

## THE ATTORNEY-GENERAL V. PRICE

(1868), 15 Gr. 304

### Upper Canada Court of Chancery, Mowat V.C., 1868

*Crown right to judgment recovered by trespassers for timber.*

Where timber which was unlawfully taken from Crown property, was subsequently taken by force out of the possession of the first taker and the latter recovered a judgment against the trespassers, which included the value of the timber:

*Held*, that the Crown was entitled to claim so much of their payment as represented the value of the timber, exclusive of the labour and money expended upon it. .

Hearing at Sandwich Autumn sittings, 1868.

Mr. *O'Connor*, for the plaintiff.

Mr. *Barker*, for the defendant.

MOWAT, V.C.--This was an information and bill. The plaintiffs and those under whom they claim have, for many [Statement] years, been in possession of the Island of Point au Pelee, under an Indian lease alleged to have been made in 1788. In 1859 the Crown obtained a judgment against them on an information of intrusion, but did not appear to have enforced the judgment; and on the 9th of June, 1866, an order in Council was passed, waiving the judgment, and recommending that a Patent should issue to the claimants under the Indian title: Before this order was carried out, and on the 7th January, 1867, the defendant *Henry Price*, obtained a verdict against some of the plaintiffs in an action of trespass for (amongst other things) seizing and carrying away certain timber which *Price* had taken from what is called Middle Island, part of the property in question, and had removed to certain premises occupied by him. The verdict included the value of this timber, the defendants to the action having no legal title to it, and the possession of the plaintiff *Price* entitling him at law to the timber as against the persons who had taken it out of his possession. The verdict was for \$635, being it is said, \$600 as the value of timber, and \$35 for the trespasses. Judgement was entered on the 16th January, 1867. On the 25th February following, the present suit was commenced. The prayer was amongst other things for an injunction to restrain execution on the judgment so far as related to the \$600; for an account of the value of the timber and other trees cut by *Price* on the Island; and that he might be decreed to make satisfaction therefor to Her Majesty, the Attorney General on behalf of Her Majesty, waiving all forfeitures and penalties incurred by *Price* in the matter. An interlocutory injunction was granted as prayed, and, *Price* having afterwards put in his answer, the cause came on for hearing before me at Sandwich, at the last Autumn sittings there.

The Indian lease gave no title to the land, and therefore none of the plaintiffs can claim here any more than at law, that they were owners of the timber for which the judgment was recovered. In this view [Judgment] it is unnecessary to consider the objections made on the part of *Price* to the proofs offered by the plaintiffs in support of their claim as such.

But the Attorney General, on behalf of the Crown, it appears, is desirous of affording relief as far as possible to the plaintiffs, and claims that if they are not entitled to relief in their own right, the Crown had a right to the timber, and has a right to the judgment recovered for it; and the Court is asked on the part of the Crown, to restrain execution on so much of the judgment as in equity the Crown is entitled to. No doubt, if the Crown can successfully claim part of the judgment for the purpose of enforcing it, the claim can be set up and maintained for any other purpose which the Crown chooses.

Now, it is a familiar doctrine of equity that, that where a fiduciary relation exists between parties, if the trustee tortiously disposes of any of the trust property for other property; the latter may be followed by the *cestui que trust* (a) Lewin on Trusts, 5 ed. 645. The same principle is acted on at law in the case of factors, brokers, and the like. (b) See *Prentiss v. Brennan*, 1 Gr. 484. But it does not appear to be confined to cases where there is fiduciary relationship. In *Gladstone v. Hadwen* (c) 1 M. & Sel. 517. it was held, that the rule applied to Bank notes which were part of the proceeds of a bill obtained by a fraudulent misrepresentation, and discounted by the party who obtained it. In the case of *The Merchants' Union Express Co. v. Morton* (d) See the cases Lewin on Trusts *ubi supra*. my brother Spragge applied the doctrine to property bought with stolen money, and expressed the opinion that the rule is "applicable to other moneys and other property," as well as to trust moneys; "and that, if the Court can trace money or property, however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner, by holding it to be his in equity, or by giving him a lien on it." [Judgment]

The rule applies though the money or property wrongfully obtained or used is mixed by the wrongdoer with money or property of his own; (c) 1 M. & Sel. 517. and though it passes into the form of a debt due to him. Where it forms part of a judgment recovered, the effect must be the same.

The timber here clearly belonged to the Crown. It was the property of the Crown before being cut or blown down, and continued so afterwards; and by the express enactments of the Legislature, the ownership was not affected by the preparation of the timber for market, by its removal from the land, or by its being mixed with other timber, so as to become undistinguishable (f) See Public Lands Act, Con. Stat. Can. ch. 28, ss. 7, 8.

It seems clearly to follow from these considerations that the Crown is entitled to claim so much of the judgment recovered by the defendant as represents the value of the timber, not as it was when taken out of *Price's* possession, but as it was before his labor and money were expended on it. Its value was enhanced, I presume, by being cut down, and removed; and though the labour and money which the plaintiff expended upon it was forfeited to the Crown, it is not, I apprehend, for this Court, on an information like the present, to enforce the forfeiture; and the Attorney General, by the information, expressly and properly waives all penalties and forfeitures. The relief which should be given is, therefore, the same, I apprehend, as would be given to a subject under like circumstances; and the relief to a subject would be limited, I think, in the way I have suggested. This view renders it unnecessary for me to consider whether the evidence offered of the jury's several findings was such as, in a case of this kind, is admissible

here.[Judgment]

It was objected that the bill is multifarious; but that is an objection which should be taken by demurrer, and cannot be insisted on at the hearing.<sup>(a)</sup> See cases 1 Dan. Pr. 4 ed. 324.

The injunction must therefore be continued. An account will be taken of the value of the timber, exclusive of the labour and money expended by *Price* upon it. *Price* will pay the Sheriff's costs (if any), and further directions and all other costs will be reserved until after the account is taken. If the parties can agree as to the value of the timber, the expense of the reference and further proceedings may be avoided, and I can dispose of the whole case and of the costs at once.