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*March 11.
*May 7.

CHARLES LAMB AND H. L. MILLER (DEFENDANTS) ..... } APPELLANTS;

AND

SAMUEL T. KINCAID AND ANTHONY KROBER (PLAINTIFFS) .. } RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Placer mining—Disputed title—Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts—Sinister intention—Conversion—Blending materials—Accounts—Assessment of damages — Mitigating circumstances — Compensation for necessary expenses—Estoppel—Standing-by—Acquiescence.

After a favourable judgment by the Gold Commissioner in respect to the boundary between contiguous placer mining locations and while an appeal therefrom was pending, the defendants, with the knowledge of the plaintiffs, entered upon the location and removed a quantity of auriferous material from the disputed and undisputed portions thereof, intermixed the products without keeping any account of the quantities taken from these portions respectively and appropriated the gold recovered from the whole mass.

In an action for damages, taken subsequently, the plaintiffs recovered for the total value of the gold estimated to have been taken from the disputed portion of the claim, without deduction of the necessary expenses of workings and winning the gold.

Held, affirming the judgment appealed from, Davies J. dissenting, that a correct appreciation of the evidence disclosed a sinister intention on the part of the defendants, that they had deliberately blended the materials taken from both parts of the location, converted the whole mass to their own use and thereby destroyed the means of ascertaining the respective quantities so taken and the proportionate expense of recovering the precious metal therefrom, and that, consequently, they were liable in damages for the total value of so much of the intermixed products as were not strictly proved to have come from the undisputed portion of the location.

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*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

Quære. Does the English rule governing the assessment of damages in respect of trespasses in coal mines supply a method of assessment applicable in its entirety to placer mining locations?

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APPEAL from the judgment of the Territorial Court of the Yukon Territory affirming the judgment of Dugas J., at the trial, by which the action of the plaintiffs was maintained with costs.

The action was brought, under the circumstances stated in the judgments now reported, to recover damages for the invasion of the plaintiffs' placer mining location by the defendants and the value of a quantity of gold which the defendants had removed therefrom and converted to their own use.

At the trial His Lordship, Mr. Justice Dugas, decided against the defendants, on the grounds that the trespass had been wilful and that there had been no account kept of the gold taken or the cost of getting it, and awarded the plaintiffs, as damages *in pœnam,* the value of all the gold shewn to have been taken from the plaintiffs' location and declined to make any deductions for the necessary cost of the workings and winning the gold from the material taken. Upon appeal to the court in banc, His Lordship Mr. Justice Craig agreed with the trial judge, while His Lordship Mr. Justice Macauley considered that the damages should have been assessed according to the milder rule applicable to trespasses committed under *bonâ fide* belief in validity of title. The trial court judgment, therefore, stood affirmed and the defendants appealed to the Supreme Court of Canada.

Ewart K.C. for the appellants. The element of a wilful taking with sinister intention is entirely absent in this case. *Livingstone* v. *Rawyards Coal Co.*

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(1); *McArthur* v. *Cornwall*(2); *Bulli Coal Mining Co.* v. *Osborne*(3), at page 364.

Hilton v. *Woods*(4); *Jegon* v. *Vivian*(5); *Ashton* v. *Stock*(6); *Kirkpatrick* v. *McNamee*(7); Mayne on Damages, (7 ed.) pages 46, 47, 418-419.

The word "wilful," as applied to trespass to land, has been explained, in a recent case, by Wetmore J. as meaning a trespass committed deliberately and intentionally, with a knowledge that there was no right whatever to do the act; *Fleming* v. *H. W. McNiell Co.*(8), at pages 314 and 315. The onus of proving that a trespass is fraudulent or unscrupulous is in each case upon the plaintiff. *Trotter* v. *Maclean*(9) at pages 586, 587. There is no obligation to refrain from dealing with property which one believes to be his own merely because somebody else claims it, and it cannot be asserted that there is a duty of abstention when a judge has decided in his favour merely because the claim continues to be asserted on appeal. In this case, abstention would have been detrimental to the defendants and would have entailed inconvenience and expense.

The plaintiffs did not ask for an injunction against the proposed operations, but stood by, allowed the defendants to proceed without protest, and now claim that the defendants were "wilful trespassers." It cannot be contended that, during the thirteen months between the judgments, the defendants should have abstained from using the disputed property in conjunction with their workings in that which it adjoined.

(1) 5 App. Cas. 25.
(2) [1892] A.C. 75.
(3) [1899] A.C. 351.
(4) L.R. 4 Eq. 432.
(5) 6 Ch. App. 742.
(6) 6 Ch. D. 719.
(7) 36 Can. S.C.R. 152.
(8) 23 Can. L.T. (Occ. N.) 312
(9) 13 Ch. D. 574.

If the courts below had decided the first point in the defendants' favour, they would not have awarded exemplary damages merely for absence of an account of takings and expenses. Aggravation is immaterial. Whether an account is or is not kept an unscrupulous trespasser receives no consideration, but the fact that an honest trespasser does not keep separate that which he firmly believes to be his own from his other property does not make him an unscrupulous trespasser.

Holman K.C. and *Gwillim,* for the respondents. The evidence justifies the findings of the trial judge and the damages are not excessive and should not be disturbed by this court. *Montreal Gas Co.* v. *St. Laurent*(1); *Sénésac* v. *Central Vermont Ry. Co.*(2).

The contention that the trespass was "innocent" or "inadvertent" is completely negatived and all presumptions must go against the defendants who deliberately omitted to keep accounts necessary to establish what quantities might come from the disputed area and the costs of getting out the dirt and separating the gold. *Attorney-General* v. *Boyd*(3). The doctrine of *per confusionem* applies; *Lupton* v. *White* (4); *Attorney-General* v. *Lansell*(5); *Band of Hope and Albion Consols* v. *Young Band Extended Quartz Mining Co.*(6); Morrison on Mining Rights, pages 280, 292. The trespasser prevents the owner working his own mine in his own way; *Munro* v. *Sutherland* (7).

The English rule as to cases of trespass in coal

(1) 26 Can. S.C.R. 176.
(2) 26 Can. S.C.R. 641.
(3) 3 Aust. Jur. Rep. 99.
(4) 15 Ves. 432.
(5) 10 Vict. L.R. 84.
(6) 8 Vict. L.R. 277.
(7) 4 Aust. Jur. Rep. 75, 139.

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mines cannot be applied to placer mining claims; the former are uniform in production while the latter are variable and the whole methods and systems complicated both as to cost, quantity and value of the gold recovered. This is pointed out in *Attorney-General* v. *Lansell*(1).

We also refer to *Wild* v. *Holt*(2) *per* Parke B.; and Armstrong on Gold Mining (7 ed.), page 88.

THE CHIEF JUSTICE.—I agree with the reasoning of Mr. Justice Duff.

GIROUARD J.—I agree in the opinion of Mr. Justice Duff.

DAVIES J. (dissenting).—The question we have to decide is as to the measure of damages to be applied to the trespasses committed by the appellants on the plaintiffs' mining area, and for which they were sued.

Are these damages to be assessed according to the severe rule, the rule *in pœnam,* whereby the trespasser is to be held liable for the full value of the gold taken by him out of the property trespassed upon without making any allowance whatever for the cost either of taking out the pay dirt or afterwards of washing and mining the gold from this pay dirt, or are they to be assessed according to the milder rule by which the necessary expense which it would have cost plaintiff to obtain the gold had he mined and obtained it himself, would be allowed to the trespasser?

The trial judge declined to make any allowance to defendants for these necessary expenses and upon appeal the court was equally divided, Craig J. holding

(1) 10 Vict. L.R. 84. (2) 9 M. & W. 672.

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with the trial judge, and Macauley J. deciding in favour of the application of the milder rule and allowing these necessary expenses.

The grounds upon which Craig J. supports his judgment are that the trespass was a wilful and deliberate invasion of the plaintiff's property. He proceeds upon the assumption that plaintiff was a wilful trespasser and incorporates, from Armstrong on the Law of Gold Mining, a definition of wilful trespasser as one

> not in possession under any colour of title and not under any mistake as to facts though misapprehending the law.

In another place he says that

> after reading Lamb's (defendant's) evidence carefully he had reached the conclusion that * * * he deliberately made up his mind to have this ground in spite of any body and that with wilful intent to obtain an unfair advantage, he entered upon this ground, took out the pay dirt, and deliberately confused it with his own.

Having reached such a conclusion that the trespass was simply a deliberate fraud, of course there could not be any doubt as to the proper rule to apply in measuring the damages. I have, bearing in mind the very strong language of Craig J., read carefully over Lamb's evidence, but I have not been able to reach any such conclusions from it as the judge seems to have done. On the contrary, I think his evidence, read with all the other evidence in the case, shews that so far from being a wilful trespasser without any colour of title, the defendants entered upon the disputed claim only after it had been judicially determined by the Gold Commissioner, after a trial, to have been their property and within the bonds of their mining lease; that they carried on their operations of taking out the pay dirt from the disputed territory during the

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winter and spring after judgment had been given in their favour, tunnelling into the territory across a tunnel of plaintiffs, and that these operations must have been known to the plaintiffs who stood by and saw the property being worked by defendants and contented themselves simply with appealing from the judgment of the Gold Commissioner, without applying for an injunction restraining the defendants from working the disputed territory.

It is true the judgment of the Gold Commissioner was more than a year afterwards reversed by the court of appeal, Craig J. stating on that appeal that it was "merely a question of boundaries and consideration of the weight of evidence." Before this appeal was determined all that is complained of by the plaintiffs was done. It does not, therefore, seem to me proper to speak of the plaintiff as a wilful trespasser, or deal with him as one in possession "not under any colour of right."

He was in possession under the judgment of a court of competent jurisdiction which declared the disputed territory to form part of his mining claim, and I cannot see that he ought to be treated as acting fraudulently or dishonestly, simply because he went on exercising rights declared to be his without any attempt to restrain him from doing so by his opponent who had appealed from the judgment simply. In the absence of any positive evidence to the contrary, and drawing reasonable inferences from the facts proved, I would conclude that what defendants did was done openly under a claim of right and *bonâ fide,* though in the ultimate result proved to be wrongful.

In his judgment in the case of *Trotter* v. *MacLean* (1), Fry J., at p. 587, after reviewing the different

(1) 13 Ch. D. 574.

classes of cases in which the milder rule or the punitive rule was applied, cited with approval from the observations of Lord Hatherley in *Jegon* v. *Vivian* (1) the following:

I think that the milder rule of law is certainly that which ought to guide this court subject to any case made of a special character which would induce the court to swerve from it; otherwise on the one hand a trespass might be committed with impunity if the rule *in pœnam* were not insisted upon; so on the other hand persons might stand by and see their coal worked, being spared the expense of mining and getting it.

Fry J then goes on to say:

These observations are material in two ways. In the first place they express the view of the Lord Chancellor that the milder rule is to be assumed when the propriety of applying the contrary rule is not shewn, and *they throw the burden on him who asserts that the severer rule ought to be applied;* and so his language has been interpreted by V.-C. Bacon, in, I think, more than one case. In the next place, Lord Hatherley points out that the milder rule should be applied where persons *stand by and see their coal worked.*

I think the plaintiffs here have failed to discharge the burden cast on them and that they should, under the circumstances, be classed with those who stand by and see their property worked.

In the case of *Livingstone* v. *Rawyards Coal Co.* (2), in the House of Lords, Lord Blackburn stated the general rule where an injury is to be compensated by damages to be that

you should as nearly as possible get at that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise, such for instance as by the consideration whether the damage has been maliciously done or whether it has been done with full knowledge that the person doing it was doing wrong.

(1) 6 Ch. App. 742 at p. 763. (2) 5 App. Cas. 25.

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I can see no evidence whatever of malicious action on defendants' part and cannot, as before stated, reach the conclusion that the defendants, with the judgment of the court of first instance in their favour, and with the plaintiffs in the position of persons looking on at defendants' operations and contenting themselves with a simple appeal, must necessarily be held to have had "full knowledge" that they were doing wrong at the time the only court that had passed upon the question had determined they could legally do what they were doing. Until evidence is given forcing the court to that conclusion of wilful wrongdoing the plaintiffs have not discharged the onus which Lord Hatherley thought lay upon them.

My attention has been called by my brother Duff to the case of *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*(1), at p. 167, decided in the House of Lords. In that case it was held by Lords Watson and MacNaghten, after an elaborate and instructive review by Lord MacNaghten of many of the cases alike at common law and equity bearing upon the question now under discussion, that on general principles the defendants, though they had illegally detained the plaintiffs' property, were entitled to repayment of the expenses properly incurred by them on account of freight and landing charges.

Whatever strength there might have been in the argument denying the right of the defendants to have any expenses allowed them for taking the pay dirt out of the disputed territory into the dump heap, I can see no just rule or reason which should preclude them from the reasonable expense of washing the gold out of the dump heap. In any event that would have had

(1) (1892) A.C. 166.

to be incurred by plaintiffs, if they themselves had taken out the pay dirt, and the cost can easily be estimated. To confirm the judgment appealed from would deny even that to the defendants.

I do not think the explanation of the reasons why they did not keep a separate account of the working of the portion of the mining area under dispute, or why they mixed the pay dirt from that area with that from their undisputed area, unreasonable as was contended. It would no doubt have been better, and proper, had it been possible, to keep these accounts and not to have mixed the pay dirt with other. But on the statement, uncontradicted so far as I can see of the extremely limited extent of dumping ground which defendants had, and the great expense of separating the pay dirt from the disputed area with that from the undisputed area, I am unable to draw the conclusion that this mixing of the two was necessarily a wilful mixing which ought to be punished by the application of the punitive rule of damages. There might have been some difficulty in reaching a proper estimate of the whole expenses to be properly allowed defendants from the evidence already in, and without a further reference. But, as counsel for the plaintiffs, respondents, pressed us, if we reached the opinion that the defendants were entitled to be allowed such expenditure as it would undoubtedly have cost the plaintiffs if they had mined and won the gold from the disputed area, not to refer the case back for further evidence but to make such estimate from the evidence already in, I think we may under that consent adopt the conclusion of Macauley J. and allow them 40 per cent. of the gross proceeds, as and for such necessary expenditure, and as being under the evidence a fair, just and reasonable allowance.

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I would, therefore, allow the appeal with costs to that extent.

IDINGTON J.—I agree in the opinion of Mr. Justice Duff.

DUFF J.—The appellants and one Randall were, in 1901 and 1902, the owners of a placer claim known as the "Miller" on Bonanza Creek in the Yukon Territory adjoining a claim known as the "Krober" owned by the respondents.

A dispute as to the boundary between the claims was determined in February, 1903, by a judgment given in favour of the respondent by the Territorial Court of the Yukon Territory reversing the judgment of the Gold Commissioner which had been delivered 11th January, 1902. Between the last mentioned date and the date of the delivery of the judgment of the Territorial Court, the appellants entered upon the area in dispute and abstracted large quantities of auriferous material, from which, after intermixing it with similar material taken from the "Miller," they extracted the gold which it contained. The respondents brought this action to recover damages for the invasion of their claim by the appellants and the trial judge awarded them $7,306.56, which the learned judge found to be the value of the gold recovered by the appellants from the respondents' claim.

On appeal, Craig J. agreed with the trial judge, while Macauley J. took the view that this sum should be reduced by a deduction equivalent to the expenses incurred by them as well in separating the gold bearing material from its natural bed as in removing it from the mine and in recovering the mineral it contained.

Before us, the appellants' principal contention was that, not having entered upon the disputed area until they had first obtained the decision of the Gold Commissioner in their favour, they are entitled to the benefit of an allowance in accordance with the view of Macauley J.

It has for some years been the settled law applicable to cases of coal mining trespass, where the trespass is not wilful, that in estimating—when that forms an element in the damages to which the plaintiffs is entitled—the value of the coal abstracted, the coal is to be treated as *in situ* and from its value at the mouth of the pit is to be deducted the cost of severing it from its natural bed and of bringing it to bank; where the trespass is wilful, the cost of severance is not allowed although as a general rule the cost of bringing it to bank is.

It was not argued and, I think, cannot be maintained, that a trespasser upon a placer mining claim held under the mining regulations of the Yukon Territory is in a position more favourable than a coal trespasser under this rule. Whether he is in a less favourable position, it is, in the view I take of the facts, unnecessary to consider. I have come to the conclusion that, assuming the rule to apply in its entirety, the appellants are within that branch of it which governs cases of wilful trespass and are, consequently, not entitled to the benefit of the allowance claimed.

No attempt, so far as I can find, has yet been made to define with precision the circumstances in which the court will treat a trespass as wilful within the meaning of the rule; but this much is sufficiently clear upon any examination of the cases—that, upon that point, the existence or non-existence in the mind of a

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trespasser of a belief in his title to the locus is not necessarily conclusive.

In the leading case *Wood* v. *Morewood*(1), for example, the test which Baron Parke instructed the jury to apply was: Did the defendant act

> fairly and honestly (not honestly only) in the *bonâ fide* belief that he had a right to do what he did?

(not merely that he owned the coal taken). If the title is in dispute and the dispute is in course of active litigation an abstraction of mineral may be innocent or non-innocent, according to the circumstances; according, for example, to its effect upon the trespasser's adversary in respect of his position in the dispute, or upon the adversary's rights, in the event of his success in litigation. If, in that event—the adversary's success—the trespasser can compensate him fully in money and if the trespass places him at no disadvantage either in the dispute itself or in the ascertainment of compensation or otherwise, then the trespass may be perfectly innocent in all but a legal sense. Apparently such a case, in the opinion of Lord Hatherly, was disclosed by the circumstances of *Jegon* v. *Vivian*(2), although I venture to think there will be few cases in which the appropriation by one party to a litigated dispute of the subject matter of the litigation, will not place upon that party a heavy burden of explanation.

If on the other hand the act is an adverse act, designed to put the adversary at a disadvantage in the dispute, the mere fact that the trespasser believes he is acting within his legal rights will not, I think, bring him within the category of the innocent. *Peruvian*

(1) 3 Q.B. 440n. (2) 6 Ch. App. 742.

Guano Co. v. *Dreyfus Bros. & Co.*(1), *per* Lord Watson at page 171. At least as effectively, would it appear to me, is he excluded from that category, if his act of trespass is designed, in the event of his own defeat, to deprive his adversary of, or to embarrass him in obtaining the whole or part of that to which he shall prove to have been entitled. In such a case he cannot be said to act "fairly and honestly," to use the language already quoted from the charge of Parke B. in *Wood* v. *Morewood*(2); or "wholly ignorantly and innocently," in the language of Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.*(3) at page 40; or without any "sinister intention" in the language of Lord Cairns, in the same case at page 31. He is in a word, a wrong-doer *in foro conscientiæ*—not in the eye of the law merely.

That the design of the defendants in committing the trespass complained of was to frustrate the plaintiffs' appeal by depriving them, in the event of their success, of the fruits of success, is in my opinion the only view fairly consistent with the whole of the facts in evidence.

A glance at the salient facts in the history of the controversy respecting the boundaries of the "Miller" and the "Krober" is necessary to enable us fully to appreciate the bearing of the evidence on this question.

The controversy began in the year 1900. The "Miller" had been located by one J. A. Miller on the 11th June, 1898, and the "Krober" on the 21st of the same month.

The "Miller" being the senior location, and the whole of the disputed territory being admittedly with-

(1) (1892) A.C. 166. (2) 3 Q.B. 440.
(3) 5 App. Cas. 25.

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in the lines of the "Krober," the question of title to that territory necessarily rested upon the determination of the boundaries of the "Miller" as originally located.

In October, 1899, the owners of the "Miller" (of whom the defendant H. I. Miller was then one) had a survey and plan of it made by one T. D. Green. The plan, which so placed the boundaries of the claim as to embrace only a part of the area in question, was signed by J. A. Miller, the locator, and filed in the office of the Gold Commissioner. In May, 1900, J. A. Miller, the locator, the present defendant H. I. Miller, and one Bowhay, who were then the owners of the "Miller," commenced in the Gold Commissioner's Court a proceeding against the present plaintiff Krober, as owner of the "Krober," claiming to have the boundaries of the "Miller" established in accordance with the survey. A date was fixed for the hearing, which, however, never took place, and the proceeding was afterwards discontinued. In the same year—the precise date is not disclosed by the evidence—the same persons made an attempt to establish the same boundaries through the procedure provided by a regulation promulgated in March of that year; under this regulation, if, after public notice of a survey of a placer claim for the period and in the manner prescribed by the regulation, there should be no protest against it lodged with the Gold Commissioner, the boundaries of the claim became defined for all purposes in accordance with the survey. Green's plan and survey were advertised, but a protest being lodged the plan and survey were withdrawn.

A fact of cardinal importance in connection with

this survey is that it was based upon the theory that the initial post of the "Miller" as located by J. A. Miller, was a post (described in the subsequent proceedings before the Gold Commissioner as post B.) which had already been placed, in locating the "Newman," an adjoining claim; on the same theory another survey of the "Miller," made by one Barwell, apparently in 1900, at the instance of the same persons, seems to have proceeded.

On the 15th June, 1901, a third survey was made at the instance of the present defendants—then the owners of the claim—by Barwell. This survey proceeded on a new theory. Barwell took as his starting point a place pointed out to him on the ground by J. A. Miller, the locator of the claim, as the situation of the initial post; and the claim as surveyed from that starting point embraced an area within the limits of the "Krober" (the area in dispute, that is to say) very much larger than that falling within the lines of Green's survey.

On the day following the completion of this survey the action was commenced in the Gold Commissioner's Court by the present defendants against the present plaintiffs which resulted in the judgment of the Gold Commissioner of the 11th January, 1902, already referred to.

The plaintiffs on the same day gave notice of appeal to the Territorial Court. The defendants having in the preceding November begun mining on the "Miller"—which had up to that time remained unworked—extended their operations after the Gold Commissioner's decision into the disputed territory, and before the hearing of the plaintiffs' appeal (on the 17th September, 1902) had removed from it the mineral bearing

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material it contained. The defendants kept no account of this material (as to either its quantity or its value), or of the cost of mining, removing or washing it. On the contrary, they—as I have already mentioned—intermixed it with similar material taken from parts of the "Miller" not in dispute and appropriated the gold recovered from the whole mass. On the 28th September, 1902, the day after the hearing of the appeal, the defendants having completed the washing of this material, discontinued operations and afterwards sold the unworked part of their claim for $10,000.00.

Quo animo then did the defendants commit these trespasses? We have here no question of inadvertence or negligence. That the defendants deliberately invaded the territory in litigation is now conceded. One of two things must therefore be clear. The defendants either rested on the decision of the Gold Commissioner as conferring on them a title of absolutely assured validity and proceeded with no misgiving as to the result of the appeal; or they disposed of the product of the property with a clear perception that, if the plaintiffs should succeed, that would happen which has happened, namely, that the plaintiffs in spite of their success would find that the subject matter of the litigation had disappeared and with it all reliable evidence of its extent and value.

The first of these alternative propositions, Mr. Ewart, if I understood him, asked us to adopt. The facts, I think, make it clear that it should be rejected.

This view of the state of mind of the defendants seems hard to reconcile with the nature of the case presented before the Gold Commissioner. The case turned in substance upon the point whether J. A.

Miller in locating the "Miller" had taken as his initial post the post "B." to which I have referred, or had placed an initial post in the situation pointed out by him to Barwell for the purposes of the third survey, in June, 1901. The plaintiffs' success depended upon their ability to maintain the latter proposition. The Gold Commissioner had accepted that view; but considering the evidence as disclosed by the materials before us in the light of the previous history of the dispute, one finds little pointing to *bona fides* on the part of the defendants; on the contrary, I regret to say there is much to suggest a case inherently unworthy of credit. The record of the trial is not in evidence; but we have the reasons given by Craig J. for his judgment on appeal, in which Macauley J. concurred; and from some observations made in the course of the judgment of Craig J. in this action, I assume that the view expressed by him had also the concurrence of Dugas J., although it appears that the last mentioned judge proceeded also on the ground that the defendants, by their course of action respecting the Green survey, were estopped from disputing the plaintiffs' contention respecting the position of the initial post. The learned judges in appeal did not of course see the witnesses; but subject to that, we may, I think, assume—otherwise doubtless the record would have been put in evidence—that, so far as it could be got from the record, the effect of the evidence is fairly stated by Craig J. The learned judge says:

> I have read the evidence in this case most carefully, and I have come to the conclusion that I cannot follow the learned Gold Commissioner on his finding on the facts. Miller, the first witness, is a most unsatisfactory witness, hesitating and uncertain and contradicdictory; he was on the ground once for a short time after he was sick, and the staking was done, and he paid very little attention to what he did. Christie, the important witness against him, was on

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the ground for a long time prior, knew it intimately, and had gone over it, and marked out the features of the ground. Warren, who confirms to a certain extent, is forced to admit upon examination that an affidavit made by him is untrue, and that he will not now support it, proving either that he was willing to sign anything laid before him without reading it, or that, having read it, he was willing to swear to it anyhow, in either case being a most unscrupulous witness. Then, again, Warren, in his evidence, swears that he can recognize a stake after it has been cut off by seeing the stem five inches from the ground. Any man who will swear to that state of things is not worthy of belief. Bowhay, who confirms Miller as to the stakes, was willing to have the plan of Green and Barwell adopted, which is not the contention which he now sets up, and it is singular that he should have done that if he knew better at the time. Miller himself signs the Green plan and approved of the Barwell plan. Against this we have the direct evidence of Hawkins, who made the first survey and found post B. with Miller's name upon it, being the only post which had the name. We have Sinclair's evidence of conversation where Miller draws a plan and shews the claims exactly as Korber now contends they are, with the "Newman" claim jutting up into the "Miller" claim. We have the evidence of Green who found the post B. We have the evidence of Jephson, who found that post. We have the evidence of Krober who saw the post. We have also the evidence of Kincaid, Ware and Rost, who either saw the post or had conversation with Miller and admitted the evidence is preponderatingly in favour of Kroeber's contention as to what the "Miller" survey was.

With the transactions of 1899 and 1900 in their minds—the Green plan signed by J. A. Miller, the Barwell plan approved by him, the proceedings (in the Gold Commissioner's office and by public notice) to establish Green's survey—can we assume that Miller and Lamb regarded as inexpugnable the case described by the learned trial judge in the passage I have quoted?

At least it would seem that their conduct in disposing of the product of the encroachment as they did calls for some explanation in addition to the suggestion that they acted on a blind faith in an unimpeachable title. Two explanations are offered by counsel. It was impracticable, it is said, first, to distinguish the

material removed from the disputed area; and secondly either to deposit it as a separate mass on the dump or separately to sluice it. It is not necessary I think to consider the exculpatory validity of these explanations; they fail because they have no basis of fact. As to the first, the evidence shews clearly that the defendants' workings crossed at three places only the boundary between the territory admittedly within the "Miller" and that in dispute. It is obvious that every carload of material excavated from the last mentioned territory must have passed one of these three points. That the points could have been ascertained with exactitude and marked on the ground by any competent surveyor is also obvious. Lamb, having in his examination in chief sworn that in order to distinguish the cars proceeding from the disputed area the constant attendance of a surveyor under ground would be necessary, in cross examination admits—what must be very plain—that the marking of the underground boundary would have involved very little expense or trouble. As to the other explanation offerred, there is some evidence given by Frank Miller in support of it; but we are relieved from considering in detail the evidence of this witness by the admissions made on cross-examination on this point also by the defendant Lamb himself, who says that the sole obstacle in the way of the suggested precaution was a little additional expense.

It is to be observed that while these explanations are put forward by counsel to account for the action of the defendants in blending the material, we have no such explanation from the lips of the persons who were directly concerned in it.

There are three persons whose *bona fides* in com-

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mitting the trespasses under consideration is in question. No one of these offers any explanation of his conduct. The defendant Miller and Randall (who owned a one-fourth interest and acted as foreman in charge of the operations down to 22nd July, 1902), were not called as witnesses; they were both, it seems, absent from the territory during the trial; but why was their evidence not taken in the way usually followed in such cases? Lamb, the only one of these persons who gave evidence at the trial, not only attempts no justification of the trespass, but professes ignorance of the fact of the trespass.

The proceedings in the present action indeed seem to me to afford some light upon this question of intention. A scrupulously honest man, having in full belief that he was exercising his rights, taken that which has proved to belong to another, would, speaking generally, evince some desire to make restitution. The defendants—being as they say in that case—first, by their pleadings denied their act of trespass; then, to shew that this was no formality of pleading, by their counsel at the trial, in answer to the court, said that the fact of the trespass was seriously put in issue; and the defendant Lamb in the witness box thus fences with the question:

Q. What was done with the gravel and other pay material taken from the ground in question?

A. *If we had anything to do with it*, it was sluiced with the rest.

* * * * *

Q. The first ground taken out would be the ground nearest the encroachment or the encroachment *if you took it?*

A. Yes, it would be the first to come out.

Q. What was done with the first ground that was taken out?

A. Sluiced.

Q. When?

A. I think somewhere about June.

Q. 1902?

A. Yes.

Q. Had you then finished your operations in the vicinity of the ground in dispute or did you continue them on after June?

A. They worked continuously right along.

Q. Was the ground included in the disputed ground worked out up to June?

A. *I don't know anything about it.*

This conduct lends no support to the theory that the defendants acted without any sinister intention. Indeed the course of the defendants throughout the whole controversy, the proceedings in 1900—the volte face of 1901—the nature of the case before the Gold Commissioner—the intermixture of the products—the failure to keep separate accounts—the conduct of the present litigation—would appear not to be reconcilable with the hypothesis that they acted with the intention of taking the benefit of that only which should prove to be rightfully theirs.

But it is contended that the plaintiffs are within the principle stated by Lord Hatherly in *Jegon* v. *Vivian* (1) and by Fry J. in *Trotter* v. *McLean* (2), which, it is said, precludes the owner from disputing the defendants' right to deduction for the expenses of severance, where he, having a knowledge of the trespass, has taken no steps or has been dilatory in taking steps to stop it. It is said that the failure of the plaintiffs to apply for an injunction brings them within these cases.

It is plain that the conduct of the owner in standing by inactive while the trespass proceeds may bear upon the trespasser's right to claim the deduction in one or both of two ways. The owner's inactivity or dilatoriness may, in the circumstances of particular cases, be an element of some importance to be considered in deciding upon the character of the trespasser's

(1) 6 Ch. App. 742. (2) 13 Ch. D. 574.

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intention. On the other hand, independently of any question of the trespasser's intention, the owner may by his laches disentitle himself to the full measure of relief which the court might otherwise award. In *Trotter* v. *McLean* (1) Fry J. found that the conduct of the owners during a certain period amounted to acquiescence in the trespass, but he held that this period of acquiescence came to an end upon a simple notice to the trespasser unaccompanied by legal proceedings.

In *Jegon* v. *Vivian* (2), the trespass was held in the circumstances not to be a wilful trespass; and the actual decision turned upon that, although no doubt the dilatoriness of the owner's proceedings was an element which influenced Lord Hatherly's mind in the consideration of the question of *bona fides*.

On the other hand, Lord Hatherly does lay down or suggest what seems to be a clear principle—viz.: that where the owner has stood by inactive and allowed a trespass to proceed, especially if it is proceeding under a *bonâ fide* belief in title, it would be wrong to refuse the trespasser the benefit of the allowance.

My difficulty is to apply to the circumstances of this case anything decided or any principle enunciated by Lord Hatherly or by Lord Fry.

The plaintiffs did not stand by inactive; on the contrary they promptly launched their appeal and it cannot be suggested, nor is it, that the prosecution of the appeal was dilatory. Such a case is, I think, very remote from anything within the scope of Lord Hatherly's language. Still less can it be maintained that there is any evidence that anything done by the defendants misled the plaintiffs into the belief that the defendants were acquiescing in the course taken

(1) 13 Ch. D. 574. (2) 6 Ch. App. 742.

by the plaintiffs. The evidence upon which the fact of the defendants' knowledge of the trespass rests is meagre, and not without ambiguity. But if that evidence proves anything, it proves this, that Randall, a co-owner with the defendants and the foreman in charge of the operations, informed the plaintiff Kincaid that the defendants did not intend to work the disputed territory until after the determination of the appeal. Had it been suggested at the trial that the plaintiffs ought to have proceeded in the manner now suggested, it is impossible to say what might have proved to be the explanation of the fact that the plaintiffs did not so proceed. Many explanations occur to one, but such speculation is profitless; and I do not think the plaintiffs can be called upon properly at this stage to justify their course from the evidence upon the record. A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it. *Browne* v. *Dunn*(1) at p. 76; *Connecticut Fire Ins. Co.* v. *Kavanagh*(2) at page 480; *The Tasmania*(3) at page 225; *Ex parte Firth*(4) at page 429; *Karunaratne* v. *Ferdinandus*(5) at page 409; *Loosemore* v. *Tiverton and North Devon Ry. Co.* (6) at page 46; *Page* v. *Bowdler*(7); *Borrowman Phillips & Co.* v. *Free and Hollis*(8) at page 68.

But it is contended that the defendants are, at least, entitled to the expenses incurred in removing and washing the product of their trespasses. It is, I

(1) 6 R. 67.
(2) [1892] A.C. 473.
(3) 15 App. Cas. 223.
(4) 19 Ch. D. 419.
(5) (1902) A.C. 405.
(6) 22 Ch. D. 25.
(7) 10 Times L.R. 423.
(8) 48 L.J.Q.B. 65.

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think, for the purposes of this appeal, a sufficient answer to this contention to say—in accordance with the view of Macauley J.—that the defendants have, by their own wrongful acts, made it impossible to ascertain these expenses. The court is not called upon to speculate in such a case for the benefit of deliberate wrong-doers; they come within the wholesome rule, that if a man by his deliberately tortious act destroys the evidence necessary to ascertain the extent of the injury he has inflicted, he must suffer all the inconvenience which is the result of his own wrong. *Armory* v. *Delamirie*(1). In such a case, to quote the language of Sir Lancelot Shadwell, V.C., in *Duke of Leeds* v. *Amherst*(2) at page 596:

> In my opinion this case is to be judged not merely by the simple circumstances of evidence which are found in it, but the reference to those great principles of justice, which, as I apprehend, have always governed mankind, and have been acknowledged from the earliest times. It appears to me that it is a very right thing to hold in one's contemplation, on deciding such a case as this, what has been the uniform opinion of mankind upon such a general case as the one now presented in this cause. I take it, that the general wisdom of mankind has acquiesced in this; that the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effects of it recoil upon himself. * * * "All those who take the sword shall perish by the sword." "The mischief-maker shall suffer for the mischief he has created."

I do not overlook the method followed by Macauley J. but, having regard to the views I have expressed, it is obviously inapplicable. The allowance of 40 per cent. made by that learned judge must be taken to include the cost not only of removing and treating the deposits but of drifting and digging as well; and

(1) 1 Strange 505.

(2) 52 Eng. Rep. 595; 20 Beav. 239 at p. 242.

further indeed—if the analogy of the terms upon which the laymen worked was consistently pursued—of all the excavations required to work the ground. There is absolutely nothing before us by which, assuming that in the view taken by the learned judge his method of ascertaining the whole cost of working the deposits is a valid method, one can distinguish the cost of removing or washing from the other expenses.

The case calls for a further observation.

The learned trial judge seems to have proceeded on the assumption that the burden was upon the plaintiffs to prove the value of the mineral taken from their claim. The burden which by this course was placed upon the defendants was much lighter than, in the circumstances of this case, they had a right to expect. In the view I have taken of their conduct, they were, under the long settled doctrine of the English law, accountable for as much of the mixed products of the two claims as they did not strictly prove to have come from their own.

Warde v. *Æyre*(1); *White* v. *Lady Lincoln*(2); *Lupton* v. *White*(3); *Re Oatway*(4); *Cook* v. *Addison*(5); Story on Bailments, 41; *Spence* v. *Union Insurance Co.*(6); *Hart* v. *Ten Eyck*(7); *Attorney-General* v. *Lansell*(8); *Last Chance Mining Co.* v. *American Boy Mining Co.*(9).

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Wilson & Stackpoole.*
Solicitors for the respondents: *Pattullo & Tobin.*

(1) 2 Bulst. 323.
(2) 8 Ves. 363.
(3) 15 Ves. 432; 2 Kent 365.
(4) (1903) 2 Ch. 356.
(5) L.R. 7 Eq. 466 at p. 470.
(6) L.R. 3 C.P. 427.
(7) 2 Johns. (N.Y.) 62 at p. 108.
(8) 10 Vict. L.R. 84.
(9) 2 Martin's M.C. 150.