

PRIVY COUNCIL.

LONDON, November 27, 1883.

Before SIR BARNES BRACOCK, SIR MONTAGUE SMITH, and SIR ARTHUR HOBHOUSE.

DUCONDU et al., Appellants, and DUPUY, Respondent.

Sale—Timber licenses—Deficiency—Warranty.

A person sold his right and title to thirteen Crown Timber licenses. He was unable to deliver two of the licenses. To make up the deficiency he assigned two other licenses representing fifty square miles of limits. The second deed contained a warranty against all disturbance. Held, (reversing the judgment of the Supreme Court of Canada, 5 L. N. 72,) that the vendor was not liable to make good a title to the limits covered by the thirteen licenses further than the licenses made a title to them, and that the two licenses assigned by the second deed must be taken exactly as the two missing licenses were taken, viz., as conveying only such right, title and interest as the vendor had obtained from the Crown, and that there was no guarantee against a deficiency by reason of a prior grant.

The appeal was from a judgment of the Supreme Court of Canada, noted in 5 L. N. 72. The case is also referred to, in its different stages, at p. 350 of vol. 3, and pp. 72, 84, 91, 105, 106, 128, 130 and 153 of vol. 5.

PER CURIAM. On the 10th July, 1858, Edward Scallon, who is the predecessor in title of the appellants, contracted with one Benjamin Peck, the predecessor in title of the respondent, to sell to him certain property called timber limits.

The nature of a timber limit is this:—Annual licenses are granted by the Commissioner of Crown Lands to take possession of certain areas of land, to cut timber within those areas or limits. There is an express provision in the statute that if any license is found to cover ground already occupied by a prior license the subsequent license shall to that extent be null and void.

Such being the nature of the property, Scallon contracted to sell all the right and title obtained by him from the Crown. The purchase money was to be paid by instal-

ments, and when the last instalment was paid the conveyance was to be completed by Scallon. The money was paid; and Scallon being dead, his heirs, the present appellants, executed a deed, dated the 16th March, 1865, for the purpose of completing the conveyance to Cushing, in whom Peck's interest was then vested. In that deed it is stated that they are acting in execution of the prior contract; and they convey and release, with a guarantee against disturbance, all the immovable property and rights which Scallon had promised. Then they proceed to describe it; and they describe it in precisely the same terms as are used in the contract of 1858. The property so described is said to be comprised in 13 different licenses, which purport to convey a title to an area of 256 miles.

Among those licenses are two, numbered 97 and 98, which purport to convey title each to an area of 25 miles on the Assumption River; and the heirs of Scallon declare that the licenses have been renewed up to that time by Peck and his representatives. It turned out that in point of fact Nos. 97 and 98 had not been renewed, and it seems doubtful whether they were in existence at the time of the contract of 1858. Mr. Fullerton has argued his case on the hypothesis, which he takes as most favorable to himself, that they were not in existence at that time.

On that discovery the parties come together again, and the heirs of Scallon agree to make good the loss accruing to the successors in title of Peck by the non-existence of licenses 97 and 98. The arrangement made by them is contained in a deed of the 22nd October, 1866, executed by one McConville, who for the present purpose is assumed to be the lawful agent of the appellants. The language used by the parties in that deed is, as stated in English, to the following effect:—After referring to the prior transactions, they say, "In virtue of that deed"—that is, the deed of 1858,—"Scallon was bound to sell "256 miles of limits for cutting wood on "Crown lands; and as there is found a "deficit of 50 miles to complete the said "quantity of 256 miles granted to Cushing, "McConville, in the name of his principals, "desiring to fill up the deficit which has "been found, has by these presents granted