WILLIAM H. STEPHENS (PLAINTIFF)...APPELLANT ; 1893

AND *Mar. 9, 19.
*May 1.

AARON GORDON AND JOHN GORDON (DEFENDANTS)..... ... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FROM ONTARIO.

Agreement, construction of—Way—Timber—Removal of, necessary.

The plaintiff was the owner of a farm of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land, under an agreement, which provided among other things, that the purchaser should have "full liberty to enter into and upon the said lands for the purpose of removing the trees and timber, at such times and in such manner as he may think proper," but reserved to the plaintiff the full enjoyment of the land "save and in so far as may be necessary for the cutting and removing of the trees and timber." To have removed the timber through the wooded land at the time it was removed, it would have involved an expenditure which would have possibly amounted to a sacrifice of the greater portion of the timber.

Held,—Affirming the judgment of the court below, that the defendants had a right to remove the timber by the most direct and available route, provided they acted in good faith and not unreasonably, and the reservation in favour of the plaintiff did not minimize or modify the defendants' right under the general grant of the trees, to remove the trees across the cleared land. Gwynne J., dissenting.

APPEAL from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of Boyd C., in the Chancery Division.

The appellant (plaintiff) was the owner of a farm of some 500 acres of land, in the 8th concession of Chat-

* PRESENT :—Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) 19 App. R. Ont. 176.

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ham. About a third of the whole tract was cleared and cultivated, and the rest was heavily wooded. In 1887 the plaintiff sold under an agreement to one A. Tierce, who afterwards assigned to the respondent, the trees and timber upon the land, except black ash and white oak then standing growing and being upon the said land, with a proviso that it should be removed within a certain period. The deed under which the respondent cut and hauled the timber contained the following way-leave for taking the timber :

"The said party of the second part, his agents, servants and workmen, with or without horses, carts, wagons or sleighs, shall at all times within three years from the said first day of March now next, have full liberty to enter into and upon the said lands, and to fell the said trees and timber in such manner as he or they shall think fit, and cut and convert the same into such convenient logs, bundles or stacks as he or they shall think proper, with full liberty to bring horses, cattle, wagons, trucks, carts and sleighs in and upon the said land for the purpose of removing the said trees and timber, at such times and in such manner as he or they may think proper." And also the following covenant for title: "And the said party of the first part for himself, his heirs, executors and administrators, covenants, promises and agrees to and with the party of the second part, his heirs, executors, administrators and assigns, that he has a good title to (sic) fee simple to the said lands, and good right, full power, and absolute authority to sell and dispose of the said timber and trees, and that they are free from all encumbrances of any kind whatsoever."

The deed also contained the following covenant on the part of the purchaser :—

"The said party of the second part for himself, his heirs, executors, administrators and assigns, covenants

with said party of the first part, his heirs, executors, administrators and assigns, that whenever he commences cutting on any portion of said lands he will lumber said lands clean, except said black ash and white oak, and that said party of the first part, his heirs or assigns, shall have the full and free use and enjoyment of the said land during said three years, without any interruption on the part of said party of the second part, his executors, administrators or assigns, or his or their workmen, servants or agents, save in so far as may be necessary for the cutting and removing of said trees and timber."

In July, 1890, while the respondent had still till the end of the year to cut and remove timber, the appellant sued the defendants for unnecessarily tearing down the plaintiff's fences and hauling timber over his crops and otherwise injuring his property and causing damage, and obtained an interlocutory injunction. The defendant denied the wrongful acts complained of, and said that he could not remove the timber advantageously without great additional expense and delay without going through the plaintiff's fields to some extent, and that he did so with as little damage to the plaintiff's property as possible, and also claimed he had a right to do what he did, and he counter-claimed for the loss suffered by reason of the injunction.

At the trial it was shown that the lumber could have been hauled to the public roads without hauling across the cleared land, but at a greater cost and expense, and the Court of Chancery held that the timber under the agreement had to be taken away by the defendant without causing any interruption in the use of the cultivated part by the plaintiff. The Court of Appeal on the contrary held that the timber might be taken across the cleared land.

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M. Wilson Q.C. for the appellant:—At the the time of the institution of the proceedings, there were lumber roads within the wooded land and also cross roads, and we contend that reading the covenant and the grant of way-leave together, the respondent had no right to cross over the cleared lands and growing crops. Under the written agreement we only had to show that it was not necessary for the purchasers to cross our crops, and this question of fact the Chancellor found in our favour, and moreover prevented us from giving more evidence on this question of fact.

It was of course necessary to cross the cultivated lands in order to remove a small portion of the timber which was surrounded thereby, but that is not in question in this action.

But even if the agreement is to be construed as giving the defendants the right to cross over plaintiff's crops and interfere with his use and enjoyment of the farm lands in every case where he could not reasonably avoid doing so in their (defendants') interest, and if the word "necessary" is to be read as "reasonably necessary for the convenient and beneficial removal of his timber," then we contend that the plaintiff was prepared at the trial to show, and should be now allowed to show that it was not reasonably necessary even in that sense to cross and destroy the plaintiff's crops at the time and place in question, and that no man of ordinary judgment and prudence would have injured and sacrificed the crops (as defendants were about to do and were restrained from doing) for the trifling benefit that would be gained thereby. In fact there would be no gain even to the defendants thereby because the old existing ways and timber roads were good and convenient for the use of the defendants.

D. McCarthy Q.C. for the respondent:—The agreement in question is a grant in the most unqualified

tems, of all the trees and timber save the two kinds specified, on the appellant's lands in question, and with this grant there is expressly provided an unlimited lease or license respecting the removal of the timber.

There is no restriction, either by express provision or by implication, by which the respondent was limited to any part of the lands comprised in the description, lots 21, 22 and south-west half of 23, either as to ingress, use or egress, for the purpose of removing the timber; and there is, on the contrary, the express provision that all such shall be as the respondent may think proper. The effect of the covenant forming part of the agreement, is merely to provide for the use by the appellant of the lots subject to the interruption necessary for the purposes of the respondent, under the grant, and leave or liberty expressed in the agreement. The covenant clearly must, under the agreement and all the circumstances, be construed as subject to the grant and leave and as bearing the meaning reasonably necessary, and I submit that the proper construction of the portions of the agreement now under discussion is that put upon them by the learned judges of the Court of Appeal.

While submitting that under the terms of the instrument respondent was clearly entitled to pass over any part of the lots mentioned, I also contend that in the case of a more limited construction of his rights herein, he was acting legally, and within his powers, in using the way which the appellant sought to restrain him from using, because it was a way necessary for the most convenient enjoyment of the grant, under the authority of *Morris* v. *Edgington* (1). And especially is the convenience of the grantee to be considered where, as in the present case, an unreasonable amount of labour and expense is required to render any other way available for use, *i. e.*, labour and expense disproportionate

(1) 3 Taunt. 24.

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and excessive in comparison with the value of the grant, *Pettingill* v. *W. Porter* (1). As to their being a right of way in the case of timber, there is no question; Plowd. Com. 16.

Further, on the construction of the instrument, I also contend that to warrant the appellant in placing the restriction he has sought to place on the use of a way by the respondent, he should have made an express provision in the instrument defining the way. "In the case of a way by grant the language of the instrument can be referred to, and it is of course for the Court to construe that language and in the absence of any clear intention of the parties, the maxim that a grant must be construed most strongly against the grantor, must be applied." *Williams* v. *James* (2).

Wilson Q.C. in reply referred specially to *Dand* v. *Kingscote* (3).

THE CHIEF JUSTICE and FOURNIER and TASCHEREAU, J.J., concurred with SEDGEWICK, J.

GWYNNE J.—The plaintiff in the month of February, 1887, was seized in fee simple of lots 21 and 22 and the west half of lot 23 in the township of Chatham, which said lots of land were bounded on the north and south by concession roads On the north part of lot 22 adjoining the concession road there, was situate his dwelling house and garden with a farm yard and suitable buildings thereon. He had about 30 acres of land adjoining, cleared, fenced in and under cultivation, of which about one half was situate on the north end of lot No. 22, and the other half on the north end of lot No. 21, which latter consisted of meadow, in the midst of which some few elm trees still remained stand-

(1) 8 Allan 1 (Mass.) (2) L.R. 2 C.P. 581.
(3) 6 M. & W. 187.

ing; the residue of the above lots consisted of wood lands wherein was standing a great variety of timber trees. Through this forest part there were several old bush or lumber roads leading from the public highways on either side back into the woods which had been made and had been in use for many years by persons to whom the plaintiff had sold the privilege of cutting down and removing timber trees there growing for the purpose of hauling the timber when cut from the woods to the public highways and so to market. Being so seized of such bush and cleared land an agreement under seal was upon the 19th day of February, 1887, entered into by and between the said plaintiff of the first part, and one Alexander Tierce of the second part, whereby it was covenanted and agreed as follows:

The said party of the first part, for and in consideration of the payments hereinafter mentioned to be made to him, hereby grants, bargains, sells and assigns all the trees and timber except black ash and white oak now standing, growing, lying or being in and upon that certain parcel of land and premises situate, lying and being in the township of Chatham, in the county of Kent, in the province of Ontario, containing by admeasurement acres, be the same more or less, and being composed of lots twenty-one, twenty-two and the south-west half of lot twenty-three in the eighth concession of the said township of Chatham, to have and to hold the said trees and timber to the said party of the second part, his heirs, executors, administrators and assigns, to and for his and their sole and only use; provided, however, that they remove the same within three years from the first day of March now next, after which date all trees or timber not removed shall revert to and be the property of the said party of the first part, his heirs, executors, administrators and assigns.

The said party of the second part, his agents, servants and workmen with or without horses, carts, wagons or sleighs shall at all times within three years from the said first day of March now next, have full liberty to enter into and upon the said lands and to fell the said trees and timber in such manner as he or they shall think fit, and cut and convert the same into such convenient logs, bundles or stacks as he or they shall think proper, with full liberty to bring horses, cattle, wagons, trucks, carts and sleighs in and upon the said land for the

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purpose of removing the said trees and timber at such times and in such manner as he or they may think proper.

Then followed a covenant by Tierce for payment of a specific sum for the said trees and timber in the manner therein stated; then a covenant by the plaintiff that he had a good title to the lands whereon the said trees were growing, and full right and absolute authority to sell the said timber; then came the clause following, viz.:—

> The said party of the second part, for himself, his heirs, executors, administrators and assigns, covenants with the party of the first part, his heirs, executors, administrators, that whenever he commences cutting on any portion of the said lands he will lumber said lands clear, except said black ash and white oak, and that said party of the first part, his heirs and assigns, shall have the free use and enjoyment of the said land during the said three years without any interruption on the part of the said party of the second part, his executors, administrators or assigns, his or their workmen, servants or agents, save in so far as may be necessary for the cutting and removing of said trees and timber.

The residue of the agreement it is unnecessary to set forth, as it has no bearing upon the present case. In or about the month of January, 1889, Tierce assigned all his interest in the said contract to the defendant, Aaron Gordon. In the month of January, 1890, the time for the termination of the contract being then shortly approaching, the defendant, in consideration of the further sum of $500.00, paid by him to the plaintiff, procured from the plaintiff an extention of the time appointed in the agreement of the 19th February, 1887, for the removal of the timber thereunder until the 30th day of March, 1891. In the month of June, 1890, the defendant, for the first time apparently, asserted a right to haul timber which he had cut down in the woodland lying south of the plaintiff's cultivated land through his meadow to the concession road at the north end, and to pull down the plaintiff's fences for the purpose, and he accordingly did so, and there-

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by, as the plaintiff contended, much damage had been done to his meadow, as well by cattle thereby getting into his meadow through the broken down fences as by the hauling of the timber through the meadow. Against this contention and conduct of the defendant the plaintiff remonstrated, but without effect, for the defendant persisted in the assertion of the right which he claimed, and continued to assert it by hauling the timber so cut in the woods south of the plaintiff's cleared land, not only through his meadow on the north end of lot 21, but also through a crop of beans which he had growing on the north end of lot 22, and so through the plaintiff's farm yard to the concession road; and for that purpose took down divers of the fences and gates of the plaintiff. In short, the contention of the defendant was, and still is, that he had perfect right by the terms of the contract of the 19th February, 1887, to haul the timber cut by him in the woods south of the plaintiff's clearance, through any part of the plaintiff's cleared land that was most convenient to the defendant, qualified only by the condition that he should do no more damage to the plaintiff's crops on such cleared land than was reasonably and necessarily attendant upon the hauling timber through them to the road.

Upon the 15th day of July, 1890, the plaintiff commenced an action against the defendant by a writ issued out of the Common Pleas Division of the High Court of Justice for Ontario, by an endorsement upon which writ the plaintiff claimed an injunction and damages upon the ground that the defendant, as assignee of the said agreement of the 19th February, 1887, had unlawfully and without authority, and in a manner which was wholly unnecessary for the removal of timber, cut under the said agreement, entered upon, the plaintiff's cleared and tilled land with men and

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horses, &c., and had broken down the plaintiff's fences, destroyed his crops, left his farm open to cattle, and otherwise greatly and unnecessarily injured the plaintiff and threatened to continue so to do. Upon the 16th July, 1890, the plaintiff obtained upon affidavit, an interim injunction against the defendant's interference with the plaintiff's said cleared land until the 18th of said month of July, or until the motion to continue the said injunction to be made on that day should have been disposed of or until the court should make further order to the contrary. At this time the few elm trees which remained standing in the meadow had not been cut down, and the only contention existing between the plaintiff and the defendant was as to the right claimed by the defendant, to haul the timber cut down by him in the forest land, lying south of the plaintiff's cleared land, through the cleared land to the concession road, and so the interim injunction operated only as it was intended to operate against defendant's hauling such timber across the plaintiff's cleared land and the crops growing therein. Upon the said 18th of July the motion to continue the said injunction came up for argument before Mr. Justice Falconbridge, who, after having heard the case argued upon affidavits filed on both sides, in pronouncing judgment expressed his opinion to be that the evidence enormously preponderated in favour of the plaintiff's contention that the brush roads through the woods by which as the plaintiff insisted that all timber cut in the woods south of his cleared land if hauled to the concession road on the north end should be hauled, could have been used by the defendant, and that this was the only way which was in contemplation when the extension of time was granted to the defendant, and that it in fact was but about 50 rods longer than the way taken by the defendant across the plaintiff's

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cleared land, however, to prevent serious injury happening to the defendant by his continuing the injunction, he added as follows:

On plaintiff undertaking to allow the defendant Aaron Gordon, if he wishes to use the way already offered by plaintiff over that indicated by D.H.K. or D.H.E., on McGeorge and Flater's plan filed on this motion, and on plaintiff also undertaking if required to grant a further reasonable extension of time for taking off the timber for the sum of $50, the injunction will be continued to the hearing with usual undertaking by defendant as to damages. Injunction dissolved as to the timber surrounded by meadow which defendants can take off by a way which will be convenient for them and do as little injury as possible to the plaintiff.

The plaintiff alleges that he never did give or consent to give, and that he was never asked by the defendant to give any undertaking to grant to the defendant any further extension of time for taking off the timber, and that he never took out an order upon the judgment of Mr. Justice Falconbridge, nor did he accept the terms and conditions thereof, and that in point of fact no order was ever issued upon the said judgment, however, the defendant never did thereafter haul over the plaintiff's cleared land, any timber cut down in the woods south thereof. The way indicated in the judgment of Mr. Justice Falconbridge by the letters D. H. K. and D. H. E. were ways which the plaintiff had offered to allow the defendant to haul his timber along, and which was across a portion of the plaintiff's cleared land, but which was in fallow, and where the hauling of timber could do no damage, but this offer of the plaintiff the defendant had declined to accept, insisting upon his claim of right to cross the plaintiff's clearance wherever was most convenient to the defendant as afore is mentioned.

The case was brought down for trial before the Chancellor of Ontario in the month of November, 1890, when the contention on behalf of the plaintiff was:

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1st. That under the agreement of the 19th February, 1887, the defendant had no right to cross the plaintiff's cultivated land, except for the purpose of removing the elm trees growing in the meadow, when they should be cut down, as to which there was no contestation, that timber not having been then yet cut; and

2nd. That even if the agreement did give the defendant the right to haul out the timber cut in the wood south of the plaintiff's cultivated land, over such cultivated land the defendant had exercised such right in a wanton, unreasonable and unnecessary manner.

The defendant's contention was the direct converse of both of these propositions. After the plaintiff had produced three witnesses in support of his case, and while he had several witnesses in court which he said he intended to call, the learned counsel for the defendant asked the learned Chancellor to rule upon the construction of the contract before any more witnesses should be called, this the learned Chancellor did, and held that as to the timber cut outside of the cleared land, it was the duty of the purchaser of the timber to haul out that timber through the bush land, without any interruption with the use of the cleared land by the proprietor, and he declined to hear the further evidence which was offered by the plaintiff. The learned counsel for the defendant proceeded to produce evidence upon the part of defendant at great length, and after hearing all the witnesses called by the defendant, twelve in number, the learned Chancellor again pronounced his judgment, affirming his former expression of opinion as to the construction of the contract, adding that as the injunction to which he held the plaintiff to have been entitled had served its purpose, he did not intend to continue it, and he asked the learned counsel for the plaintiff whether, if the

season should turn out to be such that the defendant could not remove the timber within the time specified in the agreement for extension of time made in January, the plaintiff would object to its being removed during the dry season in the following summer through the woods, to which the plaintiff's counsel answered that the plaintiff could not consent thereto, and he again insisted that he had a large number of witnesses in court which he desired to call in support of his contention, to which the learned Chancellor replied that he knew that, and that his intention was to shut out that evidence, as, if his law as to the construction of the contract was right, he did not want to hear it, and that he would rule finally upon the case for the purpose of excluding further evidence. He then gave his reasons at large for the judgment he had pronounced as to the construction of the contract and upon the evidence as it had been taken, and he concluded by expressing the opinion that on the undertaking which, as he said, he understood had been given before Judge Falconbridge, he thought the defendant should have until the termination of the dry season in the following summer to remove the timber, upon payment of $50. To this suggestion and to any further extension of time the plaintiff, through his counsel, refused to consent, whereupon the learned Chancellor said that he considered there had been an acceptance of Judge Falconbridge's judgment, and an acting upon it for the benefit of the plaintiff, and he pronounced judgment accordingly, which, as formally drawn up, is as follows :—

Dated 26th November, 1890.

This action coming on this day for trial in the presence of counsel for both parties, and hearing read the pleadings, and upon hearing *part of the evidence* adduced on behalf of the plaintiff and *all of the evidence* adduced on the part of the defendants, *but without hearing* the *further evidence* offered by the plaintiff *in reply* and upon hearing what was alleged by counsel.

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1. This court doth order and direct that upon payment of the sum of $50 on or before the 30th day of May, 1891, to the plaintiff or his solicitors, the defendants do have the privilege of going upon the said lands during the months of June, July, August and September, A.D., 1891, for the purpose of removing the timber in the manner and by the ways mentioned in the agreement referred to in the pleadings, the defendants by their counsel undertaking not to interfere with the plaintiff's use and enjoyment of the cultivated portions of the said lands, save only to such extent as may be necessary for the removal of timber surrounded by cultivated lands which cannot otherwise be reached, and in the removal of the last mentioned timber, undertaking to do as little damage to such cultivated portions as possible, under the circumstances.

2nd. And this court doth order and adjudge that this action be referred to the Master of this Court at Chatham to inquire and state what damages the plaintiff has sustained by reason of the defendants having unlawfully and without authority hauled timber, logs, bolts and cordwood across the cleared or cultivated portion of the plaintiff's land and thereby injured the plaintiff's growing crops, and also what damages, if any, done by the defendants to the plaintiff's fences, and black ash in the statement of claim referred to, and also what, if anything, is due to the defendant in respect of his counter-claim.

3rd. And this court doth reserve further directions and the question of costs until after the said master shall have made his report.

R. O'HARA,
Deputy-Registrar.

Both the defendant and the plaintiff appealed from this judgment to the Court of Appeal for Ontario, the defendant insisting, among other reasons of appeal stated by him, that the construction placed by the learned Chancellor upon the agreement is erroneous, and that the rights of the defendant being, as the defendant contended they were, given by express grant over the whole of the lands, the entries made by them (on the plaintiff's cultivated land) for the purpose of removing the timber were justified, and submitting that upon the evidence he was entitled to have the plaintiff's action dismissed with costs and the defendant's counter-claim allowed with costs, with a reference as to the amount and as to the damages suffered by the

interim injunction, or in any event that there should be a new trial with costs to be paid by the plaintiff; and the plaintiff insisting, among other things, that the learned Chancellor had no jurisdiction to alter the agreement between the parties by giving the extension of time for removal of the timber purported to be granted by the decree or judgment, for that the plaintiff never had consented to the same, and that the clause purporting to give such extension of time should be struck out of the judgment.

Upon these appeals the Court of Appeal for Ontario ordered and adjudged that the appeal of the defendant should be allowed with costs, and that that part of the judgment of the learned Chancellor, whereby it was adjudged that the plaintiff should have a reference to inquire and state what damages he has sustained by reason of the defendant's having unlawfully and without authority hauled timber, logs, bolts and cordwood across the cleared and cultivated portion of the plaintiff's land and thereby injured the plaintiff's growing crops, should be and the same was thereby reversed, and the plaintiff's claim for damages in respect of said matters should be dismissed, and that the injunction granted on the interlocutory application therefor by the plaintiff and at the trial should be and the same was thereby dissolved; and it was further ordered and adjudged that the plaintiff should pay to the defendant the general costs of the action forthwith after taxation.

And it was further ordered and adjudged that the said judgment of the learned Chancellor should be further varied by directing that the reference ordered by the said judgment to ascertain what damages, if any, had been done by the defendant to the plaintiff's fences and black ash should be confined to acts of negligence wantonly done by the defendants in excess

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of authority, and shall not embrace injury unavoidably done in felling the timber, unless caused wantonly or carelessly by the defendant, and that the costs of such reference should be reserved until the master shall have made his report.

And it was further ordered and adjudged that the counter claims of the defendant should be the subject of reference to the master, and should include also the claim for timber taken and used by the plaintiff, unless it is established to the satisfaction of the said master that there was an agreement between the defendant and the plaintiff that the same should not be paid for, *and shall also include* the claim for damages alleged to have been suffered by the defendant by reason of the said injunction; and it was further ordered and adjudged that the costs of the said counter-claim should be reserved until after the said master shall have made his report.

The plaintiff had I think just ground of appeal against the first paragraph of the formal judgment of the Divisional Court which ordered and directed that the defendant should have an extension of time until the end of the month of September, 1891, for the purpose of removing the timber. Such a direction was wholly beyond the jurisdiction of the learned Chancellor to make without the express consent of the plaintiff who, as appears by the record, instead of giving such consent expressly objected to any such adjudication being made and to the jurisdiction of the learned Chancellor to make it. The learned Chancellor appears to have considered himself warranted in directing that clause to be inserted in the decree or judgment of the court by reason of what was contained in the judgment as pronounced by Mr. Justice Falconbridge when the matter of the injunction was argued before him in July, 1890. But what Mr. Justice Falconbridge did really

amounted to no more than announcing to the parties, that upon the plaintiff undertaking to allow the defendant Aaron Gordon, *if he wishes*, to use the way which the plaintiff had already offered him, and which was indicated by certain letters upon a map or plan filed on the argument, and upon the plaintiff also undertaking *if required*, to grant a further reasonable time for taking off the timber for the sum of $50, the injunction should be continued to the hearing. This was announced as a suggestion to the parties by the learned judge, and it does not appear to have been accepted and acted upon by either the defendant or the plaintiff. Aaron Gordon does not appear to have ever expressed a wish to use the way which had been formally offered to him by the plaintiff and refused by him, nor to have asked for any further extension of time for removal of the timber as was suggested by Mr. Justice Falconbridge that he should before the plaintiff should be called upon to give an undertaking for an extension of the time as might be required; and further there is no evidence whatever that the plantiff ever was asked to give or did give, but on the contrary the plaintiff alleges and he is not contradicted, that he never was asked to give or did give, any undertaking or consent to any further extension of time for removal of the timber being given to the defendant. If indeed the plaintiff had procured an order to issue in the terms of the learned judge's suggestion and served such order on the defendant, it might perhaps have been competent for the learned Chancellor to have treated such an act of the plaintiff as an undertaking to grant a reasonable time and to have given jurisdiction to the learned Chancellor to direct what would be such reasonable time, but no order ever was made or issued in the matter, and in view of the express refusal of the plaintiff at the trial to consent to any further extension

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of time and to the learned Chancellor having any jurisdiction as to alter the contract existing between the parties, and to insert in his judgment any order for the extension of time as he expressed an intention of doing, it must, I think, be admitted beyond all question that this clause in the formal judgment of the court, inserted upon the authority of the learned Chancellor, was wholly beyond his jurisdiction and that of the court and was erroneously inserted and should have been expunged from the judgment by the Court of Appeal for Ontario; and as we are obliged to pronounce the judgment which should have been pronounced by that court, that clause must be expunged even now from the learned Chancellor's judgment as having been *ultra vires*, whether the plaintiff shall or shall not derive any benefit from its being expunged at this late period when the extended time has elapsed and the defendant has enjoyed the benefit of its having been inserted in the formal judgment of the court. For this reason alone, I think the present appeal must be allowed to this extent and with costs, but the judgment of the Court of Appeal is in my opinion erroneous in other respects and should be reversed.

It orders and adjudges that the counter-claims of the defendant shall be the subject of reference to the Master and shall include the claim for timber taken and used by the plaintiff unless it shall be established to the satisfaction of the Master that there was an agreement between the defendant and the plaintiff that the same should not be paid for; and shall also include the claim for damages alleged to have been suffered by the defendant by reason of the injunction.

With respect to these counter-claims it appears that the learned Chancellor received all the evidence offered by the defendant in support of them—they were as follows:

1st. For certain elm timber alleged to have been taken by the plaintiff and converted to his own use.....$ 100.00

2nd. Estimated damages caused by plaintiff forbidding defendants and their employees to remove timber and threatening arrest for tresspass—loss of wages.. 100.00

3rd. Estimated loss to logs by reason of injunction..... 340.00

4th. Estimated damages to 67 cords by injunction..... 83.75

5th. Estimated damages by stoppage of mill at Dresdon owing to want of stock, which defendants were prevented from hauling and by defendants being prevented fulfilling contracts entered into by Aaron Gordon..... 1,576.25

As to the first of the above items it is to be observed that if ever it was a real claim it had arisen before the plaintiff in January, 1890, granted to the defendant the further extension of time for removing the timber of one year and that never did the defendant assert or pretend to have any claim for such timber until after the plaintiff had commenced the present action ; and the learned Chancellor after hearing everything that both the plaintiff and defendant, had to say upon the subject and all the evidence offered by the latter, came to the conclusion that it should not be allowed and in express terms he disallowed it, and this was not an item in any manner depending upon the construction of the contract of February, 1887.

As to the 2nd and 5th of the above items they are obviously not claims in respect of which any amount could be allowed by way of damages ; and as to the 3rd and 4th items they are claims for damages alleged to have been occasioned by the injunction, all which

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damages are apart from the counter-claim, expressly referred to the Master by the judgment of the Court of Appeal. In the event of the judgment of the Court of Appeal, to the effect that the construction put by the learned Chancellor upon the contract of the 19th February, 1887, was erroneous, being maintained, as all damages sustained by the defendant by reason of the injunction are expressly referred to the Master there does not seem to be any reason or justice in referring to the Master the claims made in the counter-claim—either under the 3rd and 4th items, (all damages in respect of which are claimed only as occasioned by the injunction) or under items, 1, 2 and 5 which amount to $1,756.25; and of thus reopening anew at great and unnecessary expense matters in respect of which the learned Chancellor received all the evidence offered by the defendant in support of them and after hearing such evidence, exercised his deliberate judgment by expressly disallowing them, and by ordering the counter-claim to be dismissed with costs; a direction which seems to have been overlooked by the deputy-registrar who signed and issued the formal judgment of the court. It is much to be regretted I think, that the learned chancellor said anything in his judgment as to a reference of the counter-claim to the master at all. Having heard all the defendant's witnesses upon the counter-claim, there does not appear to have been any necessity or reason whatever for referring to the master matters upon which the learned chancellor himself had formed a clear judgment, and upon which it was not only competent for him to have pronounced, but upon which, I think, that under the circumstances he should have pronounced final judgment, so as to avoid subjecting the parties to the great expense of a repetition before the master of evidence taken at great length before the learned chancellor

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himself. Reading the learned chancellor's judgment directing the dismissal of the counter-claim with costs on the higher scale, I cannot but think that the direction that either party might if desired have a reference to the master was made inadvertently, and certainly I am of opinion that after the learned chancellor upon hearing all the evidence offered in support of the counter-claim had formed and expressed the deliberate judgment that it should be dismissed, there should not have been any reference of the counter-claim to the master. Even as to the plaintiff's claim, I must say that, in view of the opinion formed by the learned chancellor as to the utterly extravagant nature of that claim, a reopening of it before the master should not in my opinion have been authorized. The learned chancellor, it is true, refused to hear certain witnesses which the plaintiff had in court, and wished to call, but he did hear from the plaintiff himself a very full and particular statement of the nature and character of all the damages claimed by him to have been suffered by him under every item of his claim and from the plaintiff's own evidence he was satisfied that the plaintiff's demand was extravagant in the extreme. After attributing the whole contestation to bad temper occasioned by the defendant forcing a way through the plaintiff's crops notwithstanding his remonstrances, and to angry words which passed between the plaintiff and the defendant's son upon the subject, he says:—

> He, that is the defendant, resolved to force his way through the cultivated land. There has been no denial of what Stephens said upon that point, that he and young Gordon came directly to loggerheads. Young Gordon forced his way through. That is the origin of this unfortunate litigation, unfortunate because there is very little at stake as far as Stephens is concerned except a vindication of his right to have his cultivated land. His damage has been comparatively small, although that will be a matter of investigation afterwards *if Mr. Wilson* (the plaintiff's attorney) chooses to pursue it. Then he adds: But

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this litigation having begun in this way, it seems to me that Mr. Stephens and Mr. Gordon have taken the occasion of raking a great deal into this controversy that does not belong to it. There are four heads of damage claimed by Stephens. There was the drain blocked in May, 1889; I should say he has no case as to that. There is the black ash used for skids and destroyed by bad cutting of other trees. I should say, so far as we have gone, he has sustained no substantial damage on that—claims for fences injured—I should say he was sustained no substantial damage on that head. Then as to the going through the meadow and bean field, he says there is no dispute that the road was pushed there against his will, and I think some damage was occasioned, but his idea of $1,300 is absurd.

The defendant admitted that the plaintiff had suffered some damage upon this head for which he was willing to pay, but he contended that it was very small. The learned Chancellor proceeded thus:

I propose to give $25 with leave to Mr. Stephens to go into the Master's office *to increase his damage.*

If Mr. Stephens should have exercised this leave he must have done so at the risk of costs, and, as it appears to me, the leave was limited by the learned chancellor to the damages to the meadow and bean field for which alone the $25 was granted. Then as to the defendants counter-claim, the learned chancellor proceeded thus:

Then, on the other hand, there is the claim for the elm removed for building. It seems to me there is no claim substantially; there was the loose agreement with Mr. Tierce, and it appears that all that elm was removed before the bargain was made for the extension of time. Then was the time to have advanced this claim. So I propose to give no damages in respect of that elm, and on the whole the damages will be limited to $25 with the right *to either party* to go into the Master's Office to *increase* or *diminish* these if he pleases.

What the learned Chancellor meant by this last sentence I cannot but think was that the plaintiff, if he pleased, might incur the risk of going into the master's office to increase the $25 allowed by the Chancellor, or the defendant in like manner to diminish that sum, but that in other respects the judgment of the learned Chancellor was final, and final also as to the amount

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allowed for damages to the meadow and bean crop, unless either party desired to go into the master's office for the single purpose of increasing on the one side or on the other of diminishing the amount of $25 allowed for such damage. Then, as to the injunction and declaration of right, the learned Chancellor said:—

> The injunction was directed to the crossing the cultivated land; there is no necessity for a declaration of right now, because no further crop can be put in. I do not propose to continue the injunction for that reason. I do not propose to grant the declaration of right. I think the defendant had no right to cross the growing crops.

Then, at the close, he gives directions as to the form of the judgment of the court for the guidance of the registrar in drawing up that judgment, as follows:—

> Judgment for $25.00 damages and costs on the lower scale; dismiss counter-claim with costs on the higher scale. Allow, pursuant to undertaking, the defendant the dry season of next summer for removal of timber on payment of $50.00, either party to have a reference as to damages, in which event all costs reserved.

If anything was meant by this last sentence other than that either party, if he pleased, might have a reference for the purpose, on the one side, of increasing and on the other of diminishing the sum of $25 allowed by the learned Chancellor for damages done to the meadow and the bean crop, it should not, in my opinion, having regard to the above extracts from the learned Chancellor's judgment, have constituted part of his directions given for drawing up the formal judgment of the court, nor should the case, under the circumstances, have been thrown at large into the master's office, as if the learned Chancellor had not himself formed any judgment upon the evidence laid before him.

Upon the construction of the contract the Court of Appeal has differed wholly from the learned Chancellor, and has adopted the construction contended for

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by the defendant, namely, that by the contract the plaintiff had granted to the purchaser of the timber growing in the forest land outside of the plaintiff's cleared land full right, at his pleasure and as suited his convenience, to haul the timber cut down in such forest land across the plaintiff's growing crops in his cleared land and through his farmyard by the routes by which the defendant did haul such timber, provided that in so doing he did no more damage than was reasonably consequential upon and necessarily attendant upon the hauling of the timber by these routes through plaintiff's crops. Upon this point of construction the learned Chancellor pronounced his judgment as follows:—

I should say that as to all the land which is outside the cleared land—in the bush—it was the business of the person buying the timber to take it out without interfering with the use and enjoyment of the cleared land by the proprietor. If it is impossible to get it out by means of the road to the rear or the shanty road then it becomes necessary to go on another road but until it becomes necessary to encroach (that is on the cleared land) it should not have been done and I should think there was no right to do it. And again he said: "What is granted is not land at all, it is trees and timber—in other words it does not necessarily relate to 500 acres but to so much of the 500 acres as relates to the trees being sold."

Then as to the 2nd clause of the contract and the last words thereof namely, "at such times and in such manner as he or they may think proper," he said that in his judgment the meaning of that clause was that the defendant might go on the land where the trees were and fell the said timber and haul away and remove such timber "at such times and in such manner" as defendant might choose, that he did not think the words "in such manner" related to the way of ingress or egress at all but to the manner in which the defendant might handle the timber.

Then he dwelt upon the covenant that the plaintiff should have full and free use and enjoyment during

the three years without any interference, &c., &c., save in so far as might be necessary for the cutting and removing the said trees and timber; and upon this covenant he comments as follows:—

He (that is the plaintiff) is to have full and free use and enjoyment without any interruption except in so far as may be necessary, it does not say in so far as may be convenient but uses the word necessary and I think when we look at the locality we find a very clear meaning may be given to these words; while the land is generally composed of timber and cultivated land separated from each other by a fence, there are some parts of the timbered land within the enclosure. There is one clump of trees entirely surrounded by cultivated land so that it is not physically possible to get that timber without crossing the cultivated land and at that point it is necessary to interfere with Stephens' enjoyment to reach that place. Then as to the timber outside of the cleared land he says: "it is not necessary to cross the cultivated land he (the plaintiff) is to have the free use of that unless it is necessary to interfere with it for the purpose of cutting and removing. As to the timber which abuts on it (the cleared land) there is no necessity. As to the other timber there is the necessity; so that construction, it seems to me, is the one which must govern."

With this construction the Court of Appeal differed entirely and held that by the contract the plaintiff granted to the purchaser of the timber full power, if he found it more convenient or economical, to haul the timber cut in the forest land over the plaintiff's meadows and bean field, by the route which he did, subject only to the rule *sic utere tuo*—that under the contract, the defendant had full right to adopt such routes of haul whether over the wood land or over the cleared land as would enable him, from time to time, to get the timber and take it away most beneficially, and that "the only restriction to which he was subject was the rule *sic utere tuo*, which would require him to exercise his right in a reasonable manner and without doing any wanton or unnecessary mischief," that he might carry some of the timber over the cleared land and the rest through the woods, causing no unnecessary injury, and the court was of opinion that the covenant

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that the plaintiff had good title to the lands confirmed this view, but that title, as its context shows, was inserted simply for the purpose of confirming the vendee in the right granted by the contract to the timber sold; and finally the court held that what he did, in hauling timber cut in the forest outside of the cleared land through the plaintiff's meadow and through his bean crop and through his farmyard by the route which he did, was not unreasonable, and was quite within his rights, and they therefore dismissed the plaintiff's claim upon that head and held that he never had any right to the injunction.

In this view I am unable to answer and am of opinion that the construction put upon the contract by the learned Chancellor is the true one. I can add little to what appears to me to be the sound reasoning of the learned Chancellor. In his observations upon the words "in such manner" as they are used in the second clause of the contract I entirely concur. It cannot be contended that by these words a right of way over the cleared land is expressly granted, and if not, there is not a syllable in the contract from which a grant of a right of way over the cleared land for hauling the timber cut in the forest land can be collected. The application of the maxim *sic utere tuo*, &c., as it has been applied by the Court of Appeal for Ontario, involves the assumption of the whole question which is in issue, namely, whether the vendor of the timber on the forest land granted to the vendee thereof any right of way over the cleared and cultivated land for removing the timber cut upon the forest land? If any such way was granted either impliedly as a way of necessity, or by express grant then only could the maxim *sic utere tuo* apply; but the question is, was any such way granted either impliedly or expressly? The cases to which reference

has been made have no application upon such a question. Thus in *Newcomen* v. *Coulson* (1), there was an express grant to the allottees of certain allotments made under an inclosure act of a right of way and liberty of passage for themselves and their respective tenants and farmers, as well on foot as with carts, carriages, horses, &c., from the common highway to their respective allotments, over the east end of the allotments, doing as little damage, &c., and that the way should be always eleven yards wide, but was not to be a right of way to any one but the allottees, their tenants, &c. The owner of one of the allotments commenced building houses on his allotment and was proceeding to lay down a metalled road where there had been only an ordinary cart track, and it was held that the allottees were not confined to the way for agricultural purposes only, but were entitled to make a substantial road way suitable to the purpose to which the land was in course of being applied. In this state of facts Jessel, M. R., laid down what may be admitted to be undoubted and unquestionable law, viz.: that the grantee of a right of way has a right to enter upon the lands of the grantor over which the way extends for the purpose of making the grant effective, that is to enable him to exercise the right granted to him.

If, he says, you grant to me over a field a right of carriage way to my house, I may enter upon the field and make over it a carriage way sufficient to support the ordinary traffic of a carriage way, otherwise the grant is of no use to me.

So in *Taylor* v. *St. Helen's* (2), there was an express grant of all water-courses, dams and reservoirs upon certain lands of the grantor, and also all streams flowing into and feeding the said water-courses, dams and reservoirs, all of which were shown on a plan annexed to the grant, reserving liberty to the grantor to use the

(1) 5 Ch. D. 133. (2) 6 Ch. D. 264.

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water or overflow water from the dams and reservoirs, and the question was whether this grant was confined to the water-courses, channels, streams, &c., shown on the plan, and of such water as should find its way by those channels in the condition in which they then were, to the reservoirs; or whether it was a grant of all water which should fall on the land in heavy rains so as to entitle the grantee to deepen the channels, streams, &c., so as to retain all such last mentioned water in the reservoirs, and it was held that that grant was not a grant of all the water so falling upon the land, but of the waters flowing through the channels, &c, in the condition in which they were at the time of the grant.

In *Cannon* v. *Villars* (1), the case was of an agreement for a lease of a piece of land to which the lessee could have no access, except by a lane and gateway of the defendant, the grantor, and it was stipulated that the plaintiff should not obstruct the gateway, except for purposes of ingress and egress. It was held that the plaintiff, the lessee, had an implied right of way through the gateway for the reasonable purposes of his business. Jessel, M. R. there again states the law, which is not questioned by the appellant in the present case.

> If, he says, we find a right of way granted over a metalled road, with pavement on both sides existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed. Again, if we find a right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the face of the grant to be intended to be used for a purpose which would necessarily or reasonably require the passing of carriages, there again it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used. I agree, he says, entirely with the argument on the part of the defendant, that where you find an express right of way granted (for there is no question about a way of

(1) 8 Ch. D. 415.

necessity), it is a mere question of construction as to what the extent of the right of way granted is.

In *Bolton* v. *Bolton* (1) it was decided that when a grantee is entitled to a way of necessity over another tenement belonging to the grantor and that there are more ways than one to the tenement granted, the grantee is entitled to one way only and that the grantor may select which.

In *Dand* v. *Kingscote* (2) the case was of a grant of fee farm land excepting and reserving out of the grant all mines of coal *together with sufficient way leave and stay leave* to and from said mines and the question was whether under this reservation the grantor had a right to construct a railway for the purpose of carrying the coals from the mines.

Pennington v. *Galland* (3) was the case of a conveyance of a piece of land *together with all ways* and roads to the land belonging or appertaining, and the question was as to which of two ways had passed under the grant. There the court said (4):

A man having a close surrounded with his land grants the close to another in fee for life or years, the grantee shall have a way over the grantor's lands *as incident* to the grant, *for otherwise he could not have any benefit from the grant*, and this way which would be the most direct and convenient, which we think we may properly *assume to be* the one in question in the present case. This is founded on the legal maxim, *quando aliquis aliquid concedit id concedere videtur, et sine quo res concessa uti non potest*, which though bad Latin, is, we think good law.

In *Espley* v. *Wilkes* (5) the case was of a lease of land described as bounded on the east and north by "newly made streets" and on the south and west "by the premises of the lessor and his tenants" (through which there was no way). A plan was endorsed on the lease upon which the locus of the new streets was shown and was marked "new streets" and it was held that

(1) 11 Ch. D. 968.
(2) 6 M. & W. 174.
(3) 9 Exch. 8.
(4) P. 12.
(5) L. R. 7 Ex. 298.

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under the lease a right of way over the land marked "new streets" passed to the lessee.

It is useless to refer to more, they are all similar and the law of none is disputed: what is contended by the appellant is that they have no application to the present case where the question is, whether any way was granted either by implication as of necessity or by express grant over the plaintiff's cultivated land for hauling through the plaintiff's crops and farm yard, timber cut on the forest land that there was no way as of necessity *i.e.* by implication, is concluded beyond all question by the evidence and the finding thereon of the learned Chancellor. To establish an express grant of such right of way which was so unnecessary and would be so injurious to the plaintiff the language by which such a grant is shown must, in my opinion, be most unequivocal, and so clear as to exclude all doubt; and the sole question is: whether such an express grant can be collected from the instrument; not (assuming such a grant) what would be a reasonable exercise of the right of way if granted—the question being as to right of way over the cleared land for hauling the timber cut in the forest land, we may consider the case regardless of the fact that there were the few elm trees standing in the plaintiff's meadow. The first clause of the contract then merely grants all the trees and timber, except black ash and white oak growing and being upon lots 21, 22 and the west half of 23 in the township of Chatham—now the trees and timber so sold were situate upon say 470 acres of forest land, the residue of the lots or about 30 acres in all being in actual cultivation, in the occupancy of the plaintiff. The grant and sale of the timber and trees upon these 470 acres passed an interest in the 470 acres upon which the trees and timber were to such an extent as was necessary to give to the vendee of the

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trees and timber the full benefit and enjoyment of his purchase and to enable him to enter upon every part of such 470 acres and to cut down and remove the timber there being at such times and in such manner as to the purchaser might seem fit during the specified period named for the cutting and removal of the timber, but such grant passed no interest in, or right of entry upon the 30 acres of cleared land—the grant of timber upon the 470 acres of forest land gave no right of way whatever over the 30 acres unless the situation of the 470 acres where the timber sold was, was such that a way of necessity over the 30 acres must be held to have been granted for hauling the timber from the 470 acres. The evidence shows that the timber cut on the 470 acres could have been and for very many years had been hauled out through the forest land alone without any interference with the cleared land, so that there could not be held to be, nor has there been, any assertion of a right of way as of necessity over the cleared land. I do not understand the judgment of the Court of Appeal to be rested at all, upon the defendant having a way, over the cleared land for hauling timber from the 470 acres outside of the cleared land as a way of necessity—what they hold is that the contract expressly granted to the purchaser of the timber the right to haul the timber cut on the forest land outside of the cleared land across the cleared whenever and at whatever points suited his convenience and presented the most beneficial and cheapest mode for his conducting his business, and that the defendant, as assignee of the contract, had such right; but between a right of way exerciseable as suited the convenience of the defendant and a right of way as of necessity, there is a vast difference. Under the first clause therefore of the agreement I must say that it appears to me to be very clear that no right of way over the 30

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acres of cleared land either as of necessity or otherwise has been granted for hauling the timber cut upon any part of the 470 acres. Then the second clause of the contract grants no more right of way over the 30 acres of cleared in relation to the timber upon the 470 acres than was granted by the first clause, unless the words "in such manner" as used in that clause could be construed into a grant of a right of way over the cleared land for hauling the timber cut on the 470 acres of forest land—a construction for which it is in my opinion impossible to contend. The only lands which the 2nd clause relates to, and authorizes the vendee of the timber to enter upon are the "said" lands in the first clause referred, namely the land situate on the lots 21-22, and the W.½ of 23 upon which the timber was growing and being, and not upon the whole of the said lots, that is to say in so far as the question under consideration is concerned, the 470 acres. The clause, in my opinion, grants no right of entry whatever upon the 30 acres of cleared land save for the single purpose of cutting and removing the few elm trees growing in the meadow. The construction therefore put upon the contract by the learned Chancellor was the correct one. But I think that with the view of preventing the parties continuing this litigation at an expense which if not seriously detrimental to both parties would be enormously disproportionate to any real damage sustained, the judgment in the action should be varied so as to be more in conformity with the learned Chancellor's view of the damage sustained by the plaintiff.

Although the learned Chancellor did refuse to hear some witnesses which the plaintiff had ready to call, I do not think the plaintiff has been prejudiced thereby, they could not have presented the plaintiff's claims more favourably for him than he did

himself and upon the plaintiff's own evidence the learned Chancellor had no difficulty in coming to the conclusion that all should be disallowed except the damages sustained by the hauling of timber through the hay and bean crops, and that as to these damages the claim of the plaintiff was preposterous in the extreme, and that the sum, which the learned Chancellor said he allowed for that damages, was liberal, and so satisfied does the learned Chancellor appear to have been that the sum of $25 which he allowed for such damage was ample that he was of opinion that the plaintiff should have costs only upon the lower scale.

Then as the defendant's counter claim assuming the learned Chancellor's judgment as to the construction of the contract to be correct, as I think it is, there was no claim cognisable but that for the elm taken by the plaintiff, which claim the learned chancellor, after hearing all the witnesses the defendant had including himself, came to the deliberate conclusion of disallowing. Under these circumstances concurring in the learned Chancellor's construction, I think we shall best consult the interest of both parties to this litigation if we pronounce the judgment in the action according to the view which, the learned Chancellor has so clearly expressed, would in his opinion do complete justice in this unfortunate expensive litigation; the claims for damages in which, in his opinion, are founded upon temper and not upon any substantial injury beyond what he expressed himself of opinion should be allowed.

While therefore I think we must allow this appeal with costs, I think the judgment in the action should be varied so as to be as follows. Disallow all the plaintiffs' claims for damages except for the wrongful entry upon and hauling of timber, &c., across the plaintiff's crops, enter judgment for the plaintiff for

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$25, in respect of such damages with costs upon the lower scale, dismiss the defendant's counter claim with costs, but I cannot see that the plaintiff should have the cost of such dismissal upon any higher scale than that prescribed by the learned Chancellor as the scale upon which the costs of the action should be allowed to the plaintiff. In this manner I think the judgment will be, as it should be, according to the views expressed by the learned Chancellor.

SEDGEWICK J.—On the 19th February, 1887, the plaintiff, who was the owner of a rectangular block of land containing five hundred acres, in the township of Chatham, in consideration of the sum of $6,000 sold to one Alexander Tierce all the trees and timber, except black ash and white oak, growing thereon, allowing him until the 1st of March, 1891, to remove them. The agreement provided that Tierce should at all times during this period

> Have full liberty to enter into and upon the said lands, and to fell the said trees and timber in such manner as he should think fit, with full liberty to bring horses, cattle, waggons, carts, trucks and sleighs in and upon the said land for the purpose of removing the said trees and timber, at such times and in such manner as he might think proper; and, further, that the grantor, Stephens, should have the full and free use and enjoyment of the said land during said three years, without any interruption on the part of Tierce, his workmen, servants or agents, save in so far as might be necessary for the cutting and removing of said trees and timber.

In January, 1889, Tierce assigned his rights under the agreement to the defendant, Aaron Gordon, such assignment being recognized by the plaintiff, and he, Gordon, for the sum of $500, obtained an extension of one month beyond the time allowed to Tierce, to remove the trees. At the time of the agreement the land in question consisted partly of cultivated land and partly of wood land. The cultivated land was on the

northerly and central portion of the block, and was, speaking roughly, bounded on the front by the concession road, and was surrounded on all other sides by the wood land. It was all enclosed by fences. Inside these fences, however, and wholly surrounded by cultivated lands, there was a considerable quantity of grown timber, admittedly sold under the agreement, which it was physically impossible to remove, except by crossing the cultivated fields. Before the agreement in question timber had been taken to some extent from off the land, and through the woods there existed the wood roads or ways which had been temporarily made and used for this purpose, but no other road or way existed. The purchaser of the timber was therefore obliged, in order to its removal, to make roadways for himself, using the existing ways through the woods so far as they suited his purpose

At first there was no difficulty between the parties. The timber for the most part was being cut on the easterly portion of the block, and the convenient way to remove it was to haul it northward through uncultivated land, the land on which the trees were being cut, to the concession road on the north, without touching any portion of the cultivated land. But as the work progressed, as it became necessary to cut and remove the timber which was growing further west and to the south of the plaintiff's tilled land, the defendants found that it was not in their interest to haul it by the same way as the timber just cut by them had been, but rather that they should take it direct from where it was cut or skidded to the concession road on the north, involving, however, the necessity of their temporarily removing fences and of their crossing over and damaging, to some extent, the grass and bean fields of the plaintiff.

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Upon their attempting to carry this design into effect suit was brought and an interim injunction obtained restraining them therefrom. The plaintiff's statement of claim contained other grounds of action, and sought damages for other alleged breaches of the agreement, but the learned Chancellor before whom the case was tried held, and I think correctly, that the plaintiff had failed to establish some of them and ordered a reference in regard to others.

At the trial the Chancellor decided that the defendants, in order to the removal of the timber, were obliged to remove the same through the bush or uncultivated land, and that their attempt to remove it or any part of it (save that part wholly surrounded by cultivated land, as before mentioned) through the cultivated land was a trespass, and he assessed the plaintiff damages at $25, allowing a reference with a view of enabling the plaintiff to prove before the master that his damages were in excess of the amount awarded. The defendants appealed to the Court of Appeal, where the judgment of the learned Chancellor was reversed by a unanimous decision, the appeal court being of the opinion that the learned Chancellor's view as to the construction of the agreement upon which the action was brought was erroneous, and that the defendants were within their rights under it in crossing the plaintiff's cultivated lands, as disclosed in the evidence.

And this is the question now before this court. The plaintiff contended from the first that, as a matter of law, the defendants, under no circumstances, had a right to cross the cultivated land; that upon a true construction of the agreement he was under an obligation to remove the timber, if he removed it at all, through the bush land. And the learned Chancellor, during the progress of the trial (and before the plaintiff had

finished his case or the defendants had offered any evidence), says:— 1893

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I should say there should be a declaration of right that this timber was to be taken at such times and in such a manner as Gordon might think proper, but without any interruption in the use of the culti-Sedgewick J. vated part by the plaintiff. I shall rule that as a matter of law.

And this ruling he confirmed at the close of the case, but he stated at the same time (and I suppose such statements may be regarded as findings) that the defendants could not remove the timber at the time they were attempting to do so by the old snake road—the road through the bush insisted on by the plaintiffs—without a great expenditure of money, and that Mr. Gordon took the course he did, in crossing the cultivated land, to save the great expense which would probably amount to a sacrifice of the greater amount of the timber were he compelled to resort to the much longer and more circuitous mode of egress through the bush.

The rights of the defendants depend solely upon the agreement, and the question involved is as to its true construction. To reach that, resort may I think be had to those principles of law governing cases where there is simply the grant of lands or growing timber in or surrounded by lands of another, without further agreement as to use, or otherwise, considering at the same time whether and to what extent these principles are limited or modified by the express agreement of the parties in the present case.

In Rolle's abridgment (1) it is stated:—

If I have a field enclosed by my own lande on all sides, and I alien this close to another, he shall have a way to this close over my land as incident to the grant, for otherwise he cannot have any benefit by the grant, and the grantor shall assign the way where he can best spare it.

The grant of a thing passes everything included therein, without which the thing granted could not be had. If a man grant or reserve wood, that implies liberty to take and carry it away.

(1) 2 Rolle abr. tit. Graunt.

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There is some obscurity and perhaps confusion in the cases, which are not numerous, as to the direction of the way. But in *Pinnington* v. *Galland* (1), where a number of cases on the question are cited, it was held that the grantee was entitled to a way that would be the most direct and convenient for him. So in *Oldfield's case* (2), it was resolved that where A had an acre of land which was in the middle and encompassed with other of his lands, and enfeoffs B of that acre, B shall have a convenient way over the lands of the feoffer, and he is not bound to use the same way that the feoffer uses. From this case two points are gained: first, that the way must be convenient for the grantee, and secondly, that though the grantor may have been in the habit of using a particular path, the grantee is not necessarily bound to accept the same, but may have another if that is not convenient.

In *Pearson* v. *Spencer* (3) the court distinctly recognized the principle that the way must be convenient for the grantee; and in the *Wimbledon and Putney Commons Conservators* v. *Dixon* (4), Mellish L.J., after referring to a grant of a right of way, where the way was not defined, says:—

> If the owner of the servient tenement does not point out the line of way, then the grantee must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable way, etc.

In *Hawkins* v. *Carbines, et al.* (5), the question was whether the way used by the defendants was in excess of their rights, and the court held that the question was one for the jury—a question of fact as to what was the ordinary and reasonable use of the way.

(1) 9 Exch. 1.
(2) Noy's reports 123.
(3) 1. B. & S. 571, and in Ex. Chamber 3 B. & S. 761.
(4) 1 Ch. D. 362.
(5) 27 L. J. (Ex.) 44.

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See also the following authorities:—*Hutton* v. *Hamboro* (1); *Clifford* v. *Hoare* (2); *Cannon* v. *Villars* (3); *Cousens* v. *Rose* (4); *Harding* v. *Wilson* (5), and *Espley* v. *Wilkes* (6).

The result of the cases I think is this, that where no way is specified in the instrument of grant the grantor may assign a way, but that way must be a reasonable one—a way that will enable the grantee to enjoy, in a reasonable manner, the thing granted. If the grantor does not assign a way, or if he assigns a way that is unreasonable, the grantee may select a way, a way that is "most direct and convenient," for himself, but one, the use of which will not unreasonably interfere with the grantor in the enjoyment of his rights upon the servient tenement. And, finally, questions of this character are not questions of law, but of fact, to be determined by the jury upon evidence.

Considering the agreement in question as a grant of growing timber, and nothing more, it is, in my view, clear that the plaintiff, in attempting to compel the defendants to remove the timber through the bush land and refusing them access to the cleared land, was acting beyond his rights. The defendants had a right to remove their timber to the highway by the most direct and available route, subject, however, to this qualification, that they were acting in good faith and not unreasonably, or in other words, that there was no abuse of the rights which their grant gave them. I think it was unreasonable to insist that they should undergo the extra trouble and expense of removing the fruits of their purchase by an admittedly inconvenient and longer route, when the expense, as the learned Chancellor says, "would probably amount to a sacrifice of the greater amount of the timber."

(1) 2 F. & F. 218.
(2) L. R. 9 C. P. 362.
(3) 8 Ch. D. 421.
(4) L. R. 12 Eq. 366.
(5) 2 B. & C. 96.
(6) L. R. 7 Ex. 298.

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If there had been no agreement and no sale, and if the plaintiff, himself, had wanted to cut down and remove and carry to market the timber in question, can there be any doubt that he would have removed it in precisely the same way as the defendants did? Can it be imagined that he, rather than haul it through a hay field or growing bean crop, injuring and even destroying, it may be, the harvest, along the narrow strip necessary for the purpose, would at an enormous increase of expense, remove it by the way he seeks to impose upon the defendants? That, I think, is a fair test as to the reasonableness or unreasonableness of the plaintiff's claim, and, if so, it fails utterly.

The plaintiff's counsel contended at the argument, that he was precluded by the Chancellor's ruling at the trial, from adducing evidence to show that, the defendants' use of the way they claimed was unreasonable. I think this contention cannot avail. It does not appear that he objected to the ruling, or that during the progress of his own case, he brought forward any evidence on this point, that was excluded. The onus was upon him to show that there was an abuse by the defendants, of the rights which they had under the agreement, that they were claiming to use a way that unreasonably interfered with the plaintiff's rights, and the method, the only method by which he undertook to show that was, to prove (as if that was all that was necessary), that they took the shortest and most convenient route for themselves, the short and easy way through the plaintiff's fields, instead of the long circuitous and expensive one, through his wood lands.

The plaintiff had to establish his case in the first instance, and it would not I think, have been proper, after the defendants had concluded their evidence, to allow him to strengthen his original case, by introducing new and cumulative evidence in support of it.

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The question remains: Are the legal principles above mentioned, applicable to the present case, or have the defendants contracted themselves out of them?

In my view they have not.

The plaintiff's contention is in effect, that there is in this agreement an implied stipulation that the defendants shall not remove any of the timber by crossing cultivated land.

I cannot find that stipulation in the agreement.

I cannot from the surrounding circumstances as given in evidence, gather that such was the intention of the parties. As regards certain of the trees, the only way to remove them was across these lands. That was known to the parties. They must have contemplated a crossing of the fields, as respects these at least. If that was to be all, why does not the agreement say so? The defendants were at all times to have the right of entry and removal. A convenient method of removal, in winter might be, and was, an inconvenient method in summer; but there is no limitation as to the particular season or the particular method. The defendants' discretion was absolute. Stress is laid upon the stipulation, that during the defendants' user the plaintiff was to have the full and free use and enjoyment of the land, "save in so far as might be necessary for the cutting and removing of said trees and timber." That limitation means, and I think can only mean, that the plaintiff was to enjoy his land subject, and subject only to the defendants' right as created by the agreement. He was to have the use of the whole land uncleared as well as cultivated, subject to the plaintiff's rights. I cannot understand how the use of the word "necessary" gives foundation to the argument that the user of the land was confined to the uncleared portion. The defendants necessarily required to use some land in order to remove the trees. Any

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land used by them for such removal was necessarily used. There is not the slightest indication that the word is used to distinguish one character of land from another, or one mode of egress from another, its object being to prohibit the defendants from using any portion of the property, whether cleared or otherwise, for purposes foreign to the cutting and removal of the growing trees.

I am therefore of the opinion that the insertion in the agreement of the two clauses referred to, does not in any way minimize or modify the rights which, irrespective of them, the defendants take under the general grant of the trees, and that these rights are as I have above stated.

The result is that the appeal fails.

Appeal dismissed with costs.

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Solicitor for respondent: *J. W. Sharpe.*