

Privy Council Appeal No. 29 of 1931.

George Jardine and another - - - - - *Appellants*

v.

The Attorney-General of Newfoundland and another - - *Respondents*

The Attorney-General of Newfoundland and another - - *Appellants*

v.

George Jardine and another - - - - - *Respondents*

(Consolidated Appeals)

FROM

THE SUPREME COURT OF NEWFOUNDLAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 12TH JANUARY, 1932.

Present at the Hearing :

VISCOUNT DUNEDIN.

LORD MERRIVALE.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

The main question involved in this appeal may be shortly stated. It is whether a timber license granted to the appellant Jardine and assigned by him to the appellant Martin (who is a timber merchant) is a subsisting license or has been effectively determined by or on behalf of the Crown. The relevant facts, however, do not admit of brief statement, and must be set forth in some detail.

The license covers a tract of land in Labrador and is dated the 16th March, 1915. It is expressed to be granted under and subject to the conditions and provisions of the Newfoundland Act 3 Edward VII and the Acts in amendment thereof, the relevant Acts being the Crown Lands Act, 1903, and the Crown Lands Act, 1911. The license itself contains certain express

conditions; but before considering the actual terms of that document it will be convenient to refer to the material provisions of the relevant Acts.

The Act of 1903 contains provisions relating to the grant of licenses to cut timber on Crown lands. By Section 22 the licensee has to pay a bonus, to be fixed by the Governor in Council, varying according to the situation and value of the limit, but in no case less than two dollars per square mile. By Section 23 the Governor in Council may grant such licenses for a period of 50 years or such further period as may be deemed necessary. The Act of 1911 repealed this section and substituted for it a section enabling him to grant such licenses for a period of 99 years. Section 25 provides that "All licenses shall be issued subject to the following conditions:"—then there follow eight subsections. Some of these subsections were amended or repealed by the Act of 1911, with the result that Section 25 of the Act of 1903, so far as relevant, ran thus:—

"25. All licenses shall be issued subject to the following conditions:—

"(1) The licensee to erect a saw mill or mills or a factory or factories for the manufacture of paper or paper pulp upon or in connection with the limit described in such license and subject to any special conditions which may be agreed upon and stated in the license, such saw mill or mills to be of the capacity to cut at the rate of one thousand feet board measure in twenty-four hours for every ten square miles comprised in the license, or to establish such other manufactory of wood goods as may be agreed upon as the equivalent of such mill or mills, the licensee to commence and complete the erection of the saw mill or mills or manufactory of wood goods within such period as shall be determined by the Governor in Council and set forth in the license or to expend in the erection and equipment of a factory or factories for the manufacture of paper or paper pulp such sum as shall be prescribed and within such period as shall be limited and stated in such license, and further to work said limit in a *bona fide* manner and operate said mills or factories during each succeeding year of the term of the license; provided that the licensee may, with the consent of the Governor in Council, manufacture a greater or less quantity of timber in any year than the quantity specified.

(2) To take from every tree he cuts down all the timber fit for use, and manufacture the same into sawn lumber or other such saleable products as may be provided in the license or by any regulations made under this Act.

(4) To make returns to the Government annually on oath, on or before the 30th of November in each and every year of (a) the total quantity of timber cut between the 1st day of July and the 30th day of June then last past which is liable to the payment of royalty, and (b) of all timber cut for the manufacture of paper or paper pulp, also to make returns annually or at such other periods as may be required by the Governor in Council, or by regulations under this Act, sworn to by him or by his agent or employee, cognizant of the fact, of the quantity of all sawn lumber, timber, railway car stuff, ship timber and knees, shingles, laths, cordwood or bark, or any other product of timber sold or disposed of from the limit in whatever form the same may be sold or disposed of by him during such quarter or other period and the price or value thereof, the licensee to be liable to a fine of fifty dollars if the returns aforesaid be not filed in the Department of Agriculture

and Mines within thirty days from the date on which they are required to be filed as aforesaid.

(5) To pay in addition to the said bonus an annual ground rent of two dollars per square mile, such rent to commence and be computed from the date of the approval of the application by the Governor in Council, and to be paid in advance the first year's rental within thirty days of such approval and to be paid on the total area applied for and approved, and that for subsequent years on the area surveyed and described in the license, on the 30th day of November; and, further, a royalty in all cases, except on lands in Labrador, at the rate of 50 cents per thousand feet, board measure, for all trees cut down, and in Labrador at the rate of 25 cents per thousand feet, board measure, for all trees cut down: Provided that no royalty is to be payable on timber or trees manufactured into paper or paper pulp.

(6) To keep correct books of such kind and in such form as may be provided by his license, or by regulations under this Act, and to submit the same for the inspection of the Minister of Agriculture and Mines, or a person authorized by him whenever required, for the purpose of verifying his returns as aforesaid.

(8) The license shall be liable to forfeiture for the non-payment of rent or royalties; and, for the infraction of any of the other conditions to which the said license is subject, the licensee and his assigns shall be liable to a penalty of not more than ten thousand dollars, and a penalty of not more than one hundred dollars for every day any such infraction continues. The said penalty may be recovered by a suit in the name of the Minister of Agriculture and Mines, and shall be a first charge on any and all property that may be upon the land licensed."

In addition, the Act of 1911 enacted (by Section 6 thereof):—

"Whenever the rent or royalties payable under any license to cut timber shall be in arrears and unpaid for the period of six months from the day on which the same became due, the Governor in Council may, without any suit or other proceeding to enforce the same, declare such license forfeited and thereupon the same shall be again open to application by the public."

These being the relevant statutory provisions which were in force at the date of the issue of the license, the terms of that document now fall to be considered.

The tract covered is 1,000 square miles at White Bear Bay, Labrador. The term is 99 years from the 12th March, 1915. There is a yearly rent of 2,000 dollars and a royalty at the rate of 25 cents for every 1,000 feet board measure for all trees cut down, payable on the 30th November in each and every year during the continuance of the license. Then follows a proviso containing a series of express conditions. It contains nearly all the conditions specified in the amended Section 25 of the Act of 1903, as the conditions subject to which all licenses shall be issued; it does not, however, contain any condition corresponding with the words "and further to work said limit in a *bona fide* manner and operate said mills or factories during each succeeding year of the term of the license."

The proviso in question (so far as material) runs thus:—

"Provided and this license is upon the express conditions that the said George Jardine do and shall commence within one year and complete within three years from the 12th day of March aforesaid the erection of a

saw mill or mills of a capacity to cut at the rate of one hundred thousand feet, board measure, in every twenty-four hours, or expend the sum of 50,000 dollars in the erection and equipment of a factory or factories for the manufacture of paper and paper pulp, the erection of such factory or factories to commence within two years, and be completed within five years from the 12th day of March aforesaid ; that the said George Jardine shall take and manufacture into sawn lumber or other saleable product all the timber fit for use out of every tree cut down ; that the said George Jardine shall at all times prevent all unnecessary destruction of timber on the part of his workmen, and shall exercise strict and constant supervision to prevent the origin and spread of fire ; that the said George Jardine shall make true and faithful returns to our Minister of Agriculture and Mines for the time being on or before the 30th day of November in each and every year, upon the oath of the said George Jardine declaring (1) the total quantity of timber cut between the 1st day of July and the 30th day of June then last past which is liable to the payment of royalty, and (2) all timber cut for the manufacture of paper or paper pulp, and that the said George Jardine, agent or employee cognizant of the fact shall annually or at such other periods as may be required by the Governor in Council, make true and faithful returns upon oath declaring the quantities disposed of or sold, of all sawn lumber, timber, railway and car stuff, ship timber and knees, shingles, laths, cordwood or bark, or any other product of timber from the limit of this license in whatever form the same may be sold or disposed of during such quarter or other period, and the price or value thereof ; the said George Jardine to be subject to a fine of 50 dollars if the returns aforesaid be not filed in the Department of Agriculture and Mines within thirty days from the date on which the same ought to have been, or are required to be filed as aforesaid ; and that the said George Jardine shall keep correct books of accounts, which shall be open to inspection of our Minister of Agriculture and Mines, or to such person or persons as may from time to time be appointed by him for the purpose of verifying the returns aforesaid ; and, lastly, that the said George Jardine do and shall permit and suffer our Minister of Agriculture and Mines or such person or persons as may, from time to time, be appointed by him for that purpose, when and as often as he or such persons may think fit to enter into and upon the said hereby demised land, and to search, view and inspect, and enquire into the working of such mill or mills, with the view to ascertaining and enquiring as to whether the conditions of this license are truly and properly complied with."

The license in addition contains the following clause, upon which much of the controversy turns :—

" And it is hereby further declared and agreed upon that this license is granted under and subject to the conditions and provisions of Acts 3rd Edward VII, cap. 5, and the Acts in amendment thereof, and the rules and regulations made thereunder in relation to the licensing of timber lands, and in case the said George Jardine shall make default in performance of any of the conditions herein contained, then and in that case this license shall be null and void, and the timber hereby licensed shall revert to us, our heirs and successors."

The facts subsequent to the issue of the license must now be stated. A bonus of 2,000 dollars was payable for the license and was paid on the 22nd March, 1915. At the same time there was paid a sum of 2,000 dollars for rent for the period ending the 12th March, 1916. The next payment of rent was made on the 30th November, 1916, and consisted of a sum of 3,360·65 dollars.

representing rent from the 12th March, 1916, to the 30th November, 1917. Thereafter the rent was treated as payable in advance on every 30th November in respect of the twelve months ending on the following 30th November.

The tract of land covered by the license was situate in territory the title to which was, at the date of the license, a matter in dispute between Newfoundland and the Dominion of Canada. Unless and until that dispute was resolved in favour of Newfoundland it was obviously a matter of risk for the licensee to be erecting mills or factories and manufacturing and removing timber under his license. Accordingly, the licensee did nothing except pay his rent to the Crown. Although the time for the erection of the saw mill as required by the license ran out on the 12th March, 1918, and the time for the erection of the alternative factory ran out on the 12th March, 1920, the representatives of the Crown made no complaint. They did not seek to have fresh dates substituted by agreement. Neither did they claim that the license was at an end. On the contrary, they continued to accept without demur payment of the annual rent of 2,000 dollars, up to and including a payment made on the 25th May, 1928, which cleared the rent under the license up to the 30th November, 1928. This payment brought the total amount received by the Crown in respect of bonus and rent under the license to a sum in the neighbourhood of 30,000 dollars.

In the meanwhile the dispute between Newfoundland and the Dominion of Canada had been resolved in favour of Newfoundland, the judgment of this Board having been delivered on the 1st March, 1927.

On the 5th November, 1928, the further sum of 2,000 dollars was paid for rent, covering the period up to and including the 30th November, 1929. This seems to have been accepted by the Crown, and a receipt was given by the Department of Agriculture and Mines, dated the 5th November, 1928, and couched in the following terms :—“ Received from George J. Jardine per M. E. Martin the sum of 2,000 dollars, rent timber limit, in advance one year from November 30th, 1928.”

So the matter rested until the end of the year 1928, when a change of attitude by the department in regard to this license was revealed. On the 29th December, 1928, the Minister wrote a letter addressed to George J. Jardine, c/o M. E. Martin. It ran thus :—

“ In accordance with a decision of the Government of this Colony, I return you herewith a cheque for the sum of 2,000.00 dollars, being amount sent by you to this Department on the 5th day of November last, covering a year's rental in advance on timber limit on Labrador held under license by you.

“ You are aware that the conditions in your license relating to the establishment of a mill or mills in connection with the property have not been carried out. Two years ago the then Government of this Colony, after the decision of the Privy Council defining the limits of what now constitutes Newfoundland Labrador, decided that, inasmuch as it might reasonably

be argued on the part of licensees that the uncertain condition of the title to Labrador rendered it difficult for them to carry out this condition in their licenses, the Government would refrain for two years from taking measures for the cancellation of their licenses on the ground of non-performance of this condition. This period of two years expires on the 1st March, 1929.

“Owing to your not having complied with the conditions in relation to the erection of a mill or mills, your license is subject to proceedings for cancellation, and in view of the policy of the Government in favour of such cancellation it is not considered fair to accept from you at present the rental payment covering a period extending beyond the 1st March, 1929.

“The amount sent in by you is therefore returned herewith in full, and I have to state that if you will forward a cheque covering rental from 30th November, 1928, to 1st March, 1929, it will be accepted.”

It is to be observed that no intimation had ever been given either to the appellant Jardine or to the appellant Martin of any decision or policy of the Newfoundland Government in relation to this license, or in relation to licenses generally, or of any fresh period in relation to the erection of a mill. In their Lordships' opinion, this letter must be read as a statement by the Minister that the license would terminate on the 1st March, 1929, in consequence of the failure to perform the conditions contained in the license in relation to the erection of a mill. It was contended that the letter only meant that unless some steps were taken by the licensee before the 1st March, 1929, to erect a mill, the Crown would apply to the Courts to forfeit the license. Their Lordships cannot so read the letter. The power to forfeit is exercisable by the Crown, not by the Courts. The only part which the Courts can play in that regard is to decide, in case of dispute, whether the power to forfeit has been validly exercised. What the Minister in effect is saying in this letter is this :—“You have not carried out the condition in your license relating to the establishment of a mill or mills. After the Privy Council's decision, the Government decided not to exercise its right of forfeiture before the 1st March, 1929. Owing to your not having erected a mill your license will be cancelled on that date, and we will not accept rent for any period beyond it.”

The letter was answered on the 7th January, 1929, by the legal adviser of the appellant Martin, who disputed that any right to cancel or ground for cancellation existed, and returned the cheque. The rent up to and including the 30th November, 1930, was sent in November, 1929, but was returned. Ultimately the appellant Martin presented a petition to the Supreme Court of Newfoundland, seeking a declaration that the license was still valid and effectual. Thereupon, on the 20th February, 1930, the present proceedings were commenced by writ in the said Supreme Court, in which the Minister was plaintiff and the appellants were joined as defendants. Subsequently the Attorney-General was added as a co-plaintiff. The petition of the appellant was stayed.

The relief claimed in this action was thus framed :—

“ The plaintiff, the Attorney-General, claims :—

A declaration that the said license is null and void.

“ The plaintiff, the Attorney-General, or, in the alternative, the plaintiff, the Minister of Agriculture and Mines, claims :—

(a) A declaration of forfeiture.

(b) Damages for breaches of the conditions hereinbefore referred to.

(c) Pecuniary penalties.

(d) Such other order as the nature of the case may demand.”

The defendants counterclaimed a declaration that no valid cause existed for forfeiture of the license, that the Government was not entitled to re-possess the lands included therein, but that the license was still valid and effectual.

The trial took place before a full bench of the Supreme Court, and by its judgment, dated the 23rd June, 1930, it was adjudged that the license be declared forfeited and that the defendants pay the costs of those proceedings.

It will be observed that no date is assigned as the date on which the forfeiture occurred, and that no relief was granted in respect of the claim for damages or the claim for penalties.

From this judgment both sides have appealed to His Majesty in Council. The defendants complain of the declaration of forfeiture, while the Attorney-General and the Minister seek to obtain either an order for payment to the Minister of damages to be assessed, or an order for the payment to the Minister of such sums in respect of penalties as may be just. The two appeals were consolidated.

Before dealing with the main appeal their Lordships think it advisable to make certain preliminary observations.

The claim of the plaintiffs is to deprive the defendant Martin, without compensation, of a right for which he has paid very considerable sums. If such a power of forfeiture exists, that defendant cannot complain, but he is entitled to claim that the terms in which the alleged power is framed must be closely scrutinised, and the case must be brought within its exact terms before it can be said that his license has been forfeited thereunder.

Further, if, as is the case here, the licensor has accepted rent with knowledge of breaches of conditions already committed, no forfeiture can take place grounded on any such breaches. The right to forfeit upon those grounds has been for ever waived. A forfeiture subsequent to the last acceptance of rent can only take place by reason of some breach subsequently committed, or (if previously committed) subsequently discovered.

Finally, although the clause in the present license is so framed as to provide that in case of the relevant default “ this license shall be null and void,” this must be treated as an ordinary forfeiture clause making the license voidable at the option of the licensor, a right which can be effectively waived by him as indicated above (see *Davenport v. Reg*, 3 A.C. 115).

Their Lordships now proceed to deal with the main appeal. The conditions of the license, the breaches of which are alleged by the plaintiffs to justify the exercise of the right of forfeiture, are six in number, viz. :—

- (1) The condition as to the erection of a saw mill or saw mills (set out in the license) or manufactory of wood goods (not set out in the license);
- (2) The condition as to the erection of a paper or pulp factory (set out in the license);
- (3) The statutory condition as to working the limit in a *bona fide* manner (not set out in the license);
- (4) The statutory condition as to operating such mills or factories (not set out in the license);
- (5) The condition as to making returns of timber cut (set out in the license); and
- (6) The condition as to payment of royalties (set out in the license).

As to all these matters the defendants put forward one overriding argument. They contended that upon the true construction of the Acts of 1903 and 1911, and in particular upon the true construction of Section 25 (8) of the Act of 1903, the power to grant licenses to cut timber on Crown lands was confined to granting licenses in such a form that the license granted could not be liable to forfeiture for any reason other than the non-payment of rent or royalties. Accordingly, it was argued that the provision in this license which purported to make it null and void in the event of default by the licensee in performance of any of the conditions therein contained, was of no effect in regard to the breach of any condition other than the condition for payment of rent and royalties.

This argument was rejected by the Supreme Court; but by reason of the view which their Lordships have formed upon other aspects of the case, it is unnecessary for them to express any opinion upon the matter. They propose to deal with the case upon the footing that the clause contained in the license confers upon the Crown a valid power to put an end to the license “in case the said George Jardine shall make default in performance of any of the conditions herein contained.”

The outstanding feature of this case is the fact that the Crown accepted without demur rent paid year by year, the last of such payments being accepted on the 5th November, 1928, in respect of the period ending on the 30th November, 1929. The cheque was cashed and no hint of forfeiture was given until nearly two months later. The effect of this in law is beyond doubt. On the 5th November, 1928, the Crown recognised the continuing existence of the license and waived any right of forfeiture which then existed by reason of any known breach of condition. No right of forfeiture could arise after the 5th November, 1928, unless the licensee made some “default in performance of any

of the conditions herein contained " which was subsequent to the acceptance of the rent, or had already made some such default which only subsequently became known to the Crown. There is no question here of any unknown antecedent breach being subsequently discovered. The crucial question is whether any subsequent breach was committed; and this, in view of the fact that the licensee continued to do nothing at all except to attempt to pay a further year's rent, must in this case depend upon the question whether the relevant conditions were conditions which, if broken, were broken once and for all, or were conditions of a continuing nature so that the licensee was from the moment of the original breach of a condition continuously committing a breach thereof.

The learned Judges in the Supreme Court, although in agreement as to the result of the action, seem to have based their decision that the license was forfeited upon different grounds.

The Chief Justice held that the receipt of rent operated only as a waiver of the time limits provided for in Section 25 of the Act of 1903 and that there were continuing breaches of the conditions that the licensee should work the limit in a *bona fide* manner and should pay royalties, which breaches conferred an immediate right of forfeiture. It is not quite clear whether or not he thought that there was a continuing condition to erect a saw mill or a factory irrespective of any time limit, which was being continuously broken after the last receipt of rent. Probably he did; but his judgment appears to be based upon a consideration of the terms of the statute, rather than upon the wording of the license, and to rest primarily upon there being a continuous breach of the conditions to work the limit and pay royalties.

Mr. Justice Kent held that there was a continuous obligation to erect and operate continuously a mill or factory and that acceptance of rent was no waiver of the subsequent continuance of the breach of that obligation. By "obligation" the learned Judge no doubt meant "condition." He treated each subsection of Section 25 of the Act of 1903 as an indivisible condition; and upon this footing he held that the provisions of Subsection 1 form a single condition of a continuing nature, viz., to erect the mill or factory, work the limit and operate the mill or factory, a breach of any portion of which is a continuing breach of the whole. This judgment also seems to be based upon a consideration of the terms of the statute and not the language of the license.

Mr. Justice Higgins held that the license was properly forfeited by reason of a breach of the continuous condition as to working the limit, which is provided for in the statute; that is to say, that the power of forfeiture arose by reason of breaches of that condition committed after the last receipt of rent. The decision of this learned Judge seems to depend wholly upon breach of a condition set out in the statute, but not in the license.

In regard to the view expressed by the Chief Justice that the acceptance of rent amounted only to a waiver of the time limit, it is difficult to see upon what principle this conclusion can be based. In the case of a forfeiture clause, acceptance of rent after a known breach of a covenant or condition is not waiver of the covenant or condition or some part thereof, but waiver of the right to forfeit which has arisen from the breach; and their Lordships feel a difficulty (in the absence of any special circumstances) in attributing to the receipt of rent after notice of breach of a condition, any effect short of a complete waiver of the right to forfeit by reason of that breach. *Counter v. Macpherson* (5 Moo. P.C. C. 83) is no authority to the contrary. No question of forfeiture arose in that case. The respondent there was under a contract with the appellant to take a lease of property conditionally on the appellant executing certain works upon the property before a certain date. The respondent went into possession after the date, but before the works had been executed. The appellant attempted to get a decree of specific performance before he had executed the works. It was held that he could not get such a decree, because there was no obligation on the respondent to take a lease until the works had been executed. The failure to execute the works by the time stipulated might have avoided the contract at law, but the respondent had by his conduct waived his right to object that time was of the essence of the contract; the contract was subsisting in equity, but could only be enforced by the appellant after he had fulfilled the condition of executing the works. That case is no authority for the proposition that acceptance of rent after a known breach of a condition to do an act before a certain date is only a partial waiver, or is anything but a complete waiver of all right of forfeiture which is founded upon that breach.

Nor does the case of *Peterson v. The Queen* (2 Canad. Exch. Rep. 67) assist. In that case the acceptance of the money alleged to constitute the waiver was accompanied by a statement which qualified the acceptance and preserved the obligation to execute the works notwithstanding that the time limited had expired.

The problem must, as it appears to their Lordships, be confined in the present case to the question whether the license became forfeitable under the power to forfeit contained in the license. The statutory power of forfeiture is out of the case. It is only available for non-payment of rent and royalties. Non-payment of rent is not and cannot be suggested. The Chief Justice alone relied upon a breach of the condition as to payment of royalties, but in their Lordships' view there could be no breach of this condition unless royalties had in fact become due and payable; and this event never happened. It is true that Mr. Justice Kent took the view that an amendment made by the Crown Lands Act, 1918, which enacted a new Subsection 8 to Section 25 of the Act 1903, applied to the license here in question, with the result that the license became forfeitable under statute

on breach of any of the other conditions ; but this view is, in their Lordships' opinion, untenable. The new Subsection 8 could only apply to licenses thereafter issued.

At this stage it will be convenient to dispose of one point in the case, which is not mentioned in the judgments of the Supreme Court. The power of forfeiture contained in the license is exerciseable in case of default in performance of "any of the conditions herein contained." According to the natural meaning of these words they only apply to conditions which are contained in the document, and their Lordships feel unable to extend that meaning so as to include conditions which are not in fact contained in the document, but which are only referred to therein. In their opinion, no power of forfeiture exists under the express power conferred by the license unless the condition alleged to be broken is in fact contained in the license, *i.e.*, set out therein.

Further, it must follow from this that the proper matter for consideration is not the meaning and effect of the words used in the statute, but the meaning and effect of the language used in the license. The statute indicates the essential conditions, but it is the license to which one must turn to ascertain the actual terms of the condition or conditions the breach of which is alleged to be the foundation of the forfeiture. It is not and indeed could not be suggested that the conditions expressed in the license are inconsistent with the conditions required by the statute. This being so, the Judges in the Supreme Court ought to have addressed themselves to the words of the license.

Turning again to the problem as stated above, it is necessary to consider the six before-mentioned conditions, the breaches of which are alleged by the plaintiffs to justify the forfeiture. They must be looked at to see whether any breach of any of them occurred after the 5th November, 1928.

The first two of these conditions, so far as contained in the license, cover only part of the terms of Subsection 1 of the amended Section 25, *viz.*, the first part thereof, which ends just before the words "and further." There is no allusion to a wood goods factory in the license at all.

The third and fourth of these conditions are not to be found in the license either. Nowhere in the license is it possible to find a single indivisible condition, as described by Mr. Justice Kent, to erect a mill or factory, work the limit, and operate the mill or factory.

Their Lordships think that upon the true construction of the license the position in regard to the four first of these conditions is this :—There are two separate and distinct conditions, *viz.*, (1) a condition that the licensee shall begin and complete before certain dates the erection of a saw mill, with an alternative choice to him of beginning and completing before certain later dates a paper or pulp factory, expending thereon a sum of 50,000 dollars ; and (2) a condition, incorporated by reference from the statute, to work the limit in a *bona fide* manner and operate the said mill

or factory during each succeeding year of the term. This last-mentioned condition is one condition the meaning of which, in their Lordships' opinion, is that the limit has to be worked by the operation of the mill or factory to be erected under the earlier condition, and that this working and operation has to be continuous during each year of the term after the completion of the mill or factory. If this be the true meaning of the condition, then no breach occurred after the 5th November, 1928. As regards the first condition, it was broken once and for all long before that date, and it would be impossible to say that at any time subsequently a breach thereof took place. A man cannot on the 6th November, 1928, break a condition which requires him to complete an erection before the 12th March, 1920. As regards the second condition the position of the respondents is even more difficult. It was contended that this second condition could not have been broken after the crucial date because it was dependent on the first, and when the first condition was definitely broken, so also of necessity was the second condition broken once and for all. In support of this contention reliance was placed upon the decision in *Stephens v. Junior Army and Navy Stores, Ltd.* ([1914], 2 Ch. 516). While their Lordships appreciate that the argument derives great assistance from that authority, they think it unnecessary to come to a decision upon this point. There is a complete answer to any claim to forfeit the license upon the footing of a breach of this second condition in the fact that this condition is not set out in the license, but applies only by reason of the statute, and therefore does not form one of "any of the conditions herein contained."

As regards the fifth condition hereinbefore set out, this clearly carries the matter no further, and as regards the condition as to payment of royalties, there can have been no breach of this condition because, as already pointed out, no royalties ever in fact became payable.

The result is that the main appeal succeeds because so far as the alleged right to forfeit was based upon failure to erect a saw mill or factory, the condition in this behalf contained in the license was broken once and for all long before the 5th November, 1928, and there was not and could not be a subsequent breach thereof; because so far as it was based upon failure to work the limit in a *bona fide* manner, the condition in this behalf was not contained in the license; because so far as it was based upon failure to operate such mill or factory, the condition in that behalf was not contained in the license; and because so far as it was based on the failure to make returns of timber cut and pay royalties, no returns ever became due to be made and no royalties ever became payable.

The cross-appeal remains to be considered. There can be no claim to relief by way of damages, because there is no contractual obligation by the licensee to fulfil any of the conditions. The only

possible remedies for breach of any of the conditions to which the license is subject are (a) forfeiture and (b) penalties.

The question of forfeiture has been dealt with on the main appeal. In regard to penalties, these are not affected by the acceptance of rent. The right to them depends upon Section 25 (8) of the Act of 1903, which was left untouched by the Act of 1911. Two penalties are there mentioned, viz., a penalty of not more than 10,000 dollars and a penalty of not more than 100 dollars "for every day any such infraction continues." This latter penalty does not appear applicable to a case such as the present, where the breach is a single breach and not a continuing breach. The Crown's right to penalties seems accordingly restricted to the recovery of a penalty not exceeding the named amount. It is not easy to see upon what principles the amount is to be fixed; nor does the section contain any indication of this, or of the authority by whom the amount shall be ascertained. The parties, however, have agreed that the question and amount of the penalty shall be decided by the Court in the action, the licensee being at liberty to raise such points by way of defence to or in reduction of the claim to penalties as he may be advised.

It occurs to their Lordships to make one general observation. It was urged that a decision which left the license subsisting with no further burden upon the licensee in the future than the payment of the annual rent might result in this timber tract remaining unworked for the residue of the license term. As to this, it is to be noted that this is the exact state of affairs contemplated by Section 25 (8) of the Act of 1903, which remained unrepealed until 1918. But their Lordships cannot but think that the necessity of paying an annual rent of so substantial an amount as 2,000 dollars (in addition to some 30,000 dollars already disbursed) will be found in practice to be sufficient incentive to the enterprise of the licensee.

For the reasons given their Lordships are of opinion that an order should be made on the consolidated appeals discharging the judgment of the Supreme Court dated the 23rd June, 1930, and substituting therefor an order (1) declaring that the license is a subsisting license, and that the plaintiffs are not nor is either of them entitled to recover any damages, (2) adjourning the further hearing of the action in relation to the claim for penalties, (3) ordering the plaintiffs to pay the costs of the proceedings up to and including the order of the 23rd June, 1930, and (4) giving liberty to the parties to apply. This will enable all proper applications to be made to the Supreme Court concerning the further hearing of the action in relation to penalties, the costs of which will be dealt with by the Supreme Court in due course. Any costs already paid under the original judgment will be repaid. The plaintiffs in the action will pay the costs of the consolidated appeals. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

GEORGE JARDINE AND ANOTHER

v.

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DELIVERED BY LORD RUSSELL OF KILLOWEN.

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