1893
Jan. 9.

HENRY BULMER, THE YOUNGER..........CLAIMANT;

AND

HER MAJESTY THE QUEEN............RESPONDENT.

Crown domain—Disputed Territory—License to cut timber—Implied warranty of title—Breach of contract—Damages.

By the 50th section of *The Dominion Lands Act*, 1883, it is provided that leases of timber berths shall be for a term of one year, and that the lessee shall not be held to have any claim whatsoever to a renewal of his lease unless such renewal is provided for in the order in council authorizing it, or embodied in the conditions of sale or tender. The orders in council in question in this case authorized the issue of leases subject to the terms of the regulations of March 8th, 1883, by which it was provided that under certain conditions (existing in this case) the Minister of the Interior might renew such licenses. From the orders in council and character of the several transactions it appeared to be the intention of the parties that the licenses should be renewable.

Held, that such renewals were provided for within the meaning of the statute.

2. When the Crown agrees to issue a lease or license to cut timber on public lands it agrees to grant a valid lease or license, and a contract for title to such lands is to be implied from such agreement.

3. Not only the word "demise" but the word "let," or any equivalent words which constitute a lease, create, it appears, an implied covenant for quiet enjoyment. *Hart* v. *Windsor* (12 M. & W. 85); *Mostyn* v. *The West Mostyn Coal and Iron Company* (1 C.P.D. 152).

Quære, if this rule is applicable to a Crown lease? *The Queen* v. *Robertson* (6 S.C.R. 52) referred to.

4. To the general rule as to the measure of damages for the breach of a contract there is an exception as well established as the rule itself, namely that upon a contract for the sale and purchase of real estate, if the vendor without fraud is incapable of making a good title, the intending purchaser is not entitled to recover compensation in damages for the loss of his bargain. *Bain* v. *Fothergill* (L. R. 7 H. L. 158); *Flureau* v. *Thornhill* (2 Wm. Bl. 1078), referred to. This exceptional rule is confined to cases of contract for the sale of lands, or an interest therein, and does not apply where the conveyance has been executed and the purchaser has

entered under covenants express or implied for good title or for quiet enjoyment. *Williams* v. *Burrell* (1 C. B. 402); *Lock* v. *Furze* (L. R. 1 C. P. 441), referred to.

5. The authorities are not agreed, but it is probable that this exceptional rule as to the measure of damages for the breach of a contract of sale of real estate does not apply where the vendor is able to make a good title and refuses or wilfully neglects to do so. *Engel* v. *Fitch* (L. R. 3 Q. B. 314); *Robertson* v. *Dumaresq* (2 Moo. P. C. N.S. 84,95), referred to.
6. An agreement to issue and to renew from year to year at the will of the lessee or licensee a lease or license to take exclusive possession of a tract of land and to cut the merchantable timber thereon is an agreement in respect to an interest in land, and not merely a sale of goods.
7. The claimant applied to the Government of Canada for licenses to cut timber on certain timber berths situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground-rents and bonuses, and make surveys and build a mill. The claimant knew of the dispute which was at the time open and public. He paid the rents and bonuses, made the surveys, and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada, and consequently they could not carry out their promises.

Held, that the claimant was entitled to recover from the Government the moneys paid to them for ground-rents and bonuses but not the losses incurred in making the surveys, enlarging the mill, and other preparations for carrying on his business.

THIS was a claim for damages for the breach of several agreements,—1st. to issue and renew licenses to cut timber on certain berths situated within territory the title to which was, at the dates of such agreements, in dispute between the province of Ontario and the Dominion of Canada; 2ndly. to give good title to the trees or timber standing thereon; and 3rdly. to hold the claimant in quiet enjoyment of the said berths.

The case came before the court upon a reference by the Minister of the Interior under the provisions of 50-51 Vic. c. 16, s. 23.

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The facts appearing upon the evidence are stated in the judgment.

The case was tried at Ottawa on the 27th and 28th April and the 6th and 7th of May, 1892.

McCarthy, Q.C. for the claimant:

Before we come to deal with questions of law it may be well to state, shortly, the material facts which ought to be considered. We would have got out 8,000,000 feet in 1884-85, and we would have had the right to cut up to the end of 1885 under our license. Then we make our claim, so far as that goes, in this way: We say, during the first season of 1884-85 we were prohibited from cutting 5,000,000 feet, and in the cutting of what we did we were unable to make any profit, because, having got supplies in there for a much larger quantity, we were merely able to save ourselves from actual loss on such supplies, and, therefore, as we were not able to realize any profit we claim that we are entitled to get a profit on the whole 8,000,000 feet, which, if we had remained undisturbed, we would have cut during that season. So that upon this basis our claim is for 16,000,000 feet. Taking the evidence as a whole, I do not think that there is any question about this,—that the timber upon the berths would average 1,000,000 feet per square mile. The claimant stated that the reports made to him showed that there were 200,000,000 feet on the berths and I suppose that would be a fair maximum for us to claim; but I do not think that there is any evidence here which would reduce the quantity to less than 200,000,000 feet. Then, the facts, which I may shortly state, show this result: There was a mill put up, a portion of which was built before we got the limits and a portion was erected after we got the limits, costing, in the aggregate, $37,737. We procured and supplied boats which were required for working the limits at a cost of $10,125, a wharf at the mill costing

$325, and houses were built at a cost of $2,401. We spent in repairs to the mill $5,000. Then there were improvements on streams which cost $2,200.

Now, then, what are the rights of the licensees? (Here counsel quoted at length from the statute (1), and the regulations of the Governor-General in Council (2), governing the issuing of licenses and the rights of licensees.)

The license purports, on its face, to be granted by the Minister of the Interior under authority vested in him by the Act to which I have referred. It is granted in consideration of the sum of $286, paid as ground-rent. And two other cases include, in addition to that, a bonus. It gives the licensee full right, power and authority to cut all timber on the tract or tracts of land described in the license. So far it is a license to cut, a license not revocable because it is based on a valuable consideration. It, however, goes on to say, " and to take and keep exclusive possession of the said lands." Here it becomes a lease, for it proceeds, " except as hereinafter mentioned for and during the period of one year from the 31st day of December, 1884, to the 31st day of December, 1885, and no longer." Then, it says that the lease or license shall vest in the licensee, subject to the conditions hereinafter mentioned, all rights of property whatsoever in all trees, timber, lumber, and other products of timber, cut within the " berths " during the continuance thereof, whether such trees, timber and lumber or product be cut by authority of the licensee or by any other person with or without his consent; and shall entitle the licensee to seize in replevin, revendication, or otherwise, as his property, such timber where the same is found in the possession of any unauthorized person. So far we have got a document plain enough in its terms. First, it gives a license to cut;

(1) 46 Vic. c. 17 s.s. 50 to 56. (2) See post p. 207

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secondly, it vests in the licensee the tracts of timber land mentioned in the license, and then it declares that such timber as may be cut on that license during its continuance, by the licensee or any other person, shall be vested in him. Then it gives the condition under which the license shall be granted. It stipulates, first, that the licensee shall not have the right thereunder to cut timber of a less diameter than ten inches, except such as may be actually necessary for the construction of roads, &c., to facilitate the taking out of merchantable timber. The second condition provides that the lease or license shall not be allowed to interfere with the settlement of any lands within the berths which may be desirable for settlement; that the unnecessary destruction of growing timber shall be prevented, and after further conditions it winds up by saying, "the licensee shall erect in connection with this berth and have in operation within two years from the 1st of December, 1884, a saw-mill of a capacity to cut in twenty-four hours a thousand feet, board measure, for every two and one-half square miles of the area licensed."

Now, what are the rights of the licensee? Clearly during the term of the license there can be no question as to what his rights are. He is the lessee, during the period mentioned in the lease, of all the land mentioned therein, evidently for the purpose of enabling him to enjoy the license, which was the main object of the grant, and that is made more pointed and definite by the 54th section of the Act to which I referred (1), where, notwithstanding the license, permission is given to the Government to deal with the coal and other minerals found upon the territory, and to permit the entry of those to whom the Government may have disposed of the coal or other minerals, but who must pay for any

(1) 46 Vic. c. 17.

timber they may use in making roads or in working the mines. It is quite clear, also, that the timber when cut vests in the licensee. What his rights are up to that period, I think your lordship has decided in the *St. Catharines Milling and Lumber Company's case* (1). At this moment, I am unable to distinguish the difference between the right which the licensee would have during the continuance of the license, and the rights arising under the permit granted in the case I have mentioned. The distinction, if there be one, is this: In this case there is the exclusive right and license to cut within the territory mentioned, while in the case of the permit there is merely the right to cut, but not an exclusive right, and the Crown might grant a dozen permits to cut timber on the same territory, and prior holders of permits could not object. On the principle upon which the *St. Catharines Milling and Lumber Company's case* (1) was decided there can be no question at all that for the period for which we had our license, and for the quantity that we might have reasonably cut during that time, we have the right to say that the Crown sold to the claimant, for valuable consideration, the right to cut any timber they pleased upon those limits during the currency of the license. Then we say, the Crown having no title thereto but having implied that it had title, must make good any damage arising by reason of its breach of contract on the part of the Crown. And we say more than that. We say we are entitled to get as damages the profits we would have obtained by the exercise of our rights, if undisturbed. It is plain, according to this instrument and according to the regulations approved by order in council, that it was never contemplated that while we were compelled to erect a mill of the capacity mentioned and to have that mill in operation, the

(1) 2 Ex. C. R. 202.

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license would be terminated at the end of any one year or any given period; and therefore, we say that the license having been terminated by reason of the fact that the Crown had no title to grant it, we are entitled to get the value of the property and the expenditure made in fulfilment of our part of the contract, less, of course, such values during the period we were allowed to occupy it. Upon that part of the case, subject to what is to be said on the other side, I am unable to distinguish the principle upon which we claim to recover these damages from the rule enunciated by your lordship, therefore I assume that rule will be followed by your lordship in the disposal of this case. We make, however, a much larger claim than that. We claim that this contract on the part of the Crown was to be renewed in perpetuity—that is, the license,—until the timber, the 200,000,000 feet upon the limits, had been cut by us; and we say that the proper construction to place upon this instrument is that we are entitled not merely to recover the loss sustained by not being allowed to cut the 16 million feet, but the loss we sustained by not being permitted to cut the 200,000,000 feet.

Now, what is the rule for the interpretation of instruments of this sort? I am, no doubt, limited to the instruments that are in writing. The instruments that are in writing are the application for a license, the order in council upon which the survey has to be made, the regulations referred to in the order in council, and thereby embodied in the order in council for this particular contract, and the part performance of that contract by the license which has been issued. Now, I think the true rule is well stated in the language of the Court of Queen's Bench in England, in the case of *Ford* v. *Beech* (1) referred to in *Leake on*

(1) 11 Q.B. p. 66.

Contracts (1). There is another rule of construction, and that is that the language used by one party, if ambiguous, is to be taken most strongly against the party using it. I apply that to the regulations and to the order in council, but more especially to the regulations. It is claimed that at the utmost the licenses could not run longer than a year; but let us see to what absurd conclusions we shall arrive if the duration of the licenses is to be cut down to a period of a year. They compel us, for instance, to put up a mill. What would be the use of putting up a mill if we were to be bound down to a license of one year. I say it is absolutely plain that the licenses were to be continued. The very fact that they compel us to put up a mill and keep it in operation clearly implies that we were to have a renewal of the licenses. The claimant was required to keep the mill in operation and be prepared to cut, for "at least six months each year of his holding, at least ten thousand feet of lumber daily." Then, we have the express agreement here, that when the licensee has fully complied with all the above conditions, and where no portion of the timber berth is required for settlement or other public purposes, of which the Minister of the Interior is to be the judge, the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council. What interpretation is to be given to that word "may?" The Crown did not require to issue regulations and pass an order in council saying that it "may" renew a license. Is there a word in the statute which says to the Crown that the license may be renewed? All that it says is that the license shall not exist for more than one year, and may be renewed according to the terms on which it is granted; but

(1) P. 224.

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where is there any necessity for putting in the regulations a statement that the Minister of the Interior "may" grant a renewal of the license. My contention is that that word "may" must be read as "shall." In no other way can effect be given to the statute. Let me put the rival contentions. On our side we say, so long as we comply with the conditions of the order in council, that we shall be entitled to a license. It is true that the ground-rent and royalties may be increased; we take our chances of that. We say that such is its meaning. On the other hand, we are told that is not its meaning; we are told that the meaning is: You are to put up a mill for two years, to keep the mill running during the holding, and yet you are not to be the holder under this agreement; hat this document only holds good for one year; that the word "may" is permissive, not compulsory, nor obligatory.

Your lordship will have to determine which is the true intention to be gathered from the documents and from the Acts. There is no question at all about it; as a matter of fact, we all know what the true intention is. We know it is based on practice which has existed in both the provinces of Ontario and Quebec for I do not know how many years; and we know that the claimant never went up there and erected a mill and commenced to make these improvements in the belief that he would not get a renewal. We all know about that, but I am free to admit that notwithstanding that fact I would have to satisfy the court that in these documents there is an agreement for renewal. If that word in the regulations read "shall" instead of "may" there would be no question about it. Can it fairly be read as permissive? Let us test it. Put it in any form of contract you please, and see if it will have that meaning. Suppose in an agreement between "A" and

"B," "A" says in consideration of "B" paying a certain sum of money or performing a certain service, "A" may vest in him a piece of land. "B" pays the money, performs the service, and can it be expected that "A" can turn around and say: "All that I have agreed to is that I might let you have the land?" Now, what has been done here? The Government has required the claimant to make a survey of that limit, costing hundreds of dollars; he has been made to erect a mill costing fifty or sixty thousand dollars; he has been required to enter into a contract to keep the mill in operation during six months of each year and to perform other conditions,—and then the Crown says: "We may or may not grant you a renewal of the license." When we look at the rules to which I have referred, the only reasonable reading of the instrument is that the word must be taken as imperative not permissive. (Cites *Lee* v. *Lee*) (1). The Crown's power to make a contract such as I contend it did is expressed in clause 50 of the Act. (2)

The meaning of the contract is, I think, fairly enough illustrated, as well as the rights which grow from it, by a mining case, and as far as I can see these timber-cases are more like mining cases than anything we have. It is a lease with a right to take timber, and there might be a mining lease with a license to mine, and when you get authority of that kind, you approach pretty nearly to this particular line of contract. (Cites *Carr* v. *Benson* (3); *Hart* v. *Windsor* (4); *Mostyn* v. *The West Mostyn Coal &c. Co.* (5); *Dart on Vendors, etc.*). (6)

There remains but one question, it seems to me, open now for consideration, namely, is there any rule why

(1) 4 Ch. D. p. 175.
(2) 46 Vic. c. 17.
(3) L. R. 3 Ch. 524.
(4) 12 M. & W. 68.
(5) 1 C. P. D. 145.
(6) Vol. 2, p. 893.

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we should not get the full measure of our damages? That is settled, I think, by the case of *Locke* v. *Furze* (1). That is a case in point, and for the reasons which were laid down in that case I submit we are entitled to recover for the whole quantity of timber that was upon the limits,—admitting, of course, that in such a case we would not be entitled to recover for our mill, for the improvements or for expenses of survey, and so forth.

Ferguson, Q.C., following, contended that the claimant was entitled to damages on the basis of what he had expended in consequence of the agreement entered into with the Crown and on the faith of the Crown having the right to give him power to cut upon the limits in question.

Robinson, Q.C., for the respondent: It is difficult to see how this case and that of the *St. Catharines Milling and Lumber Company* (2) are to be assimilated. When the latter case was under discussion, the points in question here were raised in argument before your lordship, but there was practically no decision on them, and the real ground upon which your lordship had disposed of the case was that, assuming it to be a sale of goods, and there were no circumstances to the contrary, there would be an implied warranty of title. Your lordship did not there decide whether it was a sale of goods or of land.

[BURBIDGE, J.—I think I came to the conclusion that it was a sale of goods.]

The whole machinery provided by the Act points to dealing with land and not with goods. *The Dominion Lands Act* never contemplated the Crown dealing with goods. It suggests itself to my mind that as no employee of the Department of the Interior could purchase

(1) L. R. 1 C. P. 441. (2) 2 Ex. C. R. 202.

any Dominion Lands, that dealing with goods and chattels by the Government was not the intention of the Act. In regard to the case of *Marshall* v. *Green* (1) your lordship, in *The St. Catharines Milling and Lumber Company's case* (2), discussed the point at length and said you did not dissent from it. (Cites *Lavery* v. *Pursell*) (3). In *Marshall* v. *Green* (1) the fact was that the trees were to be removed as soon as possible. That is not the case under a permit or license. In *The St. Catharines Milling and Lumber Company's case* (2) the question arose under a permit, and it is necessary, in order to arrive at a proper understanding of the Government's position, to look at the terms of the permit, then the terms of the license, then the terms of the order-in-council, and see whether this was a disposition of an interest in land. Permits are granted under the authority of the Minister of the Interior by virtue of a general power which he derives under the statute for the regulation of Crown Lands and the disposition of timber.

The conditions in a license are quite different from those in a permit. The permits provide for nothing except what they may grant, and that the holder would be instructed by the Minister as to the quantity to be cut. The reservation of "ground-rent" in a license is employing a term especially applicable to land, and means something issuing out of land. It is well to call attention here to the fact that these regulations which are authorized are not regulations as to renewal, but relate to ground-rents, royalties and other dues. Now, there are three ways in which timber licenses may be granted. In the first place they may be put up at auction; in the next place they may be granted by order-in-council to a single tenderer — where there are no conflicting tenders; and, thirdly

(1) 1 C. P. D. 35. (2) 2 Ex. C. R. 202. (3) 39 Ch. D. 508.

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where there are conflicting tenders they may be granted to the highest tenderer. In this case four licenses were granted on individual applications without conflicting tenders; two others were granted upon application; none were obtained by auction, and, therefore, there were no conditions of sale. The inference I draw is that "conditions of sale" apply to those sold by auction. I should not suppose they could apply where there are single tenderers (1). These are the three methods provided by the statute.

Now we come to one of the most important sections, section 50, which I pass for a moment, because that bears on the subsequent question of the right of renewal, and not on the question I am now discussing as to whether this is an interest in land or in goods. (Counsel here refers at length to the sections of the statute quoted by the other side.)

How can there be a renewal on any other notion than that of an interest in land; how can you say that under section 51 of the statute you merely get an interest in goods? All the statutory provisions are designed to give a licensee control over the land, as distinguished merely from the timber that is to be cut. Now, if we turn to the license itself, I may ask what rights does it pretend to give *per se?* The license is even stronger in its terms as distinguishing between an interest in land and an interest in goods. I call your lordship's attention to this fact, that in the statute they speak of leases, while in the licenses they speak of leases or licenses. The license is endorsed "license," and throughout the instrument itself it is said to be a lease or license, and the person getting it is not a lessee but a licensee. Now does a permit give exclusive possession of the land? Does not the permit in other words, but in the barest possible

(1) 46 Vic. c. 17 s. 49.

manner, say: You may cut a certain amount of timber within the time specified? The statute, moreover, gives a distinct interest in land under a license, and exclusive right of possession to a piece of land. The license says:

"This lease or license shall vest in the licensee, subject to the conditions hereinafter mentioned, all right "of property whatsoever in all trees, timber, lumber "and other product of timber cut within the berth during the continuance thereof, whether such trees, timber and lumber or products be cut by authority of the "license or by any other person with or without his "consent, and shall entitle the licensee to seize in "replevin, revendication or otherwise as his property "such timber where the same is found in the possession "of any unauthorized person, and also to bring any "action or suit, at law or in equity, against any party "unlawfully in possession of any such timber, or of "any land so leased."

The words of the statute are: "Any party unlawfully in possession of any such timber," while the license says: "Any party unlawfully in possession of any such timber, or of any land so leased." There, I should say, is a clear proof of the transfer of an interest in land.

It is impossible, taking the statute and license together, and assuming that the permit confers only an interest in goods, or is only practically a sale of goods, to conceive that the license which vests in the strongest possible terms a distinct interest in land is a sale of goods and contains by implication a warranty of title. If so, this case is not governed by the *St. Catharines Milling and Lumber Company's case* (1). I do not desire to waste time in discussing the case of *Marshall* v. *Green* (2), because I have no doubt your

(1) 2 Ex. C. R. 202. (2) 1 C. P. D. 35.

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lordship has given every consideration to that case, but my contention is that this is entirely a different case from the *St. Catharines case*. It is to be remarked that just in proportion as my learned friend claims that this is a perpetually renewable lease, which they claim it is, just in proportion does it not become a mere sale of goods? Their contention is that they were given the exclusive right only to strip off the timber. If it took them twenty years to get rid of all the timber on these limits, for assuming that there were two hundred million feet on the limits and that the claimant's estimate of ten million feet annually was the capacity of the mill, it would require twenty years for the mill to get rid of all the timber on the limits, the result of their argument is that they are vested with an exclusive interest in this land for twenty years; and then they say that they are merely purchasers of goods and chattels. That surely shows there is no possibility of founding an argument in this case upon a similarity to the *St. Catharines Milling and Lumber Company's case* (1). If this is for the possession of an interest in land, one thing is certain, that there is no covenant for title. The defect of my learned friend's argument is that one contention destroys the other. If there is an implied covenant for the renewal of the license to the claimant, then it is a sale of goods. If it is a lease of land, as such, under the law of real property, there is no implied warranty. Both positions cannot be sustained; the two arguments are wholly inconsistent. (Cites *Clarke* v. *The Queen*) (2). The question of quiet enjoyment and the question of implied covenant of title is one of comparatively minor importance, for this reason, that if it be a covenant for quiet enjoyment it can only extend during the term of the lease. It seems to have no bearing whatever on the

(1) 2 Ex. C. R. 202. (2) 1 Ex. C.R. 182.

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question of renewal. According to *Woodfall on Landlord and Tenant* (1), a covenant for quiet enjoyment seems to turn on the word "demise," which is not used anywhere in the license.

As to the question of damages, my learned friend seems to think that they can recover the whole value of the mill. That is altogether out of the question. All that they can get from that would be the expenditure that they have been put to by reason of the license. (Cites Strong, J. in *The Queen* v. *Robertson*) (2). The license there conferred the right to take fish on a certain stream for a certain period but contained no covenants.

Dealing with the main question, the right of renewal, it is very important to point out that that right of renewal is expressly prohibited by the statute, except in a certain way, and I do not think sufficient attention is always paid to the binding effect of statutes. There seems to be a general impression that the Crown can do as it pleases, and if the Crown makes a bargain it ought to be subject to a petition of right, whether the statute authorizes it or not. (Cites *Churchward* v. *The Queen*) (3).

The statute prohibits the recognition by any court of any claim for renewal unless such renewal is provided for in the order-in-council authorizing it, or embodied in the conditions of the sale or tender under which it was obtained. There is not in the order-in-council any express provision for right of renewal. If there is any at all it is only raised by implication from the introduction into the order-in-council of the regulations to which it refers. I should have thought that it was a desperate argument to contend there is a right of renewal in the words of the

(1) 14th ed., pp. 695-696.
(2) 6 Can. S. C. R. 126.
(3) L. R. 1 Q. B. 210.

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regulations, because what do the regulations say: "The license may be renewed for another year subject to such revision of the annual rent and royalty to be paid therefor as may be fixed by the Governor in Council." How are you going to support a claim, if the Governor in Council does not interfere to fix the rent?

There is no object in providing with the greatest possible care what obligations the Crown shall enter into if you are entitled to go to a court of justice and say they amount to nothing. We know very well the Crown never intended to abide by any such covenants and warranties as are sought to be raised here. It is impossible upon the mere obligation which is imposed upon them to build a mill to found an obligation on the part of the Government to allow them to keep the limits until they had manufactured all the timber on such limits. In considering the measure of damages, your lordship has to bear in mind that the Government never contemplated any such legal obligation. You have these two provisions which, without going into detail, must put an end to any absolute application of the ordinary measure of damages. To my mind, one of the strongest arguments, as showing the whole tenor of the conduct of the Government, is that they never intended to bind themselves up in any legal obligation that would subject them to damages; they said you shall have it for a year and no longer. Cites *Simpson* v. *Grant* (1); *Contois* v. *Bonfield* (2); *Attorney-General* v. *Contois* (3); *McQueen* v. *The Queen* (4); *McIntyre* v. *Belcher* (5); *Addison on Contracts* (6); *Johnston v. Shortreed* (7); *Webber v. Lee* (8).

(1) 5 Grant 272.
(2) 25 U. C. C. P. 39.
(3) 25 Grant 346.
(4) 16 Can. S. C. R. 66.
(5) 14 C. B. N. S. 654.
(6) 9th ed., p. 417.
(7) 12 Ont. 643.
(8) 9 Q. B. D. 315.

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Hogg, Q.C. followed, and argued that if the Crown was liable at all it was only liable to indemnify the claimant for such expenditure as was made in performing the conditions of the license.

McCarthy, Q.C., in reply, cited *Carr* v. *Benson* (1).

BURBIDGE, J. now (January 9th, 1893) delivered judgment.

The case comes before the court upon the reference of a claim made against the Crown, by the claimant, for two hundred thousand dollars, with respect to certain timber limits or berths situated in what was formerly known as the Disputed Territory. Prior to the several applications made by or on behalf of the claimant for licenses to cut timber on certain lands in such territory, to which reference will be made, he had established himself in the lumber business at Rat Portage, in that territory, and had built a mill there for the manufacture of logs which he was cutting under permits issued by authority of the Minister of the Interior. This case has to do with ten applications for such licenses, on which orders-in-council were passed authorizing their issue, in only two out of which was the claimant the applicant. But it is admitted that he is entitled to the benefit of the concessions granted by all such orders-in-council, and no question is raised as to the validity of the several assignments of such concessions. The case is to be dealt with as if the claimant had in each case been the applicant, and all the orders-in-council had been passed in his favour. Neither is any question raised as to his right to hold more than one berth, and the departure in that respect from the regulations of the 8th of March, 1883, to which it will be necessary to refer more than once, is

(1) L. R. 3 Ch. 524.

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to be taken to have had the sanction of His Excellency the Governor-General in Council. It is also admitted that the claimant fulfilled all conditions entitling him to the issue of the licenses and that the lands described in the several orders-in-council were not required for settlement. For convenience of reference I append a brief abstract (1) of the several orders-in-council showing the date of each, the name of the applicant, the number of square miles in each berth, the cases in which yearly licenses were issued and the dates thereof.

The claimant's action, to state it briefly, is for damages: 1st. for the alleged breach of the several agreements, created by the applications and orders-in-council mentioned, to issue or renew the licenses to cut timber on the berths in question; 2ndly. for the alleged breach of the several warranties and agreements for good title to the trees and timber said to be implied from the transactions; and 3rdly. for the alleged breach of covenants for quiet enjoyment to be implied from the language used in the licenses that were issued.

It is not necessary to state all the facts relating to these several transactions. In a general way they are of like character. But taking for example the application of F. T. Bulmer, it will be seen that the order-in-council of 1st November, 1883, after reciting his application for a yearly license to cut timber on a berth of fifty square miles described in the order, gave authority for the issue of such license on the terms and under the conditions provided by the regulations approved by the order-in-council of the 8th of March, 1883, subject to any previous grant or reserve and upon the survey of the berth being made within one year under instructions.

(1) *See* following page.

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Date of the Order-in-Council.	Name of the Applicant.	Number of Square Miles surveyed or applied for.	Cases in which Leases or Licenses issued for the year, from 31st Dec., 1883, to 31st Dec., 1884, and dates of issue.	Cases in which Leases or Licenses issued for the year, from 31st Dec., 1884, to 31st Dec., 1885, and dates of issue.	Remarks.
November 1, 1883.	F. T. Bulmer	$36\frac{22}{100}$	July, 28, 1884	June, 22, 1885	Licensee notified by letter dated 14th November, 1883.
do 29, 1883.	H. H. Bailey	$52\frac{35}{100}$	November, 22, 1884	April, 28, 1885	The date of the order-in-council is that given in the statement of claim and admitted. The order-in-council put in is dated 11th Aug., 1883, and the fact of its having been passed was communicated by letter of 10th Sept., 1883. Apparently this order was not acted on.
December 1, 1883.	H. Bulmer	$57\frac{24}{100}$	....	June, 23, 1885	
do 21, 1883.	George F. Hartt	$64\frac{1}{100}$	....	March, 30, 1885	
February 5, 1884.	H. Bulmer	$51\frac{10}{100}$	September, 4, 1884	June, 20, 1885	In this case and the next there were several applicants from whom tenders were invited. The offer of Bulmer of a bonus of $500 in the one case, and that of Williamson of $13 per square mile in the other, were the only tenders received, and were accepted.
do 5, 1884.	A. C. Williamson	$49\frac{80}{100}$	....	June, 22, 1885	
October 9, 1884.	A. J. Parsons	50	....	....	
do 9, 1884.	A. J. Lefaivre	50	....	....	
do 9, 1884.	Joseph McCoy	50	....	....	
do 9, 1884.	F. T. Bulmer	$4\frac{50}{100}$	....	....	
		$465\frac{22}{100}$			

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The sale of timber upon public lands was at the time regulated by the Act of the Parliament of Canada, 46th Victoria, chapter 17. By the 47th section of that Act it was provided that the Governor in Council might from time to time declare districts of territory to be timber districts, and by the 48th section that the Minister of the Interior might set apart any tract in any timber district, and cause the same to be divided into berths not exceeding in area fifty square miles each, and that leases of the right to cut timber on such berths might be granted under such regulations as might be made by the Governor in Council respecting the ground-rents, royalties or other dues to be paid in connection therewith. By the 49th section it was provided that leases of the right to cut timber on timber berths might, by order of the Governor in Council, be offered at public auction, or that tenders might be invited from one or more applicants or the public, or that authority might be given for the issue of the lease to a sole applicant. In the two cases first mentioned the lease was to go to the person offering the highest cash bonus, and in the latter a bonus might be fixed in the order-in-council. By the 50th section it was enacted that leases of timber berths should be for a term not exceeding one year, and the lessee of the timber berth should not be held to have any claim whatever to a renewal of his lease unless such renewal was provided for in the order-in-council authorizing the lease, or was embodied in the conditions of the sale or tender, as the case might be, under which it was obtained. The rights of the lessee and the terms and conditions of the lease were dealt with in the 51st and 52nd sections. (1). The regulations of the 8th of March, 1883,

(1). 51. The lease shall describe the lands upon which the timber may be cut, and shall, during its continuance, vest in the lessee all rights of property whatsoever in all trees, timber, wood or other

referred to in the order-in-council of 1st November, 1883, and the other orders in question were made in pursuance of, and to give effect to, the provisions of *The Dominion Lands Act*, 1879, on the subject of granting yearly licenses to cut timber on Dominion Lands. (1). That

products of wood, cut within the limits of the leasehold, whether such trees, timber and wood or products be cut by his authority or by any person without his consent; and such lease shall entitle the lessee to seize in replevin, revendication, or otherwise, as his property, such timber where the same is found in the possession of any unauthorized person, and also to bring any action or suit at law or in equity against any party unlawfully in possession of any such timber, and to prosecute all persons cutting timber in trespass upon his lease to conviction and punishment, and to recover damages, if any, and all proceedings pending at the expiration of any such lease may be continued and completed as if the lease had not expired.

52. The lease shall contain, in addition to such other provisions as may be in the order-in-council granting it, or in the conditions of sale or tender under which it was obtained, provisions binding the lessee,—

1. To erect in connection with the berth leased, and to have in operation within a time prescribed in the lease, a saw-mill or mills of capacity to cut in twenty-four hours a thousand feet, board measure, for every two and a half-square miles of the area leased; or to establish such other manufactory of wood goods as may be accepted by the Minister of the Interior as equivalent thereto;

2. To pay in advance, in addition to the bonus, an annual ground-rent of five dollars per square mile, and further, to pay in cash, at each time of his making the return prescribed in sub-clause four of this clause, a royalty of five per cent. on his sales of the products of the berth, as shown by such return;

3. To keep correct books of account of his business, and to submit the same for the inspection of any authorized agent of the Minister of the Interior, whenever required;

4. To make monthly, or at such other interval of time as they may be required of him, by regulations under this Act, or by the Minister of the Interior, returns sworn to by him or by his agent or employee, cognizant of the facts, declaring the quantities taken from the berth, and those sold, of all timber or products of wood, in whatever form the same may be sold or otherwise disposed of by him, during such month or other period, and the amount received by him therefor;

5. To prevent any unnecessary waste of timber in the process of cutting it, and to prevent, when it can be avoided, the destruction of growing trees which have not yet attained a size fitting them to be used for merchantable timber;

6. To exercise strict and constant supervision to prevent the origin and spread of fire.

(1) 42 Vic. c. 31 s. 52 (10).

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Act differed in several respects from the Act of 1883. For instance, by the Act of 1879 it was provided that the right of cutting timber on timber lands should be put up at a bonus per square mile, and should be sold to the highest bidder by competition either by tender or at public auction, (1) that the purchaser should receive a lease granting, subject to certain conditions, the right to cut timber on such limits or land for twenty-one years, (2) and that if the lessee faithfully carried out the prescribed conditions, he should have the refusal of the same limits if not required for settlement for a further term not exceeding twenty-one years, on payment of the same amount of bonus per square mile as was paid originally, and on such lessee agreeing to such conditions and to pay such other rates as might be determined on for a second term. (3).

The provisions of the Act on the subject of granting yearly licenses will be found in the proviso to the 10th sub-clause of the 52nd clause of the Act, whereby it was enacted that the Governor in Council might, on the recommendation of the Minister of the Interior, in special cases where the same was deemed expedient, grant licenses in either surveyed or unsurveyed territory to cut timber for one year, and renewable from year to year in the discretion of the Minister of the Interior, at such ground-rent as the Minister might deem fair and reasonable.

It was to give effect to this provision, apparently, that the regulations of March 8th, 1883, (4), were made.

(1) S. 51.

(2) S. 52.

(3) S. 52, (9).

(4). REGULATIONS governing the granting of yearly licenses to cut timber on Dominion Lands, under the provisions of section 52 of *The Dominion Lands Act*, 1879.

1st. The area of the timber berth to be covered by yearly license shall not exceed fifty square miles, and not more than one berth shall be given to an individual or firm. Any departure from this rule, which special circumstances may render expedient, shall be made only with the sanction of the Governor in Council.

And if the transactions on which the claimant relies had occurred while the Act of 1879 was in force, the question of his right to a renewal of the licenses issued to him, to which I shall have occasion to refer, would not have presented any serious difficulty.

Coming now to the form and terms of the licenses issued in F. T. Bulmer's case, which has been selected as an illustration, we find that the license for 1885 was issued under the authority of the Act of 1883, while that for the year 1884, through inadvertence, no doubt, purported to be authorized by the repealed Act of 1879. Both licenses were issued in the name of the

2nd. Licenses shall be granted under the following conditions :— (*a.*) The licensee shall pay a ground-rent of five dollars ($5) per square mile. (*b.*) Within a month after the date of the order-in-council granting a timber berth, the party in whose favour it was passed shall pay the rent for the year, in advance, the said rent to bear interest at the rate of six per cent. per annum from that date until the same is paid. (*c.*) The licensee shall pay a royalty of five per cent. on the amount of the sales of all products of the berth. (*d.*) When applications for licenses conflict, berths shall be laid off, and described as the Minister of the Interior may direct, and tenders will be invited for the same. Parties tendering will be required to state the sum or bonus per square mile, which they will pay in addition to the ground-rent and royalty; and the limit will be awarded to the party offering the highest bonus. (*e.*) The licensee shall have in operation, within a year from a date to be fixed in the license, and keep in operation for at least six months of each year of his holding, a saw-mill capable of cutting daily at least ten thousand feet, board measure, of lumber.

3rd. When a licensee has fully complied with all the above conditions, and where no portion of the timber berth is required for settlement or other public purpose of which the Minister of the Interior is to be the judge, the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council.

4th. In unsurveyed territory the party to whom a license shall be promised shall, before the issue of said license and before the said party shall cut any timber, cause to be made at his own expense, under the instructions of the Surveyor-General, a survey of his timber berth by a duly qualified Dominion Lands Surveyor, and the plan and field-notes of such survey shall be deposited on record in the Department of the Interior.

In surveyed territory berths shall consist of Township sections, their legal subdivisions, or fractions thereof.

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Minister of the Interior, for the time being, and under the hand and seal of his deputy; and in other respects they are the same. The instrument is denominated a license to cut timber on Dominion Lands, and the person to whom it is issued is called a licensee. It contains, however, in one of its clauses, a lease of the land on which the timber was to be cut, and in that clause and the one following is described as a lease or license. For convenience I shall in general refer to it as a license.

This license, I refer now to that of 1884, sets out that in consideration of the sum of $181.10 ground-rent paid to the Minister for the use of Her Majesty, and in consideration of the royalty thereinafter mentioned, the Minister gives the licensee, his executors and administrators full right, power and license, subject to certain conditions and restrictions, to cut timber on a tract of land therein described and, except as therein mentioned, to take and keep exclusive possession of the said land for and during the period of one year from the 31st day of December, 1883, to the 31st day of December 1884, and no longer. In respect of the exclusive possession of the land given by the lease or license it follows the 7th sub-clause of the 52nd clause of the Act of 1879, and not the 51st section, the corresponding one, of the Act of 1883. The same is true also of the next paragraph of the license, which in addition to giving the licensee the right to seize any timber cut in trespass on the lands therein described, and to bring his action against any person unlawfully in possession of such timber, a provision common to both Acts, gives him in the terms of the Act of 1879 the further right to bring an action against any person unlawfully in possession of such lands, and to prosecute trespassers thereon.

Then follow the conditions to which the lease or license is subject, to none of which is it necessary to refer more particularly, except perhaps to add that it was provided that the saw-mill to be erected in connection with the berth was to be in operation within two years from the 1st of November, 1884, that the licensee should take from every tree he cut down all the timber fit for use and manufacture the same into sawn lumber or other saleable product, that he should, in addition to the ground-rent, pay a royalty of five per cent. on his monthly accounts of sales, and that the license could not be assigned or transferred without the consent of the Minister.

We have seen that the lands on which the timber was to be cut were situate in the territory formerly in dispute between the province of Ontario and the Dominion of Canada. In 1874 an agreement was come to between the Governments of the Dominion and of the Province whereby, pending the determination of the true boundary, a conventional boundary was adopted, it being provided that patents for lands to the South and East thereof should be issued by the latter, and that the Government of Canada should administer the public lands to the West and North thereof. The lands mentioned in the orders-in-council in question in this case were West of such conventional boundary. In 1879 the province of Ontario withdrew from this provisional arrangement, on the ground that the boundaries had been definitely settled by an award that had been made in the year previous. The Government of Canada refused to accept the award as binding and continued to administer the public lands to the West and North of the conventional boundary that had been agreed upon in 1874. In December, 1883, the boundaries of the province of Manitoba having in the meantime been extended

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easterly to the western boundary of Ontario, the Governments of the two Provinces agreed in submitting a case for the decision of the Judicial Committee of the Privy Council (1). The decision of the Committee was in favour of Ontario. The report was made on the 23rd of July, 1884, and approved by Her Majesty on the 11th of August following. The Government of Canada did not, however, accept this decision as conclusive against its right to deal with the lands within the territory that had been in dispute. Reliance was placed upon what was known as the Indian title and the questions raised in reference thereto were not definitely determined until December, 1888.

On the 6th of October, 1884, the Lieutenant-Governor of Ontario issued a proclamation forbidding all persons to cut timber on Crown Lands within the territory mentioned, and on the 10th of November following the claimant was, by authority of the Commissioner of Crown Lands, served with a notice in writing forbidding him to cut any kind of timber on such lands. At this time the claimant had in the woods a portion of his supplies for the ensuing winter, and he was permitted by the Ontario authorities to use up such supplies in getting out logs. But with that exception he had not, subsequent to such notice and dispossession, any use or benefit of the timber berths mentioned in the orders-in-council and licenses to which reference has been made, or of the large expense he had incurred for surveys, for ground-rents and bonuses, for river improvements, for the enlargement of his saw-mill to comply with the conditions of his contracts, and for other matters incidental to a business such as that which he had proposed to carry on.

Now it is important to ascertain if possible what the obligations of the Crown were, that resulted from the

(1) 47 Vic. (Ont) c. 2 ; 47 Vic. (Man.) c. 2.

passing of the several orders-in-council to which reference has been made, and the performance by the claimant of the terms and conditions therein mentioned. Was the Crown in the first place bound by its contracts to issue the licenses thereby authorized? Of that I think there can be no doubt. But was the Crown also bound, at the request of the licensee and so long as he complied with the conditions imposed and the land was not required for settlement or other public purpose, to renew the licenses from year to year subject only to a revision of the annual ground-rent and royalty to be paid therefor? So far as the licenses are concerned, they are in express terms limited to one year and no longer, and though they contained covenants and clauses that indicate that they formed part of a larger contract than is expressed upon the face of each, they may, I think, for the purposes of the immediate enquiry be put to one side.

We have seen that by the 50th section of *The Dominion Lands Act*, 1883, it was provided that leases of timber berths should be for a term of one year, and that the lessee should not be held to have any claim whatever to a renewal of his lease unless such renewal was provided for in the order-in-council authorizing it, or embodied in the condition of lease or tender. Was such renewal provided for in the orders-in-council in question? The applications were for yearly licenses not for licenses for a year, and authority was given to grant such licenses, that is yearly licenses. In the two cases in which tenders were called for the tenders are in evidence but not the letters to which they refer; and it does not appear what the conditions were that the tenderers undertook to comply with. The tender in each case was, however, for a timber berth or limit, not for the privilege of cutting timber thereon for the year following, or for any one year. Then the condi-

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tions in respect to the erection and operation of a saw-mill indicate that the agreements were to continue for more than one year. By the regulations of the 8th of March, 1883, on the terms of which the licenses were to issue, such mill was, after the date limited for its construction, to be operated for at least six months of each year of the holding. The 3rd paragraph of such regulations provided that, under circumstances which existed in this case, the license might be renewed for another year subject to such revision of the annual rental and royalty as might be fixed by the Governor in Council. It was objected that the word "may," used in the regulations, left the Minister an option to renew or not; and that, no doubt, was its effect in respect of any transaction that occurred under the Act of 1879. But all the Act of 1883 requires is that the renewal be provided for in the order in council; and where it otherwise appears therefrom, as I think it does in this case, that it was the intention that the license should be renewable, such provision is, it appears to me, made when the Minister is given the necessary authority to grant the renewal. Looking at the terms of the orders-in-council, and of the regulations, and having regard to the character of the transactions in question, it seems to me to be reasonably clear that the renewal of the several licenses was provided for and formed part of the contracts entered into. If that is the case, then without doubt the refusal, in 1886, in the six cases to renew the licenses, and in the other four to issue them, constituted a breach of such contracts and the claimant is entitled to judgment.

As incident to the question of damages, and before discussing the rules by which they are in this case to be ascertained, it is necessary to enquire as to whether or not the Crown, in issuing licenses in the years 1884 and 1885 to that extent discharged its obligations. Did

the Crown, in agreeing to grant leases or licenses to cut timber on the lands mentioned, impliedly promise that it had a good title to such lands, and agree that it would grant valid leases or licenses?

Unless there is some good reason for distinguishing the Crown's contracts in such a case from a subject's, the question must, I think, be answered in the affirmative. In *Stranks* v. *St. John*, (1) the defendant agreed by an instrument, not under seal, to let to the plaintiff certain lands for a term of seven years, though at the time he had no title to let them. This agreement, though void as a lease under 8 & 9 Vic. c. 106, was held to be valid as an agreement to grant a lease; and that raised the question as to whether such an agreement was merely an agreement to sign a piece of parchment, or whether it bound the lessee to grant a really valid lease, and it was held that it must in such a case be implied that the lease should be a valid lease. Mr. Justice Willes (2) discusses a number of cases supporting that view, and with reference to the opinion expressed by Lawrence, J., in *Gwillim* v. *Stone*, decided in 1811 (3), that the rule of *caveat emptor* applied to purchasers of land, says, that he cannot think that the case was "correctly reported, for it was already "settled law that on the sale of land a covenant "for a good title was implied": and he concludes his reasons for judgment with the general proposition that "a person who agrees to let land agrees to "grant a valid lease, as a person who agrees to sell "land agrees to execute a valid conveyance of it." (4) It is of course an elementary principle that, while in ordinary cases between subject and subject, a grant shall, if the meaning is doubtful, be construed most strongly against the grantor, the King's

(1) L. R. 2 C. P. 376.
(2) L. R. 2 C. P. 379.
(3) 3 Taunt. 433.
(4) L. R. 2 C. P. 380.

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grant shall be construed most favourably for him. But no strained or extravagant construction is to be made in his favour, and if the grant is made for valuable consideration it is to be construed strictly for the grantee. (1) And while, no doubt, great care should be taken (greater, let it be admitted, than in construing agreements made between subject and subject) not to imply any obligation not fairly deducible from the terms and nature of the contracts in question in this case, I can see no good reason for coming to any other conclusion than that when the Crown agreed to issue leases or licenses to cut timber on the lands mentioned, it agreed to grant valid leases or licenses thereof, and that a contract for title to such lands is to be implied from the agreement.

Now, as to damages the general rule is that a person who makes a contract with another and breaks it is bound to pay to such other person, and the latter is entitled to recover from him, such damages as may fairly be considered to have been the natural result of the breach of the contract, or such as may reasonably be supposed to have been contemplated by both parties at the time when they entered into the contract, as the probable result of the breach of it. (2) To this rule, however, there is an exception as well established as the rule itself, that upon a contract for the sale and purchase of real estate, if the vendor without fraud is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain. (3)

(1) Chitty Prerog. 391 2-3-4.

(2) *Robinson* v. *Harman* 1 Ex. 850; *Hadley* v. *Baxendale* 9 Ex. 341.

(3) *Bain* v. *Fothergill* L. R. 7 H. L. 158, approving *Flureau* v. *Thornhill* (1776) 2 Wm. Bl. 1078 and the cases in which the latter was followed, and overruling *Hopkins* v. *Grazebrook* 6 B. & C. 31. See also *The Rock Portland Cement Co* v. *Wilson* 52 L. J. N. S. Ch. 214; *Gas Light and Coke Co.* v. *Towse* L. R. 35 Chan. Div. 519; *Rowe* v. *The School Board for London* L. R. 36 Chan. Div. 619.

In *Bain* v. *Fothergill*, (1) in which the whole question is exhaustively discussed and the law settled, Lord Chelmsford expressed the opinion that the rule laid down in *Flureau* v. *Thornhill* (2) as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate, must be taken to be without exception; that no damages beyond the expenses incurred can be recovered, except in an action of deceit. If that be the true view of the matter the Crown would never be liable for any damages which a purchaser from it sustained for loss of profits or of his bargain, for in no case would a petition lie against the Crown for deceit, in an action where it is necessary to prove actual fraud. It is difficult, perhaps, to reconcile Lord Chelmsford's statement of the law with the decision in *Robertson* v. *Dumaresq* (3) in which he delivered the judgment of the Judicial Committee of the Privy Council. That case came before the Supreme Court of New South Wales upon a proceeding in the nature of an action brought by the respondent, under the local Act 20 Vic. No. 15, against the Government of the Colony. In this proceeding, which was in substitution for the remedy by petition of right, the appellant, the Secretary for Lands and Public Works, was the nominal defendant representing the Government. The respondent in this action claimed damages for the breach of a promise made, in 1826, by the Governor of the Colony to give him an allotment of Crown lands if he would retire from service in the Royal Staff Corps, in which he was a captain, and would settle in the Colony. In 1831 the land promised him was worth £100 an acre, and in 1858, when the action came in for trial, £8,000 per acre. Under a direction that

(1) L. R. 7 H. L. 158. (2) 2 Wm. Bl. 1078.
(3) 2 Moo: P. C. N. S. 84–95.

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the damages would be the value of the lands at the time of the trial, the jury found for the respondent for £5,000, and the verdict was sustained in the Supreme Court of the Colony and in the Privy Council. On the question of damages their Lordships were of opinion that if the respondent had received his allotment as he ought to have done, he would have had it with the benefit of the increased value which it might have acquired while in his possession. Of this the other party had deprived him by the breach of his promise, and whether he had obtained the benefit himself, or had hindered the respondent from enjoying it, it seemed to be equally just and reasonable that he should pay the full value of the property to the person from whom he had wrongfully withheld it. This case was, however, treated as differing materially from ordinary actions, both in the considerations applicable to the claim, and to the extent that evidence might be adduced in support of it. That is one distinction between it and the case of *Bain* v. *Fothergill* (1) which was decided ten years later. There is, I think, another distinction. *In Dart on Vendors and Purchasers* (2) it is pointed out that the decision in *Bain* v. *Fothergill* (1) applies merely to cases where the vendor is *bonâ fide* unable to give a title, and that it does not conflict with the only point decided in *Engel* v *Fitch*, (3) that a purchaser is entitled to substantial damages from a vendor who, to save himself trouble or moderate expense, or from mere caprice, absolutely refuses or, which is the same thing, wilfully neglects to perform to the best of his ability his part of the contract.

The exceptional rule laid down in *Bain* v. *Fothergill* (4) is also confined to cases of contract for the sale of

(1) L. R. 7 H. L. 158.
(2) Ed. 1888 p. 1082.
(3) L. R. 3 Q. B. 314.
(4) L. R. 7 H. L. 168.

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lands, or an interest therein, and does not apply where the conveyance has been executed and the purchaser has entered into possession under covenants express or implied for good title or for quiet enjoyment. (1) In the *Windsor and Annapolis Railway Company* v. *The Queen* (2) Lord Watson, delivering the judgment of their Lordships the Judicial Committee of the Privy Council, said that they were of opinion that, on the 1st of August, 1877, when the suppliant company was ousted by the act of the Crown, there arose to it a claim of damages for loss of possession during the whole remainder of the term specified in the agreement of 1871, for breach of which the petition was brought. This case is an illustration of one, perhaps of both, of the exceptions to the exceptional rule to which I have referred.

The claimant in this case contends, however, that the subject-matter of his agreements with the Crown was a sale of goods and not of an interest in land, and he relies upon *Marshall* v. *Green* (3) which I followed in *The Saint Catharines Milling and Lumber Company's case* (4). In the latter case, in which certain permits to cut timber were in question, I thought it was clear that the timber was not to pass until severed, and that it was not contemplated that the purchasers were to derive any benefit from its further growth in the soil. They acquired, it was clear, no interest in the land from which it was to be cut (5). Here, however, the facts are very different. The licensee is given, subject to certain exceptions that are not material, the exclusive possession of the lands and the right to bring an action against any person unlawfully in possession thereof and to prosecute all trespassers thereon, and a

(1) *Williams* v. *Burrell* 1 C. B. 402; *Lock* v. *Furze* L. R. 1 C. P. 441; 19 C. B. N. S. 96.
(2) 11 App. Cas. 616.
(3) 1 C. P. D. 35.
(4) 2 Ex. C. R. 229.
(5) *Sinnott* v. *Scoble* 11 Can. S. C. R. 581.

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ground-rent is reserved. Then, if the licenses were renewable from year to year, possibly for twenty years or more, at the request of the licensee, subject only to a revision of the ground-rent and royalty, and that is a necessary part of the claimant's case, how can it be said that the agreements entered into were for the sale of goods and not of an interest in land ? But if it were otherwise, it is not clear that the measure of damages would not be the same. Growing trees are very different from ordinary chattels. Every one knows that the vendor's title to them depends upon his title to the lands on which they are growing, and if that fails he cannot convey any interest in such trees. And it may well be that in an action on a contract to sell growing trees, whether they are to be at once removed or not, the measure of damages should, where the breach resulted from the failure of the vendor's title through no fault of his own, be the same as in a contract to sell real estate. I am of opinion that the claimant is not entitled to damages for the loss of his bargain.

Coming now to the expenses that he incurred and for which he seeks in this action to be indemnified, it will be seen that they cover ground-rent and bonuses paid to the Crown, the cost of explorations and surveys, of the enlargement of his saw-mill, and of the construction in connection with the mill, of houses, outbuildings and a wharf, the price of steam-boats purchased for use in the business, and moneys expended on river improvements, for repairs to the mill, outbuildings and boats, for insurance and taxes, and for taking care of the property during the years 1886, 1887 and 1888.

With reference to the ground-rent and bonuses paid to the respondent, there can, it seems to me, be no doubt of the claimant's right to succeed. It is not suggested that the money was paid for the Crown's in-

terest, whatever that might happen to be, or that the claimant got what he bargained for. Assuming that both parties contracted in view of the contingency that happened, that the Government's title might fail, as to which I shall have more to say presently, there would still be no ground upon which the Crown could justly or lawfully retain the money that the claimant has paid to them. There might, I suppose, be some question as to whether or not he has had any return for this outlay. In the summer of 1884, he manufactured some lumber which he thinks was cut on one of the limits, but his evidence is not very clear or satisfactory on the point, and I am not sure that he is not mistaken, and that the logs he referred to were not cut under one or other of the permits he had previously held. The earliest of the licenses was issued on the 28th of July, 1884, and the logs sawn in the summer of that year could not well have been cut under its authority, and all that were cut after the 10th of November were cut by permission of the Ontario Government and not under any of the licenses referred to. But any way the amount, if any, involved is too unimportant to justify any further enquiry. The amount paid for ground-rent and bonuses, and for interest thereon, was $5,070.18, for which sum, the plea of the statute of limitations having been withdrawn by the Crown, the claimant is, I think, entitled to judgment.

The other items of the claim stand in a different position and are subject to other considerations to which it will be necessary briefly to refer.

Asked if in 1883, he knew that the territory in respect of which his applications were made was in dispute between the Governments of Ontario and of the Dominion, the claimant answered that he did not. Asked if he had any knowledge of the general question that was being agitated at the time about the boundary

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between Ontario and Manitoba, he said that he knew there was some question, but that, personally, he did not know anything at all about the dispute. I understand the witness to mean that he knew there was a question or dispute, but that he was ignorant of the particulars or merits of it. That may be a somewhat free paraphrase of his evidence, but if he meant more, I should have the greatest difficulty in giving credit to his testimony. It is alleged in the statement in defence that the dispute was a matter of public notoriety. No evidence was tendered in proof of the allegation, but it is supported by recitals and references in Acts of the Parliament of Canada, and of the Legislature of the province of Ontario, of which I must take judicial notice (1). There is also some authority for the view that I should notice judicially such other facts in respect to the dispute as form part of the public history of the Dominion (2), and it is well known that the dispute was in 1883 no new matter. It had occurred within a few years after Rupert's Land was surrendered to the Government of Canada. It had been the subject of negotiation between that Government a d the Government of the province of Ontario, and of an arbitration that had failed because the former refused to be bound by the award. It had been referred to by the Lieutenant-Governor on several occasions in the speeches with which he opened the Legislature of the province, and it had been the subject of at least one Parliamentary enquiry. Now, the witness, who is an intelligent man of affairs, was contemplating carrying on in the territory in dispute a business, for the conduct of which a concession of timber limits cover-

(1) 38 Vic. (Ont.) c. 6; 42 Vic. (Ont.) c. 2; 43 Vic. (Dom.) c. 36; 44 Vic. (Dom.) c. 15; 45 Vic. (Dom.) c. 31.

(2) Taylor on Evidence, s. 16, citing *Bank of Augusta* v. *Earle*, 13 Pet. 590; and s. 18, citing *Taylor* v. *Barclay*, 2 Sim. 221.

ing more than four hundred and fifty square miles was not thought excessive. Would not these great interests make him alive to every thing that was being said or done in respect of such territory? And when he admits that he knew there was some question about the boundary between Ontario and Manitoba, is it possible to come to any other conclusion than that he knew that in that dispute was involved the title of the Government of Canada to the lands in question? The concessions were of great value. As to that, there can be no question. Portions of the limits were subsequently sold at auction by the Government of Ontario for bonuses exceeding one thousand dollars per square mile. These were no doubt selected portions, but the evidence of the value of the limits is all one way. The estimate that two hundred million feet of lumber could have been taken from them is probably within, rather than over, the mark. The reason of the Government authorizing the issue of licenses to the claimant for so large a tract of timber lands is no doubt to be found in their desire to aid in establishing mills that would supply Manitoba and the country to the West with lumber. The claimant was no doubt attracted by the great prospective value of the concessions he was hoping to acquire. The transaction involved some risk, and now that the chances have gone against him and his speculation has failed I do not see what good ground of complaint he has, or why the losses he incurred should be shifted from his shoulders to the shoulders of the public. With the knowledge that he had of the dispute he should, if he had wished to throw upon the Government the risk of the outlay he proposed to make, have stipulated for express covenants for title. On the transactions as they stood he would not, it appears, have been entitled to demand

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such covenants (1), but it was open to him to raise the question at any stage of the negotiations and to ascertain if the Crown was willing to warrant its title and to take the risk of loss incident to such warranty.

In the case of *The Gas Light and Coke Company* v *Towse* (2), Mr. Justice Kay, expressing the opinion that the authorities were against the claim for damages made in that case, said:

> If a man enters knowingly into a contract concerning real estate—and for this purpose a contract for a lease is, in my opinion, a contract for real estate—if he enters into it knowing exactly what the title of his vendor is, and that the carrying out of the contract eventually is subject to a possible difficulty, how can he turn round and say, "although I entered into that contract with you knowing of that diffi- "culty, still I hold you liable for damages?"

The plaintiff's predecessors had in that case, between the date of an agreement for a lease for thirty years with a covenant for renewal for a further term of thirty years and the date of such lease, expended some £2,000 in the erection of a large purifying house mentioned in the lease. The lease was made under a power and when the time for renewal came the rent reserved was not the best rent that could be obtained, and it was held that the plaintiffs were not entitled to specific performance. (3) With reference to the claim for damages the learned judge said:—

> Holding, as I do, that both parties must be taken to have known that this was an infirmity incidental to the nature of the real estate which they were contracting about, and to the title of the lessor and covenantor to deal with that real estate, it seems to me that I am only acting in conformity with that which I understand to be the doctrine as laid down in *Flureau* v. *Thornhill* (4), *Bain* v. *Fothergill* (5), and other cases, in saying that, where the trustee says, " I am

(1) Sugden on Vendors and Purchasers, p. 575.

(2) 35 Ch. D. 543. See also *Ogilvie* v. *Foljambe*, 3 Meriv. 53; *Carroll* v. *Keayes*, Ir. R. 8 Eq. 97; *Farebrother* v. *Gibson*, 1 DeG. & J. 602; *James* v. *Lichfield*, L. R. 9 Eq. 51; and *Caballero* v. *Henty*, L. R. 9 Ch. Ap. 447.

(3) 35 Chan. Div., 543.

(4) 2 Wm. Bl. 1078.

(5) L. R. 7 H. L. 158.

perfectly willing, if I have power, to carry out this contract, and I only fail to do so because of the nature of the subject-matter, it being real estate, and of the infirmity of my title and of my power to carry out the contract," that is a case in which the trustee is not liable for any damages.

That, I think, aptly illustrates the position of the parties in this case. It may be that neither the Government of Canada nor the claimant anticipated when they entered into their contracts that the title of the former would fail; but there was always that contingency, and of that the claimant must be taken to have been aware, and consequently not entitled to be indemnified by the Crown for the losses he has made.

That makes it unnecessary to discuss the items of such losses in detail. But some of them are obviously so remote, or so far from being within the contemplation of the parties, that they could not be recovered in any view of the case. That remark does not, however, apply to the expenditure for surveys or for the enlargement of the mill. Whatever loss occurred on so much of the outlay under these two heads as was made subsequently to the middle of November, 1883, when the passing of the order-in-council of the first of that month was communicated to the claimant, or probably to the 10th of September of that year, when he had notice of the order of August 11th, would no doubt be recoverable if the view that I have taken of the expenses as a whole is not correct.

There is another question which has to do with the license issued to F. T. Bulmer on July 28th, 1884, and that issued to the claimant on the 4th of September of the same year. The decision of the Privy Council in the Boundary Case was given five days before the first of these licenses issued, but at that time it was not, of course, known what action the Government of Ontario would take. There is evidence that the claimant went into possession under such licenses, and his possession

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was affected by the notice served on him on the 10th of November, 1884. That, however, is not true of the other license issued on the 22nd of November, or of any of the six licenses issued in the year 1885, under none of which was he ever in actual possession. The latter, I infer, were neither issued nor accepted with a view to the cutting of timber on the lands therein described, pending the determination of the question of the Indian title, but for the purpose of keeping alive the claimant's rights to the limits in the event of the controversy being ultimately decided in favour of the Dominion. For that reason I limit to the two leases or licenses first mentioned the contention that from their terms a covenant for quiet enjoyment is to be implied. That contention Mr. McCarthy supported by reference to *Hart* v. *Winsor* (1) and *Mostyn* v. *The West Mostyn Coal and Iron Company* (2). In the former case, which is cited as an authority in the latter, Parke, B. said:

> Considering this case without reference to the modern authorities, which are said to be at variance, it is clear that from the word "demise" in a lease under seal, the law implies a covenant, in a lease not under seal, a contract for title to the estate merely, that is for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word "let" or any equivalent words (3) which constitute a lease have no doubt the same effect but not more (4).

The words used in the licenses in this case are that in consideration of a ground-rent paid and a royalty to be paid, the Minister gives to the licensee full right, power and license to cut timber on a described tract of land, and to take and keep exclusive possession of such land for one year. That undoubtedly created a lease for one year (5) and if the law is as stated in *Hart* v. *Winsor* (6) a covenant for quiet enjoyment should be

(1) 12 M. & W. 85.
(2) L. R. 1 C. P. D. 152.
(3) Shepp. Touch. 272.
(4) Shepp. Touch. 165.
(5) Shepp. Touch. 272.
(6) 12 M. & W. 85.

implied, unless a Crown lease is to be distinguished. In *The Queen* v. *Robertson* (1) a lease of fishing for nine years made between Her Majesty, acting by the Minister of Marine and Fisheries, and the respondent came under consideration. The words used in that lease were:

Her Majesty hereby leases for the purpose of fly-fishing for salmon unto the said Christian A. Robertson hereto present and accepting for himself, his heirs, executors, administrators and assigns for and during the period hereinafter mentioned and under the conditions hereinbelow stipulated a certain fishing station situated on the South-west Miramichi river in the Province of New Brunswick and described as follows, that is to say: the fluvial or angling division of the South-west Miramichi river from Price's Bend to its source.'

Referring to this lease or license Mr. Justice (now Chief Justice) Strong said:

The fishery license granted to the respondent contains no covenant for title or warranty on the part of the Crown, and, therefore, upon no principle of law which has been suggested, or that I can discover, could the Crown be made liable to indemnify the respondent in the case of eviction (2).

But assume, for the purpose of argument, that Mr. McCarthy is right and that a covenant for quiet enjoyment is to be implied from the license issued in this case, I fail to see in what way the claimant stands in any better position as to damages for the breach of such covenant than with respect to the expenses incurred for the surveys and the enlargement of the mill. If, however, he were held to be entitled to the value of the unexpired term, what greater use could he have made of it than by the permission of the Government of Ontario he was enabled to do? Had he paid anything for that permission the case might have been different, but there is no evidence that he did, and there is nothing in the case to lead me to suppose that between the 10th of November, 1884, and the 31st day of December following he could have got out more logs

(1) 6 Can. S.C.R. 56. (2) 6 Can. S.C.R. 126.

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than he did. His intention in the autumn of 1884 to send in more men and supplies and to get out some eight million feet of lumber had reference to the operations of the season of 1884-1885, the greater part of which, subsequent to November 10th, would have been carried on under the licenses for the year 1885, under which, as we have seen, he never went into, or intended to go into, possession. Therefore, on this branch of the case I do not see that he could, under the most favourable view of the law that it is possible to take, be entitled to more than nominal damages.

The case as a whole, stated briefly, comes to this: the claimant, who was carrying on a lumber business at Rat Portage, in the Disputed Territory, applied to the Government of Canada for licenses to cut timber on certain public lands in that territory, then in their possession but in dispute between them and the Government of Ontario. The application was granted on the condition that the claimant would survey the limits and build a saw-mill. Nothing was said as to the dispute. That this happened was not more the fault of one party than the other. The dispute was a matter of public or common knowledge, and the Government had no reason to suppose that the claimant was ignorant of it. As a matter of fact, he did know of it, though there may be some question as to how much he knew. In any event, his ignorance would have been without excuse. Under these circumstances, he made his surveys and enlarged his mill, the enlargement being accepted as a performance of the conditions to build; but the Government, because their title to the lands failed, were unable to carry out their promises. That made a hard case for the claimant, no doubt; but, except for the irrelevant consideration that they were better able to bear the loss than he was, it would be equally hard that it should be borne by the

Government. The equity of the case is, I think, that the loss should fall on the party who made it. If the Government had been able to carry out its agreement and had failed or refused to do so, or if their inability had resulted from any act or fault of their own, the case would have been very different, and, notwithstanding what was said in *Bain* v. *Fothergill* (1), there would not be wanting authority to support a judgment for substantial damages. (2).

There will be judgment for the claimant for $5,070.18 and costs. In a case such as this, a subject would be liable for interest on that amount, and I should be glad to add it if I could, but that I fear is not possible, unless the Crown consents.

Judgment accordingly.

Solicitor for the claimant: *A. Ferguson.*

Solicitors for the respondent: *O'Connor, Hogg & Balderson.*

(1) L. R. 7 H. L. 158.

(2) *Engel* v. *Fitch*, L. R. 3 Q. B. 314; *Robertson* v. *Dumaresq*, 2 Moo. P. C. N. S. 66.