THE

ONTARIO WEEKLY REPORTER

VOL. 22 TORONTO, JULY 18, 1912. NO. 8

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—Cutting 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.

An appeal from a decision of the Court of Appeal for Ontario, 19 O. W. R. 38; 2 O. W. N. 993, reversing a judgment of HON. MR. JUSTICE CLUTE, at the trial in favour of the plaintiffs.

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

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

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

The appeal to the Supreme Court of Canada was heard by HON. SIR CHARLES FITZPATRICK, C.J.C., HON. MR. JUSTICE IDINGTON, HON. MR. JUSTICE DUFF, HON. MR. JUSTICE ANGLIN and HON. MR. JUSTICE BRODEUR.

Anglin, K.C., and J. A. McIntosh, for the appellants. The patentees brought the statutory right to use the timber for the purposes specified. *Gordon* v. *Moose Mountain Mining Co.*, 22 O. L. R. 473, and see *McLean* v. *The King*, 38 Can. S. C. R. 542, at p. 546.

Miller and Dickson cannot rely on a subsequent license from the Crown which would be to permit a wrongdoer to set up in justification permission to deprive the injured

party of his vested rights. See *Lamb* v. *Kincaid,* 38 Can. S. C. R. 516.

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

J. H. Moss, K.C., for the respondents, referred to *Freeman* v. *Roscher,* 13 Q. B. 780; *Lewis* v. *Read,* 13 M. & W. 834.

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

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

I think the question must be answered by the interpretation of sec. 39, sub-sec. 1, of the said Act, which is as follows:—

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

The grant is made expressly subject thereto and then the title declared to be qualified, in this that it is subject to the conditions imposed by the Act for the purpose of securing the carrying out of mining operations in and upon the said land.

When we turn to sec. 34 of the Act, we find the title thus qualified is in truth dependent for seven years from the grant upon certain mining developments taking place at the in-

stance of the grantee from year to year notwithstanding the apparently absolute grant, and that in default of that being done, the title may revert to the Crown.

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

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

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

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

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

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

Their legal position may have entitled them to bring an action for damages against any one without colour of right so changing the condition of things that they could not enjoy that to which they had a legitimate and reasonable expectation of enjoyment, by virtue of their implied license when it had become operative.

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

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

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

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

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

The possession of the appellant was, it is said, found by the learned trial Judge. Such possession as he had evidence of must be attributable to the title disclosed.

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

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

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

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

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

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

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

Nor do I think it meets the point in any aspect. The mining might fail to be of any value to any one and the last possibility of the miners resorting to the timber might disappear; are we to assume that the Crown could not then issue a license to cut these trees reserved as its property?

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

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

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

No case cited, when examined closely, has in truth any but an illusory resemblance to this case, save the case of *Casselman* v. *Hersey*, 32 U. C. Q. B. 333, which is distinguishable, but I may add, no more binds us than the finding of the learned trial Judge which is sought to be restored by virtue of a finding of possession.

I think the appeal ought to be dismissed with costs.

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

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

HON. MR. JUSTICE DUFF (*dissenting*):—This appeal arises out of two actions which were tried together, in which the appellants claimed reparation from the respondents for damages alleged to be suffered by them in consequence of the cutting and taking away of timber from certain mineral locations. These locations consisted of two sets (each comprising four) one of which, throughout the proceedings referred to under the head of the "National," was held by the plaintiffs in the action of the National Trust Co. against Miller, under Crown grants issued pursuant to the "Mines Act" of Ontario, sections 26 to 34. The other set, referred to in the proceedings as the "Schmidt" locations, was held by the plaintiffs in the action of Schmidt against Miller under leases granted under the authority of section 35 of the same Act. Of the timber in question all

but a very small percentage (less than eight per cent.) consisted of pine which was the property of the Crown, being expressly excepted from the grants and leases referred to. The learned trial Judge held the respondents accountable to the appellants for the full value of the pine timber taken from the locations; but on this point his judgment was reversed by the Court of Appeal. The substantial question is whether on this point the judgment of the Court of Appeal is right.

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

The trespasses complained of took place in the month of February, 1909. They were actually committed by the defendants Miller and Dickson, who had entered into a contract with the respondents, the Eastern Construction Co., to cut, from a defined area, timber for railway ties, to manufacture this timber into ties, and to deliver the ties at certain places designated on the line of the Northern Transcontinental Rw. Co., then in course of construction. The Eastern Construction Co. had a permit, issued by the Ontario Government under the authority of the Crown Timber Act, to cut timber from Crown lands within an area described in the permit, which will be sufficiently designated for my present purpose by saying that the southern boundary of it was Vermillion river—which it may be mentioned is a short river connecting two lakes north-west of Lake Superior, in Rainy River District, at a distance of about 200 miles from Port Arthur. The Eastern Construction Co. had entered into an arrangement with the firm of O'Brien, Fowler & McDougall (who were engaged in constructing part of the Transcontinental Railway under a contract with the Dominion Government), by which the Eastern Construction Co. (who were not themselves engaged in railway building) were to give to the O'Brien firm the use of their permit for a commission of one cent for each tie manufactured from timber cut under the permit; and the method by which the arrangement was carried out was that the Eastern Construction Co. engaged Miller and Dickson as contractors to cut the ties required from the area affected

by the permit, and to deliver them at the railway line where they were taken possession of by O'Brien, Fowler & McDougall.

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

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

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

Some time in April or May, Mr. Alexander McDougall, the managing director of the Eastern Construction Co., interviewed the Commissioner and Deputy Commissioner of Crown Lands, on the subject of the dues to be charged in respect of the government timber affected by these trespasses. According to the Government regulations, the Government is entitled to charge double dues for timber cut in trespass. In September, Inspector Smith, of the department, was directed by the Crown timber agent to make an examination and return of the extent of Miller & Dickson's trespasses, including the trespasses on the mineral locations.

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

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

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

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

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

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

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

A standing tree, (as Chitty, L.J., said in *Lavery* v. *Pursell*), is just as much a hereditament in point of law as a house which is standing on the land and just as much so as the mines which are underneath. I only speak now as a real property lawyer. I am bound of course by English law to say that a tree is not a chattel. There is no distinction in point of law between the timber on the land and the mines. I am dwelling on this because it appears to me to have an important bearing upon the principal argument addressed to us by Mr. Anglin on behalf of the appellants.

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

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

The authorities cited by Mr. Challis, at p. 256 of his book on the Law of Real Property, establish beyond question that a determinable fee may be validly limited to a man

and his heirs "as long as such a tree shall grow," or "as long as such a tree stands;" and the reason why such limitations are good is given in *Liford's Case*, 11 Co. 46(b), at p. 49(a), and is there said to be because a man may have an inheritance in the tree itself. It is perfectly true there is authority that where trees are sold under a contract that they shall be removed, the trees may, for certain purposes, be held to be chattels, the land being regarded simply as a warehouse for the timber; and, of course, a grant or reservation of timber may be so framed as to grant or reserve, as the case may be, only a chattel interest in the trees. We are not concerned with such cases. The language of section 39 to which I have adverted makes it impossible, in my judgment, to give any other effect to that section than this, that the property in all pine trees standing on a Crown location granted under the provisions of the Mines Act, is to remain in the Crown unaffected entirely by the grant of the location, with all the incidents normally attaching by law to such property. It would follow, of course, that, notwithstanding the grant of the location, the Crown would retain all its powers of dealing with the reserved timber and all such powers are exercisable lawfully with respect to such timber as may be exercised in respect of Crown timber growing upon any part of the Crown domain. It is material to add that, in view of the contentions which have been made in this case, in my judgment this timber falls within the scope of section 3 of the Public Lands Act which vests in the Crown Lands Department the management and sale of the public lands and forests; that such timber, moreover, is timber on the ungranted lands of the Crown, within the meaning of sub-section 1, of section 2, of the Crown Timber Act; and that consequently, it may be made the subject of licenses granted under that section. It would, I think, be an unwarranted restriction upon these words to confine their application to lands the soil of which remained ungranted. The contention that they ought to be so restricted was made by Mr. Anglin, not with much confidence, I thought, but a moment's consideration shews that the difficulties in the way of that construction are insuperable. It is obvious that the Legislature is addressing itself, in this phrase, to the question of the Crown's power of disposition over the timber which is to be the subject of a license granted under those sections. Nobody would argue, for example, that a grant of the minerals would take the land which was the subject

of the grant out of the category of "ungranted lands" within the meaning of this section, nor do I suppose anybody would argue that lands sold under the provisions of sections 13 and 14 of the Free Grants and Homesteads Act are not, with respect to minerals and timber, "ungranted lands" within the terms of the Act. With respect to the minerals reserved as well as with respect to the pine trees reserved, such lands are correctly described as ungranted lands. So it seems clear that the lands comprised within a mineral location to which section 39 applies are, with respect to the pine timber "ungranted lands." The grantee of the location holds his location, therefore, subject, as regards the pine timber, to the right of the Department of Crown Lands to deal with that timber in every respect as if it were timber standing upon soil still vested in the Crown. That being so, the provision in the first sub-section of section 39, authorising the holders of licenses to enter upon the locations for the purpose of cutting Crown timber thereon, obviously cannot be restricted to licenses in existence at the time of the grant of the location. Sub-sections 2 and 3, however, confer upon the grantees of locations certain rights in respect of this timber. These rights become exercisable only upon the happening of the statutory conditions, namely, that the timber is required for the purpose of working the mines on the location, or that there has been an actual clearing of the land for the purposes of cultivation, and that it has been necessary to remove the pine trees in the course of such clearing. It is important to observe that there is here no grant of the timber necessary for mining purposes. The right of the mine owner is to take such pine timber as may be necessary for mining purposes, provided that, when it becomes necessary to take it, it is there to be had. The grantee of the location acquires no property in the pine trees in *situ*, no assurance that they will not be removed, no right to object to the removal of them under the authority of the Crown. Until they are appropriated by him, or at all events until the necessity for taking them has arisen, they are absolutely subject to the authority and disposition of the department having the management of the Crown forests. Licenses may be granted in respect of them under the Crown Timber Act. If required for a public work, the construction of a government railway, for example, the Crown Lands Department would unquestionably have the power to devote them to such purposes. If they are cut

and taken away by a trespasser, the department has precisely the same discretionary powers of dealing with the trespass as it would have in the case of timber cut from any other part of the Crown domain.

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

It was not alleged that the appellants were engaged in any mining operations upon any of the locations which required the use of the timber, or that they had any intention of undertaking such operations. As to the locations held in fee, the evidence is perfectly clear; it is admitted by Mr. Shilton himself, explicitly, that at the time of the trial there never had been "any actual sinking of the shaft or penetration to the rock;" nor any "straight attempt to develop them and find out what quantity of ore can be found in the place." It is also admitted that there was no intention of working or developing these locations within the near future.

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

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

it is the value of the contingent right to take the trees. In estimating the value of that right, two elements must, of course, be taken into account, first, the probability of the timber ever being required for the purposes for which the statute permits it to be taken, and, second, the probability of the timber being permitted by the Department of Crown Lands to remain until it should be so required. In estimating the amount of the loss to the appellants which can fairly be said to have been the "natural and probable consequence" of the acts complained of, these two elements must necessarily be considered. We are not at liberty, however, to consider the appellants' case from this point of view. The appellants in the most explicit way refused to put their claim as a claim to the value of a contingent right; and the learned trial Judge refused to consider the points I have just indicated as in any way affecting either the appellants' right to recover or the extent of the damages to which they should be entitled. Evidence was tendered by the respondents of the practice of the Department in granting licenses to cut timber on locations such as the appellants' with a view to shewing the precariousness of the appellants' rights. This evidence was, on the objection of the appellants, rejected as irrelevant. It was, I think, irrelevant in view of the proposition of law on which the appellants based their case. The learned trial Judge also treated the probability of the locations being developed to such an extent as to require the use of the timber taken, as irrelevant. I repeat, the appellants' claim is not, and has not at any stage of the proceedings, been based upon an allegation that they have been interrupted in the exercise of their timber rights, nor have they asked to be compensated for the actual loss they have suffered by reason of being deprived of the possibility of exercising those rights in future in respect of the timber removed.

The mode in which the appellants put their case at the trial as well as in the Court of Appeal and in this Court was this. They were, they said, in possession of the soil on which the pine timber stood, and consequently in possession of the timber; that notwithstanding the fact that the timber was owned by the Crown and delivered by the Crown officers into the possession of the respondents after it was cut, the respondents are, under the authority of *The Winkfield*, [1902] p. 42, responsible for the full value of what they took

away by the trespass. As the learned trial Judge puts it at p. 201:—

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

As I understand the view of the majority of the Court, each step in this course of reasoning is assented to in the judgment of this Court, and out of deference to that view, it is, I think, my duty to examine the two principal propositions upon which it is based.

1. Were the appellants in possession of the timber in *situ?* It may be noted that there is no suggestion of a possession of the timber *de facto*. Mr. Shilton candidly admits that the appellants had never cut any pine timber. As to possession (he is a member of the Ontario Bar and solicitor on record for the plaintiffs in the *Schmidt Case*), he said that it was "probably a question of law," depending upon the statute and the instruments in evidence. As to possession in law then, let us look at the case of the leased locations first; in respect of which the point has been explicitly decided more than once. Where trees are excepted, they are, in the words of *Herlakenden's Case,* 4 Rep. 63b, severed from the possession of land during the term.

In *Liford's Case,* 11 Rep. 50a, it was held that the lessor in such a case "has the young of all birds that breed in the trees." And in *Raymond* v. *Fitch,* 2 C. M. & R. 588, it was held by the Court of Exchequer that a covenant by the lessee

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

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

A lease of land for life or for years, excepting the trees growing upon the land, leaves the trees in the possession of the lessor, with the right of having them grow in the soil; the trees then are no part of the demised premises, and the fruit or product of the trees presumptively goes with the trees. Consequently the wrongful cutting of the excepted trees by the lessee is technically an act of trespass, being committed upon property which is in the possession of another. But if the lessee wrongfully cut trees included in the lease, it is an act of waste and not a trespass, and the distinction is to be observed in the remedy.

I am unable to understand for what reason not applicable to the case of the leased locations, the timber on the granted locations could be held to have passed into the possession of the grantees. The possession of the timber, I should have thought, was just as distinct as that of a seam of coal excepted out of a grant. Indeed, it was frankly admitted by Mr. Anglin, who argued the case on behalf of the appellants, that his contention on the subject of possession would logically result in this, that the grantee in fee of land, under a grant containing an exception of the coal, would acquire by virtue of his grant alone, such a possession of any seams of coal as would entitle him to maintain an action against the under-ground trespasser for the full value of the coal taken, even in a case in which the trespass should be literally confined to the coal bed itself. That I should have thought, with great respect to the majority of the Court, who, I understand, accept the contention so advanced, distinctly contrary to all principle. I do not know why the usual rule should not be followed and the scope of the grantee's possession determined by his right of possession. *Low Moor* v. *Stanley Coal Co.*, 34 L. T. 186. I do not know why any underground trespasser should, in such a case, be held to be a trespasser as against the owner of the surface, any more than a trespasser on the surface should be held to be a trespasser as against the owner of the coal. Nor, indeed, why in this case a trespasser on the timber should in respect of his

acts of trespass on the timber be held to be a trespasser as against the owner of the soil, any more than the trespasser on the soil should be held to be *ipso facto* a wrongdoer against the owner of the timber. In the case of timber the proprietor of the timber as having the right to some extent to exclude the owner of the soil from the occupation of it, in virtue of his right to have the trees grow upon the soil, would seem rather to be in possession of the soil to the extent of the occupation thus involved. Mr. Anglin relied upon two cases; the case of the *Glenwood Lumber Co.* v. *Phillips,* [1904] A. C., and that of *Casselman* v. *Hersey,* 32 U. C. Q. B. 333. The first case involved no question of the possession of a corporeal hereditament and I cannot understand its application to such a case.

As to the second decision. With all respect to the Court that decided it, I am unable to follow the view there expressed and acted upon. It is now, however, suggested, and I understand the majority of the Court agree, although the view was not presented on the argument, that a rule was laid down in *Casselman* v. *Hersey,* 32 U. C. Q. B. 333, which, even if erroneous, has, on the principle of *stare decisis,* become a part of the law of Ontario because that decision has stood unreversed, and so far as the reports of decided cases are concerned at all events, unquestioned for a great number of years. I think it is impossible to invoke with any propriety the doctrine of *stare decisis* in connection with this decision. It is a very wholesome rule where a decision of an inferior Court has been acted upon for a great many years, so that the rule established by it has regulated the transactions of business men or the practice of conveyancers, or the proceedings of Courts, that the decision, or rather the rule which has been drawn from it, may properly be treated as constituting a part of the law applicable to such things independently altogether of the question whether or not the decision was originally founded upon satisfactory grounds. That is because in such cases as stated by Thessiger, L.J., in *Pugh* v. *Golden Valley Railway Co.,* 15 Ch. D., at p. 334, the rule may fairly be treated as having passed into the category of established and recognized law. But this is a principle which has no possible application to the point now said to have been established by the case in question. There was no dispute in that case, as there is no dispute here, as

to the meaning of the exception in the patent. At p. 340, Mr. Justice Wilson says:—

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

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

So far as the reciprocal rights of the Crown and the patentee were concerned, the decision is unquestioned, and is obviously right; nobody on this appeal raises any question with regard to that point. The proposition for which it is now sought to invoke the decision as an authority is that possession of the soil carries with it, *ipso jure*, the possession of the trees, notwithstanding such an exception, to such an extent as to entitle the grantee to sue in trespass for the value of such trees when cut and carried away by a trespasser. That is a point which never could arise except in some litigation between the grantee and a trespasser. I see no ground whatever for holding that, on that point, the decision has become part of the Ontario law. It would be really most extravagant supposition to suppose that the fact of such a point having been determined in favour of the grantee could ever have entered into the calculations of anybody when dealing with lands to which the decision could apply. There is not the slightest evidence that the decision has ever, on this point, been accepted in Ontario. It is not to be found referred to in any text-book. On the point in question, it is not to be found referred to in any reported case, and to me at all events, there is sufficiently convincing evidence of the fact that it has never regulated or affected transactions generally, from the circumstances that neither the Chief Justice of Ontario, nor my brother Idington, nor Mr. Justice Meredith, appears to have been aware that it has ever had any such operation. Then it is said that the decision involved the construction of the Free Grants and Homesteads Act, of that time; that that Act has been re-enacted since with no material variation, and that consequently the Legislature must be taken, under a well-known rule of construction, to have adopted and sanctioned the decision. I repeat that the decision in so far as it involved the construction of the exception in the patent and of the statute

upon which the exception was based, has no bearing upon any controversy in this appeal. The construction of the statute here is not in dispute. If it be assumed that the construction given to the Act in question in that Court has been adopted (which, as I say, is not disputed), the appellants have still to make good the contention on the point of possession. It would be stretching the rule relied upon to an extent not, I think, justified by any decision or by any principle, to hold that the adoption of the views expressed in *Castleman* v. *Hersey*, 32 U. C. Q. B. 333, as to the meaning of the exception involved the adoption of the views there expressed on the subject of possession. But the truth is that the rule referred to is one which must always be applied in this country with a great deal of caution. Every one knows that statutes are often consolidated and re-enacted without careful reference by the Legislature, or by the draughtsman of the statutes, to decisions, which the Courts may have given upon the construction of the words employed. It was for this reason that, in 1891, the Dominion Parliament passed an Act excluding the rule of construction referred to in the interpretation of Dominion statutes and that enactment was adopted in 1897 in the province of Ontario, as one of the provisions in the Interpretation Act, included in the Revised Statutes of that year. These are the relevant sections. Section 7, sub-sec. 1, is as follows:—

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

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

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

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

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

2. But apart from this, is it really the law of England, as Mr. Anglin contended, and as I understand the majority of the Court to hold, that the doctrine of *The Winkfield*, [1902] p. 42, and of *Glenwood Lumber Co.* v. *Phillips*, [1904] A. C., has any application to trespasses in respect of corporeal hereditaments? The rule as I understand it is correctly stated in Mayne on Damages, at p. 513:—

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

The damages will vary considerably, according to the plaintiff's interest in the land. This is obviously just, both to prevent the plaintiff getting extravagant recompense when his interest is on the point of expiring, or very remote, and to prevent the defendant being forced to pay for the same damage several times over. The same act may give rise to different injuries; the tenant may sue for the injury to his possession, and the landlord for the injury to his reversion. And so where several are entitled to succession as tenants for life, in tail, in fee, each can only recover damages commensurate to the injury done to their respective estates. Hence where a stranger cuts down trees, the tenant can only recover in respect of the shade, shelter, and fruit, for he was entitled to no more; and so it is where the occupant is tenant in tail after possibility of issue extinct; but the reversioner or remainderman will recover the value of the timber itself.

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

The appellants' contention must be rejected for another reason. Both Miller & Dickson and the Eastern Construction Co. became lawfully entitled to deal with the pine timber which had been felled on the locations by reason of the direction given to them by the Crown timber agent at the end of February. The evidence of the Crown timber agent himself is precise upon the point that his direction to Miller & Dickson to remove what had already been cut referred to the timber cut upon the locations as well as to timber cut upon the Crown lands. The pine was the property of the Crown, and there can be no possible question that the Crown

Lands Department would, in the circumstances existing, be acting entirely within its authority as having the management of the Crown forests, in disposing of the timber so felled, after the manner which it deemed to be best in the public interest. The Crown timber agent says, moreover, that he acted in accordance with a settled rule; that he gave the direction with the object of having the ties reach their intended destination. It might, he says, have been a very serious thing to prevent the delivery of the ties. He professed to act with the authority of the Crown Lands Department in what he did; and what he did was afterwards ratified by them. The evidence on this point is undisputed and it is conclusive. The agent reported stating that pine had been cut from the mining locations as well as from Crown lands outside the limits of the Eastern Construction Co.'s permit. The Department of Crown Lands afterwards directed the inspector to ascertain the quantity of pine timber cut from the locations, and, as I have already mentioned, the Eastern Construction Co. was billed for dues for this timber in accordance with the scale in use in respect of timber cut under the authority of a permit, thus treating the timber as timber cut under such authority. It is, therefore, incontestable that from the end of February onward the possession of this timber and of the ties manufactured from it, whether in the Eastern Construction Co., or in the O'Brien firm, or in the Dominion Government, was a perfectly lawful possession, and that from that time onward, the persons in possession had full authority to deal with it.

Some stress was laid upon the letter of the Deputy Commissioner of the 18th March, but reading that letter in connection with the acts of the departmental officials, it is quite clear that the Deputy Commissioner could have intended only to refer to timber to which the appellants were entitled. The letter of Mr. Margach advising the department of the trespasses upon the locations, was produced at the trial, although not actually put in evidence, and the letter written in November is explicit to the effect that the bill for dues covers the Crown timber taken from the mining locations as well as that taken from lands still vested in the Crown. No other conclusion seems to be possible from the undisputed facts than that at which the Court of Appeal arrived, namely, that from the date of Mr. Margach's instructions to Miller & Dickson to remove the timber cut, the respondents were dealing with all the Crown timber in question under the

authority of the Crown Lands Department. To rely on this is not, as Mr. Justice Meredith points out, to set up a *jus tertii*.

The respondents are setting up their own rights. It is to be noted, moreover, in this connection, that the facts were brought out in the plaintiff's own case. Inspector Smith called by the appellants, at p. 64 of the appeal case, says that it was by the instructions of the Government that in September he made the count of ties from the mining locations, and at p. 73, that instructions were given to Miller & Dickson to remove the ties from the mining locations, and on the same page, that the purpose of the count of ties made by him in September, 1909, was to enable the Government dues to be collected. It would be impossible, I should have thought, to sustain in these circumstances the claim for the full value of the timber, even if in a general way the decisions referred to could be held to have any application.

Let us take the case of the finder, for example. Is it really the law that a trespasser having taken an article from a finder is liable to pay the full value of it to the finder, notwithstanding the fact that before action the owner has come into the matter and has authorized the trespasser to keep the article which is the subject of the trespass? Is it conceivable that in such circumstances, unless special damages could be proved as attaching to the trespass itself as distinguished from the detention of the article, that the finder could recover more than nominal damages for the wrong done to his possession? I should have thought it was plain he could not.

Another ground is now suggested that was not suggested at the trial or in the Court of Appeal, or on the argument before us, for sustaining the judgment of the learned trial Judge. It is said that, assuming the appellants had not possession of the trees in *situ*, they came into their possession when they were felled to the ground and that the possession so acquired was sufficient to entitle them to maintain detinue and to recover the full value of the timber as it lay there. To this ground of recovery the objection to which I have just adverted, namely, that by reason of the act of the Crown officials the respondents became, before the action was brought, entitled as against the appellants to the possession of the timber, seems equally applicable. But it appears to me to involve a very considerable strain upon the principles of English law relating to the subject of possession to hold

that the timber in question ever came into the possession of the appellants as chattels. Consider the facts. The trespasses in question began about the first of February. The contractors, Miller & Dickson, proceeded in this way. They cut roads into territory south of Vermillion river, including the sites of the locations as well as the adjoining Crown lands, and at various places in the vicinity of these roads they started concurrently the felling of timber. As the timber was felled it was manufactured into ties on the spot, and these ties were hauled to the piling stations. In this way they proceeded until the end of February without any interference. There was nobody in the locality, or within hundreds of miles of the locality, having any authority on behalf of the appellants to interfere with them. The only person in the district having authority to take possession of the timber, the Crown timber agent, confirmed the possession of the contractor when the cutting came to his notice. Throughout the course of the whole proceedings, it has never been suggested on behalf of any of the parties that the respondents had not *de facto* possession of the timber from the time it was felled until it was delivered at the piling station. It is perfectly obvious from the evidence that they had and must have had as much physical control over the timber as in the circumstances would be necessary to constitute possession in fact. So far from disputing this, counsel for the appellants more than once during the trial emphasized the circumstance that the manufacturing and the hauling of the ties for delivery proceeded contemporaneously with the cutting. (See, for example, p. 158). And I have already referred to the observation of Mr. Shilton that the possession upon which the appellants relied was a possession implied by law. The possession relied upon by Mr. Anglin in his argument before us was the possession upon which the learned Judge based his judgment, and upon which the claim was based at the trial, namely, the possession of the trees as they stood upon the soil. It was not suggested that the respondents had not *de facto* possession from the time the trees were felled. It would be necessary, therefore, in order to make good this position, to rest upon some rule of law vesting possession of the felled timber in the holders of the locations solely by reason of their possession, that is to say, their legal possession of the soil upon which the timber fell, as against the *de facto* possession of Miller & Dickson. I do not think there is any

such rule of law, and if authority were needed for the purpose of negativing such a rule, it may be found in the case of *Bridges* v. *Harmsworth*, 21 L. J. Q. B. 75, in which it was held that a purse found lying on a shop floor in the day time while the shop was open for business, by a customer, was not, while lying there, in the possession of the owner of the shop.

It is suggested, however, that some such rule is deducible from the language of Lord Davey in *Glenwood Lumber Co.* v. *Phillips*, [1904] A. C. The circumstances with which Lord Davey was there dealing were these: timber had been cut by a trespasser upon Crown lands. Subsequent to the cutting a lease was granted. After the granting of the lease and occupation under it by the lessee, the timber which had been so cut was removed by the trespassers. It was held that the lessee, as lessee and occupier, had a sufficient possession of the timber to entitle him to maintain detinue for the value of it. Of course, in its broad features, the case is immediately differentiated from the present case by the intervention of the Crown Lands Department, and the authority given by the Crown officers to the respondents in this case to deal with the timber before the action was brought. In the *Glenwood Case*, [1904] A. C., the granting of the lease and the occupation by the lessee under it, had the effect of vesting in the lessee the possession of the lands and a right to the possession at least for the benefit of the Crown of all chattels on the lands to which the Crown had a right of possession at the time of the granting of the lease, and which were not intended to be excepted from the lessee's possessions. Such chattels came under (to use the phrase of Patteson, J., in *Bridges* v. *Harmsworth*, 21 L. J. Q. B. 75, the "protection of" the lessee's occupation. The lessee, therefore, clearly acquired a right to the possession of the timber which was felled and was lying within the limits of the demised property. This right of possession alone would be sufficient to entitle the lessee to maintain detinue even against the *de facto* possession of the trespassers, and there is no suggestion in the report of the case that the trespassers had *de facto* possession. In the case before us the trees in question had been expressly excepted from the possession of the appellants, and stood exactly in the same position as, for example, timber felled without authority upon adjoining Crown lands, and piled upon ground within the limits of one of the appellants' locations. The argument under con-

sideration logically applied would give a right to the holders of the locations to recover the full value of such timber, notwithstanding subsequent permission from the Crown Lands Department given to the trespasser to appropriate the timber. That is a result which cannot, I think, be fairly deduced from the *Glenwood Case,* [1904] A. C.

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

As to the tamarac, there is no ground, so far as I can see, upon which Miller & Dickson can be excused. I am inclined to think that they are not responsible for damages arising from the trespass to the soil so far as such trespass may have been merely incidental to the cutting and carrying away of the pine trees. There is certainly much to be said for the proposition that as an incident of the property in the trees the Crown would have the right to deal with a trespasser in all respects as if the trespass had been committed on Crown lands, and consequently to waive all wrongful acts incidental to the trespass, in order to claim either the value of the timber cut or compensation for it on the footing of the trespasser having acted under a permit, if the circumstances were such as to entitle the Crown to make the latter claim. In this case the Crown was clearly, I think, entitled to take that position. See the judgment of Bowen, L.J., in *Phillips* v. *Homfray,* 24 Ch. D. 466. The amount involved in this point is, however, trifling.

The Eastern Construction Co., however, with regard to the whole case, stand in a totally different position from that of Miller & Dickson. The learned trial Judge has found that they did not authorize the trespasses, that is to say, that the trespasses were not authorized by anybody who was in a position to bind them. They were held liable on the ground, as he puts it, that they took the ties with a full knowledge of the circumstances in which they had been obtained by Miller & Dickson; that they paid for them in part, and that they sold them. He concludes that by these acts they adopted what Miller & Dickson did, and made themselves responsible for it. On this branch of the case, I think, the learned Judge has fallen into some error in failing to appreciate, in its bearing upon the conduct of the Eastern Construction Co., the fact that all parties from the time Miller & Dickson were stopped cutting by the orders of the Crown timber agent, dealt with the Crown timber and the

ties which had been manufactured from Crown timber with the authority of the Crown Lands Department. Prior to that time there is no evidence that the Eastern Construction Co. had done any act which could be construed as an adoption of the wrongful acts of Miller & Dickson. Samuel McDougall, Sr., who, as I have pointed out, was authorized only to count the ties, to classify them, and to submit them for inspection to the Government inspector, was aware of the fact that some of these ties had been cut from the appellants' locations. But it is not disputed that the ties from the appellants' locations were mixed up by Miller & Dickson with ties taken from the Crown lands in such a way as to make identification impossible: See appellants' factum, p. 2; and as I have pointed out, it is not suggested that Samuel McDougall, Sr., had any knowledge of the cutting of tamarac from the mining locations, that is to say, of the cutting of any timber which was the property of the owners of those locations. McDougall had no authority to do anything on behalf of the Eastern Construction Co. amounting to an adoption of the trespass, any more than he had power to authorize a trespass antecedently. When the responsible officials of the Eastern Construction Co. became aware of the trespass Miller & Dickson had already received authority from the Crown Lands Department to deal with the Crown timber as if it had from the beginning been rightfully in their possession. What was afterwards done in dealing with the timber can fairly be attributed to this authority. It is perfectly true that during the month of April, after the Eastern Construction Co. had become aware of the trespasses, they paid considerable sums of money to Miller & Dickson, but it should be remembered that the timber taken from the locations constituted only about one-sixth of the timber cut by Miller & Dickson. The ties, as I have said, were inextricably mixed, and until Inspector Smith made his report nobody was in a position to know the exact extent of the trespass upon the locations. That was not until September. The evidence is perfectly clear that Miller & Dickson at first represented to Mr. Alexander McDougall that the trespass upon the locations was very slight. The appellants themselves were unable to give any sort of accurate information, and it was not until the end of June that they assumed the utterly unreasonable position that none of the ties cut by Miller & Dickson south of Vermillion river should be used in railway construction. It is perfectly clear that when this position was taken by the

appellants the Eastern Construction Co. were absolutely entitled under the authority of the permission given by the Crown timber agent, to make use of all ties cut from timber owned by the Crown, whether on the locations or off the locations. As to the timber not the property of the Crown, it consisted exclusively of tamarac, and there is no reason for supposing that at this time, at all events, any of the officers of the Eastern Construction Co. knew that any tamarac had been taken from the locations; and of the tamarac ties cut from the locations, there were fewer than 900 altogether. Notwithstanding all these circumstances, the Eastern Construction Co. did retain a sum almost sufficient to pay Miller & Dickson all that Miller & Dickson would have been entitled to receive from them for the cutting and manufacturing of ties to the number of those manufactured from timber cut from the mining locations.

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

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

I think the appeal should be dismissed.

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

The defendants, Miller & Dickson, cut and removed the timber under contract for their co-defendants, the Eastern Construction Company, who obtained the lumber and ties so produced. For the cutting and removal of the pine the Court of Appeal, reversing Clute, J., has held that the ap-

pellants cannot recover from either of the defendants. Under its judgment the Eastern Construction Co. is also relieved of liability in respect of the other items of the plaintiff's claim.

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

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

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

The principal question is as to the right of the appellants to recover against any of the defendants in respect of the cutting and removal of the pine. The Crown grant and Crown lease under which the appellants respectively claim are subject to the provisions of the Mines Act, R. S. O. 1897, ch. 36, and contain the reservation prescribed by section 39 of that statute, which, as amended by 62 Vict. ch. 10, sec. 10, reads as follows:—

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

(2) The patentees or those claiming under them (except patentees of mining rights hereinafter mentioned) may cut

and use such trees as may be necessary for the purpose of building, fencing and fuel, on the land so patented, or for any other purpose essential to the working of the mines thereon, and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation.

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

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

That such an exception of standing trees (it appears to be an exception though called a reservation, *Douglas* v. *Lock*, 2 A. & E. 705, at pp. 743 *et seq.*), has the effect of "dividing the trees in property from the land, although *in facto* they remain annexed to the land," *Herlakenden's Case*, 4 Rep. 62b, and "parcel of the inheritance" *Liford's Case*, 11 Rep. 48b, is old and undisputed law. It is argued that of the part of the inheritance so excepted from a grant the grantee has no possession in law, although the land on which the trees stand is his, the right to nutriment out of it for the trees being the only interest in it of the grantor. *Leigh* v. *Heald*, 1 B. & Ad. 622, at p. 626. It may be that the rule of English law which ascribes to the person in possession of land the possession of chattels upon it and, as against a trespasser, title to them by reason of such possession, thus enabling him to maintain an action for the wrongful taking away of them by a stranger and to recover as damages their full value, although they are the property of another, *Glenwood* v. *Phillips*, [1904] A. C. 405, at pp. 410-11, does not apply to trees reserved out of a grant or lease while standing, and that, apart from any proprietary or licensees' interest in the pine trees which the statute gave them, the plaintiffs could recover in respect of the mere felling of such trees only damages for the wrongful entry on their lands. But that possession such as the plaintiffs had of their mining lands would, notwithstanding an un-

qualified reservation in the Crown patent and Crown lease of the pine trees, entitle them to maintain an action in detinue against a stranger wrongfully cutting and removing such trees and to recover as damages the value of the timber taken was held by the Upper Canada Court of King's Bench in *Casselman* v. *Hersey*, 32 U. C. Q. B. 333, decided in 1872. The possession which the plaintiffs in that case had of the lands from which the timber was removed was much the same as that which the present plaintiffs had of their mining locations. Upon the sufficiency of such possession that decision has since been approved in *Kay* v. *Wilson* (1877), 2 Ont. A. R. 133, at p. 143, and in *Mann* v. *English* (1876), 38 U. C. Q. B. 240, at p. 249; (see Lightwood on Possession of Land, p. 60); and I do not understand it to be questioned in the judgment of the Court of Appeal in the present case. What was decided by the other branch of the judgment in *Casselman* v. *Hersey*, 32 U. C. Q. B. 333, has never been challenged in Ontario, so far as I am aware, until the decision of the Court of Appeal now before us, in which, it is noteworthy, no allusion is made to that case. It is cited with approval on the question of damages by Osler, J., in *Johnston* v. *Christie* (1880), 31 U. C. C. P. 358, 362. It is probably now too late to question its correctness, *Trust & Loan Co. of Upper Canada* v. *Ruttan*, 1 Can. S. C. R. 564, 584.

Since *Casselman* v, *Hersey*, 32 U. C. Q. B. 333, was decided the statutes of Ontario have been thrice revised and consolidated. On each occasion the Legislature re-enacted the provision of section 39 of the Mines Act R. S. O. 1897, ch. 36, for the reservation of pine substantially in the form in which it is now found. Vid. R. S. O. 1877, ch. 29, sec. 12; and R. S. O. 1887, ch. 31, sec. 12. The same course has been followed in regard to sections 13 and 14 of the Free Grants and Homesteads Act, R. S. O. 1897, ch. 29, which make similar provisions. Vid. R. S. O. 1877, ch. 24, sec. 10; 43 Vict. ch. 4, secs. 2, 3, and 4; R. S. O. 1887, ch. 25, secs. 10 and 11. Both the Mines Act and the Free Grants Act contain reservations of pine timber in terms substantially the same as those which were passed upon in *Casselman* v. *Hersey*, 32 U. C. Q. B. 333. In re-enacting them without making any attempt to change the effect which such a reservation was held to have, or to alter or restrict the rights which the grantee, notwithstanding it, was held to enjoy, the Legislature must be understood to have done so

in the light of the interpretation put to the Courts upon the language which it used. *Clark* v. *Wallond*, 52 L. J. Q. B. 320, 322. The following provision of the Interpretation Act of the R. S. O. 1897, ch. 1, sec. 8, cl. 57, first became law in Ontario in 1897:—

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

There is no similar clause in the Interpretation Act in the consolidation of 1877, nor in that of 1887. Whatever may be said, therefore, of the effect of re-enactment of these statutes in the revision of 1897 in view of sub-sec. 57 of section 8 of the Interpretation Act of that year, it cannot be assumed that the Legislature re-enacted the sections of the Mining Act and of the Free Grants Act in 1877 and again in 1877 in ignorance of the judicial interpretation which had been put upon such a reservation of pine timber as they provided for. When re-enacted in 1897 not only had the language of these statutory provisions received judicial construction, but that construction must be deemed to have already had legislative recognition and acceptance. Thousands of grants and leases of mining and homestead lands have been taken and paid for under this legislation in the interval of forty years since the decision in *Casselman* v. *Hersey*, 32 U. C. Q. B. 333. In these circumstances, even if we entertained doubts as to the effect of the reservation of pine timber under section 39 of the Mines Act, we should, in my opinion, if necessary, apply the doctrine of stare decisis and decline to disturb the legal rights which Crown patentees were declared to possess under language substantially the same by a judicial decision rendered so long ago and which has been since acquiesced in and never questioned until the present time. Casgrain v. Atlantic & North Western Rw. Co., [1895] A. C. 283, 300; Ex parte Campbell, L. R. 5 Ch. 703, 706; Whitby v. Liscombe, 23 Gr. 1, 17, 18, 21, 27, 35; Macdonell v. Purcell, 23 Can. S. C. R. 101, 114.

But in the case at bar the reservation to the Crown was not unqualified, as it appears to have been in the *Casselman Case*, 32 U. C. Q. B. 333. The present plaintiffs had attached to their mining lands a right not merely to enjoy, until they should be cut down by some duly authorised

licensee of the Crown, the shade of the pine trees and any other advantage to be derived from their standing on the lands, but they also had the very substantial right of themselves cutting down and using these trees for building, fencing and fuel on the land so obtained or for any other purposes essential to the working of the mines thereon, and, subject to payment of Crown dues, also the right to cut and dispose of all trees required to be removed in actually clearing the land for cultivation. Of this substantial interest in the pine trees the plaintiffs were deprived by their being cut down by the defendants, because, upon their severance from the land, whether effected by a duly authorised Crown licensee or by a trespasser, their special interest ceased just as the special interest or property in timber trees of a lessee holding under a lease without reservation of timber cease upon severance of the trees from the soil however effected. *Herlakenden's Case*, 4 Rep. 62b. The plaintiffs' statutory rights were confined to cutting for certain purposes and to taking and using what they themselves so cut. They had no statutory right to take or use what the defendants cut, although such cutting was done in trespass. For the wrongful destruction by mere trespassers of their right to cut and use the pine trees so annexed to their property they had, in my opinion, a right of action. *Nuttall* v. *Bracewell*, L. R. 2 Ex. 1; *Jeffries* v. *Williams*, 5 Ex. 792; *Bibby* v. *Carter*, 4 H. & N. 153; Smith's L. C. (11th ed.), vol. 1, pp. 358-60 The evidence shews and the learned trial Judge has found that there was not enough timber on the lands for the mining purposes of the plaintiffs. As wrongdoers and trespassers the defendants cannot be heard to say that the plaintiffs might never have used this timber for such purposes. As against them in assessing damages it must be assumed in the plaintiffs' favour that, but for the wrongful interference of the defendants, they would have had the full benefit of the rights conferred upon them. If entitled to any damages in respect of the destruction of their interest in the pine trees, whether it be regarded as proprietary in its character or as merely an interest of licensee, the plaintiffs in this aspect of the case would seem to be entitled to recover the full value of what was wrongfully cut. But I do not rest my judgment on this ground.

On another ground the plaintiffs' claim against the persons responsible for the wrongful removal of the pine trees seems to me unanswerable. When those trees were felled

the plaintiffs' special interest or property in them ceased. But it did not vest in the wrongdoers. Neither did they acquire by their trespass the rights of the Crown. As the pine trees lay upon the ground they were the property of the Crown. But for the reservation they would have been the plaintiffs' property. The cutting, however, though wrongful, converted that which had been a part of the inheritance into chattel property. *McLaren* v. *Ryan*, 36 U. C. R. 307, 312. Lying on the plaintiffs' lands, those chattels, though belonging to the Crown, were legally in their possession because of their possession of the land.

Even if continuous physical possession of the pine trees by Miller & Dickson, from the moment when they were cut until they were removed from the plaintiffs' lands would have precluded legal possession of them as chattels being ascribed at any time to the plaintiffs as owners and lessees respectively of such lands, there is no proof of such continuous physical possession in the record and in the absence of proof it will not be presumed in favour of trespassers. "Delivery is favourably construed; taking is put to strict proof." The evidence of continuous physical possession, if they had in fact kept such possession, lay peculiarly within the knowledge of the defendants and the burden was certainly upon them to produce it. Taylor on Evidence, 10th ed., 376 (a). As trespassers Miller & Dickson could have no constructive possession of anything of which they had not actual possession. While, if a person enter under title, his possession of part of a tract of land will generally be regarded as giving him constructive possession of the entire property, where the entry is without title, the legal possession of the trespasser, at all events as against the person lawfully entitled to possession, is limited to the area of his effective occupation. So in the case of movables, a man who is not entitled to take possession can obtain possession only of that which he actually lays hold of. *Ex parte Fletcher*, 5 Ch. D. 809, 813. The same rule applying to land and to chattels in regard to the extent of wrongful possession there is no reason why they should be subject to different rules as to the duration of such possession. In the case of land the possession of the trespasser ceases as soon as his actual occupation comes to an end. *Trustees Executors & Agency Co.* v. *Short*, 13 App. Cas. 793, 798. By an application of the same principle on the cesser of the physical possession

of movables held by wrong, the law will not attribute to the wrongdoer continued constructive possession of them, but the right to possession will draw after it the constructive possession and the person having such right will be deemed to have the legal possession. "Possession acquired by trespass is a continuing trespass from moment to moment so long as the possession lasts." There is no presumption of the continuance of illegality: at all events, its continuance will not be presumed in aid of a guilty person seeking thus to improve his legal position. Moreover, "in the case of goods legal possession is recognised more readily than in the case of land and mere right to possession is sometimes described as 'constructive possession' and is allowed the advantages of legal possession." Encyc. Laws of England, (2nd ed.), vol. II., p. 327. The removal of the pine trees from the plaintiffs' lands by Miller & Dickson should, in my opinion, be regarded as a taking of them from the possession of the plaintiffs. Either on this ground, or because their right to possession gave them, as against the trespassing defendants, "the advantages of legal possession," they had a status to maintain this action.

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

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

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

The respondent, on the other hand, was, in their Lordships' opinion, lessee and occupier of the lands, and, as such, had lawful possession of the logs which were on the land. It is a well-established principle in English law that posses-

sion is good against a wrong-doer, and the latter cannot set up a *jus tertii* unless he claims under it. This question has been exhaustively discussed by the present Master of the Rolls in the recent case of *The Winkfield*, 1902, p. 42. In *Jeffries* v. *Great Western Rw. Co.*, 1856, 5 E. & B. 802, at p. 805, Lord Campbell is reported to have said: "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him having no title in himself is a wrong-doer, and cannot defend himself by shewing that there was title in some third person, for against a wrong-doer possession is title." The Master of the Rolls, after quoting this passage continues: "Therefore, it is not open to the defendant, being a wrong-doer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all, and therefore, as between those two parties, full damages have to be paid without any further inquiry." Their Lordships do not consider it necessary to refer at any greater length to the reasoning and authorities by which the Master of the Rolls supports this conclusion, and are content to express their entire concurrence in it. *Glenwood* v. *Phillips*, [1904] A. C. 405, 410.

I am unable to distinguish between the act of the defendants in removing the pine logs from the plaintiffs' lands (the cutting of them is not material to this aspect of the case) and the act of the appellants in removing the logs in the *Glenwood Case*, [1904] A. C. 405, 410, which was held to entitle the respondent (plaintiff) to recover as against the trespassers the full value of the logs removed on the ground that when removed they were in the possession of the respondent as lessee of the land upon which they lay and that, as against the trespasser, such possession was equivalent to title.

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

The decision in *Casselman* v. *Hersey*, 32 U. C. Q. B. 333, may be upheld on the ground that after they were cut and lay as chattels on the plaintiffs' land the defendant in that case wrongfully took away the logs, although Wilson, J., no doubt, held the view that the lessee or grantor when the trees are excepted is in possession of them as against the stranger and wrong-doer, (p. 341).

See, too, *McLaren* v. *Ryan*, 36 U. C. Q. B. 307, 312.

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

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

The evidence of Alex. McDougall is relied upon to support this finding of the learned appellate Judge. I have seldom perused testimony more unsatisfactory. Had the defence now relied upon been pleaded this evidence would not support it. *A fortiori* it does not justify an appellate Court giving effect to a contention not presented on the pleadings, and not raised at the trial and which the plaintiffs had no opportunity to meet. Assuming that it was competent for the Crown Lands Department, after the pine had been all cut and removed from the plaintiffs' lands and delivered to the Eastern Construction Co., to make an agreement in respect of it which would have the effect of destroying the plaintiffs' vested right of action, the evidence in the record falls far short of establishing such an agreement.

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

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

There is no allusion in this letter to the cutting on the plaintiffs' locations, and in view of the attitude of the de-

partment in regard to the rights of the plaintiffs as mining locatees as against the trespassing of lumbermen, disclosed by a letter of Mr. White, the Deputy Minister, to which I am about to refer, it would seem reasonably certain that the permission for removal given by Margach was intended to cover only timber cut on the Crown lands. The cutting on the plaintiffs' locations appears to have been brought to the attention of the department later in the same month. On the 18th March, Mr. White writes to the plaintiffs:—

"Toronto, March 18th, 1909.

Gentlemen:—

Referring to your letter of the 15th inst. with regard to the cutting of Messrs. Miller & Dickson on territory south and east of Vermillion river outside of area covered by permit granted to the Eastern Construction Co., I beg to say that the department has been in communication with Mr. Crown Timber Agent Margach, in relation to this cutting, and he has been fully instructed in the matter so far as relates to lands of the Crown, but if these parties are removing illegally timber from locations to which you may be legally entitled, it would seem to be a matter between you and the parties cutting and taking the timber.

Your obedient servant,

Aubrey White,

Deputy Minister."

There is nothing to shew that the department ever changed its attitude as expressed in this letter in regard to the plaintiffs' rights, or undertook in any way to interfere with or derogate from them, or to give to the defendants a status which would enable them to do so. The timber in question was not cut for the purpose of building, fencing or fuel on the mining lands or for any purpose essential to the working of the mines. If cut by the appellants in the course of clearing for cultivation it would have been subject to payment of Crown dues. The defendants having cut in trespass were, no doubt, liable to the Crown for penalties. If the Minister of Crown Lands saw fit to waive the Crown's right to exact penalties and, as a matter of grace, in lieu thereof to accept from the defendants merely ordinary dues in respect of the timber of which they had possession, it by no means follows that he put, or intended to put them for all purposes in the same position as if they had cut under license. The acceptance by the Crown of dues in such circumstances is at the most an equivocal act. It is entirely consist-

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

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

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

But the timber and ties cut on the plaintiffs' lands were all delivered either to the Construction Company or to its nominees. The company received property, or the proceeds of property, title to which, because it was wrongfully taken from the plaintiffs' possession, must, in the circumstances of this case, as against all the defendants, be deemed to have been in the plaintiffs. The trial Judge has expressed the view that, in crossing the line of their license limits and in entering upon the plaintiffs' mining locations, Miller & Dickson acted with the concurrence, if not under the direction of Mr. Samuel McDougall, Sr., who represented the Eastern Construction Co. Although I have no doubt that his powers and authority were much wider than either he or his nephew Alex. McDougall, will admit, whether it was within the scope of his agency for the company to give such a direction so as

to bind his principals and to render it in law their direction is possibly doubtful on the evidence. But there is in the testimony of Dickson, Miller, Smith, McLean and Proud, abundant evidence to warrant a finding that Samuel McDougall, Sr., knew from the first that Miller & Dickson were cutting for his company on the plaintiffs' lands. The learned trial Judge says:—

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

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

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

I entirely agree with that statement of the law—and, as I have already said, the finding upon which it is based is fully supported by the evidence. Why the Court of Appeal, while accepting this finding, by its formal judgment relieved the construction company from liability for the tamarac which they got, it is difficult to understand. The discrepancy has not been explained.

Whatever may have been the extent of Samuel McDougall's authority, his position at the Miller & Dickson camp and his relations to the construction company were such that I have no difficulty in imputing to that company the knowledge which he had of the fact of the wrongful cutting on the plaintiffs' locations. *Commercial Bank of Windsor* v. *Morrison*, 32 Can. S. C. 98, 105. That knowledge was material to the business in which he was employed; it came to him in the course of his employment; and it was undoubtedly of such a nature that it was his duty to communicate it to his principal. Halsbury's Laws of England, vol. 1, pp. 215-6; Bowstear on Agency, 4th ed., 346.

The Eastern Construction Co. having taken the timber and ties with notice that they were wrongfully cut and removed from the plaintiff's lands, is, in my opinion, equally liable with Miller & Dickson to the plaintiffs in detinue in

respect of both the pine and the tamarac so removed. (See Pollock and Wright on Possession, p. 151, note).

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

For these reasons to the extent indicated I would allow the appeal of the plaintiffs and would restore the judgment of Clute, J., against the Eastern Construction Co.

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

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

Appeal allowed with costs.

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

Shilton, Wallbridge & Co., for the appellants, Schmidt and Shilton.

Dowler & Dowler, for the respondents.

COURT OF APPEAL.

JUNE 18TH, 1912.

THOMPSON v. GRAND TRUNK RW. CO.

3 O. W. N. 1392.

Negligence—Railway—Person Lawfully in Station Yard Killed by Being Thrown from Wagon—Dom. Rw. Act, s. 284—Defect of Roadway.

Action by plaintiff to recover damages for death of her husband through alleged negligence of defendants. Deceased was a teamster employed to unload a car of defendants in their station yard at Caledonia. He was killed by being thrown from his wagon by reason of the want of repair of the roadway in the station yard. Defendants claimed that the roadway in question was not intended as such, and that another and proper roadway had been provided, which was the only one that deceased was entitled to use. The evidence shewed, however, that the first roadway had been for some time continuously used by teamsters in unloading cars, and that it was very convenient for this purpose.

TEETZEL, J., entered judgment in favour of plaintiff for $5,000 and costs, on findings of the jury.

COURT OF APPEAL dismissed appeal therefrom with costs.

An appeal by the defendant from a judgment of HON. MR. JUSTICE TEETZEL, and a jury in favour of the plaintiff.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

D. L. McCarthy, K.C., for the defendants, appellants.

H. Arrell, for the plaintiff, respondent.

HON. MR. JUSTICE GARROW:—The plaintiff sues as administratrix of her late husband John Thompson, of the township of Seneca in the county of Haldimand, to recover damages caused by his death through the alleged negligence of the defendants.

The deceased was a teamster and was employed to unload gas pipes from a car standing upon the defendants' track in their station yard at Caledonia station. On the morning of May 17th, 1911, he went with his team to begin the work, and while in the station yard was thrown from his waggon and killed. The immediate cause of the jolt which threw him from the waggon was the sudden descent of one of the wheels into a rut in the roadway, which roadway, it is said by the plaintiff, was out of repair, such lack of repair being the negligence of which the plaintiff complains. The defendant denies that the roadway in question formed any part of the station yard, and says that another and sufficient roadway along the other side of the track had been supplied and properly maintained, and was the only roadway which the deceased was entitled to use.

The roadway in question is upon the former site of a track which had for some reason been removed southerly a distance of about ten feet some two years before the accident—after which, as the undisputed evidence shews, teams began to be driven in and out over the ground formerly occupied by that track, a custom which continued without interruption by the defendant until the accident in question. There was some evidence that the condition of the road at the time of the accident had continued for some time prior thereto. The rut is described as two feet long and about eight inches deep.

The defendant called no witnesses.

At the close of the plaintiff's case a motion of nonsuit was made upon the ground that no cause of action had been

established, which was refused, and the case went to the jury, who in answer to questions found that the place on which deceased was driving at the time of the accident was used by the public openly and constantly as a road for teams before the accident, that the defendant was guilty of negligence in allowing the rut or hole to remain as it existed at the time of the accident, that such negligence was the cause of the injury, that there was no contributory negligence, and they assessed the damages at the sum of $5,000 for which sum the plaintiff has judgment.

The case could not, I think, have been withdrawn from the jury. The material issues were upon questions of fact, and the findings are, I think, warranted by the evidence. The Railway Act by sec. 284 imposes a duty upon railway companies to furnish adequate and suitable accommodation for the carriage, unloading and delivery of traffic. And although the road upon the south side was the better road, there was nothing to indicate that the other road upon the north side was not also to be used as part of the accommodation furnished. That it was being used and used extensively and continously is abundantly clear from the evidence. And that it was out of repair and dangerous to the knowledge of the station agent in charge, long before the accident, was not on the evidence an unreasonable inference, especially as the station agent was not called to deny it. That it was necessary in order to reach the northerly roadway to drive over the rails which lay between the one road and the other, while of some significance, was certainly not under the circumstances conclusive.

The appeal in my opinion fails and should be dismissed with costs.

HON. MR. JUSTICE MEREDITH:—There was evidence upon which the jury might find that the road, on the south side of the track, was apparently one intended to be used for the purpose of loading and unloading cars standing on the track lying between it and the road on the north side of it; also that the man who was killed was proceeding by way of the northerly road to the southerly one, there to unload the car, and was acting with ordinary care in so doing; and that the accident was caused by the negligence of the defendants in leaving a dangerous hole in the southerly road; and so a case for the jury was made; and the question of contributory negligence was also one for them on the facts of the case.

If the defendants did not intend the southerly road to be so used, they should have given notice to that effect or have stopped it up; for as it was it constituted an invitation, and one of an attractive character, saving the turning around of waggons on either side to unload there.

I would dismiss the appeal.

COURT OF APPEAL.

JUNE 18TH, 1912.

REX v. HONAN.

3 O. W. N. 1412; O. L. R. ; Can. Cr. Cas.

Criminal Law—Common Betting House—Keeping—Jurisdiction of Magistrate—Code ss. 773, 774—Amended by 8 & 9 Edw. VII. c. 9.

Case stated by G. T. Denison, Police Magistrate for Toronto, at request of defendants, who were convicted by him on the charge of keeping a common betting house, on the questions whether he was right: (1) in refusing to allow accused to elect; (2) in authorising George Kennedy, a police inspector, to act in the absence of the Chief Constable and Deputy Chief, they being in the city and attending to their ordinary police duties; (3) in admitting certain exhibits seized by certain police officers in the course of a trespass, as evidence.

COURT OF APPEAL *held*, that the effect of 8 & 9 Edw. VII., c. 9, ss. 773 and 774 (Can.), was to make jurisdiction of magistrate in the case of a charge of keeping a common betting house, absolute.

First and third questions answered in affirmative. Unnecessary to answer second question for disposal of case.

Stated case heard in the Court of Appeal by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LENNOX.

T. J. W. O'Connor, for the defendant.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

HON. MR. JUSTICE MEREDITH:—The purpose of the amendments to sections 773 and 774, made in the year 1909, was to make those sections applicable to such a case as this and others of the same character: to change the law in this respect from that which this Court had then recently, and a Quebec appellate Court had long before, held it to be to that which in those cases it was contended for the Crown that it was: and the only question now is whether

Parliament has sufficiently expressed that purpose in the language used in making the amendments.

In the plainest words possible, it has made section 773 cover such a case as this; that is unquestionable: but it is urged that the change made in section 774 is not sufficient for that purpose. In that contention I am quite unable to agree.

Section 773 enumerates in detail the charges which a "magistrate" may hear and determine in a summary way; and plainly included in them is the charge in question in this case which is described as keeping a disorderly house under section 228; and that section in plain terms comprises any common bawdy house, common gaming house or common betting house as in previous sections defined.

Then section 774 proceeds to make the jurisdiction of the magistrate, conferred upon him by section 773, "absolute" in the case of keeping a disorderly house; that is in the case of keeping a disorderly house, as set out in the preceding section conferring the jurisdiction, that jurisdiction is to be absolute; and the remodelling of section 774, in respect of inmates and frequenters, makes it quite plain also that, in framing these amendments, due regard was had to that which was, in these respects, pointed out in the case of *Rex* v. *Lee Guey*, 15 O. L. R. 235, to which I have already adverted.

So that, in my opinion, the charge in this case is clearly one covered by section 774 as well as 773, as amended in the year 1909; 8 and 9 Edw. VII. ch. 9, secs. 773 and 774; and therefore the "magistrate" had "absolute" jurisdiction.

Nor can I think that the magistrate erred in admitting the evidence objected to; the question is not by what means was the evidence procured, but is whether the things proved were evidence, and it is not contended that they were not; all that is urged is that the evidence ought to have been rejected because it was obtained by means of a trespass—as it is asserted—upon the property of the accused by the police officers engaged in this prosecution. The criminal who wields the "jimmy" or the bludgeon, or uses any other criminally unlawful means or methods, has no right to insist upon being met by the law only when in kid gloves or satin slippers; it is still quite permissible to "set a thief to catch a thief"; see *The King* v. *White*, 18 O. L. R. 640.

This disposes of the first and third questions adversely to the accused, and makes it unnecessary to consider the second: though I may add that if magistrates will endeavour to give to the plain words of statutes their plain meaning, without letting that which may or may not suit their conveniences, or that which in their narrower environments may seem to be a better law, sway them, they will not find much difficulty in pursuing the right course.

CHAMBERS.

HON. MR. JUSTICE RIDDELL. JUNE 19TH, 1912.

POWELL REES v. ANGLO-CANADIAN.

3 O. W. N. 1444; O. L. R.

Debtor and Creditor—Judgment Debtor—Company—Examination of Director—Officer—C. R. 902.

MASTER-IN-CHAMBERS, 22 O. W. R. 295; 3 O. W. N. 1375, made order for examination of one Reynolds, as an officer of defendant company, under C. R. 907.

RIDDELL, J., *held*, that a company once incorporated is a body corporate, and can be sued, notwithstanding registration is a condition precedent to the commencement of business.

That "officer" in C. R. 902, includes "director."

Société Generale v. *Farina*, [1904] 1 K. B. 794, followed.

That, while an order for examination of Reynolds was unnecessary, the Court had power to make one.

Order made that subpœna issue for examination of Reynolds under C. R. 902.

No costs of unnecessary application to Master-in-Chambers to either party. Costs of appeal to be paid by Reynolds forthwith, after taxation.

See 21 O. W. R. 271; 3 O. W. N. 844.

An appeal by E. R. Reynolds from an order of the Master-in-Chambers, 22 O. W. R. 295, 3 O. W. N. 1375, allowing the plaintiffs (judgment creditors of the defendant company) to examine the appellant, as an officer of the company, for discovery in aid of execution, under the provisions of Con. Rule 902.

J. McGregor, for the motion.

M. C. Cameron, contra.

HON. MR. JUSTICE RIDDELL:—On November 29th, 1910, letters patent issued constituting E. R. Reynolds with five other persons named "and all such persons as are or shall

at any time hereafter become shareholders in the loan company hereby created under the provisions of the said Act, a body corporate and politic with a perpetual succession and a common seal by the name of The Anglo-Canadian Mortgage Corporation and (so long as the company stands duly registered in the terms of the said The Loan Corporation Act), capable of exercising all the functions of an incorporated company . . . Provided . . . that if the said company is not registered in terms of the said Act and does not go into actual operation within two years after incorporation . . . such powers, except so far as necessary for winding up the company shall *ipso facto* be forfeited . . . and . . . the charter of the said company may at any time be declared to be forfeited . . . by an order . . . in Council . . ."

The letters patent set out in the preamble: "Whereas by the statute . . . it is provided that the Lieut.-Governor . . . in Council may by letters patent grant a charter of incorporation to such persons as pursuant to the Loan Corporation Act, have duly constituted themselves a provisional loan corporation and have elected from amongst themselves six persons as provisional directors thereof. And whereas by petition . . . E. R. Reynolds," and the said five other persons named "provisional directors elected as hereinbefore mentioned have prayed that a charter may be granted to them . . ."

The charter was procured by Reynolds who is a barrister, and is, of course, issued under R. S. O. 1897, ch. 205, and amending Acts.

As the company was capable of exercising the functions of a loan company only so long as it should stand duly registered, and as it could not procure registration until $30,000 was paid into the company's treasury and as this sum was not forthcoming, it was determined to advertise in England. Reynolds was over in England twice, about it, and identifies an advertisement which contains a list of directors in Canada amongst them E. R. Reynolds, Barrister-at-law, Toronto (president). There are four others named as directors in Canada, no one of them being named in the charter. As sec. 6 of the Act makes the provisional directors named in the declaration for incorporation *ipso facto* the first directors of the corporation there must have been deliberate deceit in the English advertisement or more has occurred in the way of "organizing" the company than has been made to appear.

The advertisement does not seem to have been very successful although it represents the company as "Incorporated by letters patent under the Loan Corporation Act of the Province of Ontario, etc," and sets out as directors in the United Kingdom one K.C.M.G., one Rt. Hon. Deputy-Lieutenant and another gentleman, a director in a well known insurance company.

Worse still the advertising agents, the present plaintiffs, were not paid; and they sued the company in the English Courts and got judgment for over $15,000 in February, 1912—then they sued in Ontario upon this English judgment, and in March got judgment here for $15,696.46 and $19.60 costs—one proceeding in this action will be found reported in 3 O. W. N. 844; 21 O. W. R. 271. The plaintiffs as judgment creditors then applied under C. R. 903 for an order to examine Reynolds as to the estate and means of the debtor, etc., etc.

The M. C. made an order June 8th accordingly, giving written reasons as follows:—

"The facts are the same as when the judgment was signed. The defendant company has never been authorized to do business in this province because sufficient stock has not been subscribed and paid, but a charter was issued by the Lieut.-Governor on 29th November, 1910. In it Mr. Reynolds is the first named of six elected provisional directors, and the head office of the company was fixed at Toronto. It was also proved that in the prospectus issued by the company in England and filed with the Provincial Secretary, Mr. Reynolds is named as first of the Canadian directors and is also called president, also the head offices are stated to be at 77 Victoria St., Toronto. These facts seem sufficient to support an order for the examination of Mr. Reynolds, if plaintiffs still think it will be of any service to them. If they elect to proceed costs will be reserved. If they take the other course the motion will be dismissed with costs."

Reynolds now appeals.

What possible honest purpose can be served by refusing full disclosure about the affairs of this company? I have not been told nor am I able to discover—but that is not the question I am to determine.

The main objection taken to this examination is that the company is non-existent as a company and the judgment is a nullity—it is to be noted that it is not the company which

raises that objection but Reynolds, who pretended to be its president, when he was seeking money for it in England.

But there was a body corporate formed by the letters patent, none the less a body corporate, because it was not to exercise the functions of a loan company until it was registered. A corporation has certain powers "necessarily and inseparably incident to every corporation," and among them is the powers "to sue and be sued, implead or be impleaded . . . by its corporate name." Blackstone vol. 1, p. 475, c.f. *Conservators, Etc.* v. *Ash* (1829), 10 B. & C. 249; S. C. 8 L. J. K. B. O. S. 226; of course, the paramount power of the Legislature may intervene and direct all actions for or against a corporation to be brought in some other name, as for example in *Marsh* v. *Actona Lodge,* 27 Ill. 421; but there is nothing of that kind here.

The provision in the charter which apparently gives the power to sue and be sued by their corporate name, only so long as the company is registered is not justified by the Act and is wholly unnecessary—the power exists without any such provision and granted incorporation, which is effective by the statute, there is no power to limit the effects of the same by a provision in the letters patent. It would be absurd in my view that for example the company could not in its own name sue a director or agent who had received a large sum of money on behalf of the company. There is nothing in this objection on principle. Nor does the case of *Simmons* v. *Liberal Opinion* (*Limited*) *Re Dunn* (1911), 27 T. L. R. 278—there there was no company, no corporation at all by that name; see per M. R. p. 279, col. 2 "a non-existing corporation."

The other point is as to the position of Reynolds.

Under C. R. 902 the officers of a company may be examined, and this includes those who have been such officers.

Societé Generale v. *Farina* (1904), 1 K. B. 794.

Under C. R. 903 "any clerk or employee or former clerk or employee of the judgment debtor" may be examined, but such an examination requires an order.

The word "officer" is ambiguous—the meaning may and often does depend upon the context. Perhaps the strongest argument in favour of the appeal is to be found in sec. 94 directing the directors to appoint officers.

But for the purposes of C. R. 902 that "officer" includes "director" is beyond doubt. In the case already referred to in 1904 1 K. B. a judgment had been recovered against a

company and an application was made under Order XIII., Rule 32, for a person who had been a director of the company, but had ceased to be such to attend to be examined as to the debts, etc. The difference between the English Rule and ours is pointed out in H. & L. p. 1138—and for the purpose of this case the difference is not of consequence.

It had already been said in *Atty.-General* v. *N. M. T. C.* (1892), 3 Ch. 70, at p. 74, by North, J., "that in an enquiry of a somewhat different character," *prima facie* the secretary is the best person to interrogate, "but" he adds, "I quite admit that they are entitled to have information from such persons as can best give it with respect to the matters which are the proper subject for the interrogatories," under the particular case he thought the traffic manager was not the proper person for the purpose; see also *Chaddock* v. *B. S. A. Co.* (1896), 2 Q. B. 153. In the case in 1904, 1 K. B., a person had been a director of the defendant company, but had ceased to be such. He disputed the right to examine him on that ground. The Judge of first instance and the C. A. both took it for granted that a director was an officer for the purpose of this rule, and directed the witness to attend at his own expense to be examined.

In the present case Reynolds was the person to take out the charter; he went to England twice in connection with the company's affairs, he was a director who represented himself—or at least was represented as the Canadian president, it is sworn and not denied that he purports and undertakes to act on behalf of the company, and within a few days back has stated that he was entering into a contract for the sale of the capital stock of the company, that he cabled instructions a few months ago to England either to pay the account in judgment in this action or to send the proceeds of the sale in England of the shares in the company's stock—he does not deny that he knows all about the property of the company, but contents himself with swearing that he never held himself out to the plaintiff's solicitor as president of the company, and that as the company was not licensed it could have no president or officer. I presume that he was swearing or intending to swear to his opinion—if so, it had better have been left unsaid.

It is plain that Reynolds is a proper officer to examine under C. R. 902—and had his objection been that no order

was necessary for his examination, I think, I should have given effect to such an objection—but his objection was not at all to the practice, but to the right to examine him at all. It is not beyond the powers of the Court to order a subpœna to issue for service on an officer for an examination under C. R. 902, however unnecessary such an order may be. The formal order of the M.C. has not been drawn up—the proper order to make is that a subpœna (*duces tecum* if desired), issue for the examination of Reynolds under C. R. 902. There will be no costs of the unnecessary application before the M. C.—Reynolds will pay the costs of the appeal forthwith after taxation thereof.

HON. MR. JUSTICE KELLY. JUNE 19TH, 1912.

KARCH v. KARCH.

3 O. W. N. 1446.

Husband and Wife—Alimony—Quantum of Allowance—Custody of Children—Desertion.

Action for alimony for custody of children and order for their maintenance by defendant. Defendant, an industrious, thrifty man, addicted to no bad habits, and with a yearly income of some $900, left home on account of the quarrelsome tendencies and lack of interest in his welfare by plaintiff. At the trial of the action he refused to return.

KELLY, J., *held*, that while plaintiff's conduct was not blameless, it was not such as to disentitle her to alimony, defendant refusing to live with her.

Nelligan v. *Nelligan*, 26 O. R. 8, and *Forster* v. *Forster*, 14 O. W. R. 796, referred to.

Judgment for plaintiff for $5 per week alimony with costs of action. Defendant to have custody of children, plaintiff to be allowed to visit them weekly.

Action for alimony tried without a jury at Berlin. See S. C. before HON. MR. JUSTICE RIDDELL, 21 O. W. R. 883; 3 O. W. N. 1032.

H. Guthrie, K.C., for the plaintiff.

W. E. S. Knowles, for the defendant.

HON. MR. JUSTICE KELLY:—This action presents features not usually found in alimony actions.

The defendant left his home on November 20th, 1911; and now refuses to live with the plaintiff. The only charge of any kind made by plaintiff against him, apart from that of

his deserting the home, is what she calls his stinginess, although she gives no evidence intended to shew specific instances of this, except a statement that defendant found fault with her for having bought a coat at a price which he considered excessive.

Any troubles between this couple, the plaintiff says, arose almost entirely on money matters.

She alleges that defendant at times told her he could not afford things, but she admits that this was not a serious matter. Her further evidence is to the effect that he had provided properly for his home, that he is not a spendthrift, that he did not frequent hotels and was not addicted to other habits which might be objectionable.

The cause of the husband's leaving the home and now refusing to live with the plaintiff is to be found in her general conduct towards him. He is a machinist, working in his brother's shop, in Hespeler, close by his residence, and has been earning $50 a month. The family consists of two daughters, one eleven and the other eight years of age. On plaintiff's own admission she has not for some years, except in the months of June, July, and August, gotten up in the morning in time to prepare breakfast for defendant. There is evidence of other acts of hers which indicate that she was not as considerate as a wife should be of her husband's welfare. She justifies part, at least, of her conduct in this respect by saying that it was with his approval and consent.

Any such approval and consent on his part was, no doubt, given for peace sake, and because he was indulgently inclined.

He complains, and the plaintiff has not denied it, that she subjected him to continual nagging and scolding, that she was neglectful of his interests, and was extravagant in money matters.

He seems to have submitted to all this until November, 1911. On November 18th, she was not at home when he returned from work and had made no preparation for his supper. On November 20th, when she was again about to leave home, he remonstrated with her about being away and not preparing his meals, and she told him to "fish for his supper." When he returned from work on that evening she was not at home, and had not prepared his supper. He then left the house and remained away from Hespeler for about six weeks, when he returned and resumed work at his brother's shop; he was still working there at the time of the trial. After leaving the home, he continued to have

the tradespeople call there and supply his wife and children with whatever provisions they needed, and he paid the accounts therefor. Since November plaintiff and the two children have continued to reside in his house. In the time of his absence she had the lock of the house door, of which the defendant had a key, removed and a new lock put on, so that on the only occasion of any attempt on his part to return to the house,—which was in March, 1912,—he was unable to get in. Whatever may then have been his intention as to returning, he was most positive at the trial in his declaration of refusal to live with plaintiff. Plaintiff has made no attempt at reconciliation, nor has she communicated with him during the time of his absence, but there is no evidence of refusal on her part to live with him.

Without going further into details of the evidence, the conclusion I have come to is that the husband is an industrious, thrifty man, not given to any bad habits, that while living with the plaintiff he properly provided for his home and family, and that for peace sake or through indulgence towards his wife he condoned what might be termed her neglect of him, and finally left because of her lack of interest in him and her nagging and scolding.

In the light of such authorities as *Nelligan* v. *Nelligan*, 26 O. R. 8, and *Forster* v. *Forster*, 14 O. W. R. 796, though her conduct was not free from objection, plaintiff has not so misconducted herself as to disentitle her to alimony, the defendant refusing to live with her.

In addition to alimony, the plaintiff asks the custody of the two children and an order for their maintenance by the defendant. To this I do not think she is entitled. The husband is a fit and proper person to have the custody of these children, and he is willing and able to care for them. In fact, it was shewn that for years an important part of the personal care of the younger child fell to him. The house is his, and I think in view of all the circumstances he should remain in it with the children and there maintain and support them.

Though plaintiff has not disentitled herself to alimony, I do not think that this is a case where great liberality should be displayed in making her an allowance.

In addition to his personal earnings of $50 per month, defendant has investments which realise an income of about $300 per year, so that his annual income is about $900, and he owns the house. I allow plaintiff alimony at the

rate of $5 per week, defendant to have the custody of the two children and to maintain and support them in his home; she will have the right to visit them weekly.

At the trial I urged the parties to make a further effort to bring their differences to an end, so that the home should not in any sense be broken up, and I intimated that I would withhold judgment for a time to see if they could effect a reconciliation. I have not heard that this has been accomplished. The case is an unfortunate one, happening as it does between people possessed of all the possibilities of making a comfortable home. The plaintiff's indifference to and lack of interest in her husband's welfare, and the nagging and scolding of which he complains, have contributed largely to the present condition of affairs.

I still entertain the hope that there may be a reconciliation and I cannot better express what I think will aid much in accomplishing this than to repeat the words made use of in the judgment in *Waring* v. *Waring*, 2 Phill. Ecc. 132: "I recommend to her the duty of self-examination; and to consider whether her own behaviour may not remove the evil, and consist better with her duty to her husband, her children and herself."

The plaintiff is entitled to her costs of the action.

HON. MR. JUSTICE RIDDELL. JUNE 19TH, 1912.

CHAMBERS.

RE CORR.

3 O. W. N. 1442.

Evidence—Foreign Commission—To Ireland—Inquiry as to Next of Kin of Deceased Intestate—Order Granted on Terms of Giving Security for Costs.

Application by one Mary E. Donnelly, for leave to issue a commission to take evidence in Ireland as to her relationship to one Felix Carr, deceased, who died intestate, and to whom no next-of-kin had been found.

MASTER-IN-ORDINARY refused application.

RIDDELL, J., allowed appeal therefrom on condition that applicant pay into Court $400 as security for costs incurred and undertake to proceed with all due speed. Costs of motion and appeal reserved until after Master's report.

An appeal by certain claimants of the estate of the late Felix Corr, from an order of the Master-in-Ordinary refusing to direct the issue of a commission to take evidence in Ireland.

This is another step in the case in which HON. MR. JUSTICE MIDDLETON gave a judgment which reported in (1912), 21 O. W. R. 798, 3 O. W. N. 1177.

J. S. Fullerton, K.C., and G. S. Hodgson, for the appellants.

J. R. Cartwright, K.C., for the Crown, contra.

HON. MR. JUSTICE RIDDELL:—The proceedings before the Master in Ordinary, which I have been compelled to read, deserve all the animadversions in that judgment; but they may be excused if not justified by the circumstance that at the first meeting (as the statement made to me goes), it was suggested by the Master and agreed to by counsel, that they would most likely be able to ascertain the person entitled to the estate by having the meetings for and the taking of evidence, very informal, and the matter was so carried on without objection by any party and in absolute good faith—all parties apparently believing that some evidence might be picked up that would give a clue to indicate as between the two Felix Corr, which was the rightful one. This course should not have been followed even on consent; the Court is not a Court of enquiry and the rights of other litigants should not be delayed by the time of the Master in Ordinary being taken by a proceeding not justified by the practice. If the Crown was desirous of an enquiry along the lines suggested, a commission might have issued.

After the judgment already referred to an application was made to the Master in Ordinary for a commission to Ireland, and this was refused, the Master saying: "Apart from matters of practice, the improbability and almost impossibility of producing witnesses whose minds would be sufficiently clear as to what took place a period of 45 or 50 years ago, and who would be able to shew that a certain man who then left Ireland so corresponded with what we know of the Felix Corr, who died in Toronto, as to lead irresistibly to the conclusion that they were the same person—the almost impossibility of it staggers one at the outset. I would consider it quite improbable that a person of sufficient age could recall with the necessary certainty such facts as would satisfy a Court that the two men were the same.

But apart from that, the motion for leave to pay the expenses of a commission was made before Mr. Justice Middleton, practically by way of an appeal, and it seems to me

in the light of his judgment it would be quite useless for me to make an order for a commission, because the Crown would have no difficulty whatever in setting it aside. Therefore, I think, the motion ought to be dismissed with costs."

An appeal is now taken.

So far as the last reason given by the learned Master is concerned, the judgment in 21 O. W. R. was on an application for payment out of Court of part of the fund to pay the disbursements of a commission—and, while the learned Judge expressed a strong view as to the value, or want of value, of the evidence to be sought, the decision was based upon the viciousness of the principle involved. I need not say that I entirely agree with my brother Middleton in that regard. But this is quite a different application. The appellants recognize that the onus is upon them to prove their claim—and that if they fail to prove their claim they must be barred. It is no longer a friendly inquest; but a law-suit they are in.

They are desirous of adducing evidence which they believe to be available—and unless it is perfectly plain that the alleged evidence will not be available, or if it be available, will be wholly useless, they should be allowed to procure the evidence unless the rights of some other party would suffer. It is the Crown alone which can be affected by these proceedings—no doubt the province can manage to get along for a time without the use of this money—and the money itself is safe and bearing interest. Costs must be considered; and in case a commission should issue the appellants would be required to pay into Court a substantial sum—a sum sufficient to cover these costs in case they failed to prove their claim.

No considerable delay need be occasioned; there is no reason why the commission should not be executed during vacation.

From a careful perusal of the material I am not certain that evidence may not be available which may assist the appellants. There does not seem to be such certainty of the time of the arrival of the deceased in Toronto, much less of his leaving Ireland, as to exclude the Felix Corr through whom a claim is made. Whether witnesses can identify the Toronto Felix Corr by any means with that Felix Corr, is not to my mind quite certain. Some minds would, no doubt, place little reliance upon an identification by means of a painting which one lady says "looks like an old horse; nothing like him whatever." In fairness it should be said that to this

person the artist said: "I am sorry you have not an artistic eye in your head;" and the artist is confident that he could bring the leading artists in the city that he worked under, that would say it was the work of somebody that knew what he was doing.

I do not think that the appellants should be cut out of all opportunity to adduce all possible evidence to assist in making out a claim to this money.

If the appellants pay into Court the sum of $400 as security for any costs which may be awarded against them in respect of the commission or the application or order therefor, including this appeal, the execution of the said commission and the return thereof—and undertake to proceed with all due speed, the appeal will be allowed, costs of the motion and appeal to be disposed of by the Court after the Master's report.

HON. MR. JUSTICE RIDDELL. JUNE 19TH, 1912.

REX v. PALANGIO.

3 O. W. N. 1440.

Aliens—Immigration Act (1910), s. 33 (2), (7), (8)—Misrepresentation of Citizenship — Offence — Conviction — Jurisdiction of Police Magistrate.

Motion by defendant for an order setting aside his conviction under s. 33 (8), of the Immigration Act, 9 & 10 Edw. VII., c. 27, (Can.), for attempting to land in Canada a person whose entry has been forbidden by the Act. Defendant had furnished G. M., an Italian in Cochrane, with false naturalization papers to be used by his brother, M. M., residing in Schenectady, N.Y., in attempting to enter Canada, and had also fully instructed him as to the manner to be employed in deceiving the immigration officers.

RIDDELL, J., *held*, that the above section of the Act, s. 33 (8), is not limited to the prohibited classes mentioned in s. 3 of the Act, but that anyone who attempts to enter Canada by misrepresentation is forbidden entry within the meaning of the section.

Motion dismissed.

Motion by the defendant for an order quashing his conviction by the Police Magistrate at Cochrane for an offence under the Canadian Immigration Act.

J. M. Godfrey, for the motion.

HON. MR. JUSTICE RIDDELL:—Vincenzio Palangio appeared before the police magistrate at Cochrane, on a charge

set out in an information by a travelling immigration inspector for that he did "knowingly and wilfully assist to land or attempt to land in Canada one Michael Malerbo, a prohibited immigrant."

The charge is based upon sec. 33 (8) of The Immigration Act (1910), 9 & 10 Edw. VII., ch. 27—the Act of 1911 does not modify this sub-section: "Any transportation company or person knowingly and wilfully landing or assisting to land or attempting to land in Canada any prohibited immigrant or person whose entry into Canada has been forbidden by this Act shall be guilty of an offence . . ."

At the trial it was made to appear that G. M., an Italian in Cochrane, had a brother Michael Malerbo in Schenectady; G. M. spoke to the defendant about him, and the defendant furnished false naturalization papers to bring M. M. in on charging $15 for them. The defendant did not send the papers to M. M., but handed them to the man who was doing the writing (that is how I interpret the magistrate's "dowing the wrighting"). The defendant told G. M. also that his brother would have to have lots of money and good clothes and look intelligent to get into Canada, and then it would be a chance whether he could get in or not; and G. M. sent his brother $40 and a ticket.

At the conclusion of the case the magistrate wrote the following memorandum upon the papers: "This Court adjudges James Plango guilty of furnishing Agostino Ballarine naturalization papers to one John Patta to be enclosed in a letter and sent to Schenectady, N.Y. State, to be used as Michael Malerbo papers of citizenship thereby evading the immigration agents and landing in this country under false documents"—and imposed a fine of $150 and $110.05 costs or three months "imprisonment."

The defendant, who is said to have two houses, two stores and two banks, one at North Bay and one at Cochrane, richly deserves punishment—much more severe than that awarded—if his offence be such as the police magistrate could enquire into, and any proper amendment be made, I should not interfere.

It is said that sec. 33 (8) applies only to the prohibited classes mentioned in sec. 3 of the Act, but I do not think that it is so limited.

Section 33 (2) provides that "Every passenger or other person seeking to land in Canada shall answer truly all questions put to him by an officer when examined under the

authority of this Act." And sub-sec. 7 provides that "Any person who enters Canada . . . by . . . misrepresentation . . . shall be guilty of an offence under this Act . . . may be arrested . . . and if found not to be a Canadian citizen . . . such entry shall in itself be sufficient cause for deportation . . ."

Anything which is an offence under the Act is forbidden by the Act—it is forbidden by the Act that anyone should enter Canada by misrepresentation. The defendant and his conspirators intended M. M. to enter Canada by misrepresentation of his citizenship—and I do not think it any stretch of the meaning of the Act to hold that M. M. was a person whose entry into Canada was forbidden under the Act within the meaning of sec. 33 (8).

Then the defendant knowingly and wilfully furnished in Cochrane what the police magistrate calls "papars" which "had fawling on the floore and got durty," when the letter was "a wrighting" to M. M. to be sent to M. M. to be used as part of the misrepresentation which would effect his entry into Canada. This was in my view "an attempting to land in Canada" a "person whose entry into Canada has been forbidden by this Act."

The motion should be refused; as no one appeared contra, there will, of course, be no costs.

The Clerk in Chambers will send the papers to the County Crown Attorney and draw his attention to the conspiracy disclosed in the depositions with a view to prosecution of the persons concerned—it is high time that the villainous practice of fraudulent immigration received a check, and that those who so brazenly attempt to circumvent the policy of the country should understand their true position.

HON. MR. JUSTICE RIDDELL. JUNE 19TH, 1912.

RE TURNER.

3 O. W. N. 1438.

Executors and Administrators—Application to Court for Advice—Question Whether Lands or Proceeds Belong to Estate—R. S. O. (1897), c. 129, s. 39 (1)—Con. Rule 938.

Motion by executors of one Anne E. Turner under R. S. O. c. 129, s. 39 (1), for advice as to whom a sum of $679.09, in their hands as executors, belonged. The moneys in question were the balance remaining after the sale by mortgagees under the power in their mortgage of a certain lot, at one time owned by one Spence, who had, it was claimed, verbally renounced all claim to the lot in favour of his mother-in-law, the said Anne E. Turner. Spence had become a sailor and was unfrequently heard from, and it was not known what position he was taking as to the matter.

RIDDELL, J., refused to entertain the matter on a summary application, holding such an application not warranted by the statute. *Re Rally*, 25 O. L. R. 112, referred to.

An application by the executors of the late Anne E. Turner for advice under R. S. O. (1897) ch. 129, sec. 39 (i).

E. R. Read (Brantford), for application.

HON. MR. JUSTICE RIDDELL:—John Turner died in 1887, having devised lot 6 north side of Marlboro' St., Brantford, subject to a mortgage in favour of the R. L. & S. Company, to his daughter; in 1889, the daughter married Horace Spence, and about a year died in child bed, intestate; her child died within a few months—whereby the husband became the owner of the lot. He verbally renounced, it is said, all claim to the lot giving it up to Anne E. Turner his mother-in-law, the widow of John Turner, and who died in 1908, having been in receipt of the rent of said lot from the time of her grandchild's death in about 1891. In her will she left her real estate upon trust for sale the proceeds to be in trust for her daughter Mrs. Chittenden for life, or if she should survive her husband absolutely; if she should predecease him then her children were to have it in equal shares. It is said that these children are now of full age and are the persons entitled to the estate. I assume, therefore, that Mrs. Chittenden died before her husband.

The assignee of the mortgagees under John E. Turner's mortgage has sold for $1,505—after paying the mortgage there remained a balance of $679.09. This was claimed by the Brantford Trust Co. Ltd., as executors of Anne E. Turner and paid to them under a bond of indemnity.

It appears that Spence shortly after the death of his child went away sailing, and has led the life of a sailor ever since, about four times a year communicating with his father, the last time from the West Indies.

The executors of Anne E. Turner now apply for advice under R. S. O. 1897, ch. 129, sec. 39 (1) and base the practice on C. R. 938 (g). They ask advice as to what they are to do with this sum of $679.09. A few months ago I again pointed out that the statute does not authorize the determination of questions of this kind on an application for advice. *Re Rally* (1911), 25 O. L. R. 112. What is, of course, desired is to determine whether Spence or the estate of Mrs. Turner is entitled to this sum and that is not "any question respecting the management or administration of the property."

The motion then is refused. Then I am asked for leave to serve Spence substitutionally by delivering a notice under C. R. 938 (a). That is equally out of the question—the C. R. was not intended to enable a determination of whether certain property belongs to an estate or not. When trust companies take over the administration of an estate they have the same obligations as other executors or administrators; their whole function is not to make or lose money for their shareholders; and they must take all the obligations as well as the emoluments of private executors. If they have in their hands money which rightfully belongs to Spence, that is a matter for them to adjust—and there is no short-cut provided by the Legislature. It is said that Spence's father is likely to hear from him before long; if so, one would think a reasonable course for these depositees of the money would be to see what position Spence takes in reference to it—it may be that he will release all right to the money or convey all right he may have to the company or the grandchildren of Anne E. Turner, and so get rid of any difficulty or it may be that he will insist upon being paid the sum himself, or that it be paid to his father. Then it will be for the company to decide what to do. I am not giving this as any advice but throw it out as a suggestion of what ordinary business methods and practice would indicate should be done. As things are now, the application for substitutional service is also refused. As there was no opposition there will be no costs: but the applicants are not to be allowed to charge the costs of this application against the estate.

MASTER IN CHAMBERS. JUNE 19TH, 1912.

KEENAN WOODWARE CO. v. FOSTER.

3 O. W. N. 1451.

Venue—Change—Grey Co. C. to Nipissing Dist. C.—Witnesses—Convenience.

MASTER-IN-CHAMBERS refused motion of defendants to transfer action from County Court of Grey to District Court of Nipissing. Cos s in cause. It was made a term of the order that any extra costs occasioned by a trial at Owen Sound be to defendants in any event, plaintiffs having assented to same on argument.

This action was brought in respect of a sale of poplar bolts to plaintiff company.

The action was in the County Court of Grey County, and defendant moved to transfer same to District Court of Sault Ste. Marie on the usual grounds.

H. S. White, for the defendant's motion.

F. Aylesworth, for the plaintiffs, contra.

CARTWRIGHT, K.C., MASTER:—The main question seems to be whether there was a compliance by defendant with the terms of the written agreement as to delivery by him of the bolts "on board a scow or vessel to be furnished by the plaintiffs and placed by them in a convenient, safe and suitable point for loading" at some place in a designated region.

It seems from the material which I have read that defendant insisted that he was to be at liberty to float the bolts to the point of loading—while the plaintiffs contended that this was not allowable under the contract, and would seriously damage the wood. There is nothing in the correspondence as to any waiver by plaintiffs on this point, so far as I could find.

The defendant swears to seven witnesses as necessary in his view of the case—and the plaintiffs meet this with 12. So far as I can see at present I think it is emphatically a case to which the remark of Britton, J., on the similar motion in *Sturgeon* v. *Port Burwell*, 7 O. W. R. 360 applies: "It will be a matter of surprise if either calls half the number named."

This judgment was affirmed, see p. 380, by the Divisional Court. An action reasonably brought in one county cannot

be changed to another without proof of at least a considerable if not an overwhelming preponderance of convenience. It cannot be said this has been shewn here—and the motion will be dismissed with costs in the cause, the plaintiffs being willing as I understood that any extra costs of a trial at Owen Sound should be to defendant in any event. This will be a term of the order. It is for the interest of both parties that the trial should take place next week as ordered by the County Judge.

DIVISIONAL COURT.

JUNE 20TH, 1912.

RE DINNICK & McCALLUM.

3 O. W. N. 1463; O. L. R.

Municipal Corporations — By-law — Restricting Buildings — To be 25 Feet from Street Line—Application of By-law to Corner Lots —4 Edw. VII., c. 22, s. 19.

Motion by plaintiff for a *mandamus* directed to the corporation of the city of Toronto and the city architect, compelling the issue of a permit for the erection of an apartment house on the corner of St. Clair Ave. and Avenue Road, Toronto. Defendant corporation had passed a by-law under authority of 4 Edw. VII., c. 22, s. 19, which allows a city council to pass by-laws "to regulate and limit the distance from the street line in front thereof at which buildings on residential streets may be built," forbidding the erection of buildings on Avenue Road within forty feet of the street line. Plaintiff had applied for a permit for an apartment house, the only entrance to which was from St. Clair Ave., but the permit had been refused solely on account of the by-law above referred to. Avenue Road was, admittedly, a residential street, but plaintiff claimed the proposed building "fronted" only on St. Clair Ave.

RIDDELL, J. (21 O. W. R. 897), referred application to a Divisional Court under s. 81 of the Judicature Act, holding that he had no jurisdiction to decide differently from *Schultz* v. *Toronto*, 19 O. W. R. 1013.

DIVISIONAL COURT *held* (BRITTON, J., *dissenting*), that the proposed building would "front" on both Avenue Road and St. Clair Ave., and was, therefore, forbidden by the by-law in question.

Mandamus refused with costs.

Reference to Divisional Court of a motion, before HON. MR. JUSTICE RIDDELL. See 21 O. W. R. 897, 3 O. W. N. 1061.

The motion in Divisional Court was heard by HON. MR. JUSTICE BRITTON, HON. MR. JUSTICE TEETZEL, and HON. MR. JUSTICE KELLY.

W. C. Chisholm, K.C., for the applicant.

H. L. Drayton, K.C., and H. Howitt, for the municipality.

HON. MR. JUSTICE TEETZEL:—A motion by W. L. Dinnick for a mandamus directed to the Corporation of the City of Toronto and the city architect to issue a permit to the applicant for the erection of an apartment house on the corner of Avenue road and St. Clair avenue was heard before HON. MR. JUSTICE RIDDELL sitting in Chambers, 19 O. W. R. 897, and that the learned Judge being of opinion that but for a decision of the learned Chief Justice of the King's Bench, in *City of Toronto* v. *Schultz* (1911), 19 O. W. R. 1013, he would dismiss the motion, referred the same to a Divisional Court, under sec. 81 of the Judicature Act.

By Edw. VII. ch. 22, sec. 19, it was provided that "The councils of cities . . . authorised . . . to pass and enforce . . . by-laws to regulate and limit the distance from the line of a street in front thereof at which buildings on residential streets may be built; such distance may be varied upon different streets or in different parts of the same street."

Purporting to act under the authority conferred by this statute, the city council, in December, 1911, passed a by-law number 5891 containing the following provision:—

"No building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road from St. Clair avenue to Lonsdale road within a distance of forty feet from the east and west line of the said road, and no person shall hereafter erect or build any such building in contravention of this by-law."

That Avenue road is a "residential street" within the meaning of the Act is not disputed.

Lonsdale road is its northern terminus; and the section covered by the by-law was originally laid out at the unusual width of one hundred and twenty-five feet, and a substantial portion of it has not yet been built upon.

The applicant, being the owner of a block of land at the north-east corner of St. Clair avenue and Avenue road and desiring to build an apartment house on the corner sixty feet on St. Clair avenue and one hundred and thirty feet on Avenue road, the proposed front facing St. Clair avenue, prepared all proper plans and specifications and applied to the city architect for a building permit, which was refused

solely on the ground that the proposed building would be in violation of by-law 5891.

The matter to be decided is as to the validity of the by-law, and its application to the present case.

The points urged against the by-law by Mr. Chisholm were:—

(1) It does not in its terms comply with the enabling Act;

(2) Even if its terms complied with the Act, it is not applicable to a case like the present; and

(3) It is discriminating in its operation and unreasonable.

Upon the first point, the language of the authority is to "regulate and limit the distance from the line of the street in front thereof at which buildings on residential streets may be built," while the by-law only prohibits building "on lots fronting or abutting on . . . Avenue road . . . within a distance of forty feet from the east and west lines of said road"; so that as pointed out by Mr. Chisholm, if a fronting or abutting lot had a depth or width, measured from Avenue road, of less than forty feet, a building erected on land adjoining such lot to the rear, although within forty feet of the street line, would not be within the operation of the by-law notwithstanding such building might possibly be described as on Avenue road within the meaning of the Act.

There is nothing in the material to shew that in any survey of lots fronting or abutting on Avenue road is there any lot in reference to which such an incongruous result might follow; but even if such a result is possible, I do not think that the by law can be held to be invalid for that reason. The statute does not require that the distance limited by the by-law shall be uniform but expressly provides that "such distance may be varied upon different streets or in different parts of the same street."

Presumably, although perhaps not necessarily in every case, a building on a residential street must be built upon a lot "fronting or abutting thereon," so that, while it may be that the council in limiting the restriction to buildings "on lots fronting or abutting on Avenue road," etc., instead of imposing the restriction generally to all buildings to be erected on that street, may not have gone the full length of the authority conferred by the Act, I think it has clearly kept within that authority, for while the Act no doubt confers authority to impose the restriction in regard to all

buildings to be erected on the street in question, it does not require the restriction to be imposed upon all buildings, and, as pointed out, express authority is given to vary the distances in different parts of the street.

Then assuming the by-law to be valid, is it applicable to the building in question? The answer to this depends upon whether when erected the building can be properly described as being on Avenue road within the meaning of the words of the Act, "buildings on residential streets."

Mr. Chisholm argues that this building is on St. Clair avenue and not on Avenue road, and that that street and not Avenue road is "in front thereof," within the meaning of the Act.

The word "on" used in this connection in its ordinary and natural meaning signifies "In the relation of environing or lying along or by"; Standard Dictionary, sub voc. "on" p. 1228, column 3, para. 4; and also "In proximity to, close to, beside, near"; New Oxford Dictionary, sub voc "on" p. 114, column 2, para. 3.

Then as to the words "line of the street in front thereof" as pointed out by my brother Riddell, at page 1063 of 3 O. W. N., citing the New Oxford Dictionary, "Any side or face of a building is the front, although the word is more commonly used to denote the entrance side, ...The back front, rear front, or fore front of a house are all terms in common use, and there is no reason why a building should not 'front' on two, three or four streets, or that two, three or four streets should not be 'in front thereof'. All such streets would, I think, 'confront the building.'"

The manifest object of the Legislature was to enable councils of cities and towns to make residential streets more attractive, etc., by preventing buildings being placed out to the street-line, and it would largely defeat such purpose if a by-law could only be made applicable to buildings to be erected on inside lots and not to buildings on corner lots. When the Legislature used the words "residential street" *prima facie* the whole of such street must have been intended, and not merely the portion in front of inside lots; so that in the absence of any reservation in favour of owners of corner lots the street from end to end and from limit to limit must be included.

While a building at the corner of two streets is numbered on the street upon which its main entrance fronts, and is in

common parlance spoken of as on that street, it also lies along or borders on the other street, and in the relation of environing is also on that street, and such street would also be in front of that part of the building adjoining it.

Having therefore regard to what appears to me to be the natural meaning of the words "street in front thereof" and "buildings on residential streets" and to the object of the Legislature, I think the building in question, although the proposed entrance is from St. Clair avenue, would nevertheless be a building on Avenue road, and would therefore be within the restriction imposed by the by-law.

Then is the by-law discriminatory in its operation, or is it so unreasonable that it should be declared invalid?

If it should transpire, which is very unlikely, that there are any lots fronting or abutting on Avenue road, less than forty feet in depth or width, the by-law as worded might not, as pointed out above, apply to a building erected on adjoining land, and in that case the by-law might have the effect of discriminating in favour of such building, yet, as the council is entitled to vary the distance in any part of the street and having limited the application of the by-law to buildings on lots fronting or abutting on Avenue road, as I think it had the right to do, I do not think the by-law is open to attack on this ground.

There remains the question whether the by-law ought to be held invalid for unreasonableness in that its effect upon the applicant and others is to deprive them of the unrestricted use of their property, and in that it is limited in its operation to buildings on lots fronting or abutting on the street in question, in respect of both which matters I have already expressed the view that the by-law is within the power conferred by the Act.

Given the power to pass the by-law, the question of its reasonableness is, generally speaking, for the judgment and conscience of the council, and, except in extreme cases, it is well settled that the Court will not hold by-laws passed by municipal bodies within the ambit of their authority, to be invalid for unreasonableness. This proposition was not contested by Mr. Chisholm, and is supported by *Kruse* v. *Johnson*, [1898] 2 Q. B. 91; cited by him, and by *Stiles* v. *Galinski*, [1904] 1 K. B. 615, in which Lord Alverstone, C.J., at p. 621 says:—

"On all practical matters, provided they come within the ambit of the powers of the local authority as to making by-

laws, the discretion of the local authority ought not, in my opinion, to be lightly interfered with, and only when it is quite clear that the by-law in question is in conflict with some legal principle. I agree with that which Lord Russell of Killowen, C.J., said in *Kruse* v. *Johnson* (*supra*) that by-laws ought to be supported if possible, and that the Court ought to be slow to condemn as invalid any by-law on the ground of supposed unreasonableness."

See also *Leyton Urban Council* v. *Chew* [1907], 2 K. B. 283.

While this by-law may have the effect of depriving the applicant of making the most profitable use possible of his property, that is not, assuming the by-law is authorized and was honestly passed in the public interest, any ground for holding it invalid for unreasonableness.

As stated by Wright, J., in *Simons* v. *Mauling Rural District Council,* [1897] 2 Q. B. 433, at p. 438, "I do not think that a by-law should be held unreasonable on the ground that in a particular case inconvenient consequences might result from its enforcement. It is the public interests as a whole which have to be considered." See also *Slattery* v. *Naylor* (1888), 13 A. C. 446, where it was held that a by-law made in pursuance of a municipal act empowering councils to make by-laws for regulating the interment of the dead is not *ultra vires* by reason of its prohibiting interment altogether in a particular cemetery and therefore destroying the private property of the owners of burial places therein.

Judgment will therefore be dismissing the application with costs.

HON. MR. JUSTICE KELLY:—At the close of the argument I was of opinion that the applicant was not entitled to succeed. Further consideration has strengthened this conviction.

What the Legislature evidently had in view when passing the Act giving the councils of cities and towns the power which the council of the city of Toronto purported to exercise in this instance, was the improving and beautifying of the localities or districts to which by-laws, such as that now in question, would be made to apply. This intention of the Legislature would not be fully effected if the restriction against building applied only to inside lots, and did not include as well the lots or lands at the corners of the street.

The meaning to be given to the language of the Act and the by-law has been fully considered in the judgment of my brother Teetzel, with which I agree.

The lot or land of the plaintiff does not cease to abut on or front on Avenue road by the mere fact that the building intended to be erected thereon is so designed as to have its entrance from another street, and that the entrance will be from such other street only.

Moreover, in regard to the distance from the line of the street at which buildings may be built, there is power given by the Act to vary the distance in different parts of the same street; no such variation was provided for by the by-law in this case. In the absence of some express provision to that effect, I do not think this property is excepted from the operation of the by-law.

It was contended during the argument that the by-law works seriously to the disadvantage of the applicant. That is no doubt true; and the inclination would be to grant relief but for being prevented by the Act and the by-law. In many instances, legislation which, as is apparently the case here, is intended for the common benefit, or for the benefit of a considerable section of the public, operates as a disadvantage to one or other of the persons affected by it. That, however, does not of itself invalidate the legislation.

In my view, therefore, the plaintiff's application fails.

HON. MR. JUSTICE BRITTON:—The city of Toronto is authorised by 4 Edw. VII. ch. 22, sec. 19, (1904), to erect and enforce by-laws to regulate and limit the distance from the line of the street in front thereof, at which buildings on residential streets, may be built.

Avenue road, as admitted, is a residential street. The power of the city in this particular matter is limited to passing a by-law to regulate and limit the distance from the line of Avenue road in front of that road, at which buildings on Avenue road may be built.

The city did pass a by-law on 4th December, 1911, viz., by-law No. 5891, the first clause of which is as follows:—"No building shall hereafter be built or erected on the lots fronting or abutting on both sides of Avenue road from St. Clair avenue to Lonsdale road, within a distance of forty feet from the east and west lines of the said road, and no person shall hereafter erect or build any such building in contravention of this by-law."

Assuming for the sake of argument that this by-law was not in excess of the jurisdiction of the city, by reason of its prohibiting the building on lots fronting or abutting on Avenue road, then an interpretation must be given to the words "building on residential streets," that is in this case a building upon Avenue road. Is a building, forty feet or less distant from the line of Avenue road, close to another street and with the entrance to the building from that other street and with no entrance to the building from Avenue road, a building upon Avenue road within the meaning of the statute? I do not think so. Dinnick's proposed building is to be a building upon St. Clair avenue.

It may or may not be at a distance of 40 feet from St. Clair avenue. That is not in question here. Should the building be erected facing, or fronting on St. Clair avenue have as a lawn or a garden all the land between the east side of it and Avenue road, enclosed by fences, one fence running from the corner of St. Clair avenue and Avenue road northerly, to the northerly limit of Dinnick's lot, could that be prevented by any by-law passed by the city by virtue of the statute cited. I think not—and that seems to me, one way of testing the power of the City in the case under consideration I quite agree that "if the by-law is reasonable it ought to be supported if possible and the Court ought to be slow to condemn any by-law as invalid on the ground of supposed unreasonableness." My reason for holding as I do—is because I cannot take the words "buildings on residential streets" as having any meaning other than as fronting upon or having access to them from the street in question. Restricting the right of the owner to a certain use of his property is a quasi expropriation of part of that property for the use of the city. It is of benefit to the city at large. The policy of the law is to allow cities at the expense of the owners of property—to restrict and limit the rights of owners—but when this is done the restriction and limitation must be clearly within legislative authority. If the Legislature intended that the owner of a lot upon the corner of two residential streets cannot erect any building upon it, within the distance of a specified number of feet from the line of street it should say so in clearer language than has been used in the Act relied upon by the city in this case.

In my opinion the order for mandamus should go.

HON. MR. JUSTICE MIDDLETON. JUNE 20TH, 1912.

RE DRUMMOND ESTATE.

3 O. W. N. 1459.

Will—Construction—Equalization of Values of Shares — Personal Powers of Executors—Executors Dead—Duty Carried Out by Court.

Motion by beneficiaries, executors being dead, for an order under C. R. 938, construing will of the late J. W. Drummond, who died 9th September, 1881, leaving a will dated December 5th, 1879, by which, subject to a life interest to his widow, who died March 23rd, 1912, certain named properties were given to his five daughters, all of whom were living. In addition, there was considerable residuary estate, which was directed to be divided among the daughters on his wife's death; but, if in the opinion of the executors, the shares given theretofore to the daughters were not equal in value, they were to equalize them by the division of the residuary estate, and if still they remained unequal, the shares of those receiving more than an aliquot share were to be charged with a charge equivalent to such excess in favour of those receiving less than such share.

MIDDLETON, J., *held*, that the duties imposed were personal to the executors, and, as they were dead, would be carried out by the Court and its officers. On consent, a valuation was had, and a scheme of apportionment prescribed by the judgment.

Costs of all parties, including valuation fees, out of estate.

Originating notice to determine certain matters arising upon the will of the late J. W. Drummond.

C. J. Holman, K.C., for Hester A. Worden, Charlotte E. Benn and Eveline E. Drummond.

G. C. Campbell, for Laura Pearean.,

W. H. Irving, for Isabel Segsworth.

F. W. Harcourt, K.C., for infant children.

Adult children are represented by the same counsel as parents.

HON. MR. JUSTICE MIDDLETON:—The testator died on the 9th September, 1881, leaving the will in question, dated 5th December, 1879. He was survived by his widow and five daughters. The widow died on the 23rd of March, 1912. The five daughters have all survived her. The daughter Hester is married and has five children; the daughter Charlotte is married and has two children; the daughter Isabel is married and has no children; the daughter Laura, married, has two children; the remaining daughter Eveline, is unmarried.

By his will the testator gave his wife a life interest in the whole estate; and, subject to this, he gave to each

daughter a parcel of land, to be held by her during her natural life, and after her death to go to such of her children as may then be living and to the issue of any deceased child. The testator in addition had certain residuary estate, consisting principally of some lands on Adelaide street, now said to be worth approximately fifty thousand dollars. By the tenth clause of the will the testator directs that subject to the provision next mentioned this residuary estate shall be equally divided between his children.

In clause 18 of the will is found a provision which occasions the present controversy. By it, the testator directs that if when the division is being made of this residuary estate his trustees shall be of opinion that the fee simple of the several properties specifically devised to his daughters for life are not then equal to each other in value, the trustees shall before dividing the estate apportion to every person entitled to property of less value than the most valuable a sum equal in their opinion to the difference between the value of the fee of the property devised, and the value of the most valuable property; it being his intention that each of his children should receive as nearly as may be equal shares of his estate.

This provision is supplemented by clause 24, which directs that in case this residuary estate is not sufficient for the purpose of equalization the person whose estate is more valuable shall pay to the other or others such amount as may be necessary to bring about equalization; and the executors are given power to charge the fee simple of the lands which are to be burdened.

The executors upon whom this duty devolves are all dead; and the first question calling for determination was whether a new trustee should be appointed and whether the powers were appurtenant to the office or personal to the executors named. I came to the conclusion upon the argument that the powers were personal to the executors, and that, there being no one who could exercise the power, the duty would devolve upon the Court, through its proper officers, to itself exercise the function imposed upon the executors by the will.

Counsel all agreed in this view: and it was then arranged that, instead of directing a reference, valuators should be named, who should value the different parcels. This valuation has now been made. In the result the parcel given to Hester is valued at $92,000; the portion given to Eveline is valued at $75,000; the parcel given to Charlotte, $92,000;

that given to Isabel $75,000; and that given to Laura at $128,000.

The will itself is very obscurely expressed, and I have to determine whether upon the true construction of the will these values are the values which control and govern. I have come to the conclusion that they do. The testator has, I think, treated the daughter's share as covering that which is to go to her children upon her death; and the equality which he desires to have attained is not an equality between the life estates of the several daughters but equality between the share going to each daughter and her issue.

I think, further, that the words used in clause 18 indicate that what is to be valued is "the fee simple of the several properties," and that the distribution of the residuary estate and the charge upon the more valuable properties to be made for the purpose of equalization is to be treated as an increment to the less valuable shares, and that the sums to be set apart to produce this equalization must be held in precisely the same way as the less valuable shares are themselves held; that is to say, any money set apart from the proceeds of the residuary estate, or any money charged upon the more valuable property, will be held in trust for the daughter who has the less valuable property, for her life, and upon her death will go to her children, and the issue of deceased children.

Disregarding for the present minor matters, such as the thousand dollars to be given to the daughter who is yet unmarried, and the sums to be charged with respect to the small parcels of land that have been already sold, the result of the valuations is to give to each daughter an estate of the value of $92,000; so that neither Hester nor Charlotte is entitled to receive nor liable to be called upon to pay anything to bring about equalization. Laura must pay, to bring about equality, $34,000. Eveline and Isabel will each receive $17,000.

If the residuary estate, when sold, realizes $50,000 Hester and Charlotte will each receive one-fifth, $10,000; Laura's one-fifth will be primarily applicable to reduce from $34,000 to $24,000, the charge which would otherwise be placed upon her property; Eveline and Isabel will receive each from this source $5,000 in addition to their $10,000 share, and the amount of their charge on Laura's property will be reduced from $17,000 to $12,000 each.

When I speak of these moneys being "received," and the charge being made in favour of Eveline and Isabel, my meaning is, of course that these sums of $5,000, and the charges of $12,000 shall, as already stated, be held upon trust for them and their children in the same manner as their respective parcels are held.

I have not followed the precise directions of the will by creating charges upon each property so as to bring it up to the value of Laura's, because this would involve imposing charges upon the shares of Hester and Charlotte, and they would receive charges upon Laura's estate to precisely the same value. I set off what they would have to pay against what they would be entitled to receive had the mode of compensation pointed out by the testator been followed strictly. The result is, however, mathematically equivalent.

The valuations which have been made state that the buildings upon the different properties, other than Mrs. Pearean's, are not to be considered as worth anything, because no one would purchase the property at anything like the price at which it is now valued with any other idea than the demolition of the old buildings now upon the land.

With reference to the building upon Mrs. Pearean's property, it is, I think, to be disregarded, because the lease must be assumed to be an entire bargain, and if as the realization of that lease she receives a building of considerable value for a small sum, she is entitled to this advantage, which will go to compensate her for what is possibly an inadequate rental.

A trustee should be appointed to sell the residuary property and divide the proceeds.

The properties devised to the daughters other than Laura may be vested in them and their issue, in accordance with the terms of the trust; or, if it is thought more to their advantage, the properties may be vested in trustees on the same trusts.

Mrs. Pearean's property will be charged with payment of the $24,000 with interest at five per cent.; the principal to fall due as to one-half upon the death of Eveline, the other half upon the death of Isabel. The charge will be to a trustee upon the proper trusts for each daughter for life and after her death for division as directed by the will. Mrs. Perean should have the privilege of paying off the whole or any portion of this charge at any time she may desire, when the money will be held upon the same trusts.

The shares of all the daughters in the residuary estate (except Mrs. Pearean's share which is to be applied *pro tanto in esse* of the charge) will go to the respective daughters absolutely.

The figures can be adjusted and the details arranged when the order comes to be settled.

The interest upon the charge on Mrs. Pearean's share will be payable out of the rent.

Some discussion took place as to the effect to be given to the leases. I do not think they have any effect upon the valuation. The leases must be assumed to have been properly made by the life tenant. If they are open to attack, then they must be attacked directly, or her estate must be made answerable. Leases made by the life tenant within her authority, or sanctioned by the Court under the Settled Estates Act, are not made a factor in the valuation.

Costs of all parties, and the valuators' fees, will be paid by the trustee out of the proceeds of the residuary estate.

HON. MR. JUSTICE RIDDELL. JUNE 20TH, 1912.

SARNIA GAS CO. v. SARNIA.

3 O. W. N. 1455.

Municipal Corporations—Expropriation—Works and Property of Gas and Electric Light Company—Municipal Act (1903), s. 566 (4).

RIDDELL, J., *held*, on a stated case submitted in the action for the opinion of the Court, that s. 566, s.-s. 4, (a. 2), (a. 3), of the Municipal Act (1903), providing that where there is any gas, electric light, or water company in a municipality, it shall not strike any rate nor construct any works for the supply by it of any of such services, until an offer is made to such company for the purchase of its works and property at its current value, plus 10%, does not confer upon a municipality any power of expropriation.

Question of costs left to be dealt with in general action.

A special case stated for the Court.

The plaintiffs had their origin in a declaration filed in 1878 under R. S. O. 1877 ch. 157 whereby they became under sec. 5 a body corporate for 20 years under the name "The Sarnia Gas Company," and with the object "to supply the town of Sarnia and its suburbs with gas for illuminating purposes." In the same month a by-law was passed by the town of Sarnia permitting the company to lay down pipes,

&c., subject to such conditions and supervision as the council might impose—this by-law was of course passed to comply with the provisions of sec. 4 although it apparently purports to have been passed "to secure compliance with the provisions of sec. 55 of the Act."

In 1880 another declaration was filed under the same Act by different persons (except two) from the former for a corporation under the name "The Sarnia Gas Company" with a term of 50 years and the object the supplying of the town of Sarnia with gas for lighting, heating, cooking and all other purposes for which gas is capable of being used and to manufacture and supply the said town with electric galvanic or any other artificial light in connection with gas or otherwise"—and in December, 1880, a by-law was passed pursuant to the Act of 1879, 42 Vic. ch. 23, sec. 5, giving the consent required by that section. The Statute gave the company the power to supply electric light: the by-law gave them for 30 years the exclusive right to lay down gas pipes, the company to supply the town with gas for lighting at consumers' rates.

This last named corporation was affected by a special Act (1881) 44 Vic. ch. 56; its name was changed to "Sarnia Consumers' Gas Company"—it required if it desired to supply any municipality adjacent to Sarnia to receive authority from the council of such municipality and then had in effect the same powers there as in Sarnia. The rights if any of the first company were not interfered with sec. 5.

By the Act of 1890 53 Vic. ch. 133 the status of The Sarnia Consumers' Gas Company was confirmed and it was made obligatory on that company to supply the town with electric light: sec. 2—the rights of the first company were also transferred to this company: sec. 3.

Then came 56 Vic. ch. 105, which changed the name to "The Sarnia Gas and Electric Light Company," without affecting the rights or liabilities of the company.

By 2 Edw. VII., ch. 61, a by-law of the village of Point Edward (which is contiguous with the town of Sarnia) was validated—this allowed the company under the name of The Sarnia Gas and Electric Light Company (Limited) to have the exclusive right for 25 years from 1901 as a gas and electric light company to lay down pipes, &c. Ch. 80 of 3 Edw. VII. confirms a By-law No. 575 of Sarnia empowering the company to erect powers, etc., for the full and complete carrying on the business of the company in supplying elec-

tricity, the by-law to remain in full force and effect as long as the said company is empowered to supply electricity to the said corporation and inhabitants: clause 8.

In 1909 a by-law was passed by the town of Sarnia No. 738 giving the company for a term of 20 years from December, 1910, the exclusive right and authority to lay down pipes, for the conveyance of gas under the streets, etc., but reserving to the town the right to lay down pipes for natural gas for manufacturing and fuel purposes, but the company to have the option of doing this themselves—this by-law was accepted and its terms embodied by reference in an agreement of August 26th, 1909.

By-law No. IV. D., of the township of Sarnia passed November 28th, 1910, gave the company for 20 years after December 20th, 1910, the exclusive right to erect and maintain poles, &c., for the carrying on of the company's business in supplying electricity to the corporation and its inhabitants and also to lay down pipes for carrying gas along the streets, etc., within a mile of Sarnia, etc.—and this was accepted and its terms incorporated by reference in an agreement 29th November, 1910. The company calls itself and is called sometimes "The Sarnia Gas and Electric Light Company (Limited)" and sues in that name. There was no reference to any legislation, etc., which justified the assumption of the affix (Limited); but there was no doubt what company was meant throughout.

The company had since January 1st, 1910, wholly discontinued the manufacture and supply of artificial gas.

August 21st, 1911, a By-law No. 766 was passed by the town of Sarnia that the sum of $125,000 should be offered the company "for its works and property"—the offer was made the next day and on September 18th the company refused and notice was served "that the said company has appointed H. H. M. . . . the arbitrator of the said company to determine the price to be paid for the works and property of the said company," and therewith was handed to the city a copy of a by-law of the company No. 25 "which by-law is dated the 18th day of September, 1911, and the Sarnia Gas and Electric Light Company, Limited, hereby calls upon you the said corporation" of the town of Sarnia to appoint an arbitrator on your behalf for the purpose aforesaid pursuant to the statutes in that behalf made and provided."

The by-law appoints Mr. M. of Toronto as the arbitrator of the company "to determine the price to be paid for the

works and property of the said company pursuant to the statutes in that behalf made and provided."

The town, through the Mayor, appointed Mr. W. of Sarnia their arbitrator; and the County Judge appointed Judge Colter the third arbitrator, Act 28, 1911. Mr. W. wrote to Mr. M. suggesting November 3rd for their first meeting; Mr. M. was going to England and so wrote Mr. W.—Judge Colter and Mr. W. met—counsel for the company objected to the proceedings and the arbitrators did not proceed with the arbitration. The company brought action February 2nd, 1912, and the parties agreed upon the stated case.

I. F. Hellmuth, K.C., W. J. Hanna, K.C., and R. V. LeSueur for the plaintiffs.

E. F. B. Johnston, K.C., and J. Cowan, K.C., for the defendants.

HON. MR. JUSTICE RIDDELL:—The main question in the case is whether even if an award be made under the Municipal Act the town can take the works and property of the company —if this be answered in the negative, there is I am informed no need of answering any further.

The statute is the Municipal Act of 1903; 3 Edw. VII., ch. 19, sec. 566, sub-secs. 3, 4. Before the Act of 1899, 62 Vic. (2) ch. 26, sec. 35, which introduced what are known as the Conmee clauses sec. 565, sub-sec. 4 read thus: "By councils of cities or towns—for constructing gas and water works and for levying an annual special rate to defray the yearly interest of the expenditure therefor, and to form an equal yearly sinking fund for the payment of the principal within a time not exceeding 30 years nor less than 5 years." Then followed (a) providing for the case of a water company incorporated for the municipality and that the council should not levy water rates before offering the company a price for the works or stock of the company, &c., &c. No provision was made for the case of a gas company.

This was amended by 62 Vic. (2) ch. 26, sec. 35 giving power to cities, towns and villages to construct gas, electric light or water works and introducing the provision "in case there is any gas, electric light, or water company incorporated for or in the municipality" to be found in the present Act. The amendments of 63 Vic. ch. 33, sec. 29, and 2 Edw. VII. ch. 29, sec. 20, I pass over as immaterial on the present enquiry.

The town contends that it has the power under the statute upon an arbitration being had and the price paid or secured, to take the works and property of the company or some of it sec. 566, 4 (a4).

It is argued for the company that it is not "a gas, electric light or water company incorporated for or in the municipality," but I do not proceed upon that ground—but upon the general ground that nowhere is there given to the municipality a right of expropriation.

From personal knowledge I am able to say that the intention of some at least of those who were interested in the passing of the Act of 1899 was solely to protect the companies already in operation—it was thought unjust for a municipality to start opposition with a private enterprise without giving the owners of the enterprise an opportunity of "getting from under"—it was not intended to give the municipalities a power they had not theretofore had of taking away the business directly from its owners.

Of course we must determine the meaning of the legislation not by what we may know or surmise of the meaning and intention of the legislators or some of them, but by the meaning of the language which is employed.

It is trite law that a man's property is not to be taken from him except by legislation of the clearest character—here there is no legislation at all indicating that the property can be taken *in invitum*. What is provided for is that no rate shall be struck or works constructed by the municipality until the company has had a chance of getting out with 10 per cent. over and above the value of their works and property as it stands sec. 566, 4 (a2), (a3).

The only penalty upon the company is that the municipality may go on and run a competing business—if the shareholders are ratepayers, they will know that their own money is being used to build up a business competitor.

The question of costs is not left to me and the practice is not for the judge hearing the "special case" to decide as to costs—that may be done in the action.

Attorney-General v. *Toronto General Trusts Corporation* (1903), 5 O. L. R. 607. I do not deal with the many other questions raised, more or less interesting, more or less important.

COURT OF APPEAL.

JUNE 18TH, 1912.

NORTHERN SULPHITE CO. v. CRAIG.

3 O. W. N. 1388.

Principal and Agent—Authority of Agent—Bonds Purchased by Agent —For Principal—Dispute as to Ownership—Evidence—Finding that Bonds were Purchased for Principal.

Action by plaintiff against defendants to recover certain first mortgage bonds of the Imperial Land Company for $500 each, claimed to be the property of the plaintiff company. The boards of directors of plaintiff and defendant companies were composed of the same individuals who also controlled the land company. The defendant company acted as agent for the land company in the handling of its bonds, and when certain of such bonds matured, as a temporary expedient took them up with moneys belonging to plaintiff company. Later the land company being unable to redeem, a minute was put through the books of both companies reciting that plaintiff company had purchased the bonds.

MEREDITH, C.J.C.P., at trial, *held*, 20 O. W. R. 317; 3 O. W. N. 214, plaintiff company was entitled to bonds and gave judgment for plaintiffs with costs. Agent given lien for part purchase money paid. Reference to Master in Chambers.

COURT OF APPEAL affirmed above judgment.

An appeal by the defendants from a judgment of HON. SIR WM. MEREDITH, C.J.C.P., 20 O. W. R. 317, 3 O. W. N. 214, at the trial, in favour of the plaintiff.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LENNOX.

C. A. Masten and H. W. Mickle, for the defendants, appellants.

I. F. Hellmuth, K.C., and J. H. Moss, K.C., for the plaintiffs, respondents.

HON. MR. JUSTICE GARROW:—The action was brought by the plaintiff E. R. C. Clarkson as Receiver of the Northern Sulphite Mills of Canada, Limited, to recover from the defendants John Craig and the Occidental Syndicate, Limited, certain first mortgage bonds of the Imperial Land Company for $500 each, claimed to be the property of the plaintiff company.

The questions involved which are almost entirely questions of fact, seem to depend less upon contradictory evidence, of which there is very little, than upon the proper

inferences to be drawn from certain of the facts appearing in evidence which are not in themselves decisive or plainly pointing only in one direction. There were, it appears, several joint stock companies, some organised in England and some in Canada, all more or less related, namely the defendant company which was in some respects the parent company, the plaintiff company, the Imperial Land Company and the Imperial Paper Mills Company. The three latter companies were engaged in certain undertakings at or near Sturgeon Falls in this province, which included the manufacture of pulp and paper, and, in the case of the land company, the sale of lands.

The defendant company acted at London, England, in financial matters for the other companies. Its board of directors consisted of Archibald Baird Craig, chairman and managing director, his brother the defendant John Craig, and William Richard Loxley. The same gentlemen were also the directors of the plainitff company. Both companies occupied the same offices in London and employed the same office staff. The defendant John Craig was also the managing director of the plaintiff company and of the paper mills company, and was president of the land company, and resided in Canada. The defendant company had, as agent for the land company, floated for it certain bonds, of a total issue of $50,000, and among them, those now in question, which bonds were to mature on January 1st, 1906. The land company was apparently not at that time prepared to take them up. The defendant company had also as agent for the plaintiff company floated certain bonds of that company, the proceeds of which were still in hand at the credit of that company. It was the intention of the land company to issue additional bonds, with the proceeds of which the bonds so maturing would be paid, and pending such issue the requisite money required to retire them was transferred by the common directors from the account of the plaintiff company to that of the defendant company, and by the latter used to take up the bonds now in question. Of these there were originally in all 52. One was subsequently paid by the land company itself out of its own money, and is now no longer in question. Forty of them were so taken up and received from the holders in London, the other 12 were sent by the holders direct to the office of the land company in Canada for redemption, and were taken up out of money which had been remitted for the purpose by

the defendant company to the land. The 40 so taken up in London were afterwards sent to J. H. Payne, secretary-treasurer of the land company at Sturgeon Falls, in a letter written by William Tait, the defendant company's secretary, the date of which does not appear, but it was evidently written in January, 1906, in which Mr. Tait said: "I am sending you by this mail the following debentures and coupons which have been paid by this syndicate on behalf of your company on the 1st instant, viz.," &c. Mr. Payne afterwards handed these to the defendant John Craig, who had at the time the other twelve in his possession, and the whole were placed by him in the safe of the Imperial Paper Mills Company for safekeeping, where they remained until brought into Court under the order made in this action before trial.

The original minute of the transaction dated January 15th 1906, in the defendant company's books, is set out in full in the judgment of the learned Chief Justice, from which it appears that the transaction then bore the appearance merely of a payment by the defendant on behalf of the land company. Nothing is said in it about the source of the money with which the payment was made, or to otherwise indicate that the plaintiff company was interested.

The new bond issue of the land company not having for some reason materialised, the defendant company's auditor, Andrew Wilson Tait, who was also auditor for the plaintiff company, intervened, and at his suggestion the original minute was so amended as to read as if the defendant company had only acted in the matter as agent for the plaintiff company, and a corresponding minute was made in the books of the plaintiff company to agree with the amended minute in the defendant company's books. The necessary entries were also then made in the books of account of the respective companies so as to shew that the bonds had been purchased and were the property of the plaintiff company, and not of the defendant company. All of which was done under the direction and with the consent of the same directors who had been the parties to the original minute, and indeed could not have been done without their consent. And from that time forth until this litigation began the matter apparently so stood in the books of both companies.

The defendant company now contends that notwithstanding such entries it was the purchaser and is the owner

of the 51 bonds in question, and that the money of the plaintiff company which was used in the purchase should be regarded either as a loan to it from the plaintiff company, or as a repayment by it upon account of its indebtedness to the defendant company. These several contentions were determined by the learned Chief Justice in favour of the plaintiff company, and with his conclusions I agree. I do not, however, regard it as essential to go so far as to hold that what was done in July was, as he apparently thought, intended to express and carry out the original intention held by the parties in the previous month of January. The whole transaction including the use made of the money of the plaintiff company was clearly of a temporary character, intended merely to bridge the gap until the new bond issue of the land company came forward, which until midsummer Mr. A. B. Craig says was expected "any day." To speak of it as a repayment by the plaintiff company of a debt not yet due, and even if due a considerable over-payment, or as a loan of money in the ordinary sense by the one company to the other, seems to me in the light of all the evidence to be simply absurd. No one at the time, I am satisfied, intended either a loan or a repayment. The money was there under the control of the two gentlemen who comprised the quorum of the boards of both companies, and it was used for such temporary purpose practically as a convenience for the land company with the intention of a speedy readjustment when the new bonds of that company were sold. It was never for a moment intended that the bonds so acquired should be permanently held by either company. And when it was afterwards found that the original intention could not be carried out through the temporary failure of the source of expected recoupment, it was quite within the power of the parties to give the temporary transaction of January the more permanent form given to it in July by which the bonds formally became the property of the company which had supplied the chief part of the funds for their acquirement. The amount actually paid for the bonds apparently somewhat exceeded the amount withdrawn, from the account of the plaintiff company, and for such excess the learned Chief Justice has, apparently without objection, given to the defendant company a lien.

But in addition, the defendant company claimed before us a lien of the nature of a general lien upon the bonds for

the balance owing by the plaintiff company upon the accounts between them, a claim not apparently made before the learned Chief Justice, or at all events not dealt with in his judgment.

Such a lien depends, of course, upon proof that the party claiming it is in possession of the property in respect of which the lien is asserted and such proof is, in my opinion, wholly absent in this case. As I have said, the bonds were physically in the safe of the Imperial Paper Mills Company when the litigation began. They had been placed there by the defendant John Craig, who received them from the land company of which he was president, and the only reasonable or proper inference upon the whole evidence, his own included, is that in so placing them he acted for and on behalf of the land company, and not as a director of the defendant company, as he now asserts, another instance of which we see so many, of "wisdom after the event." He had, so far as appears, no instruction from his co-directors in London to require or to assert a right to the possession of the bonds. The 40 redeemed in England had been sent without limitation of any kind direct to the land company, to which company the holders also sent the remaining 12, and any possession afterwards acquired by John Craig from that company was clearly so acquired solely in his character of an officer of that company. The exact date at which the bonds were placed in the Imperial Paper Mills Co.'s safe is not stated in the evidence further than that it occurred sometime in the year 1906. If it was after the date of the change made in London on July 30th of that year by which the plaintiff company became the owners, it might even be said that the possession of the defendant John Craig was that of the plaintiff company, of which in addition to his other numerous and one would think slightly embarrassing offices he was the managing director. But it is not necessary to go so far, because in my opinion the reasonable and proper inference upon the whole evidence is as I have before stated, that such possession was and remained that of the land company only.

For these reasons I would dismiss the appeal with costs.

DIVISIONAL COURT.

JUNE 20TH, 1912.

MERCANTILE TRUST CO. v. CANADA STEEL CO.

3 O. W. N. 1467.

Negligence—Master and Servant—Dangerous Work—Warning—Lack of Proper Appliances—Prohibited Acts—Inadvertence—Contributory Negligence—Not Expressly Found by Jury.

Action by administrators of one Peduzzi, a labourer formerly in employ of defendants, for damages for his death, alleged to have been caused by defendants' negligence. Peduzzi was killed by being struck by a brick falling down a shaft to which his duty was to bring material to be hoisted to bricklayers above. The jury found that deceased had unnecessarily projected his head below the shaft in spite of explicit warning as to the danger involved, and that if he had been in his proper place, he would not have been killed, but could not agree as to whether the system employed by the defendants was defective or otherwise..

RIDDELL, J., at trial, dismissed action with costs, 21 O. W. R. 808; 3 O. W. N. 980.

DIVISIONAL COURT dismissed appeal therefrom with costs.

Moore v. *Moore*, 4 O. L. R. 174, distinguished.

Dego v. *Kingston*, 8 O. L. R. and subsequent cases, referred to.

An appeal from a judgment of HON. MR. JUSTICE RIDDELL, 21 O. W. R. 808, 3 O. W. N. 980, dismissing the plaintiff's action.

The plaintiffs were the administrators of the estate of David Feduzzi. The defendants were lining a steel furnace with brick, the furnace being 16 feet in diameter, and the lining 3 feet thick. The system adopted was as the work proceeded to lay a flooring from time to time upon which the men who were engaged in the work could stand while laying the brick. An aperture was left sufficient to permit a bucket to be raised, carrying the material of brick and bags of cement.

The deceased, Feduzzi, was at the bottom of the shaft, and his duty was to place the material upon the hoist. To do this the hoist was pulled to one side so that it was unnecessary for him in doing his work to place himself immediately beneath the opening. On the occasion in question the hoist had been lowered containing some empty bags, which in removing the plaintiff, instead of pulling the hoist to one side and removing the bags without placing himself beneath the shaft, reached forward and so placing his head in the opening

of the shaft, when he was struck by a falling brick, and from the injuries received died.

The negligence charged was that the defendants "did not provide a proper, safe and efficient system of carrying on their work," and that the place where the deceased was working should have been protected. There was also a charge of negligence of the superintendent and lack of inspection. These latter charges were not material, having regard to the findings of the jury.

The questions submitted to the jury and their answers were as follows:—

1. Was there any defect in the appliances of the defendants which caused or assisted in causing the casualty?

2. If so, what was it? Answer fully.

3. Was the deceased warned to keep his head from below the shaft? (a) By the foreman? Yes. (b) By Bissett? Yes.

4. Did he know that it was dangerous to put his head below the shaft? A. Yes.

5. Was he killed by reason of his putting his head below the shaft? A. Yes.

6. Was he in his proper place when he was killed? A. No.

7. If he had been in his proper place would he have been killed? A. No.

8. Damages? A. $2,150. To the widow $1,000; to Maria (8½ years), $500; to Elmo (5 years) $500; to Administrator $150, doctor's bill.

We consider that if the shaft had been continued upwards another 6 inches this accident would not have happened, but we cannot agree whether the absence of this is or is not a defect, nor can 10 of us agree as to this.

W. R. R. J."

The appeal to Divisional Court was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LENNOX.

A Lewis and Telford, for plaintiffs, appellant.

John Nesbitt, K.C., for defendant, respondent.

HON. MR. JUSTICE CLUTE:—Even assuming that the answers to the two first questions were favourable to the plain-

tiffs, the answers to the remaining questions preclude the plaintiffs from recovering.

The deceased was warned to keep away from the shaft. He know that it was dangerous, and it was by reason of his doing that which he was warned not to do that he came to his death. He was not in his proper place. Had he been he would not have been killed. All this is found by the jury upon sufficient evidence.

Mr. Lewis strongly urged that there was not sufficient finding that the deceased was guilty of contributory negligence. The finding is stronger; it is in effect that he was the cause of his own death, and that with knowledge of the danger and warning not to incur it.

Plaintiffs' counsel strongly relied upon the language of Armour, C.J.O., in Moore v. Moore, 4 O. L. R. at page 174, where he says: "A person may be exercising reasonable care and in a moment of thoughtlessness, forgetfulness or inattention may meet with an injury caused by the deliberate negligence of another and it cannot be said that such momentary thoughtlessness, forgetfulness or inattention will, as a matter of law, deprive him of his remedy for his injury caused by the deliberate negligence of the other, but it must in all such cases be a question of fact for the jury to determine." In this case, as the Chief Justice points out, the jury negatived contributory negligence on the part of the plaintiff, finding that he used reasonable care for a boy of his age. There were no findings against him such as in the present case, and having regard to the facts of that case and the findings of the jury, I think it quite distinguishable from the present.

Deyo v. *Kingston*, 8 O. L. R. 588. In this case, where the deceased was on top of the car contrary to the rules of the company, of which he was aware, and was knocked from the car by coming in contact with the overhead bridge, it was held that the accident was caused by his own negligence and the defendants were not liable although there was not a clear headway space as required by the statute. This case was distinguished in *Muma* v. *C. P. R.*, 14 O. L R. See also *Findley* v. *Hamilton Elec. Light Co.*, 11 O. W. R. 48; *Markle* v. *Simpson Brick Co.*, 9 O. W. R. 436; in appeal 10 O. W. R. 9; *Grand Trunk* v. *Birkett*, 35 S. C. R. 296; *Bist* v. *London & Southwestern Rw. Co.*, 1907, A. C. 209. In *Barnes* v. *Nunnery Colliery Co.*, 1912, A. C. 44, a boy employed at the colliery jumped into a hoist tub in order to rise to his work.

It was a common practice for the boys to ride to their work in this way, and it was expressly forbidden, and the prohibition was in force as far as possible. It was held that the death was caused by an added peril to which the deceased by his own conduct exposed himself, and not by any peril involved by his contract of service.

I think the appeal should be dismissed with costs, if demanded.

HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LENNOX, agreed.

DIVISIONAL COURT.

JUNE 20TH, 1912.

FOSTER v. MITCHELL.

3 O. W. N. 1509.

Partnership Dissolution—Taking Partnership Accounts—Goodwill—Compound Interest—Profit and Loss Account—Depreciation of Plant and Machinery.

TEETZEL, J., *held*, 20 O. W. R. 754; 3 O. W. N. 425; that where one partner of four makes up a partnership account for the purpose of settling the claim of two of the other partners in the business, which was accepted, at that time, by the fourth partner, as satisfactory to him, the fourth partner is not thereby estopped from going behind that account, upon dissolution of the partnership, other than the valuation placed upon the items, except book accounts which make up the capital.

That where one partner contributed book account ($4,527) to the capital of the partnership, but subsequently charged back or wrote off $2,149.96 as bad, he was bound by his own just interpretation of the rights of the parties.

That, where a business had been carried on fairly successfully for several years and the articles manufactured had acquired a good reputation and an extensive and valuable trade connection established, upon it being converted into a partnership, the person who had so carried on that business is entitled to an allowance for "goodwill," as it is an asset capable of valuation.

Inland Revenue Comrs. v. *Muller*, [1901] A. C. 217; *Trego* v. *Hunt*, [1896] A. C. 7, and *Hill* v. *Fearis*, [1905] 1 Ch. 466, followed.

That, compound interest should not be allowed, where not provided for in the partnership agreement.

That, the profit and loss account should be properly charged with depreciation on buildings, plant and machinery, but a partner is entitled to have the actual value of all assets ascertained quite apart from any values thereof that appear in the partnership books.

That, where one partner borrowed $3,500, which he placed in the business, as part of the capital, but concurrently withdrew $1,000 from the business, he was entitled to interest on the whole $3,500, but his capital account should be charged with the $1,000.

DIVISIONAL COURT varied above judgment on a minor finding of fact, but affirmed findings above set out.

Subject to above variation, appeal and cross-appeal dismissed. No costs of appeal.

An appeal from a judgment of HON. MR. JUSTICE TEETZEL, 20 O. W. R. 754, 3 O. W. N. 425.

The appeal to Divisional Court was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LENNOX.

F. E. Hodgins, K.C., for plaintiff, appellant.

I. F. Hellmuth, K.C., and C. L. Dunbar, for defendant, respondent.

HON. MR. JUSTICE CLUTE:—At the trial the case was referred under sec. 29 of the Arbitration Act to his Honour Judge Chadwick. He made his report from which the defendant appealed upon the following grounds:—

"1. That the learned Referee should not have found that the plaintiff is entitled to an account of the partnership dealings from the inception of the partnership on the 1st August, 1899, to the 5th January, 1909, and that he should have found that the plaintiff is not entitled to an account of the partnership dealings prior to the 1st day of August, 1905.

"2. That the learned Referee should not have deducted the sum of $2,141.96 from the accounts receivable of the defendant at the inception of the partnership.

"3. That the learned Referee should not have reduced the capital of the defendant at the inception of the partnership by the sum of $5,000 constituting the item of "goodwill."

"4. That the learned Referee should have found that the defendant is entitled to interest on his capital in the partnership ascertained from year to year.

"5. That the defendant should not be charged with the so-called 'cash shortage' items or any part thereof.

"6. That the learned Referee erred in finding that the profit and loss account of the firm should not have been charged with depreciation on buildings, plant and machinery.

"7. That the defendant should not be charged with any sum whatever in connection with the mortgage referred to in clause 9 of the Report."

Teetzel, J., dismissed the appeal upon the first, second, fourth and sixth grounds, and allowed the same upon the third and seventh grounds. From this order both parties have now appealed.

Upon the argument objection was taken to the jurisdiction of the Court upon the ground that there was no Report from which an appeal lay to a single Judge. This objection was overruled at bar.

Before dealing with the different matters in appeal, it will be proper to state the nature of the partnership and the position of the parties; The defendant Mitchell had established a very considerable business at Guelph for the manufacture and sale of carriage goods and supplies. A partnership was entered into between the plaintiff and defendant, and Cutten and Engeland in May, 1899, to commence on the first day of August, 1899. The defendant Mitchell was to prepare the partnership agreement, but this was never done. A question arises as to whether or not there was an actual sale of the former assets of the Guelph Carriage Top Company, under which Mitchell had carried on the business to the new company, or whether the partnership related simply to the right to use all the assets of the former business at a certain valuation and to share in the profits.

The order in the appeal before Teetzel, J., declares that "Upon the formation of the said partnership everything that was put into the partnership became the property thereof, subject to the account, in which the defendant was credited, with the values of the various assets which the defendant was putting into the said partnership, which assets must, in taking the accounts and making the enquiries herein directed, be treated as partnership and not as separate property." Against this finding both parties appeal.

The plaintiff in his notice of motion by way of appeal alleges that the defendant never sold or intended to sell the assets or the good-will of his business to the partnership. The defendant in his cross-appeal says that the learned Judge erred in the declaration that upon the formation of the partnership everything that was put into the partnership became the propery of the partnership, and that, in taking the accounts, must be treated as partnership assets.

On the argument the counsel for the defendant expressed his willingness, as I understand him, to accept the view that all the assets of the old firm passed to the new firm. Mr. Hodgins on the contrary contested this view. The truth is that the evidence upon this point is very obscure. The parties seem rather to have taken it for granted that there was

only a partnership with reference to the profits and that the assets of the old firm were put in to be used by the new partnership at a valuation in order that interest might be charged against the new firm for their use. This, I think, was the fact and all parties have acted upon this view from the beginning of the partnership, and in this respect I think the finding of my brother Teetzel should be reversed.

Dealing with the partnership then as having been entered into with a view of running the business and not of its purchase, I proceed to deal with the matters in appeal upon this basis.

The principal point argued on behalf of the plaintiff was with reference to the item of interest upon $5,000 charged as a valuation of the good-will of the business. It is conceded by both parties that the question of good-will was not mentioned at the time the partnership was entered into. There is no doubt it formed a material part of the defendant's business, which had been carried on for some years prior to the partnership and valuable connections formed. During the period of partnership the plaintiff got the benefit of this. The learned Referee disallowed the item, but it was restored by my brother Teetzel. The good-will formed a part of the assets or property of the defendant, which. during the continuance of the partnership, formed the capital from which the profits would arise. The valuation of the assets to be turned in for the use of the partnership was to be made by the defendant. This valuation he did make and it included the good-will which he placed at $5,000, and entered the same in his private ledger with other items representing the values of the assets contributed. This ledger the plaintiff claims not to have seen until this action was brought, but it is clearly established by his own evidence that when the defendant made up the account in the action of *Cutten* v. *Mitchell*, when the other two partners went out, this item of $5,000 for good-will was included, and to his knowledge the share of profits allowed to Cutten and Engeland were reduced by this charge, and to the extent that the plaintiff shared in the profits, subsequently he was benefited thereby. In valuing the assets, which were handed over to the partnership, the good-will was included, and I think, properly included inasmuch as it formed a part of the property from which the profits were to arise. Upon this question I agree with the

finding of my brother Teetzel, and only refer to the further case of *Hibben* v. *Collister,* 30 S. C. R. 459.

The question of interest upon the sum of $3,500 was disposed of upon the argument.

The result is, with reference to the plaintiff's appeal, that the same should be dismissed, except as to the declaration of the assets of the former firm having passed to the new firm. With reference to this, there should be a declaration that there was no sale of the assets, but only a right of user for which interest was to be paid during the continuance of the partnership. In others respects the plaintiff's appeal is dismissed.

With reference to the cross-appeal. Upon the first ground I agree that the plaintiff is entitled to an account of the partnership dealings from the inception of the partnership on the 1st of August, 1899, to the 5th January, 1909, and not merely from the 1st of August, 1905. This ground of appeal is dismissed.

I also am of opinion that the second ground of appeal fails as to the sum of $2,141.96. This amount the learned Referee has deducted from the total of accounts passed over by the old firm to the new. They have been charged originally by the defendant, but he himself made the deduction and in explanation stated that having regard to their character, he thought it only fair that he should do so. Many of them were obviously bad at the time the partnership was entered into and no one knew bttter their character than the defendant himself and he having made this deduction as fair, ought not now to be permitted to withdraw from a position which upon a full knowledge of the facts he then took. This ground of cross-appeal should be dismissed.

The next ground is a question of interest. It was to charge what in effect was compound interest. This was disallowed, and, I think, properly so, in the absence of any agreement of the parties to pay compound interest.

The only remaining ground of the cross-appeal is that in relation to the depreciation on buildings, plant and machinery. The Referee found that the profit and loss account of the firm should not be charged with such depreciation. Taking the view that there was no sale of the assets of the old firm and that the intention of the parties was at the conclusion of the partnership, the defendant should receive

them back, and the further fact that repairs were made from time to time upon the property incident to the business, I think the finding of the Referee as confirmed by my brother Teetzel was right.

The result is that the appeal and cross-appeal are dismissed except as to the declaration above referred to. As both parties have failed in their appeal, except upon a point in which they practically agree as to the question of sale, there should be no costs. There should be a reference back to the Master to make his final report and dispose of the question of costs under the original order of reference.

HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LENNOX:—Agreed.