MICHAEL SINNOTT AND ALBERT MONKMAN ..... } APPELLANTS;

AND

THOMAS C. SCOBLE, W. G. DENISON AND S. TRUDEAU ..... } RESPONDENTS.

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*Jan. 19.

*June 23.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH MANITOBA.

Permits to cut timber (Man.)—Rights of holders of—Dominion Lands Act, 1879, 47 *Vic., ch.* 71, *sec.* 52—*Interim Injunction—Damages.*

On the 21st November, 1881, Sinnott *et al.* obtained a permit from the Crown Timber Agent, Manitoba, "to cut, take and have for their own use from that part of range 10 E, that extends five miles north and five miles south of the Canadian Pacific Railway track," the following quantities of timber: 2,000 cords of wood and 25,000 ties, permit to expire on 1st May, 1882. They obtained another permit on the 10th February, 1882, to cut 25,000 ties. In February, 1882, under leave granted by an Order in Council of 27th October, 1881, Scoble *et al.* cut timber for the purpose of the construction of the Canadian Pacific Railway from the lands covered by the permit of the 21st November, 1881. Sinnott *et al.* by their bill of complaint claimed to be entitled by their permit to the sole right of cutting timber on said lands until the 1st May, 1882, and prayed that the defendants Scoble *et al.* might be restrained by injunction from cutting timber on said lands, and might be ordered to account for the value of the timber cut. An interim injunction was granted agianst Scoble *et al.* who justified their acts under the Order in Council of the 27th October, 1881, and denied the exclusive possession or title to the lands or standing timber. The injunction was made perpetual by the judge who heard the cause, but, on re-hearing, the judgment was reversed, and it was ordered that an enquiry should be made as to damages suffered by defendants by reason of the issue of the interim injunction at the instance of the plaintiffs.

*PRESENT—Sir W. J. Ritchie C.J. and Strong Fournier Henry and Gwynne JJ

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Held, that the decree made on re-hearing by the Court of Queen's Bench of Manitoba should be affirmed, and that the permit in question did not come within the provisions of the Dominion Lands Act of 1879, and did not vest in Sinnott *et al.* (the plaintiffs) any estate, right or title in the tract of land upon which they were permitted to cut, nor did it deprive the Government from giving like licenses or others of equal authority to other persons, as long as there was sufficient timber to satisfy the requirements of the plaintiff's licenses.

APPEAL from the judgment given and the decree made by the full Court of Queen's Bench for Manitoba, reversing the decree made in favor of the appellants by Miller J.

The pleadings and evidence are referred to at length in the judgment of Ritchie C.J.

Dalton McCarthy Q.C. for appellants:

The question is whether the permits granted by the Department of the Interior to cut timber on Dominion Lands enables licensees to protect their property. The license here is equivalent to a sale of the standing timber, and my first proposition is that having actual possession of this limit with the assent of the Crown, appellants are entitled to exclude trespassers, such as the respondents. *Harper* v. *Charlesworth* (1); *Asher* v. *Whitlock* (2); *Chambers* v. *Donaldson* (3); *Gilmour* v. *Buch* (4).

The recent consolidation of the Dominion Lands Act also shows that the intention was, and is, that these short leases or permits should carry with them the right to exclusive possession. See Dominion Lands Act, 1883, 47 Vic., ch. 71, sec. 52.

The permit gives the appellants leave to cut a certain quantity of timber, and it must be assumed that the Government intended to grant it under statutory powers, because they had no other. If it is held that

(1) 4 B. & C. 574.
(2) L. R. 1 Q.B. 1.
(3) 11 East 65.
(4) 24 U. C. C. P. 157.

it must, of necessity, be for a year, the permit should not be held invalid, but that declaration at the end of it which says: "this permit expires 1st May, 1882," should be held invalid, as an unauthorized limitation.

The appellants were responsible to the Government for damage done to timber on their limit by fire, by provisions of their permit; and the Government could not have intended to allow others on the limit while exacting fulfilment of this provision.

In any case they had a right to cut 25,000 ties and 2,000 cords of wood, and further quantity of 25,000 ties under the two permits, and I contend that both permits are perfectly good, but even if the last was not appellants had not cut what they were permitted to cut by the first permit, and were entitled to retain exclusive possession and a choice of locality and timber until all was cut and removed.

As to the decree made at the hearing it only directed the continuation of the injunction until the expiry of the plaintiffs permits; but, by mistake, it was drawn so as to continue it indefinitely, and on the settlement of it the defendants' solicitor raised no objection. The plaintiffs have always been willing, and offered to allow it to be amended in that respect, but the defendants' counsel did not desire this and said, if you are entitled to an injunction at all that makes no difference.

Hector Cameron Q. C. and *T. S. Kennedy* for respondents.

The plaintiffs bill alleges they were in actual rightful possession of this tract of land, if this fact has not been proved, the bill should be dismissed.

The respondents contend then, first, that the appellants have shown no title to the land or timber which would entitle them to interfere with the respondents cutting and removing timber also from the same lands,

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and therefore the bill for an injunction will not lie and the appeal must be dismissed.

And second, that they were lawfully cutting and removing timber from off said lands by reason of the agreement with the railway and under rights conferred by the Order in Council.

The following cases were cited: *Carr* v. *Benson* (1); *Harper* v. *Charlesworth* (2).

Dalton McCarthy Q.C. in reply, cited *Newby* v. *Harrison* (3); Kerr on Injunctions (4).

Sir W. J. RITCHIE C.J.—Plaintiffs, by their bill on 1st paragraph, allege that they were in certain and rightful possession of range 10, east of the principal meridian, Province of Manitoba, that extends five miles north and five miles south of the Canadian Pacific Railway track, under and by virtue of a permit to cut timber on Crown Lands issued to plaintiff by Anderson, crown timber agent, by authority of the Minister of the Interior, in accordance with the provisions of the Dominion Lands Act, and are entitled by such permit to the sole right of cutting timber on the said lands until the first of May next.

In the second paragraph, that defendants have, from 3rd February, instant, continually, trespassed upon said lands by cutting down and removing timber and trees growing on lands.

Third paragraph, that defendants continue to threaten and intend to continue to trespass, although requested to desist; have men and teams, cutting and hauling away timber. Plaintiffs pray that defendants may be restrained by injunction and ordered to account and ordered to pay costs and other relief.

Defendants for answer, say to first paragraph, plaintiffs had a permit to cut on said lands, dated 21st No-

(1) 3 Chy. App. 524.
(2) 4 B. & C. 574,
(3) 1 John. & H. 393.
(4) P. 114.

vember, 1881, which had been agreed to be given them previous to 1st November, but only to the extent of 2,000 cords of wood and 25,000 ties, and had not sole right to cut timber and other trees on said land.

As to the second paragraph of the said bill, we say that by an Order in Council, which is in the words and figures following:—

Copy of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor-General in Council, on 1st November, 1881.

On a Report dated 27th October, 1881, from the Minister of the Interior, submitting an application by the Canadian Pacific Railway Company, for permission to cut ties and timber requisite for the construction of the railway of the territory, lying between Broken Head River and the western boundary of the territory, acquired by the late Government of Canada, from the Indians, under the treaty commonly known as the "Robinson Treaty," and for a distance throughout of twenty miles in depth on each side of the Canadian Pacific Railway line.

The Minister observes that the company represents it experiences difficulty in obtaining the requisite wood for the great extent of railway, which it intends to complete next season.

The Minister therefore recommends that the company be given permission to cut timber, for the purposes of construction of the line on any lands belonging to the Dominion, included within the space above described, subject to the payment of dues by the company on each class and kind of timber taken at the rates set forth in the following schedule:

Fence posts, 8 ft. 6 in. long, each, 1 cent. Telegraph poles, 22 ft. long, each, 5 cents; each lineal foot over, 1 cent.

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Railroad ties, 8 ft. long, each, 3 cents. Rails, 12 ft. long, $2 per M.

Stakes, 8 ft. long, each $2 per M. Shingles, 60 cents per M.

Square timber and saw logs of oak, elm, ask or maple, $3 B. M.

Pine, spruce, tamarac, cedar and all other woods (except poplar), $2.50 per M.

Poplar, $2 per M. All other products of the forest, not enumerated, 10 per cent. *ad valorem*.

The committee concur in the above report and submit the same for your Excellency's approval.

3. That plaintiffs' have cut and delivered to railway the said 30,000 ties, and there is standing on the land over and above the amount required to cut the 30,000 ties, trees sufficient to make 75,000 more at least.

That the Canadian Pacific Railway acquired permission to cut timber on said lands, and defendants contracted with railway company to cut and deliver to them on line of railway between station Ingolf, on the east, and the half-breed line, near the Broken Head river, on the west, 75,000 ties and 4,000 telegraph poles, and railway agreed with defendants that they should have all the rights granted them by Order in Council, reserving to plaintiffs the right to cut ties and other wood to the extent of the contracts, the said railway had entered into with the plaintiffs—the said plaintiffs' contract, viz.,30,000 ties.

4. Defendants sub-let to Strevel a portion of contract for ties, who sub-let to Trudeau, and he, under instructions from defendants and Strevel entered on land, and cut and hauled away ties, which are the trespasses.

5. Injunction injurious to defendants, Strevel and Trudeau, and if continued, will prevent defendant from fulfilling contract with railway.

6. The plaintiff has no right to cut over and above

said 30,000 ties, and defendants pray injunction to restrain them from doing so.

The following is the permit to cut timber on Crown lands:

I, James Anderson, Crown Timber Agent, by virtue of power granted to me by the Right Honorable the Minister of the Interior, do hereby permit M. Sinnott and Company, Winnipeg, Man., to cut and take, and have for his own use from that part of range 10, east, that extends five miles north and (5) fives miles south of the Canadian Pacific Railway track, the following quanties of timber:

2,000 cord of wood, at 25 cents per cord.....	$ 500 00
Fence rails, at per 100.....	0 00
Fence posts, at do	0 00
House timber, at per lineal foot.....	0 00
25,000 ties, at 3 cents per tie.....	750 00
	$1,250 00
Permit fee.....	0 50
	$1,250 50
20 per cent. paid.....	250 50
	$1,000 00

And I hereby acknowledge the receipt of $250.50 on account. The balance to be paid, and affidavit of the quantity cut, to be made at Crown Timber Office, Winnipeg, on or before the first day of May, 1882. Such permit to be liable to forfeiture for non-fulfilment of any of the conditions set forth in the Order in Council of 17th January 1876, or of this permit, and the holder of this should he not fulfil such conditions, will be subject to the penalties of the Dominion Lands Act, 1879, for cutting without authority.

Granted under my hand and the seal of the Crown Timber Office, Winnipeg, this twenty-first day of November, 1881.

(Signed,) E. F. STEPHENTON,
For Crown Timber Agent.

This permit expires 1st May, 1882.

This permit extends only to lands owned and in possession of the Crown.

PERMIT TO CUT TIMBER ON DOMINION LANDS.

I, E. F. Stephenson, for Crown Timber Agent, by virtue of power granted to me by the Minister of the Interior and in consideration of the dues hereinafter set forth, do hereby permit Sinnott & Co., of the city of Winnipeg, Manitoba, to cut and take and have for their

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own use or for the purposes of barter or sale from the following described Dominion Lands: That part of Range Ten, East (R. 10, E.), that lying five miles north and five miles south of the Canadian Pacific Railway track, the following quantities of timber: 25,000 ties.

The dues on which amount to seven hundred and fifty dollars, and I hereby acknowledge the receipt of one hundred and fifty dollars, on account.

The affidavit printed on the back of this permit, showing the quantity cut to be sworn and the balance due thereon to be paid at Winnipeg on or before the first day of May, 1882.

This permit is liable to be forfeited for non-fulfilment of any of the conditions set forth in the Order in Council of 10th October, 1881, or of this permit and the holder of the permit should they not fulfil such conditions, will be subject to the penalties of the Dominion Lands Act, 1879, for cutting without authority.

Granted under my hand, this tenth day of February, 1882.

(Signed,) E. F. STEPHENSON,
For Crown Timber Agent.

Office fee, 50 cents.

This permit expires on 1st May, 1882.

I accept this permit and agree to all the terms and conditions thereof.

(Signed,) M. SINNOTT & Co.

Witness: (Signed,) E. F. STEPHENSON.

Plaintiffs then put in an agreement between themselves and the Canadian Pacific Railway, dated 3rd January, 1882, whereby plaintiffs agreed to cut and deliver in winter of 1882, on or before 1st May next, 30,000 railway ties and 2,000 cords of wood, to be cut on a certain limit extending west of White Mouth and lying on both sides of the line of the Canadian Pacific Railway.

The following evidence was given at the trial:—

Monkman proves Stephenson was acting Crown timber agent and in sole charge of office.

Plaintiffs went in to fulfil contracts. Proves defendants cutting on limits. That he got an extension of limit on Monday and filed bill on Tuesday.

Sinnott proves 25,000 ties got out.

James Jackson proves 1,200 ties got out and not marked.

Skead, agent of Canadian Pacific Railway for ties, says: 20,000 have been inspected and plaintiffs claim 10,000 more.

Defendants are getting out 75,000 ties, 4,000 telegraph poles, and 3,000 piles on section 11 of Canadian Pacific Railway; they put in an Order in Council, and 1st November, 1881, and close. (The Sinnott limit is a limit of Canadian Pacific Railway).

Defendant Dennison proves contract with Van Horne representing the Canadian Pacific Railway, to get out 75,000 ties, 4,000 telegraph poles, and 1,000 piles, before 20th June, on Canadian Pacific Railway limits. Plaintiffs' limits are on this. We had all rights of Canadian Pacific Railway, except what had been given to Stewart and Short. Plaintiffs were not exempted; they applied for it but did not get it till some time after.

Trudeau says:—

I am one of the defendants. I know part of this limit. I have known it for two years, there is timber enough there that I have seen on a part of plaintiff's claim, to make 75,000 to 80,000 ties, and I have not seen all the limit and some I have not seen at all, and a small piece west of a certain line, from the railroad at its southern end, about three miles running north, I have not seen. On the west part of limit, south of railroad, I have not seen at all.

And again he says:

There are 15,000 ties that can be got out on corner where I was working.

W. Kennedy, for defendant, offers further evidence as to number of ties, &c.

The judge.—"I say not."

Wm. C. Van Horne says:—

25th February, 1882.

I am General Manager of Canadian Pacific Railway, and have been so since early in December. The defendants have a contract with Canadian Pacific Railway to furnish ties, wood and poles. The Canadian Pacific Railway have a permit to cut on sections 15 and 14,

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as per Order in Council. They undertook to supply 75,000 ties, if they were allowed to have the rights of Canadian Pacific Railway on section 15, and as far east on section 14 as Ingolf.

Cross-examination—Nothing was said about Sinnott & Co., or other private rights.

In rebuttal—Andrew Mackie knew Sinnott & Co.'s foreman; says he knows the Sinnott limit pretty well; I don't think there are more than 12,000 ties left.

James Jackson:—

I examined what is left over, and above what Mackie has spoken of; I think there are 6,000 left.

This is practically all the evidence in the case. The interim injunction having been continued till the 25th February, on that day the cause came on for judgment, when the following decree was pronounced:

This court doth order and decree: That the defendants and their servants, agents and workmen, be restrained from felling, cutting, removing, or otherwise interfering with any timber now being upon the lands in the plaintiffs bill of complaint mentioned, being that part of range 10, east of the principal meridian in the Province of Manitoba, extending five miles north and five miles south from the track of the Canadian Pacific Railway, where it crosses the said range, and that an injunction do issue accordingly.

This court doth further order and decree: That it be referred to the Master of this court to take an account of the damage caused to the plaintiffs in consequence of the timber cut by the defendants, or by their authority and direction, and of the value thereof to the plaintiffs; and that the defendants do pay such damages to the plaintiffs, when ascertained, forthwith.

This court doth further order and decree: That the defendants do pay to the plaintiffs their costs of this suit, and of the interim injunction, and motion to continue the same, forthwith, after taxation thereof by the Master of this court.

We are left entirely in the dark as to the reasons which led to the making of this decree, or, indeed, as to whether any reasons were given.

A re-hearing having been granted before the full court, this decree was reversed by the Chief Justice and Mr. Justice Dubuc, Miller, J., adhering to his original opinion.

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I cannot discover under what statute, order in council, or legal authority, the permit under which plaintiff claims was issued as this was.

If under a legal authority, it did not give the licensee possession of the land covered by the permit, or any interest in all the trees standing on such land; nor did it prevent the Crown from giving a permit to cut on the same land subject to such permit.

And even in my opinion, if this license or permit had been issued under legal authority, it amounted to no more than a mere permission or right to enter on the land and cut the quantity of timber specified in the permit, and gave the licensee no interest in or possession of the land, or exclusive right to cut or property in the standing trees. This permit is entirely different from a license such as that contemplated by the 52nd section of the Dominion Lands Act, which covers all the timber on the land, and gives the licensee the exclusive possession of thel and.

I do not think the plaintiff could complain unless he could show that the holder of the second permit wrongfully interfered with him, and that there was not sufficient to fill the permit and allow any others to cut, and then could he have more than an action on the case. See *Beckwith* v. *McPhelim* (1).

Long ago it was held, by the Supreme Court of New Brunswick, that a license to cut timber and remove it from lands does not enure as a grant of the trees until cut under the license. *Kerr* v. *Connell* (2); and again, that license conveys no interest in the land to the grantee, nor any property in the standing trees. *The N. B. & N. S. Land Co.* v. *Kirk* (3); *Breckenridge* v. *Woolner* (4).

(1) 2 Allen 501.
(2) Bert. R. 133.
(3) 1 Allen 443.
(4) 3 Allen 303.

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But it was held that a licensee of Crown land with authority to cut and take away timber may maintain an action on the case against a person wrongfully cutting, in consequence of which the licensee sustains damage. *Beckwith* v. *McPhelim* (1).

The appeal should be dismissed with costs.

STRONG J.—I adhere to the judgment of the late Chief Justice of Manitoba in all respects. I think the appellant has shown no title whatever, and that the appeal should be dismissed with costs.

FOURNIER J.—Le permis invoqué par l'appellant n'est pas accordé en conformité des dispositions du "Dominion Lands Act of 1879," et ne confère à l'appellant aucun droit de possession à l'étendue de terrains sur laquelle il lui était seulement permis de couper du bois de corde, des liens (*ties*). Ce permis ne privait pas le gouvernement du droit d'accorder le même privilège à d'autres personnes. L'appellant n'avait aucun intérêt à contester ce droit tant qu'il existait dans l'étendue du terrain en question une quantité plus que suffisante de bois pour lui permettre de couper les quantités mentionnées dans son permis. La preuve a fait voir qu'il y en avait beaucoup plus qu'il n'avait droit d'en couper.

Les causes citées n'ont rapport qu'à des permis accordés en vertu des "Statuts Refondus du Canada" et non pas à des permis d'un caractère tout spécial, comme dans le cas actuel.

Quant à la partie du jugement de la Cour du Banc de la Reine réformant le jugement de l'hon. juge Miller ordonnant une référence, pour l'estimation des dommages causés aux intimés par la suspension de leurs travaux, ordonnée par *l'injonction intérimaire*, je crois qu'elle doit être maintenue. Je concours dans les motifs donnés à ce sujet par l'hon. juge Gwynne.

Appel renvoyé avec dépens.

(1) 2 Allen 501.

HENRY J. concurred.

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GWYNNE J.—The plaintiffs claiming to be in actual and rightful possession of a tract of land twenty miles in length and ten miles in depth, situate in the Province of Manitoba, filed their bill in the Court of Queen's Bench in Manitoba, alleging that the defendants had trespassed on the said tract of land, and were cutting down and removing therefrom and applying to their own use, and threatened to continue cutting down, removing and applying to their own use, divers valuable timber trees growing on the said land, and the bill prayed that the defendants might be restrained by injunction from committing the acts aforesaid and other acts of a like nature, and that they may be ordered to account for the value of the timber and other trees cut down, removed and applied to their own use, and for further relief an interim injunction was granted *ex parte*. The defendants by their answer denied the right and title asserted by the plaintiffs and claimed to have a right to cut the timber they were cutting under authority derived from orders in council of the Privy Council of the Dominion of Canada of equal authority with the right under which the plaintiffs claimed, and they claimed damages for the injury sustained by reason of their work having been stopped by the interim injunction. At the hearing of the case Mr. Justice Miller made a decree that the defendants and their servants, agents and workmen be restrained from felling, cutting, removing, or otherwise interfering with any timber upon the lands in the bill mentioned, being part of range 10 east of the principal meridian, in the Province of Manitoba, extending five miles north and five miles south from the track of the Canadian Pacific Railway, where it crosses the said range, and that an injunction do issue accordingly; and that it be referred to the

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master to take an account of the damages caused to the plaintiffs in consequence of the timber cut by the defendants, or by their authority and direction, and the value thereof to the plaintiffs, and that the defendants do pay such damages to the plaintiffs when ascertained. Upon the cause being re-heard by the full court this decree was reversed, and a decree was made in effect dismissing the plaintiffs' bill with costs, and directing an account to be taken of the loss and damage sustained by the defendants by reason of the interim writ of injunction, and that the plaintiffs should pay to the defendants the amount so to be found due.

The plaintiffs appeal from this decree.

The title upon which the plaintiffs rested their claim, so far as it is necessary to set it out, is as follows:—(1)

I am of opinion that this appeal should be dismissed and that the decree pronounced upon the re-hearing should be sustained, and for the reasons stated by the learned judges who constituted the majority of the court and by whom that decree was pronounced, namely: that the permit, under which alone the plaintiffs claim title, neither is or professes to be such an instrument as comes within the provisions of the Dominion Lands Act of 1879, and that it does not vest in the plaintiffs any estate, right, or title in the tract of land upon which they were permitted to cut the quantities of cordwood and ties mentioned, but is and professes to be only a license to the plaintiffs to enter upon the tract in question, and to enable them to cut thereon the specified quantities of timber mentioned without subjecting them to be treated as trespassers. It gave to the plaintiffs no estate whatever in the land, nor did it deprive the government from giving like licenses or others of equal authority to other persons, whose acting under which, whatever might be

(1) See p. 577.

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their form, the plaintiffs had no right whatever to dispute, so long at least as there was timber growing on the tract more than was sufficient to satisfy the requirements of their own prior license; and there is no pretence that this was not the case here, nor, indeed, did the plaintiffs rest their claim upon any such pretence, but solely upon the ground that, as they contended, the license they had to cut 2,000 cords of wood and 25,000 ties upon a tract of 20 miles long and 10 miles wide, even though it should be covered with timber, vested in the plaintiffs an exclusive right and title, to the possession of the whole of the tract, and to the whole of the timber growing thereon, and to so much, if any, as should be cut by any other person thereon, so long as their license should continue in force which was stated to be only until the 1st May, 1882.

The cases relied upon, as decided under the provisions of the Consolidated Statutes of Canada, relating to Crown Timber Licenses issued under that Act, have no bearing whatever upon licenses of the special character of that under which the plaintiffs claim.

As to the clause in the decree upon re-hearing, which directs an enquiry before the master, as to the damage sustained by the defendants by reason of the issuing of the interim injunction under the undertaking of the plaintiffs interested therein, I concur in the opinion expressed by Lord Justice Cotton in *Smith* v. *Day* (1), and in the authority of *Novello* v. *James* (2) cited by him, decided by Lords Justices Turner and Knight Bruce, the latter of whom, as Vice-Chancellor, was the author of the undertaking as to damages which is inserted in orders for interim injunctions. I am therefore of opinion that the clause should be retained.

This case is one which, in my judgment, emin-

(1) 21 Ch. D. p. 429. (2) 5 DeG. M. & G. 876.

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ently calls for satisfaction in damages being rendered to the defendants. The plaintiffs have by the claim which they set up, very wantonly, as it seems to me, done great damage to the defendants, and these interim injunctions are, I think, in the courts of this country at least, granted more freely and with less consideration than they would be if it were not considered that they are granted at the whole risk of the plaintiff, in whose interest they are granted as to damages in case upon more mature reflection of the case at the hearing, it should appear that the plaintiff's right to have had the injunction, cannot be sustained. If a reference as to damages should never be directed, and if it be established that a plaintiff, by giving the undertaking, incurs no responsibility, when the judge grants the injunction by a mistake in law, in a case in which the court, upon mature consideration at the hearing, shall be of opinion that it should not have been granted, these injunctions, which are found so useful in practice, must needs to a great extent fall into disuse, and as observed by Lord Justice Cotton, the courts of first instance will have to deal with those cases in a way in which they ought not to be dealt with. The appeal, in my opinion, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *F. B. Robertson.*

Solicitor for respondents: *T. S. Kennedy.*