Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of **The** *Glenwood Lumber Company, Limited,* v. *George L. Phillips, since deceased, and now represented by Robert K. Bishop, from the Supreme Court of Newfoundland; delivered the* 14*th May* 1904.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

In the year 1898 the Appellants and the Respondent Phillips respectively applied to the Governor in Council of the Colony of Newfoundland for licences to cut timber on certain blocks of timber land near the Main River flowing into Gander Lake in that Colony. The Respondent Phillips is hereafter referred to as the Respondent.

The practice appears to be for such applications to be first considered in the Colonial Secretary's office, and if they are approved, a notification is sent to the Minister of Agriculture and Mines from whose office the licences are then issued. On the 16th of November 1898 the Deputy-Colonial Secretary wrote a letter of that date to the Minister of Agriculture and Mines enclosing four licences to cut timber which (he stated) had been approved by His Excellency the Governor and which had been granted to the following persons, viz., to the Respondent two

31767. 100.—5/1904. [23] A

blocks, one of which is the area in question in this litigation, and to the Appellants two other blocks.

The Respondent's agent was informed by the Colonial Secretary on the 15th November 1898 that the grants to him had been passed, but no licence was issued until the 20th January 1899.

On the 17th October 1898 the Appellants, without any title to do so but (as stated in their case) "expecting and believing" that their application would be granted by the Government, commenced cutting timber on land which was comprised in the licence afterwards granted to the Respondent, and they continued such cutting, notwithstanding a formal notice from the Respondent, until the 23rd of January 1899. At that date the timber which had been cut by the Appellants either lay on the ground or was piled on the land near the river. None of it was removed until after the 23rd January.

The Respondent's licence, which was dated the 20th January 1899, was granted under the Great Seal of the Colony, in pursuance of Section 51 of Chapter 13 of the Consolidated Statutes of Newfoundland (Second Series). The Crown thereby "licensed" to the Respondent, his executors, administrators and assigns all that tract, piece or parcel of land particularly described to hold for the purpose aforesaid (*i.e.*, for cutting the timber thereon), for the term of twenty-one years from the date of the licence, at an annual rental of ninety-six dollars, and the payment of a bonus of forty dollars on execution. There was a proviso that persons might at all times make and use roads upon and travel over the ground licensed, and that nothing therein contained should prevent any person taking standing timber without compensation to be used for certain public works by the Government, the authority of the Surveyor-General being first

obtained, and that persons settling by lawful authority within the ground licensed should not be interrupted in clearing and cultivation by the licensee.

The Appellants contended that this instrument conferred only a licence to cut timber and carry it away, and did not give the Respondent any right of occupation or interest in the land itself. Having regard to the provisions of the Act under the powers of which it was executed and to the language of the document itself their Lordships cannot adopt this view of the construction or effect of it. In the so-called licence itself it is called indifferently a licence and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. By Sub-section (7) of Section 51 of the Act it is enacted that the lease shall vest in the lessee the right to take and keep exclusive possession of the lands described therein subject to the conditions in the Act provided or referred to, and the lessee is empowered (amongst other things) to bring any actions or suits against any party unlawfully in possession of any land so leased and to prosecute all trespassers thereon. The operative part and *habendum* in the licence is framed in apt language to carry out the intention so expressed in the Act. And their Lordships have no doubt that the effect of the so-called licence was to confer a title to the land itself on the Respondent.

Subsequently to the 23rd January 1899 the Appellants proceeded to remove the logs which they had cut before that date. On the 20th June 1899 the Respondent commenced an action

against the Appellants. In the Statement of Claim it is alleged (1) that the Appellants on the 20th January 1899 and divers other days wrongfully entered on the Respondent's land and cut down Respondent's trees; (2) that the Appellants detained from the Respondent the Respondent's goods and chattels (that is to say) 15,500 logs, and the Respondent claimed a return of the said goods and chattels or their value, and by the third paragraph the Respondent claimed an injunction. The defence was a traverse of the allegations in paragraphs 1 and 2. This defence was, after trial, amended by adding specific allegations that the land described was not the Respondent's land, that the trees stated to have been cut down were not the Respondent's trees, and the logs stated to have been detained were not the Respondent's logs.

The action was tried before Mr. Justice Morison, and by his Judgment, dated the 27th of August 1900, it was adjudged that the Respondent should recover from the Appellants 521,979 feet of lumber then piled in the Appellants' mill, or $3,132 their value, and $468 for other lumber, and $400 damages and costs, and that a sum of $1,174. 50 (which the Respondent had agreed to pay to the Appellants for sawing the logs after the date of an interlocutory injunction) be set off against the damages and costs.

There was an appeal from this Judgment which, by an Order dated the 2nd April 1901, was ordered to be dismissed with costs. The present Appeal is from the latter Order.

The first and principal point taken for the Appellants at their Lordships' Bar was that the logs having been cut before the date of the commencement of the Respondent's title did not vest in, and were not the property of, the Respondent. It was also contended that at any

rate an alteration should be made in the details of the judgment.

An endeavour was made by the learned Counsel for the Appellants to restrict the second paragraph of the Statement of Claim to logs cut after the 20th January 1899. Their Lordships cannot accept this narrow construction of the Statement of Claim, and they think that the action was in substance for trespassing on the Respondent's lands, and for detinue of the logs removed from his lands after the 20th January 1899. 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. Indeed any such title is negatived by their own statement in their case that they acted in expectation only that they would afterwards acquire a title, and by the evidence of Mr. Mews, the Deputy Colonial Secretary. And their Lordships cannot listen to the suggestion of Counsel that the Appellants may have had a licence from the Crown. The Appellants were wrong-doers in entering on the lands of the Respondent 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 possession 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*, in 1902, Prob. D. 42. In *Jeffries* v. *Great Western Railway Company*, 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 showing 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.

5 E. & B. 802, at p. 806.

The learned Counsel for the Appellants recently moved before their Lordships for leave to make a further statement as to matters which he said had not been considered in the argument. The application was unusual, but their Lordships thought it better to hear the motion. Attention was then drawn to the statement in the judgment of the learned Judge as to the agreement of the 7th September 1899 entered into between the parties in the course of the litigation. The agreement itself is not in the Record and is not referred to in the Appellants' case, and it was obviously not intended to be relied on in support of their Appeal. Nor does it appear to their Lordships

to give them any assistance. The words used by the learned Judge of course mean the property of the Plaintiffs as between the parties to the action and there is no evidence of any intention to vary the rights of the parties or to determine the rights of third persons who were not parties to the action.

These considerations dispose of the Appellants' principal point, and it is unnecessary for their Lordships to discuss the opinion expressed by Mr. Justice Morison that the communication to the Respondent that his application for a licence had been granted would give him as from that date a good title to the logs, although the licence was not completed until a later date.

The Appellants' point on the form of the judgment is that the learned Judge should have allowed them as against the Respondent the expenses of cutting the trees and floating the logs down the river, as well as the expenses of sawing and piling. The latter expenses were allowed by arrangement between the parties. There was no arrangement as to the former. Their Lordships think that the judgment is in the form usual in actions for detinue, and it would not be right to impose on the Respondent the obligation of paying the Appellants the expenses of their wrongful acts as a condition of recovering what must be considered in this action as his property, although such expenses might properly, but would not necessarily, be taken into account in estimating the alternative damages.

Their Lordships will humbly advise His Majesty that the Appeal be dismissed, and the Appellants will pay the costs of it including the costs of the motion made by Sir James Winter subsequent to the hearing.