

30,1941

In the Privy Council.

No. 75 of 1939.

ON APPEAL FROM THE SUPREME COURT  
OF CANADA.

BETWEEN

PORT ROYAL PULP & PAPER COMPANY  
LIMITED .. .. . (Defendant) Appellant,

AND

THE ROYAL BANK OF CANADA .. .. (Plaintiff) Respondent.

CASE FOR THE RESPONDENT.

1. This is an appeal from the unanimous judgment of the Supreme Court of Canada, rendered on the 19th day of December, 1938, allowing an appeal by the Respondent from a judgment of the Supreme Court of New Brunswick, Appeal Division, and restoring a judgment of the Supreme Court of New Brunswick, King's Bench Division, dated the 5th February, 1937, whereby judgment was given in favour of the Respondent for \$8,897.53 and costs. Record.  
p. 198.  
p. 105.  
p. 96.

2. The action was brought on the 22nd February, 1936, by the Respondent against the Appellant for the sum of \$8,000 with interest thereon at the rate of seven per centum per annum from the 30th June, 1935, being the amount of advances made by the Respondent to one Ewart C. Atkinson and secured as hereinafter appears to assist Atkinson in carrying out two contracts between him and the Appellant dated respectively the 31st October, 1933, and the 26th April, 1934, for the sale and delivery of pulpwood by him to the Appellant. The Respondent's claim was made under two alternative heads: the first by way of damages for the conversion by the Appellant of 6,005.43 cords of pulpwood delivered by Atkinson to the Appellant of which the Respondent claimed ownership by virtue of security given thereon to the Respondent by Atkinson under the provisions of Section 88 of the Bank Act R.S.C. 1927 Cap. 12, and the second as a right to receive the moneys pp. 1-2.  
pp. 221-2.  
pp. 316-7.

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Record.  
pp. 210-12.  
pp. 318-20.

due from the Appellants to Atkinson under the said contracts by virtue of two Assignments of Atkinson's rights thereunder dated respectively the 10th March, 1934, and 27th May, 1934.

pp. 221-2.

p. 106,  
ll. 31-5.

**3.** The first of the said two contracts was made in the first instance not by Atkinson but by New Lepreau Ltd., a Limited Company, whose capital stock was at the time practically all held jointly by Atkinson, who held 247 shares, and the Appellant, who held 241 shares, out of the total issued capital stock of 490 shares, the two remaining shares being held as director's qualifying shares. By this contract New Lepreau Ltd. agreed to sell and deliver to the Appellant 1,000 to 4,000 cords of draw shaved or rossed spruce and fir pulp- 10 wood, at the price of \$6.50 per cord delivered at the Appellant's mill at Fairville, N.B., these to be cut from lands owned or controlled by the seller at New River, New Brunswick.

p. 309.

**4.** By letter dated the 1st March, 1934, it was agreed between Atkinson and the Appellant with the acquiescence of New Lepreau Ltd. that Atkinson should be substituted for New Lepreau Ltd. as a party to his contract.

pp. 221-2.  
p. 223.

**5.** On or about the 20th January, 1934, Atkinson applied to the Manager of the Respondent's Branch at Fredericton, N.B., for assistance by way of advances, in order to carry on his pulpwood operations under the said contracts, and on the same day Atkinson signed a Notice of Intention to give 20 security to the Respondent under the authority and provisions of Section 88 of the Bank Act which notice was duly filed with the Assistant Receiver-General at Saint John, N.B., on the 22nd January, 1934. Section 88 of the Bank Act, which is hereinafter called Section 88, is a long section which will call for further discussion below; it makes a number of provisions dealing with the making of loans by banks to various classes of persons including wholesale dealers in products of the forest. It lays down among other things that any person intending to give security to a bank under the provisions of the section must sign a "Notice of intention to give security" and have it registered with the Assistant Receiver-General of the Province in which the 30 person has his place of business.

pp. 224-5.

**6.** On the 24th January, 1934, Atkinson signed an application to the Respondent for a revolving line of credit up to \$5,000.00, in connection with his pulpwood operations, and promised and agreed thereby to give security to the Respondent on all the rough or draw shaved or sap peeled spruce and fir pulpwood which was then owned by Atkinson or which might be owned by him while any advances made under the said application for credit remained unpaid, and which was then or might afterwards be in the Lawrence Flowage on New River, in the County of Charlotte, or elsewhere.

pp. 225-8.

**7.** At the same time Atkinson signed an Agreement known as Form 301, 40 being an agreement setting out the powers of the Respondent in relation to



advances and securities held therefor. Sections 1, 2, 5 and 12 of this form give the Respondent inter alia a right to the proceeds of the sale of the goods secured and provide for the assignment to it of these proceeds.

Record.  
p. 225,  
l. 24.  
p. 226, l. 3.  
p. 226,  
ll. 25-33.  
p. 228,  
ll. 1-20.  
p. 229.

8. On the same day the Respondent made its first advance to Atkinson of \$1,000.00 and took as security therefor in pursuance of Section 88 an assignment of all the rough or draw shaved spruce and fir pulpwood in the Lawrence Flowage on New River in the County of Charlotte or elsewhere. Rough or draw shaved pulpwood is wood cut in the autumn or winter when the bark is firmly attached to the tree and must be cut or shaved off. Sap peeled wood is wood cut in the spring when the sap is running freely and the bark peels off easily.

p. 102,  
ll. 1-9.

9. In the course of the years 1934 and 1935 the Respondent made further advances in the same way to Atkinson to assist him in his pulpwood operations. The advances were 41 in all amounting to \$8,000 and the Respondent took from him 41 separate assignments in the form mentioned in paragraph 8 hereof under the provisions of Section 88. As each such advance was made the Respondent also took from Atkinson a promissory note payable on demand for the amount of such advances.

pp. 229-307.

10. The Respondent thus took in all 41 demand notes corresponding with the 41 assignments, but at the time of issuing of the Writ herein the first 20 of these notes had been liquidated. The remaining notes represent Atkinson's indebtedness to the Respondent and the amount recovered by the Respondent against the Appellant on the judgment under appeal.

pp. 229-307.

pp. 327-348.

11. The total amount so advanced by the Respondent to Atkinson between the 24th January, 1934, and the 10th March, 1934, in connection with his said operations was \$3,000.00.

12. On the 10th March, 1934, Atkinson assigned to the Respondent all moneys due under the said contract dated the 31st October, 1933, and the Respondent sent a copy of this assignment by mail to the Appellant on the 12th March, 1934, which it acknowledged on the 16th March, 1934. This assignment was executed pursuant to and was a carrying out of the terms of the Agreement set out in Form 301 mentioned in paragraph 7 hereof.

p. 310.

p. 313, l. 1.

p. 313, l. 20.

13. By letter of the 20th March, 1934, the Respondent notified the Appellant that it held security from Atkinson on his pulpwood under the provisions of Section 88.

p. 314.

14. On the 26th April, 1934, Atkinson entered into the second contract with the Appellant, already mentioned. He thereby agreed to sell and deliver to the Appellant 10,000 cords of peeled spruce and fir pulpwood at the price of \$7.25 per cord delivered at the Appellant's mill at Fairville, N.B.,

pp. 316-7.



Record. the pulpwood to be cut from lands owned or controlled by Atkinson at New River, Charlotte County, New Brunswick.

pp. 318-20. **15.** On the 27th May, 1934, Atkinson assigned to the Respondent by a document in the same terms as that mentioned in paragraph 12 hereof all moneys due to him under the said second contract of the 26th April, 1934.  
p. 327, l. 1. On the 17th July, 1934, the Respondent forwarded a copy of this assignment to the Appellant.

p. 321, l. 23, to p. 322. **16.** On the 16th July, 1934, Atkinson, finding that he required further assistance from the Respondent to assist him in carrying on his operations, applied to it for an increase in his line of credit. The application he signed therefor was marked as follows: "supplementary to application and promise  
pp. 323-6. "dated January 24th, 1934," and asked for a revolving line of credit up to \$10,000.00, Atkinson thereby agreeing to give security to the Bank therefor on all the rough, draw shaved or sap peeled spruce and fir pulpwood in the Lawrence Flowage on New River Stream in the County of Charlotte or elsewhere. On the same date Atkinson signed another agreement in Form 301 and delivered it to the Respondent.

p. 349, ll. 1-20. **17.** By letter of the 19th July, 1934, the Appellant acknowledged to the Respondent the receipt of the assignment (mentioned in paragraph 15 hereof) of moneys due under the contract of the 26th April, 1934, and at the same time advised the Respondent that it had made advances to Atkinson on his contracts amounting to \$10,975.62.

p. 314, ll. 20-23, pp. 221-2, pp. 316-7. **18.** This sum of \$10,975.62 included a loss of \$5,330.91 carried forward by the Appellant from an old contract which the Appellant had had with New Lepreau Ltd. in the Spring of 1933 (which is not in evidence) which loss the Appellant had subsequently applied with the consent of Atkinson but not of the Respondent against the contracts already mentioned between itself and Atkinson.

p. 358, p. 221, p. 316. **19.** The Respondent had assisted New Lepreau Ltd. with the contract referred to in the preceding paragraph, and on the 10th January, 1934, and prior to the application for credit made by Atkinson in that month, as mentioned in paragraphs 5 and 6 above, the Appellant paid this sum to the Respondent by a post-dated cheque of the Appellant for the sum of \$5,350.00. It appears that by the month of July 1934 the Appellant according to its own figures, had advanced to Atkinson on the said two contracts the sum of \$5,644.71, and at the same time the Respondent had advanced to Atkinson on his same operations the sum of \$6,000.00, taking security in accordance with Section 88 on his pulpwood therefor, and had so advised the Appellant on the 20th of March, 1934.  
p. 314.

p. 352, ll. 31-3, pp. 316-17. **20.** By agreement between the Appellant and Atkinson the Appellant had agreed to take delivery of 3,000 cords of pulpwood in Autumn 1934 under



the second said contract under which deliveries were provided to begin only in March 1935, and it actually received from him 1,772.90 cords in the month of November 1934.

Record.

21. As Atkinson's difficulties increased the Respondent made repeated demands for payment of the amount due, both to Atkinson and to the Appellant but without result, and on the 15th May, 1935, the Respondent as it was entitled to do by virtue of its property in the pulpwood under the various agreements above mentioned instructed Atkinson by letter not to move any of the pulpwood until the Bank's advances were fully repaid.

p. 358.

10 22. This letter was shown by Atkinson to the Appellant's Manager Lacroix the next day, the 16th May, 1935, and they discussed the matter fully.

p. 65, l. 19,  
to p. 66, l. 6.

23. Despite these instructions from the Respondent the Appellant actually took delivery from Atkinson in the months of May, June and July, 1935, of 4,332.52 cords of pulpwood valued, according to the Appellant's own figures, at \$26,786.32. Nothing was paid to the Respondent.

p. 94, l. 43,  
to p. 95, l. 29.

p. 95, l. 5.

24. In all, the Appellant took delivery of all the pulpwood, amounting to 6,005.43 cords delivered by Atkinson under the two said contracts of the 31st October, 1933, and the 26th April, 1934, but refused to pay the Respondent the monies due under the said contracts and sought to apply these monies against Atkinson's liability to the Appellant as well as to the old debt of New Lepreau Ltd. for \$5,330.91 under the earlier contract above referred to, which does not form part of any of the subject matter of this litigation.

pp. 221-2,  
316-7.

25. At the trial, which took place before Chief Justice Barry of the King's Bench Division of the Supreme Court of New Brunswick the main contentions on behalf of the Defendant, the now Appellant, were that Atkinson was not the owner of the pulpwood involved, that the security taken by the Plaintiff was for that reason invalid under Section 88, and that there was for the same reason no title in the Respondent to found an action for conversion.

26. On the 5th February, 1937, Chief Justice Barry gave judgment for the Respondent for \$8,000.00, with interest, in all \$8,897.53, holding that the security given to the Respondent by Atkinson was valid under the Bank Act, that the pulpwood was its property, and that its position was superior to any right of the Appellant as purchaser because the Appellant "knew as much of what was going on between the Bank and Atkinson as did the Bank itself."

p. 96.

27. Appellant appealed and on the 11th June, 1937, the Supreme Court of New Brunswick (Appeal Division) (Baxter C.J., Grimmer and Fairweather

p. 105.



Record. JJ.) maintained the appeal and reduced the judgment in favour of the Respondent to \$192.02.

pp. 105-10.  
p. 108.  
ll. 43-4.

pp. 310-12,  
318-20,  
221-2,  
316-7.  
p. 109,  
ll. 8-25.

p. 109, l. 38,  
to p. 110, l. 6.

p. 110,  
ll. 6-19.

pp. 316-7.

**28.** Chief Justice Baxter held that only an owner could validly give security under Section 88, that Atkinson was not the owner of the pulpwood, and that "so far therefore as the Bank's case is based upon Section 88 it cannot be supported." In so far as the case was based on the assignments of Atkinson's rights under the two contracts his Lordship further held that the Appellant could properly deduct from the amount owing to the Respondent part of the sum of \$5,330.91 the Appellant's loss on the earlier contract mentioned in paragraphs 18 and 19 hereof. The learned Judge without giving any basis for the holding appeared to assume that the Appellant was entitled to charge against the value of the wood all its operating and other expenses in connection with the pulpwood contracts to wit \$43,551.26 less the amount of \$5,330.91, being a sum of \$38,220.35. On this basis as the total contract price received by the Appellant for the wood sold under the second said contract was \$38,412.37, there was left a balance in favour of the Respondent of \$192.02.

Justices Grimmer and Fairweather gave no reasons.

p. 198-199.

**29.** The Respondent appealed to the Supreme Court of Canada and on the 19th December, 1938, the Supreme Court (Cannon, Crocket, Davis, Kerwin, Hudson JJ.) maintained the appeal and restored the judgment of the trial Judge.

pp. 199-209.

p. 209, l. 1.

p. 209,  
ll. 9-11.

**30.** Mr. Justice Crocket, in whose judgment Mr. Justice Cannon concurred, disposed of an argument advanced on behalf of the now Appellant that on the true construction of Section 88 no person who was not the owner of the goods could give valid security over them to a bank and that the property in the wood in this case was not in Atkinson but in New Lepreau Ltd., by stating that "upon the undisputed facts as disclosed by the evidence Atkinson must be treated as the owner of the pulpwood when it was cut within the meaning of S. 88 of the Bank Act and that his assignments to the plaintiff Bank were valid thereunder." Accordingly in his view the position of the Respondent was in every way superior to that of the Appellant and as the Respondent had kept the Appellant fully informed at every step of its negotiations with Atkinson he found no justification for the Appellant deducting from the advances made by the Respondent any monies which the Appellant "paid to Atkinson or to anybody else for supplies, wages, stumpage or any other purposes."

pp. 209-14.  
p. 213,  
ll. 25-7.

**31.** Mr. Justice Davis stated that it was not necessary for him to consider whether it was necessary to the validity of the security under Section 88 that Atkinson should be the owner of the pulpwood because he concluded that "Atkinson had at all times a qualified ownership or interest in the wood as soon as it was cut from the standing timber sufficient to entitle the Bank



“to take from him Section 88 security.” He stated that the Appellant took possession of the wood with full knowledge of the Respondent’s position and its rights and destroyed the identity of the wood by using it in its mill operations and that the evidence did not satisfy him that the actual value of the wood when the Appellant took possession of it was less than the sale price of the wood or less than the amount of the Respondent’s advances against it.

Record.  
p. 213,  
ll. 36-44.

32. Mr. Justice Kerwin was of the opinion that “the proper inference from the evidence is that Atkinson was the owner and that he gave security to the Bank under Section 88.” In spite of the fact that the Appellant had notice of the Respondent’s rights it had converted the wood to its own use and was therefore liable in damages for such conversion, *i.e.*, the value of the wood at the time and place of conversion. The learned Judge thought it right to permit the deduction from the increased value of the wood which he fixed at \$43,008.97 a total sum of \$38,220.35 being monies paid out by the Appellant in respect of the logs to Atkinson or the Respondent or for wages, supplies, stumpage, rent or freight. The difference between these two sums, \$4,788.62 represented the value at the time and place of conversion and was the amount that in the learned Judge’s view the Respondent was entitled to claim.

pp. 214-17.  
p. 215, l. 1.

pp. 216-217.

20 33. Mr. Justice Hudson was for allowing the appeal for reasons given by Crocket and Davis JJ.

p. 217,  
ll. 15-17.

34. As already stated the Respondent’s submission is twofold, first that it had validly acquired by way of security under Section 88 the property in the wood and that the Appellant was guilty of converting the wood, and second that under the assignments of Atkinson’s rights under the two contracts the Respondent had the right to claim the proceeds of sale of the wood.

pp. 310-12,  
318-20,  
pp. 221-2,  
316-7.

35. The technical completeness of Atkinson’s title to the wood it is further submitted is of no moment seeing that his possession and control was free of any superior claims and that New Lepreau Ltd., the only other interested party, concurred through its directors and shareholders in Atkinson’s assertion of ownership.

36. It is further submitted that Atkinson was a “wholesale dealer in the products of the forest” and a “wholesale manufacturer” of wood and as such could validly give security under Subsections 1 and 3 of Section 88. The relevant subsections of Section 88 read as follows:—

“88. (1) The Bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, . . . upon the security of such products.

40 “(3) The Bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise

[ 7 ]

B 2



“ upon the security of the goods, wares and merchandise manufactured  
 “ by him, or procured for such manufacture.

“ (5) Any such security, as mentioned in the foregoing provisions  
 “ of this section, may be given by the owner of the said products, goods,  
 “ wares and merchandise.

“ (6) The security may be taken in the form set forth in Schedule C  
 “ of this Act, or to the like effect.

“ (7) The bank shall, by virtue of such security acquire the same  
 “ rights and powers in respect of the products, goods, wares and mer-  
 “ chandise . . . covered thereby as if it had acquired the same by 10  
 “ virtue of a warehouse receipt; Provided, however, that the wages,  
 “ salaries or other remuneration of persons employed by any wholesale  
 “ purchaser, shipper or dealer, or by any wholesale manufacturer, in  
 “ connection with any of the several wholesale businesses referred to,  
 “ or by any farmer, in connection with the farm, owing in respect of a  
 “ period not exceeding three months, shall be a charge upon the property  
 “ covered by the said security in priority to the claim of the bank there-  
 “ under, and such wages, salaries or other remuneration shall be paid by  
 “ the bank if the bank takes possession of or in any way dispose of the  
 “ said security or of the products, goods, wares and merchandise covered 20  
 “ thereby.”

**37.** It is submitted that if on the true construction of Section 88 it was contrary to the Respondent's contention it was necessary that Atkinson, in addition to being a wholesale dealer in the products of the forest and a wholesale manufacturer of wood, should also be the owner of the wood, he was in fact the owner thereof within the meaning of Section 88 and that the security given by Atkinson to the Respondent was valid.

**38.** It is further submitted that the juxtaposition of the various subsections of Section 88 and the wording of Subsection 5 thereof show that a wholesale dealer in the products of the forest and a wholesale manufacturer 30 of wood can give security on wood to a Bank without being the owner. It is submitted that the wording of Subsection 5 is permissive and not restrictive and that it is not to be considered as applying to the previous subsections.

**39.** It is submitted that this interpretation of Subsection 5 of Section 88 is borne out by the form prescribed by the Act which leaves such blanks as would suggest that the borrower may be a different person from the owner. This form reads as follows :—

“ SCHEDULE C.

“ In consideration of an advance of \_\_\_\_\_ dollars made by  
 “ the \_\_\_\_\_ Bank to A.B., for which the said Bank holds 40  
 “ the following bills or notes : (*describe the bills or notes, if any*), [or, in  
 “ consideration of the discounting of the following bills or notes by the



“ Bank for A.B. : (*describe the bills or notes*), the products of agriculture,  
 “ the forest, quarry and mine, [or, the sea, lakes and rivers, or, the live  
 “ stock or dead stock, *or* the products thereof, or the goods, wares and  
 “ merchandise, *or* the grain (*as the case may be*)], mentioned below are  
 “ hereby assigned to the said Bank as security for the payment on or  
 “ before the                      day of                      of the said advance,  
 “ together with interest thereon at the rate of                      per cent. per  
 “ annum from the                      day of                      [or, of the said  
 “ bills or notes, or renewals thereof, or substitutions therefor, and interest  
 10 “ thereon, *or as the case may be*].

“ This security is given under the provisions of section eighty-eight  
 “ of The Bank Act, and is subject to the provisions of the said Act.

“ The said products of agriculture, the forest, quarry and mine, [or,  
 “ the sea, lakes and rivers, *or*, the live stock or dead stock, or the pro-  
 “ ducts thereof, *or*, the goods, wares and merchandise, *or*, the grain (*as*  
 “ *the case may be*)], are now owned by                      and are now in the  
 “ possession of                      and are free from any mortgage, lien or  
 “ charge thereon (*or as the case may be*), and are in (*place or places where*  
 20 “ *the goods are*), and are the following (*description of goods assigned*).  
 “ Dated, etc.”

40. It may be noted in reinforcement of this argument that under  
 Section 87 of the Bank Act a Bank can get valid security by virtue of a  
 warehouse receipt from persons other than the owner. Section 87 reads:—

“ 87. (1) If the previous holder of such warehouse receipt or bill  
 “ of lading is any person

“ (a) entrusted with the possession of the goods, wares and  
 “ merchandise mentioned therein, by or by the authority of the  
 “ owner thereof ;

30 “ (b) to whom such goods, wares and merchandise are, by or  
 “ by the authority of the owner thereof, consigned ; or

“ (c) who, by or by the authority of the owner of such goods,  
 “ wares and merchandise, is possessed of any bill of lading, receipt,  
 “ order or other document covering the same such as is used in the  
 “ course of business as proof of the possession or control of goods,  
 “ wares and merchandise, or as authorising or purporting to  
 “ authorise, either by endorsement or by delivery, the possessor of  
 “ such a document to transfer or receive the goods, wares and  
 “ merchandise thereby represented

40 “ the bank shall be, upon the acquisition of such warehouse receipt or  
 “ bill of lading, vested with all the right and title of the owner of such  
 “ goods, wares and merchandise, subject to the right of the owner to  
 “ have the same retransferred to him if the debt or liability, as security  
 “ for which such warehouse receipt or bill of lading is held by the bank,  
 “ is paid.



“(2) Any person shall be deemed to be the possessor of such goods, wares and merchandise, bill of lading, receipt, order or other document as aforesaid

“(a) who is in actual possession thereof ; or

“(b) for whom, or subject to whose control such goods, wares and merchandise are, or bill of lading, receipt, order, or other document is held by any other person.”

It is submitted that if one need not be owner to give valid security under Section 87 it would be strange that one must be owner to give security under Section 88 especially when regard is had to the history of this form of security set out in the next following paragraph.

41. It is further submitted that the legislative history behind Sub-section 5 of Section 88 shows that a manufacturer of timber can give security on the said timber to a Bank without being owner. Formerly in Canada the main form of security was a warehouse receipt, Banks being authorised to lend on this security by Section 8 of the Incorporated Banks Act of 1859 C.S.L.C. Cap. 54, which reads as follows :—

“ 8. Notwithstanding anything to the contrary in the Charter or Act of Incorporation of any Bank in this Province, any bill of lading, any specification of timber, or any receipt given by a warehouseman, miller, wharfinger, master of a vessel, or carrier, for cereal grains, goods, wares or merchandise, stored or deposited, or to be stored or deposited in any warehouse, mill-cove, or other place in the Province, or shipped in any vessel, or delivered to any carrier for carriage from any place whatever to any part of this Province, or through the same, or on the waters bordering thereon, or from the same to any other place whatever, and whether such cereal grains are to be delivered upon such receipt in species or converted into flour, may, by indorsement thereon by the owner of, or person entitled to receive such cereal grains, goods, wares or merchandise, or his attorney or agent, be transferred to any incorporated or chartered Bank in this Province, or to any person for such Bank, or to any private person or persons, as collateral security for the due payment of any bill of exchange or note discounted by such Bank in the regular course of its Banking business, or any debt due to such private person or persons, and being so indorsed shall vest in such Bank or private person from the date of such indorsement, all the right and title of the indorser to or in such cereal grains, goods, wares or merchandise, subject to the right of the indorser to have the same retransferred to him, if such bill, note or debt be paid when due ; And in the event of the non-payment of such bill or note or debt when due, such Bank or private person may sell the said cereal grains, goods, wares or merchandise, and retain the proceeds or so much thereof as will be equal to the amount due to the Bank or private person upon



“ such bill or note or debt, with any interest or costs, returning the over-  
 “ plus, if any, to such indorser.”

Record.

In order to take advantage of Bank facilities the custom grew up for owners to make out warehouse receipts to themselves and this practice was validated by Section 54 of the Bank Act of 1885 (49 Vic. Cap. 120) which reads as follows :—

“ 54. If any person who grants a warehouse receipt or bill of lading  
 “ is engaged in the calling, as his ostensible business, of keeper of a yard,  
 “ cove, wharf, or harbor, or of warehouseman, miller, saw-miller, maltster,  
 10 “ manufacturer of timber, wharfinger, master of a vessel, or other carrier  
 “ by land or by water, or by both, curer or packer of meat, tanner,  
 “ dealer in wool or purchaser of agricultural produce, and is at the same  
 “ time the owner of the goods, wares and merchandise mentioned in such  
 “ warehouse receipt or bill of lading, every such warehouse receipt or  
 “ bill of lading and the right and title of the bank thereto and to  
 “ the goods, wares and merchandise mentioned therein, shall be as valid  
 “ and effectual as if such owner, and the person making such warehouse  
 “ receipt or bill of lading, were different persons.”

This section made it permissible for the owner and the manufacturer to be  
 20 one and the same person and is now, it is submitted, represented with a number  
 of minor changes by Subsection 5 of the present Section 88.

42. In any event it is submitted that the Appellant is estopped, by reason of its treatment of Atkinson as the owner and its assertion of title to the wood in Atkinson for the purpose of his sale and delivery thereof to the Appellant, from denying the fact of Atkinson's ownership and his right to give security to the Respondent upon the wood under Section 88.

43. In view of the fact that the Appellant had complete knowledge of the Respondent's advances and the extent thereof and of the Respondent's position and rights under Section 88 it is submitted that by taking and hold-  
 30 ing the wood subject to an obligation to pay the Respondent and subsequently keeping the wood and denying the obligation to pay the Respondent the Appellant became guilty of conversion.

44. It is admitted in the Statement of Defence that the value of the wood converted at the time of the institution of the action was \$43,008.97. It is submitted that there is no evidence that the value of the wood at the time of conversion was less than \$43,008.97, and that in any event the actual value of the wood converted by the Appellant at the time of its conversion was at least greater than the advances of the Respondent in respect of the wood which totalled as already stated \$8,000.00.

p. 26, l. 29.  
 to p. 27, l. 23.

40 45. It is submitted that the Respondent was in possession of the wood through Atkinson as its bailee by virtue of the agreements in Form 301

p. 225.



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p. 323.

signed as mentioned in paragraphs 7 and 16 and that as against the Respondent in possession the Appellant cannot set up a *jus tertii* in New Lepreau Ltd.

pp. 221-2,  
316-7.  
p. 222, l. 30.  
p. 317,  
ll. 35-6.

46. In addition to the claim under Section 88 and for conversion the Respondent claims as already mentioned as assignee from Atkinson all moneys due and payable by Atkinson under the two contracts with Appellant. The said contracts contained the following clause: "Also if there are any "encumbrances or Government dues on said wood, company" (Appellant herein) "shall deduct same from remittance to the seller."

p. 27, l. 3.  
p. 27, l. 28.

47. The Appellant claims as already mentioned the right to deduct 10 from the moneys assigned a balance of \$5,330.91 of an old claim by the Appellant against New Lepreau Ltd., mentioned in paragraphs 18 and 19 hereof and a number of expenses incurred by the Appellant in respect of the wood such as wages, supplies, taxes, which including the item of \$5,330.91 total \$43,551.26. The total contract selling price of the wood is admitted to be \$43,008.97 so that the Appellant claims there is still due to it \$542.29.

48. It is submitted that the proved facts establish that Atkinson gave security upon the wood to the Respondent with the full knowledge of Appellant and that consequently the Appellant cannot be heard to contest the superior position of the Respondent and claim the right to make deductions. 20

49. It is submitted that the Appellant has not the right to set off against the Respondent's claim the balance of \$5,330.91 of the old claim between it and New Lepreau Ltd., because this set-off was not specially pleaded as required by law and because in any event if there were a debt it was the debt of a third person (New Lepreau Ltd.) to the said Company to the set-off of which Atkinson could not agree.

p. 359.

p. 222, l. 30.  
p. 317, l. 35.

50. It is submitted that none of the deductions described by the Appellant as: Wages paid by Port Royal; Supplies; Stumpage; Workmen's Compensation; Taxes, etc.; Hanson, Doherty & West Stumpage (Frasers); Rent housing men; and Freight on wood received under the contracts, are 30 permissible under the contract between Atkinson and the Appellant because there is no evidence that these items or any of them are "encumbrances or "government dues on said wood," and that the burden of proving that these deductions are permissible rests upon the Appellant and has not been discharged.

p. 222,  
ll. 30-2.  
p. 317, l. 35.  
pp. 310-2,  
318-20.

51. It is submitted that even if some of the deductions are justified as being "encumbrances or Government dues on the wood" that the amount remaining due under the assignments is more than sufficient to meet the Respondent's claim of \$8,000.00.



52. The Respondent submits that the Judgment appealed from should be affirmed and the appeal dismissed for the following among other

### REASONS.

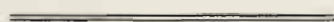
1. Because the Judgment appealed from was in accordance with the facts and the Law.
2. Because Atkinson was a wholesale dealer in the products of the forests and a wholesale manufacturer of wood within the meaning of Section 88 of the Bank Act.
- 10 3. Because under Section 88 of the Bank Act a wholesale dealer in the products of the forest or a wholesale manufacturer of wood can give security on the wood without also being the owner.
4. Because if it were necessary that Atkinson should be the owner of the wood he was the owner thereof within the meaning of Section 88 of the Bank Act.
5. Because the Appellant is estopped from denying as a fact Atkinson's ownership and right to give security upon the wood to the Respondent under Section 88 of the Bank Act.
- 20 6. Because Atkinson's possession and control of the logs was free from any superior claim and the only other interested party had through its Directors and Shareholders concurred in Atkinson's assertion of ownership.
7. Because the security given by Atkinson to the Respondent on the wood was valid under Section 88 of the Bank Act.
8. Because the Appellant is liable to the Respondent for conversion of the wood.
9. Because the actual value of the wood converted by the Appellant at the time of its conversion was greater than \$8,000.00.
- 30 10. Because the Appellant cannot set up a *jus tertii* in New Lepreau Ltd. against the Respondent in possession.
11. Because the Respondent is assignee from Atkinson of all moneys due and owing by the Appellant to Atkinson under his two contracts with the Appellant.



12. Because the Appellant has no right to set off against the Respondent's claim as assignee any of the expenses incurred by the Appellant in respect of the wood.
13. Because Atkinson gave security to the Respondent with the full knowledge of the Appellant.
14. For the reasons given by the Learned Trial Judge in his judgment and by the Learned Judges of the Supreme Court of Canada.

D. N. PRITT.

WARWICK F. CHIPMAN. 10





In the Privy Council.

No. 75 of 193

ON APPEAL FROM THE SUPREME  
COURT OF CANADA.

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BETWEEN

PORT ROYAL PULP & PAPER  
COMPANY LIMITED (*Defendant*) *Appellan*

AND

THE ROYAL BANK OF CANADA  
(*Plaintiff*) *Responden*

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CASE FOR THE RESPONDENT.

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LAWRENCE JONES & CO.,

Lloyd's Building,

Leadenhall Street, E.C.3.