

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

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

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

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

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