1948

OLE HANSON (PLAINTIFF) .....APPELLANT;

*April 29, 30
May 3
*Oct 5

AND

BERTHA CAMERON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Logging agreement provided time of essence—Default waived —Whether Court may declare contract subsisting and decree specific performance—Whether interest in land vests in holder of special timber license under Forest Act, 1912, B.C., c. 17 and/or his assignee.

The respondent, the holder of a special timber license issued under the provisions of the *Forest Act,* 1912, Statutes of B.C., c. 17, by an agreement under seal dated May 15, 1941, agreed to sell to the appellant all the merchantable timber upon the lands covered by such license. The appellant agreed to "log and/or pay for" not less than 4,000,000 feet board measure each year during the term of the agreement and to log the lands clean of all merchantable timber not later than May 15, 1945. The stipulated stumpage was to be paid on all timber cut and removed from the lands based on government scale in the boom as and when the logs were sold. It was agreed that if default were made by the purchaser, the vendor might by notice in writing demand such default be remedied, and should default continue for 30 days, terminate the agreement. Time was declared to be of the essence. The appellant did not log or pay for the stipulated quantity of timber in any of the first three years but respondent accepted payment for the quantity cut without protest. On April 13, 1945, however, the respondent gave notice of default and of her intention on continued default for 30 days to cancel the agreement. The appellant then tendered a sum sufficient to pay stumpage upon the merchantable timber remaining upon the limits based on a cruise made prior to the date of the agreement. This was refused and the appellant then paid the money into court and sued for specific performance.

Held: by the majority of the court, Locke J. expressing no opinion, that the parties by their conduct having waived the provision making time of the essence, the agreement should be declared subsisting and specific performance decreed, and the matter referred to the trial court to fix a reasonable time for performance.

(The principle laid down in *Kilmer* v. *B. C. Orchards,* [1913] A.C. 319 as explained in *Steedman* v. *Drinkle,* [1916] 1 A.C. 275 at 280 applied.)

Held: That the effect of the agreement was to create an interest in land. (*McPherson* v. *Temiskaming Lumber Co.* [1913] A.C. 145, followed.)

Per, Locke J., that the respondent acquired an interest in the land under the license and the appellant under the agreement, and neither such interest nor the agreement itself would *ipso facto* terminate if there were default either in cutting the timber, or alternatively, in making the payments within the time stipulated.

*PRESENT: Rinfret C.J. and Rand, Kellock, Estey and Locke JJ.

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Per, Locke J., that the parties should be held to have contemplated that if the purchaser elected to pay for any part of the timber not logged prior to May 15, 1945, the quantities would be ascertained by cruising and the judgment at the trial, directing a reference to the registrar to ascertain the amount standing or not removed following which the balance owing if any would be payable, should be restored.

APPEAL from the judgment of the Court of Appeal for British Columbia, (1), reversing (Sydney Smith J.A., dissenting), the judgment of Coady J. at the trial.

Alfred Bull K.C. for the appellant.

J. W. deB. Farris K.C. for the respondent.

The judgment of the Chief Justice and Kellock J. was delivered by:

KELLOCK J.:—Under the provisions of paragraph 6 of the agreement between the parties the appellant covenanted to commence putting logs in the water not later than August 15, 1941, and thereafter to "log and/or pay for" not less than 4,000,000 feet "each and every year during the term" of the agreement, subject to acts of God, strikes, breakdowns, fire or other causes beyond his control, and to log continuously the said lands and premises clean of all accessible and merchantable timber "not later than the 15th day of May, 1945". By the provisions of paragraph 28 time was expressly declared to be of the essence of the agreement and it was further provided that if the respondent should at any time "grant" any extension of time for the payment of any stumpage or other monies, such extension should not operate as a waiver on the part of the respondent of the provision as to time. The effect of the agreement as a whole was to create in the appellant an interest in land; *McPherson* v. *Temiskaming,* (2).

Until the early part of 1945 the parties paid no attention to the times fixed by the provisions of paragraph 6. The appellant logged considerably less than 4,000,000 feet per year, payment being made only for what had been logged and these payments were accepted by the respondent as and when made without any complaint. There was no request on the part of the appellant at any time for any extension of time and no "grant" of any extension by the respondent. The parties simply paid no attention to time

(1) [1948] 1 W.W.R. 733; [1948] 2 D.L.R. 512.

(2) [1913] A.C. 145.

so far as obligation to perform the contract was concerned. On April 13, 1945, however, the respondent served a notice purporting to be under the provisions of paragraph 26 of the agreement. Two grounds of default were alleged, as to one of which the learned trial judge has found there was no foundation in fact. The other ground specified was that the appellant had not "as agreed logged 4,000,000 feet during each year of the agreement". Under the agreement the appellant was not obliged to log 4,000,000 feet but to log and pay for that quantity or to pay for the quantity without having done the actual logging. I therefore agree with Robertson J.A., in the court below (1) in thinking that the notice was ineffective on the ground of its failure to specify a default within the terms of the agreement. I do not accept the argument advanced by Mr. Farris that the words "as agreed" are to be taken as meaning that the appellant had not paid for 4,000,000 feet and that the notice therefore meant that the appellant had not logged or paid for that quantity.

It is contended on behalf of the appellant that by reason of the non-observance by both parties of the provisions as to time provided by paragraph 6, time ceased to be of the essence. In *Kilmer* v. *British Columbia Orchards* (2), the respondent company had sold land for a price to be paid in instalments at specified dates with a forfeiture clause in default of punctual payment, time being declared to be of the essence. The first instalment was duly paid on the execution of the agreement but the second instalment and interest were not paid on the day fixed, and a new day for payment was set. Default being made the company refused to complete and brought action for a declaration that the agreement was at an end. The purchaser counter-claimed for specific performance. It was held that the action failed and specific performance was granted. As explained in *Steedman* v. *Drinkle* (3), the Privy Council reached its decision on the ground that when the vendor had submitted to postponement of the date of payment it could not "any longer" insist that time was of the essence and the provision for forfeiture was considered as a penalty against which equity would relieve. It is true that in *Kilmer's case* there was in question default with respect to one instalment only

(1) [1948] 2 D.L.R. 512.
(2) [1913] A.C. 319.
(3) [1916] 1 A.C. 275.

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and the question as to the effect of the postponement of one payment on the right of the vendor to insist on the provision as to time with respect to later instalments was not raised.

In *Steedman's case* Viscount Haldane in the course of his discussion of *Kilmer's case* said at page 280:

> As time was declared to be of the essence of the agreement, this could only have been decreed if their Lordships were of opinion that the stipulation as to time had *ceased to be applicable.*

Lower down on the same page he said what has already been quoted, in part, that:

> * * * when the company had submitted to postpone the date of payment they could not *any longer* insist that time was of the essence.

In *Barclay* v. *Messenger* (1), Sir George Jessel referred at page 354 to the conflicting views of Lord Cranworth, the Vice-Chancellor, and Lord Romilly, the Master of the Rolls, in *Parkin* v. *Thorold.* The judgment of the former is reported in 2 *Sim.*, 1, and of the latter in 16 *Beavin,* 59. Sir George Jessel said:

> There was no actual decision as to the effect of the so-called waiver upon the original contract, but the Vice-Chancellor had expressed an opinion that the mere giving of time, where time was of the essence of the contract, would have no effect except by extending the time; and the Master of the Rolls thought that having once extended the time, you had destroyed the essentiality of the condition altogether.

He went on to quote the comment of Lord St. Leonards upon the view of Lord Romilly as follows:

> * * * but the opinion of the Vice-Chancellor on the voluntary extension of the time seems to be right, for it can hardly be contended that if time be of the essence of the contract, an extension of it by one party for the convenience of the other can be considered operative beyond the further day named.

Sir George Jessel continues:

> It appears to me plain that a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time.

This view, however, has not been accepted by the Privy Council in *Steedman's case* which, on the contrary, is in conformity with the view of Lord Romilly to the extent that an extension of time with respect to a particular instalment destroys the essentiality of time with respect to that instalment at least.

(1) (1874) 30 L.T.N.S., 351.

In *Southby* v. *Hutt* (1), Lord Cottenham, L.C., said at page 621:

> The abstract of title was not delivered within the twenty-one days so that *no question* arises as to the time specified in these conditions of sale.

The authors of the 8th Edition of Dart at page 436 express the view that:

> * * * it is conceived that a waiver of time as respects matters (such as the delivery of the abstract, etc.,) which must precede completion, would, in general, amount to a waiver of the time (if any) fixed for completion. So, a vendor who receives and entertains the purchaser's requisitions, delivered after the time specified, waives his right (unless expressly reserved) to insist on the conditions as to time; and, as a general rule, either party relying on time being essential as a defence to an action for specific performance, should take the point promptly.

In *Boyd* v. *Richards* (2), Middleton J.A., acted on a similar view and granted specific performance. In *Korman* v. *Abramson* (3), Rose J., as he then was, reached a contrary conclusion but without any analysis of the authorities. I find myself unable to accept the view of Rose J. In my opinion on the present state of the authorities the expressions from the judgment in *Steedman's case* which I have cited should be taken in a general sense, unless and until the Privy Council should rule otherwise.

I therefore think that the conduct of the parties in the present case was such as to make the provision for complete logging by May 15, 1945, no longer of the essence of the contract. I would allow the appeal and refer the matter to the trial court to fix a reasonable time for the performance of the contract in view of all the circumstances, including the bringing of action and the injunction granted therein which affected due performance of the contract by the appellant. The appellant should have his costs throughout.

RAND J.:—By a contract under seal entered into on May 15, 1941 the appellant, as purchaser and the respondent, the owner of a timber license covering certain lands on Cracroft Island, British Columbia, as vendor, agreed to buy and sell "all the accessible merchantable timber" on the lands, subject to the conditions of the license and the terms of the contract. The purchaser was given "full right, liberty and authority" to enter upon the lands and "to fell, buck

(1) (1837) 40 E.R. 619.
(2) (1913) 29 O.L.R. 119.
(3) (1921) 49 O.L.R. 9.

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and carry away *all timber* thereon"; "and was to pay stumpage upon timber *cut and removed* from the lands as the purchase price thereof" at the rate of $2.00 a thousand feet board measure for cedar and 90c for all other varieties, based on the official scaling, as and when the logs should be sold. A down payment of $500 was to be made and an additional $1.00 for each thousand on the first 1,500,000 feet, to serve as a deposit of $2,000 to be applied against the last 2,000,000 feet removed. Logs were to remain the property of the vendor until paid for, but the purchaser was free to sell in the ordinary course of business.

The purchaser covenanted that he would commence putting logs in the water not later than August 15, 1941 and would "thereafter *log and/or pay* for not less than 4,000,000 feet board measure, British Columbia log scale, *each and every year* during the term of this agreement, subject to the acts of God, strikes, breakdowns, fire, or other causes beyond the control of the purchaser", and would "log continuously the said lands and premises clean of all accessible and merchantable timber" not later than the 15th day of May, 1945. A proviso entitled him to shut down logging operations for such time as the price of camp run cedar logs should be below the price of $11 a thousand feet, but they should be reopened and continued so soon as the market price should reach $11. Any excess in the footage produced in any year could be applied to a shortage in subsequent years.

The purchaser was to provide for the scaling in the booms at Cracroft Island if practicable; otherwise at the point of delivery of the booms. The scale bills were to be delivered to the agent of the purchaser in Vancouver who was to sell the logs and pay the stumpage price to the vendor, to whom copies of the bills were to be furnished.

The vendor was to be kept informed of the course of operations, to have the right at all reasonable times to examine the logging records and camp scale, and "to enter upon the said lands for the purpose of inspecting and surveying the said timber".

The purchaser was to take precautions against fire. Any timber destroyed by this cause through his negligence was to be paid for as soon as the quantity had been determined by an official survey. Any timber damaged by fire was

either to be logged or paid for as and when the quantity should be similarly ascertained. In case of loss during transportation or before scaling, the amount was to be determined by a comparison with the next two previous booms scaled in the booming ground.

Then two clauses, 25 and 26, dealt with power to terminate. Under the first, on default in the payment of any moneys "strictly on the days and times and in the manner specified", or in respect of any of the "covenants, stipulations or agreements", and failure to remedy the breach within thirty days after notice in writing, the purchaser was forthwith to "cease to have the right to cut or remove any further timber from the said lands and logging operations shall immediately cease and the purchaser shall not be entitled to sell, remove, pledge or otherwise dispose of any timber or logs cut from the said lands or any part thereof." A receiver might be appointed by the vendor who would be "entitled to *take possession of the said lands and premises*".

Clause 26 declared that if default in any of the "covenants, provisos, terms or stipulations" should continue for thirty days after written notice, specifying the default and the vendor's "intention to cancel this agreement", the agreement should be void and of no effect and the vendor should be at liberty to sell "the said lands and premises and logs" for her own use and benefit. In such event, the purchaser was to *deliver up possession of the lands* but would have no claim against the vendor who was to be deemed to be the owner and entitled to the possession of all the logs or products which at the time of the default had not been sold.

Finally, time was expressly declared to be of the essence in respect of "all payments to be made and all conditions, provisos and stipulations to be observed and performed".

The purchaser at once entered upon the operation. The land was a rough area suitable only for timber, but apparently not unusually difficult for logging purposes in that section of the Province. A main logging road with half a dozen bridges was built at a cost of approximately $15,000 and houses and works put on the lands brought the total initial outlay near $25,000. The quantity logged and sold in the first contract year was 328,000 feet; for the second

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year, 2,249,760 feet; for the third, 1,798,757 feet; and to May 15, 1945, 1,400,239 feet, making a total for the four years of 5,776,979 feet. On the last date there were between 1,500,000 and 2,000,000 feet of logs cut and lying on the lands. Thereafter and until June, 1947, the quantity scaled amounted to 3,354,594 feet. Operations were continued until the judgment of the Court of Appeal in March, 1948, but the quantity logged or scaled does not appear.

The evidence indicated that from the commencement the purchaser had trouble in getting and keeping workmen. A normal logging crew would be about sixteen men, but only for two short periods was that number reached. There was difficulty also in obtaining repairs to equipment. But it is clear that the purchaser was a competent logger and had carried out the work efficiently.

Although for the first three years the minimum of 4,000,000 feet had been neither logged nor paid for, no complaint was made by the vendor. The stumpage during those years and up to January, 1945 was paid in the regular way upon the sale of the timber and was accepted without demur.

Early in April, 1945, the husband of the vendor, acting for his wife, a few days after intimating to the purchaser's agent for the first time his dissatisfaction with the operations, met the purchaser and the agent and informed them of the vendor's intention to cancel. The purchaser at once by letter declared his willingness to pay in cash the entire stumpage on the basis of a cruise of the lands made in 1933 which the trial judge found had been the general basis in the negotiations and according to which there was then on the land approximately 16,350,000 feet of lumber, and to pay any additional stumpage the completed operations might show to be owing. This offer was rejected and on April 13, the following notice was given:—

Pursuant to the terms of an agreement dated the 15th day of May, 1941, between BERTHA CAMERON as Vendor and yourself as Purchaser you have made default in the covenants, provisos, terms, conditions or stipulations of the said agreement in the following respects, namely:

1. You have not as agreed logged 4,000,000 feet board measure, British Columbia log scale in each and every year during the term of the said agreement including the year 1944.

2. You have not logged continuously nor clean the said lands and premises of all accessible and merchantable timber, as you went along. If such default shall continue for a period of thirty days after notice

shall have been given to you it is my intention to cancel the said agreement and in accordance with the terms of the said agreement the same shall be void and of no effect.

During those thirty days, letters passed between solicitors and on the 13th of May there was tendered to the vendor the sum of $15,276.05, representing the calculation of stumpage then remaining unpaid according to the 1933 cruise, amounting to $15,705.50, plus 10 per cent, less the $2,000 then being held by the vendor. The tender was refused and a writ issued on the following day claiming specific performance and other relief, and bringing into Court the sum of $13,705.50, representing the outstanding stumpage, $15,705.50 less the same $2,000. This was accompanied by a declaration of willingness by the purchaser to bear the cost of a cruise to ascertain the exact balance of stumpage.

The trial judge, finding that there had been no default as claimed in the second paragraph of the notice, held the first, construed by him to be limited to default up to May 15, 1944, had been cured by the tender and offer; he therefore decreed as claimed and referred it to the District Registrar to ascertain the amount, if any, to which the defendant might be entitled by way of further payment for the accessible merchantable timber.

On appeal this judgment was reversed (1), the action ordered to be dismissed, and judgment on the counterclaim entered for damages for trespass and for logs cut or removed from the lands after May 15, 1945. Sloan C.J., assuming erroneously that the question of the validity of the notice had not been raised in the Court below, held the default could not be cured by a tender of money, and that the trial judge in effect rewrote the contract by substituting for the ascertainment of the price by scaling, an estimation by cruising. Robertson J.A., while finding the notice defective in treating the obligation of the purchaser to be that of logging merely without the alternative mode of payment, and because of the reference to the year 1944-45, not yet elapsed, was of the opinion that no property interest arose until the timber had been cut and removed, and that the real sale was of such logs only as the purchaser might cut and remove before May 15, 1945. Smith J.A. dissented and would have affirmed the trial judgment. He held the

(1) [1948] 2 D.L.R. 512.

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provision regarding time to have been waived and the parties to have been remitted to the ordinary rules of equity relating to that factor.

The license had originally issued in 1913 and came under the provisions of the *Forest Act of 1912,* which made it transferable and renewable from year to year while there should be on the land merchantable timber in sufficient quantity to make it commercially valuable. By section 18, there was vested in the holder "all rights of property whatsoever in all trees, timber and lumber cut within the limits of the license during the term thereof, whether the trees, timber and lumber are cut by the authority of the licensee or by any other person with or without his consent." He could seize any such trees or timber in the hands of an unauthorized person and also "institute any action against any wrongful possessor or trespasser and to prosecute all trespassers and all offenders to punishment, and to recover damages (if any)." These powers, together with the right of perpetual renewal, undoubtedly create an interest in the land: *McPherson* v. *Temiskaming Lumber Company* (1); and it was the beneficial interest in them, including, as between the parties, the right of possession, which when realized would exhaust the license, that was conferred on the purchaser: the retention of the legal title to the license and the logs was only for security purposes. The purchaser therefore likewise acquired an interest in land.

I agree with Robertson J.A. that the notice given was defective. The first item alleging failure to log does not specify a default under the contract; and the reference to the year 1944, by its ambiguity, strikes it likewise with a fatal infirmity; and the second item was found against the respondent.

I think, also, with Smith J.A., that the provision as to time was waived. It was purely formal. The indulgence to be given to the purchaser through delay in strikes and other causes beyond his control as well as the specific right to cease operations pending the adjustment of the price of cedar show beyond doubt that time was not in fact of the essence; and the acceptance in each of three years of less than one-third of the stumpage the contract called for and the affirmation of the contract up to January, 1945,

(1) [1913] A.C. 145.

relieve the Court from the coercive effect of the formal stipulation: *Steedman* v. *Drinkle* (1). Even, then, had the notice of cancellation been effective, the Court would be free to apply its ordinary rules as to time and relief from forfeiture in specific performance.

In the covenant to "log and/or pay for" not less than the minimum in each year, the word "pay" must be taken as a supplementary mode of performance in payment, though incapable by itself of being definitive, which the purchaser had the right to employ. And on its further requirement to log the land "clean" not later than May 15, 1945, two observations are to be made: taking the word "log" to extend to removal from the lands, the obligation does not include payment: and since the purchaser may pay in each year, he may do so in the last year, which implies that the logging may not be completed although in fact fully paid for.

The right to enter and remove was subject, as to the vendor, "to the payment of the stumpage and other moneys as hereinafter set forth", but to no other provision. Apart altogether from any right of removal attached by law, this is a power coupled with an interest or a license annexed to a title and in the absence of qualification is irrevocable. Nowhere in the contract is that right of removal rendered controllable or conditioned except under the forfeiture clauses by notice, in the absence of which the right continues in full efficacy; but as security against delay in realizing the value of all the timber, which was the primary object of the vendor, were the obligation to log and the power to terminate.

The amount offered by the purchaser on the threat of cancellation, greater than any sum then due, the vendor was bound to accept under the minimum clause and the promise for the balance was what the contract itself provided. Acceptance of it would have left only a small quantity of logs unpaid for. It is pertinent to the time for paying this balance, that the counterclaim, which the Court of Appeal has allowed, was not delivered until approximately eighteen months after the commencement of the action, during which time the purchaser continued operations. Although there was the tender and later money

(1) [1916] 1 A.C. 275.

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brought into Court, from the first interview in April to the present appeal he has asserted his readiness and willingness in this somewhat involved situation to do whatever was incumbent upon him as a condition of the equitable relief sought. I agree that the Court cannot substitute a cruise of standing timber for the scaling of logs in boom to ascertain the total price; and the purchaser must perform substantially the entire obligation assumed by him: from this it follows that he must fulfil the covenant to log the lands clean within such time as under all the circumstances would be just and equitable.

I would, therefore, allow the appeal and direct the following judgment:—

1. Declare the contract to be subsisting.

2. Declare the money in Court, subject to the payment of costs, to be payable out to the respondent to apply on the purchase price as from the date of payment in.

3. Restrain the respondent from interfering with the logging operations or from taking any further action on the contract otherwise than as allowed herein before such date to be fixed by the trial Court for the completion of the logging and it is referred back to that Court for such purpose.

4. The foregoing to be without prejudice to any claim for damages on the covenant to log or pay the minimum in each year and to complete in four years, to be made on a reference or by action.

5. Liberty to apply.

The appellant should have his costs throughout.

ESTEY J.:—The appellant asks specific performance of an agreement under which he purchased from the respondent all the accessible merchantable timber situated upon Timber License No. 11943 being Lot 532, Range 1, Coast District, B.C.

The agreement, dated May 15, 1941, was subject to the conditions contained in the license from the Crown and to the appellant paying all rents, royalties, taxes and fire protection fund charges. It provided that appellant would pay as the purchase price thereof stumpage as follows:

For all cedar logs, at the rate of two dollars ($2.00) per thousand feet board measure,

For all other species of timber, at the rate of ninety cents ($.90) per thousand feet board measure.

The learned trial judge found that the agreement was made upon the basis of the Eustace Smith cruise of the premises, made in November 1933, which disclosed a total of 18,511,000 board feet of accessible merchantable timber. Since then and prior to this agreement, 2,124,275 board feet had been logged by a third party, leaving 16,386,725 board feet upon the premises.

Paragraph six of the said agreement reads:

> 6. The Purchaser covenants and agrees with the Vendor that he will commence putting logs in the water not later than the fifteenth day of August, 1941, and will thereafter log and/or pay for not less than Four Million feet board measure British Columbia log scale, each and every year during the term of this agreement, subject to the acts of God, strikes, break-downs, fire, or other causes beyond the control of the Purchaser, and will log continuously the said lands and premises clean of all accessible and merchantable timber as hereinbefore defined not later than the fifteenth day of May, 1945. PROVIDED ALWAYS that the Purchaser shall be entitled to shut down his logging operations for such time as the price of camp run Cedar logs shall be below the price of Eleven Dollars ($11.00) per thousand feet board measure British Columbia log scale on the Vancouver market, according to the British Columbia Loggers' Association price, but shall re-open and continue logging so soon as the market price thereof shall reach the sum of Eleven Dollars ($11.00).

Notwithstanding the foregoing provisions that the appellant would commence putting logs in the water not later than August 15, 1941, log and/or pay for not less than 4,000,000 feet in each year and log continuously, he had logged up to April 15, 1945, but 5,776,979 board feet and paid the purchase price therefor to the respondent in the sum of $9,383.26.

This $9,383.26 was paid in relatively small amounts as the timber was scaled and sold during the currency of this agreement so that when, on April 13, 1945, the respondent gave her notice of cancellation all the lumber logged had been paid for in full and she had also the deposit of $500 and the additional deposit of $1,500. These deposits were required under the terms of the agreement and to be applied on account of the purchase price or stumpage as hereinafter set out.

These payments covering the purchase price of the timber logged were accepted, and while inquiries as to why more was not being logged were made from time to time, there was never a complaint until the respondent's husband, who acted as her agent throughout, in April 1945 (the exact

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date is not disclosed) told the appellant that as he had not fulfilled his obligations under the agreement, he (the husband) expected to receive instructions to give notice terminating the agreement.

On the same date, and as a result of that interview, the appellant wrote the respondent in part:

> I do refer you to clause 6 of the agreement which provides for deferment of payments for reasons including causes beyond my control, and it would be a very simple matter for me to establish that the difficulties of labour, equipment, etc., has made it impossible for me to log these limits any faster than I have done.

And he further pointed out that on two occasions he was required by the Government Forestry Department to discontinue operations because of danger of fire. Then, after making reference to his investment in roads and other expenditures, he stated:

> I write to inform you that I have made arrangements to provide for payment in full of the timber which you have sold to me by the 15th of May next, and thus, irrespective of the difficulties of this operation, you will be paid as you contemplated.

He further stated that he proposed to tender the full amount due on May 15th and "If, as and when the scale bills establish that there is more timber logged from the property than the 16,000,000 feet anticipated, I undertake to pay for any such excess timber at the contract rate."

The respondent's solicitor acknowledged the letter under date of April 13, 1945, stating that under the terms of the agreement he was giving the notice of cancellation and that in any event, the agreement would terminate on the 15th of May, 1945, when logging operations by the appellant must cease and the respondent would take possession. In fact the respondent gave notice of cancellation on April 13, 1945, which reads:

> Pursuant to the terms of an agreement dated the 15th day of May, 1941, between Bertha Cameron as Vendor and yourself as Purchaser you have made default in the covenants, provisos, terms, conditions or stipulations of the said agreement in the following respects, namely:
>
> 1. You have not as agreed logged 4,000,000 feet board measure, British Columbia log scale in each and every year during the term of the said agreement including the year 1944.
>
> 2. You have not logged continuously nor clean the said lands and premises of all accessible and merchantable timber, as you went along. If such default shall continue for a period of thirty days after notice

shall have been given to you it is my intention to cancel the said agreement and in accordance with the terms of the said agreement the same shall be void and of no effect.

Dated at Vancouver, British Columbia, this 13th day of April, A.D. 1945.

Bertha Cameron.

This notice, as held by Mr. Justice Robertson, was ineffective in that there was no covenant in the agreement to log 4,000,000 feet board measure per year but rather to log and/or pay for 4,000,000 feet board measure, and in respect to the second default that was found in fact not to exist by the learned trial Judge.

The respondent in her statement of defence alleges a further default in that the appellant had not logged the said lands and premises clean of all accessible and merchantable timber by the 15th of May, 1945.

The foregoing indicates that the appellant realized his default and because of the thirty-day period he could only remedy that default by making payment under the alternative method of performance provided under paragraph six. The giving of the foregoing notice was followed by interviews and correspondence throughout which the appellant offered to pay or make such settlement as would remedy his default. Nothing came of this effort and on May 11, 1945, the appellant's solicitor wrote explaining his proposed tender of $15,276.05 and concluded:

We wish to make it clear past doubt that Mr. Hanson is ready, able and willing to satisfy any proper claim Mrs. Cameron has under the agreement of May 15, 1941.

The tender of the said sum of $15,276.05 was made on May 12, 1945, within the thirty-day period fixed by the notice of April 13th, and was refused. This sum of $15,276.05 was computed by accepting the figures of the Eustace Smith cruise deducting the amounts logged, leaving 10,609,746 board feet divided as follows:

Cedar	5,506,116 feet @	$2.00 per M.	$11,112.23
Other Species	5,103,630 feet @	.90 per M.	4,593.27
			$15,705.50

Then he added 10 per cent as an allowance for any error in favour of the respondent in the said cruise and deducted the deposits in the sum of $2,000.

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This action was commenced on May 14, 1945, asking *inter alia* a declaration that the agreement is valid and subsisting, for specific performance thereof, an injunction restraining the respondent from interfering and paying into Court the sum of $13,705.50 with an undertaking to pay the cost of a cruise and of any additional amount found to be thereby owing.

The respondent pleaded default on the part of the appellant in that (*a*) he did not log and/or pay for not less than 4,000,000 board feet in each year; (*b*) he did not log the premises continuously and clean of all merchantable timber by May 1945; (*c*) he did not log the premises clean of all merchantable timber as he proceeded and because of which the value of the said lands and timber had been impaired and decreased; and further that time was expressly of the essence in respect of all payments, conditions and provisos; and that respondent gave notice of cancellation dated April 13th, terminating the agreement, and that, in any event the agreement terminated by virtue of its terms by April 1945; that, under all the circumstances, the appellant was not entitled to relief from forfeiture. The respondent also counterclaimed asking a declaration that the said agreement was null and void, an injunction restraining the plaintiff from further cutting and removing the timber, and for possession of the said lands and premises and damages.

The learned trial Judge found that, under the circumstances, the appellant had not made a default under his covenant to log continuously and clean, but did find that the appellant had made default in that he did not log and/or pay for 4,000,000 board feet in each year. The evidence supports these findings of facts. Therefore the essential issues are whether the appellant had under the terms of the agreement the right to remedy his default, and if so, did he by his tender and payment in Court effect that remedy.

This is an executory agreement of sale of timber with a covenant that the logging should be completed within a specified period rather than a sale subject to a condition that the logging should be completed in a specified time. The vendor might in such a case be entitled to damages

but no evidence was here adduced and the learned trial Judge stated "no such claim for damages is before me for consideration."

The provisions of this agreement indicate that the parties contemplated, subject to the contingencies therein provided for, including causes beyond the control of the appellant and the price of cedar falling below $11 per thousand feet, continuous logging operations on the part of the appellant. If, however, in any year he should not log 4,000,000 board feet, then after allowing for any excess in a previous year, his obligation was to make up the difference by a payment in cash.

The appellant had paid the deposits as aforesaid, and commenced his logging operations on or before the 15th day of August, 1941. He logged very little the first year, a little more the second year, and had in fact, when the notice of cancellation was served, logged about one-third of the estimated accessible and merchantable timber, and had made the payments thereto from time to time throughout the currency of this agreement.

The parties, by paragraph twenty-eight, provided "Time is expressly declared and stipulated to be of the essence of this agreement in respect of all payments to be made and all conditions, provisos and stipulations to be observed and performed."

> Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach. Viscount Haldane, *Steedman* v. *Drinkle,* [1916] 1 A.C. 275 at p. 279.

The respondent—with full knowledge of the defaults on the part of the appellant—has accepted in each year the purchase price of the timber logged, and the appellant's explanations as to why he was not logging larger quantities. The giving of the notice on April 13, 1945, though ineffective as such, was an admission on the part of the respondent that she regarded the agreement as current and subsisting, and thereby indicated to the appellant that the provision

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making time of the essence had been waived. *Fong* v. *Cooper* (1). The conduct of the respondent has therefore been such that it justifies the implication of an agreement waiving the provision making time of the essence. *Kilmer* v. *B.C. Orchard Lands Ltd.*, (2); *Brickles* v. *Snell* (3); *Simson* v. *Young* (4).

If, therefore, the appellant has by his tender and payment into Court remedied his default, it would seem that he is entitled to a declaration that this agreement is valid and subsisting and that a reasonable time be fixed for its performance.

On May 12, 1945, within the thirty-day period fixed by the respondent in the notice of April 13th, the appellant tendered $15,276.05 which the respondent refused and in this action with his claim for specific performance he paid into Court the amount of $13,705.50. The respondent contends that no valid tender has been made because: (*a*) it was made after the cancellation of the said agreement; (*b*) that the amount tendered was insufficient to pay for all the accessible merchantable timber; (*c*) that the amount did not include any sum for damages prior to May 1945.

The agreement contemplated such a payment as one method of remedying a default of the type here in question within the thirty-day period, and I agree with the learned trial Judge that there is, therefore, no merit in the first objection. As to the third, even if such an objection might well be taken in an appropriate case, the respondent while alleging damages, has not tendered any proof thereof and therefore we can only conclude that no damages have been suffered.

The amount of $15,276.05 as tendered on May 12th was made up as herebefore stated. Previously and probably on May 3rd, the appellant's solicitor called upon the respondent's solicitor and left with him a recapitulation of this amount as tendered, and the following day confirmed this by a letter dealing with the figures and showing the computation of the amount tendered as well as the amount of $13,705.50 paid into Court. This latter sum is the $15,705.50 being the purchase price of the timber still to be logged, computed as above, less the $2,000 paid as deposits.

(1) (1913) 5 W.W.R. 633 at 637.
(2) [1913] A.C. 319.
(3) [1916] 2 A.C. 599.
(4) (1918) 56 S.C.R. 388.

The contract makes no provision for the computation of the amount sufficient to pay in any year for 4,000,000 board feet or any balance thereof. As both cedar and other species were logged and paid for at different rates, it made this computation rather difficult. It is therefore reasonable to conclude that inasmuch as the agreement had been negotiated on the basis of the Eustace Smith cruise that the parties, had they provided for such a computation, would have specified that it should be made on the basis of the information in that cruise. In fact the appellant has arrived at his figures on that basis.

> There may be many possibilities within the contemplation of the contract of charter-party which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence. Per Lord Watson in *Dahl* v. *Nelson, Donkin & Co.* (1).

With the greatest respect for the opinion of the learned judges who have expressed a contrary view, this tender does not vary or alter the basis for payment as specified in the contract. It is there provided that payment shall be made when the said logs are sold by the purchaser and on the basis of the Government scale. The $500 deposit and the $1,500 additional deposit were, by the express provision of the agreement, to be applied on account of payment of the last 2,000,000 feet of logs to be removed. The same should be implied with respect to any payments in cash on account of the 16,000,000 feet. Under this agreement the parties contemplated the actual logging of the timber, and any payment in cash made under the three above-mentioned headings should be applied on account of the purchase price as determined by the Government scale as and when logged.

The appellant made his computation on the basis that there were 16,386,725 board feet of accessible merchantable timber upon the premises and he therefore did not restrict or limit his tender or payment into Court to the 16,000,000 feet which he was required to pay for within the four year

(1) 1881 6 A.C. 38 at 59.

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period. His tender is therefore sufficient in amount and possibly larger than required to remedy his default. A tender of too large an amount does not invalidate the tender, *Dean* v. *James* (1); *Benjamin on Sales*, 7th ed., p. 813. It was unconditional and sufficient.

There was no obligation on the appellant to pay or offer to pay for another cruise and his doing so was but further evidence of his desire to complete the contract. It was not suggested that his preparation involving a considerable investment upon the premises for the logging operations contemplated by the agreement were inadequate. In fact, throughout, the evidence discloses that the appellant has consistently disclosed both the desire and ability to perform his obligations under the contract.

The appellant is therefore entitled to a declaration that the said agreement dated May 15, 1941, is valid and subsisting and to a decree that the same be specifically performed within a reasonable time. The judgment of the learned trial Judge, so far as it so directs, should be restored. The case should be remitted back to the learned trial Judge to determine what, under the circumstances, might be a reasonable time within which the appellant might be permitted to perform his agreement.

The appeal should be allowed with costs.

LOCKE J.:—By the special timber license, the ownership of which was vested in the respondent, she was authorized "to cut, fell and carry away timber upon all that particular tract of land" described in the license. The term was for a period of one year from March 12, 1913, and it was stated to be renewable from year to year, as provided by the statute. Sec. 18 of the *Forest Act, cap.* 17, Statutes of British Columbia, 1912, reenacted sec. 95 of the *Land Act, cap.* 129 R.S.B.C. 1911, and declared that such a license vested in the holder thereof "all rights of property whatsoever in all trees, timber and lumber cut within the limits of the license during the term thereof, whether the trees, timber and lumber are cut by authority of the licensee, or by any other person with or without his consent" and entitled the holder thereof to seize any such trees, timber or lumber found in the possession of any unauthorized

(1) (1833) 4 B. & Ad. 546.

person and to prosecute "all trespassers and other offenders to punishment, and to recover damages (if any)". The sections of the *Land Act* and of the *Forest Act* referred to may be compared with sec. 3 of the *Crown Timber Act* of Ontario considered in the judgment of the Judicial Committee in *McPherson* v. *Temiskaming Lumber Co. Ltd.* (1), and while the British Columbia statutes do not in terms state that the licensee shall have the right to take and keep exclusive possession of the lands subject to the regulations, the effect of the license granted and of the sections of the statute was to vest that right in the licensee. That the right thus acquired by the licensee is an interest in land is determined by the judgment of the Judicial Committee in *McPherson's case* and it may be noted that in *Glenwood Lumber Company* v. *Phillips* (2), where the effect of a license granted by the Government of Newfoundland giving an exclusive right to occupation of lands and the right to cut timber and carry it away, though subject to certain reservations or to a restriction of the purposes for which it might be used, was considered, Lord Davey said that it was in law a demise of the land itself. It was, in my opinion, an interest in land that was the subject matter of the sale entered into between the parties to this action on May 15, 1941. By it the respondent agreed to sell to the appellant who agreed to purchase all the accessible merchantable timber upon the timber license and the appellant was authorized to enter into possession for the purpose of felling and removing the timber, subject to the terms and conditions of the license. It is clear from the agreement that what was intended was that the appellant as purchaser should have the same exclusive right of possession of the lands covered by the license as had been granted to the respondent by the license from the Crown. The right to possession and the right to cut and remove timber might be suspended in the manner provided by the first of the default clauses in the agreement, in which event the respondent was to be entitled to appoint a receiver to take possession of the lands, and both rights might be determined in the event of certain defaults under a cancellation clause which provided, *inter alia,* that upon the termination of the agreement under its provisions the purchaser should

(1) [1913] A.C. 145 at 151. (2) [1904] A.C. 405 at 408.

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deliver up possession of the lands and premises to the vendor. While by the terms of the agreement title to the timber felled on the limit was not to pass to the purchaser until the agreed stumpage and royalty charges had been paid, the purchaser, in my opinion, acquired under the agreement an equitable estate in the interest in land which was the subject matter of the sale and became in the eyes of a court of equity the real beneficial owner, the vendor being a trustee of such interest for him (*McKillop* v. *Alexander* (1), Anglin J. at 578; *Shaw* v. *Foster* (2). Neither such interest nor the agreement itself would *ipso facto* terminate if there were defaults either in cutting the timber or alternatively making the payments within the times stipulated.

I think it is apparent from the terms of the agreement providing that the purchaser would "log and/or pay for not less than four million feet board measure British Columbia log scale each and every year during the term of this agreement" that, contemporaneously with the making of the agreement, the parties had ascertained to their satisfaction the quantities of the various species of merchantable timber that were to be found upon the limit. If this were not so it is not easy to understand how the payment or the aggregate of the payments which the purchaser was permitted to make in lieu of logging four million feet a year was to be determined. The learned trial Judge upon conflicting evidence found as a fact that a cruise of the timber made by Eustace Smith, a well-known timber cruiser, was the basis upon which the parties dealt. This had been made some years before and some of the timber had been logged in the interval but, as the cruise showed the quantities of each of the species of timber and the records obtainable from the Forest Branch showed the exact quantity of each species which had been cut and removed, it was possible to ascertain the amount remaining upon the limit. Assuming the accuracy of the Smith cruise, there remained as of the date of the agreement 16,386,726 feet. With this information available it appears that the respondent was satisfied with an arrangement whereby the purchaser would log or pay for not less than four million feet board measure in each year of the term, since this would

(1) (1912) 45 S.C.R. 551. (2) (1872) L.R. 5 H.L. 321 at 338

ensure that in a period of four years the timber, with the exception of a small quantity, would be either logged or otherwise paid for. Whether the option to "log and/or pay" for this quantity in each year would have permitted the purchaser to pay for that quantity of timber and refrain from logging, or whether the further provision of the same clause whereby the purchaser agreed to "log continuously the said lands" required him to carry on logging operations continuously in any event and pay for any deficiency in the required yearly quantity, need not be determined in view of what transpired between the parties.

The learned trial Judge has found that the appellant did in fact carry on logging operations continuously and, though the required annual total was not reached in this manner, the appellant might remedy this by paying for the difference between the amount cut and such total in each year. While the agreement thus permitted the appellant to pay for any such deficiency it did not specify the rate of such payment for timber paid for but not cut and this appears to me a clear indication that what the parties contemplated was that this should be determined by the Eustace Smith cruise. This showed that as of May 14, 1941, there remained standing upon the limit a total of 6,625,612 feet of fir, hemlock and balsam and 9,761,913 feet of cedar. For any deficiency below four million feet board measure the purchaser might have paid the lower stumpage rate of 90 cents until either by logging or by payment the above amount of fir, hemlock and balsam had been paid for, and thereafter the higher rate upon cedar would be payable. Had there not been such a cruise available and had the parties not dealt on the basis that it was at least a reasonably accurate estimate of the timber on the limit, it seems apparent that the vendor would not have agreed to this alternative means of payment. The value of the limit to the respondent lay entirely in the timber and upon its removal possession of the land was of no further value: what she was concerned with was to obtain payment for the timber within the four year period in either one of the methods specified by the contract and the recovery of possession of the lands on that date was of no moment. The evidence showed that up to May 12, 1945, the appellant had cut and removed and paid for 4,254,997 feet of cedar

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and 1,521,982 feet of the other species, leaving either standing upon the limit or felled and bucked and not removed 10,609,746 feet consisting of 5,506,116 feet of cedar and 5,103,630 feet of other species according to the Smith cruise, and it was stumpage upon these quantities at the contract rate, plus an added amount of ten per cent thereon to allow for any under-estimate in the cruise, which the appellant endeavoured to pay to the respondent in advance of the commencement of the action. The total of all species for which the appellant had paid and attempted to pay was the 16,386,726 feet which the cruise had shown to be upon the limit at the time the agreement was entered into and the appellant gratuitously added to this the further amount, apparently in the hope of bringing about an amicable settlement. In my view, what the respondent attempted to do was exactly what both parties must have contemplated would be done if the purchaser elected to log part of the timber and pay in cash for the balance. Since the amount to be paid annually to make up for any deficiency in the timber logged was apparently to be computed on the basis of the species and quantities as shown by the Smith cruise and not by scaling, I consider it must be held that the parties contemplated that if the purchaser elected to pay for any part of the timber which was not logged prior to May 15, 1941, the quantity remaining, which clearly was ascertainable by cruising, would be so ascertained. This was the reasonable method proposed by the solicitor for the appellant on his behalf and while I agree that the Court cannot be asked to make a contract for the parties a court of equity exercising its jurisdiction in specific performance may properly direct the ascertainment of the quantities in a case such as this in the manner ordered by the learned trial Judge. The word "tender" seems to me to be a misnomer for what was attempted to be done on behalf of the respondent. It is true that the letter of May 11, 1945, written by the solicitor for the appellant stated that the bearer had instructions to tender the sum of $15,276.05 in full of the purchase price of the timber and that if it was not accepted the appellant proposed to commence an action for a declaration that the full purchase price had been paid and for such ancillary and other relief as might be required to protect his interest, but at the same time the letter stated

that the appellant was still prepared to pay $13,705.50 and the cost of a cruise to determine whether any additional moneys might be due. The larger amount included the added ten per cent which the appellant had earlier in the correspondence suggested that he was prepared to pay to dispose of the matter, and it was this amount which was offered to the respondent on May 13th in legal tender. The solicitor who formally offered the sum to the respondent was not called as a witness but the amount offered was satisfactorily proven. As a general rule, in the case of vendor and purchaser where the mutual engagements of the parties will be considered dependent on each other, either must perform his liabilities before seeking to enforce his rights under the contract and a purchaser cannot in general sue upon an agreement for sale of land without tendering a conveyance and the sum due in respect of purchase money and interest. But here the parties had agreed that the purchaser might pay for the timber, partly by logging and paying the stipulated stumpage after the scaling of the logs at tidewater and their subsequent sale, and partly by payments in cash in advance of logging without in terms defining how the exact quantity of timber was to be ascertained if the purchaser exercised his option to pay for part of it in the latter manner. The purchaser in this case was not in the letter of May 11th or on the day following asking for a transfer of the timber license but was simply attempting to pay the amount which he computed as the balance of the amount to be paid for stumpage and proposing, if that was unacceptable, to pay the lesser amount which according to the Eustace Smith cruise was payable and suggesting a method of determining what balance, if any, was payable by a cruise. The respondent could have accepted the money without acknowledging that it was payment in full by simply so stating. I think no formal tender on the part of the appellant was necessary in the present case. I agree with the learned trial Judge that the offer of payment and the subsequent payment of the amount into Court remedied any default on the part of the appellant.

The notice of cancellation was, in my opinion, wholly ineffective. It is true that the appellant had in each year

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of the three year period between May 15, 1941, and May 15, 1944, failed to either log or pay for four million feet board measure. However, after these respective defaults the respondent accepted repeated payments of stumpage from the appellant, thus precluding herself from claiming to terminate the agreement by reason of them. As to the year terminating May 15, 1945, the time within which the purchaser was entitled to log or pay for the balance of the timber had not expired when the notice was given. As to the other reason assigned for giving the notice, that the respondent had not "logged continuously nor clean the said lands and premises of all accessible and merchantable timber as you went along", the trial Judge has found there was no such default.

The judgment entered after the trial is in terms permitting the Registrar to have ascertained the quantities of merchantable and accessible timber now remaining upon the limit by a cruise and the enquiry directed will determine the quantity which has been cut for which stumpage is payable. The sum paid into Court should be credited as of the date of the payment in upon the amount payable and the balance, if any, in respect not only of the timber which has been felled or felled and removed and timber remaining standing should be payable forthwith. The appeal should be allowed and the judgment of the trial Judge restored: the appellant should have his costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellant: *Bull, Houser, Tupper, Ray, Carroll & Guy.*

Solicitors for the respondent: *Campbell, Murray & Campbell.*