IN THE MATTER of the Petition of Right of

JOSEPH GENELLE.....SUPPLIANT; 1907 Jan. 7.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Dominion lands—License to cut timber—Royalties—Burnt timber—Payment by mistake—Rectification—Lapse of time—Counter-claim for damages for trespass—Estoppel.

The suppliant held certain licenses from the Crown to cut timber on Dominion lands. Three of such licenses were issued on the 28th of January, 1892, and each provided for a royalty of 5 p.c. on the timber cut thereunder. Another license was issued on the 8th of August in the same year, and contained a provision that "if the timber be burnt then the royalty shall be 2½ p.c. instead of 5 p.c." The suppliant obtained other licenses containing similar provisions as to "burnt timber." The suppliant cut timber under such licenses, but owing, as he alleged, to mistake and inadvertence, the returns furnished by him did not show that a portion of the material cut was "burnt timber." Royalties having been paid upon the basis of there being no burned timber cut; the suppliant claimed in these proceedings a refund of one half of such royalties as a fair deduction for burnt timber. During the time that the timber was cut and returns made the suppliant was unable to read or write, and he claimed that he had not seen or been made aware of the provisions as to the royalty on burnt timber. His book-keeper and business manager testified that he had not seen any timber regulations, and that he had never taken the trouble to read the suppliant's licenses. At the trial it appeared that no person's attention, either on behalf of the Crown or the suppliant, had been directed to the matter with a view of ascertaining or even estimating the quantity of burnt timber. Furthermore, at the time of the trial, there was no opportunity for scaling the quantity of burnt timber.

Held, that it was too late to open up the matter after action brought, and that the suppliant had not shown circumstances that would make it inequitable for the Crown to retain the dues which the suppliant himself had returned as due and payable on the timber cut.

2. The Crown counterclaimed in the action for damages for timber cut by the suppliant in trespass on vacant Dominion lands, in effect claiming the difference between the royalty for which he was liable under his licenses and the dues he would have been liable for had the timber in

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Argument of Counsel

question been cut under a permit to cut the same on Dominion lands. To this suppliant answered that the timber alleged to have been cut in trespass, if any, was included in the whole quantity of timber which the suppliant had returned as cut under his licenses, and that a royalty of 5 p.c. having been paid thereon to the Crown officers and accepted by them, the Crown was estopped from setting up a larger claim.

Held, that the Crown was not estopped by the laches of its officers from claiming as damages a larger sum than that already paid as royalties.

PETITION OF RIGHT for the return of moneys in the hands of the Crown.

The facts of the case are stated in the reasons for judgment.

October 12th, 1906.

The case came on for trial at Vancouver, and was referred to the Local Registrar at that place to take evidence. That was done, and the evidence reported to the court.

March 6th, 7th and 8th, 1906.

The case was now argued at Ottawa.

W. Martin Griffin (with whom was *J. F. Smellie*) for the suppliant, contended that the excess of royalties paid over the sum actually due on "burnt timber" was paid under a mistake of law by the suppliant. The court will rectify such a mistake.

As to counter-claim for damages for timber alleged to be cut in trespass by the suppliant, the Crown is estopped from claiming such damages. The Crown's officers made an inspection of the timber, and the only question then raised was: Had Genelle paid royalties on the timber he got from other parties? They accepted Genelle's statement of the royalties due, and they were paid. It is to late now for the Crown to claim these damages.

E. P. Davis, K.C., for the respondent, argued that the burden was on the suppliant to show the amount of "burnt timber" cut. He had failed to discharge that burden.

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Accepting the suppliants' case that it was a mistake of law that induced the suppliant to pay a higher royalty than was actually due on the burnt timber, still he has no right to relief. *Rogers* v. *Ingham* (1). The suppliant made the return himself, and put the Crown Timber Agent off his guard irretrievably.

As to the counter-claim, the Crown cannot be estopped by the improper act or negligence of its servant. There was no consideration for accepting a less sum than was due, nothing arose upon the transaction which would bar the Crown's claim for the proper amount of damages due in respect of the trespass. However, the Crown is content to treat the matter as if the timber cut in trespass was cut under permit. *Wells* v. *Nickles* (2).

Mr. *Griffin*, in reply, cited *Snell's Equity* (3); *Daniell* v. *Sinclair* (4).

THE JUDGE OF THE EXCHEQUER COURT now (January 7th, 1907) delivered judgment.

The suppliant filed his petition in this case to recover from the Crown a sum of $9,766.85, made up as follows:—

(1). The sum of $7,700 paid by the suppliant to the Crown as security for and to meet certain dues then claimed to be owing by the suppliant to the Crown in respect of timber, logs and other products of the forest cut on Crown lands This payment or deposit was made on the occasion of the transfer by the suppliant to a purchaser of the timber licenses that he held from the Crown and in order to obtain the Crown's assent to such transfer.

(2). The sum of $1,464.54 alleged to have been paid by mistake in excess of dues payable on burnt timber.

(3). The sum of $230.92 alleged to have been paid in mistake in excess of the actual dues upon 5,773 cords of wood mentioned in the petition.

(1) 3 Ch. D. 351.
(2) 104 U. S. R. 444.
(3) 14th ed. p. 459.
(4) 6 App. Cas. 181.

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(4). A sum of $168.25 alleged to be due in excess of the sum of $618.75 allowed as a refund of dues on 4,500 cords of wood mentioned in the petition of right.

(5). A sum of $42 alleged to have been paid as dues on certain ties on which dues were also collected from other parties; and

(6). The sum of $161.14 alleged to have been paid in mistake as dues on lumber manufactured from certain logs bought from settlers.

On the argument of the case the third item was not pressed, and in respect of the fourth item a sum of $78.75 was claimed, leaving the amount of the suppliant's claim as finally presented to the court at the sum of $9,446.43.

The Crown by its statement in defence denied its liability for the several amounts so claimed, and it also claimed by way of counterclaim a much larger amount than that for which the suppliant's petition was brought.

The following, stated briefly, were the items of the counterclaim:—

(1) Royalty dues alleged to be due on products of the forest cut by the suppliant as shown by his books ...	$ 3,354	84
(2) Dues on 269,182 feet of lumber used in the building of the suppliant's mill	123	02
(3) Dues on lumber and other products of the forest cut on permit No. 20565..	4,750	00
(4) Damages for timber, logs, ties and cordwood cut in trespass on Crown lands ..... (This amount is increased by the particulars subsequently given).	7,031	21
(5) Balance of Royalty dues as shown by return of 31st December, 1898.....	30	63

(6) Balance due for the rent of timber berth No. 139 and interest on such balance	61 40	
	$15,351 10	

The damages claimed for timber and other products of the forest alleged to have been cut in trespass on Crown lands were set up both as an answer to the demand for the return of the $7,700 deposited with the Crown as mentioned, and as part of the counterclaim. That will appear by reference to the fourth paragraphs respectively of the statement in defence and of the counterclaim, which were filed on the 13th day of September, 1900. Particulars of these alleged trespasses were given in pursuance of an order of court. In these particulars the amount of damages claimed for lumber cut in trespass was fifty cents per thousand feet board measure. That did not differ greatly from the five per cent. on the amount of the sales of the product of his berths, which was payable under the licenses held by the suppliant. But where timber was cut under a permit from the Crown the dues payable on square timber and saw logs of pine, cedar, spruce, tamarac and other woods unenumerated, were at the time two dollars and fifty cents per thousand feet, board measure. On the 12th day of October, 1903, at the City of Vancouver, Mr. Davis, for the Crown, applied for and obtained an order to so amend the fourth paragraph of the counterclaim as to enable the Crown to claim two dollars and fifty cents per thousand, board measure, for timber cut in trespass, instead of thefifty cents per thousand at which the amount claimed in that paragraph for timber had been computed. That amendment as applied to the particulars given increased the Crown's claim by a large amount. It has however become unnecessary to consider the Crown's claim in the largest form in which it has been put forward. At the

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argument of the case Mr. Davis, for the Crown, did not press the smaller items; and as to the other items he put the claim in this form :—

(1) Dues shown by the suppliant's books to be due from him to the Crown..	$ 2,605	00
(2) Dues on lumber used in construction of mill.....	500	00
(3) Dues on timber and other products of the forest cut under permit No. 20,565	3,400	00
(4) Damages on at least five million feet of timber, &c., cut in trespass.....	10,000	00
	$16,505	00

But as to this amount he did not ask for any judgment for the Crown for any excess over and above whatever amount was found to be due to the suppliant upon his claim. The Crown is content, he said, if in the result no judgment goes against it.

It will be convenient, I think, to take the first item of the suppliant's claim for money deposited with the Crown, and the first item of the counterclaim for royalties shown by the suppliant's books to be due the Crown, and to strike a balance between these two amounts; and then to consider first the other items of the claim, and secondly, the other items of the counterclaim.

With respect to the sum of $7,700.00 deposited by the suppliant with the Crown there is no material controversy between the parties. And with reference to the dues that are shown by the suppliant's books to be due to the Crown it appears that on the 1st day of August, 1901, the parties by consent referred the following questions of fact to John F. Helliwell, of the City of Vancouver, accountant, and to Arthur Malins, of the City of New Westminster, estate agent, for inquiry and report :—

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"1. The amount of the following products of the forest "cut and sold by Joseph Genelle, the suppliant herein, "during the years 1892 to 1898 both inclusive, according "to the entries made in his books, showing in tabulated "form the amount of dressed lumber, rough lumber, ties, "piling, cribbing, telegraph poles, posts and cordwood, "respectively.

"2. The total amount of money received by the said "Joseph Genelle for the sale of products of the forest "mentioned in paragraph 1.

"3. The amount shown by the suppliant's books to "have been paid for freight and labour respectively on "such products of the forest.

"4. The amount of money shown by the said books to "have been paid for royalty dues on the products of the "forest mentioned in paragraph 1.

"5. The amounts found by the said referees shall be "binding on both parties hereto and shall be admitted "in evidence at the trial of this action without any further "proof to be a correct statement of the fact and facts."

The referees in answering the first inquiry did not include cordwood, as to which they made a separate report. They found the gross receipts arising from the sale of products of the forest mentioned in paragraph one of the submission to be $372,847.29, including $7,234.67 paid for freight and $26,591.31 paid for labour thereon.

They found the records in the suppliant's books of amounts paid for royalties incomplete, but from these and certain vouchers and endorsed cheques submitted to them they found that during the years 1892 to 1898, both inclusive, a sum of $15,056.86 was paid upon the products of the forest enumerated in their answer to paragraph one. Cordwood is included in the enumeration contained in paragraph one of the reference, but it is not included in the enumeration in the answer to the question submitted by that paragraph. Then there was a refund of dues

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amounting to $618.75, to which the suppliant was entitled and which was not in dispute. Coming to the matter of cordwood it will be seen that with the exception of certain transactions at Kamloops, which are not now in question, the suppliant's books did not show any transactions; but from copies of Government returns the referees found the suppliant sold 12,722 cords of wood of the value of $27,978.00, on which he paid royalties amounting to $1,398.93.

At this point a question of construction of the referees' report arises, as to which the parties are at difference. For the suppliant it is contended that the sum of $372,847.29 at which the referees placed the gross receipts of the products of the forest mentioned in paragraph one, includes the $27,978 which they found from the Government returns to be the value of the cordwood with which they dealt separately in their report. For the respondent it is contended that the latter amount is not included in the former. And though the matter is not as clear as it might be, I think that the construction that counsel for the respondent put upon the report is the correct one. By the second paragraph of the reference the referees were asked to find the total amount of money received by the suppliant for the sale of products of the forest mentioned in paragraph one. That included cordwood "according to entries made in the suppliant's books." The referees' report, however, that with respect to the cordwood, the value of which they otherwise found to be $27,978, the books contained no entries. They expressly exclude this cordwood from their answer to the first paragraph of the reference, and so far as I can see they have not included its value in their answer to the second paragraph. The referees were not to find the amount received by the suppliant for all products of the forest sold by him during the years mentioned; but the value of such products "according the entries made in

his books;" and of the cordwood now in question there was no such entry.

Taking that to be the true construction of the referees' report, the computation of the amount of dues owing to the Crown may be shown in either of two ways. Either the sum of $27,975, the value of the cordwood, may be added to the amount of $372,847.29, which was found to be the proceeds of other products of the forest sold by the suppliant as shown by his books, and the royalty of five per centum payable by him computed on the sum of the two amounts, less the amount paid out for freight, in which case the suppliant would be entitled to a credit of $1,398.93 for the royalties paid on such cordwood; or the computation may be made omitting any reference to such cordword. For convenience I adopt the latter method, the result in each case being the same.

The gross receipts from products of the forest for the years 1892 to 1898, both inclusive, were, according to entries made in the suppliant's books		$372,847 29
Deduct amount paid in freight		7,234 67
Balance		$365,612 62
Royalty thereon at five per centum		18,280 63
Dues paid thereon	$ 15,056 86	
Refund allowed	618 75	
		15,675 61
Balance due the Crown as shown by the suppliant's books		$2,605 02

Dealing then with the first items of the claim and of the counterclaim respectively, we arrive at the following balance in the suppliant's favour:—

Amound paid to the Crown conditionally out of which the dues payable to the Crown were to be satisfied	$	7,700 00
Dues found to be due to the Crown according to the suppliant's books		2,605 02
Balance in favour of the suppliant	$	5,094 98

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With reference to the suppliant's claim for a refund of part of the dues paid on lumber alleged to have been manufactured from "burnt timber" during the year 1892 and subsequent years, down to and including the year 1898, it will be seen by reference to the Regulations which governed the granting of yearly licenses and permits to cut timber on Dominion Lands that it was therein provided that on all timber cut under license the licensee was required to pay, in addition to the ground rent, a royalty of five per cent. on his monthly account of sales, or if he so desired it on the value of the lumber in the log, unless the lumber or other material sold was manufactured from burnt timber, in which case the royalty was to be two and one half per cent. These regulations were made by His Excellency in Council under the provisions of Chapters 54 and 56 of the Revised Statutes of Canada intituled respectively "The Dominion Lands Act" and "An Act respecting certain Public Lands in British Columbia." The provision mentioned occurs in clause (c) of the second section, and in the sixth clause of the Form of License given in the tenth section of such regulations as approved by an order in council dated the 17th day of September, 1889, and amended by orders in council of the 18th day of December, 1890, and of the 20th day of July, 1891. During the years 1892 and 1893 Genelle Brothers, of which firm the suppliant was a partner, and to whose interest in the matter he succeeded, and in the subsequent years mentioned the suppliant himself held certain timber berths in the railway belt in British Columbia under licenses issued pursuant to these regulations. There are in evidence four licenses to cut timber granted to Genelle Brothers in the year 1892 Of these three were issued on the 28th day of January of that year, and provide for a royalty of five per cent. on the timber cut thereunder. The fourth was issued on the 8th day of August, 1892, and contains a provision that "if the tim-

"ber be burnt then the royalty shall be two and one half "per cent. instead of five." The same provision occurs in the licenses issued in the year 1893, and in other later licenses put in evidence by the suppliant. It appears that the suppliant, although a man of intelligence with the capacity to carry on the considerable business in which he was engaged, was not able to read or write. He says that during the years mentioned he did not know of the lower rate of royalty on lumber manufactured from burnt timber; that he had never seen the regulations mentioned; and that the provision in his licenses respecting the royalty on burnt timber had never been brought to his attention. The returns on which the royalty on lumber sold by Genelle Brothers and by the suppliant was computed and paid were made by them and his bookeepers. In these returns no claim was made that any of the lumber or other material sold was manufactured from burnt timber; and the full royalty of five per cent. was returned as due and was paid. The suppliant now says that a proportion of the lumber sold by him was manufactured from burnt timber and as to that he claims a refund of one half of the royalty paid thereon. During the years mentioned there were several bookkeepers in the employ of Genelle Brothers and of the suppliant. Of these one at least is dead; and one, a man named Robert Stewart, was called as a witness by the suppliant. He was in charge of the books, and in the suppliant's absence of his business, during the years 1894, 1895 and 1896. During his time he made the returns on which the royalty was paid. There was, he says, no copy of the regulations at the suppliant's place of business, and he never took the trouble to read the licenses which were in the suppliant's possession and his. He says that some lumber was manufactured from burnt timber and sold, and he gives his estimate of the quantity. It is of course impossible to ascertain with any reasonable degree of certainty what the amount of such lumber

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was. No person's attention was at the time directed to the matter with a view of ascertaining or even estimating the proportion or quantity of such timber, and the evidence in that respect is of a general and unsatisfactory character. There is nothing to go upon that is really trustworthy. If the claim had been made as the lumber was being cut and the sales made the logs could have been examined to see if any of them really fell within the meaning of the expression "burnt timber" as used in the regulations; and if so the quantity could have been scaled or otherwise definitely determined. But all that is impossible now. The Crown has no opportunity to have an impartial examination or investigation made, and is in that way prejudiced by the neglect and laches that the suppliant and Stewart respectively attribute to themselves. It is difficult to understand how it could happen that a man as capable and as conversant with the lumber business as the suppliant was, could carry on the lumber business for six years under the licenses that he had in his possession and never find out until afterwards that the royalty on lumber manufactured from burnt timber was two and one half per cent. In the same way it is hard to give credit to the witness Stewart when he says that for three seasons he made out the returns that the licenses called for, and never took the trouble to read over any of the licenses or to make himself acquainted with their provisions. The whole story is improbable. But experience teaches us that improbable things happen sometimes, and when the suppliant and Stewart say that they were ignorant of the provision respecting the royalty on lumber manufactured from burnt timber, there is nothing to discredit their statements except the improbability of the statements being true. But if such statements are accepted as true, and for the purposes of this case I accept them, their ignorance was the result of their own laches and neglect, and by reason thereof the

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position of the parties has been altered to the prejudice of the Crown. Under the circumstances there is nothing inequitable, it seems to me, in the Crown retaining the dues that the suppliant returned as due and paid; while on the other hand to open up the matter now and to attempt to dispose of it on general and unsatisfactory evidence would, I think, be inequitable and to the prejudice of the Crown and of the public interest. This item of the suppliant's claim is not allowed. In this connection, it ought, perhaps, to be mentioned that counsel for the Crown on the argument of this case moved to amend the statement in defence and to set up the statute of limitations, which would in any event be a bar to part of this item of the claim. In a case like this such a plea is not unreasonable, and the amendment on fair terms might very properly be made. But as no part of the item is allowed there is no occasion for the amendment.

With reference to the claim made for an additional refund in respect of the 4,500 cords of wood mentioned in the seventeenth paragraph of the petition, it appears that the Canadian Pacific Railway Company paid a royalty of twenty-five cents a cord thereon, amounting to $1,125; and as it turned out that the wood had been cut on one of the suppliant's berths, the Crown retained as dues properly payable on such wood the sum of $506.25, and gave the suppliant credit for the balance, namely, the sum of $618.75, mentioned in dealing with the amount of dues shown by the suppliant's books to be due the Crown. The sum of $506.25 retained by the Crown represents five per cent royalty on 4,500 cords of wood at $2.25 per cord. The suppliant contends that the price should have been stated at a lower figure in making the computation, and if that were done the amount of the refund would have been larger. The Crown would have got less and he would have got more. In the petition an amount of $168.25 is claimed. On the argument that was reduced

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to $78.75, the contention being that the value of this wood should be put at $1.90 a cord instead of $2.25 per cord. It will be seen by reference to the referee's report, which has been discussed, that the value of 12,722 cords of wood, on which the suppliant paid royalty was $27,978, or approximately $2.20 a cord, and that the prices of such wood varied from $1.50 a cord to $2.25 a cord. There is no reason to think that $2.25 a cord was not a fair price on which to compute the royalty payable on this particular lot of wood. This item of the claim is not allowed.

The item of $42 paid as royalty by the suppliant on 4,000 ties cut in trespass by one Smith is allowed. The Crown collected double dues on these ties at six cents per tie, as they had been cut in trespass on Crown lands, and the $42 paid thereon by the suppliant as royalty, should be refunded.

I pass over for the present the item of the suppliant's claim for the sum of $161.14 alleged to have been paid in mistake as dues on lumber manufactured from certain logs purchased from settlers; and coming to the counterclaim I allow the second item of $123.02, being the amount claimed in the particulars as delivered. I also pass over for the present the third item of the counterclaim for dues on lumber and other products of the forest alleged to have been cut by or on behalf of the suppliant on permit No. 20,565. That brings us to a consideration of the fourth and most important item of the counterclaim, namely, the claim made by the Crown for damages for timber and other products of the forest cut in trespass on vacant Crown lands, or on Crown lands on which settlers or homesteaders had entered. The evidence on this branch of the case is voluminous, but a careful reading of it will show that a large part of the lumber and other products of the forest manufactured by Genelle Brothers and the suppliant during the year 1892

and subsequent years down to and including the year 1898, was made from timber cut in trespass. It is admitted that to a limited extent these trespasses were committed with the suppliant's knowledge and consent, if not by his direction. It is argued, however, that the amount of lumber so cut in trespass with his knowledge and participation did not exceed one million two hundred thousand feet board measure. I have not been able to adopt that view. On the contrary I am inclined to the view (if that should be thought to be material) that his personal knowledge of the trespassing that was done was greater and more definite than he is willing to concede. During the years in which his brother, Peter Genelle, was his partner, there was considerable trespassing of which the latter must, I think, have had direct and personal knowledge. Then it is shown that a large quantity of timber for the suppliant's mill was cut in trespass by one Sullivan (since deceased) either as foreman for Genelle Brothers or the suppliant or as a jobber getting out logs for the suppliant. It also appears that a considerable portion of the timber and other products of the forest manufactured by the suppliant was cut in trespass on Crown lands on which homesteaders or settlers had entered.

Now the balance of $5,094.98 that has been found to result in the suppliant's favour after dealing with the first items of the claim, and of the counterclaim, respectively, is arrived at by debiting the suppliant with five per cent. royalty on the value of all timber cut, including that cut in trespass, and that, approximately, was all that the Crown's officers were claiming on lumber when the amount of $7,700 hereinbefore mentioned was paid to the Crown conditionally. That, too was approximately all that was claimed on lumber when the particulars were delivered, though a higher rate was therein charged on ties. The royalty of five per cent on ties amounts to

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about one cent per tie; the dues payable thereon when cut under a permit to cut timber on Dominion Lands is three cents per tie, and that was the amount demanded in the particulars delivered. But on lumber the royalty of five per cent. amounted to forty or forty-five cents per thousand feet board measure. In the particulars as delivered a rate of fifty cents per thousand feet board measure was demanded, while the rate on similar lumber cut under a permit was two dollars and fifty cents per thousand feet board measure. Under the amendment the Crown claims as damages on the timber cut in trespass and manufactured at the suppliant's mill, or sold by him, the difference between the royalty for which he was liable under his licenses and the dues that he would have been liable for had the timber in question been cut under a permit to cut the same on Dominion Lands. In other words the Crown now claims two dollars per thousand feet board measure on the lumber manufactured at the suppliant's mill from timber cut in trespass, and an additional two cents per tie for all the ties that were cut in trespass by or for the suppliant; and so of other products of the forest.

And first for the suppliant it is contended in answer to the claim so made that the payment of the royalty of five per cent. concludes the matter, and that the Crown is estopped by the laches and actions of the Crown timber agent and other Crown officers from now setting up the larger claim. With that contention I am not able to agree. It is well settled that the Crown is not bound by the laches of its officers, and there is, in my opinion, nothing to prevent it from recovering in this action such damages as it may be entitled to as against the suppliant for the trespasses complained of.

Then with regard to the measure of damages, I see no good objection to the course proposed, namely: to allow the difference between the dues payable under licenses

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and those payable under permits to cut timber on Dominion lands. There is nothing in that to which the suppliant can, it seems to me, reasonably object.

That leaves for determination only the question of the quantity of lumber and other materials on which the additional dues are to be allowed by way of damages. And as to that the position taken for the Crown at the argument of this case, namely, that it did not ask for any judgment for any balance found in its favour against the suppliant has rendered any close estimate or calculation of quantity unnecessary.

If the item of the claim for $161.14, which was passed over, were allowed (I do not wish to be understood as expressing any opinion that it should be allowed, but if it were) the balance in the suppliant's favour, apart from the damages in question and the dues payable in respect of permit No. 20,565 would be something less than five thousand two hundred dollars; and that sum would only be equal to the damages recoverable on two million six hundred thousand feet board measure of lumber manufactured from timber cut in trespass by or for Genelle Brothers and the suppliant. In the view that I have formed from reading the evidence, there was with respect to lumber alone, more than that quantity manufactured from timber cut in trespass to the knowledge of the suppliant, or of his partner, or of his foreman or other person left in charge of his business. In that view of the case it is not necessary to pursue the enquiry further either as to this item of the counterclaim or as to the item respecting the dues payable on permit No. 20,565 that was passed over. If anything were allowed as to the latter item or for other trespasses the amount would only add to a balance in the Crown's favour for which no judgment is asked.

On the whole case, that is on the claim and counterclaim, there will be judgment for the respondent.

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With regard to costs, the principal question is as to whether the Crown's claim for damages on the timber cut in trespass is of the nature of a cross-action, or only a set off. In the former case the suppliant would be entitled to the costs of the claim and the respondent to the costs of the counterclaim, having regard of course to the issues raised by the claim and counterclaim respectively, as to which each party succeeded, in which case a balance should be struck between the respective amounts taxed, and judgment for costs entered for such balance in favour of the party entitled thereto. But possibly in this case expense would be saved and the equities of the case met by not giving costs to either party. And for the present the question of costs will be disposed of in that way, with leave to either party to move to vary the judgment in that respect.

Judgment accordingly.

Solicitors for suppliant: *Tupper & Griffin.*

Solicitor for respondent: *F. W. Howay.*