LOUIS DUPUY, *ès-qualité*.....APPELLANT ; 1881

AND *May 5,6,7.

DAME M. M. DUCONDU *et al*.....RESPONDENTS. *Dec. 13.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Sale en bloc—Deficiency—Warranty, effect of.

By a deed executed October 22nd, 1866, for the purpose of making good a deficiency of fifty square miles of limits which respondents had previously sold to appellants, together with a saw mill, the right of using a road to mill, four acres of land, and all right and

* PRESENT: Sir William J. Ritchie, Knight, C. J., and Strong, Fournier, Henry and Gwynne, J.J.

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title obtained from the Crown to 255 square miles of limits for a sum *en bloc* of $20,000, the respondents ceded and transferred "with warranty against all troubles generally whatsoever" to the appellants, two other limits containing 50 square miles; in the description of the limits given in the deed, the following words are to be found: "Not to interfere with limits granted or to be renewed in view of regulations." The limits were, in 1867, found in fact to interfere with anterior grants made to one *H.*

Held, That the respondents having guaranteed the appellants against all troubles whatsoever, and at the time of such warranty the said 50 miles of limits sold having become, through the negligence of respondent's *auteurs*, the property of *H.*, the appellants were entitled, pursuant to Art. 1518 C. C., P. Q., to recover the value of the limits from which they had been evicted proportionally upon the whole price, and damages to be estimated according to the increased value of said limits at the time of eviction, and also to recover, pursuant to Art. 1515 C. C., for all improvements, but as the evidence as to proportionate value and damages was not satisfactory, it was ordered that the record should be sent back to the court of first instance, and that upon a report to be made by experts to that court on the value of the same at the time of eviction the case be proceeded with as to law and justice may appertain.

Per *Henry* and *Gwynne*, J. J., dissenting, That the only reasonable construction which could be put upon the words "with warranty against all troubles generally whatsoever" in the deed, must be to limit their application to protecting the assignee of the licenses against all claims to the licenses themselves, as the instruments conveying the limits therein described, and not as a guarantee that the assignee of the licenses should enjoy the limits therein described, notwithstanding it should appear that they were interfered with by a prior license. But, assuming a different construction to be correct, there was not sufficient evidence of a breach of the guarantee.

APPEAL from a judgment rendered by the Court of Queen's Bench, *Montreal* (*Sir A. A. Dorion*, C. J. and *Monk*, *Ramsay* and *Cross*, J.J.), confirming a judgment of the Superior Court, *Joliette* (*Olivier*, *J.*), whereby the action of *T. H. Cushing*, plaintiff, now represented by appellant, against the respondents, was dismissed.

The facts of the case are briefly these: The late *Edward Scallon*, of *Joliette*, lumber merchant, by pro-

mise of sale, dated 10th July, 1858, agreed to sell to *Benjamin Peck* or his assigns, "a saw mill built of stone, situated on the *L'Assomption* river, in the second range of township of *Keldon*, in the parish of *St. Charles Borromée*, in the said district of *Joliette*, with its saws, straps, gearing, water power, booms, chains, anchors.

"The right of using the road leading from the Queen's highway to said mill.

"Four acres of land bounded as follows: in front by the Queen's highway, in rear by the brink of the hill, on the north side by the road leading from the Queen's highway to the mill, on the south side by the land owned by the seller with the right of passing over the land of the seller along the bank of the river from the mill to the boom.

"All the right and title obtained by seller from the Crown to certain timber limits situated on the banks of *L'Assomption* river and its tributaries, the *Black* river and river *Ducharme*," in all thirteen limits covering an area of 256 square miles, for the sum of $20,000 and other considerations. After *Scallon's* death, his successors, represented by respondents, in execution of the promise of sale, by notarial deed of the 16th March, 1865, "did cede, transfer and abandon with *promise of warranty against all troubles generally*," to the appellant as *Peck's* assign, the immoveables and rights which the late *Edward Scallon* had promised to sell to the said *Peck*, giving the description *verbatim* as in the promise of sale of the 10th July, 1858.

The sellers by this deed also acknowledged that the $20,000, price of sale of the said limits, had been paid to the said late *Edward Scallon* in the manner stipulated for in the paper-writing of the 10th July, 1858. They recognized also having received from the said *B. D. Peck*, his representatives and assigns, the costs of the renewal of all the licenses for said limits dating from 10th July, 1858, up to the 16th March, 1865.

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It was, however, afterwards discovered that there was a deficiency of fifty square miles in the extent of the timber limits sold, and thereupon *P. E. McConville*, as agent for the respondents, for the purpose of making good the above deficiency of fifty miles of timber limits, by another notarial deed dated 22nd October, 1866, "did cede and transfer, *with warranty against all troubles generally whatsoever*, to the appellant present and accepting thereof, an equal quantity of fifty miles of timber limits on the *L'Assomption* river, and described as follows in the English language, to wit:

"No 25. 25 square miles { "Commencing at the upper end of limit No 94, on the south west side of *L'Assomption* river, *granted to late Edward Scallon*, and extending five miles on said river, and five miles back from its banks, making a limit of twenty-five square miles, *not to interfere with limits granted or to be renewed in virtue of regulations.*"

"No. 26. 25 square miles { Commencing on the north-east side of *L'Assomption* river, at the upper end of limit No. 96, *granted to late Edward Scallon*, and extending five miles up the river, and five miles from its banks, making a limit of twenty-five square miles, *not to interfere with licenses granted or to be renewed in virtue of regulations.*" And the licenses for the year 1866, 1867, were handed to Mr. *Cushing*, and a sum of $500 for all claims whatsoever up to that day was paid by respondents.

With a view to work these 50 miles of limits, and to bring the wood down by the river *L'Assomption*, the plaintiff in 1867-1868, caused the rocks to be blasted, and the obstructions existing in the river to be removed, and constructed four dams to hold in the water and facilitate the bringing down of the wood from said limits.

But it was found that these limits also interfered

with limits granted to *George B. Hall*, and the matter having been referred to the Crown Lands Department, it was ascertained that the limits assigned by the last deed of 22nd October, 1866, to appellant by respondents *did not exist*, and were covered by the licenses previously granted to Mr. *Hall* as far back as 1853. Conformably to the foregoing facts plaintiff (appellant) brought his action and prayed for a condemnat on against the defendants in the sum of $58,200, leaving them, however, the option of immediately placing him in possession of the quantity of 50 miles of limits, either those sold him by the deeds of 10th July, 1858, and of the 16th March, 1865, or else those above described, and in either case asking condemnation for $8,200 damage only.

The defendant, *Dame Clothide Scallon*, pleaded separately from the other defendant, but she, as well as the others, set up against the action a *défense en fait* followed by a peremptory exception. By the latter plea the defendants allege:

That by the deed of 22nd October, 1866, the plaintiff acknowledged having received from the defendants the licenses for the two timber limits which he pretended then to be deficient upon those sold him by the late *Edward Scallon*, and the said defendants.

That by the same deed the plaintiff acknowledged having received from the defendants a sum of $500 for all rights and claims whatsoever that he might have had until that time against the defendants by reason of the deeds made by said *Edward Scallon*, or by the defendants in favor of said plaintiff or his predecessors (*auteurs.*)

That the parties to the said deed reciprocally and in good faith gave to each other a general acquittance of all claim that might exist on one side or the other.

There was a cross-action, but the judgment rendered on the cross-action was not appealed from.

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The plaintiff, by his answers to the defendants' peremptory exceptions, alleged that it was only in consideration of the cession and abandonment made to him, in full ownership, by defendants of the 50 miles of limits in question, and of the undertaking on their part to secure him in the enjoyment thereof with warranty against all possible disturbance, encroachment or trouble of whatever nature or kind, and upon the payment to him made of the sum of $500, that he consented to grant acquittance of the claims he had against the defendants, the said acquittance relating chiefly to divers claims which the plaintiff had against the defendants for encroachments they had made upon his limits and other properties.

Upon this issue the parties went to proof, and judgment was rendered against the plaintiff dismissing his action, which judgment was confirmed in the Court of Queen's Bench (appeal side.)

Mr *Bethune*, Q.C., for appellant:

The action in this case arises out of an agreement, dated 22nd October, 1866, between *T. H. Cushing*, appellant's representative and the respondents, by which the latter expressly sold and conveyed to said *Cushing*, with promise of warranty against all hindrances, 50 miles of limits, Nos. 25 and 26, in lieu of limits 97 and 98 that were wanting in a previous transaction. *Cushing* only found out in 1868 that he could not get possession of limits 25 and 26, the Government having previously sold them to one *Hall*, and thereupon this action was commenced against *Scallons's* estate upon a breach of the express warranty contained in the agreement. The Superior Court and the Court of Appeal dismissed our action on the ground that the warranty did not extend to these licenses; in other words, that the warranty only meant the seller had the

licenses and the buyers stood in his room and place with the Crown.

I submit that view is erroneous. These licenses are issued under Con. Stat. Can. ch. 23, and under Order in Council August, 1851, licentiates were entitled to renewal perpetually, and the Courts of *Quebec* have so held. *Watson* v. *Perkins* (1).

Under the code, art. 1592, they are bound to deliver us what is sold to us, and having found *Hall* in possession they were bound to put us in possession; the burden is upon them to show that *Hall* had no right to be there. We say also that, under the departmental regulations, it is provided, if any conflict between adjoining owners arises, it shall be determined in the office, and we say the Commissioner having given his decision against us, that was practically an eviction and there was no need on our part to produce *Hall's* licenses. The bargain was, that they were to give us licenses which would have been renewed from year to year, and we complain that they had no such licenses to give us. We have given legal evidence that we could not get possesion as Mr. *Hall* had been lumbering for ten years on this land. *Harper* v. *Charlesworth* (2).

As to the obligation of the seller I will cite arts. 1491, 1492, and 1493, 1500, 1505. See also *Troplong Vente* (3).

Now as to the warranty--The respondents, by notarial deed, acknowledge their obligation in the most formal manner to make up the deficit of these fifty miles, and they convey to plaintiff, with express warranty against all hindrances whatsoever, not the licenses simply, but the specific quantity of 50 miles of limits indicated in the licenses set forth in the deed. It can-

(1) 18 L. C. Jur. 261. (2) 4 B. & C. 509.
(3) Nos. 263, 264.

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not have been meant to weaken or impair the warranty in the prior part of this deed.

The danger of prior title was one it was quite competent for *Scallon's* representatives to warrant against, which was legally and appropriately done by just such a warranty clause as was used. Every grant from the Crown, whether of timber limits or of the soil itself, is made subject to the conditions stated in the deed or the statute authorizing it, that in cases of a prior grant, and in other instances also, the grant shall be void; but it could not surely be pretended that the holder of such a title or a person holding a quit claim deed could not be held to the consequences of a sale with warranty, because for the purpose of indicating the property sold, the original title was recited in the deed of sale, especially as in the case in question in this cause, the sale was avowedly made to effectually replace a like quantity which the purchaser had the most undoubted right to have from the vendors, and the warranty stipulated has no meaning unless attaining that object or its legal equivalent.

If the appellant is right, as he believes, in claiming that warranty against non-delivery exists in his favor, this, it seems, is decisive of the case, for the other points mentioned in the judgment and invoked by respondents have no force to prevent reversal of the judgment appealed from.

It is clear that the five hundred dollars cash paid by respondents at the execution of the deed of 22nd October, was in no way meant to stand alone as a sufficient consideration for the deed, if the fifty miles of limits failed, and that the right of appellant to indemnity for failure to convey these fifty miles is unaffected by the payment of said sum, which appears to have been paid as the difference in value between limits Nos. 97 and 98 and Nos. 25 and 26

If it be a fact that the possibility of not getting the limits was foreseen at the execution of the deed of the 22nd October, this is all the more reason why it is covered by the warranty, especially when this was the only thing to which the warranty could apply. See articles 1506, 1507, 1508, 1524, 1511, 1512, 1514, 1515, 1516, 1487, C. C.

Then that there was good cause and consideration for the stipulation fully appears in the deed itself.

These licenses were represented to the buyer as having been all renewed. Now, it appears that *Scallon*, instead of renewing all the licenses, put the money in his pocket, and therefore we find his succession recognizing that he was obliged to make them good.

It is in evidence that when the plaintiff wished to take possession of these limits he found there another person (*Hall*) who had been in possession of them for a period long prior to the deed of 22nd October, 1866. Was he therefore obliged to take recourse by petitory action against *Hall*, or had he not the right to take a direct action against the respondents ? It seems to us that this last course was open to him, for he had never had delivery of the limits from defendants according to terms of art. 1493 of the Civil Code. Several witnesses were examined, and all agreed in saying that the greater part of the land comprised in these licenses was covered by prior licenses granted to *Hall*. If counsel permits evidence to be gone into, it is too late afterwards to object, and I submit that point was waived.

Then the decision given by the Commissioner of Crown Lands is binding. See *Kennedy* v. *Lawlor* (1), and in this court *Farmer* v. *Livingstone* (2).

Independently of that, we contend the proof of *Hall's* right of preference to the limits in question is legally

(1) 14 Grant 224. (2) 5 Can. S. C. R. 221.

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proved by the official documents and plans of the Crown Lands Department.

Then it is argued also on the other side, that there is no proof of *McConville's* agency with power to give this warranty, but they themselves rely on this deed, and it is too late now for them to raise that point here. *McConville* was a witness for the defence, and there was no dispute as to his power to enter into the deed.

As to damages I refer to art. 1511.

Mr. *Trenholme* followed on behalf of the appellant:

The case of *Watson* v. *Perkins* (1) clearly establishes that the right and title in timber limits is a real right, and that the same rules apply in cases of sale of timber limits as of immoveable property. Now, this being admitted, can it be said that a man who goes into the market and pays $50,000 for limits, and it turns out there are no limits, is not even entitled at least to a return of the price paid? This brings me to discuss the judgment appealed from. There is, I respectfully submit, manifest error in saying respondents were under no obligation to make good the 50 miles conveyed to us. That point was not dealt with in the Superior Court. The deed of 1866 admits there was an obligation to make good these 50 miles, and then they superadded a warranty. Did they plead they were never obliged to this? I could stop and say if there was mistake, it was for respondents to plead it and prove it.

I will now say that they were bound to give us the deed of 1866. By the promise of sale in 1858 they sold their right and title; if these words are used it is because they are descriptive of the species of ownership which they had, and does not mean there is any defect in the title, and when the property is specified, the

(1) 13 L. C. Jur. 261.

seller is responsible in damages, for when a party sells, he warrants by law that he is the owner of the thing sold, and express warranty covers all defects. See *Duranton* (1), *Laurent* (2).

Mr. *Pagnuelo*, Q. C., and Mr. *McConville*, for respondents:

If it were true that the warranty clause was inserted not by mistake but deliberately; if it were true that *Hall* had prior licenses, and that *Scallon* had been guilty of pocketing $800; that plaintiff never had possession, and that all the parties interested had agreed to submit the difficulty to the commissioner, and he had decided against us, we admit we would be bound, and this appeal would have to be allowed. But we deny all these propositions, and we contend that the documents produced show that these assertions are without foundation. The point for decision in this case is whether we have fulfilled our original agreement by which we sold simply our rights to these limits. Now, in 1865, when it became necessary to fulfil the agreement entered into between *Scallon* and *Peck*, instead of following the original agreement of 1858, by which we sold simply our rights to cut timber on 256 miles of timber limits, the notary at the beginning of the deed inserted a general warranty clause which is to be found in all printed forms of notarial deeds of sale. It was evidently a *lapsus calami*, the intention of the parties clearly to fulfil the promise made in 1858, and nothing more. *Peck* had bought *Scallon's* licenses such as they were, at his own peril; all licenses were issued with such reservations under a statute, and under regulations published in the official *Gazette* of August 16th, 1851. *Peck* therefore made the risk his own by bargaining for "all the right and title obtained from the crown to certain timber limits, and also "the

(1) 16 vol. 264. (2) 24 vol. Nos. 257 to 260.

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right of using and cutting timber on said limits is now given to the full extent which the said *Edward Scallon* possesses from the crown," and no more. Under such circumstances, and for either of these two reasons, to wit, the knowledge of the danger of eviction and the fact that he bought at his own risk, *Peck* could not claim back any portion of the price paid for such limits already granted to other parties or covered by former licenses in that wild, unsurveyed and unexplored part of the country, unless there be a positive and clear clause of warranty (1510, 1512, 1523, C. C.); and even then he could not claim any damage at all.

The undertaking by *Edward Scallon*, to give a good and sufficient deed to *Peck* on the payment of the price stipulated, had reference only to the mill, and went no further. There is an express stipulation to that effect.

There was no occasion to grant a deed for the timber limits, as the licenses were yearly renewed, and in 1855 were renewed in the name of the plaintiff, and were, together with his possession, the only deeds that could be granted to him and that he required. *Scallon* transferred to *Peck* the right he had to the renewal of the licenses, and *Peck* was to possess all the rights, under such licenses, that *Scallon* would have had. The licenses for the then current year were sufficient to entitle the plaintiff to a renewal in his own name; and it is not denied, but admitted that he availed himself of this right.

However, on discovering that licenses for Nos. 97 and 98 were missing, the appellants, by deed of 22nd October, 1865, substituted for them Nos. 25 and 26. Now, this deed shows that it was made for the purpose also of giving effect and fulfilling the bargain of 1858 in so far as the timber licenses were concerned. It is stated that, under and by the terms of this bargain, Mr. *Scallon* had agreed to sell to Mr. *Peck* 256 miles

of timber limits; this declaration can have no further extension than the writing of 1858 will warrant; it simply means therefore that Mr. *Scallon* had sold and transferred over to Mr. *Peck* such rights in timber limits intended to cover an extent of 256 miles, as he himself held under licenses from the Crown, and no more.

As to our pocketing $800, it is not stated or proved that we received the amount, but simply that all dues of the Crown were paid. It was stipulated that *Cushing* should pay ground rent, but there is no evidence that *Cushing* ever paid for these two licenses. The plaintiff held at that time licenses from the crown, and was perfectly well aware that they could not avail as against a former grantee; and further, the licenses themselves contained that reservation.

Under such circumstances, he accepted licenses Nos. 25 and 26 at his own risk, and no guarantee of any nature existed on the part of the defendants: art. 1020, 1523, C. C.; *Pothier* (1); *Troplong* (2).

A timber limit is something in its nature more aleatory than a venal office, on account of the uncertainty of its value, and even of its existence, against which the statute and the license itself forewarned the grantee.

The statute (R. S. C. ch. 23) enacts that if, by reason of inaccuracies in the surveys, or for any other cause, a license should include lands already granted, the license last in date is of no effect, and no claim shall lie against the crown.

What the defendants meant to guarantee was not the existence of the limits, but that of the license; all they transferred was the license and the rights that might accrue under it.

If it were intended that the guarantee should go

(1) Vente, No. 185.

(2) Vente, 480, 482, 495, 503, 506, 522.

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further, it should have been expressly declared and warranted that the license was the one first issued, that the limits did exist, and that the plaintiff would have the peaceful enjoyment of them. In the absence of such a special guarantee, all the plaintiff can claim is that he shall enjoy the benefit of the licenses just as the defendants would have done.

We see an example of such a guarantee in 2 *Boniface*, p. 119, where the seller of a venal office stipulated a guarantee against the suppression of the charge, and was held liable in damages on account of new offices being created.

Also in art, 1577 C. C., which provides that when a debt or other incorporeal right is sold, and the seller, by a simple clause of warranty, obliges himself for the solvency of the debtor, the warranty applies only to his solvency at the time of the sale; if there is no clause of warranty, he is only responsible for the existence of the debt.

The learned counsel then reviewed the evidence and contended that the plaintiff had not proved that *Hall* held licenses covering the territory included in limits Nos. 25 and 26.

Let us now examine the plaintiff's other propositions necessary to establish his demand, that the Crown Land Commissioner was the proper authority to decide upon a question of timber limits or berths.

Under the rules and regulations adopted on 8th August, 1851, "in cases of contestation as to the right to berths or the position of bounds, the opinion of the surveyor of licenses at *Bytown*, or agent for granting licenses elsewhere, is to be binding on the parties, unless and until reversed by arbitration within three months after notification of such opinion has been communicated to the parties, or their representatives on the premises, or sent to their address, or by decision of court."

The licenses for Nos. 25 and 26 were issued under these regulations, which were revoked and replaced by new regulations only on 13th June, 1866, as appears from official *Gazette* of 23rd June, 1861, not fyled in this cause.

By these new regulations, disputes as to berths were to be settled by "the decision of the crown timber agent of the locality, or the inspector of crown timber agencies, or other officer authorized by the commissioner of crown lands." Never was the commissioner or his assistant invested with this supreme authority of deciding upon disputes between grantees of timber limits; practical men are always chosen. But we have only to look at the regulations of 1851 under which both the licenses of Mr. *Hall* and licenses Nos. 25 and 26 to estate *Scallon* were issued, and the only persons invested with that right are the surveyor of licenses at *Bytown*, or agent for granting licenses elsewhere.

Plaintiff was asked under oath to produce a copy of any claim in writing made by him with the commissioner; he answered that he could not find any copy.

The defendants then applied to the crown lands department for a copy of any claim filed by the plaintiff, and the result is the production of a memorandum dated 13th November, 1869, made and signed by plaintiff on behalf of *Theophilus Cushing*, the then proprietor *pro formâ* of the limits.

All he claims, then, by that memorandum is to be maintained in the possession of Nos. 94, (29), and 96, (30) to the exclusion of Mr. *Hall*, who advanced pretensions even against a portion of them.

This very important fact shows conclusively that the plaintiff did not lose his right to limits Nos. 25 and 26 (of 1866) through a decision of the crown lands commissioner rendered in 1874, as the question was not submitted to him, and plaintiff had virtually given

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them up in 1869 and even in the fall of 1868, when he gave way without resistance before Mr. *Hall's* men and agents, then in 1869 by this document, and next year by ceasing to renew the licenses.

Art. 1521 C. C. rules the present case.

Finally, supposing it to be true that the whole of Nos. 25 and 26 are covered by licenses issued in 1853 in favor of Mr. *Hall*, the plaintiff is precluded from claiming a cent from defendants on that ground, because he accepted them, together with $500, in full settlement of all claims whatever against the defendants; he accepted these licenses 25 and 26 issued in 1866, such as they were, as he had accepted No. 97 and 98 in 1858, such as they were at that time, whether they were prior or posterior to Mr. *Hall's*.

The present claim is but an attempt to take an advantage of an evident *lapsus calami* in order to have all the benefits of, and be relieved of, all the risks assumed in a *bonâ fide* contract, fairly executed by respondents. As to bad habits of notaries introducing clauses of style. *Trolong de la Prescription* (1); *Laurent de Villargue Repertoire* (2).

Mr. *Trenholme*, in reply.

RITCHIE, C. J.:—

It is quite clear that the release contained in the deed of the 22nd of October, 1866, does not extend to or in any way affect the warranty contained in that deed in relation to the fifty miles of limits thereby conveyed to the plaintiff; therefore the peremptory exception of defendants must fail, the replication of the plaintiff being a good and sufficient answer.

There is nothing whatever in the evidence or circumstances surrounding this transaction to justify our going behind the deed of 22nd October, 1866. My

(1) No. 62. (2) Verbo "style", 100.

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brother *Fournier* has made this so manifest in the judgment he is about to deliver, which he has kindly permitted me to peruse, and in which I entirely agree, that it would be waste of time for me to discuss the question at greater length. Agreeing then, as I do, with the learned Chief Justice of the Queen's Bench that:

It is plain that the appellant, having by the deed of the 22nd day of October, 1866, discharged the respondent from all claims whatsoever arising out of the previous deed of the 16th March, 1865, cannot now refer to the original sale and promise of sale to sustain his present action. Whatever rights he might have had under the original deed, have been finally adjusted by the transaction of the 22nd of October, 1866—

on the same principle I am at a loss to conceive how it can be invoked by the respondents to defeat any rights the appellant may have acquired by the deed of the 22nd October, 1866, or to control or in any way prevent that deed from having its full effect in accordance with the terms and provisions therein contained, by which the rights of both parties must, in my opinion, be governed. "It is, therefore," as the the learned Chief Justice says, "under this last deed alone that the appellant can have any claim against the respondents, and any reference to other deeds, and to the obligations of the respondents under those deeds, is only calculated to create confusion, as such reference can have no effect whatsoever on the determination of this case."

By the deed of 22nd October, 1866, compensation is made to *Cushing*, assignee of *Peck*, for the deficit of fifty miles of the 250 miles of limits *Scallon* had, by deed of 6th March, 1865, agreed to sell to plaintiff in these words:

Et en vertu de ce titre feu M. *Scallon* s'était obligé de vendre deux cent cinquante six milles de limites pour couper du bois sur les terres de la Couronne situées sur la rivière de l'*Assomption* et ses tributaires la rivière *Noire* et la rivière *Ducharme*, et comme il

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se trouve un déficit de cinquante mille pour compléter la dite quantité de deux cent cinquante six milles cédés au dit M. *Théophilus H. Cushing* par l'acte de dépôt, cession et transport du seize mars mil huit cent soixante et cinq, le dit Sieur *McConville* pour et au nom qu'il agit, voulant compléter le déficit qui se trouve a, par les présentes, cédé et transporté avec la garantie de tous troubles généralement quelconques au dit M. *Théophilus H. Cushing*, ici présent et acceptant, la dite quantité de cinquante mille de limites sur la dite rivière l'*Assomption*, et désignée comme suit, en langue anglaise, savoir :

No. 25. 25 Square miles } Commencing at the upper end limit No. 94 on the south west side of L'*Assomption* river, granted to late *Edward Scallon* and extending five miles on said river, and five miles back from its banks, making a limit of twenty-five square miles, not to interfere with limits granted or to be renewed in virtue of regulations.

And for the damages in these words :

De plus, le dit M. *Théophilus Cushing* déclare que le dit M. *McConville* pour et au nom qu'il agit lui a présentement payé la somme de cinq cent dollars cours actuel pour toutes réclamations généralement quelconques qu'il aurait pu avoir contre la succession du dit feu *Edward Scallon* et ses représentants légaux, déclarant en outre au moyen des présentes qu'il n'a plus rien à prétendre ni réclamer pour aucunes fins, causes ni raisons contre ces derniers, lui résultant soit d'actes ou faits jusqu'à ce jour, leur donnant quittance et décharge générale et finale.

And

Et de son côté, le dit M. *McConville* pour et au nom qu'il agit donne au dit M. *Théophilus H. Cushing* et à tous autres qu'il appartiendra quittance générale et finale, et déclare en outre pour et au nom qu'il agit, qu'il n'a plus rien à prétendre ni réclamer en aucunes façons, causes, ni raisons quelconques contre le dit M. *Théophilus H. Cushing*, et résultant à la dite succession de feu *Edward Scallon* ses héritiers ou légataires universels sus-nommés jusqu'à ce jour, et lui en donne quittance et décharge générale et finale, sans que les présentes ne puissent préjudicier en aucunes façons quelconques aux droits et recours que la succession du dit feu *Edward Scallon*, ses représentants légaux, peuvent exercer contre *James Payton*, commercant de bois, de township de *Rawdon*, à raison d'une vente de billots par lui faite au dit feu M. *Edward Scallon* suivant contrat.

It is claimed that the "guarantie de troubles géné-

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ralement quelconques" does not guarantee that the licenses were valid and subsisting, conveying to the holder the right purporting to be thereby conveyed, but that the same were to be taken and accepted subject to the proviso in the licenses contained, that they were not to interfere with limits granted or to be renewed in virtue of regulations.

The decision of the Court of Queen's Bench turns upon the assumption that respondents, having obtained licenses from the Crown for the limits in question, and having transferred those limits to the appellant, they have fulfilled their obligation, and that the appellants assumed the risk of any loss which might arise from the existence of a previous license for the same, or any portion of the same limits, and as to which the warranty did not extend, and that there was no cause or consideration for the guarantee. This is in truth the main and substantial question in the case, and was so treated by the respondent in his factum.

I think there was a clear case of misinterpretation of the contract. It seems to me the guarantee is not limited in any such way, and so to read it would make it meaningless; the clause in the license is for the protection of the Crown, the guarantee in the deed is for the protection of the assignee and to prevent his being subjected to the trouble and loss which would result from the limits having been already granted, and therefore subject to be renewed to other parties in virtue of regulations.

If this was not the intent and object for which the guarantee was given, it simply meant nothing, and if licenses, valueless by reason of the ground being already licensed to other parties, could be held as within the contemplation of the parties, how could the deficit be made good, and the object of the parties and of the giving of the deed be accomplished, viz:—"Pour com-

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pléter la dite quantité de deux cent cinquante six milles ?"

It is very clear to my mind that the original quantity having fallen short and the parties representing *Scallon*, being liable and ready to make up the deficiency, as by the giving of the deed of the 22nd October it is clearly admitted they were bound to do, did it by transferring these limits with a warranty that they were good, valid and subsisting licenses, and if they were not they would guarantee the holders of the licenses against all troubles whatsoever that might thereafter arise, by reason of the insufficiency to convey the right thereby purported to be conveyed. Without this guarantee, if the licenses should prove ineffective, the deficiency would not be made up as intended; with the guarantee, in such an event, the guarantee would furnish an equivalent, and so the evident intention of all parties that the deficiency should be made up, successfully carried out; therefore, while the respondents did not and could not convey to the appellant an indefeasible title to these timber limits, they undertook to convey such a title as the timber licenses granted by the Crown professed to give, and, in effect, guaranteed that if the licenses did not convey such a title they would indemnify the appellant against any loss which might arise to him by reason of the insufficiency of the licenses; in other words, by their guaranteeing, they assumed the licenses were, at the time of the transfer, in force, entitling the appellant to all the rights and advantages accruing to a license under a valid subsisting license and with which no other person had any right to interfere, that is to say, that they did not when so assigned interfere with limits already granted or to be renewed in virtue of regulations, and that they would guarantee the appel-

lant against any trouble that might arise by reason of any such outstanding or prior right.

Then, again, it is said there is no cause or consideration for this guarantee; but it seems to me the very best cause and consideration appears on the face of the deed itself; the representatives of *Scallon* discover that they cannot make good the undertaking of *Scallon*, that he having agreed to sell 250 miles they were fifty short, by reason of which *Cushing* representing *Peck* had a claim on them, to settle and dispose of which, it is agreed that they will give *Cushing* $500 for damages sustained, or difference in value of lots, and fifty miles of other limits in lieu of the deficiency, which they propose to do by transferring two other limits of fifty miles by a good and sufficient title.

To make good this deficiency, it is absolutely necessary that they should have right to those limits, that the licenses they claim the right to transfer should be valid and sufficient to convey the fifty miles, for if not valid and sufficient for that purpose and not conveyed by a good and sufficient title, matters would remain just as they were, the deficiency would not be made up, and without a guarantee of title, *Cushing*, while relinquishing his claim under the deed of 16th March, 1865, would have no security that he was actually obtaining what they proposed to give in lieu of such claim, viz., fifty miles of limits.

In consideration of *Cushing* releasing the succession of the late *Scallon* generally from all claims up to the date of the deed, they agree to pay him $500 damages, and to cede to *Cushing*, with guarantee against all troubles whatever, the limits in question, by which operation the deficiency is secured to *Cushing* under the license if good and valid, or under the guarantee should the lease prove valueless. A better cause or consideration for a guarantee I cannot very well conceive.

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As to *force majeure*, I cannot see there was anything of the kind in this case; had the licenses been issued and been good, valid and effectual at the time of transfer, and on the termination the Crown had refused to renew them, I can readily understand how, in such a case, respondents should be held to have fulfilled their undertaking, and should be held harmless as to any loss the appellant might make by such refusal. I think it is abundantly clear from the evidence in the case, as well on the part of the defendant as on that of the plaintiffs, that the limits in question were held by *Hall*, and in his possession at the time of the giving of this guarantee under a prior license, and so the license proposed to be transferred was of no effect and consequently there was a breach of the guarantee.

As to the damages, I think they should be estimated as follows:—

The whole purchase money or value of the mill, etc., and all the limits having been $20,000, experts shall ascertain the value of the mill and the land, and deducting the amount from the said $20,000, the balance will be the price of all the limits sold, *viz.*, 250 square miles; a fifth of this balance will be the price paid for the fifty square miles, from which, deducting $500 already paid by respondents as being the difference in value between the fifty miles which were wanting and the substituted fifty miles, the balance arrived at will be the amount to which plaintiff is entitled to on account of his purchase money, together with interest from 22nd October, 1866; and if the property at the time of eviction has increased in value, then plaintiff would be entitled to recover such increased value in addition to the price paid, of which the experts could be directed to enquire; but the eviction being so soon after the 22nd October, 1866, there would be probably no increase in the value.

And finally, experts to ascertain also the amount expended by plaintiff in improvements, and this amount, with interest from the date at which it was expended, being added to the above balance of purchase money and increased value, if any, shall be the total sum which the plaintiff is entitled to recover, with costs in the different courts.

STRONG, J., concurred in the judgment of *Fournier*, J.

FOURNIER, J.:—

La première question à examiner et à résoudre est de savoir exactement en quoi consiste le contrat intervenu entre les auteurs des parties pour la vente du moulin et des limites qui faisaient l'objet de la promesse de vente du 10 juillet 1858 entre *Edward Scallon* d'une part et *Benjamin D. Peck* de l'autre, ainsi que du contrat de vente en date du 16 mars 1865 fait en exécution de cette promesse de vente. Est-il vrai, comme le prétendent les Intimés que la vente n'est que du moulin et des quatre acres de terre avec un certain droit de passage, et qu'elle ne comprend aucunement les droits et titres obtenus de la Couronne par le vendeur, aux treize limites énumérées dans la promesse et dans l'acte de vente ? C'est-à-dire qu'aucune partie des $20,000, prix de vente, n'a été payée comme la considération de la cession de ces limites, lesquelles auraient été données sans considération à l'acheteur, comme le prétend le conseil des Intimés,—ou bien, cette vente n'est-elle pas au contraire, la vente de plusieurs choses ne formant qu'*un tout*,—qu'une seule exploitation, comme l'était le moulin en question et les limites qui fournissaient le bois de commerce nécessaire à son alimentation ?

La solution de cette question se trouve dans les termes de la promesse de vente et surtout dans l'acte de vente qui a définitivement fixé les droits des parties.

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Pour appuyer leur prétention que les limites de bois ne font pas partie de la vente, et qu'aucune considération n'a été fournie pour icelles par l'acheteur, les intimés se fondent sur certaines expressions de la promesse de vente, qui, si elles étaient prises seules et sans égard aux termes formels de l'acte de vente, pourraient rendre assez plausible leur prétention. En effet on y trouve le passage suivant au sujet des limites :

> The right of using and cutting timber on said limit is *now given* to the fullest extent which the said Edward Scallon possesses from the Crown.

Et cet autre concernant le moulin :

> " Now, if upon the payment of the above sum as specified *for payment of the said mill*, I, Edward Scallon, *give a good sufficent title* of the above named mill, then this obligation shall be null and void, otherwise remain in full force and virtue.

C'est sur les mots " *now given* " dans la première citation que les intimés appuient leur proposition que les limites ont été données sans considération, et ils invoquent pour la confirmer les expressions qui se trouvent dans la seconde " *the above sums as specified for payment of the said mill.*"

Ce n'est pas en prenant des expressions isolées que l'on doit interpréter un acte ; lorsqu'il y a doute sur sa signification, c'est par l'examen de l'ensemble des conventions qu'il contient que l'on doit arriver à connaître la véritable intention des parties. En faisant application de ce principe à la promesse de vente en question, on y découvre facilement la nature du contrat des parties. Par cette promesse *Edward Scallon*, sur paiement de $20,000 s'obligeait de vendre (*has agreed to sell*) à *B. D. Peck*, non pas seulement le moulin comme le prétend les intimés, mais, comme on le verra par la citation ci-après, quatre différentes propriétés : 1o d'abord le moulin et ses agrès, etc., etc. ; 2o le droit de se servir du chemin conduisant du chemin public au moulin ;

3o quatre acres de terre y désignés ; 4o tout droit et titre qu'il a obtenu de la couronne à certaines limites dans les termes qui suivent :—

KNOW all men by these presents, that I, EDWARD SCALLON, of Industry village, in the district of Joliette, Canada East, stand bound and obliged to Benjamin D. Peck, Esquire, of Portland, State of Maine, in the full and just sum of thirty thousand dollars. The condition of this obligation is this, that this day I, Edward Scallon have agreed to sell to the said Benjamin D. Peck, or his assigns : A saw mill built of stone, situated on the L'Assomption river, in the second range of Township of Keldon, in the parish of St. Charles Borromée, in the said district of Joliette, with its saws, straps, gearing, water power, booms, chains, anchors.

The right of using the road leading from the Queen's highway to said mill.

Four acres of land bounded as follows : in front by the Queen's highway, in rear by the brink of the hill, on the north side by the road leading from the Queen's highway to the mill, on the south side by the land owned by the seller with the right of passing over the land of the seller along the bank of the river from the mill to the boom.

All the right and title obtained by seller from the Crown to certain timber limits situated on the banks of L'Assomption river and its tributaries, the Black river and river Ducharme as here enumerated and numbered as follows :

No. 94, twenty-five miles situated on the L'Assomption river.
No. 96, twenty-five miles situated on the L'Assomption river.
No. 97, twenty-five miles situated on the L'Assomption river.
No. 98, twenty-five miles situated on the L'Assomption river.
No. 27, twelve miles situated on the Black river.
No. 27½, twelve miles situated on the Black river.
No. 28, twelve miles situated on the Ducharme river.
No. 93, eighteen miles situated on the L'Assomption river.
No. 92, twenty-four miles situated on the L'Assomption river.
No. 91, eighteen miles situated on the L'Assomption river.
No. 90, twenty-four miles situated on the L'Assomption river.
No. 132, eighteen miles situated on the Black river.
No. 133, eighteen miles situated on the Black river, being in all an area of 256 miles.

La promesse de vente est donc d'un ensemble de propriété composé de quatre lots différents. L'expression de la considération qui suit l'énumération des

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propriétés ne peut laisser aucun doute sur ce sujet : "This bargain is made for and in consideration of the "sum of twenty thousand dollars, five thousand the "said seller acknowledged having received, &c., &c." Les mots "this bargain" ayant rapport à toute la transaction font bien clairement voir que la considération de $20,000 est pour toutes les propriétés décrites et non pas pour une seule en particulier.

Les mots " now given " au sujet des limites, venant après l'expression de la considération de $20,000, ne peuveut pas signifier " donner " dans le sens d'une donation gratuite, ils signifient dans cette phrase, donner pour la considération ci-dessus exprimée. Le mot " donner " doit avoir ici la signification qu'il a dans l'art. 1472, C.C. définissant la vente : " Un contrat par lequel une personne *donne* une chose à une autre moyennant un prix en argent que la dernière s'oblige de payer." Il faut encore observer que les mots *now given* ne se rapportent qu'au droit d'entrer en possession des limites et de les exploiter immédiatement, sans égard aux délais qui doivent s'écouler pour le paiement du prix de vente avant que l'acheteur puisse obtenir un titre définitif.

Il en est de même de l'expression " The above sums as specified *for payment of the said mill.*" Le mot *mill* n'est seul employé que pour abréger, en évitant de répéter l'énumération de toutes les propriétés, que dans la première partie *Scallon* s'obligeait de vendre et qui sont comprises dans l'expression de la considération " This bargain is made, etc., etc. "

Si cette interprétation n'était pas bien fondée, il n'y aurait pas que les limites qui auraient été données, il y aurait encore le droit de passage et les quatre acres de terre. Une telle interprétation serait manifestement contraire à l'intention des parties.

En effet, pourquoi les limites auraient-t-elles été

données ? Est-ce parce que ce genre de propriété est sans valeur, ou bien encore, est-ce que les conventions en question font voir de la part de *Scallon* une intention de faire une libéralité à *Peck* ? Ni l'une ni l'autre de ces suppositions ne sauraient être acceptées pour un seul instant. Indépendamment de la preuve faite en cette cause, il est de notoriété publique que les limites ou licences pour exploiter le bois de commerce sur les terres de la couronne ont une grande valeur. Il s'en vend fréquemment et pour des prix considérables, dépassant presque toujours la valeur des moulins qui servent à leur exploitation. Dans une vente comme celle dont il s'agit, l'objet principal de la vente était sans doute les limites—le moulin n'était qu'un acessoire assez facile à remplacer, tandis que le moulin seul, sans limites, n'aurait eu à peu près aucune valeur. Si, après un examen attentif des conditions de la promesse de vente, il pouvait rester encore un doute sur l'intention des parties, les citations ci-après faites de l'acte de vente le feront bientôt disparaître.

Comme on l'a déjà vu par les termes de la promesse de vente, ce n'est qu'après le paiement entier du prix de vente que *Scallon* s'obligeait de donner "*a good sufficient title.*" C'est ce que ses représentants ont fait en faveur de l'acquéreur des droits de *Peck* par l'acte de vente du 16 mars 1865, consenti en exécution de la promesse de vente, dans le but de donner *a good sufficient title* que *Scallon* s'était engagé de fournir.

Pour mieux faire ressortir le peu de valeur des arguments des intimés, concernant la vente des limites, je serai obligé de citer d'assez longs extraits de l'acte de vente.

Après l'énonciation des qualités des parties, et une déclaration de dépôt de la promesse de vente ci-dessus citée, l'acte de vente procède ainsi :

Les dites parties de première part ès-dites qualités déclarent qu'en

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exécution au dit acte du dix juillet mil huit cent cinquante-huit, dont dépôt est ci-dessus fait, elles cèdent, transportent et abandonnent avec promesse de garantir chacun en droit soi, de tous troubles généralement quelconques, au dit Monsieur Théophilus Hamilton Cushing, comme étant aux droits et représentant le dit sieur Benjamin D. Peck, à ce présent et acceptant pour et au nom du dit M. Théophilus H. Cushing, ses hoirs ayant cause et successeurs, le dit François Benjamin Godin, Ecuier. son procureur comme susdit, les immeubles et droits que le dit feu Edward Scallon avait promis et s'était obligé de vendre au dit sieur Benjamin D. Peck, desquels immeubles et droits la désignation et description est ci-après donnée littéralement et verbatim et telle qu'elle se trouve en langue anglaise au dit acte du dix juillet mil huit cent cinquante-huit, savoir :

Suit la description des propriétés vendues exactement dans les mêmes termes que ceux de la promesse de vente citée ci-dessus, et immédiatement après cette description et l'énumération des limites à bois, l'acte continue ainsi :

Ainsi que le *tout* se trouvait, comportait et étendait de toutes parts circonstances et dépendances au dix juillet mil huit cent cinquante-huit, époque de la promesse de vente faite par le dit feu M. Edward Scallon, au dit Benjamin D. Peck, à l'exception cependant du bois qui a pu être coupé par ce dernier, ou ses représentants sur les dites limites depuis la passation du dit acte en dernier lieu mentionné jusqu'à ce jour, ainsi que le dit acquéreur le reconnait et dont et du tout il se déclare content.

Pour par le dit sieur acquéreur partie de seconde part jouir, u er faire et disposer *du tout présentement vendu en toute propriété* en vertu des présentes.

Les dites parties de première part ès-qualités déclarent que la somme de vingt mille dollars, cours actuel, prix stipulé dans l'acte du dix juillet mil huit cent cinquante-huit précité, pour lequel le dit feu M. Scallon s'était obligé de passer titres en bonne et due forme *du tout présentement* vendu au dit Benjamin D. Peck ou représentants aussitôt que le paiement intégral en aurait été effectué suivant les termes portés au dit acte du dix juillet mil huit cent cinquante huit en capital et intérêt, qu'icelle dite somme aurait été entièrement et finalement payée tant en capital qu'en intérêts accrus sur les divers termes d'échéance stipulés dans la dite promesse de vente, et en donnent à qui de droit quittance générale et finale.

En conséquence, en vertu des présentes, les dites parties de première part ès-qualités mettent et subrogent le dit M. Théophilus

Hamilton Cushing partie de seconde part en *tous droits, noms, raisons, actions et privilèges* qui pouvaient résulter au dit feu M. Edward Scallon sur les dites limites, et lui ont présentement remis toutes les dites licences entre les mains du dit sieur Godin son procureur comme susdit, ainsi que ce dernier le reconnaît et en donne ès-qualité quittance à qui de droit, excepté celles de mil huit cent cinquante-sept et mil huit cent cinquante-huit et celles de mil huit cent cinquante-huit et mil huit cent cinquante-neuf qui n'ont pas été délivrées, celles de la présente année n'ont pas été délivrées n'ayant pas encore été retirées du bureau de l'agent des bois de la Couronne pour l'Ottawa inférieure, mais les dites parties de première part s'obligent de remettre au dit M. Cushing les dites licences ou copie d'icelles à leurs frais et dépens à demande.

De son côté, le dit M. Théophilus H. Cushing par son dit procureur promet et s'oblige de se conformer à toutes les règles et règlements auxquels les dites limites peuvent être assujéties envers le gouvernement de Sa Majesté en cette province, comme aussi de lui payer tous les droits qui peuvent être dus pour la coupe du bois sur les dites limites.

Au moyen de tout ce que dessus exprimé les dites parties de première part ès-qualités ont cédé et transporté au dit M. Théophilus H. Cushing partie de seconde part, pour lui ses hoirs et ayant cause, tous droits de propriété, fonds, très fonds, noms, raisons, possession et autre choses généralement quelconques qu'elles pourraient avoir demander ou prétendre en ou sur ce que dessus vendu, dont et du tout elles se sont démis et dessaisis pour en vêtir le dit M. Théophilus H. Cushing, ses hoirs et ayant cause, consentant qu'il en soit saisi et mis en possession par et ainsi qu'il appartiendra, constituant à cette fin pour procureur le porteur des présentes lui donnant pouvoir de ce faire ; car ainsi, etc.

Si la promesse de vente du 10 juillet 1858 ne contient pas une clause de garantie aussi précise que celle de l'acte de vente ci-dessus cité, c'est qu'elle ne constituait pas le titre définitif, mais elle contient cependant l'obligation formelle d'accorder cette garantie dans la promesse de donner *a good sufficient title* après paiement entier du prix de vente. Peut-on dire que les héritiers *Scallon* auraient exécuté cette convention en offrant à *Cushing* un titre sans garantie ou même un titre dont la clause de garantie aurait été omise ? Non, car il est de principe que le vendeur est tenu de garan-

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tir à moins de stipulation contraire—mais il y a plus dans le cas actuel, la condition de fournir un titre bon et suffisant (a good and sufficient title) contient l'obligation de donner un titre avec garantie. Un titre sans garantie ne pourrait être considéré, d'après la loi de la province de *Québec*, un titre bon et suffisant. C'est ainsi que les héritiers *Scallon* l'ont compris en insérant la clause de garantie ci-dessus, laquelle, au lieu d'être un *lapsus calami* de la part du notaire, est évidemment en exécution de la promesse de donner un bon titre. La clause de garantie insérée dans cet acte est la clause ordinaire que l'on trouve dans toutes les ventes sérieuses et importantes. Elle est d'un usage général, et personne, on peut dire, n'aurait l'idée, dans la province de *Québec*, d'acheter des propriétés de l'importance de celle dont il s'agit sans cette stipulation de garantie. Les intimés ne pouvant nier avec succès l'existence de cette clause, essaient d'en restreindre l'effet à la vente du moulin, mais contrairement à leurs prétentions, cette clause est générale et s'applique à toutes les propriétés vendues par *Scallon*. Elle ne contient pas de restriction—elle couvre toutes les propriétés en propres termes par les expressions suivantes : "Avec promesse " de garantir chacun en droit soi, de tous troubles géné- " ralement quelconques, au dit M. *T. H. Cushing*, etc., " etc., les immeubles et *droits* que le dit feu *Edward* " *Scallon* avait promis et s'était obligé de *vendre* au dit " sieur *Benjamin D. Peck*, desquels immeubles et droits " la désignation est ci-après donnée littéralement et *ver-* " *batim* et telle qu'elle se trouve en langue anglaise au " dit acte du 10 juillet 1858, savoir, etc, etc." Cette référence à la description contenue dans la promesse de vente, indépendamment de la généralité des termes, fait bien voir que la garantie devait s'appliquer aux licenses ou permis de coupe de bois, comme aux autres immeubles vendus.

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En examinant les termes de la promesse de vente, j'ai dit que l'obligation de vendre embrassait comme un tout les diverses propriétés y décrites. L'acte de vente rend évidente cette interprétation, en ne référant à ces propriétés que comme un tout. Après leur description, il est déclaré que la vente en est faite, ainsi que le *tout* se trouvait et comportait et étendait, etc., etc. Il en est de même de la clause de saisine qui est en ces termes : "Pour par le dit sieur acquéreur partie de seconde part, jouir, user, faire et disposer *du tout* présentement vendu en toute propriété en vertu des présentes." On retrouve encore la même qualification dans la clause portant quittance du prix de $20,000, "pour lequel le dit feu sieur *Scallon* s'était obligé de passer titres en bonne et due forme *du tout* présentement vendu, etc., etc." S'il fallait ajouter encore à cette démonstration, on pourrait recourir à l'acte du 22 octobre 1866, qui contient encore dans les termes les plus clairs et les plus positifs l'admission que la vente a été faite avec garantie de tous troubles des *immeubles* et *droits* que feu *Edward Scallon* s'était obligé de vendre. Il faut donc conclure de tout cela que la vente a été faite de toutes les propriétés en question comme *un tout* et pour une seule considération, $20,000. S'il existait réellement quelque différence importante entre les conventions de la promesse et l'exécution de la vente, n'est-ce pas le dernier acte qui doit les régler. Le contrat entre les parties n'est devenu parfait et définitif que par ce dernier acte. C'est lui qui contient leurs véritables conventions ; s'il y a eu quelque dérogation, ce que je n'admets pas, c'est du consentement des deux parties. S'il y avait eu erreur, on aurait sans doute attaqué l'acte pour cette cause. Cela n'a pas été fait, les conventions contenues dans l'acte de vente restent entières. L'obligation de livrer 256 milles de limites n'ayant pu recevoir son exécution parce qu'il s'est trouvé un déficit de 50 milles pour

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compléter la quantité convenue, l'acte en dernier lieu cité a été passé entre les mêmes parties dans le but spécial de combler le déficit. Par cet acte les intimés ont *cédé et transporté*, avec la garantie de tous troubles généralement quelconques au dit *L. H. Cushing*, la dite quantité de cinquante milles de limites sur la dite rivière de *L'Assomption* et désigné comme suit en langue anglaise, savoir :

No. 25. 25 square miles } "Commencing at the upper end limit No. 94 on "the south west side of L'Assomption river, "granted to late Edward Scallon and extending five miles on said "river and five miles back from its banks, making a limit of twenty "five square miles, not to interfere with limits granted or to be "renewed in virtue of regulations."

No. 26 25 square miles } "Commencing on the north east side of L'Assomp- "tion river, at the upper end of limit 96, granted "to late Edward Scallon, and extending five miles up the river and "five miles back from its banks, making a limit of twenty-five square "miles, not to interfere with licences granted or to be renewed in "virtue of regulations."

Les licenses de ces limites pour les années 1866-7 furent alors remises au dit *Cushing*, pour par lui le dit M. *Cushing*, ses hoirs ayant cause et successeurs, jouir, faire et disposer du tout comme bon lui semblera, d'exploiter et couper du bois dans et sur les dites limites à la charge de se conformer en tout aux règles et règlements auxquels les dites limites peuvent être assujéties envers le gouvernement de Sa Majesté en cette province, comme aussi de lui payer tous les droits qui peuvent être dus pour la coupe du bois sur les dites limites.

La preuve fait voir que le déficit qu'il s'agissait de combler par cet acte provenait de ce qu'une partie des limites en premier lieu cédées se trouvait alors sujette aux droits antérieurs de *G. B. Hall*, comme premier concessionnaire. Malheureusement il en a été de même pour les limites cédées en second lieu.

Il s'agit maintenant de déterminer l'étendue de la

garantie des intimés en vertu du dernier acte. C'est avec connaissance parfaite de la cause qui avait amené le déficit, et dans le but évident de se garder contre une semblable éventualité qu'a été faite la deuxième cession.

La garantie stipulée devait donc, dans l'esprit des parties, porter sur cette cause d'éviction. C'est sans doute pour cette raison que la clause qui la contient est si générale et si absolue.

Les intimés prétendent cependant qu'elle ne l'est pas, qu'au contraire, elle contient plusieurs restrictions, la 1ère que les limites en second lieu cédées n'interviendront pas avec d'autres limites déjà cédées ou qui peuvent être renouvelées en vertu des règlements ; la 2ième que cette cession est faite, comme la 1ère, "*à la charge de se conformer en tout aux règles et règlements* auxquels les dites limites *peuvent être assujéties.*"

Quant à la 1ère restriction, celle protégeant la Couronne contre les conséquences d'une concession antérieure, il est clair qu'elle ne se trouve pas dans la clause de garantie, c'est dans la description de la limite qu'elle est insérée, et, en faveur de la Couronne seulement. Les intimés n'ont pas fait de cette réserve de la Couronne une restriction à leur garantie, elle ne se trouve mentionnée que dans la description de la propriété cédée, et ne peut, conséquemment, aucunement affecter leur convention de garantie qui a pour but précisement de couvrir ce danger. Si, d'un côté on peut dire à l'appelant que dans tous les cas, il était averti par les termes de la license de la cause probable d'éviction, de l'autre, il peut répondre que c'est contre ce danger prévu, et dont il avait déjà été la victime, qu'il s'est prémuni par la clause de garantie.

Pour éviter les conséquences de cette garantie, les intimés prétendent encore assimiler l'effet de cette réserve en faveur de la Couronne à une éviction pour cause de *force majeure* ou *fait du prince.* Cette pré-

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tention n'est aucunement fondée, car en loi, on ne doit considérer le fait du prince comme un cas fortuit et une force majeure que lorsque personne ne peut le prévoir ni l'empêcher. Certes, ce n'est pas le cas actuel, car non-seulement le fait était prévu, mais il était déjà accompli au moment de la cession.

Rien n'était plus facile pour les intimés que de s'en assurer, puisque c'est par le fait de leur auteur *Scallon* que la priorité du titre qu'il avait sur *Hall* a été perdue. Si on ne peut pas assimiler le cas actuel au fait du souverain, les intimés auraient encore bien moins raison de prétendre que ce prétendu fait du souverain, prévu et même accompli, ne pouvait pas en loi faire le sujet de la garantie. La jurisprudence établit le contraire, comme on peut s'en assurer en référant au Rép. de *Merlin*. Vo. "Fait du souverain." Si la garantie n'avait pas lieu dans le cas actuel, il faudrait contrairement à cette autorité conclure que l'on ne peut pas légalement stipuler la garantie contre le fait du souverain. Ce qui serait une erreur évidente.

L'éviction dont *Cushing* a été la victime n'a été amenée par aucune infraction aux obligations que lui imposaient ces règles et règlements auxquels il devait se soumettre. Elle n'a été causée que par la négligence de *Scallon* à faire régulièrement ses renouvellements de licences.

Cette négligence ayant eu pour conséquence de permettre aux licences de *Hall* de prendre effet, il s'en est suivi devant l'assistant commissaire des terres et ses employés, conformément à la loi, et aux règlements du département, les procédés qui ont eu pour résultat l'éviction de *Cushing*.

Les intimés soutiennent qu'ils ne peuvent être tenus responsables des conséquences de cette éviction, parce que *Cushing* ne les a ni notifiés ni mis en cause pour le défendre. S'il se fût agi d'une action devant les tribu-

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naux au lieu de procédés administratifs, les intimés pourraient sans doute se plaindre de n'avoir pas été appelés en garantie dans les délais voulus. Mais il est clair que les procédés du code de procédure ne pouvaient s'appliquer à la décision de questions uniquement de la compétence du départemement des terres. D'après les lois et règlements concernant ces sortes de contestations, le Département n'avait à décider que sur les prétentions respectives de *Hall* et de *Cushing*. Ces lois et règlements n'établissent aucun mode de faire intervenir ou mettre en cause dans ces procédés d'autres parties pouvant y avoir des intérêts. En n'appelant pas les intimés en garantie dans ces procédés, *Cushing* ne s'est donc rendu coupable d'aucune négligence qui puisse compromettre sa position.

Tout au plus, tombe-t-il sous l'effet de l'art. 1520. C. C. " La garantie pour cause d'éviction cesse lorsque " l'acheteur n'appelle pas en garantie son vendeur dans " les délais prescrits par le code de procédure civile, si " celui-ci prouve qu'il existait des moyens suffisants " pour faire rejeter la demande en éviction."

Les intimés n'ont pas fait cette défense pour la raison évidente qu'il n'y avait aucun moyen d'empêcher l'éviction de *Cushing*, résultant de la négligence de Scallon à renouveler ses licences, et du fait qu'il avait vendu avec garantie des limites qui avaient cessé de lui appartenir au temps même de la vente.

La deuxième restriction consistant dans l'obligation de se conformer aux règles et règlements du département des terres ne porte que sur la manière d'exercer les droits conférés en vertu de la licence. Il n'y a aucune plainte à ce sujet contre *Cushing*, et c'est, comme on l'a vu plus haut, pour une autre cause que l'éviction a eu lieu.

Les motifs ci-dessus exposés m'amènent à la conclusion que l'acte de cession du 22 octobre 1866 contient

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une garantie expresse contre le danger d'une seconde éviction pour cause de priorité de titre.

En outre de la question de garantie, il y en a plusieurs autres qui ont été décidées par le jugement de la Cour Supérieure, mais sur lesquelles la Cour du Banc de la Reine n'a point exprimé d'opinion. L'opinion de cette cour sur la question de garantie rendait inutile une décision sur les autres points. La majorité de cette cour adoptant une conclusion différente, on doit s'assurer si, malgré son droit à une garantie, l'appelant n'a pas failli dans la preuve de faits essentiels au succès de sa cause.

Un des considérants du jugement est que d'après l'article 1204 du Code Civil du *Bas-Canada*, la preuve offerte doit être la meilleure dont le cas, par sa nature, soit susceptible, et qu'une preuve secondaire ou inférieure ne peut être reçue à moins qu'au préalable il n'apparaisse que la preuve originaire ou la meilleure ne peut être fournie, et que l'article 14 du dit Code Civil frappe de nullité ce qui est fait en contravention d'une loi prohibitive.

Ces propositions de droit sont sans doute bien fondées. Mais la preuve faite en cette cause donne-t-elle lieu à leur application ? Il eût, sans doute, été mieux de produire les licences de *Hall* que d'en faire la preuve par d'autres documents. Cette preuve consiste dans les exhibits No. 14 et D, produits à l'enquête et dans les plans des lieux provenant du département des terres. Cette preuve ne laisse aucun doute sur la priorité des licences de *Hall*. Est-il vrai de dire que ces documents ne font qu'une preuve secondaire ou inférieure ? Ce serait le cas, si par plusieurs textes de nos lois ils n'étaient déclarés la meilleure preuve que l'on puisse faire, celle qui résulte de la production de documents, revêtus du caractère de l'authenticité. Un acte authentique passé devant notaire a-t-il plus de force

probante qu'un autre acte auquel la loi accorde également l'authenticité. Y a-t-il des degrés dans la force probante des actes déclarés authentiques par le code civil ou par un statut ? Certainement non. Ils font tous pleine foi de leur contenu au même degré.

Les exhibits cités, établissant l'existence des limites de *Hall* sont de la catégorie de ceux que l'article 1207 C.C., déclare authentiques et faisant preuve de leur contenu. Un des paragraphes de cet article s'exprime ainsi : " Les archives, régistres, journaux et documents " publics des divers départements du gouvernement " exécutif et du parlement de cette province."

La 32e *Vict.*, chap. 10, (stat. de *Québec*, 1869) contient les dispositions suivantes sur le même sujet, s.-s. 2, " les archives, registres, journaux et documents pu- " blics des divers départements du gouvernement exé- " cutifs de cette province ;—s.-s. 3, les copies et extraits " officiels des livres et documents et écrits ci-dessus men- " tionnés, les certificats et tous les autres écrits qui peu- " vent être compris dans le sens légal de la présente sec- " tion quoique non énumérés." Ces autorités font voir que la legalité de la preuve de l'existence des limites de *Hall* est établi par le Code Civil aussi bien que par les statuts. Cela doit certainement suffire,

Un autre motif de ce jugement est que le demandeur (appelant) n'avait pas le droit de soumettre à une décision à l'amiable la vérification des lignes de divisions des limites en question. Ce considérant ne me paraît pas mieux fondé que le précédent. *Cushing* troublé, comme il l'était par *Hall*, dans son exploitation qu'il fut forcé d'abandonner, devait-il se croiser les bras ? On me répondra peut-être que non, mais on dira avec les intimés qu'il ne s'est pas adressé au tribunal qui avait juridiction dans une contestation de ce genre, savoir, celui de l'inspecteur des licences à *Bytown* (*Ottawa*) en vertu des 16me et 17me articles des

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règlements du département des terres, en date du 8 août 1851. Cette objection serait sérieuse si la loi n'avait pas modifié ces règlements en donnant au Commissaire et à l'Assistant Commissaire des terres les pouvoirs les plus amples pour la décision de ces sortes de contestations. L'appelant avait le choix de deux tribunaux, celui de l'Inspecteur des licences ou celui du Commissaire ou de son assistant. Les deux lui étaient ouverts. Peut-on lui reprocher de s'être adressé, comme il l'a fait, à la plus haute autorité. Il avait indubitablement, comme on le verra par la citation ci-après, la faculté de s'adresser au département des terres dont le Commissaire et son assistant avaient tous les pouvoirs nécessaires pour adjuger sur cette contestation. La 36me Vict., ch. 8, sec. 1, s.s. 1, contient la disposition suivante sur le sujet.

There shall continue to be an assistant Commissioner of Crown Lands, who shall be appointed, from time to time as a vacancy occurs, by the Lieut.-Governor in council, and he shall have the superintendence of all the officers, clerks, messengers or servants, and the general control of all the affairs of the department; his orders shall be executed in the same way as those of the Commissioner of Crown Lands himself, and his authority shall be deemed to be that of the head of the department, so that he can validly affix his signature, in this said quality, and thereby give force and authority to all acts, receipts, permits of occupations, contracts or deeds of sale or location.

Tickets, letters patent, adjudication revocations of sales or locations and all other documents whatsoever which are or may be within the juridiction of the Department.

Cette section ne laisse certainement aucun doute sur la compétence de l'assistant commissaire à prononcer sa décision sur la réclamation qui lui a été soumise par *Cushing*.

Du fait que la durée des licences ne doit être que du 1er juin au 30 avril de chaque année, et que l'année 1866 s'est écoulée sans que *Cushing* ait éprouvé aucun trouble, l'Honorable juge de la Cour Supérieure en a

tiré la conclusion que les défendeurs avaient satisfait à leur obligation. Mais on ne peut en arriver là qu'en oubliant qu'au moment de la cession du 22 octobre 1866 les représentants de *Scallon* cédaient des droits qu'ils n'avaient plus. De plus, ils s'étaient obligés de céder une licence contenant la condition de pouvoir être renouvelée en se conformant aux règles du département des terres. Ces renouvellements sont à la volonté du concessionnaire, *licenciate*. Il est à peu près sans exemple qu'un concessionnaire qui n'a contrevenu à aucune de ses obligations se soit vu refuser un renouvellement. Cette tenure, quoique en apparence très précaire dépend en réalité, pour sa durée, de la volonté du concessionnaire. Il est de notoriété publique que les marchands de bois ont toujours conservé à volonté leurs limites en dépit de cette précarité qui semble n'avoir été imposée que comme un moyen puissant de forcer les concessionnaires d'être exacts dans le paiement des droits de la couronne. En cédant une licence qui ne pouvait pas être renouvelée pour la raison qu'elle appartenait à *Hall*, les intimés ne remplissaient donc pas leur obligation. Il est vrai que c'est après avoir pris lui-même les renouvellements des licences cédées que *Cushing* a été troublé par *Hall*, mais ce trouble n'a pu avoir lieu que parce que les renouvellements se trouvaient sans effet, en conséquence de la violation de l'obligation de céder des licenses à des limites sur lesquelles personne n'aurait de priorité de titre. Si *Cushing* n'a pu faire de renouvellements effectifs, c'est en conséquence de l'insuffisance de son titre, et c'est aux héritiers *Scallon* à répondre des conséquences en vertu de leur garantie.

Enfin, l'honorable juge a admis un autre moyen invoqué par les intimés. C'est celui tiré du défaut de production des procurations autorisant *McConville*, à agir comme procureur des parties qu'il représentait

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aux divers actes cités dans la déclaration et notamment celui du 22 octobre 1866. C'est sans doute un moyen très rigoureux—si surtout l'on considère que ces mêmes actes sont invoqués par les Intimés dans leur exception péremptoire. Mais il est vrai qu'ils ont eu le soin d'accompagner cette exception d'une défense au fonds en fait générale—ce qui aurait nécessité la production des diverses procurations si les intimés eussent persisté jusqu'à la fin dans leurs dénégations. Mais dans leurs répliques aux réponses du demandeur à leur exception péremptoire en droit perpétuelle, les intimés ayant invoqué eux-mêmes l'acte du 22 octobre 1866, sans cette fois l'accompagner de la défense au fonds en fait, ils doivent être considérés comme s'étant départis de leur injuste dénégation. Cette réplique contient une admission de l'acte du 22 octobre 1866 qui rend inutile la production des procurations. En bonne procédure il était du devoir des intimés de renouveler leurs dénégations ou de déclarer qu'ils persistaient dans celles qu'ils avaient déjà faites,—par cette omission ils ont réparé celle commise par le demandeur en ne produisant pas ces procurations. Aucune des objections que je viens de passer en revue ne formant d'obstacle sérieux contre la demande de l'appelant, je suis venu à la conclusion qu'en conséquence de l'éviction que *Cushing* a soufferte il y a lieu à des dommages et intérêts conformément à l'art. 1518, c'est-à-dire que l'appelant a droit de réclamer des intimés : 1o. La valeur des limites dont il a été évincé, proportionnellement au prix total de $20,000. 2o. Les sommes dépensées dans les années 67–68 pour le nettoyage de la rivière afin d'y faire flotter le bois de commerce, aussi celles employées à la construction de chemins et de maisons et écuries nécessaires à l'exploitation des dites limites. Il aurait aussi droit à l'accroissement de valeur que pouvaient avoir les dites

limites en 1868, époque à laquelle *Cushing* en a été évincé de fait.

Pour arriver à la détermination exacte du montant des dommages et intérêts il manque dans la preuve un élément indispensable, c'est la valeur des limites en question proportionnellement au prix total de vente qui était de $20,000. C'est cette proportion du prix de vente qui devait être accordée à l'appelant, l'augmentation de valeur, plus les sommes ci-dessus mentionnées, dépensées en travaux d'améliorations. Pour établir cette proportion je suis d'avis que la cause devrait être renvoyée à la cour inférieure, etc., etc., pour y être procédé par experts, etc., etc., pour constater cette proportion.

HENRY, J.:—

I have not prepared a written judgment in this case, as my brother *Gwynne* favored me with the reading of a lengthy one prepared by him some time ago, and which embraces my views on the several points to which it refers. I may add, however, that admitting the respondents are liable under the covenant, the appellant is not entitled to recover for several reasons:

1st. He has shown no eviction. The purchaser went into full possession of all the lands and premises he purchased, made roads through the "limits" and cut a number of logs which he voluntarily abandoned to a party who claimed the land on which they had been cut without, as I can see, any reason whatever. He therefore, by his own act, gave up possession and the right to the limits now in dispute.

2nd. It is admitted that the limits sold and covenanted for covered the lands originally, and the evidence, to my mind, shows that if the right to the limits was subsequently lost or interfered with, it was a loss for which the purchaser was liable, and not the covenantor.

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3rd. No title was shown to the *locus* by *Hall*, who claimed under the adverse licenses. They were not produced on the trial, nor their contents shown, nor was any survey of them shown. It was not, therefore, shown that they touched or included any part of the *locus*. It is, on the other hand, shown by the evidence, that even had they been put in evidence the rights under them would have been restricted to the one side of the height of ground between two rivers, while the *locus* was on the other. I think the decision of the assistant commissioner of crown lands—not having been made under the proceedings provided by the statute—is not binding on the respondents who got no notice of the proceedings before him, and were no parties to them.

I concur, then, in the judgment to which I before referred, and think the appeal should be dismissed with costs.

GWYNNE, J. :—

With great deference to my learned brothers, with whom I am unable to agree, I must say, that in the judgment of the Court of Queen's Bench, *Montreal*, in appeal, as well as in that rendered by the learned judge of the Superior Court of the district of *Joliette*, before whom the case was originally tried, I entirely concur. If I am in error in the view which I take, it is at least a satisfaction to me to be in such good company. By the deed of the 10th July, 1858, after reciting therein an agreement made by *Edward Scallon* to sell to *Benjamin D. Peck*, or his assigns, a saw mill built of stone, and four acres of land annexed thereto, together with all the straps, gearing, water-power, booms, chains and anchors to the mill belonging and the right of using a road leading from the Queen's highway to the mill; and all the right and title obtained by *Scallon* from the crown to certain timber limits situate on the banks of the River *l'Assomption* and its tributaries, the *Black River* and the *River Ducharme* particularly enumerated

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by numbers, among which were Nos. 97 and 98 (stated as covering each 25 miles on the river *l'Assomption*), and being in all 13, and stated as covering an area of 256 miles, at and for the price or sum of $20,000, of which $5,000 was acknowledged by the deed to have been then paid, and the balance was made payable in five annual instalments of $3,000 each, with interest, *Scallon* bound himself in the penal sum of $30,000, with a condition thereunder written, that if, upon payment of the above sums as specified for payment of the said mill, the said *Edward Scallon* should give a good and sufficient deed of the above mill, then the said bond or obligation should be null and void. The deed also contained the following clause: "The right of using and cutting timber on said limits is now given to the full extent which the said *Edward Scallon* possesses from the crown." As to these licenses it was also by the deed agreed that they should be renewed in the name of *Scallon*, and that the cost and expenses of such renewals should be paid by *Peck* as well as the moneys which should accrue to the crown for the limits and for timber duty to be cut on the limits, and that *Peck* should conform to the regulations of the Crown Land Department, and that after the last instalment of the $20,000 should be paid, the licenses might be taken out in the name of the purchaser.

Now, by this deed it appears that all the title *Scallon* agreed to give for the timber limits mentioned therein, including those numbered 97 and 98, was such title as he had and no more: and that title he did give; all his title to those limits passed by the deed. The vendee, however, by the deed agreed that the renewals to be taken out for them, which were to be taken annually, should be taken out and paid for by the vendee in *Scallon's* name until the last instalment of the $20,000 should be paid, when the vendee might procure their issue in his

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own name. These numbers 97 and 98, it may be here remarked, covered the following limits: namely, 97, ten miles in length up the river *l'Assomption*, measuring from the upper boundary line of No. 94, and on the left bank as you ascend the river and extending to a line back 2½ miles from and parallel with the river; and 98, the like length up the river, measuring from the upper boundary line of No. 96, which is a continuation of the upper boundary line of limit No. 94, and extending 2½ miles from the river on its right bank as you ascend it. For the protection of his own rights, the onus lay upon the vendee to see to the renewal of those licenses which he undertook to do in *Scallon's* name, whose only interest was to see that they should be renewed by the vendee in his (*Scallon's*) name, as security to the latter until his last instalment of the $20,000 should be paid. The agreement itself vested in *Peck* all *Scallon's* title to those timber limits which was all in relation to them that he had sold or agreed to sell.

Why *Peck* and his assigns did not, if they did not, enjoy the benefit of those limits numbered 97 and 98, or why renewals of them were not issued from year to year, does not clearly appear. The onus of taking what proceedings might be necessary to procure the renewals, lay upon *Peck* and his assignees.

It was alleged by the plaintiffs, but I see no proof of the allegation, that *Peck* and his assigns paid yearly the moneys payable for their renewal to *Scallon* who neglected to renew Nos. 97 and 98, and appropriated to his own use the moneys paid to him to be applied for their renewal amounting to $800.

The only evidence which the plaintiffs offered in support of this allegation, is a passage referred to by them in a deed dated the 16th March, 1865, executed by the plaintiffs and the heirs of *Scallon*, who was then dead, which does not support the allegation. The deed

at the place referred to declares that the whole $20,000 had been paid, and further, that the cost of the renewal of the timber licenses transferred to *Peck* by the deed of 1858 had been paid by *Peck* and his assigns, and that those licenses had been renewed each year in the name of *Scallon* as had been undertaken by *Peck*.

This passage is obviously no proof of the allegation that *Peck* or his assigns had paid the moneys for renewal of the licenses to *Scallon*; the passage simply amounts to a declaration or admission by the parties to that deed that *Peck* and his assigns had, at their own cost and charges, renewed the licenses in *Scallon's* name, as in the terms of the deed of 1858, it was their duty to do.

The plaintiffs also offered evidence which was objected to as not the best evidence procurable upon the point—that by the books of the department in the possession of a witness named *Bell*, but which books were not produced, it appeared that for the year 1858, or any subsequent year, no renewal had been obtained for Nos. 97 or 98. This evidence was objected to upon the ground that if this appeared by books in the department, these books should have been produced to enable the parties sought to be affected by such entry to see if it, in truth, were so, and if so to examine the parties making the entries as to their correctness, and in explanation of the cause of the non-renewal; but assuming the fact to be as suggested, that at the time of the execution of the deed of 1858 *Scallon* had not renewed his licenses for the limits 97 and 98 for that year, it appears by the regulations of the department put in evidence that he had still the right to do so, and that he transferred such right to *Peck*, who could have procured the renewal of the licenses for those limits to be issued in right of *Scallon* for 1858, and each subsequent year, if non-payment of the license fees was

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all that stood in the way of their being issued, for it is not alleged or pretended that in consequence of *Scallon's* omission to renew in 1858, his right to renew was lost by reason of a subsequent grant of the same limits by the Crown Land Department to any other person. So that the fact of *Scallon* not having renewed his licenses for limits 97 and 98 in 1858, if true, would not have afforded any reason for the non-renewal of these Nos. 97 and 98 by *Peck* in virtue of the provisions of the deed of 1858 in the subsequent years. The true reason for the non-renewal of the licenses for those numbers is to be found, I apprehend, in the fact which appeared in evidence, that by reason of an error in the measurement of the limits lying lower down the river than Nos. 94 and 96, the upper boundary lines of those latter limits were placed higher up the river than they ought to be, and that, in truth, there was no such distance as ten miles higher up the river l'*Assomption* to represent the whole extent in length of the limits 97 and 98; and if that was the reason then the defect was not one which would give any claim whatever under the deed of 1858 against the heirs of *Scallon*, or against *Scallon* himself, who by that deed only agreed to give just such title as he had to those limits, and no more. Now that this was the reason for Nos. 97 and 98 not being renewed, I think, appears by the fact which does plainly appear in the evidence, that in 1866 the Crown Land Department issued licenses Nos. 25 and 26, the former in substitution for 97, and the latter for 98, and that these licenses, Nos. 25 and 26 respectively, comprise limits extending only five miles up the river instead of 10, from the upper limits of 94 and 96, and five miles in width from the river, instead of 2½ miles, covering the same quantity of land as did 97 and 98 respectively, although differently shaped and covering one-half of the precise land com-

prised in 97 and 98 respectively. These licenses Nos. 25 and 26 were issued from the same office of the Crown Land Department as 97 and 98 had been issued from, and the limits therein described were granted to and in the name of "the heirs of the late *Edward Scallon*;" from this form of expression the natural and reasonable presumption is that the licenses were granted to *Scallon's* heirs in right of *Scallon* who had been the licensee of 97 and 98, which covered respectively half of the identical limits described in 25 and 26. There can, I think, be no doubt that the limits described in 25 and 26 were granted as they were "to the heirs of the late *Edward Scallon*" in substitution for Nos. 97 and 98, for the reason that there was found not to be ten miles up the river from Nos. 94 and 96 to meet the requirements of 97 and 98. We see here a good reason, and, in the absence of any evidence to the contrary, I think we may take it to have been the real one, for the substitution and for the licenses for 97 and 98 not having been renewed. Now, immediately prior to the execution of the deed of the 22nd October, 1866, which is relied upon as containing what is insisted upon as the guarantee for the alleged breach of which this action is brought, the condition of the parties was this: *Scallon* by the deed of 1858, had already transferred to *Peck* all his right, title and interest in the timber licenses enumerated therein, including Nos. 97 and 98. By the deed of 1865, the *Scallon* succession had conveyed the mill and the four acres of land thereunto annexed, with the roadway mentioned in that deed, in fulfilment of the condition of the obligation in that behalf, contained in the deed of 1858, upon the part of *Scallon*, his heirs and assigns, to be fulfilled; all therefore that remained for the heirs of *Scallon* to do was, as the parties named under the designation of "the heirs of the late *Edward Scallon*," as licensees of the limits des-

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cribed in the licenses 25 and 26, to transfer them to the assignee of *Peck*, who was entitled to receive them as a fruit growing out of the right which *Scallon* had had by reason of his having been the licensee named in 97 and 98, all which right he had transferred to *Peck* by the deed of 1858. In so far as *Scallon's* heirs were concerned, they were under no obligation to do anything more; and, although it appears that a sum of $500 was allowed by them to the plaintiff, for the reason that the haul to the river was greater in the limits Nos. 25 and 26, by reason of their greater depth from the river, than had been that of the limits described in 97 and 98, it does not seem to me that the *Scallon* succession was under any obligation to make such or any allowance; for that *Scallon* had a right, title and interest in the limits described in the licenses Nos. 97 and 98 at the time of the execution of the deed of 1858, and that by that deed he did transfer to *Peck* all such right, title and interest, and that this was all he agreed to do, appears to me to be clear. All right to renew those licenses thenceforth belonged to *Peck* and his assigns, and if the Crown Land Department had, for any reason other than prior forfeiture by *Scallon* and a subsequent grant of the same limits to some other person, of which there is no evidence or pretence whatever, refused to renew such licenses, the loss consequent upon such refusal must have fallen upon *Peck*, who had acquired, as all that he was entitled to, all *Scallon's* rights whatever they were on the 10th July, 1858; and when, therefore, Nos. 25 and 26 were issued to and in the name of the heirs of *Scallon* in recognition, as we must take them to have been, of *Scallon's* rights in 97 and 98, and in substitution for those latter, they enured in the hands of *Scallon's* heirs to the benefit of the assignee of *Peck*, as a fruit issuing from the rights of *Scallon* which had been transferred to *Peck* and his assigns by the deed of

1858. The heirs of *Scallon* were, in fact, trustees of those limits for the plaintiff, the assignee of *Peck*, who could have compelled their transfer to him. It would have been impossible for them to have resisted the right of the plaintiff, as assignee of *Peck* under the deed of 1858, to have had those licenses Nos. 25 and 26, which covered one-half of the precise limits described in 97 and 98 respectively, and which were given the additional width to make up for the diminished length, transferred by a legal instrument to the plaintiff. In such a state of things it is obvious that in any deed to be executed by the heirs of *Scallon*, transferring those licenses to the plaintiff, any covenant or guarantee by them as to the goodness of the title purported to be given by those licenses, or the insertion of anything directly or indirectly imposing upon the heirs of *Scallon* any greater liability than was by the deed of 1858 imposed upon them, would be altogether out of place, improper and without any cause, motive or consideration therefor; and the evidence does not supply anything which is suggestive even of any cause, motive or consideration for their incurring such obligation. In this condition of things the deed of the 22nd October, 1866, was executed. Now apart from, and laying aside, all question as to whether it was, or not, necessary for the plaintiffs to have offered evidence of the right of *McConville* to represent and bind the parties which in that deed he is said to represent, that deed declares that :

The said *Sieur McConville*, for and in the name of those for whom he acts, declares that the said parties whose attorney he is, have, in execution of the said deed under private signature of date of the 10th July, 1858, and each for himself, ceded with warranty against all disturbances generally whatsoever to the said Mr. *Theophilus H. Cushing*, as exercising the rights of the said Mr. *Peck*, the immovable property and the rights which the said late *Edward Scallon* had promised and obliged himself to sell to the latter by and in virtue of the said deed of deposit, cession and transfer of date of 16th

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March, 1865, of which immovables and rights the designation and description is given literally and verbatim in the said deed of cession, as also it is found in the said deed of the 10th July. 1858.

And in virtue of this title, the late Mr. *Scallon* obliged himself to sell 256 miles of limits for cutting timber upon the crown lands situated on the river *l'Assomption* and its tributaries *Black River* and River *Ducharme*, and as there exists a deficit of 50 miles to complete the said quantity of 256 miles ceded to the said Mr. *Theophilus H. Cushing* by the deed of deposit, cession, and transfer of the 16th March, 1865, the said Sieur *McConville*, for and in the name of those for whom he acts, wishing to complete the deficit which exists, has by these presents ceded and transferred, with warranty against all disturbances generally whatsoever, to the said Mr. *Theophilus H. Cushing*, hereto present and accepting, the said quantity of limits on the said river *l'Assomption* and designated as follows in the English language, to wit:

No. 25. 25 square miles. } Commencing at the upper end limit No. 94, on the south-west side of *l'Assomption* river, granted to late *Edward Scallon*, and extending five miles on said river and five miles back from its banks, making a limit of 25 square miles, not to interfere with limits granted or to be renewed in virtue of regulations.

No. 26. 25 square miles. } Commencing on the north-east side of *l'Assomption* river, at the upper end of limit 96, granted to late *Edward Scallon*, and extending five miles up the river and five miles back from its banks, making a limit of 25 square miles, not to interfere with licenses granted or to be renewed in virtue of regulations.

The licenses for the said quantity of fifty miles of limits for the years 1866 and 1867 have now been handed to the said Mr. *Cushing*, as he acknowledges and grants acquittance and discharge thereof to whom it shall appertain.

For the said Mr. *Cushing*, his heirs, assigns and successors, to enjoy, have and dispose of the whole as to him shall seem fit; to make operations and to cut timber in and upon the said limits at the charge of conforming himself in all respects to the rules and regulations to which the said limits may be subjected towards Her Majesty's Government in this province; as also to pay thereto all the dues that may be exigible for cutting timber on the said limits * * * Further, the said Mr. *Theophilus H. Cushing* declares that the said Mr. *McConville* for, and in the name of those for whom he is acting, has now paid him the sum of $500 currency for all claims generally whatsoever that he might have against the succession of the said late *Edward Scallon* and his legal representatives; declaring, more-

over, by these presents that he has nothing further to pretend or claim for any objects, causes, or reasons against the latter, accruing to him either from deeds or acts up to this day, giving them general and final acquittance and discharge.

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Now, with reference to this deed, it is to be observed that the allegation therein, that in virtue of this title the late Mr. *Scallon* obliged himself to sell 256 miles of limits for cutting timber, &c., is not a correct statement of the purport, tenor and effect of the deed of 1858, which is the only instrument containing the obligation which *Scallon* had in his lifetime entered into with *Peck* in relation to these timber limits. That instrument, as we have seen, only professed to sell and transfer, and did transfer to *Peck* and his assigns all the right, title and interest which *Scallon* had under and in virtue of the licenses therein enumerated, which professed to cover 256 miles of limits, and the operation of the deed of 1866 is to cede and transfer the licenses No. 25 and 26, and all the right, title and interest of the licensees therein named, under and in virtue of such licenses, to the limits therein described, to have and to hold the same to the use of *Cushing*, his heirs and assigns, so as, however, not to interfere with limits granted, or to be renewed in virtue of regulations to which, if any such there should prove to be, the licenses 25 and 26 were in express terms made subject.

The contention of the plaintiff is, that the words "with warranty against all disturbances generally whatsoever" being inserted in connection with the words "ceded and transferred, &c., &c.," operate as a warranty that the 50 miles of limits, as described in the licenses, had not, nor had any part thereof, been granted to any other person, and that no part of such limits was liable to be interfered with by any other person whomsoever. So to construe these words would be to subject the heirs of *Scallon* to an obligation which by the deed of 1858 they were not subjected to, and would make the

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guarantee to be altogether *sans cause*, as no cause, motive or consideration whatever existed for the heirs of *Scallon* to give any such guarantee.

The alleged interruption which is relied upon by the plaintiff as a breach of the warranty, construing it as the plaintiff construes it, shows how utterly absurd it would be for any vendor of these timber licenses to give such a guarantee. The interruption is alleged to have been made in virtue of a title conferred by a prior license issued from a wholly different office, and describing limits situate upon a different river altogether. The fact that the description inserted in licenses so issued might overlap each other was an event so probable from the manner in which the licenses are issued, that the Crown Land Department takes the precaution of drawing the attention of all licensees to the fact by inserting in express terms in every license the provision that they are liable to be interfered with by any prior license, if any there should prove to be, and by their regulations, which provide that in such case the subsequent licensee shall have no claim whatsoever against the government in respect of any such interference. Now, that any licensee, when selling one of these licenses, should give his guarantee that his license should not be interfered with by the owner of any previous license of the existence of which he was not and could not be aware, which in effect would be a guarantee that his license should not, in the hands of his assignee, be affected by the condition to which it was in express terms made subject, would be absurd in the extreme; but the insertion of such a guarantee in a deed executed by the heirs of *Scallon*, situate as they were in the present case, could be attributed only to ignorance or inadvertence; the only reasonable construction, therefore, which can be put upon the words "with warranty against all disturbances generally whatsoever" in the

deed of October, 1866, must be to limit their application to protecting the assignee of the licenses against all claims to the licenses themselves as the instruments conveying the limits therein described, and not as a guarantee that the assignee of the licenses shall enjoy the limits therein described, notwithstanding it should appear that they are interfered with by a prior license, to which they are, in express terms, contained in the license themselves, made subject; or, in other words, that while holding the limits under the licenses they shall be relieved from the effect of a condition which constitutes an express term, subject to which alone the license can be held.

For these reasons I am of opinion that the judgment should be sustained, and that the appeal should be dismissed with costs.

But assuming the deed of 1866 to be subject to the construction put upon it by the plaintiff, there was no sufficient evidence given of any breach of the guarantee, construing it as the plaintiff desires to have it construed. As to license No. 25, which was a substitute for 97, no question arises, for no interference with the limits described in it is pretended to have occurred. If any reliance is to be placed upon the map annexed to the printed case, it appears that the plaintiff himself, subsequently to the transfer to him of license No. 25, accepted from the Crown Land Department a license, numbered 37, which that map exhibits as encroaching upon part of the limits described in No. 25, but that is a matter of no importance in the present case. The plaintiff's claim is reduced to the alleged interference with the limits described in license No. 26, and no evidence whatever was given, which could affect the defendants, to show that *Hall*, the alleged claimant, had any prior license which interfered with the limits described in license No. 26, or that his licenses, which

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were admitted to be for limits upon the river *Matawin*, made those limits cross the height of land separating the watershed of that river from the watershed of the river l'*Assomption* and reach to the latter river; comprehending thus, not merely the additional width given to the limits described in license No. 26 over what had been described in license 98, but comprehending even the limits described n license 98, which was a subsisting license at the time when the license under which *Hall* acquired any rights was said to have first issued. What appeared in evidence was, that while the plaintiff was in possession and enjoyment of the limits described in license No. 26, and after he had cut a quantity of timber thereon, *Hall*, who claimed under a license issued to him for limits situate upon the river *Matawin*, whose watershed is wholly distinct from that of the river l'*Assomption*, claimed the timber so cut, as cut upon his limits, to which claim the plaintiff, notwithstanding a strong and almost violent presumption that such claim could not be supported, appears to have at once yielded, and to have paid *Hall* a trifling sum for the timber, trifling for the reason which constituted the strong presumptive evidence against his claim, namely, that being cut within the watershed and valley of the l'*Assomption*, by which alone the logs could be conveyed to market through lands covered by other licenses belonging to the plaintiff, to his mill at the mouth of the river, they were not available to *Hall*, whose mills were at the mouth of the *Matawin*, to which river the logs could not have been at all hauled, or if at all, not at a cost which would have warranted their being conveyed to that river, and so were useless to *Hall*. The plaintiff, as dispensing with evidence of the contents of *Hall's* license, and of the limits which it described, and of its being prior to the plaintiff's

license, and having precedence over it, relies upon a letter of the Commissioner of Crown Lands, dated 24th April, 1874, wherein he asserts that *Hall* had a license having priority over license No. 26, but this letter cannot deprive the defendants of their right to compel the plaintiff to prove, by legal evidence, an interruption of his possession by a superior title: true it is, that by the regulations of the department, subject to which the licenses are issued, the holders of the licenses for the time being are subjected to certain special provisions for determining disputes between contestants as to the right and position of berths or limits, but such special provisions being in derogation of the general law can only affect the parties actually contesting about the situation of the limits. There is nothing in the guarantee of the defendants, construing it as the plaintiff desires to construe it, which subjects them to any such mode of determining their liability. The matter relied upon by the plaintiff as a breach of their warranty must be established by evidence in accordance with the provisions of the general law; they have a right to insist upon strict legal evidence that the interruption was under superior title, and that, too, under the circumstances appearing in evidence, superior to the title granted, not only by license 26, but to that which had been granted by license 98, part of which is comprised in 26; and such evidence was the more important to be given in a case like the present, in which it appears that the plaintiff so readily submitted to the claim of *Hall*, made as it was, in the face of strong presumptive evidence against its validity. But, in truth, in whatever way the Commissioner of Crown Lands may have satisfied his mind of the matters asserted in his letter referred to, the evidence fails to show any proceeding to have been taken of the character of an investigation, which,

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under the provisions of the regulations in that behalf, was made binding on the plaintiff. There does not appear to have been any contestation between *Hall* and the plaintiff as to the boundaries of their respective limits brought under the notice of the proper authority by the statute and the regulations in that behalf authorized to decide between contestants.

The plaintiff submitted at once to *Hall's* demand. *Hall*, influenced, perhaps, by the fact that, if there were any more timber upon limit No. 26 (as to which there was evidence given by defendants calculated to create a doubt), he could not carry to his mill, or make it available, and, perhaps, doubting the goodness of his claim, and content with the easy success of his demand for the timber cut, or for some other reason, declined to become a party to any contestation with the plaintiff under the provisions of the regulations. The plaintiff took no steps to make him a party. The regulations provide that, as between contestants as to the right to berths or the position of bounds, the opinion of the surveyor of licenses at *Bytown*, or agent for granting licenses elsewhere, is to be binding on the parties, unless and until reversed by arbitration within three months after the notification of such opinion has been communicated to the parties or their representatives on the premises, or sent to their address, or by decision of court; and that the surveyor of licenses at *Bytown* and officer thereunto authorized elsewhere shall, at the written request of any party interested, issue instructions stating how the boundaries of timber berths should be run to be in conformity with existing licenses.

Now, there was no evidence whatever that anything of the nature here indicated occurred. There was, in fact, no evidence that anything was done which, by the special regulations in derogation of the general law, was made binding upon the plaintiff, or gave him an

opportunity to appeal from the decision as erroneous. There was, in short, no evidence of anything which could give to the letter of the Commissioner of Crown Lands the character of an adjudication binding upon the plaintiff, nor, *a fortiori*, upon the defendants, but even if the plaintiff was bound thereby, the defendants are not deprived of their right, when sued upon their guarantee, to insist upon strict proof of the breach relied upon, according to the course of the general law, wholly irrespective of the special regulations affecting owners of berths, by which regulations the defendants have not consented that any liability arising under their guarantee shall be governed. In a recent case, the Court of Appeal of the High Court of Justice in *England* (1) has held that, in the absence of special agreement, a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved in the action against him equally as it was necessary to have been proved against the principal debtor ; so in like manner, as it appears to me, the defendants in this action, upon their guarantee, are entitled to strict proof of *Hall's* title irrespective of anything which may have taken place between the plaintiff and him, which, as between them, could amount to an adjudication under the provisions of the regulations to which the licenses were subject.

It is unnecessary, in my opinion, to show, as could be readily done, that the plaintiff has offered no evidence entitling him to any damages, if his evidence had gone far enough to raise a question as to damages. In every particular necessary to the maintaining an action, plaintiff's case, in my judgment, fails.

There was evidence adduced by the defendants that at the time of the trial there was no valuable timber to

(1) *Ex parte Young* v. *Kitchen*, Weekly Notes, May 21, p. 80.

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be seen on limit 26. The plaintiff's counsel, however, contended that the plaintiff was entitled to recover what he gave for that limit, which, as he contended, was the limit 98, but the foundation of his claim is that he never got limit 98. If he had gotten it, he got all *Scallon* agreed to give; but assuming that the plaintiff is entitled to recover what he gave for 26, it having been taken as a substitute for 98, what the plaintiff gave for 98 is what he gave for 26, and when we look at the deed by which 98 was sold, we find not only that all *Scallon* agreed to sell was his right thereto, but that the price agreed to be paid and paid by *Peck* is stated to be for the mill, and its appurtances, and all *Scallon's* interest in the timber limits named, no sum being mentioned as the price of any of the limits, so that it is impossible to say what price, if any, in particular, was the price paid as the price of No. 98, or whether the limits were not all thrown in as having no special value apart from the mill, and its appurtenances.

Appeal allowed with costs.

Solicitors for appellant: *Beique & McGoun.*

Solicitors for respondent: *McConville & McConville.*