

Beck, the president of defendants, to attend for examination by plaintiffs for discovery.

F. E. Hodgins, K.C., for defendants.

A. G. F. Lawrence, for plaintiffs.

MACMAHON, J.—Plaintiffs are a company owning a timber slide, &c., on the Pickerel river, and defendants are a company owning timber which they intended in 1904 to pass through and over plaintiffs' works, for which they were required to pay toll. Under the first part of sec. 44 of the Timber Slide Companies Act, R. S. O. ch. 194, "Every company may demand from the owner of any timber intended to be passed through any portion of the works of the company, or from the person in charge of the same, a written statement of the quantity of every kind of timber and the destination of the same, and of the sections of the works through which it is intended to pass, and if no written statement is given when required, or a false statement is given, the whole of the timber, or such part of it as has been omitted by a false statement, shall be liable to double toll."

Plaintiffs, being notified that defendants intended to drive timber through or over their works, demanded from them a statement of the quantity, &c., of timber they intended to pass through and over the works, and were notified in writing that the quantity would be 2,000,000 feet board measure, after which the Commissioner of Crown Lands, under the authority conferred on him by sec. 43 of the Act, fixed the tolls which should be paid for the passing of such timber. Defendants, however, instead of driving 2,000,000 feet over the works, passed logs through which only measured 1,575,845 feet, on which they paid tolls.

The action is to recover tolls on the difference between the 2,000,000 feet and the 1,575,845 feet, which passed through plaintiffs' works, under the last paragraph or part of sec. 44, which provides: "In case any owner or person in charge, knowingly or wilfully, falsely returns a larger quantity than it is his intention or the intention of such proprietor or person in charge to pass over any of said sections, the company shall be entitled, in addition to any other remedies it may have, to collect tolls on the difference between the quantity so falsely estimated and the quantity actually passing over the works."

The main ground of appeal is that the action is to recover a penalty, and that in such case an officer of the defendant company cannot be compelled to submit to examination for discovery.