1929

*May 2, 3.
*June 13.

THOMAS THOMPSON (DEFENDANT).....APPELLANT;

AND

FRASER COMPANIES, LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Real property—Boundaries—Trespass—Title—Construction of Crown grant as to land conveyed—Construction of exception from grant—Distances marked on plan attached to grant—Exception described in grant with reference to description in prior grant—Actual situations and measurements on the ground—Controlling factors in determining extent of exception—Trial—Non-direction in charge to jury, as ground for new trial—Failure to ask judge to give direction.

By Crown grant, in 1786, known as the "Prince William grant," certain lots were granted in York County, New Brunswick, according to a plan. The plan showed many lots "not granted," including those numbered 247, 249 and 251, which were side by side and went back from the river St. John to a "designed road," the distances back not being designated. In a Crown grant, known as the "Saunders grant," in 1819, under which the plaintiff claimed, there were excepted lots 247, 249, and 251 "as described in the said Prince William grant, being reserved by us for a glebe." Attached to the Saunders grant was a plan which showed the side lines of said excepted land as running back from the river 92 chains and 81 chains respectively. A grant in 1836 conveyed to a church for a glebe land of which the description therein coincided in effect with lots 247, 249 and 251 for a distance measured back from the river of 92 chains on one side and of 81 chains on the other. As found on the evidence, the distances along said side lines from the river to the "designed road" in the Prince William grant plan extended, by ground measurement, much beyond said 92 and 81 chains; and it was the area so beyond that was in dispute, the plaintiff, which claimed damages for trespass, contending that the Saunders plan regulated the locality and area of the excepted lots and that the disputed land passed under the Saunders grant.

Held: It was the Prince William grant that determined the dimensions and locality of the excepted lots; and as it mentioned no distances for their side lines, which were otherwise limited by the designed road, upon which the lots were based; and as the position of these lots, as inset upon the Saunders plan, with regard to a certain lake and to the designed road, corresponded with that shown upon the Prince William grant plan; and in view of the actual situation and measurements on the ground, the distances of 92 and 81 chains mentioned in the Saunders grant plan should not control, but should give way to more definite and convincing evidence of intention arising from the relative physical situations. Furthermore, as it is a rule of interpretation that Crown grants of this character ought to be con-

*PRESENT:—Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

1929

THOMPSON v. FRASER COMPANIES, LTD.

strued most favourably to the Crown, it should follow that the statement of erroneous distances, tending to reduce the excepted area, upon the inset of the Saunders grant plan, ought not to control the interpretation of the exception as derived by express reference to the Prince William grant. Plaintiff, therefore, had not shewn title to the disputed land.

Judgment of the Supreme Court of New Brunswick ([1929] 1 D.L.R. 168), which set aside verdict at trial in defendant's favour and gave judgment for plaintiff, reversed.

A party should not be granted a new trial on the ground of non-direction in the trial judge's charge to the jury, where, having opportunity to do so, he did not ask the judge to give the direction the omission of which he complains of. (*Neville* v. *Fine Art & Gen. Ins. Co.*, [1897] A.C. 68, at p. 76, cited).

APPEAL by the defendant from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), which allowed the plaintiff's appeal from the judgment of Le Blanc J., upon the verdict of a jury, in favour of the defendant, in an action by the plaintiff to recover damages for alleged trespass. The judgment of the Appeal Division ordered that the verdict entered for the defendant be set aside and that a verdict be entered for the plaintiff for damages, the amount thereof to be ascertained by a new trial (confined to that question) unless the parties reached an agreement in respect thereof.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed, with costs in this Court and the Appeal Division, and the verdict of the jury and judgment of the trial judge restored.

J. B. McNair for the appellant.

P. J. Hughes K.C. and *C. L. Dougherty* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The question at issue depends upon the extent of the exception in the grant of King George III, on behalf of the Province of New Brunswick, to the Honourable John Saunders, dated 11th February, 1819. The exception is expressed in these words:

And excepting. * * * Also the lots number Two Hundred and Forty-seven, number Two Hundred and Forty-nine and number Two Hundred and Fifty-one as described in the said Prince William Grant, being reserved by us for a glebe.

(1) [1929] 1 D.L.R. 168.

The validity of the exception is not in controversy.

The plaintiff claims under the Saunders grant, and seeks to recover damages for trespass for the cutting of trees upon the area in dispute, which, if not comprised within the exception, would be within the limits of the Saunders grant. The cutting is established, or admitted, and the *locus* is sufficiently identified, but the defendant denies the plaintiff's alleged title and possession or right to possession.

It is necessary to look at the earlier instrument, known as the Prince William grant. By letters patent of New Brunswick of 19th May, 1786, the King granted

unto the several Grantees hereinafter named in severalty to each of them and unto each and every of their several and respective Heirs and Assigns certain Lots or Plantations of Land known and distinguished by their respective numbers herein mentioned, that is to say, unto Francis Horsman the Lot Number One, unto John Alloway the Lots Number Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five, and Twenty-six,

etc. The grant proceeds to mention the names of a great many other grantees, with the numbers of the respective lots granted to each, followed by an explanatory clause, and the description, reading as follows:

The said Lots hereby granted as aforesaid being part of Two Hundred and Sixty-two lots described on the Plan hereunto annexed and contained within a certain Tract or Parcel of Land situate, lying and being in the Parish of Prince William in the County of York in our Province of New Brunswick in America and abutted and bounded as follows, to wit, beginning at a Cedar Tree marked KAD on the Northwest bank of the River Saint John nearly opposite the lower end of Scoodewabscook Island and Twenty-five chains (of four poles each) and fifty Links measured on a right line distant from the point which forms the entrance of Scoodewabscook Creek or River to the Westward, the said Cedar being the Upper or Northwesterly boundary of a Tract of Land granted to Colonel Isaac Allen and Associates, thence running (by the magnetic needle) South forty-five degrees West, One hundred and fifty-two Chains (of four Poles each) or until it meets the Northeast Corner of a Tract of Land reserved for His Majesty's use by His Majesty's Surveyor General of Woods at a Hemlock Tree marked IW, thence along the northerly line of the said reserve North forty-five degrees West, one hundred and Twenty chains to a Spruce Tree marked IW at the northwest corner thereof, thence along the westerly Line of the said reserve, South forty-five degrees west one hundred and ten chains, thence North forty-five degrees West nine hundred and forty chains or until it meets the westerly line of a designed road, to run from the northwest bank of the River Saint John sixteen poles wide parallel to and adjoining the westerly or upper line of the Lots Number Two Hundred and Sixty-one and Two hundred and Sixty-two, thence along the westerly line of the said designed road North forty-five degrees east two hundred and Thirty chains or until it meets the westerly bank or shore of the River Saint John, thence

1929

THOMPSON v. FRASER COMPANIES, LTD.

Newcombe J.

along the said bank or shore following the several courses of the said river down stream to the bounds first mentioned, containing in the whole twenty thousand two hundred and forty-one acres, more or less, with an allowance of four thousand two hundred and fifty acres for roads and waste, each of the said Lots (contained as aforesaid within the Tract above described) measuring in breadth on a right line at right angles to the sides thereof thirty-two poles and the division lines of the said lots running from their respective boundaries (marked on each side of a designed road sixteen poles wide described on the said Plan hereunto annexed) north forty-five degrees east (by the magnet) to the bank or shore of the River Saint John and South forty-five degrees west to the rear or westerly line of the whole Tract, the said road dividing the lots into two ranges and the lower or easterly line of the said road running (by the magnet) north forty-five degrees west through the whole Tract from a Cedar Sapling on the first described line of the said Tract marked KAD and distant on the said Line from the first mentioned bounds One hundred and three chains (of four poles each) which said tract above described and the said lots therein contained have such shape form and marks as appear by the actual Survey thereof made under the directions of our Surveyor General of our said Province, of which Survey the said Plan hereunto annexed is a representation, whereon is also noted the quantity of land respectively contained in each and every of the said lots.

It will be observed that this description includes a tract of considerable extent, and that the lots enumerated are divided into two tiers, upper and lower, separated by "a designed road" for which, as shewn by the plan accompanying the grant, there is a reservation of 16 rods in width. The lots are laid out to abut upon this road on either hand, and the side lines of the lots are not projected across it; the lower lots bear the odd numbers, and the upper lots, the even. It thus becomes obvious that, in order to locate the lots in accordance with the survey, description and plan of the Prince William grant, it is necessary to find the location of the designed road.

The plan shews a lake about 160 chains in length by 100 chains in breadth, within the bounds of the tract granted, and towards its northwesterly end; it is called Prince William Lake, or, sometimes, Davidson Lake. This is a natural feature of much importance, because the lake, on its lower side, intersects the road, and extends below the road for a distance of about 15 chains, thus impinging upon, or overlying, or reducing the lower tier of lots for that width, and for nearly the entire length of the lake.

Another noteworthy fact is that many of the delineated and enumerated lots, especially at the northwesterly end of the tract, do not bear the names of grantees, but, on the

contrary, are expressly marked " not granted." As to these, so far as I can perceive, the grant did not operate to affect the Crown's title, and they remained Crown lands; and of this character are lots 247, 249 and 251, already mentioned.

Now it will be found that if the plan of the Saunders grant be superimposed upon the Prince William grant, beginning at the northwesterly line of Peter Ganter's lot, No. 219, where it touches the river on the latter plan, the Saunders plan will occupy the entire area of the Prince William grant to the northwest of lots 219 and 220, and to that extent it overlies, subject, of course, to the exceptions. That part of the waters of the lake which lie within the bounds of the Saunders grant is, however, excepted, as well as some lots, which had been previously granted, and so we come to the exception above quoted, of lots 247, 249 and 251, " as described in the said Prince William grant, being reserved by us for a glebe." These lots therefore did not pass under the Saunders grant; but, by letters patent of 15th September, 1836, lands described as follows were granted to the Rector, Church Wardens and Vestry of Saint Paul's Church of the Parish of Dumfries,

for a Glebe a Tract of Land situate in the Parish of Dumfries in the County of York in our Province of New Brunswick and bounded as follows, to wit, Beginning at the Northerly angle of Lot number Two hundred and forty-five, in the Grant to The Honourable John Saunders, and on the Southeasterly side of the River Saint John; thence by the magnetic needle south forty-six degrees and thirty minutes West ninety-two chains of four poles each; thence North forty-three degrees and thirty minutes West twenty-four chains; thence North forty-six degrees and thirty minutes East eighty-one chains to the said side of the aforesaid River Saint John and thence along the Bank or Shore of said River down Stream to the place of beginning, containing two hundred and twenty-eight acres, more or less, and also particularly described and marked on the Plot or Plan of Survey hereunto annexed; * * *

This grant conveys the excepted lots, 247, 249 and 251, for the distance of 92 chains on the lower side-line, and 81 chains on the upper side-line, leaving still ungranted the rear portion of these lots between the line of the Church grant, described as " north 43 degrees and 30 minutes west 24 chains," and the designed road, or " Alma Road," as it is frequently spoken of in the case, and this rear portion constitutes the area or *locus* of the alleged trespass. Upon the assumption that the plaintiff company has not acquired title to this parcel, its action fails.

1929

THOMPSON v. FRASER COMPANIES, LTD.

Newcombe J.

It is shewn that the actual width of the Prince William grant at the locality in question exceeds its width as ascertained by the scale of the grant by about 40 chains, and this excess was admitted at the argument before us. In 1882, a surveyor named Bellamy traced on the ground the rear line of the Church grant at the distance from the river called for by that grant. There is no dispute as to that line, and it is the area extending from it for 40 chains to the southwestward that is in dispute. At the trial, the plaintiff's counsel, in opening his case to the jury, referred to the Church grant as corresponding with the glebe reservation in the Saunders grant, but he said, very frankly, that he thought that the lots in the Prince William grant went back very much farther than 92 chains from the river; that the real issue was the establishing of the rear line; and that, if the defendant were right in going back to the extension of the "old road running through Prince William in the Prince William grant," there had been no trespass.

We are told that the trial of the case occupied seven days, and there are 350 pages of testimony, exclusive of the documents. The locality of the designed road upon the ground, particularly on the northwesterly side of the lake, so far as lines are concerned which indicate its position, is somewhat confused and obscure, because the road has not been constructed there and put into use, but considerable testimony was introduced.

The plaintiff relied upon the plan attached to the Saunders grant, upon which are traced the lines of the excepted lots, shewing the outside or lower line of lot 247 as running from its starting point at the river, south 46 degrees and 30 minutes west, in 1818, 92 chains, thence at right angles 24 chains until it meets the outside or upper line of lot 251, which is drawn from the river to the point of intersection, parallel to the side-line of lot 247, a distance of 81 chains; and the force of the plaintiff's argument lies in the contention that this plan regulates the locality and area of the excepted lots, and that, as they are shewn by the Saunders grant plan to extend from the river only 92 chains on the one side, and 81 chains on the other, the land beyond these distances passed under the latter grant, and belongs to the plaintiff company, which has succeeded, under the

conveyances in proof, to the Saunders title. But there are governing considerations which conflict with this view. It is the Prince William grant that determines the dimensions and locality of the excepted lots, and it mentions no distances for their side-lines, which are otherwise limited by the designed road, upon which the lots are based; and moreover, the position of these lots, as inset upon the Saunders plan, with regard to the lake and to the designed road, corresponds with that shewn upon the Prince William grant. Consequently, when it is shewn that the lake is more than 92 chains from the river, and that the front line of the designed road, as shewn on the Saunders plan, on the left or northeasterly side of the lake, when produced across the lake, coincides with the rear limit of the excepted lot, it becomes unreasonable to permit the distances of 92 chains and 81 chains to control; and, upon general principles, these distances must give way to more definite and convincing evidence of intention, arising from the relative situation of the lake and the projected road upon which these lots are based.

Furthermore, it is a rule of interpretation of Crown grants of this character that they shall be construed most favourably to the Crown; wherefore it should follow that the statement of erroneous distances, tending to reduce the excepted area, upon the inset of the plan accompanying the Saunders grant, ought not to control the interpretation of the exception as derived by express reference to the Prince William grant, by which the excepted lots were constituted and defined, and extend from the river by ground measurement 40 chains farther.

The action was tried before LeBlanc J. with a jury. The learned judge in his charge pointed out that the plaintiff relied upon a documentary title; but he said that he would not withdraw from the consideration of the jury a title by possession, inasmuch as both sides had attempted to produce evidence of possession. He explained that in order to interpret the Saunders grant it was necessary to go back to the Prince William grant, to see what was excluded, and that it was for the jury to find, by the evidence, the location upon the ground of the designed road, which limited, at the rear, the excepted lots; that the Saunders grant took effect at the time it was made, and if it were found

1929

THOMPSON v. FRASER COMPANIES, LTD.

Newcombe J.

that there was an ungranted area between the Alma road and the Bellamy line, the jury should further consider whether the plaintiff had proved such possession as would establish a prescriptive title; and he directed the jury's attention to the evidence. He told the jury that the defendant had no documentary title, although he admitted the cutting upon the *locus*. The plaintiff's counsel made several suggestions during the course of the charge, but he does not appear to have requested the learned judge to give any material instruction to the jury which was not submitted.

The judgment of the Appeal Division was pronounced by Grimmer J., and the principal difference between the trial judge and the Appeal Division, as I understand their respective views, appears to be that, whereas the jury were told in effect that if they found the designed road to be where it was shewn to be by the Prince William plan, there would be 40 chains ungranted between that and the Bellamy line, the Appeal Division, on the other hand, would limit the length of the excepted area to 92 chains on one side and 81 chains on the other, leaving the excess to pass under the grant. I am disposed, with great deference, to reject the latter view, for the reasons which I have stated; and the verdict must, I think, be held to imply that the road is found to be where it is depicted in relation to the lake, as shewn on the Prince William grant, and at the ascertained distance of 40 chains above the Bellamy line, and so to justify, according to the submissions of the parties, the general verdict for the defendant.

The learned judge of appeal was, I think, unduly impressed by the fact that the road was not, on the Saunders plan, projected across the lake or shewn within the limits of the Saunders grant, but that, in my view, is a circumstance of no importance, if, as I apprehend, we must look to the earlier grant to ascertain what was intended to be included within the excepted lots.

The question of possession was also considered in the appeal judgment, but with the preliminary passage:

> That there was controversy between the different owners of the Glebe lots and the owners of the adjoining lots in the rear is evident from the great mass of evidence that was produced relating thereto, and the number of lines that were run, and that there was more or less cutting upon some of the rear lots by different persons at different times is also evident, but this case rests entirely upon the title of the plaintiff in Lots 2 and 3.

The reference here to lots 2 and 3 relates to a subdivision of the Saunders property after the death of the grantee, and these two lots, which belong to the subdivision, appear to occupy the space which was covered by the lower end of lots 248, 250 and 252 in the upper tier of the Prince William grant, opposite to the disputed area, and which, wherever they were situate, were separated from the *locus* by the road; and the court would have been right in affirming the plaintiff's title only if the road were found to coincide on its lower side with the Bellamy line, or to lie below it. The learned judge proceeds to premise his observations upon the question of possession by saying that,

> While so far as this judgment is concerned the question of possession does not enter into it to any great extent yet the effect of the charge which in my opinion was clearly wrong, upon a jury that might be wavering over the question of a documentary title might readily be all that was needed to enable them to render the verdict appealed from.

Follow some references to cases with regard to possessory title, and to the testimony in the case, and the learned judge says that:

> There was much evidence given by the Crown Land surveyors who were respectively employed to run the lines of the parties to the action from time to time, but from the continued repetition that was made by both counsel on the trial it is a matter of practical impossibility to me to follow and I do not well see how the jury after a seven days trial could possibly have followed and intelligently understood the meanderings of these men.

But, if I do not misapprehend the purpose of the learned judge, I am disposed to think that, in speaking of misdirection, he refers to the omission of the trial judge to instruct the jury on the footing that the plaintiff company, being in possession, under deeds of the subdivisions, lots 2 and 3, was entitled to refer the acts of possession of itself or its predecessors to the whole area included within the subdivisions, and that if, according to the metes and bounds, the disputed area was part of the subdivisions, these acts of possession would be referable to the latter area, as well as to the upper portions of the lots upon which the acts of possession actually took place. But in answer to this it is in effect said, and I think justly, that, in the first place, the learned judge at the trial was not asked to submit any such instruction to the jury; and, as was said in *Nevill* v. *Fine Art and General Insurance Company* (1):

(1) [1897] A.C., 68, per Halsbury L.C., at p. 76.

1929

THOMPSON v. FRASER COMPANIES, LTD.

Newcombe J.

That would, but for what I am about to say, give the appellant only a right to ask for a new trial, which, though he has not asked for it, it is no doubt within your Lordships' competence to give him; but what puts him out of court in that respect is this, that where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect.

And, secondly, if such a direction as I have indicated had been given, it could have served no useful purpose, because all the difficulties of location which are incident to the case would have attended upon the attempt to locate the boundaries of the subdivisions, which seem to have been intended to affect nothing which had not passed to Saunders under his original grant; and there is evidence that no cutting was done on the part of the plaintiff below the road; and moreover, that any cutting which was done below the road was on behalf of the proprietors or occupants of the lower lots.

In conclusion, Grimmer J. says:

The conclusion I have reached is that under ordinary circumstances a new trial would be granted by reason of the misdirection of the learned trial judge as pointed out, but as I am satisfied the plaintiff has fully proved its title in the *locus* and this Court has before it all the materials necessary for finally determining the questions in dispute, and in order to prevent further appeals and costly litigation, the verdict for the defendant should be set aside and a verdict entered for the plaintiff. But inasmuch as there has been no finding by the jury on the matter of damages there shall be a new trial to be confined exclusively to ascertain the amount of damages, if any, the plaintiff is entitled to, unless the parties in interest within thirty days from the date of this judgment reach an agreement between themselves in respect thereof.

I do not think, however, that the Court of Appeal was justified in substituting its finding for that of the jury; I think, moreover, that there was evidence before the jury which reasonably supports its finding; and I see no sufficient reason to set that finding aside.

In the result, therefore, I would allow the appeal, with costs here and in the court below.

Appeal allowed with costs.

Solicitors for the appellant: *Winslow & McNair.*

Solicitor for the respondent: *Charles L. Dougherty.*