

THE NATIONAL TRUST COM- PANY, LIMITED, AND OTHERS (PLAINTIFFS)	} APPELLANTS; *Nov. 13, 14. 1912 *March 21.

AND

WILLIAM MILLER AND WILLIAM D. DICKSON AND THE EASTERN CONSTRUCTION COMPANY, LIMITED (DEFENDANTS)	} RESPONDENTS.

THERESE SCHMIDT AND JOHN SHILTON (PLAINTIFFS)	} APPELLANTS;

AND

WILLIAM MILLER AND WILLIAM D. DICKSON AND THE EASTERN CONSTRUCTION COMPANY, LIMITED (DEFENDANTS)	} RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Mining Act—Grant of mining land—Reservation of pine timber—
Right of grantee to cut for special purposes—Trespass—Cutting
pine—Right of action.*

The Ontario Mining Act, R.S.O., [1897] ch. 36 as amended by 62 Vict. ch. 10, sec. 10, provides in sec. 39, sub-sec. 1, that "the patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands may at all times, during the continuance of the license, enter upon the lands and cut and remove such trees and make all necessary roads for that pur-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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pose." By the other provisions of the section, the patentee may cut and use pine required for necessary building, fencing and fuel and other mining purposes and remove and dispose of what is required to clear the land for cultivation, but for any cut except for such building, fencing and other mining purposes he shall pay Crown dues.

Held, Idington and Duff JJ. dissenting, that a patentee and a lessee of mining lands who had taken possession thereof, but were not at the time of the trespasses complained of in actual physical possession, have, notwithstanding such reservation, or exception, such possession of the pine trees, or such an interest therein, as would entitle them to maintain actions against a trespasser cutting and removing them from the land. *Glenwood Lumber Co. v. Phillips* ([1904] A.C. 405) followed; *Casselman v. Hersey* (32 U.C.Q.B. 333) discussed.

In this case the defendants cut and removed the pine timber from plaintiffs' mining lands without license from the Crown, but claimed that they subsequently acquired the Crown's title to it and should be regarded as licensees from the beginning.

Held, Idington and Duff JJ. dissenting, that assuming that the Crown could after the trees had been cut and removed, take away by its act the plaintiffs' vested right of action the evidence shewed that defendants were cutting on adjoining Crown land as well as on plaintiffs' locations and did not clearly establish that any title acquired by defendants included what was cut on the latter.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the plaintiffs.

The plaintiffs are patentees of mining locations in the Rainy River District under letters patent from the Ontario Government. By the "Ontario Mining Act" the pine timber on the location is excepted from the grant and remains Crown property subject to the right of the patentees to use it for certain specified purposes. Any licensee of the Crown may enter on the land and cut and remove it. The plaintiffs at the time this action was begun had not taken physical possession of the mining land.

The defendants, The Eastern Construction Co., had a license from the Crown to cut timber on lands adjacent to the locations and contracted with the defendants Miller and Dickson for a supply of railway ties to be delivered at the right-of-way of The National Transcontinental Railway. In carrying out this contract Miller and Dickson cut the pine and other trees on plaintiffs' location, had them made into ties and removed same from the land. The action was brought for the value of the trees so cut and damages for injury to the land thereby. The facts are more fully stated in the opinions of the judges on this appeal.

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The trial judge gave judgment for the plaintiffs which was reversed by the Court of Appeal in so far as the pine was concerned. The plaintiffs appealed to the Supreme Court of Canada.

Anglin K.C. and *J. A. McIntosh*, for the appellants. The patentees brought the statutory right to use the timber for the purposes specified. *Gordon v. Moose Mountain Mining Co.*(1), and see *McLean v. The King*(2), at page 546.

Miller and Dickson cannot rely on a subsequent license from the Crown which would be to permit a wrongdoer to set up in justification permission to deprive the injured party of his vested rights. See *Lamb v. Kincaid*(3).

The Eastern Construction Co. by accepting and paying for the ties became liable for the trespass.

J. H. Moss K.C., for the respondents, referred to *Freeman v. Rosher*(4) ; *Lewis v. Read*(5).

(1) 22 Ont. L.R. 373.

(3) 38 Can. S.C.R. 516.

(2) 38 Can. S.C.R. 542.

(4) 13 Q.B. 780.

(5) 13 M. & W. 834.

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THE CHIEF JUSTICE.—On the whole, I concur in the opinion of Mr. Justice Anglin.

IDINGTON J. (dissenting).—The question raised herein is reduced to the narrow point of whether or not the grantee of lands under the “Mines Act,” R.S.O. 1897, has such possession in the pine timber on such lands so granted him by the Crown, that he can recover the value thereof when cut and removed from the lands, not only from the actual trespasser, but from those taking under him the fruits of the trespass after the removal, and without the purchaser having any notice or knowledge of such trespass until after the removal.

I think the question must be answered by the interpretation of section thirty-nine, sub-section 1, of the said Act, which is as follows:—

(1) The patents for all Crown lands sold as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such land may at all times during the continuance of the license enter upon the lands and cut and remove such trees and make all necessary roads for that purpose.

The grant is made expressly subject thereto and then the title declared to be qualified

in this that it is subject to the conditions imposed by the said Act for the purpose of securing the carrying out of mining operations in and upon the said land.

When we turn to section 34 of the Act, we find the title thus qualified is in truth dependent for seven years from the grant upon certain mining developments taking place at the instance of the grantee from year to year notwithstanding the apparently absolute grant, and that in default of that being done, the title may revert to the Crown.

He has no more property in the pine trees, or charge of or over them, than if they were growing upon an adjacent lot under such legal conditions that he might by virtue of a covenant from the owner in fee simple in certain contingencies which might or might never happen, have a license to cut and use same for his use in developing his mining interest in the land granted for such purpose, but for no other purpose.

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The trees having continued the property of the Crown, how can the grantee in any such case assert the right of property claimed here, when the trees have been cut and removed from the land?

The appellants as such grantees had neither a legal nor physical possession of the pine trees and hence no basis on which to rest a claim to the ties into which they were cut.

They were under no position of responsibility to the Crown to have them protected from the acts of others than themselves.

Their sole relation to the pine trees, or the Crown as owner of them, was that upon certain contingencies happening, if the Crown by its license had not in the meantime taken the trees, then they (the appellants) had a license to use them for specified purposes.

But when we find they had been removed from the land, cut into ties and are being delivered to the respondent company, how can it be possible by virtue of such a contingent license, to say the appellants had any property in the ties?

Their legal position may have entitled them to bring an action for damages against any one without colour of right so changing the condition of things

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that they could not enjoy that to which they had a legitimate and reasonable expectation of enjoyment, by virtue of their implied license when it had become operative.

Whatever the form of action it does not appear to me it could ever be trespass. Nor can it be trover. It has been said a bailor can call on a bailee recovering in trover for an account. What right would the Crown have to call on the appellants for the fruits of such an action? The bailor has that right *pro tanto* his interest in case the bailee makes recovery. But on what legal ground could the Crown here rest such a claim?

Likewise in the case of lessor and lessee, the latter being liable for waste is responsible therefor, and being answerable to the lessor is the proper party to sue for trespass and to recover full damages.

The Crown might sue the trespassers for and recover the value of these trees taken notwithstanding the appellants' recovery. But how can the trespasser answer the Crown by any such recovery as sought herein?

It seems an extraordinary thing if because the appellants have a grant which may terminate, indeed, be abandoned, by reason of necessity for an expenditure upon it far beyond its commensurate value in order to comply with the terms of the grant, they can thus indirectly strip the land of its pine timber and carry away that which may far exceed the minerals in value.

This would be to convert that which was intended to convey minerals and preserve timber into a grant to convey timber.

The possession of the appellant was, it is said,

found by the learned trial judge. Such possession as he had evidence of must be attributable to the title disclosed.

What rights of recovery the bare possessor owing no duty, in relation to the thing trespassed upon, to any one else may have as against a mere trespasser and the measure of damages in such a case are beyond the present inquiry.

This is a case where the actual or physical possession clearly goes no further than the legal, and that does not entitle appellants to claim as alleged in the statement of claim that the trees were their property. Nor does it entitle them to follow the trees when cut and converted into a something else.

Again, the right of the appellants was subject to be divested by any licensee of the Crown cutting by virtue of his license.

How do we know there has not been outstanding such a license?

The parties hereto argued as if none existed, but when a something happened in the Crown Lands Office of which we only know part, the appellants say with force, we do not know it all.

Assume a renewable license outstanding at the date of the grant, what possible right is left in the appellants to claim those ties or their value?

The argument, addressed to us, which maintained it was only licenses existent at the date of the grant that the statute had in view, does not meet the possibility I have adverted to.

Nor do I think it meets the point in any aspect. The mining might fail to be of any value to any one and the last possibility of the miners resorting to the timber might disappear; are we to assume that the

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Crown could not then issue a license to cut these trees reserved as its property ?

Surely no such absurd result was ever contemplated by any one.

And unless we can maintain it was so, this pine timber was liable to be cut at any time by licensees of the Crown.

But why labour with it ? How can trespass as to these pine trees ever lie on such a title ?

No case cited, when examined closely, has in truth any but an illusory resemblance to this case, save the case of *Casselman v. Hersey* (1), which is distinguishable, but I may add, no more binds us than the finding of the learned trial judge which is sought to be restored by virtue of a finding of possession.

I think the appeal ought to be dismissed with costs.

The appeal in the case of Schmidt against the same parties must also fail.

They were argued together, being so much alike. I have not found them identical by any means, but the case of the grant is so much stronger in some aspects needless to dwell upon, that having fully examined it I need not say more than that the weaker one fails also.

DUFF J. (dissenting).—This appeal arises out of two actions which were tried together, in which the appellants claimed reparation from the respondents for damages alleged to be suffered by them in consequence of the cutting and taking away of timber from certain mineral locations. These locations consisted of two sets (each comprising four) one of which, throughout the proceedings referred to under

(1) 32 U.C.Q.B. 333.

the head of the "National," was held by the plaintiffs in the action of the National Trust Co. against Miller, under Crown grants issued pursuant to the "Mines Act" of Ontario, sections 26 to 34. The other set, referred to in the proceedings as the "Schmidt" locations, was held by the plaintiffs in the action of Schmidt against Miller under leases granted under the authority of section 35 of the same Act. Of the timber in question all but a very small percentage (less than eight per cent.) consisted of pine which was the property of the Crown, being expressly excepted from the grants and leases referred to. The learned trial judge held the respondents accountable to the appellants for the full value of the pine timber taken from the locations; but on this point his judgment was reversed by the Court of Appeal. The substantial question is whether on this point the judgment of the Court of Appeal is right.

The material facts are either undisputed or are decided by the findings of the learned trial judge; but in the view I take of the questions arising on the appeal, more especially of some points not raised by the parties themselves, it is necessary to dwell with a little care upon these facts as well as upon the course of the trial and the nature of the case made by the parties there.

The trespasses complained of took place in the month of February, 1909. They were actually committed by the defendants Miller and Dickson, who had entered into a contract with the respondents, the Eastern Construction Co., to cut, from a defined area, timber for railway ties, to manufacture this timber into ties, and to deliver the ties at certain places designated on the line of the Northern Trans-

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continental Railway, then in course of construction. The Eastern Construction Co. had a permit, issued by the Ontario Government under the authority of the "Crown Timber Act," to cut timber from Crown lands within an area described in the permit, which will be sufficiently designated for my present purpose by saying that the southern boundary of it was Vermilion River — which it may be mentioned is a short river connecting two lakes north-west of Lake Superior, in Rainy River District, at a distance of about 200 miles from Port Arthur. The Eastern Construction Co. had entered into an arrangement with the firm of O'Brien, Fowler & McDougall (who were engaged in constructing part of the Transcontinental Railway under a contract with the Dominion Government), by which the Eastern Construction Co. (who were not themselves engaged in railway building) were to give to the O'Brien firm the use of their permit for a commission of one cent upon each tie manufactured from timber cut upon the permit; and the method by which the arrangement was carried out was that the Eastern Construction Co. engaged Miller and Dickson as contractors to cut the ties required from the area affected by the permit, and to deliver them at the railway line where they were taken possession of by O'Brien, Fowler & McDougall.

The appellants' locations were all situated south of Vermilion River outside the area affected by the permit.

In the beginning of February, Miller and Dickson, in circumstances which it will be necessary to refer to more particularly when considering the responsibility of the Eastern Construction Co., began cutting timber south of Vermilion River from Crown lands as

well as from the appellants' locations. On the 24th February, when nearly the whole of the timber cut in the course of these trespasses had been manufactured into ties and delivered, Mr. Margach, the Crown timber agent for the district of Rainy River, then on one of his tours of inspection with Inspector Smith, observed that Miller & Dickson were exceeding the limits of the Eastern Construction Co.'s permit, and ordered them to stop. A few days afterwards Mr. Margach notified Miller & Dickson that they might remove any timber that had been cut. When this permission was given, Mr. Margach was aware of the fact that Miller & Dickson had been cutting on the mineral locations in question, and the permission was intended to apply, and was understood to apply to the Crown timber cut there.

On the 26th February Mr Margach reported Miller & Dickson's trespasses to the Department of Crown Lands, informing the Department at the same time that the area trespassed upon included the appellants' locations. On the 6th March he formally notified the Eastern Construction Co. that Miller & Dickson had been trespassing south and east of Vermilion River, that he had ordered them to stop trespassing, but had authorized them to remove what they had cut and to make a separate return of it.

Some time in April or May, Mr. Alexander McDougall, the managing director of the Eastern Construction Co., interviewed the Commissioner and Deputy Commissioner of Crown Lands, on the subject of the dues to be charged in respect of the government timber affected by these trespasses. According to the government regulations, the government is entitled to charge double dues for timber cut in tres-

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pass. In September, Inspector Smith, of the Department, was directed by the Crown timber agent to make an examination and return of the extent of Miller & Dickson's trespasses, including the trespasses on the mineral locations. Smith's report was made in September, 1909, and that report was put in at the trial by the appellants, and upon it the learned trial judge based his estimate of the damages to which he found the appellants entitled. In November of the same year the Crown timber agent, by direction of the department, delivered an account to the Eastern Construction Co. for Crown dues on timber cut under the company's permit, including the Crown timber cut upon the mining locations. The dues so charged for the timber cut in trespass were the ordinary dues payable to the Crown for timber cut under license, in other words, the department treated timber taken by Miller & Dickson from the mining locations as timber lawfully cut under the authority of the department.

These facts, as I have already said, are either found by the learned trial judge, or not seriously open to dispute: and on these facts the respondents were held by the learned trial judge to be accountable to the appellants for the full value of the timber taken from the mining locations. The Court of Appeal held on the contrary that as respects the pine timber which was vested in the Crown, the appellants were not entitled to recover.

Before examining the respective grounds of these conflicting views, it will be convenient to state what are the rights of the Crown and the appellants respectively in the timber standing on the mining locations. With regard to the granted locations, those rights are defined in section 39 of the "Mines Act" (R.S.O. 1897), ch. 360, which is as follows:—

39. (1) The patents for all Crown lands sold as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands may at all times during the continuance of the license enter upon the lands and cut and remove such trees and make all necessary roads for that purpose.

(2) The patentees or those claiming under them (except patentees of mining rights hereinafter mentioned) may cut and use such trees as may be necessary for the purpose of building, fencing and fuel on the land so patented, or for any other purpose essential to the working of the mines thereon, and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation.

(3) No pine trees, except for the said necessary building, fencing and fuel, or other purpose essential to the working of the mine, shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of, except for the said necessary building, fencing and fuel, or other purpose aforesaid, shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw logs.

By section 40, section 39 is made applicable, with some modification, to locations held under lease. For the purposes of this case the rights of the lessees in respect of timber upon leased locations may be treated as if they rested upon section 39. The effect of the first sub-section is apparently to leave the property in the pine trees in the Crown entirely unaffected by the grant. "The pine trees shall," the Act says, "continue to be the property of Her Majesty." The effect of such a provision seems to be that the ownership of the trees is severed from the ownership of the soil, but the quality of the ownership of the trees is not in any degree altered by the grant of the soil. The timber remains vested in the Crown as a corporeal hereditament. A standing tree, (as Chitty L.J. said in *Lavery v. Purssell*)

is just as much a hereditament in point of law as a house which is standing on the land and just as much so as the mines which are underneath. I only speak now as a real property lawyer. I am bound of course by English law to say that a tree is not a chattel.

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no distinction in point of law between the timber on the land and the mines.

I am dwelling on this because it appears to me to have an important bearing upon the principal argument addressed to us by Mr. Anglin on behalf of the appellants.

The principle (as applicable to the case where the grantor is a subject) seems to be stated by Mr. Leake with his usual accuracy in his book on the Uses and Profits of Land, at p. 30 :—

A grant, or an exception from a grant, of the trees growing in certain land, creates a property in the trees, separate from the property in the soil; but with the right of having them grow and subsist upon it. An estate of inheritance in a tree may thus be created; which would be technically described as a fee conditional upon the life of the tree.

The authorities cited by Mr. Challis, at p. 256 of his book on the Law of Real Property, establish beyond question that a determinable fee may be validly limited to a man and his heirs "as long as such a tree shall grow," or "as long as such a tree stands;" and the reason why such limitations are good is given in *Liford's Case*(1), at p. 49(a), and is there said to be because a man may have an inheritance in the tree itself.

It is perfectly true there is authority that where trees are sold under a contract that they shall be removed, the trees may, for certain purposes, be held to be chattels, the land being regarded simply as a warehouse for the timber; and, of course, a grant or reservation of timber may be so framed as to grant or reserve, as the case may be, only a chattel interest in the trees. We are not concerned with such cases.

(1) 11 Co. 46(b).

The language of section 39 to which I have adverted makes it impossible, in my judgment, to give any other effect to that section than this, that the property in all pine trees standing on a Crown location granted under the provisions of the "Mines Act," is to remain in the Crown unaffected entirely by the grant of the location, with all the incidents normally attaching by law to such property. It would follow, of course, that, notwithstanding the grant of the location, the Crown would retain all its powers of dealing with the reserved timber and all such powers are exercisable lawfully with respect to such timber as may be exercised in respect of Crown timber growing upon any part of the Crown domain. It is material to add that, in view of the contentions which have been made in this case, in my judgment this timber falls within the scope of section 3 of the "Public Lands Act" which vests in the Crown Lands Department the

management and sale of the public lands and forests;

that such timber, moreover, is

timber on the ungranted lands of the Crown,

within the meaning of sub-section 1, of section 2, of the "Crown Timber Act"; and that consequently, it may be made the subject of licenses granted under that section. It would, I think, be an unwarranted restriction upon these words to confine their application to lands the soil of which remained ungranted. The contention that they ought to be so restricted was made by Mr. Anglin, not with much confidence, I thought, but a moment's consideration shews that the difficulties in the way of that construction are insuperable. It is obvious that the Legislature is addressing itself, in this phrase, to the question of the Crown's power of disposition over the timber which

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is to be the subject of a license granted under these sections. Nobody would argue, for example, that a grant of the minerals would take the land which was the subject of the grant out of the category of "un-granted lands" within the meaning of this section, nor do I suppose anybody would argue that lands sold under the provisions of sections 13 and 14 of the "Free Grants and Homesteads Act" are not, with respect to minerals and timber, "ungranted lands" within the terms of the Act. With respect to the minerals reserved as well as with respect to the pine trees reserved, such lands are correctly described as un-granted lands. So it seems clear that the lands comprised within a mineral location to which section 39 applies are, with respect to the pine timber "un-granted lands." The grantee of the location holds his location, therefore, subject, as regards the pine timber, to the right of the Department of Crown Lands to deal with that timber in every respect as if it were timber standing upon soil still vested in the Crown. That being so, the provision in the first sub-section of section 39, authorizing the holders of licenses to enter upon locations for the purpose of cutting Crown timber thereon, obviously cannot be restricted to licenses in existence at the time of the grant of the location. Sub-sections 2 and 3, however, confer upon the grantees of locations certain rights in respect of this timber. These rights become exercisable only upon the happening of the statutory conditions, namely, that the timber is required for the purpose of working the mines on the location, or that there has been an actual clearing of the land for the purposes of cultivation, and that it has been necessary to remove the pine trees in the course of such clearing. It

is important to observe that there is here no grant of the timber necessary for mining purposes. The right of the mine owner is to take such pine timber as may be necessary for mining purposes, provided that, when it becomes necessary to take it, it is there to be had. The grantee of the location acquires no property in the pine trees *in situ*, no assurance that they will not be removed, no right to object to the removal of them under the authority of the Crown. Until they are appropriated by him, or at all events until the necessity for taking them has arisen, they are absolutely subject to the authority and disposition of the department having the management of the Crown forests. Licenses may be granted in respect of them under the "Crown Timber Act." If required for a public work, the construction of a government railway, for example, the Crown Lands Department would unquestionably have the power to devote them to such purposes. If they are cut and taken away by a trespasser, the Department has precisely the same discretionary powers of dealing with the trespass as it would have in the case of timber cut from any other part of the Crown domain.

It is necessary in order to make my view of the case clearly understood, to observe, before proceeding to examine the validity of the grounds upon which the learned trial judge proceeded, that the appellants did not at the trial rest their claim upon any contention that there had been any interruption of, or interference with, the exercise of their rights to take pine timber for mining purposes.

It was not alleged that the appellants were engaged in any mining operations upon any of the locations which required the use of the timber, or that

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they had any intention of undertaking such operations. As to the locations held in fee, the evidence is perfectly clear; it is admitted by Mr. Shilton himself explicitly that at the time of the trial there never had been "any actual sinking of the shaft or penetration to the rock"; nor any "straight attempt to develop them and find out what quantity of ore can be found in place." It is also admitted that there was no intention of working or developing these locations within the near future.

With regard to the locations held under lease, it appears that some work was at one time done upon one of them; a cross cut had been made 20 or 30 feet long, 15 deep at one end, and about 8 feet wide at the top. But at the time of the trial no mining operations were in progress or in contemplation. No timber had ever been cut on any of the eight locations for mining purposes.

There is another ground upon which one might have expected the appellants to attempt to base their claim to relief if the facts had justified it. The appellants' right to take the pine timber for mining purposes is a right annexed by the statute to the ownership or other interest held by them in the locations. The acts of the respondents Miller & Dickson have, of course, deprived them of all possibility of exercising this right in respect of the timber which has been removed; and if, as the appellants contend, this was done without lawful justification or excuse, by means of and in course of trespass upon the land, for the benefit of which the right of exercisable, then I should have thought the appellants entitled to reparation to the extent of the loss suffered by them by reason of these wrongful acts. But the measure of that loss is not the

value of the trees; obviously it is the value of the contingent right to take the trees. In estimating the value of that right two elements must, of course, be taken into account, first, the probability of the timber ever being required for the purposes for which the statute permits it to be taken, and, secondly, the probability of the timber being permitted by the Department of Crown lands to remain until it should be so required. In estimating the amount of the loss to the appellants which can fairly be said to have been the "natural and probable consequence" of the acts complained of, these two elements must necessarily be considered. We are not at liberty, however, to consider the appellants' case from this point of view. The appellants in the most explicit way refused to put their claim as a claim to the value of a contingent right; and the learned trial judge refused to consider the points I have just indicated as in any way affecting either the appellants' right to recover or the extent of the damages to which they should be entitled. Evidence was tendered by the respondents of the practice of the Department in granting licenses to cut timber on locations such as the appellants' with a view to shewing the precariousness of the appellants' rights. This evidence was, on the objection of the appellants, rejected as irrelevant. It was, I think, irrelevant in view of the proposition of law on which the appellants based their case. The learned trial judge also treated the probability of the locations being developed to such an extent as to require the use of the timber taken, as irrelevant. I repeat, the appellants' claim is not, and has not at any stage of the proceedings, been based upon an allegation that they have been interrupted in the exercise of their timber

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rights, nor have they asked to be compensated for the actual loss they have suffered by reason of being deprived of the possibility of exercising those rights in future in respect of the timber removed.

The mode in which the appellants put their case at the trial as well as in the Court of Appeal and in this court was this. They were, they said, in possession of the soil on which the pine timber stood, and consequently in possession of the timber; and notwithstanding the fact that the timber was owned by the Crown and delivered by the Crown officers into the possession of the respondents after it was cut, the respondents are, under the authority of *The Winkfield* (1), responsible for the full value of what they took away by the trespass. As the learned trial judge puts it at page 201:—

Nevertheless, it seems to me to be clear that there were interests and rights given with the lands to the patentee and to the lessee for mining purposes, and that they were in fact in possession of the whole lands including the timber, and, whatever rights the Crown may have, a mere trespasser has no right to avail himself of the rights of the Crown, that in short, a trespasser is responsible for the whole value of that which he takes away by his trespass, and the damages arising from the injury done to the property by reason of the trespass, and that in this case, the fact of the trespass not being in dispute, the fact of the timber being actually taken away and sold and converted by the defendants not being in dispute, the fact that the plaintiffs were in possession, that they had put improvements upon the lands, that there was a *bonâ fide* development of the prospect upon the lands, that they were in possession lawfully and legally, and have the right to be protected from the acts of any trespassers; and the trespassers cannot, I say, rely upon any rights of the Crown in reducing the amount of damages caused by reason of the trespasses which they have committed.

As I understand the view of the majority of the court, each step in this course of reasoning is assented

(1) [1902] P. 42.

to in the judgment of this court, and out of deference to that view, it is I think my duty to examine the two principal propositions upon which it is based.

1. Were the appellants in possession of the timber *in situ*? It may be noted that there is no suggestion of a possession of the timber *de facto*. Mr. Shilton candidly admits that the appellants had never cut any pine timber. As to possession (he is a member of the Ontario Bar and solicitor on record for the plaintiffs in the Schmidt case), he said that it was "probably a question of law" depending upon the statute and the instruments in evidence. As to possession in law then, let us look at the case of the leased locations first; in respect of which the point has been explicitly decided more than once. Where trees are excepted, they are, in the words of *Herlakenden's Case*(1), severed from the possession of land during the term.

In *Liford's Case*(2), it was held that the lessor in such a case "has the young of all birds that breed in the trees." And in *Raymond v. Fitch*(3), it was held by the Court of Exchequer that a covenant by the lessee not to cut trees excepted from the demise was purely collateral to the land demised for the reason that

the trees being excepted from the demise, the covenant not to fell them is the same as if there had been a covenant not to cut down trees upon an adjoining estate of the lessor (p. 598).

The effect of the decisions is stated by Mr. Leake in the work already referred to, at p. 31:—

A lease of land for life or for years, excepting the trees growing upon the land, leaves the trees in the possession of the lessor, with the right of having them grow in the soil; the trees then

(1) 4 Rep. 62*a*, at p. 63*b*.

(2) 11 Rep. 46*b*, at p. 50*a*.

(3) 2 C.M. & R. 588.

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are no part of the demised premises, and the fruit or product of the trees presumptively goes with the trees. Consequently the wrongful cutting of the excepted trees by the lessee is technically an act of trespass, being committed upon property which is in the possession of another. But if the lessee wrongfully cut trees included in the lease, it is an act of waste and not a trespass, and the distinction is to be observed in the remedy.

I am unable to understand for what reason not applicable to the case of the leased locations, the timber on the granted locations could be held to have passed into the possession of the grantees. The possession of the timber I should have thought was just as distinct as that of a seam of coal excepted out of a grant. Indeed, it was frankly admitted by Mr. Anglin, who argued the case on behalf of the appellants, that his contention on the subject of possession would logically result in this, that the grantee in fee of land, under a grant containing an exception of the coal, would acquire by virtue of his grant alone, such a possession of any seams of coal as would entitle him to maintain an action against the under-ground trespasser for the full value of the coal taken, even in a case in which the trespass should be literally confined to the coal bed itself. That I should have thought, with great respect to the majority of the court, who, I understand, accept the contention so advanced, distinctly contrary to all principle. I do not know why the usual rule should not be followed and the scope of the grantee's possession determined by his right of possession. *Low Moor Co. v. Stanley Coal Co.*(1). I do not know why an underground trespasser should, in such a case, be held to be a trespasser as against the owner of the surface, any more than a trespasser on the surface should be held to be a tres-

(1) 34 L.T. 186.

passer as against the owner of the coal. Nor, indeed, why in this case a trespasser on the timber should in respect of his acts of trespass on the timber be held to be a trespasser as against the owner of the soil, any more than the trespasser on the soil should be held to be *ipso facto* a wrongdoer against the owner of the timber. In the case of timber the proprietor of the timber as having the right to some extent to exclude the owner of the soil from the occupation of it, in virtue of his right to have the trees grow upon the soil, would seem rather to be in possession of the soil to the extent of the occupation thus involved. Mr. Anglin relied upon two cases; the case of the *Glenwood Lumber Co. v. Phillips* (1), and that of *Casselman v. Hersey* (2). The first case involved no question of the possession of a corporeal hereditament and I cannot understand its application to such a case.

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As to the second decision. With all respect to the court that decided it, I am unable to follow the view there expressed and acted upon. It is now, however, suggested, and I understand the majority of the court to agree, although the view was not presented on the argument, that a rule was laid down in *Casselman v. Hersey* (2), which, even if erroneous, has, on the principle of *stare decisis*, become a part of the law of Ontario because that decision has stood unreversed and so far as the reports of decided cases are concerned at all events, unquestioned for a great number of years. I think it is impossible to invoke with any propriety the doctrine of *stare decisis* in connection with this decision. It is a very wholesome

(1) [1904] A.C. 405.

(2) 32 U.C.Q.B. 333.

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rule where a decision of a superior court has been acted upon for a great many years so that the rule established by it has regulated the transactions of business men or the practice of conveyancers, or the proceedings of courts, that the decision, or rather the rule which has been drawn from it, may properly be treated as constituting a part of the law applicable to such things independently altogether of the question whether or not the decision was originally founded upon satisfactory grounds. That is because in such cases as stated by Thessiger L.J. in *Pugh v. Golden Valley Railway Co.* (1), at p. 334, the rule may fairly be treated as having passed into the category of established and recognized law.

But this is a principle which has no possible application to the point now said to have been established by the case in question. There was no dispute in that case, as there is no dispute here, as to the meaning of the exception in the patent. At page 340, Mr. Justice Wilson says:—

The trees remained, therefore, notwithstanding the grant, the property of the Crown, and they were so at the time of the cutting and removing of them by the defendant.

The right of the Crown to the soil itself on which the trees grew was not excepted; but by reason of the exception, the Crown had the right to the nutriment of the soil sufficient for the growth and preservation of the trees which were excepted.

So far as the reciprocal rights of the Crown and the patentee were concerned, the decision is unquestioned, and is obviously right; nobody on this appeal raises any question with regard to that point. The proposition for which it is now sought to invoke the decision as an authority is that possession of the soil carries with it, *ipso jure*, the possession of the trees,

notwithstanding such an exception, to such an extent as to entitle the grantee to sue in trespass for the value of such trees when cut and carried away by a trespasser. That is a point which never could arise except in some litigation between the grantee and a trespasser. I see no ground whatever for holding that, on that point, the decision has become part of the Ontario law. It would be really most extravagant to suppose that the fact of such a point having been determined in favour of the grantee could ever have entered into the calculations of anybody when dealing with lands to which the decision could apply. There is not the slightest evidence that the decision has ever, on this point, been accepted in Ontario. It is not to be found referred to in any text-book. On the point in question, it is not to be found referred to in any reported case, and to me at all events, there is sufficiently convincing evidence of the fact that it has never regulated or affected transactions generally, from the circumstance that neither the Chief Justice of Ontario, nor my brother Idington, nor Mr. Justice Meredith, appears to have been aware that it has ever had any such operation. Then it is said that the decision involved the construction of the "Free Grants and Homesteads Act" of that time; that that Act has been re-enacted since with no material variation, and that consequently the Legislature must be taken, under a well-known rule of construction, to have adopted and sanctioned the decision. I repeat that the decision in so far as it involved the construction of the exception in the patent and of the statute upon which the

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exception was based, has no bearing upon any controversy in this appeal. The construction of the statute here is not in dispute. If it be assumed that the construction given to the Act in question in that court has been adopted (which, as I say, is not disputed), the appellants have still to make good the contention on the point of possession. It would be stretching the rule relied upon to an extent not, I think, justified by any decision or by any principle, to hold that the adoption of the views expressed in *Casselman v. Hersey* (1) as to the meaning of the exception involved the adoption of the views there expressed on the subject of possession. But the truth is that the rule referred to is one which must always be applied in this country with a great deal of caution. Every one knows that statutes are often consolidated and re-enacted without careful reference by the legislature, or by the draughtsman of the statutes, to decisions which the courts may have given upon the construction of the words employed. It was for this reason that, in 1891, the Dominion Parliament passed an Act excluding the rule of construction referred to in the interpretation of Dominion statutes and that enactment was adopted in 1897 in the Province of Ontario, as one of the provisions in the "Interpretation Act" included in the Revised Statutes of that year. These are the relevant sections. Section 7, sub-section 1, is as follows:—

7(1). This section and sections 8 to 12 of this Act and each provision thereof, shall extend and apply to these Revised Statutes of Ontario and to every Act of the Legislature of Ontario, passed after the said Revised Statutes take effect * * *

(1) 32 U.C.Q.B. 333.

And section 8, sub-section 57, is in these words:—

57. The Legislature shall not, by re-enacting an Act or part of an Act, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise, been placed upon the language used in such Act or upon similar language.

These provisions obviously govern the construction of the statute in question, which is chapter 36 of the Revised Statutes of 1897, at all events in respect of grants and leases issued under it subsequent to the year 1897.

For these reasons it seems to me to be clear that in felling and carrying away the trees, the respondents Miller & Dickson were not, except as to trespasses upon the soil which was vested in the appellants, committing any trespass of which the appellants have any title to complain.

2. But apart from this, is it really the law of England, as Mr. Anglin contended, and as I understand the majority of the court to hold, that the doctrine of *The Winkfield* (1), and of *Glenwood Lumber Co. v. Phillips* (2), has any application to trespasses in respect of corporeal hereditaments? The rule as I understand it is correctly stated in *Mayne on Damages*, at p. 513:—

In actions for injury to land, the measure of damages is the diminished value of the property, or of the plaintiff's interest in it, and not the sum which it would take to restore it to its original state.

* * * *

The damages will vary considerably, according to the plaintiff's interest in the land. This is obviously just, both to prevent the plaintiff getting extravagant recompense when his interest is on the point of expiring, or very remote, and to prevent the defendant being forced to pay for the same damage several times over. The same act may give rise to different injuries; the tenant may sue for the injury to his possession, and the landlord for the injury to his

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reversion. And so where several are entitled to succession as tenants for life, in tail, in fee, each can only recover damages commensurate to the injury done to their respective estates. Hence where a stranger cuts down trees, the tenant can only recover in respect of the shade, shelter, and fruit, for he was entitled to no more; and so it is where the occupant is tenant in tail after possibility of issue extinct; but the reversioner or remainderman will recover the value of the timber itself.

The appellants in this case, as I have pointed out, have deliberately elected not to put forward any claim based upon the extent of the injury to their contingent interest caused by the acts complained of. The claim is based, and the loss has been appraised upon the assumption that they were entitled to the full value of the timber.

The appellants' contention must be rejected for another reason. Both Miller & Dickson and the Eastern Construction Co. became lawfully entitled to deal with the pine timber which had been felled on the locations by reason of the direction given to them by the Crown timber agent at the end of February. The evidence of the Crown timber agent himself is precise upon the point that his direction to Miller & Dickson to remove what had already been cut referred to the timber cut upon the locations as well as to timber cut upon the Crown lands. The pine was the property of the Crown, and there can be no possible question that the Crown Lands Department would, in the circumstances existing, be acting entirely within its authority as having the management of the Crown forests, in disposing of the timber so felled, after the manner which it deemed to be best in the public interest. The Crown timber agent says, moreover, that he acted in accordance with a settled rule; that he gave the direction with the object of having the ties reach their intended destination. It

might, he says, have been a very serious thing to prevent the delivery of the ties. He professed to act with the authority of the Crown Lands Department in what he did; and what he did was afterwards ratified by them. The evidence on this point is undisputed and it is conclusive. The agent reported stating that pine had been cut from the mining locations as well as from Crown lands outside the limits of the Eastern Construction Co.'s permit. The Department of Crown Lands afterwards directed the inspector to ascertain the quantity of pine timber cut from the locations, and, as I have already mentioned, the Eastern Construction Co. was billed for dues for this timber in accordance with the scale in use in respect of timber cut under the authority of a permit, thus treating the timber as timber cut under such authority. It is, therefore, incontestable that from the end of February onward the possession of this timber and of the ties manufactured from it, whether in the Eastern Construction Co., or in the O'Brien firm, or in the Dominion Government, was a perfectly lawful possession, and that from that time onward, the persons in possession had full authority to deal with it.

Some stress was laid upon the letter of the Deputy Commissioner of the 18th March, but reading that letter in connection with the acts of the departmental officials, it is quite clear that the Deputy Commissioner could have intended only to refer to timber to which the appellants were entitled. The letter of Mr. Margach advising the Department of the trespasses upon the locations was produced at the trial, although not actually put in evidence, and the letter written in November is explicit to the effect that the bill for dues covers the Crown timber taken from the mining loca-

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tions as well as that taken from lands still vested in the Crown. No other conclusion seems to be possible from the undisputed facts than that at which the Court of Appeal arrived, namely, that from the date of Mr. Margach's instructions to Miller & Dickson to remove the timber cut, the respondents were dealing with all the Crown timber in question under the authority of the Crown Lands Department. To rely on this is not, as Mr. Justice Meredith points out, to set up a *jus tertii*. The respondents are setting up their own rights. It is to be noted, moreover, in this connection, that the facts were brought out in the plaintiffs' own case. Inspector Smith called by the appellants, at page 64 of the appeal case, says that it was by the instructions of the Government that in September he made the count of ties from the mining locations, and at page 73, that instructions were given to Miller & Dickson to remove the ties taken from the mining locations, and on the same page, that the purpose of the count of ties made by him in September, 1909, was to enable the Government dues to be collected. It would be impossible, I should have thought, to sustain in these circumstances the claim for the full value of the timber, even if in a general way the decisions referred to could be held to have any application.

Let us take the case of the finder, for example. Is it really the law that a trespasser having taken an article from a finder is liable to pay the full value of it to the finder, notwithstanding the fact that before action the owner has come into the matter and has authorized the trespasser to keep the article which is the subject of the trespass? Is it conceivable that in such circumstances, unless special damages could

be proved as attaching to the trespass itself as distinguished from the detention of the article, that the finder could recover more than nominal damages for the wrong done to his possession? I should have thought it was plain he could not.

Another ground is now suggested which was not suggested at the trial or in the Court of Appeal, or on the argument before us, for sustaining the judgment of the learned trial judge. It is said that, assuming the appellants had not possession of the trees *in situ*, they came into their possession when they were felled to the ground and that the possession so acquired was sufficient to entitle them to maintain detinue and to recover the full value of the timber as it lay there. To this ground of recovery the objection to which I have just adverted, namely, that by reason of the act of the Crown officials the respondents became, before the action was brought, entitled as against the appellants to the possession of the timber, seems equally applicable. But it appears to me to involve a very considerable strain upon the principles of English law relating to the subject of possession to hold that the timber in question ever came into the possession of the appellants as chattels. Consider the facts. The trespasses in question began about the first of February. The contractors, Miller & Dickson, proceeded in this way. They cut roads into territory south of Vermilion River entering the sites of the locations as well as the adjoining Crown lands—and at various places in the vicinity of these roads they started concurrently the felling of timber. As the timber was felled it was manufactured into ties on the spot, and these ties were hauled to the piling stations. In this way they proceeded until the end of February with-

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out any interference. There was nobody in the locality, or within hundreds of miles of the locality having any authority on behalf of the appellants to interfere with them. The only person in the district having authority to take possession of the timber, the Crown timber agent, confirmed the possession of the contractors when the cutting came to his notice. Throughout the course of the whole proceedings, it has never been suggested on behalf of any of the parties that the respondents had not *de facto* possession of the timber from the time it was felled until it was delivered at the piling stations. It is perfectly obvious from the evidence that they had and must have had as much physical control over the timber as in the circumstances would be necessary to constitute possession in fact. So far from disputing this, counsel for the appellants more than once during the trial emphasized the circumstance that the manufacturing and the hauling of the ties for delivery proceeded contemporaneously with the cutting. (See, for example, p. 158.) And I have already referred to the observation of Mr. Shilton that the possession upon which the appellants relied was a possession implied by law. The possession relied upon by Mr. Anglin in his argument before us was the possession upon which the learned judge based his judgment, and upon which the claim was based at the trial, namely, the possession of the trees as they stood upon the soil. It was not suggested that the respondents had not *de facto* possession from the time the trees were felled. It would be necessary, therefore, in order to make good this position, to rest upon some rule of law vesting possession of the felled timber in the holders of the locations solely by reason of their

possession, that is to say, their legal possession of the soil upon which the timber fell, as against the *de facto* possession of Miller & Dickson. I do not think there is any such rule of law, and if authority were needed for the purpose of negating such a rule, it may be found in the case of *Bridges v. Hawkesworth*(1), in which it was held that a purse found lying on a shop floor in the day time while the shop was open for business, by a customer, was not, while lying there, in the possession of the owner of the shop.

It is suggested, however, that some such rule is deducible from the language of Lord Davey in *Glenwood Lumber Co. v. Phillips*(2). The circumstances with which Lord Davey was there dealing were these: timber had been cut by a trespasser upon Crown lands. Subsequent to this cutting a lease was granted. After the granting of the lease and occupation under it by the lessee, the timber which had been so cut was removed by the trespassers. It was held that the lessee, as lessee and occupier, had a sufficient possession of the timber to entitle him to maintain detinue for the value of it. Of course, in its broad features, the case is immediately differentiated from the present case by the intervention of the Crown Lands Department, and the authority given by the Crown officers to the respondents in this case to deal with the timber before the action was brought. In the *Glenwood Case*(2) the granting of the lease and the occupation by the lessee under it, had the effect of vesting in the lessee the possession of the lands and a right to the

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(1) 21 L.J.Q.B. 75.

(2) [1904] A.C. 405.

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possession, at least, for the benefit of the Crown of all chattels on the lands to which the Crown had a right of possession at the time of the granting of the lease, and which were not intended to be excepted from the lessee's possession. Such chattels came under (to use the phrase of Patteson J., in *Bridges v. Hawkesworth* (1)), the "protection of" the lessee's occupation. The lessee, therefore, clearly acquired a right to the possession of the timber which was felled and was lying within the limits of the demised property. This right of possession alone would be sufficient to entitle the lessee to maintain detinue even against the *de facto* possession of the trespassers, and there is no suggestion in the report of the case that the trespassers had *de facto* possession. In the case before us the trees in question had been expressly excepted from the possession of the appellants, and stood exactly in the same position as, for example, timber felled without authority upon adjoining Crown lands and piled upon ground within the limits of one of the appellants' locations. The argument under consideration logically applied would give a right to the holders of the locations to recover the full value of such timber, notwithstanding subsequent permission from the Crown Lands Department given to the trespasser to appropriate the timber. That is a result which cannot, I think, be fairly deduced from the *Glenwood Case* (2).

Thus far I have dealt only with the pine timber, and I have proceeded upon the assumption that the Eastern Construction Co. stand in the same case with Miller & Dickson.

(1) 21 L.J.Q.B. 75.

(2) [1904] A.C. 405.

As to the tamarac, there is no ground, so far as I can see, upon which Miller & Dickson can be excused. I am inclined to think that they are not responsible for damages arising from the trespass to the soil so far as such trespass may have been merely incidental to the cutting and carrying away of the pine trees. There is certainly much to be said for the proposition that as an incident of the property in the trees the Crown would have the right to deal with a trespasser in all respects as if the trespass had been committed on Crown lands, and consequently to waive all wrongful acts incidental to the trespass, in order to claim either the value of the timber cut or compensation for it on the footing of the trespasser having acted under a permit, if the circumstances were such as to entitle the Crown to make the latter claim. In this case the Crown was clearly, I think, entitled to take that position. See the judgment of Bowen L.J. in *Phillips v. Homfray* (1). The amount affected by this point is, however, trifling.

The Eastern Construction Co., however, with regard to the whole case, stand in a totally different position from that of Miller & Dickson. The learned trial judge has found that they did not authorize the trespasses, that is to say, that the trespasses were not authorized by anybody who was in a position to bind them. They were held liable on the ground, as he puts it, that they took the ties with a full knowledge of the circumstances in which they had been obtained by Miller & Dickson; that they paid for them in part, and that they sold them. He concludes that by these acts they adopted what Miller & Dickson did and

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made themselves responsible for it. On this branch of the case I think the learned judge has fallen into some error in failing to appreciate, in its bearing upon the conduct of the Eastern Construction Co., the fact that all parties from the time Miller & Dickson were stopped cutting by the orders of the Crown timber agent, dealt with the Crown timber and the ties which had been manufactured from Crown timber with the authority of the Crown Lands Department. There is no evidence that before that time the Eastern Construction Co. had done any act which could be construed as an adoption of the wrongful acts of Miller & Dickson. Samuel McDougall, Sr., who, as I have pointed out, was authorized only to count the ties, to classify them, and to submit them for inspection to the Government inspector, was aware of the fact that some of these ties had been cut from the appellants' locations. But it is not disputed that the ties from the appellants' locations were mixed up by Miller & Dickson with ties taken from the Crown lands in such a way as to make identification impossible: see appellants' factum, p. 2; and as I have pointed out, it is not suggested that Samuel McDougall, Sr., had any knowledge of the cutting of tamarac from the mining locations, that is to say, of the cutting of any timber which was the property of the owners of those locations. McDougall had no authority to do anything on behalf of the Eastern Construction Co. amounting to an adoption of the trespass, any more than he had power to authorize a trespass antecedently. When the responsible officials of the Eastern Construction Co. became aware of the trespass Miller & Dickson had already received authority from the Crown Lands Department to deal

with the Crown timber as if it had from the beginning been rightfully in their possession. What was afterwards done in dealing with the timber can fairly be attributed to this authority. It is perfectly true that during the month of April, after the Eastern Construction Co. had become aware of the trespasses, they paid considerable sums of money to Miller & Dickson, but it should be remembered that the timber taken from the locations constituted only about one-sixth of the timber cut by Miller & Dickson. The ties, as I have said, were inextricably mixed and until Inspector Smith made his report nobody was in a position to know the exact extent of the trespass upon the locations. That was not until September. The evidence is perfectly clear that Miller & Dickson at first represented to Mr. Alexander McDougall that the trespass upon the locations was very slight. The appellants themselves were unable to give any sort of accurate information, and it was not until the end of June that they assumed the utterly unreasonable position that none of the ties cut by Miller & Dickson south of Vermilion River should be used in railway construction. It is perfectly clear that when this position was taken by the appellants the Eastern Construction Co. were absolutely entitled under the authority of the permission given by the Crown timber agent, to make use of all ties cut from timber owned by the Crown, whether on the locations or off the locations. As to the timber not the property of the Crown, it consisted exclusively of tamarac, and there is no reason for supposing that at this time at all events any of the officers of the Eastern Construction Co. knew that any tamarac had been taken from the locations; and of the tamarac ties cut from the locations, there were fewer

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than 900 altogether. Notwithstanding all these circumstances, the Eastern Construction Co. did retain a sum almost sufficient to pay Miller & Dickson all that Miller & Dickson would have been entitled to receive from them for the cutting and manufacturing of ties to the number of those manufactured from timber cut from the mining locations.

Some stress was laid upon the circumstance that the Eastern Construction Co. paid the wages bill of Miller & Dickson for work done in trespass on the locations. In paying the wages bill they simply honoured the cheques issued by Miller & Dickson as they were bound to do under their contract. It is an impossible suggestion that in doing that they were making themselves responsible for everything done by the workmen who were so paid.

The Eastern Construction Co. are responsible for the value of the tamarac ties cut from the appellants' location which were received by them. That is more than covered by the amount paid into court.

I think the appeal should be dismissed.

ANGLIN J.—The appellants in the first action are owners of certain mining locations in the District of Rainy River in the Province of Ontario and the appellants in the second action are lessees of other mining locations in the same district. They seek damages for alleged wrongful cutting upon and removal from their respective locations of pine and tamarac timber and for incidental injuries due to negligence in the cutting and removal.

The defendants, Miller & Dickson, cut and removed the timber under contract for their co-defendants, the Eastern Construction Company, who obtained the

lumber and ties so produced. For the cutting and removal of the pine the Court of Appeal, reversing Clute J., has held that the appellants cannot recover from either of the defendants. Under its judgment the Eastern Construction Company is also relieved of liability in respect of the other items of the plaintiffs' claim.

Miller & Dickson are, however, held liable for the tamarac, its ownership by the plaintiffs not being questioned, and for such damages, if any, as the plaintiffs sustained owing to negligence in cutting and removing both pine and tamarac. From this part of the judgment no appeal has been taken.

The appellants seek to restore the judgment of the trial judge awarding them damages against all the defendants for the cutting and removal of the pine and to have the Eastern Construction Company, as well as Miller & Dickson, declared liable to them in respect of the other items of claim.

The fact of the cutting and removal of the timber from the plaintiffs' locations is not in question. No justification is advanced for the cutting of the tamarac. Neither is it contended by the respondents that when the pine was cut and removed they had a license from the Government to cut or take it, although some subsequent ratification or approval by the Department of Crown Lands of their having done so is now set up. The Eastern Construction Company claims that it is not responsible for the tortious acts of its co-defendants, Miller & Dickson, who, though made respondents, were not represented at bar in this court.

The principal question is as to the right of the appellants to recover against any of the defendants in respect of the cutting and removal of the pine. The

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Crown grant and Crown lease under which the appellants respectively claim are subject to the provisions of the "Mines Act" (R.S.O. 1897, ch. 36), and contain the reservation prescribed by section 39 of that statute, which, as amended by 62 Vict. ch. 10, sec. 10, reads as follows:—

39 (1) The patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands, may at all times, during the continuance of the license, enter upon the lands, and cut and remove such trees and make all necessary roads for that purpose.

(2) The patentees or those claiming under them (except patentees of mining rights hereinafter mentioned) may cut and use such trees as may be necessary for the purpose of building, fencing and fuel, on the land so patented, or for any other purpose essential to the working of the mines thereon, and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation.

(3) No pine trees except for the said necessary building, fencing and fuel or other purposes essential to the working of the mine, shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of, except for the said necessary building, fencing and fuel, or other purpose aforesaid, shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw logs.

For the plaintiffs it is contended that notwithstanding the exceptions thus made, they had such possession of what was so excepted, or such an interest in it, as sufficed to give them a status to maintain an action in trespass or in trover against the defendants as strangers and trespassers.

That such an exception of standing trees (it appears to be an exception though called a reservation, *Douglas v. Lock* (1), at pp. 743 *et seq.*), has the effect of "dividing the trees in property from the land, al-

though *in facto* they remain annexed to the land," (1), and "parcel of the inheritance" (2), is old and undisputed law. It is argued that of the part of the inheritance so excepted from a grant the grantee has no possession in law, although the land on which the trees stand is his, the right to nutriment out of it for the trees being the only interest in it of the grantor. *Legh v. Heald* (3), at page 626. It may be that the rule of English law which ascribes to the person in possession of land the possession of chattels upon it and, as against a trespasser, title to them by reason of such possession, thus enabling him to maintain an action for the wrongful taking away of them by a stranger and to recover as damages their full value, although they are the property of another (4), does not apply to trees reserved out of a grant or lease while standing, and that, apart from any proprietary or licensees' interest in the pine trees which the statute gave them, the plaintiffs could recover in respect of the mere felling of such trees only damages for the wrongful entry on their lands. But that possession such as the plaintiffs had of their mining lands would, notwithstanding an unqualified reservation in the Crown patent and Crown lease of the pine trees, entitle them to maintain an action *in detinue* against a stranger wrongfully cutting and removing such trees and to recover as damages the value of the timber taken was held by the Upper Canada Court of King's Bench in *Casselman v. Hersey* (5), decided in 1872. The possession which the plaintiffs in that case had of

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(1) *Herlakenden's Case*, 4 Rep.
62b, at p. 63b.

(2) *Liford's Case*, 11 Rep. 46b,
at p. 48b.

(3) 1 B. & Ad. 622.

(4) *Glenwood Lumber Co. v.*
Phillips, [1904] A.C. 405,
at pp. 410-11.

(5) 32 U.C.Q.B. 333.

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the lands from which the timber was removed was much the same as that which the present plaintiffs had of their mining locations. Upon the sufficiency of such possession that decision has since been approved in *Kay v. Wilson* (1), at page 143, and in *Mann v. English* (2), at page 249; (see Lightwood on Possession of Land, p. 60); and I do not understand it to be questioned in the judgment of the Court of Appeal in the present case. What was decided by the other branch of the judgment in *Casselman v. Hersey* (3) has never been challenged in Ontario, so far as I am aware, until the decision of the Court of Appeal now before us, in which, it is noteworthy, no allusion is made to that case. It is cited with approval on the question of damages by Osler J. in *Johnston v. Christie* (4). It is probably now too late to question its correctness, *Trust and Loan Co. of Upper Canada v. Ruttan* (5).

Since *Casselman v. Hersey* (3) was decided the statutes of Ontario have been thrice revised and consolidated. On each occasion the legislature re-enacted the provision of section 39 of the "Mines Act" (R.S.O. 1897, ch. 36), for the reservation of pine substantially in the form in which it is now found. (Vide R.S.O. 1877, ch. 29, sec. 12; and R.S.O. 1887, ch. 31, sec. 12.) The same course has been followed in regard to sections 13 and 14 of the "Free Grants and Homesteads Act" (R.S.O. 1897, ch. 29), which make similar provisions. (Vide R.S.O. 1877, ch. 24, sec. 10; 43 Vict. ch. 4, secs. 2, 3, and 4; R.S.O. 1887, ch. 25, secs. 10 and 11.) Both the "Mines Act" and the

(1) (1877) 2 Ont. A.R. 133.

(2) (1876) 38 U.C.Q.B. 240.

(3) 32 U.C.Q.B. 333.

(4) (1880) 31 U.C.C.P. 358,
at p. 362.(5) 1 Can. S.C.R. 564, at p.
584.

“Free Grants Act” contain reservations of pine timber in terms substantially the same as those which were passed upon in *Casselman v. Hersey* (1). In re-enacting them without making any attempt to change the effect which such a reservation was held to have, or to alter or restrict the rights which the grantee, notwithstanding it, was held to enjoy, the legislature must be understood to have done so in the light of the interpretation put by the court upon the language which it used. *Clark v. Wallond* (2). The following provision of the “Interpretation Act” of the R.S.O. 1897 (chapter 1, section 8, clause 57), first became law in Ontario in 1897:—

The legislature shall not, by re-enacting an Act or part of an Act, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise, been placed upon the language used in such Act or upon similar language.

There is no similar clause in the “Interpretation Act” in the consolidation of 1877, nor in that of 1887. Whatever may be said, therefore, of the effect of the re-enactment of these statutes in the revision of 1897 in view of sub-section 57 of section 8 of the “Interpretation Act” of that year, it cannot be assumed that the legislature re-enacted the sections of the “Mining Act” and of the “Free Grants Act” in 1877 and again in 1887 in ignorance of the judicial interpretation which had been put upon such a reservation of pine timber as they provided for. When re-enacted in 1897 not only had the language of these statutory provisions received judicial construction, but that construction must be deemed to have already had legislative recognition and acceptance.

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(1) 32 U.C.Q.B. 333.

(2) 52 L.J.Q.B. 321, at p. 322.

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Thousands of grants and leases of mining and homestead lands have been taken and paid for under this legislation in the interval of forty years since the decision in *Casselman v. Hersey* (1). In these circumstances, even if we entertained doubts as to the effect of the reservation of pine timber under section 39 of the "Mines Act," we should, in my opinion, if necessary, apply the doctrine of *stare decisis* and decline to disturb the legal rights which Crown patentees were declared to possess under language substantially the same by a judicial decision rendered so long ago and which has been since acquiesced in and never questioned until the present time. *Casgrain v. Atlantic and North-West Railway Co.* (2); *Ex parte Campbell* (3); *Corporation of Whitby v. Liscombe* (4); *Macdonell v. Purcell* (5).

But in the case at bar the reservation to the Crown was not unqualified, as it appears to have been in the *Casselman Case* (1). The present plaintiffs had attached to their mining lands a right not merely to enjoy, until they should be cut down by some duly authorized licensee of the Crown, the shade of the pine trees and any other advantage to be derived from their standing on the lands, but they also had the very substantial right of themselves cutting down and using these trees for

building, fencing and fuel on the land so obtained or for any other purpose essential to the working of the mines thereon.

and, subject to payment of Crown dues, also the right to

cut and dispose of all trees required to be removed in actually clearing the land for cultivation.

(1) 32 U.C.Q.B. 333.

(2) [1895] A.C. 282, at p. 300.

(3) 5 Ch. App. 703, at p. 706.

(4) 23 Gr. 1, at pp. 17, 18, 21, 27, 35.

(5) 23 Can. S.C.R. 101, at p. 114.

Of this substantial interest in the pine trees the plaintiffs were deprived by their being cut down by the defendants, because, upon their severance from the land, whether effected by a duly authorized Crown licensee or by a trespasser, their special interest ceased just as the special interest or property in timber trees of a lessee holding under a lease without reservation of timber ceases upon severance of the trees from the soil however effected. *Herlakenden's Case*(1). The plaintiffs' statutory rights were confined to cutting for certain purposes and to taking and using what they themselves so cut. They had no statutory right to take or use what the defendants cut, although such cutting was done in trespass. For the wrongful destruction by mere trespassers of their right to cut and use the pine trees so annexed to their property they had, in my opinion, a right of action. *Nuttall v. Bracewell*(2); *Jeffries v. Williams*(3); *Bibby v. Carter*(4); Smith's L.C. (11 ed.), vol. 1, pp. 358-60. The evidence shews and the learned trial judge has found that there was not enough timber on the lands for the mining purposes of the plaintiffs. As wrongdoers and trespassers the defendants cannot be heard to say that the plaintiffs might never have used this timber for such purposes. As against them in assessing damages it must be assumed in the plaintiffs' favour that, but for the wrongful interference of the defendants, they would have had the full benefit of the rights conferred upon them. If entitled to any damages in respect of the destruction of their interest in the pine trees, whether it be regarded as proprietary in its character or as merely

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(1) 4 Rep. 62b.

(3) 5 Ex. 792.

(2) L.R. 2 Ex. 1.

(4) 4 H. & N. 153.

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an interest of licensees, the plaintiffs in this aspect of the case would seem to be entitled to recover the full value of what was wrongfully cut. But I do not rest my judgment on this ground.

On another ground the plaintiffs' claim against the persons responsible for the wrongful removal of the pine trees seems to me unanswerable. When those trees were felled the plaintiffs' special interest or property in them ceased. But it did not vest in the wrongdoers. Neither did they acquire by their trespass the rights of the Crown. As the pine trees lay upon the ground they were the property of the Crown. But for the reservation they would have been the plaintiffs' property. The cutting, however, though wrongful, converted that which had been a part of the inheritance into chattel property. *McLaren v. Ryan*(1). Lying on the plaintiffs' lands, those chattels, though belonging to the Crown, were legally in their possession because of their possession of the land.

Even if continuous physical possession of the pine trees by Miller & Dickson, from the moment when they were cut until they were removed from the plaintiffs' lands, would have precluded legal possession of them as chattels being ascribed at any time to the plaintiffs as owners and lessees respectively of such lands, there is no proof of such continuous physical possession in the record and in the absence of proof it will not be presumed in favour of trespassers. "Delivery is favourably construed; taking is put to strict proof." The evidence of continuous physical possession, if they had in fact kept such possession, lay peculiarly

(1) 36 U.C.Q.B. 307, at p. 312.

within the knowledge of the defendants and the burden was certainly upon them to produce it. Taylor on Evidence (10 ed.), p. 376(a). As trespassers Miller & Dickson could have no constructive possession of anything of which they had not actual possession. While, if a person enter under title, his possession of part of a tract of land will generally be regarded as giving him constructive possession of the entire property, where the entry is without title, the legal possession of the trespasser, at all events as against the person lawfully entitled to possession, is limited to the area of his effective occupation. So in the case of movables,

a man who is not entitled to take possession can obtain possession only of that which he actually lays hold of.

Ex parte Fletcher (1). The same rule applying to land and to chattels in regard to the extent of wrongful possession there is no reason why they should be subject to different rules as to the duration of such possession. In the case of land the possession of the trespasser ceases as soon as his actual occupation comes to an end: *Trustees, Executors and Agency Co. v. Short* (2). By an application of the same principle, on the cesser of the physical possession of movables held by wrong, the law will not attribute to the wrongdoer continued constructive possession of them, but the right to possession will draw after it the constructive possession and the person having such right will be deemed to have the legal possession. "Possession acquired by trespass is a continuing trespass from moment to moment so long as the possession lasts." There is no presumption of the continuance of illegality: at all

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(1) 5 Ch. D. 809, at p. 813.

(2) 13 App. Cas. 793, at p. 798.

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events, its continuance will not be presumed in aid of a guilty person seeking thus to improve his legal position. Moreover, "in the case of goods legal possession is recognized more readily than in the case of land and mere right to possession is sometimes described as 'constructive possession' and is allowed the advantages of legal possession." Encyc. Laws of England (2 ed.), vol. XI., p. 327. The removal of the pine trees from the plaintiffs' lands by Miller & Dickson should, in my opinion, be regarded as a taking of them from the possession of the plaintiffs. Either on this ground, or because their right to possession gave them, as against the trespassing defendants, "the advantages of legal possession," they had a status to maintain this action.

Lord Davey, delivering the judgment of the Judicial Committee in a case in which unsuccessful applicants for a lease of timber lands (the appellants) had cut timber on the lands in anticipation of obtaining such lands and had removed it after the lease had been granted to the respondent, said:—

The action was in substance for trespassing on the respondent's lands and for detinue of the logs removed from his lands. * * The action was in fact so treated by the learned judge at the trial. It was then said that at any rate the logs were, as between the respondent and the Crown, the property of the Crown.

The answer to this argument is that the appellants were wrong-doers in every step of their proceedings. There is not a hint in either the pleadings or the evidence of any title in the appellants to cut the trees. * * * The appellants were wrong-doers in entering on the lands of the respondent for the purpose of removing the logs, and also in removing the logs, which were certainly not their property.

*The respondent, on the other hand, was, in their Lordships' opinion, lessee and occupier of the lands, and, as such, had lawful possession of the logs which were on the land. It is a well-established principle in English law that possession is good against a wrong-doer, and the latter cannot set up a *jus tertii* unless he claims under it. This question has been exhaustively discussed*

by the present Master of the Rolls in the recent case of *The Winkfield* (1). In *Jeffries v. Great Western Rly. Co.* (2), Lord Campbell is reported to have said: "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him having no title in himself is a wrong-doer, and cannot defend himself by shewing that there was title in some third person, for against a wrong-doer possession is title." The Master of the Rolls, after quoting this passage, continues: "Therefore, it is not open to the defendant, being a wrong-doer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all, and therefore, as between those two parties, full damages have to be paid without any further inquiry." Their Lordships do not consider it necessary to refer at any greater length to the reasoning and authorities by which the Master of the Rolls supports this conclusion, and are content to express their entire concurrence in it. *Glenwood Lumber Co. v. Phillips* (3).

I am unable to distinguish between the act of the defendants in removing the pine logs from the plaintiffs' lands (the cutting of them is not material to this aspect of the case) and the act of the appellants in removing the logs in the *Glenwood Case* (3), which was held to entitle the respondent (plaintiff) to recover as against the trespassers the full value of the logs removed *on the ground that when removed they were in the possession of the respondent as lessee of the land upon which they lay* and that, as against the trespasser, such possession was equivalent to title.

Although it does not appear in the reports of this case either before the Judicial Committee or in the colonial courts (N.F. Reps. 1897-1903, 390, 454) that the appellants had at any time relinquished or that the respondent had acquired physical possession of the lumber after it was cut and prior to its removal, their Lordships seem to have found no difficulty in

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(1) [1902] P. 42.

(2) (1856) 5 E. & B. 802, at p. 805.

(3) [1904] A.C. 405, at p. 410.

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ascribing legal possession of it to the latter as lessee of the land and in treating the removal of it as a wrongful taking out of his possession.

The decision in *Casselman v. Hersey* (1), may be upheld on the ground that after they were cut and lay as chattels on the plaintiffs' land the defendant in that case wrongfully took away the logs, although Wilson J., no doubt, held the view

that the lessee or grantor when the trees are excepted is in possession of them as against a stranger and wrong-doer, (p. 341).

See, too, *McLaren v. Ryan* (2).

But it is urged that, although the respondents admittedly had no right or title when they cut and removed the pine timber from the plaintiff's lands, they subsequently acquired the Crown title to it and must now be treated as if they had been Crown licensees *ab initio*. This defence was not pleaded and it appears not to have been set up at the trial. It is given effect to, however, in the judgment delivered for the Court of Appeal by Meredith J.A., who says:—

It is not a case of setting up the *jus tertii*; the defendants have acquired the rights of the Crown and are setting up their own rights so acquired.

The evidence of Alex. McDougall is relied upon to support this finding of the learned appellate judge. I have seldom perused testimony more unsatisfactory. Had the defence now relied upon been pleaded this evidence would not support it. *A fortiori* it does not justify an appellate court giving effect to a contention not presented on the pleadings and not raised at the trial and which the plaintiffs had no opportunity to meet. Assuming that it was competent for the Crown Lands Department, after the pine had been all cut

(1) 32 U.C.Q.B. 333.

(2) 36 U.C.Q.B. 307, at p. 312.

and removed from the plaintiffs' lands and delivered to the Eastern Construction Company; to make an agreement in respect of it which would have the effect of destroying the plaintiffs' vested right of action, the evidence in the record falls far short of establishing such an agreement.

Miller & Dickson had cut in trespass upon Crown property as well as upon the locations of the plaintiffs. Apparently in respect of the former, Mr. Margach, a Crown lands official, notified the Eastern Construction Company, by letter of the 6th March, that:—

The department has refused the permit. You will please see that they do no more cutting. They are at liberty to remove what they have cut and make a separate return of it.

There is no allusion in this letter to the cutting on the plaintiffs' locations, and in view of the attitude of the department in regard to the rights of the plaintiffs as mining locatees as against the trespassing lumbermen, disclosed by a letter of Mr. White, the Deputy Minister, to which I am about to refer, it would seem reasonably certain that the permission for removal given by Margach was intended to cover only timber cut on the Crown lands. The cutting on the plaintiffs' locations appears to have been brought to the attention of the department later in the same month. On the 18th March Mr. White writes to the plaintiffs:—

Toronto, March 18th, 1909.

Gentlemen:—

Referring to your letter of the 15th inst. with regard to the cutting of Messrs. Miller & Dickson on territory south and east of Vermilion River outside of area covered by permit granted to the Eastern Construction Company, I beg to say that the Department has been in communication with Mr. Crown Timber Agent Margach, in relation to this cutting, and he has been fully

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instructed in the matter so far as relates to lands of the Crown, but if these parties are removing illegally timber from locations to which you may be legally entitled, it would seem to be a matter between you and the parties cutting and taking the timber.

Your obedient servant,

AUBREY WHITE,
Deputy Minister.

There is nothing to shew that the department ever changed its attitude as expressed in this letter in regard to the plaintiffs' rights, or undertook in any way to interfere with or derogate from them, or to give to the defendants a status which would enable them to do so. The timber in question was not cut for the purpose of

building, fencing or fuel on the mining lands or for any purpose essential to the working of the mines.

If cut by the appellants in the course of clearing for cultivation it would have been subject to payment of Crown dues. The defendants having cut in trespass were, no doubt, liable to the Crown for penalties. If the Minister of Crown Lands saw fit to waive the Crown's right to exact penalties and, as a matter of grace, in lieu thereof to accept from the defendants merely ordinary dues in respect of the timber of which they had possession, it by no means follows that he put, or intended to put them for all purposes in the same position as if they had cut under license. The acceptance by the Crown of dues in such circumstances is at the most an equivocal act. It is entirely consistent with an intention on the part of the department to treat the defendants as persons who had acquired from the plaintiffs timber cut for the purpose of clearing the land for cultivation, which the plaintiffs would have the right to dispose of subject to payment of Crown dues. These dues the Crown

claimed from the defendants as the persons in possession of the timber subject to them. It would require something much more conclusive, especially in the face of Mr. White's letter, to establish that the Crown intended to confer on the defendants the rights of licensees *nunc pro tunc* and to deprive the plaintiffs of their vested right of action, or that what took place had that effect. There is no evidence on this point from the Department of Crown Lands, and the testimony of Alex. McDougall is quite inconclusive. It is sufficiently surprising that the defendants should have been permitted to take for the first time in the Court of Appeal the position that they should be treated as having cut and removed the timber in question under Crown license. But I find it still more extraordinary that effect should have been given to such a contention upon the evidence before the court. There is, in my opinion, nothing to sustain it.

For these reasons I would hold the defendants, Miller & Dickson, liable as claimed by the plaintiffs, and, as to them, would allow the appeal and restore the judgment of the trial judge.

The liability of the defendants, the Eastern Construction Company, however, does not necessarily follow. Miller & Dickson were not their servants or agents, but independent contractors.

But the timber and ties cut on the plaintiffs' lands were all delivered either to the Construction Company or to its nominees. The company received property, or the proceeds of property, title to which, because it was wrongfully taken from the plaintiffs' possession, must, in the circumstances of this case, as against all the defendants, be deemed to have been in the plaintiffs. The trial judge has expressed the view that, in

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crossing the line of their license limits and in entering upon the plaintiffs' mining locations, Miller & Dickson acted with the concurrence, if not under the direction of Mr. Samuel McDougall, Sr., who represented the Eastern Construction Company. Although I have no doubt that his powers and authority were much wider than either he or his nephew Alex. McDougall, will admit, whether it was within the scope of his agency for the company to give such a direction so as to bind his principals and to render it in law their direction is possibly doubtful on the evidence. But there is in the testimony of Dickson, Miller, Smith, McLean and Proud, abundant evidence to warrant a finding that Samuel McDougall, Sr., knew from the first that Miller & Dickson were cutting for his company on the plaintiffs' lands. The learned trial judge says:—

I think Miller & Dickson crossed the line and cut those ties, and that the cutting was afterwards brought to the attention of the Eastern Construction Company, and that they deliberately received and accepted those ties from their contractors, and paid part upon them, and sold them and received the payment therefor.

Although its formal judgment relieves the Construction Company from liability in respect of the tamarac as well as the pine, in delivering the opinion of the Court of Appeal Meredith J.A. said:—

Upon the finding of the trial judge that the Eastern Construction Company took the goods with knowledge of the circumstances, the holding that they are answerable for the value is right.

I entirely agree with that statement of the law — and, as I have already said, the finding upon which it is based is fully supported by the evidence. Why the Court of Appeal, while accepting this finding, by its formal judgment relieved the Construction Company

from liability for the tamarac which they got, it is difficult to understand. The discrepancy has not been explained.

Whatever may have been the extent of Samuel McDougall's authority, his position at the Miller & Dickson camp and his relations to the Construction Company were such that I have no difficulty in imputing to that company the knowledge which he had of the fact of the wrongful cutting on the plaintiffs' locations. *Commercial Bank of Windsor v. Morrison* (1). That knowledge was material to the business in which he was employed; it came to him in the course of his employment; and it was undoubtedly of such a nature that it was his duty to communicate it to his principal. Halsbury's Laws of England, vol. 1, pp. 215-6; Bowstead on Agency, 4th ed., 346.

The Eastern Construction Company having taken the timber and ties with notice that they were wrongfully cut and removed from the plaintiff's lands, is, in my opinion, equally liable with Miller & Dickson to the plaintiffs in detinue in respect of both the pine and the tamarac so removed. (See Pollock and Wright on Possession, p. 151, note.)

But for such damages as may have been caused by mere negligence or by cutting in an improper and improvident manner, Miller & Dickson are alone responsible. Such misconduct of independent contractors is not imputable to the persons by whom they are engaged.

For these reasons to the extent indicated I would allow the appeal of the plaintiffs and would restore

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—
SCHMIDT
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(1) 32 Can. S.C.R. 98, at p. 105.

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the judgment of Clute J. against the Eastern Construction Company.

The respondents should pay to the appellants their costs in this court and in the provincial Court of Appeal.

BRODEUR J.—I concur with the views expressed by Mr. Justice Anglin.

Appeal allowed with costs.

Solicitors for the appellants, Eastern Construction Co. and others: *Macdonald & McIntosh.*

Solicitors for the appellants Schmidt and Shilton: *Shilton, Wallbridge & Co.*

Solicitors for the respondents: *Dowler & Dowler.*
