1890
Nov. 4.

THE SAINT CATHARINES MILLING AND LUMBER COMPANY, AND JOSEPH O. B. LATOUR..... PLAINTIFFS;

AND

HER MAJESTY THE QUEEN..... DEFENDANT.

Crown domain—Territory in dispute between Dominion of Canada and Province of Ontario—Permit to cut timber—Implied warranty of title—Sale of chattels—Breach of contract to issue license— Damages.

A permit, issued under the authority of the Minister of the Interior, under which the purchaser has the right within a year to cut from the Crown domain a million feet of lumber, is a contract for the sale of personal chattels, and such a sale ordinarily implies a warranty of title on the part of the vendor; but if it appears from the facts and circumstances that the vendor did not intend to assert ownership, but only to transfer such interest as he had in the thing sold, there is no warranty.

(2.) The Government of Canada by order-in-council authorized the issue of the usual annual license to the plaintiff company to cut timber upon the Crown domain, upon certain conditions therein mentioned. The company did not comply with such conditions, but before the expiry of the year during which such license might have been taken out, proceedings were commenced by the Government of Ontario against the company under which it was claimed that the title to the lands covered by the license was vested in the Crown for the use of the Province of Ontario, and that contention was ultimately sustained by the court of last resort.

Held, that there was a failure of consideration which entitled the company to recover the ground rent paid in advance on the Government's promise to issue such license.

Quære:—Will an action by petition or on reference lie in the Exchequer Court against the Crown for unliquidated damages for breach of warranty implied in a sale of personal chattels?

THIS was a claim for the value of certain logs cut under a permit, issued under the authority of the Minister of the Interior, upon territory then in dispute between the Province of Ontario and the Dominion of

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Argument of Counsel.

Canada,—such logs having been seized by the Government of Ontario; and for damages for loss of profits upon the lumber which might have been manufactured from such logs.

The claim came before the court upon a reference by the Minister of the Interior under the provisions of 50-51 Vic. c. 16 sec. 23.

The facts appearing upon the evidence are fully stated in the judgment.

February 17th, 18th, 19th and 20th, and May 10th, 1890.

McCarthy, Q.C. for the plaintiffs:

The case for the plaintiffs may be divided into two branches: 1st. a claim for damages for a breach of warranty of title under the permit to cut timber issued to the plaintiffs; and 2ndly. a claim for damages for breach of contract on the part of the Crown to issue a license to cut timber to the plaintiffs.

The plaintiffs allege, with reference to the subject of the first branch of their case, that under the permit they had cut some one and three-fourths million feet of timber in saw logs, which, before they had converted it into lumber and brought it to a market, was taken from them by the paramount authority of the Ontario Government, and they were thus deprived of the value the timber would have had to them when sawn and sold.

The question of law which arises here is, was there any implied warranty of title in the contract between the Government and the company?

The language of the permit is that the timber should be cut for "barter and sale." It contemplates the transfer of property in goods to be immediately severed from the soil; the purchase money not to be paid until, and only payable upon, the timber being cut and measured. Therefore, I submit that the

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Argument of Counsel.

contract was executory,—an executory contract for the sale of chattels; and this being the case the law implies a warranty of title on the part of the vendor. It was a sale of chattels to be severed from the soil within the period covered by the permit, viz., twelve months; and it makes no difference whether the purchaser is to take delivery of the goods himself or whether the vendor has to make delivery so far as the principle of implied warranty of title on the part of the latter is concerned. (Cites *Marshall* v. *Green* (1), *Summers* v. *Cook* (2), *Johnston* v. *Shortreed* (3), *Steinhoff* v. *McRae* (4), *Blackburn on the Contract of Sale* (5).

We contend that this was a sale of standing timber with a view to immediate severance from the soil. In the case of *Steinhoff* v. *McRae*, and the other cases I have cited, the distinction drawn between sales of chattels and the sale of an interest in land appears to be that if standing timber be sold and no specific time is given in which the purchaser must take it off the land, he has a right in the growth of the timber and its development, and, therefore, an interest in the land itself; but if the sale is with a view of immediate severance from the soil, the land is then regarded simply as a storehouse where the goods are to be kept till the severance takes place.

The reference to *Blackburn on the Contract of Sale*, just given, shows the law to be precisely as I am now stating it. *Marshall* v. *Green* is there referred to at some length, and Brett, J.'s tests of the two kinds of contracts are there quoted at length. All the latest cases bearing on the question before us are given in *Benjamin on Sales* (6), viz.: *Morley* v. *Attenborough* (7),

(1) 1 C. P. Div. 35.
(2) 28 Grant 179.
(3) 12 Ont. 633.
(4) 13 Ont. 546.
(5) P. 14.
(6) 4th ed. p. 629, *et seq.*
(7) 3 Ex. 500.

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Argument of Counsel.

Sims v. *Marryat* (1), *Eichholz* v. *Bannister* (2). The most recent case is one at *nisi prius*, *Raphael* v. *Burt* (3).

In *Benjamin on Sales* (4) a number of rules are laid down in relation to implied warranty of title in sales of personal chattels. Under rule 1, if not under rule 2, the facts in evidence establish our right to damages upon the 1st branch of our case; rule 3 does not apply.

With reference to the second branch of our case, it is in evidence that plaintiffs made a regular application for a license to cut timber upon the territory in question, and that there was an order-in-council passed authorizing the issue to them of such license. The regulations in force when the order-in-council was passed, and which governed the issuance of such a license, required the licensee to pay a ground rent of $5 per square mile. The plaintiffs performed that condition. Another condition which governed the granting of the license was that the licensee should cause a survey of the limits to be made and a plan and field-notes thereof filed in the Department of the Interior. The plaintiffs had twelve months in which to perform this condition, but before the expiry of that time the timber cut by them was seized by the Ontario Government and proceedings taken against them to restrain them from cutting any more logs upon the territory. The contract to give plaintiffs a license is clearly established, and they have performed all conditions, possible to be performed, precedent to the accrual of their right to have the license issued to them. They claim that they are entitled to damages for loss of profit on the lumber that could have been taken from the territory in question during the winter of 1884 and the year 1885. Now, I submit that the

(1) 17 Q. B. 281.
(2) 17 C. B. N. S. 708.
(3) 1884, Cab. & El. 325.
(4) 4th ed. p. 622 *et seq.*

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Argument of Counsel.

only way possible for the court to estimate the damages here is to ascertain the quantity of timber that could have been so cut by plaintiffs and what it would be worth in its proper market when manufactured into lumber, less the cost of sawing and transportation. (Cites *Bennet* v. *O'Meara* (1); *Brown* v. *Cockburn* (2).) The two questions of damages, namely, that respecting the timber that had been cut down and reduced to the shape of saw-logs during 1883, and the standing timber which might have been cut during the winter of 1884 and the year 1885, might be conveniently considered together.

[BURBIDGE, J.—It was the plaintiffs' fault that the lumber was not manufactured from the saw-logs.]

That does not affect the question as to our right to recover damages upon the basis I have indicated. If the markets fell between 1883 and 1884, and we did not manufacture our lumber in 1883, we cannot get the price ruling in the proper market of that year. We claim the value of the lumber in that market in 1884, when the logs were seized and when we would have manufactured them into lumber. (Cites *Hendrie* v. *Neelon* (3); *Hadley* v. *Baxendale* (4).

[BURBIDGE, J.—What do you say as to the measure of damages in respect of the standing timber that might have been cut?]

There the court must deduct from the market price the cost of getting out the timber as well as the cost of sawing and transportation.

[BURBIDGE, J.—The license which you say should have been granted to plaintiffs would have covered the year 1884 only. How can you claim damages for the probable cut of the following year?]

The license would undoubtedly have been renewed.

(1) 15 Grant 396.
(2) 37 U. C. Q. B. 592.
(3) 12 Ont. App. 41.
(4) 9 Ex. 341.

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Argument of Counsel.

The regulations of 1878 expressly provide for such renewal, and it was the practice of the Department to renew upon the fulfilment of certain conditions.

[BURBIDGE, J.—The Crown was not bound to renew.]

Not in the sense that we could enforce the renewal by petition of right ; but the Crown having taken the money from the plaintiffs for the second year, damages should be recovered for the breach of its promise to renew.

Ferguson followed on the same side, and reviewed the evidence in support of plaintiffs' case.

Robinson, Q. C. for the defendant: The contract in this case was not a contract for the sale of chattels. The whole current of the authorities is against the drawing of such an inference from the facts in evidence. (Cites and comments upon *Marshall* v. *Green* (1) ; *Ferguson* v. *Hill* (2) ; *McLean* v. *Burton* (3) ; *Summers* v. *Cook* (4) ; *MacDonell* v. *McKay* (5) ; *McCarthy* v. *Oliver* (6) ; *Mitchell* v. *McGaffey* (7) ; *McGregor* v. *McNeil* (8) ; *McNeill* v. *Haines* (9).)

[BURBIDGE, J.—Do not most of these cases arise under the Statute of Frauds ?]

Yes, my Lord, upon the question whether the facts arising in the several cases make them fall within the sections of the statute regulating, respectively, the sale of goods and the sale of an interest in land.

In the case of a breach of contract to give a title to land, the purchaser is entitled to get back his deposit, and all plaintiffs could, under any circumstances, get in this case is what they have paid the Crown for the

(1) 1 C. P. Div. 35.
(2) 11 U. C. Q. B. 530.
(3) 24 Grant 134.
(4) 28 Grant 179.
(5) 15 Grant 391.
(6) 14 U. C. C. P. 290.
(7) 6 Grant 361.
(8) 32 U. C. C. P. 538.
(9) 17 Ont. 479.

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Argument of Counsel.

purpose of obtaining a license. This is clearly a case of contract for the sale of an interest in land. (Cites *Reed on Statute of Frauds* (1); *Baker on Sales* (2); *Benjamin on Sales* (3).) As to what damages are recoverable on breach of a contract for the sale of an interest in land, I would refer to *Mayne on Damages* (4).

Now with regard to the more important branch of the case, namely, that the permit was obtained in the first instance by misrepresentation and fraud. That is an indisputable conclusion to be drawn from the evidence. The whole negotiations between the promoters of the company and the Government with reference to the permit show unmistakable fraud on the part of the former. By means of misrepresentations by Bertrand and Prudhomme, the original applicants for the permit who assigned their rights to the promoters of the company, the permit was obtained, and the company undoubtedly took it with knowledge, at least on the part of its promoters, of the doubtful character of the title and the fraudulent way in which it was obtained. Now, although a corporation may not be liable to an action on account of the misrepresentations of its promoters made before it came into existence, yet it cannot afterwards take advantage of such misrepresentations without becoming responsible for the results which flow from them. (Cites *Earl of Shrewsbury* v. *North Staffordshire Ry. Co.* (5), *Edwards* v. *Grand Junction Ry. Co.* (6), *Robertson* v. *Dumaresq* (7), *The Queen* v. *Robertson* (8), *Thomas* v. *Crooks* (9), *Williams* v. *St. George's Harbour Co.* (10), *Brice on Ultra Vires* (11), *Lindley on Companies* (12).)

(1) Vol. 2 § 707.
(2) P. 152.
(3) 4th ed., p. 122.
(4) 4th ed., 186.
(5) 1 L. R. Eq. 593.
(6) 1 M. & C. 650.
(7) 2 Moo. P. C. (N.S.) 66.
(8) 6 Can. S. C. R. 52.
(9) 11 U. C. Q. B. 579.
(10) 2 DeG. & J. 547.
(11) 2 ed. p. 576.
(12) 5 ed. 149.

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Argument of Counsel.

The company petitioning in this case cannot recover damages arising upon a permit which was obtained through the fraud of its promoters; neither can it succeed in respect of the breach of contract to give a license, because that was only a modification of the first arrangement made at the request and for the benefit of the company.

Hogg, following on the same side, discussed the effect of the failure by plaintiffs to satisfactorily show that the logs had all been cut inside their limit.

McCarthy, Q.C. in reply: There is not the slightest difficulty about the application of the law to the facts in this case. The principles are clear and consistent, up to the present time, as laid down in the cases affecting the two classes of contracts.

The *ratio decidendi* of the cases is that whether the contract is or is not to be treated as a sale of timber or an interest in land depends altogether upon whether or not the purchaser has to take the timber off the land within a limited time. If that be found to have been the intention of the parties, the contract is to be treated as a sale of timber. (Refers to the judgment of Ferguson, J. in *McNeill* v. *Haines* (1); and the cases of *Summers* v. *Cook*, *Johnston* v. *Shortreed*, and *Steinhoff* v. *McRae* (cited *ante*); *Lock* v. *Furze* (2), and *Crowley*, *et al.* v. *Vitty* (3).

With reference to the acts of the promoters of the company which took place before it came into existence, I submit that we have nothing to do with them in this case. There was no contract between the Government and Bertrand and Prudhomme to begin with. No permit was ever issued to them; and we are not claiming under them, and are, therefore, not affected by notice to them. They had no legal rights

(1) 17 Ont. at p. 486.
(2) L. R. 1 C. P. 441.
(3) 7 Ex. 319.

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Argument of Counsel.

to assign, and the promoters of our company only took the assignment from them at the instance of the Department of the Interior to settle the difficulty of conflicting applications. The permit was not granted to the company as assignees, but in their independent capacity. Then, again, with regard to notice of defective title, notice to a director is not notice to the company unless he has authority to act for the company and the reception of such notice is within the scope of his authority; and if but one of the shareholders lack notice it is not notice to the company. The company in this case cannot be charged with notice of defective title. (Cites *Lindley on Companies* (1); *McArthur* v. *The Queen* (2).)

BURBIDGE, J. now (November 4th, 1890) delivered judgment.

The plaintiffs seek to recover from the defendant the value of certain logs cut by the Saint Catharines Milling and Lumber Company from off a timber berth situated in what was formerly known as the disputed territory, and damages for loss of profits on lumber that they might have taken therefrom had the title to such territory been in the Crown for the Dominion of Canada; or, failing that, to be indemnified for the expenses incurred by them in getting out such logs, and in carrying on operations incident thereto. The plaintiff Latour is assignee by way of mortgage of such timber berth.

The plaintiff company were incorporated on the 6th of February, 1883, for the purpose and with the powers, among others, to acquire, hold and sell timber lands and timber, to manufacture timber and lumber, and the products thereof, and to carry on all business incidental to lumbering and the timber trade.

The shareholders of the company named in the char-

(1) 5th Ed. 156, 204. (2) 10 Ont., 191.

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

ter were Messrs. James Murray, of Saint Catharines, Pierre H. Chabot and James A. Gouin, of Ottawa, and Noé Chevrier and Henry Alfred Costigan, of Winnipeg. Afterwards Mr. Olivier Latour, of Ottawa, became a shareholder. At the first meeting of such shareholders, held on March 1st, 1883, Messrs. Murray, Gouin, Costigan, Chevrier and Chabot were elected directors; and, at an adjourned meeting held on the day following, the directors were authorized and directed to apply to the Minister of the Interior for the issue of a permit to the company to cut timber to the extent of two million feet of lumber in the territory on the Three Tongue River, Wabigoon Lake, from a plan made by A. Charest then on file in the Department of the Interior, and to take steps to have such permit granted. At a meeting of directors held on the same day, the following appointments were made: James Murray to be President; J. A. Gouin, Vice-President; P. H. Chabot, Secretary-Treasurer; Olivier Latour, Manager, and A. J. St. Pierre, Book-Keeper and Acting Secretary.

On the 3rd of March, the company, by letter from their President to the Minister, applied for such permit, it being alleged in such letter of application that two permits of one million feet each had already been granted to Messrs. L. A. Prudhomme & Co. and H. A. Bertrand & Co. to cut timber in the same territory, but they having surrendered their rights thereto in favor of the company there was no objection on that ground to the application. The language used in this letter may be taken, perhaps, to express in a general and popular sense, but not accurately, what had previously taken place in reference to the transactions therein referred to.

On the 24th December, 1881, there was received at the Department of the Interior a letter dated at Winnipeg the 15th of that month and purporting to be from

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

L. A. Prudhomme & Co. of that city, by which application was made for "a timber berth of one hundred "and fifty square miles on Three Tongue River, a "tributary running into Eagle Lake, Province of Kee- "watin." On the 27th of the same month a like letter, also dated at Winnipeg of the 15th, and purporting to be signed by A. H. Bertrand & Co. of that city, was received by the Minister, by which letter a similar application was made "for a timber limit on Three "Tongue River, a tributary running into Eagle Lake, "Province of Keewatin." It appears from the assignments of March 29th, to which I shall have occasion to refer, that the firm name "L. A. Prudhomme & Co." was used to designate Mr. L. Arthur Prudhomme, then an advocate residing at Winnipeg, and now a Judge of a County Court in Manitoba; and the name "A. H. Bertrand & Co." was used to designate Mr. Antoine Honoré Bertrand of the same city, of whom Chevrier speaks as a speculator living at Winnipeg. To the Bertrand letter there does not appear to have been any reply, but on the 4th January, 1882, the Acting Surveyor-General, by direction of the Minister, addressed a letter to Prudhomme & Co. acknowledging the letter of the 15th of December and stating in reply thereto that, as the land described was in the territory covered "by the late but unconfirmed award to the Province of Ontario," no action could then be taken on the application.

On the 15th February the two letters following were received at the Department of the Interior, the one purporting to be from A. H. Bertrand & Co., and the other from L. A. Prudhomme & Co.: –

WINNIPEG, February 8th, 1882.

To the Right Honorable
Sir John A. Macdonald,
Minister of the Interior.

SIR,—We are informed that your Department cannot grant us just

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

now a yearly license on the Three Tongue River Territory of Keewaydin, because that part of the territory is in dispute at present.

But having contracts to fulfil and being in great need of timber, we now ask a permit of cutting on said Three Tongue River, and on same area as mentioned in our prior application, according to the regulations to cut timber on Dominion Lands under section 52 of 1879, as annexed. We further state that we will humbly submit ourselves, and abide by any further decision that may take place in reference to the above disputed territory.

We remain yours
Most truly,
(Sgd)., A. H. BERTRAND & Co.

WINNIPEG, February 9th, 1882.

To the Right Hon.
Sir John A. McDonald,
Minister of Interior.

SIR,—In answer to yours of the 4th Jany. we have the honor to submit to your Department that we have a contract to fulfil and being in great need of timber, we now ask you a permit of cutting timber on the Three Tongue River, a tributary of the Eagle Lake, on same area as already applied for in our prior application, and according to the regulations to cut timber on Dominion Lands under section 52 of the Act of 1879, as memo. annexed.

We beg to state that we will respectfully submit ourselves to any decisions respecting that part of the disputed Territory of Keewaydin.

We have the honor to be
Your most obedt. servts.,
(Sgd)., L. A. PRUDHOMME & Co.

The signature attached to the Prudhomme letter is not his, and there is no evidence that it was signed by his authority. The Bertrand letter, though dated at Winnipeg, was written and signed at Ottawa by one Troop, a clerk in the employ of Gouin, then the proprietor of the "Russell House" at Ottawa. Neither Gouin nor Troop knew Bertrand. That Troop wrote and signed the Bertrand letter with Gouin's knowledge and by his direction, I have no doubt. As to his own authority to act in the matter, the most that Gouin would say was that he would not have signed the letter without some authority, but he could not recollect, and would not undertake to say, that he had Bertrand's,

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

authority. To avoid repetition I may as well state now that the same is true of the other letters written by Troop, to which reference will be made.

On the 23rd of February, following, two other letters purporting to be from Prudhomme & Co. and Bertrand & Co., respectively, were received by the Minister of the Interior. They bear date at Ottawa of the 21st of that month, and are in the following terms:—

OTTAWA, Feby. 21st, 1882.

To the Right Honorable
Sir John A. McDonald,
Minister of Interior.

SIR,—In ours, of date 9th instant, asking permit to cut timber on the Three Tongue River, we humbly state that we have contracted with Colonization Companies to furnish them fifteen million feet, board measure, of red and white pine, also spruce and tamarack lumber; five million feet per annum. On exploration we find timber small, so that we require the large area mentioned in our first application to cut the said quantity of fifteen million.

We have the honor to remain,
Yours respectfully,
(Sgd)., L. A. PRUDHOMME & Co.,
of Winnipeg.

OTTAWA, Feby. 21st, 1882.

To the Right Honorable
Sir John A. MacDonald,
Minister of the Interior.

SIR,—In reference to our letter of the 8th instant asking for a permit to cut on the Three Tongue River, we beg leave to state that we have contracts with Colonization Companies for fifteen million feet, board measure, of red and white pine lumber, also of spruce and tamarack lumber, that we have three years to supply said quantity at the rate of five million feet each year. The timber being small and scattered it requires a very large tract of land to cut said quantity; that was our reason for asking, in our first application, the area mentioned.

We have the honor to remain,
Yours most truly,
(Sgd)., A. H. BERTRAND & Co.,
of Winnipeg.

The Prudhomme letter appears to have been written and signed by the person who wrote and signed that

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

of February 9th, and that perhaps is all that can, with certainty, be said of it, except that the signature thereto is not Prudhomme's. The Bertrand letter, as in the other case, was written and signed by Troop. On the representations contained in these letters, the Minister of the Interior, on the 17th March following, authorized the issue of a permit to Prudhomme & Co. to cut one million feet of timber in the territory referred to, and a like permit to Bertrand & Co., and caused letters to be written to them to inform them of the action taken. These letters bear date of the 17th March, 1882, and are signed by Mr. Lindsay Russell, then the Deputy of the Minister of the Interior. A few days after Mr., Mousseau, who was at the time Secretary of State, addressed the following letter to Prudhomme & Co., and another in the same terms to Bertrand & Co.:—

OFFICE OF THE SECRETARY OF STATE, CANADA,
OTTAWA, 24th March, 1882.

L. A. PRUDHOMME & Co.,
Traders,
WINNIPEG, MAN.,

GENTLEMEN,

When I delivered, the other day, the permit granted to you by the Department of the Interior, to cut one million feet of timber in the place described in your application, I was too busy to give you the reasons why the Government did not think proper to grant the permit for a larger quantity.

Many parties apply for timber licenses or permits which they don't utilize themselves, and sell to others, making thereby large benefits which the Government cannot countenance, because all speculations in that direction would greatly enhance the price of timber and thereby thwart the colonization of our Great North-West.

If, as I am sure, you are in earnest, if you build mills and go seriously cutting timber, your timber permit will be renewed as soon as you will have cut the first one million granted, even before the expiration of the year.

From the moment the Government will see you have built mills, and you are cutting timber to fill your contracts, it has no reason to refuse you as many millions as you want.

Most truly yours,
(Sgd)., J. A MOUSSEAU.

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

It appears that Mr. Mousseau had no authority from the Minister of the Interior to speak for him in this matter, and no permit had then issued, or was ever issued, to either Prudhomme or Bertrand. But apart from any question of renewal, as to which Mr. Mousseau's letters fairly enough, I think, indicate the course of action the Government, although not bound to take, usually takes in such matters, Prudhomme and Bertrand were entitled under the concessions made to them, and the practice of the Department, to take out the permits and cut the timber at any time before May 1st, 1883.

On the 29th March, 1882, Prudhomme, by an instrument under seal and in consideration of one dollar, assigned his interest in the permit therein alleged to have been granted to him to Noé Chevrier, Pierre H. Chabot, James A. Gouin, and one Donald Cameron, of Winnipeg, gentleman. An inspection of the document will show, however, that Cameron's name is erased in the premises though subsequently retained in the *habendum* clause in respect of an one-eighth share or interest, and that the erasure is not noted by Mr. Olivier, the subscribing witness to the execution of the instrument by Chabot and Gouin, or by Bellemare, a clerk in Chabot's employ, whose name is falsely subscribed as a witness to Chevrier's signature. Chevrier says that the signature of Prudhomme set to this document, though not witnessed, is genuine; and in that he is corroborated by Mr. Burgess, the Deputy of the Minister of the Interior. On the same day, the 29th of March, 1882, Bertrand, in like manner, in consideration of one dollar assigned to Chevrier, Chabot and Gouin his interest in the permit which, it was alleged, had been granted to him. The signature of Bertrand set to this assignment was assumed to be genuine, but, if this assumption is justified, the conclusion to be drawn from

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

a comparison of the handwriting is that Bertrand did not sign the application of the 15th December, 1881; and, in like manner, from a comparison of Prudhomme's signature to his assignment of the 29th March, with that set to the letter of December 15th, 1881, purporting to be from Prudhomme & Co., I conclude that the letter was not signed by Prudhomme.

In September or October, 1882, Chevrier represented to Olivier Latour, who was then engaged in the lumbering business, that there were some good timber limits on the Three Tongue River, which could be obtained from the Government and something made out of them, and he wanted Latour to go to the North-West and explore the limit and take it up. Thereupon Latour, about the 1st of October, sent Antoine Charest to explore the territory and to see how the matter stood, and whether or not Chevrier's representations could be relied upon. Charest is the person who made the plan referred to in the resolution authorizing the directors of the company to apply for a permit in the territory on the Three Tongue River.

On the 17th November following, the Minister of the Interior received a further communication purporting to be addressed to him by Prudhomme & Co. and Bertrand & Co. It was in the following terms :—

OTTAWA, Nov. 16th., 1882.

To the Right Honorable
The Minister of the Interior,
Ottawa.

SIR,—After having explored all rivers emptying into Eagle Lake repeatedly last summer and fall, we have discovered, only recently through our last explorer, Mr. A. Charest, that our first explorer Mr. Donald Cameron, of Winnipeg, made a mistake in his report to us in March, 1880, by having reported that Three Tongues River was a tributary of Eagle Lake, when it has been found and ascertained by our said last explorer, Mr. A. Charest, that the said Three Tongues River is a tributary of Wabigoon Lake, and having made so heavy expenditures for the said exploration and the purchase of a saw mill for the pur-

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

pose of fulfilling the contract of our permit with your Government, we respectfully ask you to let us cut the timber as your permit grants us to do, and that we may be allowed to do so in the said Three Tongues River, a tributary of Wabigoon Lake, as shown by the map and plan, marked red, with its description annexed to this present, and to allow our permit to be corrected by having the words "Three Tongues River" a tributary of "Eagle Lake" changed, and the following words inserted in lieu thereof: "Three Tongues River" a tributary of "Wabigoon Lake."

We have the honor to be,
Sir,
Your most obedient servants,
(Sgd)., A. H. BERTRAND & Co.,
Per J. A.G.,
(Sgd)., L. A. PRUDHOMME & Co.

This letter and the signatures "A. H. Bertrand & Co. per J. A. G.," are in Troop's handwriting. The initials "J. A. G." were intended to indicate that Gouin had signed for Bertrand. As in the other cases, there is nothing to show who signed the communication for Prudhomme.

Neither Prudhomme, Bertrand nor Troop were called as witnesses, and, consequently, much is unfortunately left to inference that might have been made clear.

There is no reason to doubt, however, that there was a large quantity of valuable timber in the territory south of Lake Wabigoon, and that this fact was known in 1882; for as early as August, 1881, Thomas Marks, of Prince Arthur's Landing, had caused a survey of a timber limit on the southern shore of the lake to be made, and had filed the plan of such survey and his application for such limit in the Department of the Interior. If it were safe, as I fear it is not, to give credit to the representations, other than such as refer to Charest's exploration, contained in the letter of November 16th, 1882, to the Minister of the Interior, hereinbefore set out, one would be justified in concluding that the territory had also been explored by Donald Cameron prior

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY *v.* THE QUEEN.

Reasons for Judgment.

to March, 1880, and that he had in that month reported to Prudhomme and Bertrand. Then we have the further facts that the consideration expressed in the assignments of March 29th is nominal, and that Chevrier does not claim to have paid Bertrand more than one hundred dollars for the concession that the latter had obtained from the Crown, or Prudhomme more than fifty dollars. In view whereof, it is not, I think, reasonable to conclude that either of them ever had any such contracts as those mentioned in the letters of the 8th, 9th and 21st of February, 1882, or that in order to obtain concessions to which they attached so little importance, they falsely represented to the Minister that they had entered into the same. The fair inference is, I think, that at most they were applicants in name only, and not aware of the fraud that was committed in their names.

Chevrier's account of his earlier connection with the matter is in substance as follows:—in the month of March, 1882, he was talking to Bertrand about the matter, and the latter showed him the Russell letter of the 17th of that month and told him that Prudhomme had a similar letter, both of which he saw at the same time. This happened at Winnipeg about the time they received such letters, and was his first connection with the matter. Thereupon negotiations were entered into for the purchase by him of Prudhomme and Bertrand's interests. Afterwards, but whether before or after the completion of such negotiations, he is unable to say, they showed him the Mousseau letters of March 24th. These four letters came into his possession and were all that he got from them, or saw. After agreeing with Prudhomme and Bertrand, he wrote to Chabot at Ottawa to have the assignments drawn up, and to insert Gouin's name if he thought proper, and that was done. Previously he had not spoken with either Chabot or Gouin on the subject and did not then communicate with

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

Gouin. He had not asked either for authority to insert his name in the transfers, the reason assigned being that Chabot was a partner with him in other licenses, and that Gouin was, he thought, interested with Chabot in another limit. When the assignments of March 29th were executed no permits had been issued, the Russell letters of March 17th being the documents referred to as such permits. These letters were what he had, and what induced him to get the assignments. He also says that he never saw the letter of January 4th, 1882, and never had any knowledge of the letters of the 8th and 9th of February, and that he cannot in any way account for the statements made about contracts with colonization companies in the Prudhomme and Bertrand letters, which he saw for the first time on the trial. He did not hear from any one that the Government was disposing of the disputed territory and letting the purchasers take the chances of getting a good title, or that the licenses or permits in that country were not the same as elsewhere. He believed them to be the same.

Chabot was not asked as to his knowledge of the contents of the Prudhomme and Bertrand letters, but his evidence is incompatible with any knowledge thereof, for he says that he never heard that applicants for permits in the territory in question took such permits at their own risk. I take it to be clear, however, that before February 15th, 1882, Gouin knew of the applications of the 15th December preceding, of the Minister's refusal to grant the same and the grounds of such refusal, and that then, and subsequently, he became privy to the making of the representations on which the Minister acted. As he was not acquainted with either Prudhomme or Bertrand, I would have expected to find some person with such acquaintance acting in concert with him. Chevrier was at Winni-

peg at the time. He knew both Prudhomme and Bertrand. He admittedly came into the matter shortly after, and, but for his positive statements, I should, without hesitation, have concluded that he was equally well informed as Gouin in all that took place. But if I credit him with the ignorance he professes, I must, I think, deny to him the leading part that he claims to have taken in the acquisition of Prudhomme and Bertrand's rights in the concession referred to, and venture to doubt that Gouin owed his subsequently acquired interest therein to the accident of a supposed connection with Chabot in another limit, and for that reason was a fair object for Chevrier's bounty, generously exercised by giving him in each case a larger share than fell to the lot of either Chevrier or Chabot.

Subsequently, Chevrier, Chabot and Gouin promoted the organization of the plaintiff company, and Murray, Costigan and Latour became associated therewith as already mentioned. Neither Murray nor Latour knew anything of the Prudhomme or Bertrand correspondence, or had even heard that the Government declined to issue permits or licenses to cut timber in the disputed territory except at the applicant's risk. Personally Murray knew nothing of the statements made in the company's application for a permit, the letter having been written by the acting Secretary and submitted to him. Having, as President, signed it, he had nothing more to do with it. Mr. Burgess, who was at the time the Acting Deputy of the Minister of the Interior, says that Mr. Gouin gave him this application at the Department of the Interior, and that at the same time he handed him the Prudhomme and Bertrand assignments as evidence of their "surrender" of their rights to the company. Gouin, who was then, and subsequently, a director and the Vice-President of the company, admits seeing Burgess relative to the matter, but

1900

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

denies that he took the application to the Department. Burgess thinks, but is not positive, that Chabot accompanied Gouin. Chabot says he did not. Burgess says that he called their attention to the fact that the assignments were not made in favor of the company but of three individuals, and that on the following day they brought him a letter from Chabot to the Minister, stating that Chabot and Chevrier were members of the company and also assignees of Prudhomme and Bertrand. In this letter, which bears date of March 3rd, no mention is made of Gouin, although he was in a like position. The company's application for the permit, the two assignments, and the letter last referred to, bear the impression of the stamp of the Department of the 5th March. There is also in evidence another letter of the 3rd March. It is from the Surveyor-General to the Crown Timber Agent at Winnipeg, advising him that Bertrand & Co. and Prudhomme & Co. had assigned their rights to the permits he had been instructed to issue to them, in the Three Tongue River, to the Saint Catharines Lumber Company, and authorizing him to issue a permit to the company for the amount and on the ground on which he had been instructed to issue the permits to Bertrand and Prudhomme. There is nothing to show when this letter was mailed, but on the 5th a telegram to the same effect was sent from the Department to the Crown Timber Agent.

Now, there is a promptness and despatch about this that one would not look for in the case of papers entrusted to the mails and fortune ; and I have no doubt that Burgess is right when he says they were handed to him, and by Gouin. Whether Chabot was present is not material, though I should, perhaps, add that I am inclined to credit Chabot's statement that he was

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

not. His letter appears to me to some extent to corroborate his testimony in that behalf.

To one other conflict between the evidence of Burgess and that of Gouin I must briefly refer. Burgess says that in 1883 it was part of his instructions from his Minister, and his duty, to call the attention of applicants for concessions in the disputed territory to the fact of the dispute relative thereto between the Governments of Canada and of Ontario, and to put them upon their guard. This had been particularly impressed upon him by Sir John Macdonald. He thinks it is likely that when Gouin came about the application he told him of the position of affairs between the Department and Prudhomme and Bertrand, but he has no positive recollection of doing so. The Prudhomme and Bertrand correspondence was at the time before him. He has no doubt that he acted on his instructions, and his recollection, as well, is, that he told Gouin that the limit applied for was situated in the disputed territory, and that the title would not be as good as the title in territory outside of the disputed boundaries. Gouin in his direct examination in reply says that Burgess did not tell him anything of the kind, and that he never heard that he took the permit at his own risk. But in his cross-examination he says that he will not undertake to contradict Burgess as to this, but that he does not remember being told about the dispute and the state of the title.

Apart from that general knowledge of the dispute between the two Governments, which was public property, Gouin, from his connection with the Bertrand correspondence, to which I have referred, must, at the time when the company's application was made, have known that the Minister was not issuing permits in the territory in question except at the applicant's risk; and, having this knowledge, it may be that what Burgess told

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

him would make no strong impression on his mind. Burgess, on the other hand, knew nothing of the part Gouin had taken in respect to the Bertrand correspondence; and believing him to be ignorant of the course that the Minister was pursuing in regard to such permits, would be likely, I think, to follow his instructions, as his duty was, and to give Gouin when he came with the company's application, the usual warning. I think the probabilities are, and, for the purposes of this case, I find, that Burgess did this.

The company having, as stated, obtained the Minister's authority for the issue of a permit to cut two million feet of timber in the territory described, applied on the 30th of April to the Crown Timber Agent at Winnipeg for, and, on May 1st, obtained from him, a permit to cut one million feet on Dominion Lands "described in a tracing in the Department." This application was made upon a form printed for the use of settlers, and upon the face of which there is a notice from the Crown Timber Agent containing three paragraphs, the first and third of which are in terms limited to settlers, the third being in these words:—

> Any person applying for a permit and through error receiving the same on land which is no longer owned or in possession of the Crown, or on which any person has a claim, will not be entitled to any compensation, protection or redress from the Government.

During that season the company caused to be cut, on what they supposed to be the lands described in the permit, one million six hundred and fifty-one thousand nine hundred and ten feet of timber, board measure. The company used, I think, a tracing of the Charest plan, which was made without reference to the Marks' application and which showed a limit of fifty square miles on the south of Lake Wabigoon, while the reference in the permit is to a tracing made from a plotting based upon the Marks' survey and Charest's plan, which

placed the company's limit to the south of the Marks' limit. In this way, it appears to me, it happened that of the timber cut, the company, without doubt, cut one hundred and fifty thousand feet on lands not covered by their permit; and as to the rest it is, I think, impossible, without a new survey, to say whether or not any of it was cut on land covered thereby. Dumais' survey, made in September, 1889, obviously established nothing. No action was taken against the company either in respect of cutting in excess of the million feet authorized by the permit, or of any cutting outside the limits; and subsequently accounts were rendered to them charging them with the usual dues upon all the timber cut.

It was the intention of the company to erect a saw mill at Elm Bay, on Lake Wabigoon, at a point contiguous to the Canadian Pacific Railway, and there to manufacture into lumber for the Winnipeg market the logs that they had cut. They purchased the machinery for the mill, but could not put it up until they got the Canadian Pacific Railway Company to put in a siding for them. During 1883 and 1884, they made frequent applications to the railway company for the siding, and though, as it appears, promises were made, nothing was done in that direction. This is, I think, the rock on which the company's enterprise, so far, at least, as the permit is concerned, came to grief. If they could have manufactured the logs in 1883, or during the first six months of 1884, they would, in all probability, have escaped the seizure and consequent loss which overtook them later. But without the siding they were unable to erect their mill, or manufacture their logs; and for the same reason, I take it, they refrained in 1884 from perfecting their right to the license to cut timber to which I am about to refer, and from prosecuting lumbering operations thereunder. Chevrier in answer to the

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

question: "What prevented them from going on with the work in 1884?" stated that the siding was not put in in September or October in time to ship men and to prepare for operations; that they were depending upon the siding, and it was not put in.

In August, 1883, the Government of Canada changed its policy in respect of the administration of timber lands in the disputed territory, and commenced to issue yearly licenses to cut timber there instead of permits. The holder of a permit, according to the regulations then in force, was charged dues upon the quantity of lumber he was allowed to cut within the year for which it was issued (in the case mentioned two dollars and fifty cents per thousand feet), while a licensee was required to pay a ground rent of five dollars per square mile, and five per centum royalty on the sales of the product. The holder of a permit was not required to make any survey, but in the case of a license, the person to whom it was promised, in respect of unsurveyed territory, was bound before the license issued, and before he cut any timber, to cause to be made at his own expense, under the instructions of the Surveyor-General, a survey of the timber berth by a duly qualified Dominion Land Surveyor, the plan and field-notes of which were to be deposited of record in the Department of the Interior. The regulations respecting licenses also contained provisions for inviting competitive tenders (where there were more applicants than one for a berth), for the erection of mills, and the renewal of such licenses. The payment of the ground rent appears to have been exacted when the license was promised. A license was not assignable without the consent of the Minister.

By order-in-council of November 1st, 1883, confirmed, with a change in the description of the limit, by a subsequent order of December 27th, authority was, on the

company's application, given for the issue to them, on the usual conditions, of a license to cut timber in the territory covered by the permit issued to them in May. This territory was unsurveyed.

By a report of the Judicial Committee of the Privy Council of the 23rd July, 1884, adopted by Her Majesty on the 11th of August following, the dispute as to the western boundary of Ontario, to which I have made frequent reference, was determined in favor of Ontario; and on the 30th October following, an action was commenced by the Queen, on the information of the Attorney-General for Ontario, against the company for a declaration that they had no right in the timber cut by them in the territory mentioned, and for an injunction and damages. An order for an interim injunction was made by the Chancellor of Ontario on the 20th of January, 1885. The company defended the action, raising the question of the Indian title, which was subsequently, in December, 1888, definitely determined by the Judicial Committee of the Privy Council in favor of the Province of Ontario.

In May, 1885, the company, on grounds mentioned in their petition, prayed the Minister of the Interior to be indemnified against any expense, loss or damage that they might sustain in defending their title to the said timber, and to be protected in the rights conferred upon them by the permit. It does not appear that the Minister of the Interior replied to this communication; but on September 29th, 1885, the Superintendent-General of Indian Affairs, by letter addressed to the company, promised to indemnify them against the costs of an appeal from the judgment of the Chancellor to the Court of Appeal for Ontario. That promise has been kept; and I also understand that all the costs incurred by the company in its litigation have been paid by the Crown.

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

The dues on the timber cut under the permit, with a fee of fifty cents therefor, amounted to $4,125.50, of which sum the company paid $500.50 when the permit was issued, and $1,625 in the following October, leaving a balance of $2,000 due to the Crown. In December, 1883, or January, 1884, the company paid to the Minister :

One year's ground rent ($250.00), in advance, from the first of December, 1883, for the timber berth for which the Minister of the Interior was authorized by order-in-council to issue a license to them.

On the 25th May, 1885, in response to a request preferred by the company in September, 1884, a change in the account as it stood in the books of the Department was approved, by which the dues paid on the permit of 1st May, 1883, were applied as if the timber cut thereunder had been cut under a license. This change in the account was favorable to the company ; and after making a charge therein of $21.23 for ground rent for December, 1884, and of $250 for ground rent for the year 1885, the account showed a credit in their favor of $119.77, instead of a debit of $2,000 against them.

The company never perfected their right to the issue of a license by performing the conditions on which it was promised to them, and never asked to have the same issued. As to that, they say, however, that when the Attorney-General of Ontario commenced proceedings against them there remained one month of the year for which they had paid the ground rent in which to make the survey ; and they rely upon the action of the Minister in crediting them with the ground rent for the month of December, 1884, and the year 1885. They claim, therefore, that in addition to the value of the logs seized, to be ascertained by reference to what could have been realized from them by their manufacture and sale, they are entitled to

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

damages for loss of profit on the lumber that could have been taken from the territory in question during the winter of 1884 and the year 1885.

As to the permit issued to the company, I agree with Mr. McCarthy that, whichever view may be taken of the grounds upon which *Marshall* v. *Green* (1) can be supported (2), it is a contract for the sale of personal chattels. The property in the timber was not to pass until severed, and it was not in the contemplation of the parties that the purchasers were to derive any benefit from its further growth in the soil. I agree, too, that such a sale ordinarily implies a warranty by the vendor that the chattels are his. But in this case there are, it appears to me, facts and circumstances which show that the Crown did not intend to assert ownership, but only to transfer such interest as it had in the chattels sold; and that of this the plaintiff company must be taken to have had notice. No doubt some difficulty arises from the fact that the permit issued to a joint-stock company, whose shareholders consist not only of the promoters of the company, the assignees of the Prudhomme and Bertrand concessions, but of persons ignorant and innocent of the means by which such concessions were obtained. But, I take it that the distinction made by Mr. Robinson between cases in which remedies are sought to be enforced against companies in respect of the acts and contracts of their promoters, and cases in which companies seek to obtain the benefit of such acts or contracts, is good in principle, and not, I think, inconsistent with authority (3). Looking at the terms of the company's application, and the surrounding circumstances, it appears to me that

(1) 1 C. P. D. 35.

(2) Benjamin on Sales, 4th ed. 122.

(3) Brice on *Ultra Vires*, 2 ed. 666-694; Lindley on the Law of Companies, 5th ed. 151.

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

it would be inequitable to permit them to escape the consequences resulting from the conditions attached to the Prudhomme and Bertrand concessions, to which they, in effect, succeeded. I do not overlook the fact that such permits as those promised were good for one year only, and on 1st May, 1883, when the permit in question was issued to the company, the Government was in law free to issue it to them without reference to Prudhomme and Bertrand's assignees. But apart from any pretension which the latter were in a position to make—that in the fair administration of the public domain they were entitled as against third persons to a continuance of the concessions mentioned—we have the not unimportant fact that the authority for the issue of such permit was given nearly two months before its issue, and at a time when such assignees might have taken advantage of the promises given by the Minister. For which reason, no doubt, we find the officers both of the Crown and company, in the negotiations preceding the issue of the permit, acting in the view that it was important that the company should be considered the virtual successors of Prudhomme and Bertrand.

Then, I have no doubt that Gouin was acting for the company in the negotiations that in March, 1883, he had respecting the issue of the permit; and that notice to him must be taken to be notice to the company. I do not in this connection refer to the knowledge that Gouin had by reason of his connection with the Bertrand correspondence, which he cannot, perhaps, be taken, as against the company, to have communicated to them, and which, in fact, he did not so communicate, but to the actual notice given to him by the Acting Deputy of the Minister of the Interior, and which it was, I think, his duty to have communicated to the company. We have also the notice

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

printed upon the face of the form used by the company in making their application to the Crown Timber Agent; and though there is, from the connection in which such notice occurs, some reason for concluding that it is applicable to settlers only, yet one would think, that had it not been well understood that the company were to take the risk of the Crown's title, such a notice would have put the company on their guard and, at least, have suggested the necessity for making further enquiry.

Then as to the orders-in-council authorizing the issue of a yearly license to the company, there was, I think, a failure of consideration which entitles them to recover the two hundred and fifty dollars paid for the ground-rent for the year ending November 30th, 1884. As to the claim for unliquidated damages there was not, in my opinion, any breach by the Crown of its contract. The company never perfected their right to the issue of a license in the year 1884, and never demanded the issue thereof. It was not contended that they had performed the conditions on which it was promised, but that they were discharged from the performance of such conditions, not by the definite determination in 1884 of the boundary dispute, but by the proceedings subsequently commenced against them by the Attorney-General of Ontario, in which the question of the Indian title was the principal question in issue. Those proceedings were commenced on October 30th of that year, and the injunction order was made on the 20th of January following; while the year for which the license was promised expired on the 30th November, 1884. At the latter date the defect in the Crown's Indian title had not been established; it had not done anything to put it out of its power to issue the license; and it had not refused to issue it. On the contrary, I infer that the license would have issued had the company

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

perfected their right to it, for I observe by a return put in evidence that licenses to cut timber in the disputed territory were actually issued in October and November of 1884, and April and June of 1885.

But, assuming for a moment that there was a breach of the contract to issue such a license for the year 1884, the plaintiffs would not be entitled to recover more than nominal damages. The company could not without the Minister's consent have sold or assigned the license in case it had been issued to them. It would have been of value to them for the purpose of carrying on lumbering operations only, and they do not contend that they suffered loss except in being prevented from prosecuting such operations thereunder. But it is clear that it was not any defect in the Crown's title, but the fact that they had no siding on the Canadian Pacific Railway, that stood in the way of such operations in the year 1884. With reference to 1885, the plaintiffs' case rests wholly upon the change that was made in the departmental accounts to which I have referred. That, however, was a concession made to the company, at their request, without consideration so far as I can see, and as a mere act of grace, whereby the relations of the parties, if altered, were not, I think, altered otherwise than in respect of the disposition to be made of the moneys that had been paid on account of dues which had accrued under the permit; except, perhaps, that it might also be taken to have been an intimation to the company that the Crown was at the time still ready to issue the license on the performance by them of the conditions prescribed in the orders-in-council and regulations therein referred to.

In the view I have taken of this case I have not thought it necessary to consider the question, mooted at the argument, as to whether an action by petition or

1890

THE SAINT CATHARINES MILLING AND LUMBER COMPANY v. THE QUEEN.

Reasons for Judgment.

on a reference will lie against the Crown for unliquidated damages on a breach of a warranty implied in the sale of a chattel.

The Crown by its statement in defence alleges that it has always been ready and willing to repay to the plaintiffs the moneys paid by the plaintiff company for ground rent and timber dues; and, without admitting any legal liability, tenders the plaintiffs the sum of two thousand three hundred and seventy-five dollars and fifty cents in full of such moneys. In this sum is included the two hundred and fifty dollars that I have said I think they are entitled to recover for the ground rent paid for the year 1884. In giving effect to the defendant's offer to pay the larger sum, I do not wish to be understood as intimating more than this: that, under all the circumstances, the offer is, in my opinion, eminently fair. There will be judgment for the plaintiffs for $2,375.50.

Judgment for plaintiffs; costs reserved.

Solicitor for plaintiffs: *A. Ferguson.*

Solicitor for defendant: *W. D. Hogg.*