Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ducondu and others v. *Dupuy, from the Supreme Court of Canada; delivered November 27th,* 1883.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ARTHUR HOBHOUSE.

ON the 10th July 1858 Edward Scallon, who is the predecessor in title of the Appellants, contracted with one Benjamin Peck, the predecessor in title of the Respondent, to sell to him certain property called timber limits. The nature of a timber limit is this:—Annual licenses are granted by the Commissioner of Crown Lands to take possession of certain areas of land, to cut timber within those areas or limits. There is an express provision in the statute that if any license is found to cover ground already occupied by a prior license the subsequent license shall to that extent be null and void. Such being the nature of the property, Scallon contracted to sell all the right and title obtained by him from the Crown. The purchase money was to be paid by instalments, and when the last instalment was paid the conveyance was to be completed by Scallon. The money was paid; and Scallon being dead, his heirs, the present Appellants, executed a deed, dated the 16th March 1865, for the purpose of completing the conveyance to Cushing, in whom Peck's interest was then vested. In that deed it is stated that they are acting in execution of the prior contract; and they convey and release, with a guarantee against disturbance, all the immovable property and rights which Scallon had promised. Then

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they proceed to describe it; and they describe it in precisely the same terms as are used in the contract of 1858. The property so described is said to be comprised in 13 different licenses, which purport to convey a title to an area of 256 miles. Among those licenses are two, numbered 97 and 98, which purport to convey title each to an area of 25 miles on the Assumption River; and the heirs of Scallon declare that the licenses have been renewed up to that time by Peck and his representatives. It turned out that in point of fact Nos. 97 and 98 had not been renewed, and it seems doubtful whether they were in existence at the time of the contract of 1858. Mr. Fullarton has argued his case on the hypothesis, which he takes as most favourable to himself, that they were not in existence at that time. On that discovery the parties come together again, and the heirs of Scallon agree to make good the loss accruing to the successors in title of Peck by the non-existence of licenses 97 and 98. The arrangement made by them is contained in a deed of the 22nd October 1866, executed by one McConville, who for the present purpose is assumed to be the lawful agent of the Appellants. The language used by the parties in that deed is, as stated in English, to the following effect:—After referring to the prior transactions, they say, "In virtue of that deed"—that is, the deed of 1858,—"Scallon was bound to sell 256 miles of "limits for cutting wood on Crown lands; and "as there is found a deficit of 50 miles to "complete the said quantity of 256 miles "granted to Cushing, McConville, in the name "of his principals, desiring to fill up the deficit "which has been found, has by these presents "granted and conveyed, with warranty against "all disturbances generally, whatsoever they may "be, to Cushing, the said quantity of 50 miles of

" limits on the said River Assumption, described " as follows in the English tongue." The description is contained in two other licenses, Nos. 25 and 26. Licence 25 is in these terms :—" Commenc- " ing at the upper end, limit No. 94 on the south- " west side of L'Assomption River, granted to " late Edward Scallon, and extending five miles " on said river and five miles back from its " banks, making a limit of 25 square miles, not " to interfere with limits granted or to be " renewed in virtue of regulations." *Mutatis mutandis*, license 26 is in the same terms. The deed states that McConville has, for his principals, paid the sum of 500 dollars to Cushing, on account generally of all claims which Cushing may have against the heirs of Scallon, and Cushing further declares that by reason of this deed he has nothing to claim, for any cause or reason whatever, against the heirs of Scallon ; and a general release is given. McConville on his part gives a general release to Cushing for all claims by the heirs of Scallon.

It is on that deed that the present question arises. The difficulty which has arisen is this : that when the grantee, Cushing, came to work on the limits contained in the licenses 25 and 26 he was stopped by a man of the name of Hall, who claimed to be possessed of the same land in virtue of a prior license from the Crown. There has been a great deal of controversy as to whether the interference by Hall has been properly proved in this suit ; but for the purposes of the present decision all that part of the case is assumed in favour of the Respondents. Cushing could not get the benefit of all the land described in licenses 25 and 26, by reason of a prior grant to Hall. Cushing accordingly, or his assignee, Dupuy, the present Respondent, sues the heirs of Scallon upon the warranty which he alleges that they have given for 50 square miles

of timber limits. The question is whether the Appellants have given a warranty for those 50 miles of limits absolutely, or only a warranty for the licenses which purport to give a title to the 50 square miles. It is a question of very considerable difficulty. The Courts in Montreal have taken one view, in favour of the Appellants; and the majority of the Supreme Court has taken the other view, in favour of the Respondent.

There has been a good deal of question, both in the Courts below, and at the bar here, whether it is proper to go behind the deed of October 1866. It is quite plain what the course of a court of justice must be. In one sense we cannot go behind the deed of 1866; that is to say, the rights of the parties must be regulated by the construction of that deed, and of that deed alone. In another sense we have to go behind it, because the deed itself refers to prior transactions. It professes to be founded upon the liability arising out of those prior transactions; and a court cannot properly construe the deed without ascertaining what the position of the parties was at the time when they came to execute it. Now the position of the parties appears to their Lordships to be this: Scallon contracted to sell his right and title to the 13 licenses, which purport to contain 256 square miles. He was not liable to make good a title to the 256 square miles any further than the licenses themselves made a title to them. But he was liable to have and to deliver the licenses which he purported to sell. In point of fact he had not got two of those licenses, and when that fact is discoverd his heirs come to make up the deficit, as they call it "*compléter le déficit;*" that is to say, to do that which Scallon was bound to do. At that time Scallon was bound to make good in some way the loss sustained by the non-existence of licenses 97 and 98.

What then do the parties do? They make up the deficit by assigning two other licenses. They call it, "50 miles of limits described as follows." Even taking the word "limits" to be an ambiguous term, their Lordships are of opinion that "limits described as follows" must be taken to indicate the thing which is sold according to the description which is given. Into that description is imported the condition that the license sold is not to interfere with limits granted or to be renewed in virtue of regulations. Therefore the two licenses which formed the subject of the assignment of 1866 are to be taken exactly as the two missing licenses which formed the subject of the contract of 1858 were taken, viz., as conveying only such right, title, and interest as the vendors had obtained from the Crown. Now the guarantee can only extend to the thing that is sold, the very subject of the assignment. If the licenses 25 and 26 were not forthcoming, or if there was any defect in the title of the heirs of Scallon to those licenses, the guarantee might have some operation; but the licenses are forthcoming and have been handed over, and there is no guarantee against a deficiency by reason of a prior grant.

The result is, that, assuming the Respondent to be right in all the issues raised by him with respect to the breach of the alleged guarantee, their Lordships are of opinion that no guarantee exists to cover that alleged breach.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the Supreme Court be reversed, and the decrees of the lower Courts restored. The costs of the Appeal will follow the result.