1921
*June 8,
*Oct. 11.

THE TOWNSHIP OF ZONE (DEFENDANT) ........................ APPELLANT;

AND

JOHN B. McDOWELL (PLAINTIFF). RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

*Municipal corporation—Road allowance—Highway—Private land fenced back of boundary—Municipal Act,* *R.S.O.* [1914] *c.* 192, *s.* 478—*Surveys Act,* *R.S.O.* [1914] *c.* 166, *s.* 13.

Owing to a dispute between a municipality and M. as to whether or not some of the land claimed by the latter was part of the highway the Municipality applied to the Department of Lands, Forests and Mines for a survey which was made and confirmed by an order of the Minister. M. then moved his fence to the boundary thereby established.

Sec. 13 (4) of the Surveys Act provides that "the order of the Minister confirming the survey shall be final and conclusive upon all persons and shall not be questioned in any court." In an action by M. to restrain the municipality from tearing down his fence the latter invoked the provisions of sec. 478 of the Municipal Act that where a municipality desiring to open an original road allowance by mistake opens a road not wholly upon such allowance the private land included shall be deemed to be expropriated.

*Held*, per Davies C.J. and Anglin and Mignault JJ., that the road allowance this case was opened long before any such provision was placed in the Municipal Act and sec. 478 could not be invoked. The order of the Minister confirming the survey was conclusive and the boundaries established thereunder must be accepted.

*Per* Idington and Brodeur JJ., that the order of the Minister is final and the municipality cannot claim any boundary other than that established by the survey.

*Per* Duff J. The appeal should be dismissed for the reasons given by Mulock C.J. in the appellate division.

Judgment of the Appellate Division (48 Ont. L.R. 459) affirmed.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment at the trial (2) in favour of the respondent.

The respondent was, and is, the owner of lots numbers 4, 5 and 6 in the Gore Concession of the township of Zone, in the county of Kent, and brought his action against the appellants for an injunction and damages for the tearing down of the fences erected by the respondent upon his said lots, for a mandatory order compelling the appellants to re-erect the fences torn down by them, and for such other relief as the respondent might be declared to be entitled to.

The council of the appellants, in May, 1915, under the provisions of "The Surveys Act," R.S.O. 1914, chapter 166, applied to the Lieutenant-Governor in Council to cause the base line from the road allowance between concessions three and four, in the said township of Zone, to be surveyed and to be marked by monuments of stone or other durable material, under the direction and order of the Minister of Lands, Forests and Mines, in the manner described by the said Act.

The survey was duly made by G. A. McCubbin, O.L.S., an engineer appointed by the said Minister of Lands, Forests and Mines, and the survey so made was confirmed by the said Minister of Lands, Forests and Mines, in accordance with the provisions of the said Act, and an order confirming the same was duly made by the said Minister.

Notwithstanding the said order confirming the survey, the appellants, in September, 1919, by their servants, agents and workmen, entered upon the said lands of the respondent and tore down and damaged

(1) 48 Ont. L.R. 459. (2) 48 Ont. L.R. 268.

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or destroyed his fences thereon, and after the respondent had re-erected his said fences the appellants, in November, 1919, by their servants, agents and workmen, entered upon the said lands of the respondent and again tore down and destroyed them, and threatened to enter and tear down any fences which he might erect upon his said lands.

The action was tried before the Honourable Mr. Justice Orde, who reserved his decision, and subsequently, by his judgment, declared that the survey made by the said George A. McCubbin, O.L.S., is final and conclusive as establishing the boundary line of that part of the road allowance, commonly called the Base Line, which it covers, ordered and restrained the appellants, their servants, workmen and agents from trespassing upon the respondent's lands, and from tearing down and removing his fences, directed a reference to the local master to assess the respondent's damages, ordered the appellants to pay the damages so found by the master, and ordered the appellants to pay the costs of the action.

The appellants appealed and the Appellate Division affirmed this judgment.

Sec. 13, sub-sec. 4 of the Surveys Act provides that "(4) On the return of such survey to the Minister he shall cause a notice thereof to be published once in each week for four consecutive weeks in a newspaper published in the county or district town of the county or district in which the lands lie, and shall specify in the notice a day, not less than ten days after the last publication, on which the report of the survey will be considered, and the parties affected thereby heard, and on the hearing the Minister may either confirm the survey or direct such amendments or corrections to be made as he shall deem just, and shall

confirm the survey so amended or corrected, and the lines or parts of the lines so surveyed and marked shall thereafter be the permanent boundary lines of such concession or side roads or parts of concessions or side roads to all intents and purposes, and the order of the Minister confirming the survey shall be final and conclusive upon all persons and shall not be questioned in any court."

Sec. 478 of the Municipal Act relied on by the appellant reads as follows:—

(1) Where the Council of a municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be, but is not wholly or partly upon such allowance, the land occupied by the road as so opened shall be deemed to have been expropriated under a by-law of the corporation and no person on whose land such road or any part of it was opened shall be entitled to bring or maintain an action for or in respect of what was done or to recover possession of this land, but he shall be entitled to compensation under and in accordance with the provisions of this Act as for land expropriated under the powers conferred by this Act.

(2) The right to compensation shall be forever barred if the compensation is not claimed within one year after the land was first taken possession of by the corporation. 3-4 Geo. 5, c. 43, s. 478.

*Pike K.C.* for the appellant. The highway is the whole land between the fences and it is not necessary that all the space should be fit for travel. See *Walton* v. *Corporation of York* (1), at page 188; *Sibbald* v. *Grand Trunk Ry. Co.* (2), at page 190.

(1) 6 Ont. App. R. 181. (2) 18 Ont. App. R. 184.

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The evidence shows that this road was used as a public highway for over fifty years which shifts the burden of proof to the plaintiff. *Chicago* v. *Chicago &c., Ry. Co.* (1).

*Hellmuth K.C.* for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs and concur in the reasons for judgment as stated by my brother Anglin.

IDINGTON J.—This case might have been so presented as to raise some important questions of law governing the rights of litigants similarly situated, but I doubt if on the evidence any satisfactory decision of such a character can be reached.

The base line road, so called, within appellant's jurisdiction, for some reason or other, or none at all so far as appears in evidence, was constructed in such irregular fashion that a contest arose between the landowners on either side claiming that those opposite them had got an advantage by reason of the actual road not being placed where it should have been. This resulted in an application being made under section 13 of the Surveyors' Act by the appellant's council to the Lieutenant Governor in Council to cause the concession lines to be surveyed on either side of that part of said base line now in question and to be marked by monuments as provided by said statutory provision.

The authority so applied to duly directed such survey and it was proceeded with at some considerable expense and trouble.

(1) 152 Ill. 561.

The necessary steps to enforce the results reported by Mr. McCubbin, the surveyor chosen, were duly taken and the line so surveyed was duly established.

When it became evident what such results would be the appellant's council sought to revoke its application, but the Minister in charge of such subject matters after due consideration declined to accede to such request.

When the process directed for establishing such concession lines had been duly completed the respondent, as owner of several lots fronting upon said base line, moved out his fence to the McCubbin line so established.

The appellant directed his fences to be torn down more than once.

The respondent then brought this action to restrain such conduct on appellant's part, and the trial resulted in a judgment of Mr. Justice Orde holding that appellant, having appealed to the tribunal duly constituted to hear and determine such like issues, must abide by the result and that in accord with such result the respondent was right and appellant wrong, and granted the injunction asked by respondent against appellant's council repeating its lawless proceeding of tearing down respondent's fences placed on the McCubbin line, and to pay such damages as already done and, if the parties could not agree on that, same to be settled by a reference, and to pay respondent's costs.

The appellant sought relief in the second Appellate Division of the Supreme Court of Ontario. That court held that, on the facts adduced in evidence, it was unnecessary to determine the question which may be properly raised some day, of how far the line laid down by a survey pursuant to section 13 of the Survey Act can invade the actual travelled highway upon which public money has been expended in construction thereof, and dismissed the appeal.

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In answering that, which I think a quite correct view if the evidence supports it, I am surprised to find that appellant does not seem to have come prepared with a case presenting evidence to meet such an obvious view of the law.

Its conception of a highway, under such circumstances, is not that travelled on and upon which public money has been actually expended to make it travellable, but that all that happened to exist, rightfully or wrongfully, between the fences on either side must be held to be the highway within the meaning of what we have to deal with.

Accordingly, turning to the evidence upon which it relies herein, one of the first assertions in the factum for appellant in this connection is that where plaintiff moved his fences "was on the graded portion of the road."

Turning to the evidence I am surprised to find the following:—

Q.—And your fence was moved out where it would obstruct travel to some extent on the road? A.—I don't think so.

Q.—It was on the travelled portion of the road, on the graded portion? A.—Well, you could use it for a car if you wished.

Q.—Yes, that was over in a ditch there was on the south side? A.—There was no watercourse on the south side

Q.—So that it was really all the way that could be travelled? A.—It could be travelled, but it was on grass I put the posts, not on the travelled part.

This illustrates appellant's point of view in regard to the whole case and its contention to be that despite the old definition in the Municipal Act of 1866, and long before and after, being as follows

315. All allowances made for roads by the Crown surveyors in any town, township or place already laid out, or hereafter laid out, and also all roads laid out by virtue of any Act of the Parliament of Upper Canada, or any roads whereon the public money has been expended for

opening the same, or whereon the statute labour hath been usually performed, or any roads passing through the Indian Lands, shall be deemed common and public highways, unless where such roads have been already altered, or may hereafter be altered according to law,

the highway is what lands happen to be found between the two fences on either side.

I submit you cannot extend the statutory definition beyond the actual roadway unless coupled with other circumstances such as the original survey, or the dedication by someone, or some such right to claim expansion beyond that part travelled upon or improved so as to be travelled upon.

Counsel for appellant in argument expressly renounced any claim resting upon dedication.

As demonstrating appellant's contention to be such as I ascribe to it, I find a mass of evidence that does not pretend to adhere to the travelled way as the highway, but takes as the sole guide, to ascertain and determine that, the farm fences on either side, sometimes very feeble and irregular at that if one applies common knowledge as to conditions in this country.

The very interesting question of law of whether or not the actual travelled and graded highway in use having had public money expended upon it and been found beyond the bounds presented by a report such as that of Mr. McCubbin in question herein, can yet be declared, by virtue thereof, to be receded as it were to the rightful owner, does not seem to me to arise on the evidence presented in this case.

Apart from such a question of fact giving rise to a necessary solution of that problem, there is nothing in this appeal.

I am not prepared to declare that the view of the evidence taken by the court below is erroneous and upon the facts as in the judgment declared I am not prepared

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to say that court is wrong, and in regard to the relevant law applied thereto I think that court clearly right.

I would therefore dismiss this appeal with costs.

DUFF J.—This appeal should be dismissed with costs. I concur in the reasons given by Mulock C.J. in the Appellate Division.

ANGLIN J.—That under the original survey the strip of land in dispute formed part of lot 4 now owned by the respondent is, I think, conclusively established by the confirmation of the McCubbin survey by the Minister of Lands, Forests and Mines under s. 13 of the Surveys Act, R.S.O. [1914], c. 166. The appellant, defendant, nevertheless asserts that it is part of the highway known as the Base Line. It rests this claim neither on prescription nor dedication, but solely on the effect of s. 478 of the Municipal Act (R.S.O., [1914], c. 192), which reads as follows:—

478. (1) Where the council of a municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be, but is not wholly or partly, upon such allowance, the land occupied by the road as so opened shall be deemed to have been expropriated under a by-law of the corporation, and no person on whose land such road or any part of it was opened shall be entitled to bring or maintain an action for or in respect of what was done or to recover possession of his land, but he shall be entitled to compensation under and in accordance with the provisions of this Act as for land expropriated under the powers conferred by this Act.

(2) The right to compensation shall be forever barred if the compensation is not claimed within one year after the land was first taken possession of by the corporation.

The learned trial judge held that the operation of that section was superseded by the confirmation of the McCubbin survey by the Minister under s. 13 of the Surveys Act. The Appellate Divisional Court, expressing no opinion on that point, based its judgment dismissing the defendant's appeal, on the ground that because

there is no evidence shewing the performance of any statute labour or expenditure of any public money on any portion of the strip in question, nor so far as appears has it ever been used as a highway,

that strip of land had not been shewn to be part of "the land occupied by a road" opened by the municipal council by mistake within s. 478 of the Municiapl Act.

While there is, no doubt, cogent evidence given by the engineer Flater, called by the plaintiff, that the strip of land in question at no point encroached on the travelled way, with great respect there is some testimony adduced by the defendants that some of the permanent boundary posts planted by McCubbin were on the graded roadway and there is also evidence that the ditch on the south side of the *via trita* and some small part of the latter itself were within the disputed strip.

But in the view I take of the purview of s. 478 of the Municipal Act, it is unnecessary to rest a judgment on the determination of that issue of fact which, if found in the appellant's favour, would probably cover only a comparatively small part of the land in dispute and would render another survey necessary, unless, as held by the learned trial judge, the McCubbin survey should be deemed to have fixed finally the boundaries of the highway by virtue of the provisions of the Surveys Act.

What is now s. 478 of the Municipal Act was first enacted in 1881 by 44 V., c. 34, secs. 15 and 16:—

15. In case it appears that any municipality in whose jurisdiction an original road, or allowance for road is situate, shall open that which they take and believe to be the true site of the same, and in case the municipality their officers and servants shall act in good faith, and shall take all reasonable means to inform themselves of the correctness of their line and work, and in case it appears that the road being opened, although not or not altogehter upon the true line of the original road,

or allowance for road, is nevertheless, from any difficulty in discovering correctly the true line, as near to or as nearly upon the true line as under the circumstances could then be ascertained, no action shall be brought by any person against the municipality, their officers or servants, for or in respect of the opening of such road or allowance for road, or for any other act or matter whatsoever connected with or arising from the same.

16. The municipality shall, however, in any case respecting the opening of an original road, or road allowance, make to any person having title to or interest in the same, reasonable compensation in full of all claims, and as a final settlement of the same: Provided the claims for such compensation shall be made within one year from the time of the laying out or taking possession of such road by the municipality or its officers, or the part thereof in respect of which compensation is claimed, and in the event of the parties not agreeing as to the amount or terms of such compensation, the same shall be ascertained and the payment thereof enforced, under the provisions of the Municipal Act relating to arbitrations.

The character of these provisions makes it reasonably certain that they were meant to apply only to roads thereafter opened or laid out. The verbs "shall open," "shall act," and "shall take" in the future tense, so indicate, and the restriction of the provision for compensation to claims "which shall be made within one year, etc.," seems to put that beyond doubt. There is nothing to shew that the municipality "opened" or "laid out" the road known as the Base Line. On the contrary it would rather seem that the owners of the adjoining lands on either side had erected fences on what they conceived to be the boundaries of their lots as best they could leaving what they regarded as the road allowance between them. There is no evidence in the record that the officers and servants of the municipality "acted in good faith" or that they took "all reasonable means to inform themselves of the correctness of their line and work," or that the road opened was

from any difficulty in discovering correctly the true line as near to or as nearly upon the true line as under the circumstances could then be ascertained.

The evidence puts it beyond doubt that the Base Line road had been in use as a travelled highway for about 60 years, that is for some twenty years before the statute of 1881 was enacted.

Sections 15 and 16 of the statute of 1881 were carried into the Consolidated Municipal Act of 1892 (55 Vict., ch. 42) as section 549 in substantially the same form as in the original enactment of 1881. In the Revision of 1897 (1) the future subjunctive "shall open" was replaced by the present "opens." The section was carried in the same form into the consolidation of 1903, 3 Edw. VII., ch. 19, sec. 635. "Open" was in the revision of 1913 substituted for "opens," and the conditions as to good faith, care and unavoidable error are now covered by the comprehensive phrase

> where the municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be, but is not, wholly or partly upon such allowance.

At the same time an idea which had theretofore been left to implication was expressed in the words "the land occupied by the road * * shall be deemed to have been expropriated," and the provision restricting the right to recover compensation to claims made within one year "after the land was first taken possession of by the corporation" was retained.

I have no doubt whatever that section 478 does not apply to the road here in question. Apart from the other reasons for that conclusion above indicated, the fact that it was opened long before there was any such statutory provision seems to me to be conclusive against the claim of the appellant.

(1) R.S.O., c. 23, s. 635.

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Any difficulty presented by section 478 being thus removed, there appears to be no valid reason for not giving effect to the provision of subsection 4 of section 13 of the Surveys Act, that the lines surveyed and marked on a survey approved by the Minister under that section

> shall thereafter be the permanent boundary lines of such concession or side roads * * * to all intents and purposes and the order of the Minister confirming the survey shall be final and conclusive upon all persons, and shall not be questioned in any court.

The appeal in my opinion fails and must be dismissed with costs.

BRODEUR J.—There had been for years a dispute as to the true location of the original road allowance of the Base Line in the township of Zone. This township had been surveyed about a century ago and the adjoining proprietors of the Base Line had erected fences to divide their farms from the highway.

In 1915, the council of the appellant township resolved, at McDowell's request, to bring a government engineer to establish the true line of the road allowance. The Government under the provisions of the Survey Act (ch. 166 R.S.C. ss. 13 and 14) sent an engineer, Mr. McCubbin, to make the survey. The survey as reported was evidently adverse to the township's claims and the township then rescinded its resolution asking for this official survey; but the Minister of Lands and Forests would not accept such a rescission and confirmed the survey which, according to the provisions of the law, became "final and conclusive upon all parties" and could not be questioned thereafter in any court whatsoever.

The municipality now urges that section 478 of the Municipal Act should apply. This section provides that where a municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be but which is not wholly or partly upon such allowance, then the land occupied by the road as so opened shall be considered as having been duly expropriated.

It seems to me that the municipality, having requested the provincial authorities to determine the boundary line between its highway and the adjoining land owners, is debarred from asking for any other boundary than the one declared by such provincial authorities. There never was on the additional piece of land which the township now claims any statute labour nor the expenditure of any public money. It is not in evidence either that this piece of land was used as a public highway.

For those reasons the appeal should be dismissed with costs.

MIGNAULT J.—I concur with my brother Anglin.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Wilson, Pike & Stewart.*

Solicitors for the respondent: *Meredith & Fisher.*