presence in 1836, when he (Holmes) was a youngster sixteen years of age, that he had been mistaken and a line four chains or more further south, was the right line of Peter Grant's grant, and that would throw his south line that much further south.

(1) 22 L.J.Q.B. 124. (2) 1 C.M. & R. 919.

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I will deal presently with the plan he produced and spoke to, and another made by McKenzie, together, as the latter is founded on the former.

The plaintiff rested his case upon that evidence, and plan of Holmes, and after the defendants had given much evidence, as to what is known in the case as the elm tree line, respecting which I will say nothing, and other matters, Mr. McKenzie was called in rebuttal and testified to the correctness of a plan, that he produced, which was the result of his visiting the locality, under the guidance of Mr. Holmes in 1889. He spoke of a recent visit in 1901, to refresh his memory, I take it, and from which his impressions as set forth in the plan were confirmed.

I merely wish to deal with the plan, which is of the same general character as the plan produced by Mr. Holmes and to refrain from dealing at length with the evidence of McKenzie.

The remarkable feature of both, is that the lands in question have spread out and grown, in a way that is quite inconsistent with all I have related, as to the original plan and the plan annexed to the 1816 grants. There appear two new strips of land in both, and two new proprietors in the Holmes plan between the James Fraser original grant and the Holmes grant.

One of these is the Finlay Cameron grant, clearly covered in the grant of 1816 to Fraser, as part of his 300 acres, 72 rods in width, but now appearing south of and alongside the same.

Another is that of "Fraser Saddler grant 1816" lying between the James Fraser grant of 1816, and the Holmes grant, though the north line of the James Fraser 1816 grant is, as shewn above, bounded on the north by the same land.

If gross error existed, in widths originally expressed, as given them, I could understand an expansion of the Holmes and Alexander Grant's grant, which filled the whole vacant space in question.

If, for example, each of them had been found to have in fact, respectively, a width of twenty-seven chains, and twenty-six chains twenty-five links, instead of seventeen chains, and sixteen chains twenty-five links, respectively, their grants having minerals reserved to the Crown, and subject to such a mining lease as that in question, the lease would operate thereon.

Expansion of that sort I could conceive of, if evidence shewed it as possible, but I decline to accept intercalations of the sort put before us in plain violation of the descriptions given in the grant of 1816 without direct evidence. And to write across it words "granted 1816" when no such grant appears in the evidence is, to say the least, confusing.

There is a deed Ex. W.W.C. given by James Fraser Senior to James Fraser Junior on 9th February, 1816, fifteen days after the Crown grant of 1816 which certainly is, in light of what preceded it, a sort of puzzle. It appears in defendants' claim of title. It purports to cover 420 acres more or less. It has John Holmes' farm lot for north boundary

> for five hundred and sixty rods or until it comes to the rear line of said James Fraser Senior's farm lot from thence to run south twenty degrees east along said rear line one hundred and thirty rods or until it comes to the said line of said James Fraser Senior's farm lot, from thence to run south seventy degrees west along said line five hundred and ten rods until it comes, etc.

We have Holmes' farm lot, given in his grant, at five hundred and twenty rods, along his southerly

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line; so this Fraser deed runs forty rods past it. We have Fraser's lot given at 660 rods (see plan) and the given area confirms that as correct. And we have the entire Fraser line of that date, consisting of two parcels, one 18 chains and other 22 chains wide or a total of thirty chains.

What is this rear line? What is the southerly line referred to in this lastly quoted description?

The Holmes plans, Ex. W.W. /9 & W.W./5, give the Finlay Cameron grant, the Fraser Sadler grant, and the Holmes grant, as of the same length and forming part of a rectangular block of land.

We know Finlay Cameron grant was 100 chains, and Holmes grant one hundred and thirty chains, and that Fraser grant of 1816 extended far beyond either.

It is not necessary that I should solve this puzzle.

The deed from Fraser Senior to Fraser Junior, being subsequent to the Crown grants, can have no effect on the question I am dealing with just now.

It may or may not be necessary for the purpose of their title, for defendants herein to clear up this and the elm tree line.

I am only concerned with what obviously has a bearing on the judge's charge, and just now with the fundamental part of it, which at the beginning and at the close presented a *primâ facie* case, in favour of the plaintiff. Did it exist? I remark on this Fraser deed to shew I have not overlooked it, and that it cannot form any basis for a *primâ facie* case in favour of the plaintiff.

Turning from the Holmes plan to the McKenzie plan, Ex. W. W. /6, we find, though it shews Finlay Cameron lot, and some other person's narrow strip,

lying between Fraser grant of 1816, and his original grant of 1785, that they are not alike in the rear lines.

The cross measurement, however, of the McKenzie plan is more important, so I pass these minor differences of which some explanation, perhaps involving minor inaccuracies, may exist. Their disregard of accuracy, in measurement of lines from river to rear will appear presently, in what to me is much more formidable, in estimating the strength of this corroborative evidence of Mr. McKenzie.

To begin with, there is a clear issue of fact, presented by the comparison of the McKenzie plan, with the original plan.

Measured on the east side of the river, from the north line of plotted lands, to the south line of the original Fraser grant, there is by scale in the original plan presented a width of 115 chains and by the McKenzie plan when scaled a width of 152½ chains. Which plan is right? Who has blundered? They cannot both be right.

We were asked to believe the vacant spaces were inaccurate. I have said why I do not think so. Are these the only inaccuracies? Are these the only sources of differences of results? Have they anything to do with the enormous difference of results over so comparatively short a space of ground? Was the surveyor of the work appearing on the original plan systematically accurate or the reverse?

Whatever he was, his plan has left abundant means of demonstrating inaccuracy if it existed. The configuration of the ground with its river running through it and of the plotting done thereof make his plan an easy mark. Has the river changed? Is it in soil that would render change probable? Has it still

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those sharp bends and those long divergences starting from one or other of those bends first in a general course one way, and then another, alternating as it were?

To destroy confidence in the original plan is absolutely necessary to have any in McKenzie's fragmentary plan. No such general line of attack was made. I assume the original plan as to the river correct. I assume, when Finlay Cameron's grant of 100 acres appeared thereon, south of a most marked bend in the river, and so far past that bend, as it were, that the man surveying and placing it south of this river bend knew what he was doing.

I cannot conceive why he would place it there if, in truth and fact, he had surveyed and laid it out further north as McKenzie and Holmes plainly put it in their plans.

By his plan the end of this lot, butting on the river, is so nearly straight, that he has placed 100 chains as length of rear, and the consequent result of 100 acres is the given area. The north line must have been found about equal to the south as indeed the plan shews.

The other plans I refer to, place the west end of the Finlay Cameron lot, so that it abuts on the acute slant of the river, where the north and south boundaries cannot be equal.

It moreover occupies that slant so much that there was no place to fit in Holmes' lot, as I purpose shewing it was fitted in, south of the apex of the bend in question.

The north line of Peter Grant's lot, is on the McKenzie plan identical, in scale length, with that of the north line of the Peter Grant lot in the original plan,

doubtless copied according to scale. The north line according to Holmes' plan is ten chains longer, according to scale, than the north line of the original lot. The end butted on the river, according to the original plan at a part of the river, where there would not be so much difference between north and south lines, as to make it worth considering. At least the south line or short one being found 150 chains and the rear width 20 chains, the area was 300 acres. It is not so in other and especially Holmes' plan.

The rear of Peter Grant's line and that of the James Fraser original grant appear to the eye, on the original plan when tried by the same perpendicular or meridian line, as if Grant's rear projected easterly over the Fraser original rear line, yet, on these McKenzie and Holmes plans, the original Fraser rear line projects easterly beyond that of Peter Grant.

What does this mean? Fraser's original south line was 158 chains and Peter Grant's 150 chains. Why do these lines and the relative position of these lands differ so much though the plans are a hundred years apart? Has the river changed? Or has the shifting of the location of Peter Grant's land, by the intercalations I have referred to, of twenty to thirty chains further north, on the river, had anything to do with it? Let any one look at the plans and compare them in light of the course of the river. I leave it there, for I have not the instruments or means at hand to acquire more accurate results. A tracing of the original on the same scale placed over McKenzie's plan will shew curious results.

Is the whole work, on the ground, on both sides of the river, actually, in corresponding parts throughout, as diverse as the results got on the east side, by tests?

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If such comparative tests were applied to both sides of the river and there were found corresponding errors or inaccuracies as the case may be, they should go far to settle this conflict between the different plans.

If confidence still exists in Holmes' and McKenzie's locations, as an interpretation of the original plan, I would like to know how the plan remained so absolutely accurate as to the original grants of James McDonald, and of James Fraser, which are yet respectively, exactly 20 chains and 22 chains wide, and all else, for the most part, so extravagently in error, save in the case of Peter Grant's grant which comes out within thirty links, in width of the original. But if the second edition of Holmes' relations were to be applied then where would Peter Grant be in McKenzie's plan? Where would the intercalations go?

I cannot understand this absolute accuracy of width at the north and at the south and the intervening gross inaccuracies.

Men inaccurate by nature or habit continue inaccurate, and the most accurate of men, in the same way, though seldom shewing absolute accuracy, shew a general approach thereto, with remarkable uniformity.

This original plan will even at the distance of a hundred and twenty years, if thoroughly investigated, be found accurate or the reverse.

Where, according to this plan in 1785, Cameron and Peter Grant's lands were, they must now be. Their acts of locating them only furnish some evidence to interpret the plan. If the work on the ground upon which the plan was founded gave more or less than the figures on the plan indicate that might govern.

It may be inferred, for example, from the case of the Hugh McDonald lot, found to be 11.27 chains instead of 10 chains that he got more. Others may have got more, or less, though owing to the general aim of the Crown surveys to give full measure very unlikely less.

It does not follow that, if over a wide range a surplus width, counting by figures on a plan, be found, it of necessity falls to the Crown or its lessees, still less in one place. All the errors of that sort cannot of necessity fall in one place. Yet is not that what Mc. Kenzie's evidence comes to?

Finding extra width disturbs but settles nothing.

Test the matters in question by the Holmes' grant, of 17 chains wide, as it stood in 1811 on the south side of the apex of the bend in the river, and next Finlay Cameron, when it was 470 rods on the north line, and on the south 520 rods. Fit it into the angle that was left in the river when Finlay Cameron's land was allotted him, and see how exactly such delimitation would suit the facts.

It is removed by McKenzie to the north side of the apex and there the north line must be the longer one, and the south one the shorter one, for the mathematical results of fitting it into the northerly line of the triangle in the river, obviously must be so. Yet when I scale them I find about $5\frac{3}{4}$ inches equal to 112 chains or 448 rods of north line as against $4\frac{5}{8}$ inches equal to $92\frac{1}{2}$ chains or 370 rods for south line.

Certainly these are not the same boundary lines or these lots the same.

Without, so far as I can see, observing this, explaining it, or alluding to it, the learned trial judge on the strength of the following in McKenzie's evidence

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The Court:—Q.—Are the angles and turns of the river correctly represented on this plan—G. 3 ? A.—Very nearly so.

made the impressive remarks as to roads and rivers that are complained of.

The Mount Horeb road I certainly understood counsel in answer to repeated questions, to concede, lay on the south side of the Finlay Cameron grant. If so then we have that part of the learned trial judge's charge going in the wrong direction.

If the intercalations are omitted from the plan and ought to appear as substitutions or superpositions, so to speak, as the evidence of some witnesses indicates, then the Mount Horeb road may be still on the south line of where Finlay Comeron's 100 acre lot lay. In that, however, McDonald Roy and his corroborators would be right, and the learned trial judge's original impression be right, but what he got from McKenzie be absolutely wrong, and the impression left on the jury correspondingly so.

If these observations are nearly correct, though touching only a fringe of the case, there is much to complain of in the possible effect of the learned trial judge's charge in this regard.

There appear on the later plans brooks that do not appear on the original. One of these brooks might have fitted this Holmes lot, in either place chosen to set it down. Whether the brook attracted the settling man, or the eye of the artist saw no difference, in later times, as to which brook should be used, I know not. I pass the coincidence. I note only this, that the brook may have in a hundred years transformed the apex of the river so much by its wearings and deposits, that some of, or some part of, the inferences I

have been drawing, may not be justifiable. There is no evidence of it however.

I cannot usefully add much more on the issue now before me which is the concrete, or possibly concrete effect, of Mr. Justice Russell's charge relative to the alleged *primâ facie* case, of the plaintiff, at the beginning and ending of his charge and that part I have just dealt with.

I cannot share Mr. Justice Graham's abstract theories as to it.

I cannot accept, as he has apparently been able to do, the evidence as to so wide a vacant space as conclusive, and I am therefore less inclined to adopt his abstract proposition as to the possible meanings of such a charge. The evidence of McKenzie shews that his method of cross measurements was dependent upon hearsay as to lines, and at the offsets he makes errors may have crept in. And though he swears to having had plans with him that ought to have so startled him, when contrasted with his results, as to have put him to some more systematic method of checking his work than is observable in the evidence, yet we are left to guess at explanations.

I am clear not only that the charge was technically erroneous, but that it must of necessity be destructive of the defendants' case, unless jurors are in Nova Scotia, of a class by themselves, above impressions from the Bench.

I have not read any of the numerous affidavits filed on the application to amend the notice. The plans filed therewith as well as the argument here indicate a probability that the course of the river may have been dealt with in the affidavits in such a way as to change or confirm my present impressions.

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I have purposely abstained from the reading of them, as I think this motion ought to be disposed of upon the case that was presented to the minds of court and jury at the trial. A careful reading of the evidence, of the charge, of the opinion judgments below and of the appellants' factum, and a careful consideration of all that is apparent to me therein, has produced the results I have written and led me to the conclusion that this appeal should be dismissed with costs.

I am by reason of what has transpired in regard to the last appeal herein to this court in this case, constrained to say, that however much there may be incidentally in what I have said helpful or hurtful to either side in the method of investigation I have followed and I think in part should be followed in such a case, yet I have dealt only with one aspect of this case, and only part of it, and that nothing herein should be presented to a future jury as the decision of this case beyond the result that a direction involving any presumption of law, as presenting at the close of the trial a *primâ facie case,* in favour of such a case as plaintiff at last trial presented is not good law.

A presumption of law in favour of a junior grant as against a senior grant wherein the respective plans conflict and the senior grant has had the original plan incorporated with the grant as here is perhaps possible in human experience, but hardly likely to arise here.

There is another phase of the trial that to my mind is against this appeal.

The parties were agreed that if judgment must go for plaintiff in the case, the damages must be assessed by a named referee.

All else, however, that would entitle the plaintiffs to judgment must be found by the jury.

Now all that was left to and got from the jury on this trial were the following questions and answers:

1. Were any ores mined by the Pictou Charcoal & Iron Company and sold to the Nova Scotia Steel Company taken out south of the south line of Peter Grant's grant dated Nov. 3rd, 1785?

Ans.—Yes.

2. Is the property described in the agreement between the New Glasgow Coal & Railway Company and James Fraser and others covered by the Finlay Cameron grant in 1785?

Ans.—No.

3. Has it been proved that the line claimed to run from the elm tree is the north line of the lot granted to Peter Grant in 1785?

Ans.—No.

I am at a loss to know how a verdict, in an action of trespass, can be entered on such findings, and so followed by judgment that the scope of the referees' duties may be definitely ascertained.

In view of the difficulty I have in this regard I asked counsel on argument if any such rule existed in Nova Scotia as in Ontario where the judge can submit parts of the case as he sees fit by question to a jury, and reserve the rest for himself to deal with, and they were agreed that there is not. I, therefore, in absence of such rule or any power, without consent of parties, in a trial judge to deal with anything but the answers on issue raised, would desire before adopting the Pudsey decision and applying it to this case, to consider further if I found it necessary to decide the point. I would not be disposed to think that order 38, rule 10, of the "Nova Scotia Judicature Act" could be stretched so far as to cover the omissions here.

I think the appeal should be dismissed with costs.

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MACLENNAN J.—After considering this case very fully in all its bearings, I think the order for a new trial should stand.

I do so substantially for the reasons given in the Court of Appeal by Mr. Justice Longley. I say substantially because Mr. Justice Longley has fallen into one or two inaccuracies in his statement of the evidence. He states that the description and survey made by Holmes of the land in 1872 defined it by corner stones, as described in the plaintiff's lease, whereas Holmes himself says that he marked the corner with wooden stakes, and not with stones, and that although he saw stones in 1875, where he had put stakes no stones were there in 1889, the date of the lease, and he thought they had not been there for 12 or 16 years before. The evidence is that when the lease was made there was neither a marked maple tree, nor corner stones, by which the demise could be located. It follows that the only means of doing so was by ascertaining the Peter Grant south line. The description of the lease does not begin where a marked maple tree and marked corner stone had stood at some former time, but at a point where these objects were to be found at the making of the lease.

Not only was there no corner stone at the supposed point of commencement, at the making of the lease, but there was none at any of the other three corners as described in the lease, and the only part of the description, by which the land could be located, either at the making of the lease, or at any time afterwards, was the Peter Grant line, and the bearings and measurements.

The tree and stones might be rejected as *false demonstratio,* but the Grant line, and the bearings and measurements, would still be sufficient to save the

lease from being void. Under these circumstances I think the onus was cast upon the plaintiff to establish the Grant line, and to shew that the workings were south of that.

I also agree with Mr. Justice Longley in his opinion of the great importance of the grant of 1785 (called by him 1784), and the plan annexed thereto, in their bearing upon the case. I think both plan and grant must be taken to be accurate, and to shew correctly the position, relative to each other, of the several parcels, as well as their respective dimensions and acreage and the bearings of their boundaries.

It is inconceivable that a plan, annexed to and forming part of a Crown grant, intended to exhibit sixteen different parcels of land, differing much from each other in length, breadth and area, all fronting upon a river, winding and irregular in its course, and granted to sixteen different persons, should not have been prepared with great care, so as to shew with correctness the relations of the parcels to each other, or in other words, have been drawn to a scale, and that it should not have been the result of a correct survey of the whole tract.

And here I may express surprise that there is no mention in the case, from first to last, of the field notes of that old survey. It may be that it was shewn in the former trials that they had been searched for, and were not found, and that the absence of all reference to them is thus accounted for. There is a memorandum upon the old plan which might perhaps help a search in the Crown Land Department for the field notes of the survey on which it was made. That memorandum is as follows, "B. 17, page 83," and is written upon the Peter Grant parcel, and upon one other.

But in the absence of the field notes, which if pro-

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duced might have shewn an error in the scale, I think the plan must be taken to be correct and that the breadth of the ungranted land between Peter Grant's 300 acre parcel and Finlay Cameron's 100 acre parcel, must be taken to be what is indicated on that plan, by the scale, namely, 26¼ chains and not 64.03 chains, as claimed by the plaintiff's lease.

It was argued that the grant to John Holmes in 1811 of a parcel 17 chains wide, and a grant to Alexander Grant in 1816 of another parcel 16¼ chains wide, making together 33¼ chains in width between the Peter Grant and the Finlay Cameron land, was evidence that the old plan of 1785 was wrong, and that there was at least 33¼ chains in width included in the plaintiff's lease.

I do not think, however, that is so. The old grant and plan being earlier must still govern in the absence of evidence of error in the plan.

The subsequent grants to Holmes and Alexander Grant of 33¼ chains, or any other subsequent solemn act or declaration of the Crown, could have no effect in displacing the grants to Peter Grant and Finlay Cameron respectively, made years before.

I am also of opinion that the questions submitted to the jury and answered by them, are insufficient to enable the master to take an account, because both the Peter Grant and the Finlay Cameron lines are left undefined.

DUFF J.—I concur in the opinions stated by Mr. Justice Maclennan.

Appeal dismissed with costs.

Solicitor for the appellant: *Henry C. Borden.*
Solicitor for the respondents: *Robert E. Harris.*