I therefore agree with the opinion expressed by my learned brothers.

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HART v. FEDERAL COMMISSIONER OF LAND TAX.

*Appeal dismissed with costs.*

Solicitors, for the appellant, *Ritchie & Parker*, Launceston.

Solicitors, for the respondent, *Dobson, Mitchell & Alport*, Hobart.

N. McG.

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[HIGH COURT OF AUSTRALIA.]

MOUNT BISCHOFF TIN MINING COMPANY, REGISTERED . . . PLAINTIFFS, } APPELLANTS;

AND

MOUNT BISCHOFF EXTENDED TIN MINING COMPANY, NO LIABILITY DEFENDANTS, } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

*New trial—Evidence—Weight of evidence—Trespass—Common Law Procedure Act* 1855 (*Tas.*) (19 *Vict. No.* 16), *secs.* 1, 2.

In an action for trespass, where the boundary line between two adjacent leases was in dispute, it appeared that at or about the time of the plaintiffs' original lease in 1874 the boundary in question was actually marked on the ground by the plaintiffs' lessor, the Crown; that its position could still be identified; and that the plaintiffs' occupation had continuously extended up to that line. There was no evidence to controvert these facts.

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HOBART, *Feb.* 18, 19, 20.

Griffith C.J., Barton and Isaacs JJ.

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*Held, per totam curiam*, that the possessory title of the plaintiffs cast the burden of proof of the true boundary on the defendants who disputed it.

*Per Griffith* C.J. and *Barton* J.—The fact that later and more accurate surveys disclosed error in the original measurements of the lengths of the line in question and of other boundary lines was immaterial.

*Per Isaacs* J.—The fact that the land was Crown land did not in the circumstances affect the burden of proof.

By the *Common Law Procedure Act* 1885 of Tasmania a Judge may, with the consent of the parties, hear a case without a jury, and in such cases it is provided that a new trial shall not be granted on the ground that the verdict is against the weight of evidence.

*Held*, that where all the relevant evidence is one way, and there is no conflict of evidence, the question of weight of evidence does not arise.

Decision of the Supreme Court of Tasmania refusing a new trial: *Mount Bischoff Tin Mining Co., Registered* v. *Mount Bischoff Extended Tin Mining Co., No Liability*, 8 Tas. L.R., 103, reversed on the evidence.

APPEAL from the Supreme Court of Tasmania.

The appellants and the respondents were the owners of adjoining leaseholds which were worked by them for mining purposes.

The appellants brought an action in the Supreme Court to recover damages for trespass on their property by the respondents by their underground workings, and the respondents set up that the then boundary line between the two leases was not in the correct position. The action was, by consent of the parties, tried without a jury by *Nicholls* J., who gave judgment for the defendants. On appeal to the Full Court a motion for a new trial was refused: *Mount Bischoff Tin Mining Co., Registered* v. *Mount Bischoff Extended Tin Mining Co., No Liability* (1).

From that decision the plaintiffs now appealed to the High Court.

The material facts and evidence are fully set out in the judgment of the Chief Justice.

*Irvine* K.C., *Waterhouse* and *M. J. Clarke*, for the appellants. As the trial was without a jury, by the consent of both parties under secs. 1 and 2 of the *Common Law Procedure Act*, No. 2, this Court cannot now consider the balance of the evidence.

(1) 8 Tas. L.R., 103.

This is a case for mining encroachment. The land on which the mining was carried on by the respondents was clearly marked on the ground as being on appellants' lease; and under the *Mining Act* the actual boundaries marked on the ground are the points that should be relied on to determine the boundaries.

The *Mining Act* 1905 (Tas.) (5 Ed. VII., No. 23) shows that the land leased from the Crown is in fact that land defined by the surveyor's marks on the ground. At the hearing of the action the appellants proved that the marks had been there since 1891, and for an indefinite time before.

The Judge took up the position that he would disregard the boundary line (AB) between the two leases, unless it could be shown that it was the original surveyed line. The respondents' workings extend 62 feet north of the line AB. Except where there is some gross mistake, the actual marks placed on the ground by the original surveyor are to be deemed to be the proper marks, and in their correct places: *Lyle* v. *Richards* (1).

There is no necessity for the appellants to go beyond their 1910 title, unless the respondents can prove a prior title. The boundaries of the appellants' present title bring them to what appear to be the old marks. That throws the onus on the other side to show that they were not the original boundary marks. AB was the starting line, and because the measurement of BD was incorrect that would not alter the position of the starting point.

There was no such evidence on which the jury could reasonably find a verdict: *Avery* v. *Bowden* (2); *Phillipson* v. *Hayter* (3); *Bayne* v. *Stephens* (4).

Section 71 of the *Mineral Lands Act* 1884 (Tas.) (47 Vict. No. 10) made it obligatory for the first time to keep the boundaries of mineral leases marked.

*Ewing* and *Shields*, for the respondents. In 1907 the appellant company had a lease from the Crown, and they cannot now claim as against the Crown, or anyone else, that the Crown gave them more than it then granted. There were no actual marks on the ground until 1910. It is evident that the learned Judge of first

(1) L.R. 1 H.L., 222.
(2) 26 L.J.Q.B., 3.
(3) 40 L.J.C.P., 14.
(4) 8 C.L.R., 1.

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instance did not believe the plaintiffs' evidence, and the Full Court considered there was not sufficient ground for them to find for the plaintiffs.

*Cur. adv. vult.*

GRIFFITH C.J. This is an appeal from an order of the Full Court of Tasmania dismissing a motion for a new trial after a verdict given by *Nicholls* J., who, by consent of parties, heard the case without a jury, as may be done under the law of Tasmania. The Statute provides that in such a case a new trial shall not be granted on the ground that the verdict is against the weight of evidence, but it does not say that a new trial may not be granted for any other ground open on a trial with a jury.

The action was for trespass to a mine by underground workings.

The plaintiffs and the defendants were the holders of adjoining mineral leaseholds at Mount Bischoff. The boundary between them at the place in question ran east and west between two termini, which have been spoken of as A and B, A being at the western, and B at the eastern, end of the line.

The only question for determination, as the case was presented at the trial, was the location of that boundary. The points A and B are in fact denoted by pegs in the ground, and there is no question as to their actual position on the surface of the earth. The question raised, or sought to be raised, is whether they correctly denote the true boundary between plaintiffs' leasehold to the north and defendants' leasehold to the south.

The plaintiffs' present title is a consolidated lease dated 24th November 1910, which superseded a previous consolidated lease of 2nd May 1907, No. 2704M, which itself superseded earlier leases, one of which, called lease No. 49, is the root of their title to the land in question. The lease was dated 21st May 1874—from which time the plaintiffs or their predecessors in title have been the lessees of the land.

At that date the locality was practically unsettled. The land is precipitous, in many parts covered by timber and what is called horizontal scrub, which I would describe—having seen it

—as like a floor of dense compacted foliage raised some feet above the soil, and supported by stems inclined from the perpendicular. It may be likened to a Roman military tortoise.

The description of the land comprised in lease No. 49, which is the crucial matter, takes as the starting point of the boundary the south east angle of "land applied for to lease by one Thomas Thoms." The area is 80 acres, and the description is in these words: "Bounded as follows:—On the north by 24 chains 33 links westerly along land applied for to lease by Thomas Thoms commencing at the south east angle thereof, on the west by 32 chains southerly along land applied for to lease by John Walsh" —this brings us to point A—"on the south by twenty-five chains easterly along land leased to Lavington Roope and thence on the east" &c., to the point of commencement. The eastern end of the 25 chains is the point B.

It appeared from the evidence that this land was, in fact, surveyed by a Mr. Sprent, who is now deceased.

There was no positive law in force at that time requiring the corners of mining leaseholds to be actually marked, but it is at least highly probable that they would be marked, as there would be no other means of denoting the area in such country. But in 1883 the *Mineral Lands Act* 1884 was passed by the Tasmanian Parliament, which provided by sec. 71 that "Every lessee, during the term of his lease shall erect and keep erected, at each and every angle of the land comprised in such lease, a post eight inches in diameter, and not less than four feet six inches above the ground; and such lessee shall cut and maintain at each such post trenches, not less than three feet in length and nine inches in depth, indicating the direction of the boundary lines"; with a penalty on failure. After that it was the duty, as well as the interest, of lessees to mark and maintain their boundary posts. The term "lessee" in the Act applied to existing as well as to future holders. It is highly probable, then, that the lessees did mark and maintain the corner posts at the points which, at that time, were believed to be the true ends of the southern boundary of lease No. 49. In 1891, according to the evidence, a Mr. D. Jones, who is now a district surveyor under the Government, and who assisted Sprent in marking the line in 1872,

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was employed by the appellants to re-define their boundaries at this place. He says that at that time he found the points A and B marked by pegs, and that he re-pegged and re-marked the line in accordance with the original pegs. He says further, that Sprent had been sent between 1877 and 1880 to re-define the line AB. Another witness, Root, who is now a sawmiller, assisted Jones in 1891 in the work of re-defining the boundaries. He says that they found there the old marks and the pegs at the corners, that is, at the points A and B; and that they made fresh marks on the trees, which they found showing old marks, and put new pins in where the old ones came out. If his evidence can be relied on at all, the points A and B were marked on the ground as long ago as 1891, and had been marked there for a considerable time, for the marks were then old. So much for the plaintiffs' case.

The defendants' present title is a lease dated 11th March 1909, which is a consolidated lease superseding, as to the *locus in quo*, a lease No. 3644/93 M of 1st June 1899, granted long after the fresh demarcation of 1891.

The description of the land in this lease of 1899, which is the foundation of the defendants' title, begins thus:—"Bounded as follows: on the north by twenty-five chains easterly along section No. 49 leased to the Mount Bischoff Tin Mining Company Registered, commencing at the south west angle thereof, on the east" &c. "by 50 chains and 48 links southerly" &c.

There can be no doubt as to the identity of the first boundary line, or as to its identity with the 25 chain line mentioned as the southern boundary of the land in plaintiffs' lease No. 49. There is no room, therefore, for any paper conflict as to boundary at that spot. The plaintiffs' southern boundary, wherever that was, was the defendants' northern boundary, which was, in 1891, eight years before the defendants' title began, denoted by old marks on the ground and was then marked afresh.

Other witnesses deposed that in 1910 the old marks were still visible. At the point A, they found an iron peg with old trenches in which scrub had grown. At the point B also, they found an iron peg surrounded by stones and with old trenches. Two other old marks were also visible along the line between A and B.

The line AB was also continued to the westward by marks on trees.

An old peg was found lying close to the point A, and was taken away from there by one of the witnesses, probably in 1910. This peg, which was produced to us, was very old, and the lower part of it which had been in the ground was much decayed, but on the upper part were still clearly cut the letters and figure "No. 4." At this point the decay had begun. It is at least probable that the figures originally on it were 49. There were, further, traces on another side of the peg of an S and a W, which would indicate that it came from the SW corner of some holding. This peg, as I said, was found lying close to the point A. None of this evidence was contradicted, or indeed impeached, except by suggestions as to inaccuracy on the part of the witness Jones. But as to the continued existence of the marks at A and B, there is no room for doubt upon the unimpeached evidence.

There is no trace in the locality of any other boundary mark, or anything that would have served for a boundary mark. The only possible inference that can be drawn is that the plaintiffs maintained these marks as denoting the southern boundary of the land in their lease No. 49, and that they were erected long before the defendants acquired a title to any land in the vicinity.

In determining the question of parcel or no parcel the greatest weight is always attached to old marks. Here there was a strong interest as well as a legal duty to maintain marks, and marks were actually maintained. I think that the Court is bound, *primâ facie* at least, to infer that the marks so kept up and maintained were the old marks. And, in the absence of any evidence to the contrary, I think the conclusion is irresistible that the pegs at the points A and B denoted the boundary described in lease No. 49. But even if they did not, they certainly denoted the extent of the land held by the plaintiffs under a possessory title and claimed under their lease. Such possession is sufficient evidence of title in the absence of any evidence to displace it.

Against this case the defendants set up a paper title depending on their lease of 1909, to which I will refer directly. The learned Judges have described their proofs as "not constructive of any definite theory." I will go further and say that, in my

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opinion, they were wholly irrelevant. I will state, as briefly as I can, the paper titles.

The plaintiffs' first consolidated lease of 1907 (No. 2704M) recited that the lessees had surrendered various leases, including No. 49, and witnessed that the Minister granted a consolidated lease of 880 acres, being the whole of the land included in the surrendered leases. No new area therefore was granted, although the description of the external boundaries naturally differed from the description in the old leases.

In this consolidated lease the boundary at the place in question is described as "commencing at the north west angle of 3644/93M" —which is the defendants' earliest title—"and running easterly along that section 25 chains, thence southerly" &c. Now, we know that the northern boundary of that lease was the southern boundary of lease No. 49. The boundary at this point is, therefore, left as it was. I refer next to the defendants' consolidated lease, which is No. 3964. The description, after stating the boundary to the point A, proceeds as follows:—"thence again easterly along consolidated lease No. 2704/M 25 chains" &c. This is the same line AB, and there can be no question of its identity. It will be observed that in this description the boundary is measured from west to east.

The plaintiffs' second consolidated lease contains a recital that they had surrendered the previous lease 2704M, and also an application for a small adjoining piece of land - apparently of a few acres—in the Town of Waratah; and witnesses that the Minister had granted a consolidated lease for "871 acres of land included in the before mentioned lease (consolidated) and application for lease as shown in the diagram drawn thereon from recent surveys and more particularly described in the first schedule."

The boundary at the *locus in quo* is described as "westerly along consolidated lease No. 3964M 24 chains and 4 links." This is the identical line AB, although the length is not stated as 25 chains, as in the first lease.

There can be no question that in all the leases the boundary at this point has always been described as located in the same place.

On these facts the defendants set up a case which it requires the exercise of some ingenuity to understand.

About a mile south of point B is a point which has been called D, and the position of which is definitely known. The line BD in fact divides the plaintiffs' and defendants' leaseholds, the plaintiffs' land being to the east, and the east and west line passing through D forming the southern boundary of both.

In the plaintiffs' first consolidated lease the length of the line BD is given as 71 chains 90 links, in their second consolidated lease as only 70 chains 31 links (which it appears is the true length as now accurately computed). But in the defendants' consolidated lease the length of this line BD is given as 71 chains 43 links, measured from B southwards to D. On this they say: "Our consolidated lease is prior in time to the plaintiffs' last consolidated lease; the point D should be taken as the starting point for measuring the line BD, and this will bring the end of it to a point 1 chain and 12 links north of the actual marked position of B." It is suggested that the alteration in the length of the line BD in the plaintiffs' second consolidated lease indicates a change in intention, and that it was intended to grant less land than the plaintiffs had previously held. I have already shown that the position of the boundary AB does not depend in any way upon the length of the line BD. The explanation of the change in the lengths is clear upon the evidence. The present measurements, as is recited in the last lease, are taken from recent surveys. The original measurements were only approximate, in consequence of the difficulty of the country, and the inaccurate method—what is called breaking the chain—which was adopted in measuring the horizontal lengths on steeply inclined planes. The result was that all the distances originally given were too great, and that when the accurate surveys were made the lines were found to be shorter, with the further result that the area enclosed by those lines was apparently somewhat diminished, so that the last consolidated lease, although it included a few additional acres, expressed the grant of an aggregate smaller holding. But as to the identity of the land comprised in the leases there can be no doubt, as is manifest upon comparison of the diagrams upon the successive leases. The fact, therefore, that in defendants'

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lease the line from B southward to D is described as of a length of 71 chains 43 links, is absolutely irrelevant. Whatever the length of that line is, it starts from B, which is on the boundary between No. 49 and 3644/93M. The defendants wish to read the description in their lease backwards, to make D instead of B the starting point of the line, and to make the length 71 chains 43 links conclusive.

This was absolutely the only case that was set up in answer to the plaintiffs' case, as far as I can understand the defendants' case.

These were the facts. At the trial the plaintiffs first called Jones, and by arrangement did not then call any evidence in corroboration. His evidence having made out a *primâ facie* case, the defendants gave their evidence, and then the learned Judge allowed witnesses to be called to corroborate Jones' testimony.

The character of the plaintiffs' witnesses is not impeached, but the learned Judge thought that Jones' evidence was "inaccurate and careless"—in what respect does not appear. The evidence of the other witnesses was not in any way impeached. As far as I can understand, he seems to have thought that it was necessary for the plaintiffs to prove, not only that they had been in possession of all the land to the north of the line AB, but also to prove that the line was actually in the right place, according to the present paper title. But that is not so. It was sufficient to show that they were in possession of the land under a claim of title not displaced by a better title. The accuracy of Jones, as far as I can understand, is only attacked as to the exact identity of the position of his marks of 1891 with the original marks put there by Sprent, which fact the learned Judge seems to have thought material. But even if the position was not identical, they were put there in assertion of title several years before the defendants' earliest lease of the adjoining land, and the fact of possession as against them is not affected. The learned Judges of the Full Court say on that point: "As to the remainder of the evidence his Honor came to the conclusion that its value depended on the first witness whom he had decided to be unreliable."

But the rest of the evidence did not depend on the evidence of Jones, except so far as it proved that the marks put up in 1891

were in identically the same places as Sprent's marks, which was not material.

The result is that all the relevant evidence is one way. The verdict is, accurately speaking, not against the weight of evidence, for there was no conflict requiring a balance of evidence, but against the evidence.

In my opinion the verdict for the defendants was demonstrably wrong.

There must therefore be a new trial, no other remedy being open under the law of Tasmania.

BARTON J. This is an action of trespass and is based on possession by the plaintiff company.

The respective leases are undisputed.

The only question at the trial was whether AB is the southern boundary of plaintiffs' possession. The learned Judge who tried the case was not satisfied with the evidence of Mr. Jones. But even apart from his evidence, where not corroborated, the plaintiff company showed there were old marks at A and B and a surveyed line connecting them, that the plaintiffs were in possession north of these marks and this line: and that the defendants were subsequently in possession south of it. In the face of this possession, evidence that the points A and B were not the accurate termini of the intervening boundary according to the admittedly inaccurate measurements of the old surveys and leases seems to me to be wholly immaterial in such a case as this. It does not contradict the evidence of possession, and it does not set up a title in the defendants. It is away from the purpose to consider whether the plaintiffs' occupation was in exact correspondence with the measurements either of their old or their consolidated leases, unless it could be shown that their occupation included land to which defendants had some title, and that was not shown; the defendant company could not take advantage of the title of any third party—such as the Crown—unless they set up a positive claim under it. In the absence of such proof the question of exact identity between the metes and the limits of occupation was one between the Crown and the plaintiffs only. The defendants had no part in it. Moreover, there is no doubt that

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the points A and B were marked by survey on behalf of the Crown as the termini of the southern boundary line of Area 49, and thus fixed by the plaintiffs' lessor as the southern limit of their occupation.

I am of opinion that the evidence on the root question of possession was all one way and that the plaintiffs established a *primâ facie* case which is so far unanswered. Whether it can be answered is a question to be determined in another trial, which I think should be granted, and for that purpose the appeal should be allowed.

ISAACS J. read the following judgment:—In my opinion the judgment appealed from ought to be set aside because it is founded on a mistaken principle, namely, that the burden of satisfying the learned Judge who tried the case as to the accuracy of the boundary line called AB as actually marked or indicated on the ground rested on the plaintiffs.

The action is for trespass to land, and it is of the first importance to remember that it is a possessory action.

For a good many years back, according to practically all the evidence, and certainly according to very clear and distinct evidence of some witnesses whose reliability was not questioned by the learned primary Judge, the plaintiff company had, rightly or wrongly, adopted a boundary line, which if correct would show the defendants had trespassed on the plaintiffs' land. This line had never been challenged by the Crown or the defendants at all, but was taken to be the true line. The letter from defendants' manager to plaintiffs' manager, dated 11th March 1911, appears to recognize the *de facto* line as the boundary, and learned counsel for the defendants in stating his case said "Defendants' lease goes N. of AB. Defendants' lease is 1909. We are the owners of the piece in dispute because it is included in our lease." The present importance of that line is that it indicates that the plaintiff company was in actual physical possession of the land upon which the acts complained of were done. The acts themselves were admitted, but the accuracy of the position of the boundary line having regard to the documentary title, is the one point in contest. Evidence was given

as to this by both sides; the learned primary Judge, as appears by the judgment of the Full Court, could not make up his mind whether that line was accurate or not. He thought, and the Full Court supported him in his opinion, that the burden of establishing the accuracy of the *de facto* boundary rested on the plaintiffs as an essential element to prove the trespass, and as he was not satisfied of that, he gave a verdict for the defendants. Much of the argument before us was directed to the point whether there was any evidence upon which a jury could reasonably find a verdict for the defendants by refusing to be satisfied of the plaintiffs' contention that the *locus* falls within their own title. If that were the sole question, I should hesitate to say there was not, however much I should feel pressed by the testimony the other way; and remembering the rule of law on the subject that, in such a case as the present, this Court is not a court of appeal on the facts and before setting aside a verdict it is necessary to determine whether upon the evidence before the jury it was one which they could reasonably find, I am not prepared to say I would accede to the appellants' view: See *Pearse* v. *Schweder* (1). Further, some questions of difficulty presented themselves during the argument as to the proper construction of the two competing extant leases upon which the respective titles now depend, and how far parol evidence of former leases and original surveys may control them. Those questions I leave undetermined as unnecessary at the present stage. They may hereafter become important, and may to some extent depend upon facts which may appear on the new trial, and therefore cannot be dealt with now; and if they do, reference may be made to *Waterpark* v. *Fennell* (2). Lord *Chelmsford* (3) makes the following observations:—"Parol evidence is generally admissible to apply the words used in a deed, and to identify the property comprised within it. You cannot, indeed, show that the words were *intended* to include a particular piece of land, but you may prove facts from which you may collect the meaning of the words used, so as to include or exclude a portion of land where the words are capable of either construction." Lord

(1) (1897) A.C., 520, at p. 525. (2) 7 H.L.C., 650, at pp. 678, 680.
(3) 7 H.L.C., 650, at p. 678.

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*Cranworth* (1) says:—"Where, indeed, words have a clear definite meaning, no evidence can be admitted to explain or control them." As *Lyle* v. *Richards* (2) was cited in argument, the observations upon it in *Dart*, 7th ed., p. 1011, might also be considered. However, I offer no opinion on those points, and rest my judgment in the present instance on the point which is fundamental, namely, the burden of proof.

Once the fact of the plaintiffs' actual possession of the disputed land is settled—and the acts complained of are admitted to have been done upon that land—the burden of justification is cast on the defendants.

To cast the burden on the plaintiff is to change the nature of the action, because it compels him to rely on title-deeds. (See *per Bayley* J. in *Chambers* v. *Donaldson* (3)).

And in many cases, some of the highest authority, this rule of law is emphasized. *Graham* v. *Peat* (4) laid it down in striking circumstances. There the side-note, correctly stating the effect of the judgment, says:—"One in possession of glebe land under a lease void by the Statute 13 Eliz. c. 20 by reason of the rector's non-residence may yet maintain trespass upon his possession against a wrongdoer." Lord *Kenyon* said (5):—"Any possession is a legal possession against a wrongdoer." *Parke* B., in *Elliott* v. *Kemp* (6), stated it to be conclusive evidence of title against a mere wrongdoer. In *Bristow* v. *Cormican* (7) Lord *Cairns* L.C. said that actual, physical, or mechanical possession, for however short a period, would, as against a trespasser, be sufficient, and Lord *Hatherley* (8) observed that the slightest amount of possession would be sufficient to recover as against a mere trespasser. And until the intruder justifies his act under a better title than that of the possessor he disturbs he remains a mere trespasser. In *Glenwood Lumber Co.* v. *Phillips* (9) Lord *Davey* for the Privy Council says:—"It is a well-established principle in English law that possession is good against a wrongdoer, and the latter cannot set up a *jus tertii* unless he claims under it."

(1) 7 H.L.C., 650, at p. 680.
(2) L.R. 1 H.L., 222.
(3) 11 East, 65, at p. 77.
(4) 1 East, 244.
(5) 1 East, 244, at p. 246.
(6) 7 M. & W., 306, at p. 312.
(7) 3 A.C., 641, at p. 651.
(8) 3 A.C., 641, at p. 657.
(9) (1904) A.C., 405, at p. 410.

Now, by compelling the plaintiffs to prove as part of their original case that their lease covered the land in question, it is in effect allowing the defendants to set up a *jus tertii*, namely, the *primâ facie* right of the Crown, and without claiming under the Crown. If, however, the defendants be compelled, as in my opinion the law does compel a trespasser, to claim under the third persons whose superior right is asserted, then it means that the defendants are bound to prove affirmatively the inclusion of the *locus* in their own lease to the satisfaction of the tribunal whose function it is to ascertain the facts. This was the task which Mr. *Ewing* properly undertook. Confessedly, the learned Judge did not address his mind to this aspect, and did not find the fact, and so the defendants cannot be said to have established the necessary justification.

Mr. *Ewing* said the delimitation of the boundary, and its maintenance as such by means of pegs and pins and marked trees, should not be regarded as sufficient indication of possession. I do not know what more could be reasonably expected, short of actual mining; and, certainly, having regard to the well-known principle recognized and embodied in the recent case of *Kirby* v. *Cowderoy* (1), the contention is hopeless. There Lord *Shaw*, for the Judicial Committee, quoting with approval from an earlier case, said that possession "must be considered in every case with reference to the peculiar circumstances . . . . the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession."

The fact that the land in question is Crown land does not, in the circumstances of the present case, preclude the application of the rule as to burden of proof and the credit given to possession to which I have referred. The plaintiffs' possession is a *bonâ fide* possession as in pursuance of the Crown lease, and it must be assumed, from the nature of the occupation, the requirements of the regulations and the length of time, with the knowledge

(1) (1912) A.C., 599, at p. 603.

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Isaacs J.

and permission of the Crown; and so, whatever may be the law as to a mere intruder, the plaintiffs' position here is as strong as if the land were private property: *Harper* v. *Charlesworth* (1). I assume then, in defendants' favour, there was ample evidence upon which the learned trial Judge would have been justified in finding the disputed area was comprised in defendants' lease. Still the Judge was not bound to find it so. He might as a jury have arrived ultimately at the opposite view, or he might, as he appears to have done, have found himself unable to satisfy his mind affirmatively one way or the other. But unless the question be affirmatively determined in defendants' favour, it fails to justify their interference with the peaceable possession in fact which the plaintiffs theretofore enjoyed, and to which the law gives credit until displaced by better title, of defendants or of one through whom they claim, and so the defendants remain a mere wrongdoer. Up to the present no such determination has been made, and therefore, so far, the defendants cannot be held to have succeeded.

For these reasons I agree the appeal should be allowed and a new trial ordered.

*Appeal allowed. Order appealed from discharged. Verdict set aside and new trial granted. Costs of last trial to be costs in the cause. Costs of new trial motion plaintiffs' costs in cause. Respondents to pay costs of appeal.*

Solicitors, for appellants, *Ritchie & Parker*, Launceston.
Solicitors, for respondents, *Ewing, Hodgman & Seager*, Hobart.

N. McG.

(1) 4 B. & Cr., 574.