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SUPREME COURT OF CANADA.

MARCH 21ST, 1912.

NATIONAL TRUST CO. ET AL. V. WILLIAM MILLER
ET AL.

46 S. C. R. 45.

ON APPEAL FROM COURT OF APPEAL FOR ONTARIO.

ON APPEAL FROM HON. MR. JUSTICE CLUTE.

*Mining Act—Grant of Mining Land—Reservation of Pine Timber—
Right of Grantee to Cut for Special Purposes—Trespass—Cut-
ting Pine—Right of Action.*

The Ontario Mining Act, R. S. O., [1897] c. 36, as amended by 62 Vict. c. 10, s. 10, provides in s. 39, s.-s. 1, that "the patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such land may at all times, during the continuance of the license, enter upon the lands and cut and remove such trees and make all necessary roads for that purpose." By the other provisions of the section, the patentee may cut and use pine necessary for necessary building, fencing and fuel, and other mining purposes, and remove and dispose of what is required to clear the land for cultivation; but, for any cut except for such building, fencing, and other mining purposes, he shall pay Crown dues.

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

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

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

Judgment of Court of Appeal for Ontario, 19 O. W. R. 38; 2 O. W. N. 993, reversed.