

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The American Asbestos Company v. The Johnsons Company, from the Superior Court (sitting in Review) of the Province of Quebec ; delivered the 28th March 1911.

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD MERSEY.

LORD ROBSON.

SIR ARTHUR WILSON.

[DELIVERED BY LORD ROBSON.]

This is an Appeal by the Plaintiffs in the action from a Judgment of the Superior Court of Quebec sitting in review, which affirmed a Judgment of Mr. Justice Hutchinson dismissing the action with costs.

124/ The Appellants and Respondents are owners of adjacent plots of land numbered 31 (containing about ~~87~~ acres) and 32 (containing 123 acres) bordering on St. Francis Road, in the Township of Coleraine, in the County of Megantic and Province of Quebec, which have been found to contain valuable deposits of asbestos. The dispute between the parties is as to the proper boundary line between the said plots.

In February 1903 the Respondents commenced an action "en bornage" in the Superior Court of the Province of Quebec against the predecessors-in-title of the Appellants, praying that the said boundary line might be ascertained and

declared. The Defendants in that action acquiesced in the claim and did not plead thereto. Two land surveyors were thereupon appointed by the Court to define the boundary in question, one of them, Mr. G. K. Addie being suggested by the Respondents, and the other, Mr. H. B. Tourigny, by the Appellants. Those gentlemen agreed as to the starting point of the boundary line but differed as to its direction or bearing. They made separate reports, and the Court (Mr. Justice Lemieux) after considering them, pronounced judgment substantially in favour of the present Respondents. Subsequently the present Appellants acquired the ownership of lot 32 and they prosecuted an Appeal to the Court of King's Bench, which by a majority allowed the Appeal. The Respondents thereupon appealed to the Supreme Court of Canada, which reversed the Judgment of the Court of King's Bench and restored the Judgment of the Superior Court. The Appellants then discovered that, as they allege, the surveyor Tourigny, as also the Courts which had acted on the reports of the two surveyors, had proceeded on a wrong assumption which was said to be due to a fraudulent mis-statement by Addie. The Appellants therefore in January 1908 brought the present action to have the Judgments in the previous action "en bournage" set aside and asking that they should be permitted to have the said lots bounded according to law.

This action is founded on Articles 1177 and 505 of the Code of Civil Procedure (Quebec). Article 1177 provides that Judgments may be revoked on various grounds including (1) that fraud has been employed by the opposite party; (6) that the judgment has been rendered upon documents subsequently discovered to be false; and (8) that after judgment other new evidence of a conclusive nature has been discovered which

satisfies the conditions contained in Article 505. Article 505 provides for a new trial on the discovery of new evidence when the party applying therefor shows (1) that it would probably have changed the result of the trial, and (3) that it could not with reasonable diligence have been discovered in time to be used at the trial.

Their Lordships are of opinion that the Appellants have failed to establish a case on any of their alleged grounds.

6/ The land in question was surveyed and divided into lots on behalf of the Province by one Poudrier in 1836. He was instructed by the authorities to lay out in lots the land on both sides of St. Francis Road which ran through the Township of Coleraine, from the Township of Adstock on the east, to the established outline of the Township of Ireland on the west. The lots were to be defined by straight lines running nearly at right angles to St. Francis Road for a certain distance, and were of a width between those straight lines of about 13 chains. Poudrier began his delimitation at the western end of the block starting from the boundary line between the townships of Coleraine and Ireland. This, Mr. Justice Lemieux decided, was the "fundamental" or "base line" which served as a base for the operations of Poudrier. The first lots delimited from that point were those now in question, viz., 32 and 31. Further eastward, between lots 9 and 10, at a distance of about 6,000 yards, where a bend in the road took place, Poudrier laid down what he called a "central guide line."

In the action "en bornage" all parties seem to have assumed that the "central guide line" between lots 9 and 10 and the line between the townships of Coleraine and Ireland were parallel to each other. It is now ascertained that this was a mistake and that the bearings of the two

lines were substantially different, the central line between Lots 9 and 10 being South 26 degrees and 30 minutes West, astronomically, and the township line South 39 degrees 23 minutes West. Poudrier in his notes treated both lines as being South 38 degrees West. The Plaintiffs in that action (the present Respondents) contended, as they still contend, that the division line between their lot and the Appellants' lot should be drawn parallel to the township line. The Appellants' predecessors did not dispute that it should be drawn parallel to the township line, but contended that the township line should be treated as drawn according to the provisions of the Proclamation erecting the Township of Coleraine. Mr. Addie, on the other hand, contended that the township line, like the line between lots 31 and 32, should be taken in accordance with the survey made by Poudrier and incorporated in his (Poudrier's) report and plan.

In their present action the Appellants say that Poudrier was wrong in using the township line as the line to which the boundary lines were to be drawn parallel, and that the proper line to be used for that purpose was the line between lots 9 and 10. They further allege that Mr. Addie knew of Poudrier's mistake in treating the township line and the line between 9 and 10 as parallel, and that he gave false evidence in relation thereto.

Apart altogether from the questions as to whether Poudrier failed to obey his instructions or Mr. Addie misled the Court, it should be observed that the Appellants have got exactly the property their predecessors in title contracted to buy from the Crown. The Letters Patent granting lot 32 were issued in 1878. They do not expressly incorporate or refer to Poudrier's plan, nor do they set out metes and bounds, but they purport to convey 123 acres;

and that measurement (according to the Judgment of Mr. Justice Lemieux) exactly corresponds with the lot as delimited by Poudrier and shown on the plan. The plan also identifies the exact situation of the lot, and has been admitted in evidence for that purpose. It is, therefore, clear that the boundaries, however they may have been arrived at by Poudrier, were settled long before the sale to the Appellants' predecessors, and are binding on the Appellants. Yet, the Appellants are now claiming a re-adjustment of the boundary lines which would give them a far larger acreage than their conveyance gives them. This consideration alone is sufficient to dispose of their case.

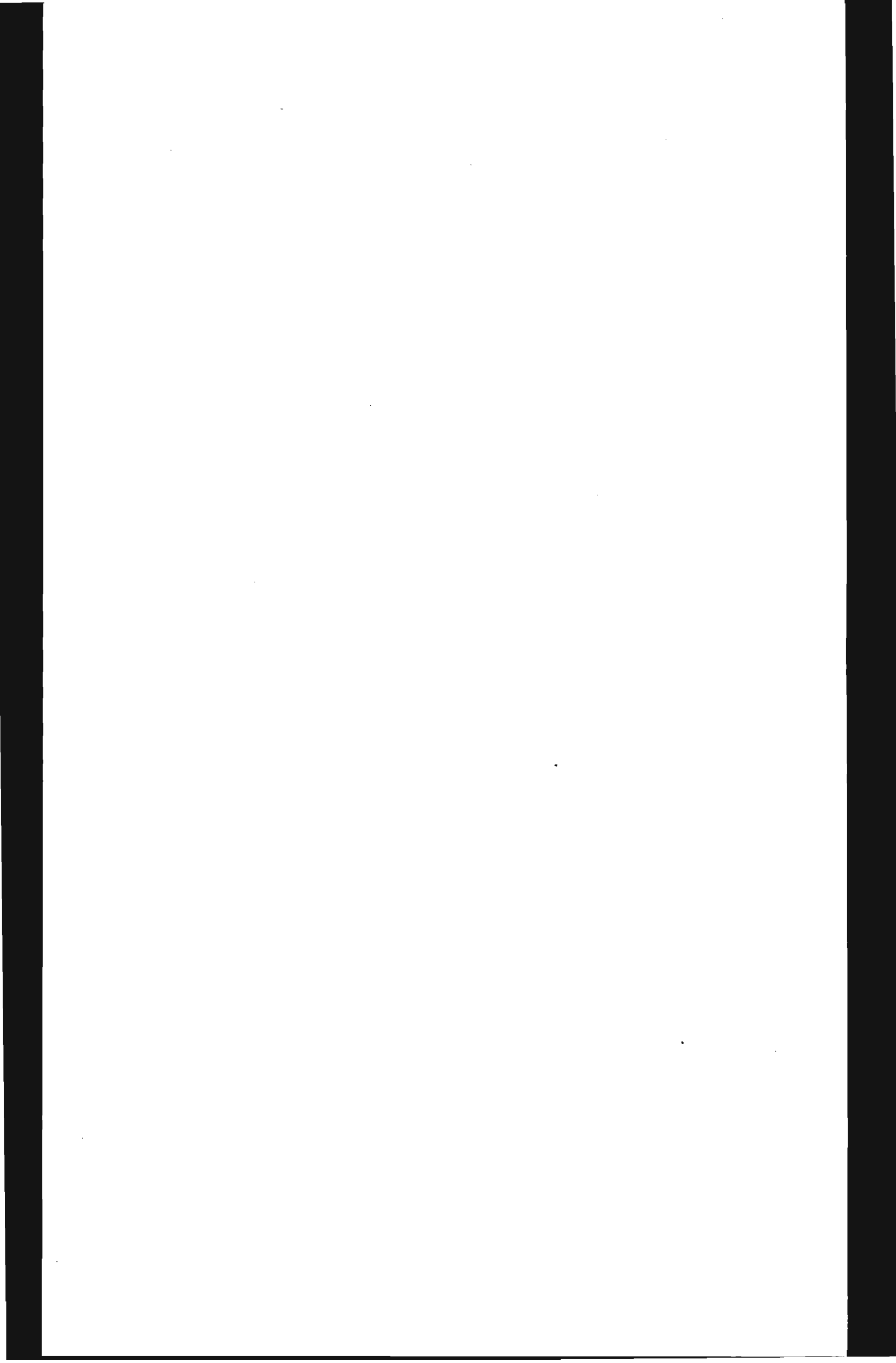
With regard however to the points raised in the Courts below, their Lordships think that Mr. Addie was right in following Poudrier and in taking the township line as the base of operations rather than the so-called "central guide line" between lots 9 and 10. They agree with the Superior Court that the latter line, (although no doubt believed to be parallel to the township line), was probably intended to serve mainly as a check or guide at a particular point where the divergence of St. Francis Road made such a guide desirable, but not to supersede the township line as the first or "base" line. This negatives the main contention on which the Appellants rest their case.

Under these circumstances the charge made against Mr. Addie loses its point. It is said that he knew that the line between lots 9 and 10 was not parallel to the township line and that he yet reported to the Court in a contrary sense. Even if he did know it, his duty would still have been to ascertain the boundary as Poudrier did, viz., by running parallel to the township line. The bearing of the line between 9 and 10 was in his view immaterial, and he was right in so

regarding it. If, in fact, any forgetfulness or omission in reference to that point can be proved against him, it is difficult to see how it could be due to any dishonest motive, and in any event cannot form a ground for setting aside a Judgment which it did not and should not affect. At the same time, it is only fair to Mr. Addie, (who was a professional witness and not a party interested in the case), to say that their Lordships having carefully considered his evidence, and the circumstances to which it related, are of opinion that the charge of fraud against him is unjustified.

Their Lordships are also of opinion that this Appeal does not comply with the requirements of Articles 1177 and 505 of the Code of Civil Procedure under which it is brought, in that the alleged new evidence could and should with reasonable diligence have been discovered by the Appellants in time to be used at the trial of the first action. If the parallelism between the "central guide line" and the "towship line" was important, it might and should have been checked before that action was determined. The Appellants nominated a surveyor, Mr. Fourigny, who was acting along with Mr. Addie when the dispute as to the proper direction of the towship line arose, and it is difficult to see how their surveyor missed checking that line with what they now contend is the dominant line of guidance, namely the line between lots 9 and 10.

Their Lordships will therefore humbly advise His Majesty that this Appeal should be dismissed with costs.



In the Privy Council.

THE AMERICAN ASBESTOS COMPANY

v.

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