

THE LAKEFIELD LUMBER AND }
 MANUFACTURING COMPANY } APPELLANTS; ¹⁸⁹¹
 (DEFENDANTS)..... } *Feb. 4, 5.
 *Nov. 17.

AND

WILLIAM SHAIRP (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Crown lands—License to cut timber—Free grants—Patent—Interference
 with rights of patentee.*

By sec. 3 of R.S.O. (1887) ch. 25—the Lieutenant-Governor in Council may appropriate any public lands * * * *
 as free grants to actual settlers, &c., and by sec. 4 such grants or appropriations shall be confined to lands * * *
 within the tract or territory defined in that section. By sec. 10 pine trees on land located or sold within the limits of the free grant territory after 5th March, 1880, shall be considered as reserved from the location, and shall be the property of Her Majesty, and sec. 11 enacts that patents of such lands located or sold shall contain a reservation of all pine trees on the land and that any licensee to cut timber thereon may, during the continuance of his license, enter upon the uncleared portion and cut and remove trees, &c.

The L. Co. held a license, issued 30th May, 1888, to cut timber on land within the free grant territory but which had not been appropriated under sec. 3 of the above act. A license was first issued to the company in 1873 and had been renewed each year since that time. The license authorized the cutting of timber on lands unlocated and sold at its date; lands sold or located while it was in force; pine trees on lots sold under orders in council of 27th May, 1869; and pine trees, when reserved, on lots sold under O. in C. of 3rd April, 1880, upon the location described on back of license.

Regulations made by O. in C. of 27th May, 1869, provide that "all pine trees on any public land thereafter to be sold, which at the time of such sale or previously was included in any timber license, shall be considered as reserved from such sale and shall

* PRESENT:—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau Gwynne and Patterson JJ.

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be subject to any timber license covering or including such land in force at the time of such sale, or granted within three years from the date of such sale, &c. All trees remaining on the land at the time the patent issues shall pass to the patentee. A patent for a lot in the free grant territory was issued to S. on 13th March, 1884.

On the back of the license was a schedule of lots included in the location with the date of sale or location, and the sale or location of S.'s lot was mentioned. The company claimed the right to cut timber on said lot which had not been appropriated by the L. G. in C.

Held, affirming the judgment of the Court of Appeal for Ontario, that the provisions in secs. 10 and 11 of R. S. O. (1887) c. 25 relating to the pine trees in the territory, only apply to such lots as have been specifically appropriated under sec. 3; that the license of the company, though renewed from year to year, was only an annual license; that the license issued in 1888 did not give the holders a right under the regulations of 27th May, 1869, to the timber on land patented in 1884, and that the company had notice, by their license of 1888, that the lot in question had been patented to S. more than three years previously.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment at the trial in favour of the plaintiff.

The facts of the case are sufficiently set out in the above head-note and in the judgment of Mr. Justice Gwynne in this court.

The case was tried before MacMahon J. and a jury, when damages were assessed and judgment was reserved on certain points of law raised during the trial. Judgment was subsequently given in favour of the plaintiff which was affirmed by the Court of Appeal. The defendants appealed to the Supreme Court.

McCarthy Q. C. and *Poussette* Q. C. for the appellants cited *Boynnton v. Boyd* (2); *Walker v. Rogers* (3).

Edwards for the respondent referred to *Canada Permanent Loan Co. v. Taylor* (4); *Doe d. Henderson v.*

(1) 17 Ont. App. R. 322.

(2) 12 U. C. C. P. 334.

(3) 12 U. C. C. P. 327.

(4) 31 U.C.C.P. 41.

Westover (1); *Cockburn v. Muskoka Lumber Co.* (2);
Dunkin v. Cockburn (3); *McArthur v. Northern and Pacific*
Junction Railway Co. (4); and *McLure v. Black* (5).

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Sir W. J. RITCHIE C. J.—For the reasons given in the court of first instance, and in the Court of Appeal confirming the judgment of the trial judge, I think this appeal should be dismissed.

STRONG J.—I concur in the judgment of Mr. Justice Gwynne in this case.

FOURNIER and TASCHEREAU JJ.—concurred in dismissing the appeal.

GWYNNE J.—This appeal must, in my opinion, be dismissed.

The learned counsel for the appellants rested their contention upon the grounds:

1st. That the land in question, lot 4 in the 15th concession of the township of Burleigh, is within what is spoken of as “Free Grant Territory,” in the Ontario statute of 1880, intituled “An Act to amend the Free Grants and Homesteads Act,” and therefore subject to the provisions of that act and the regulations made in pursuance thereof, and that being such the license under which the appellants claim prevails over the letters patent under which the respondent claims; and 2nd. That even if the land be not within the operation of the “Free Grants and Homesteads Act,” the license issued in 1884 under which the appellants claim is the same license as that originally issued, which was about 1873, and renewed from year to year

(1) 1 E. & A. (Ont.) 465.

(4) 17 Ont. App. R. 86.

(2) 13 O. R. 343.

(5) 20 O. R. 70.

(3) 13 O. R. 254; 15 Ont. App. R. 493.

1891 ever since, and as the lot in question is still specially
 THE named in the license of 1884 it must prevail over the
 LAKEFIELD letters patent and sale made to the respondent under
 LUMBER the act respecting the management and sale of
 AND MANU- public lands upon the authority of *McMullen v. Mac-*
 FACTURING donell (1) and *Farquharson v. Knight* (2).
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Gwynne J. The statute of the late province of Canada 23 Vic.
 ch. 2 intituled "An Act respecting the Sale and
 Management of the Public Lands" in its 11th section,
 enacted that except as thereafter provided no free
 grant of public land should be made. In its 13th
 section it enacted that :

The Governor in Council might appropriate any public lands as
 free grants to actual settlers upon or in the vicinity of any public roads
 opened through the said lands in any new settlements, under such
 regulations as shall from time to time be made by order in council.
 But no such free grant shall exceed one hundred acres.

By the 14th section the Governor in Council was
 empowered to set apart and appropriate such of the
 crown lands as he might deem expedient for wharves,
 piers, market places, and other purposes therein stated,
 and to make free grants thereof for such purposes
 subject to certain limitations therein expressed.
 And as to the sale of public lands it was enacted
 that the Governor in Council might from time to time
 fix the price per acre of the public lands and the terms
 and conditions of sale and settlement and payment.
 Then by the 16th section the Commissioner of Crown
 Lands was authorized to issue to purchasers, as well
 as to settlers on land, as a free grant, licenses of oc-
 cupation, and that such license of occupation should
 operate to enable the holder to maintain suits against
 any wrong-doer or trespasser as effectually as he could
 under a patent from the crown, but that it should
 have no force against a license to cut timber existing

(1) 27 U. C. Q. B. 36.

(2) 25 U. C. Q. B. 413.

at the time of the granting thereof. The 17th section gave to a certificate of sale, and to a receipt for money received on the sale of public lands, the same force and effect as by the previous section were given to the license of occupation.

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The legislature of the province of Ontario in its first session passed an act, 31st Vic. ch. 8, intituled "An Act to secure Free Grants and homestead to actual settlers on the public lands," and thereby enacted that the statute of the Parliament of the late province of Canada, passed in the 23rd year of Her Majesty's reign, intituled "An act respecting the sale and management of the public lands," might be cited and designated in all acts and proceedings as "The Public Lands Act of 1860," and is the act thereafter so designated; it then repealed the 13th section of the above act, and enacted that the Lieutenant Governor in Council might appropriate any public lands considered suitable for settlement and cultivation, and not being mineral or pine timber lands, as free grants to actual settlers under such regulations as should from time to time be made by order in council not inconsistent with the provisions of the act, but that such grants or appropriations should be confined to lands then already surveyed or thereafter to be surveyed within a very extensive tract of country particularly described in the fifth section of the act.

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In the sixth section it was enacted that all persons to whom any land might be allotted or assigned under such regulations for a free grant should be considered as located for the land; and by sections seven and eight, that no person should be located for any land under the act or the said regulations unless certain conditions should be fulfilled; and by section nine, that no patent should issue for any land located under the act, or under said regula-

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tions, until the expiration of five years from the location, nor unless certain settlement duties should be performed. Then by section ten, all pine trees on the land, except such as might be actually necessary to be removed for the clearing of the land and for building, fencing or fuel, were reserved as the property of Her Majesty until the patent should issue, at which time all trees remaining on the land should pass to the patentee.

Now by orders and regulations made under the above "Free Grants and Homesteads Act of 1868," and "The Public Lands Act of 1860," and passed by the Lieutenant Governor in Council on the 27th May, 1869, it was provided among other things :

Par. 1.—That the quantity of land to be located to any person as a free grant, under "the Free Grants and Homesteads Act of 1868," should be 100 acres.

Par. 2.—That any locatee under said act, being the male head of a family, should be allowed to purchase an additional 100 acres at 50 cents per acre cash at the time of such location, subject to the same reservations and conditions, and the performance of the same settlement duties, as are provided in respect of free grant locations by the 9th and 10th sections of said act, except that actual residence and building on the land purchased will not be required.

Par. 5. All pine trees growing or being on any land hereafter located as a free grant under the said act *or sold under the preceding regulation* shall be subject to any timber license in force at the time of such location or sale or granted within five years subsequently thereto, and may at any time before the issue of the patent for such land be cut and removed under the authority of any such timber license while lawfully in force.

Upon the same 27th May, 1869, another order in council was approved and passed whereby regulations of a wholly different nature were established in relation to the sale of lands under "The Public Lands Act of 1860." By this order it was provided that

all pine trees growing or being upon any public land hereafter to be sold and which at the time of such sale or previously were included in any timber license, shall be considered as reserved from *such sale and*

such sale shall be subject to any timber license covering such land in force at the time of such sale or granted within three years from the date of such sale, and such trees may be cut and removed from such land under the authority of any such timber license while lawfully in force, but the purchaser at such sale or those claiming under him or her may cut and use such trees as may be necessary for the purpose of building, fencing and fuel on the land so purchased, and may also cut and dispose of all trees required to be removed in actually clearing said land for cultivation ; but no pine trees except for the necessary building, fencing and fuel as aforesaid shall be cut beyond the limit of such actual clearing before the issuing of the patent for such land ; and all pine trees so cut and disposed of (except for the necessary building, fencing and fuel 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. All trees remaining on the land at the time the patent issues shall pass to the patentee.

And it was, apparently *ex majori cautela*, provided that

this order shall not apply to any land to be sold as mining land nor to land to be sold to any free grant locatee under the regulations or order in council bearing date this day.

From the above orders and regulations it appears that while lands sold to a free grant settler under the above regulations in that behalf are made subject to any timber license in force at the time of such sale or granted within five years subsequently thereto, lands sold under the Public Lands Act of 1860 are made subject only to such licenses as may be in force covering such land at the time of such sale or granted within three years from the date of such sale, and that the provision in the 10th section of "The free grants and Homesteads Act of 1868," that all trees remaining on the land at the time the patent to a free grant locatee issues shall pass to the patentee, is by the order and regulation made in relation to land sold under "The Public Lands Act of 1860" made part of the contract of sale entered into with the purchaser to the benefit of which he is entitled.

The Lieutenant Governor in Council, prior to the month of February, 1871, appears to have exercised the

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authority vested in him by the 4th and 5th sections of "The Free Grants and Homesteads Act of 1868," by appropriating certain of the townships comprised in the tract of country described in the 5th section of the act as townships in which free grants might be made to actual settlers, but the date or terms of the order in council making such appropriation do not appear for the order has not been produced; but on the 13th February, 1871, an act was passed intituled "An Act to encourage settlement in the Free Grant Territory," whereby after reciting that

it is expedient to ascertain how far immigration would be encouraged, and the welfare of settlers promoted by the partial clearance of lands forming part of the public lands appropriated for free grants

* * * *

authority was given to set apart \$20,000 from the consolidated fund for the purpose.

It appears further that prior to the appropriation of such townships for free grants by the Lieutenant-Governor in Council, under the said "Free Grants and Homesteads Act of 1868," contracts of sale for the sale of some lots in some of these townships to settlers had been made under "The Public Lands Act of 1860," and the above regulations made thereunder, which sales the Government seems to have desired to convert into free grants, for on the 2nd of March, 1872, the statute 35 Vic. ch. 21, intituled "An Act to provide for the remission of sums due by settlers in certain *Free Grant Townships*," was passed whereby it was enacted that :

The Lieutenant-Governor in Council may remit the sums due to the crown in respect of their lands by *bonâ fide* settlers still in occupation of their lands in all free grant townships save and except (four townships named) and place such settlers in the same position as those who settled in the *free grant townships under the free grant regulations*.

Then again, on the 24th March, 1874, an act 37 Vic. ch. 23 was passed, intituled "An Act respecting sales

of pine trees by certain settlers" in the free grant townships in the districts of Muskoka and Parry Sound whereby an order in council of the 4th of October, 1871, was affirmed and declared to be good and valid in law. Then on the 2nd March, 1877, the act 40 Vic. ch. 15, intituled "An Act respecting the Free Grants and Homesteads Act of 1868," was passed, whereby after reciting that

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doubts have arisen as to the right of the Commissioner of Crown Lands to issue licenses to cut timber over and upon lots located or sold to free grant settlers under the "Free Grants and Homesteads Act of 1868," and that it was expedient to remove such doubts,

it was enacted that

nothing in the said act or in the act passed in the 37th year of Her Majesty's reign, chaptered 23, or in any other act passed by the legislature of this province or within its legislative authority contained, shall be held to have in any way restricted the authority of the Commissioner of Crown Lands to grant licenses to cut timber on lots located or sold under the said Free Grants and Homesteads Act of 1868, and on the contrary it is hereby declared that the said commissioner ever since the passing of the said act had and now has under chapter 23 of the Consolidated Statutes of Canada intituled "An Act respecting the sale and management of Timber on public lands," full authority to grant licenses to cut timber on lots located or sold under the said Free Grants and Homesteads Act of 1868.

If this act had stopped here, although it may be difficult to conceive what doubt could have existed as to the right of the Commissioner of Crown Lands to grant licenses to cut timber on lands in the free grant townships equally as on crown lands in other townships under the regulations to be issued from time to time by order of the Lieutenant-Governor in Council, still, if any such doubts did exist, this first section of the act now in recital was sufficient to remove them; but the act, while in its form a mere declaratory act passed for the purpose of removing the doubts said to exist proceeds to repeal, not in terms but in substance and effect, the very plain

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provision of the 10th section of "The Free Grants and Homesteads Act of 1868," which enacted that "all trees remaining on the land at the time the patent issues shall pass to the patentee," for the 2nd section declares that

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every such license heretofore issued, whether the same has expired or is still current, and every such license which may be hereafter issued, to cut timber within the limits of any territory appropriated as free grant territory under the said "Free Grants and Homesteads Act of 1868," shall be deemed to have been and to be good and valid in all respects whatever for the period for which the same was or may be granted, notwithstanding the patents for lands included may in the meantime have been issued; and every such license shall be taken to have conferred and to confer upon the holder thereof the right to cut timber on the lands included therein until its expiration, whether such lands were or are located or sold under the said act, or were or are unlocated or unsold, subject, however, to such conditions, regulations and restrictions specially applicable to the free grant territory, or to the said lots so sold or located, as may have been heretofore or may be hereafter made by the Lieutenant-Governor in Council in respect to the payment of timber dues or otherwise, and subject also to such exceptions or restrictions as may be contained in any such license. Provided that no license shall confer the right to cut any other than pine timber upon lands which have been located or sold in the said territory prior to the date of such license unless the location or sale shall have been cancelled.

This mode of repealing the plain language of a prior statute as to the construction of which no doubt is alleged to have been entertained was corrected, however, by the Ontario statute, 43 Vic. ch. 4, whereby secs. 7 and 10 of the said "Free Grants and Homesteads Act of 1868," were expressly repealed and other provisions substituted therefor. The clause substituted for the repealed 10th section of the act of 1868 enacts that

all pine trees growing upon any land located or sold within the limits of the free grant territory after the passing of this act shall be considered as reserved from said location, and shall be the property of Her Majesty [subject to certain specific exceptions stated.]

And that

the patents for all lands hereafter located or sold as aforesaid shall

contain a reservation of all pine trees standing or being on said lands, which pine trees shall continue to be the property of Her Majesty, and any person or persons now or hereafter holding a license to cut timber or saw logs may at all times during the continuance of such license enter upon the uncleared portion of any such lands and cut and remove such trees and make all necessary roads for that purpose and for the purpose of hauling in supplies, doing no unnecessary damage thereby; but the patentees or those claiming under them may cut and use such trees as may be necessary for the purpose of building and fencing on the lands so patented, and may also cut and dispose of all trees required to be removed in actually clearing the said land for cultivation, but no pine trees (except for the said necessary building and fencing as aforesaid) shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of 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.

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And further that

the patentee, his heirs or assigns, of land hereafter located or sold under the Free Grants and Homesteads Act and this act shall be entitled to be paid out of the consolidated revenue of the province on all pine trees cut on such land subsequent to the 3rd day of April next after the date of the patent and upon which dues have been collected by the crown, the sum of twenty-five cents on each thousand cubic feet of square or waney pine timber; and the Lieutenant-Governor in Council is to make regulations for ascertaining and determining the persons from time to time to receive such payments and the sums to be paid.

Now, it is to be observed that all of the above acts passed since the passing of "The Free Grants and Homesteads Act of 1868," were passed wholly in relation to the lands by that act authorized to be appropriated by order of the Lieutenant-Governor in Council for free grants to be made to actual settlers, and for the purpose of giving effect to that act or by way of amendment thereof; so that it might be well doubted whether any of them would have any application to the case of a lot of land sold even in a free grant township, if such a sale should be made and a patent be issued therefor under the provisions of "The Public Lands Act of 1860," and the regulations

1891 established by order in council under that act. With
 THE that question, however, we are not now concerned.
 LAKEFIELD For the purposes of the present case it is sufficient to
 LUMBER say that the above acts leave no doubt as to the con-
 AND MANU- struction to be put upon the term "free grant terri-
 FACTURING tory" as used in 43 Vic. ch. 4 now consolidated in ch.
 COMPANY 25 of the revised statutes of Ontario, namely, that it
 v. is the same construction as must be put upon the
 SHAIRP. words in 40 Vic. ch. 15: "Any territory appropriated
 as free grant territory under the said Free Grants
 and Homesteads Act of 1868" and upon the words in
 37 Vic. ch. 23, "free grant lands in townships open
 for sale and location under the 'Free Grants and
 Homesteads Act of 1868,'" and on the words in 25
 Vic. ch. 21 "free grant townships," and upon the
 words in 34 Vic. ch. 5, "lands forming part of the
 public lands appropriated for free grants to settlers
 under the term of the Free Grants and Homesteads
 Act of 1868," and that construction must be, lands
 in those townships which by order of the Lieutenant-
 Governor in Council have been appropriated for free
 grants to be made therein to actual settlers.

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The above several acts having been consolidated in
 ch. 25 of the Revised Statutes which is intituled "An
 Act respecting Free Grants and Homesteads to actual set-
 tlers on public lands," their provisions must receive in
 the consolidated act the same construction as they must
 have received in the original acts as they stood before
 consolidation. By a book produced from the Crown
 Lands Department it appeared that 133 townships
 within the limits prescribed by the act of 1868 have
 been by order of the Lieutenant-Governor in Council
 appropriated as free grant townships for free grants
 to be made therein, and that Burleigh, which has been
 a township of the county of Peterborough at least as
 far back as 1851, is not one. There can, therefore, be no

doubt, in my opinion, that neither the above act 43 Vic. ch. 4 nor the revised statute ch. 25 has any application whatever to the lot of land in question in this suit, which must be regarded in point of law, as it in point of fact was, as sold and patented under the provisions of "The Public Lands Act of 1860" now consolidated as ch. 24 of the Revised Statutes under the title "An Act respecting the sale and management of Public Lands."

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Now the lot was sold to the respondent on the 13th of March, 1884, and by the regulations, under which the sale took place as above extracted, we have seen that the land was subject only to such timber license as was then in force, or as should be granted within three years from the date of the sale; and by these regulations, which constituted the terms of the sale, it was declared that all trees remaining on the land at the time the patent issues should pass to the patentee. It is admitted that all settlement duties were performed by the purchaser, and that his last instalment of purchase money was all paid up in full on the 18th of April, 1888. We must assume then, and it is not disputed, that the respondent became then entitled to receive his patent, and this being so it is contended by the respondent that it was not competent for the Commissioner of Crown Lands to grant a license to cut any timber upon the lot after the 18th of April, 1888. But in my opinion the Commissioner of Crown Lands has not done so or affected to do so unless it be under the words in the license "and pine trees on lands or lots sold under orders in council of the 27th May, 1869." It is true that he issued the license under which the appellants claim upon the 3rd of May, 1888, but the true construction of the license, in my opinion, is that it covers and professes to cover only such of the lots comprised in the location described

1891 on the back of the license as were unlocated and un-
THE sold at the date of the issue of the license on the 3rd
LAKEFIELD May, 1888. Now in the location endorsed on the license
LUMBER the lot in question is mentioned as it had been in
AND MANU- licenses issued ever since 1873, yet by an express
FACTURING notice, also endorsed on the license, the licensee was
COMPANY informed that this particular lot had been sold on the
v. 13th March, 1884, and so was not included in the lots
SHAIRP. over which the license operated. The chief object of
Gwynne J. the regulations under which the public lands are sold
to purchasers is to prescribe the extent to which the
lands sold shall be subjected to licenses to cut timber
thereon. I have no doubt, therefore, that when a lot
was unsold when a license to cut timber thereon
issued, but was sold while such license was in
force, the licensee would be bound to ascertain and to
conform himself to the terms of such regulations as
among those which, by the express terms of the act re-
specting timber on public lands, now ch. 26 of the
revised statutes of Ontario, the license is subjected to.
But in the present case, as the lot had not been only
sold, but the right of the purchaser to receive his
patent therefor had accrued before the license issued,
the license construed as above, and as I think it must
be construed, in express terms excludes the lot in ques-
tion from the operation of the license, which conferred
upon the licensee the right to cut timber only
upon such of the lands enumerated on the back as had
not been sold before the issue of the license, and the
notice endorsed gave express information to the
licensee that the lot in question had been sold on the
13th of March, 1884.

It is said, however, that the license expressly
authorizes the licensee to cut "pine trees on lands
sold under order in council of the 27th May,

1869." From the context in connection with which these words are used they certainly seem to be used as applying to the regulations of that date under "The Public Lands Act of 1860," and not those of the same date made under "The Free Grants and Homesteads Act of 1868," but in virtue of what authority these words were inserted in the license did not appear. However, assuming them to have been intended to apply to lands sold under the Public Lands Act of 1860, now ch. 26 of the revised statutes of Ontario, the licensee must be regarded as having thereby express notice of those regulations and must be bound by them, and by reference to them it appears that no timber is reserved to the crown otherwise than as is stated in those regulations, and that by the express terms thereof all trees remaining on the land at the time the patent issues shall pass to the patentee; and as all the timber in question was cut long after the issue of the patent it is unnecessary to enquire whether there was any right over the timber reserved to the crown which the Commissioner of Crown Lands could grant over the lot in the interval between the final payment of the balance of purchase money on the 18th April, 1888, and the issuing of the patent. As to the point that the license which issued on the 3rd May, 1888, was the same license as that issued in all the years subsequent to and in the year 1873 when the first appears to have been granted and before the lot in question was sold, and that, therefore, the license of 1888 covered the lot in question equally as did that issued in 1883, and in prior years, it does not seem to me to be necessary to make any observations further than that it cannot be entertained.

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The appeal, therefore, must be dismissed with costs.

PATTERSON J.—I am of opinion that this appeal

1891 should be dismissed for the reasons given in the court
THE below in the judgments of Mr. Justice Osler and Mr.
LAKEFIELD Justice Maclellan.

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Appeal dismissed with costs.

Solicitors for appellants: *Poussette & Johnston.*

Solicitor for respondent: *E. B. Edwards.*

Patterson J.
