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*May 17, 18.
*Dec. 19.

THE ROYAL BANK OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

THE PORT ROYAL PULP & PAPER COMPANY, LTD (DEFENDANT).... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Banks and Banking—Security under s. 88 of The Bank Act (now 1934, c. 24, Dom.)—Validity—"Owner"—Pulpwood—Description—Conversion—Basis of damages.

The appellant bank claimed against the respondent company the unpaid balance of amounts which the bank had advanced to A. to assist A. in pulpwood operations to fulfil two contracts to sell and deliver pulpwood to respondent. The bank had taken from A. the form of security under s. 88 of the *Bank Act* (now 1934, c. 24, Dom.) and assignments of the moneys payable by respondent under the contracts. The bank sued, under the security and assignments, as assignee of A's rights against respondent and alternatively for damages for conversion. Respondent, among other defences, challenged the validity of the security under the *Bank Act*, claimed certain credits and priorities, and denied that any further moneys were payable under the contracts.

* PRESENT:—Cannon, Crocket, Davis, Kerwin and Hudson JJ.

The contracts between A. and respondent were dated October 31, 1933, and April 26, 1934. The pulpwood to be cut was on Crown lands on which a company, New Lepreau Ltd., held licences to cut timber. A. was president of that company and held a majority of its shares, nearly all the remaining shares being held by respondent. The contract of October 31, 1933, was first made in the name of New Lepreau Ltd. but later A's name was substituted.

The trial judge, Barry, C.J. K.B.D., gave judgment for the bank for the amount of its claim, $8,000 and interest. The Supreme Court of New Brunswick, Appeal Division, 12 M.P.R. 219, reduced the judgment to $192.02. It held that, so far as the bank's case was based on s. 88 of the *Bank Act,* it failed, as A. was not the "owner" entitled to give security within s. 88 (the pulpwood being, so far as the evidence disclosed, the property of New Lepreau Ltd.); that (apart from s. 88) on A's assignments to the bank of the moneys payable by respondent under the contracts, the bank should recover, but, on the proper debits and credits, the amount recoverable was only $192.02. The bank appealed.

Held (Kerwin J. dissenting in part): The judgment at trial for the bank for the amount of its claim should be restored.

A's assignments given as security under s. 88 of the *Bank Act* were valid under s. 88. (*Per* Cannon, Crocket and Hudson JJ.: A. must be treated as the owner of the pulpwood when it was cut, within the meaning of s. 88). (*Per* Davis and Hudson JJ.: A. had at all times a qualified ownership or interest in the pulpwood as soon as it was cut, sufficient to entitle the bank to take from him security under s. 88). (*Per* Kerwin J.: The security under s. 88 must be given by the owner. The proper inference from the evidence is that A. was the owner and that he gave security to the bank under s. 88).

Though down to a certain date the assignments by A. to the bank as security under s. 88 described the wood as "all the rough or draw shaved spruce and fir pulpwood" on the described location, omitting "or sap peeled" spruce and fir pulpwood (inserted in later assignments; and also inserted in A's first and subsequent applications for credit and promises to give security), it was *held* that all the spruce and fir pulpwood (including sap peeled wood) got out by A. on the described location was included in the pledges to the bank (affirming the trial judge, who held that the particular designations only served to indicate the season of the year in which the wood is cut).

As to respondent's claim that, should the bank's security be held valid under s. 88, respondent's liability, if any, rested in a claim for conversion, and that damages should be fixed by ascertaining the value of the pulpwood at the time and in the condition that respondent took possession of it, involved in which was the question of certain expenditures by respondent:—

Held (Kerwin J. dissenting on this point), that respondent was bound to pay the full amount of the bank's advances to A.

Per Cannon, Crocket and Hudson JJ.: A's assignments as security under s. 88 being valid, and the bank having kept respondent fully informed of every step in its negotiations with A., there is no right in respondent to deduct from the amount of the bank's advances any moneys which respondent paid to A. or to anybody else for supplies, wages, stumpage, or any other purpose in pursuance of the terms and conditions of its agreement with him.

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Per Davis and Hudson JJ.: Practical difficulties arise in any attempt to fix value at any particular stage; respondent took possession of the wood with full knowledge of the bank's position and rights and destroyed the identity of the wood in using it in its mill operations; it is respondent's knowledge that is the determining factor in this case; A's evidence was that all the moneys got from the bank were actually used in the woods operations; the evidence does not establish that the actual value of the wood when respondent took possession of it was less than the amount of the bank's advances against it.

Kerwin J. dissented as to the amount recoverable, holding that respondent was liable in damages for conversion, the damages being the value of the logs at the time and place of conversion; that in fixing such damages there should be deducted, from the ascertained value of the logs in the state in which they were to be delivered, at the place of delivery, under A's contracts with respondent, certain sums expended by respondent in bringing the logs to that state at that place, being for wages and supplies in such operation, stumpage, workmen's compensation, taxes, etc., rent for housing men, and freight; (*Reid* v. *Fairbanks,* 13 C.B. 692, *Morgan* v. *Powell,* 3 Q.B. 278, *Burmah Trading Corpn. Ltd.* v. *Mirza Mahomed,* L.R. 5 Ind. A. 130, at 134, cited). On above basis he fixed the bank's claim at $4,788.62 and interest thereon from the date when respondent received the last of the logs.

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), reducing the amount of the judgment given by Barry, C.J. K.B.D., in favour of the plaintiff ($8,000 and interest, in all $8,897.53) to $192.02. The action was brought by the plaintiff bank to recover the sum of $8,000 (and interest) alleged to be the unpaid balance of moneys advanced by the bank to one Atkinson to assist him in getting out pulpwood under two contracts between him and the defendant company. The bank had taken from Atkinson the form of security under s. 88 of the *Bank Act* and assignments of the moneys payable by defendant under the contracts. The bank sued, under the security and assignments, as assignee of Atkinson's rights against respondent and alternatively for damages for conversion. The material facts of the case and issues in question are sufficiently stated in the judgments now reported. The bank's appeal to this Court was allowed and the judgment of the trial judge restored, with costs throughout, Kerwin J. dissenting in part.

W. F. Chipman K.C. and *C. L. Dougherty* for the appellant.

C. F. Inches K.C. and *M. Gerald Teed* for the respondent.

(1) 12 M.P.R. 219; [1937] 4 D.L.R. 254.

The judgment of Cannon and Crocket JJ. was delivered by

CROCKET, J.—This action arose out of two contracts, which the defendant entered into for the purchase of pulpwood for the defendant's pulp manufacturing operations at its mill at Fairville, New Brunswick, the first contract dated October 31, 1933, and the second April 26, 1934. Although stating in its introduction that it is made between E. C. Atkinson (New Lepreau Ltd.) of Fredericton and the defendant, the first contract was signed New Lepreau Ltd. by Ewart C. Atkinson, President, and Port Royal Pulp and Paper Co. Ltd. by its manager. By it the seller agreed to sell and deliver to the defendant and the defendant agreed to purchase and accept 1,000 to 4,000 cords of draw shaved or rossed spruce and fir pulpwood at $6.50 per cord. The pulpwood was to be cut from lands owned or controlled by the seller and situated at New River, N.B., (these lands were Crown lands on which New Lepreau Ltd. held a licence to cut timber), and was to be shipped from New River, consigned to the defendant at Fairville or such other points as the company might designate, freight to any other point than Fairville to be equalized on Fairville freight rate. It was agreed that the contract should continue as directed by the defendant until all pulpwood had been shipped to the defendant during the winter 1933-34, "to be completed by June 1, 1934." The contract provided that payment should be made by the defendant to the seller on the 15th day of each month for all pulpwood delivered to and accepted by the company during the previous month, and also that if there were any encumbrances or government dues on the wood the company "shall deduct same from remittance to the seller."

Atkinson was the president of New Lepreau Ltd., in which he owned a controlling interest, holding 247 of the 489 shares of its capital stock, the remaining shares, with the exception of five qualifying shares, being held by the defendant company. On January 20th Atkinson gave notice under the provisions of *The Bank Act* of his intention to give security under s. 88 to the plaintiff Bank. This notice was duly registered in the office of the Receiver-General at Saint John on January 22nd. Two days later he made application to the plaintiff on the usual printed

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form for a revolving line of credit to the amount of $5,000 for his pulpwood business and for advances thereunder on the security of all the rough or draw shaved or sap peeled spruce and fir pulpwood

which are now owned or which may be owned by the undersigned from time to time while any advances made under this credit remain unpaid, and which are now or may hereafter be in the Lawrence flowage on New River Stream in the County of Charlotte,

and agreed to give the Bank

from time to time and as often as required security and further security for the said advances by way of assignments under section 88 of *The Bank Act*

covering all the said goods, and appointed the Bank his attorney "to give from time to time such security and further security." Simultaneously he executed an agreement with the Bank in the regular printed form also as to its powers in relation to all advances and securities held therefor.

On March 1, 1934, the manager of the defendant wrote Atkinson that following their conversation and correspondence the defendant would agree

to change the contract * * * dated October 31, 1933, which is in the name of the New Lepreau Ltd. to E. C. Atkinson, personal account.

On the same date the defendant advised the Bank of this change in the contract, and on March 10th Atkinson executed an assignment to the Bank by way of security under s. 88 of

all moneys, claims, rights and demands whatsoever which the undersigned may now, or at any time hereafter, have or be entitled to under or by virtue of or in respect of or incidental to [the said contract], the said moneys, claims, rights and demands or any of them, or any part or parts thereof, being hereinafter referred to as the "debt."

It sets forth in para. 2 that Atkinson agrees that

the debt shall be held by the Bank as general and continuing collateral security for the fulfilment of all obligations, present or future, of the undersigned to the Bank, whether arising from dealings between the Bank and the undersigned or from any other dealings by which the Bank may be or become in any manner whatsoever a creditor of the undersigned, and whether such obligations were or be incurred alone or jointly with another or others, and whether as principal or surety, and whether matured or not, and whether absolute or contingent.

Also by para. 14 that it

is given in addition to and not in substitution for any similar assignment heretofore given to and still held by the Bank and is taken by the Bank as additional security for the fulfilment of the aforesaid obligations of the undersigned to the Bank and shall not operate as a merger of any simple contract debt or in any way suspend the fulfilment of, or prejudice or

affect the rights, remedies and powers of the Bank in respect of, the said obligations or any securities held by the Bank for the fulfilment thereof.

On March 12th the manager of the Bank sent the defendant a copy of this assignment, requesting it at the same time in future to send all cheques in payment direct to the Bank and to advise the Bank what payments the defendant had made to date on the contract. On March 16th the defendant acknowledged receipt of the assignment of the contract and informed the Bank that its advances on the contract during the winter amounted to $484.90 plus an amount of about $4,000 over-advance on a previous contract it had with Atkinson and which, the letter stated, Atkinson had asked the defendant to charge against the new contract. To this letter the Bank made the following reply:

> Referring to your letter of the 16th inst., in which you advise that $484.90 has been paid against the contract dated Oct. 31st, 1933, with Mr. E. C. Atkinson, we note that you have a claim against him for $4,000 on the previous contract which has not yet been completed owing to pulp to be shipped. We have advanced him $3,000 on the contract dated Oct. 31st, under Section 88 Security, and therefore shall expect our advances in this connection to be repaid before your claim of $4,000 mentioned.

No pulpwood had been shipped or delivered to the defendant under the October, 1933, contract up to this time.

The Bank made its first advance—$1,000—on January 24, 1934—the date of Atkinson's application for the $5,000 credit—and four other advances of $500 each between that date and March 19th. No further advance was made until May 28th.

In the meantime, on April 26th, the defendant entered into the second contract, this time with Atkinson personally. By this contract Atkinson agreed to sell and deliver and the defendant to purchase and accept 10,000 cords of peeled spruce and fir pulpwood at $7.25 per cord, which was "to be cut from lands owned or controlled by the seller and situated in Charlotte County, N.B." This last contract provided that advances on the pulpwood should be made by the defendant to Atkinson at the rate of $1.25 per cord when it had been sawed and piled in the forest ready for scaling, an additional dollar per cord when the wood had been hauled to the river ready for driving and the further advance of 50 cents a cord when it had been driven down the river to New River Station, and that the

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balance of the purchase price should be paid on the 20th day of each month for all pulpwood delivered to and accepted by the defendant during the previous month. It contained the same provision as regards shipment as the contract of Oct. 31st, 1933, and as to deduction for any encumbrances or government dues.

On May 27th Atkinson executed an assignment to the Bank as security under s. 88 of "all moneys, claims, rights and demands whatsoever, which the undersigned may now, or at any time hereafter, have or be entitled to under or by virtue of or in respect of or incidental to" this last contract in the same terms as his assignment of his rights under the first contract.

On July 14th the defendant wrote a letter to Atkinson advising him that it agreed to alter the contract to read, "whatever shipment you may have this summer up to a quantity of 3,000 cords we will take care of this shipment on the terms in this contract."

On July 16th Atkinson made application to the Bank for a further revolving line of credit for his pulpwood business to the amount of $10,000 and for advances to him thereunder on the security of all

> the rough or draw shaved or sap peeled spruce and fir pulpwood which are now owned or which may be owned by the undersigned from time to time while any advances made under this contract remain unpaid, and which are now or may hereafter be in the Lawrence flowage on New River Stream in the County of Charlotte

—the same locus as described in his application for the $5,000 credit on January 24th. This application was in precisely the same form and contained the same undertakings on the part of Atkinson as that of January 24th in respect of the first contract. At the same time Atkinson signed another agreement as to the powers of the Bank in relation to all advances and securities held therefor in the same form as that of January 24th in reference to advances and securities in connection with the first contract. The Bank made its first advance thereunder ($1,000) on July 17th, on which date the manager sent the defendant Atkinson's assignment of May 27th. In his covering letter he made reference to the defendant's letter to Atkinson of July 14th and the statement contained therein as to its agreement to "take delivery of 3,000 cords this summer" and asked the defendant to advise him the amount the defendant had advanced to Atkinson

on pulpwood not delivered. The defendant acknowledged the receipt of this letter on July 19th and advised the Bank that the amount of advances to Atkinson on pulpwood was $10,975.62, and on July 24th wrote Atkinson that it was "going to make all the effort possible to provide further advances of three thousand for August 6th."

Up to the time when the second contract was entered into (April 26, 1934), the Bank had made advances to Atkinson to the amount of $3,000 on the security it took from Atkinson in January, 1934, in connection with the first contract of October 31, 1933, the last of these advances —$500—having been made on March 19th. In addition to the $1,000 advanced on May 28th, four other advances of $200 each and another, $500, were made in the month of June after Atkinson had entered into his second contract for the 10,000 cords of pulpwood to be cut on the same limits and for which, the record makes it quite clear, the Bank had not been fully repaid, neither when Atkinson executed the assignment to the Bank of his rights under the second contract on May 27th nor when he obtained his additional credit of July 16th. On the making of all these advances the Bank took from Atkinson a demand note for the amount of each advance with interest from date until paid, to which was attached a signed promise to give the Bank from time to time, as required, security and further security for such note by way of assignments and further assignments under s. 88 upon the goods mentioned in his application for the line of credit as well as a further assignment of the "goods now owned by the undersigned and now in the possession of Atkinson in the Lawrence flowage on New River Stream in the County of Charlotte or elsewhere." To each of these assignments was attached a schedule setting out the advances made under the line of credit to date. The schedule annexed to the assignment of May 28th shows nine advances amounting to $4,000 and that of June 30th eleven advances amounting to $5,000. On July 17th, 1934, after the Bank received Atkinson's application for the $10,000 credit and the assignment of his rights under the second contract, the assignment of the pulpwood at the Lawrence flowage under s. 88 is stated as being given in consideration of an advance of $6,000 and the attached schedule setting out the advances includes all those made from May 28th to July 17th, totalling

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$6,000, while the demand note of $1,000 given to the Bank on that date (July 17th, 1934) is stated in Atkinson's attached written promise as being given

> for an advance made to the undersigned under the terms of the "Application for credit and promise to give bills of lading, warehouse receipts or security under Section 88" made by the undersigned to the Bank and dated January 24th and July 16th day of 1934.

The Bank made two further advances of $1,000 each in July; six advances in August amounting to $3,500; four in September amounting to $1,125; three in October amounting to $300; one in November of $100; three in December amounting to $650 and two in January, 1935, amounting to $239.45.

An examination of the schedules attached to the various individual assignments shows that on August 6th Atkinson's indebtedness to the Bank in respect of its advances to him for his pulpwood operations under both contracts had reached $8,000 and that, although subsequent advances were made during August, September, October, November, December and down to January 29th, 1935, on further demand notes with individual assignments under s. 88 attached thereto similar to the one referred to as given on July 17th, 1934, the subsequent advances effected no increase in his net indebtedness to the Bank beyond this sum. This, presumably, was due to the fact that the demand notes given thereafter by Atkinson to the Bank, secured as described, were in reality the consequences of adjustments of interest and renewals of previous notes.

While the first contract of October 31, 1933, described the wood Atkinson agreed to sell and deliver to the defendant and the defendant agreed to purchase and accept as "draw shaved or rossed spruce and fir pulpwood" and the contract of April 26th, 1934, as "peeled spruce and fir pulpwood," all the individual assignments executed by Atkinson in consideration of the various advances made to him by the Bank from January 24th under his formal applications for credit of January 24th and July 16th, 1934, described the wood as "all the rough or drawn shaved spruce and fir pulpwood" down to September 11th, 1934. The assignment taken on the latter date and all subsequent assignments down to January 29th, 1935, described the wood covered thereby as "all the rough or drawn shaved or sap peeled spruce and fir pulpwood."

Atkinson cut and delivered to the defendant a total of 6,005·45 cords of pulpwood under the two contracts, of which the defendant claimed that 707·17 cords were cut and delivered under the first contract and the balance amounting to 5,298·26 cords were cut and delivered under the second. The purchase price, therefore, of the 707·17 cords at the contract price of $6.50 per cord would amount to $4,596.60 and the purchase price of the 5,298·26 at the contract price of $7.25 per cord to $38,412.37, making for the 6,005·43 cords $43,008.97.

None of the pulpwood was shipped to the defendant under either contract until November, 1934, Atkinson having made his first shipment on the 12th of that month. The defendant received the entire quantity of 6,005·43 cords between November 1st, 1934, and the last day of July, 1935.

Although the Bank in its action, which it brought in February, 1936, sued in the alternative for the wrongful taking and conversion of the pulpwood and for the purchase price under the two contracts as assignee of Atkinson's rights thereunder, it claims on either head only to the amount of the advances made by it and interest on the demand notes given therefor.

The defendant in its statement of defence challenged the validity of all of the Bank's assignments from Atkinson under the provisions of s. 88 and denied that it wrongfully converted any of the pulpwood. It denied also that it was aware of Atkinson's assignment of May 26th, 1934, of his rights under the second contract until it received from the Bank a copy thereof on or about July 17th, 1934. It claimed that it paid the Bank and Atkinson jointly all moneys thereafter accruing due to the latter under the contract of April 26th and denied that any further moneys were due and payable by it to the plaintiff or to Atkinson under that contract. It also raised the question as to the Bank's having no security on any of the "sap peeled" pulpwood until after September 11th, and claimed that the defendant had an equitable right in the wood as soon as it was cut and marked and that the Bank had actual knowledge or notice of its said equitable right. The defendant also raised the question as to its right to charge against the Bank's security a sum of $5,330.91, alleged to have been due to it by Atkinson for over-advances on a

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previous contract it had with Atkinson in the spring of 1933. This apparently was the amount at which, after the termination of the operations of 1934-5, under the two contracts of October 31st, 1933, and April 26th, 1934, it figured its over-advances to Atkinson in relation to the earlier contract of the spring of 1933, and which in its letter to the Bank under date of March 16th, 1934, it placed at $4,000—the amount that letter stated Atkinson had asked the defendant to charge against the new contract of October 31st, 1933. The Bank in its reply hereinbefore set out refused to assent to this proposition and informed the defendant that it would expect its advances to Atkinson on the October 31st contract under s. 88 security to be repaid before the said claim of $4,000.

The defence also put forward a claim that, of the 6,005·43 cords of pulpwood it received from Atkinson, 522·34 cords were cut upon lands of the Fraser Co. Ltd. or the Restigouche Co. Ltd., without the consent or licence of either of those companies and that, the stumpage on this 522·34 cords ($1,044.68) having been paid after its delivery to the defendant, it was entitled to deduct this amount from the amount of the advances made by the Bank to Atkinson.

It also claimed priority over the Bank's security to an amount of $11,096.56 for moneys paid to New Lepreau Ltd. and/or Atkinson under its contract of October 31st, 1933, prior to its receipt of notice of Atkinson's assignment to the Bank of his rights thereunder, and moneys subsequently paid to Atkinson and/or the Bank, which it alleged were received by the Bank. It also claimed priority over the Bank's security in respect of the following moneys:

Moneys paid for wages for the operation..	$9,631 11
Moneys paid for supplies for the operation.	4,482 31
Moneys paid for stumpage, Crown Land Timber Licence fees, Workmen's Compensation Board Assessment.....	7,376 56
Moneys paid for rent, housing men for operation	26 00
Moneys paid for freight on wood received.	5,607 81

The action was tried by Barry, C.J. K.B.D., without a jury, who found a verdict for the plaintiff for the full

amount of its claim, $8,366.66, to which he added $530.87 to represent the accrued interest on the principal sum of $8,000 from the date of the delivery of the particulars to the date of his judgment.

The defendant appealed from this judgment to the Appeal Division of the Supreme Court, with the result that the judgment was reduced to $192.02, with costs of the action, while the Bank was ordered to pay the costs of the appeal. The judgment of the Appeal Court was delivered by Baxter, C.J., and concurred in by Grimmer and Fairweather, JJ. It seems to have been based principally on the conclusion that Atkinson was not an "owner" within the meaning of s. 88 of the *Bank Act* and that, so far as the Bank's case was based on that section, it could not be supported. Having reached that conclusion, the court proceeded to deal with the case on the basis of the assignment which Atkinson made to the Bank of all his rights under the contract of October 31st, 1933, a copy of which the Bank sent to the defendant on March 12th.

Referring to the defendant's letter of March 16th as to the charging of the $4,000 over-advanced on the previous contract, the learned Chief Justice said:

> I cannot see, in view of the testimony, any justification for applying the original deficit to anything but the contract of 31st October, 1933. It seems clear, however, that the deficit on the earlier contract was agreed to be charged against the contract of 31st October, 1933, before Atkinson's assignment to the Bank.

This, of course, refers to the agreement between the defendant and Atkinson and not between them and the Bank. As already pointed out, the Bank refused to assent to the proposal. Then the learned Chief Justice dealt with the contract of April 26th, 1934, and pointed out that after July of that year the defendant paid all the operating expenses and the Bank ceased to make any further advances to Atkinson. His Lordship held that the defendant received wood to the value of $4,596.60 under the contract of October 31st, 1933, and which it could properly set off against the balance of $5,330.91 due upon the earlier contract, leaving a loss to the defendant of $734.31 in respect of the earlier contract, which it was not entitled to charge against the contract of April 26th, 1934. He subtracts the $5,330.91 from the total debit against Atkinson of $43,551.26 for the over-advance in respect of the earlier contract of

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the spring of 1933 and for moneys paid and supplies provided by the defendant on account of Atkinson's operations under the contract of April 26th, 1934, leaving $38,220.35 as the debit chargeable to the latter contract. "Under that contract," he says, "the defendant received 5,298·26 cords at $7.25 per cord which would give Atkinson a credit of $38.412.37, or a balance in his favour of $192.02."

If the Appeal Court is right in its conclusion that the Bank's securities under s. 88 of the *Bank Act* were invalid because Atkinson was not the owner of the pulpwood within the meaning of that section and the case is one which rests entirely, so far as the Bank is concerned, upon the assignments to it, apart from the provisions of s. 88, of Atkinson's rights under the two contracts of October 31st, 1933, and April 26th, 1934, the result at which it arrived might be difficult to impeach.

This appeal, however, in my view, turns entirely upon the question as to the validity of the Bank's assignments under s. 88 in respect of the two contracts of October 31st, 1933, and April 26th, 1934, and their relation to each other. As to this, after the fullest and most careful consideration I have been able to give to the case, I find myself in complete accord with the reasons by which Barry, C.J., K.B.D., so lucidly and logically supports his judgment. There is no material dispute respecting any one of the facts I have above set forth. As the learned trial judge points out, the question is: In whom during the interim between the first advance of $1,000 to Atkinson on July 17th, 1934, and the shipments of the pulpwood to the defendant in the following November rested the legal title to the pulpwood? I quote the following passages from his judgment:

> Before the banks were authorized to loan money on such operations as those with which we are now dealing, it was the common practice of purchasers under a contract to cut lumber, to make it a term of the written contract with the operator that the property in the lumber cut would be in the contractee from the stump. This would be a protection to the party who was advancing the money to the operator to carry on the operation. But no such stipulation, I venture to think, will be found in the contracts of the present day, in cases at any rate where the operator has to go to a bank for assistance, for the very obvious reason that such a stipulation would deprive the operator of the very assistance which he wanted, in the event of neither the operator nor the purchaser of the output being able to finance the operation. No bank would loan to a pulpwood operator, were the product of the operation as soon as

cut, to become the property of the purchaser of the output. So, also, I think it would be true to say, that no bank would be willing to advance money to a woods-operator of any kind, to enable him to carry on an operation, unless he could satisfy the bank that he had a contract with some responsible party, to take at a commercially attractive price, the output of the operation. If that be sound doctrine then we are met here with the paradoxical contention of the defendant, which advances the proposition, and one which I think untenable, that because Ewart C. Atkinson had contracted to sell his pulpwood cut to the defendant company and the plaintiff bank was aware of the fact, it could not under the *Bank Act* take security for advances on the pulpwood, the subject-matter of the contract between Atkinson and the defendant company. There is nothing in the *Bank Act* that I can see to prevent the bank from doing so.

* * *

It is set out in the defendant's factum that: "In the summer of 1934, the defendant's manager, Mr. Lacroix, becoming aware that the plaintiff's advances had reached $8,000, endeavoured to negotiate some compromise between the parties in a settlement of their conflicting claims, and believing that there would be sufficient wood to meet the claims of both parties, endeavoured to reach an arrangement whereby the wood would be conveyed to the defendant by Bill of Sale, and the plaintiff would receive $2 a cord as the wood was delivered at the mill. This offer, however, was refused."

Although this offer was refused, it shows at least one thing, that is that the defendant at that time had little faith and did not think itself secure in the title which it now asserts, but was anxious to have the wood conveyed to it by Bill of Sale from the plaintiff so as to put its title to the wood upon a sounder basis and beyond further question.

Pulpwood is pulpwood whether draw shaved, rossed or sap peeled. The particular designations, if I understand the matter, only serve to indicate the season of the year in which the wood is cut; nothing more. If cut in the spring while the sap is running freely, and the bark can be easily removed, it is sap peeled wood. If cut in the fall and winter, when the sap has stopped running, the bark is more firmly attached to the tree trunk, and another method of removing it has to be resorted to; it is then called rough draw shaved or rossed, but to say that it is an entirely different commodity from the sap peeled wood is, I think, a fallacy.

The title to all of the spruce and fir pulpwood gotten out by Ewart C. Atkinson during the two seasons and put into the Lawrence flowage on New River Stream in the County of Charlotte, no matter of what particular description it may be called, was in my opinion pledged to the plaintiff bank upon the taking of the securities referred to.

* * *

There is no evidence that there was any other operator simultaneously cutting pulpwood on the ground operated by Atkinson, or that there was any other operator putting wood into the Lawrence flowage on New River Stream in the County of Charlotte. There was no danger of Atkinson's cut becoming intermingled or mixed up with the cut of any other operator. There was not the slightest danger of failure of identification. Extrinsic evidence, could, as we have seen, have been resorted to if necessary. Therefore it is that I say that in my opinion the description of the pulpwood pledged by Atkinson to the bank, anterior to the 11th of September, 1934, was broad enough in its terms to include "sap peeled" wood, although that term was not used in the securities taken.

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Aside from all that, however, I can see no objection to the bank taking additional security upon the sap peeled pulpwood at the time of the renewals of the $8,000 note. If the bank holding pledged pulpwood as security for the notes, substitutes for these notes renewals from time to time, without, however, receiving actual payment, the whole series of notes and renewals form links in the chain of liability, which is secured by the pledged pulpwood. Although as a matter of book-keeping the bank may have treated the first notes, and the subsequent substituted notes, as paid by the application of the proceeds from time to time of the renewals, there is no payment in fact of the notes for which the security was given.

The facts of the transactions between Atkinson and the bank are not really in dispute here; it is the legal effect of those transactions that is the question. The bank had before it the contracts between Atkinson and the defendant company, and therefore knew that the company as purchaser of the pulpwood under the contracts, would, when the liens and charges against it were discharged, become its owner. In its negotiations with Atkinson the bank was not acting in the dark or behind closed doors, but on the contrary kept the defendant fully informed of every step in the negotiations. I think one would be justified in saying that the company knew as much of what was going on between the bank and Atkinson as did the bank itself. That I think is so fully demonstrated by the mass of documentary evidence which was introduced at the trial, that I see no reason for further referring to this phase of the case.

I have no hesitation in holding, for my part, 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. This being so, and the Bank having kept the defendant fully informed of every step in its negotiations with Atkinson, as the learned trial judge has found, I cannot understand upon what ground the defendant's claim can be justified that it has a right to deduct from the advances made by the Bank any moneys which it (the defendant) paid to Atkinson or to anybody else for supplies, wages, stumpage or any other purpose in pursuance of the terms and conditions of its agreement with him.

I would allow the appeal and restore the trial judgment with costs throughout.

DAVIS, J.—The transactions out of which this litigation arose were carried on throughout their various stages by the parties to this litigation and one Atkinson, with whom both parties were dealing, in such a loose and unbusiness-like manner as necessarily to create a state of facts which now involves difficult questions of law. And the evidence at the trial was not in any way developed to lessen the manifest difficulties and confusion.

The respondent, Port Royal Pulp & Paper Company Limited (hereinafter for convenience referred to as the Port Royal Company) carried on, as its name implies, a pulp and paper business in the province of New Brunswick. One of its sources of supply for pulpwood appears to have been the standing timber in what is commonly called the Lawrence flowage in Charlotte county in the said province held under licence to cut from the Crown by another New Brunswick company, New Lepreau Limited. There is so little evidence in the case directed to the narrative and the really material facts (the Crown timber licence is not even produced) that the Court is driven to conjecture to a large extent as to what really occurred. It is plain that prior to the transactions involved in this litigation New Lepreau Limited had acted as a contractor in taking out wood from its limits for the Port Royal Company. Atkinson and the Port Royal Company were the owners of practically all of the shares of New Lepreau Limited. What is a common practice in the woods operations of large pulp and paper companies in this country was no doubt adopted by the Port Royal Company, that is, to engage a contractor to cut, haul and deliver pulpwood to the mill rather than do the work by servants or employees of the company, because of practical business considerations in dealing with the woods operations in that way. In this case, the Port Royal Company and Atkinson (although we are told nothing about it) may have incorporated and organized New Lepreau Limited, and very likely did, for that very purpose. All we know is that Atkinson held 247 shares and the Port Royal Company 241 shares out of a total issued capital stock of 490 shares. Why the Crown timber licence to cut was not taken in the name of the Port Royal Company rather than in the name of New Lepreau Limited is not explained. The common practice in this country undoubtedly is for the large pulp and paper mills to acquire their own timber limits from the Crown upon which to cut timber for the supply of wood to their mills and then to let out to different contractors the cutting and delivery of the wood to the mills. All that is plain in the evidence is that the timber involved in this case was cut upon Crown land in respect of which New Lepreau Limited held a licence to cut.

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Davis J.

For reasons best understood by themselves, not attempted to be explained in any way in this litigation, the Port Royal Company made two contracts with Atkinson personally whereby Atkinson undertook and agreed to cut on the New Lepreau limits and deliver to the Port Royal Company at its mills, and the appellant bank undertook to assist Atkinson in financing his woods operations. The singular fact is that although all the parties were perfectly familiar with the position of New Lepreau Limited, no one of them appears to have paid the slightest attention to the rights of that company. So far as the evidence shows, New Lepreau Limited for the purposes of these two contracts was just obliterated from the picture. The two contracts for the delivery of the pulpwood were dated October 31st, 1933, and April 26th, 1934, respectively. The first contract covered 1,000 to 4,000 cords of pulpwood and the second contract covered 10,000 cords. The first of these contracts had in fact been made between the Port Royal Company and New Lepreau Limited, Atkinson signing for New Lepreau Limited as its President, but sometime about March 1st, 1934, Atkinson and the Port Royal Company agreed to strike out the name New Lepreau Limited on this contract and substitute therefor Atkinson's name as the seller. The first of the several promissory notes sued on in this action, secured by sec. 88 security, was taken by the bank subsequent to this change in the first contract. The second contract was taken directly in the name of Atkinson as seller. The Port Royal Company clearly understood the position of New Lepreau Limited, whatever it was, because the Port Royal Company was with Atkinson in substance a joint owner of the company. The appellant bank knew of New Lepreau Limited because it had a pledge of Atkinson's shares in that company and it had the Crown timber licence of that company in its possession. But New Lepreau Limited, so far as the evidence discloses, was disregarded in these two transactions. It is shown in the evidence that at the time of the first contract Atkinson was personally indebted to the appellant bank in a large sum of money and that on an earlier contract (of the spring of 1933) which the Port Royal Company had with New Lepreau Limited the Port Royal Company ultimately sustained a loss of approximately $5,000. The conclusion appears to me to be inescapable that both the appellant bank and the Port Royal

Company desired to see Atkinson get a chance to make some money for himself by taking these pulpwood contracts in his own name and at his own risk, in the hope that he might recoup both the bank and the Port Royal Company, to some extent at least, for their losses. Atkinson undoubtedly agreed with the Port Royal Company that that company might charge up against him the amount of its loss on the New Lepreau Limited contract that had been made in the spring of 1933, although at the time of entering into the contracts the actual amount of the loss, or of any loss at all, had not been ascertained.

In due course Atkinson cut and delivered to the Port Royal Company large quantities of pulpwood under the two contracts in question. The Government dues for cutting the timber from Crown lands were ultimately paid to the Government and there is no suggestion that the Government ever raised any question of trespass. New Lepreau Limited is not a party to these proceedings and does not appear to have raised at any time any question as to Atkinson's right to go in and cut on the areas covered by its Crown timber licence, and a fair inference on the evidence is that both the Government and New Lepreau Limited knew and were quite satisfied that Atkinson should personally take the contracts in question here. It made no difference to the Government, so long as it got its Crown dues paid, which it did, and it is only reasonable to assume that New Lepreau Limited (owned and controlled as it was by Atkinson and the Port Royal Company) was content that what was done should be done. We do not know what consideration moved New Lepreau Limited, but there is nothing to indicate any protest or unwillingness on its part that Atkinson should personally cut on its limits. New Lepreau Limited did not own the land or the standing timber; it had a mere right or licence to cut and remove on payment of Crown dues.

It is perfectly plain that Atkinson had no money and was known to have no money to finance the woods operations covered by his two contracts. While Atkinson was not strictly an employee or servant of the Port Royal Company in relation to his woods operations under the two contracts, he was virtually in the position of an agent or employee. The arrangement, no doubt, was a matter of business convenience; Atkinson in this way could borrow

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money at the bank on the wood by giving security under sec. 88 of *The Bank Act* and, over and beyond whatever borrowings he could make from the bank to finance the operations in ease of the Company, the Company would itself advance moneys to Atkinson during the course of the woods operations to enable him to carry out his contracts. And that is what actually happened. The bank advanced substantial sums; the Company advanced substantial sums; and Atkinson superintended the woods operations and delivered the wood to the Company. Both the bank and the Company were perfectly familiar from the beginning to the end with the fact (though perhaps not with the exact details) of the borrowings and advances from each of them to enable Atkinson to carry out his contracts.

On the completion of the contracts, it became obvious that Atkinson had not made any profit. When the amount of wood which he had actually delivered had been calculated at the contract price per cord, the total advances of the bank and of the Company exceeded the total contract price. The bank was out of pocket $8,366.66 and the Company claimed to be out of pocket $542.29, although in arriving at the latter sum the Company had charged up against Atkinson on the two contracts the amount of its loss on the New Lepreau Limited contract that had been made in the spring of 1933, the actual loss from which contract had in the meantime become ascertained at $5,330.91.

The bank demanded from the Port Royal Company that it pay the balance that remained outstanding upon Atkinson's borrowings in respect of the two contracts which had, to the full knowledge of the Company, been secured not only by sec. 88 security but by assignments of the purchase moneys under the two contracts. There does not appear to have been any effort made by the bank to collect from Atkinson; no doubt because his position must have been worse at the conclusion of the two contracts than it was when he undertook them. The Port Royal Company, while not denying in any way that it got the pulpwood, took two positions against the bank. First, it said that the bank security under sec. 88 was invalid because Atkinson was not the owner of the wood that had been cut—it said that it was the timber of New Lepreau Limited

and not of Atkinson—and that the bank was therefore not entitled to take sec. 88 security from him. Second, that it was entitled as between itself and the bank to charge against Atkinson's contracts the $5,330.91 loss that it had suffered in the contract with New Lepreau Limited of the spring of 1933, and that when this sum was charged up against Atkinson on the contracts, there was a debit against Atkinson of $542.29. A subsidiary point taken on behalf of the Port Royal Company, but a point without any substance, was that the difference between rossed or rough draw shaved pulpwood and sap peeled pulpwood materially affected the issues in the action.

The learned trial judge, the Chief Justice of the King's Bench Division of the Supreme Court of New Brunswick, Chief Justice Barry, gave judgment in favour of the appellant bank for its full claim with interest ($8,897.53) and costs. An appeal was taken by the Company from that judgment to the Appeal Division of the Supreme Court of New Brunswick, which allowed the appeal and reduced the amount of the judgment in favour of the bank to $192.02. The members of the Appeal Court took the view that Atkinson was never an "owner" within the meaning of sec. 88 of *The Bank Act* and that the bank was therefore not entitled to take from him sec. 88 security. They held that

> So far as the evidence discloses, the wood was the property of the New Lepreau Limited.

But although the Crown timber licence was not produced at the trial, it was perfectly plain that it was Crown land and that the standing timber was Crown property. All that the licensee, New Lepreau Limited, had was a right to enter upon and to cut and remove the standing timber; and no doubt, as stated by one of the counsel on the hearing of the appeal before us, the licence contained the usual provision that the property in the wood would not pass from the Crown to the licensee until the Crown dues were paid. However, in the conclusion of the Appeal Court that Atkinson was not an "owner" within the meaning of sec. 88, that Court held that the bank's security under sec. 88 was invalid. The Appeal Court then considered the rights of the bank by virtue of its assignments from Atkinson of the purchase moneys under the two contracts. That Court held that the Port Royal

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Company was entitled, as between itself and the bank, to charge against Atkinson the deficit ($5,330.91) on the New Lepreau contract of the spring of 1933, upon the ground that Atkinson had agreed to the charging of this deficit against him before the date that the bank had taken the assignment from Atkinson of the first of the contracts involved in this action (that is, the contract of October 31st, 1933). But the Appeal Court held that the agreement to charge the deficit against Atkinson only applied to the first of the two contracts (that of October 31st, 1933) and not to the second of the contracts (that of April 26th, 1934) and therefore arrived at the conclusion that, so treating the deficit, any credit to Atkinson on the first contract had been wiped out; but, disregarding the deficit, or any part of it, on the second contract, Atkinson had a credit balance of $192.02 on the second contract for which amount, and for which amount alone, the Appeal Court held the bank was entitled to recover from the Port Royal Company on the basis of the assignment to the bank by Atkinson of the second contract.

On the argument before this Court, counsel for both parties very ably discussed at considerable length the history and the effect of sec. 88 security, but I do not find it necessary for the purpose of this appeal to become involved in the consideration of the somewhat intricate points of law argued on this branch of the case. It seems quite plain to me 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 sec. 88 security. I think the attack upon the bank's security fails.

That being so, the question was then argued that the liability of the Port Royal Company, if any, to the bank rests in a claim for damages for wrongful conversion. An attempt was made by the Company to fix the damages (in the event that its attack upon sec. 88 security failed) by ascertaining the exact value of the pulpwood at the time and in the condition the Company took possession of it. In dealing with deliveries from time to time of thousands of cords of pulpwood very practical difficulties arise in any attempt to fix value at any particular stage. The Company took possession of the wood with full knowledge of the bank's position and of its rights, and

destroyed the identity of the wood in using it in its mill operations. It is the knowledge of the Company that is the determining factor in this case. Atkinson's evidence is that all the moneys he got from the bank were actually used in the woods operations and not diverted to any other purpose. The evidence does not satisfy me that the actual value of the wood when the Company took possession of it was less than the amount of the bank's advances against it and I think that under all the circumstances the Company is bound to pay the full amount of the bank's advances.

For these reasons I would allow the appeal and restore the judgment at the trial, with costs throughout.

KERWIN, J. (dissenting in part)—The first point to be determined in this appeal is whether the security which banks may take under subsections one and three of section 88 of the *Bank Act* must be given by the owner of the products, goods, wares and merchandise therein referred to. Prior to 1890, when Parliament inserted in the *Bank Act* the forerunner of section 88, it was possible for a bank to lend money upon a warehouse receipt issued by the possessor of the goods to a third party (the owner) or upon a warehouse receipt issued by the owner who originally was one of a select class of manufacturers but which class had been considerably widened by 1890. Chapter 31 of the statutes of that year retained the privilege, so far as warehouse receipts issued by the possessor, not being the owner, were concerned, but it abolished the right of the bank to loan upon warehouse receipt issued by the possessor, who was also the owner, and substituted what is now known as Schedule C security. If subsection 3 of section 74 of the Act of 1890 had provided only that the bank should acquire by virtue of such security the same rights as if it had acquired them by virtue of a warehouse receipt, it might have been contended that, the security being given by an owner, no rights could be acquired by the bank, and it was to overcome that difficulty that it was provided that the security might be given by the owner.

It appears obvious to me that if security under section 88 is not given by the owner, it is of no avail, as the bank cannot acquire title from a person who has none. The

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notice of intention to give security must be given by the person to whom the loan is to be made. That, I think, is apparent from subsection 17 of section 88, which reads as follows:

> Any person intending to give a bank security under the authority of this section must give notice of such intention before any loan is made by the bank to such person and the security taken, by signing a document hereinafter called a "notice of intention," which may be in the form set out in Schedule G to this Act or to the like effect.

I have no hesitation, therefore, in coming to the conclusion that the security must be given by the owner.

While the licences to cut timber had been issued in the name of New Lepreau Limited and the first contract for the sale of logs to the respondent was made by that company, and the contract of October, 1933, was at first made between the same parties, the respondent agreed to the alteration whereby Atkinson was substituted as vendor under the last mentioned contract. New Lepreau Limited is not a party to these proceedings, and, while there is no evidence that it agreed to the alteration, it must be borne in mind that all the shares in that company, except a few qualifying ones, are held by the respondent and Atkinson, and as a matter of fact the latter's certificates were left with the appellant. The distinction between a company and its shareholders is well known, but no claim has been made by New Lepreau Limited that it is the owner of the logs. Furthermore, it is only by virtue of the two contracts filed as exhibits that the respondent claims any interest in the logs, and I think the proper inference from the evidence is that Atkinson was the owner and that he gave security to the Bank under section 88.

It was argued that the securities were not validly given or taken, but I find no substance in this contention as, with reference to the last twenty-one advances made by the Bank to Atkinson (which are the only ones in question), the evidence is clear that these were made contemporaneously with the taking of the securities, and in any event the second notice by Atkinson of intention to give security had been given after the amendment to the statute in 1934, and the advances in question are all later than the date of the coming into force of that enactment.

It was also contended that, in any event, of the securities taken only the twelve last were valid. This argument

is based upon the fact that the nine prior securities described the products of the forest owned by Atkinson and in his possession as being "all the rough or draw shaved spruce and fir pulpwood" and as being "in the Lawrence flowage on New River stream in the County of Charlotte," while in the latter securities the words "or sap peeled" were inserted after the words "draw shaved." I agree, however, with what the trial judge said with respect to this:

> Pulpwood is pulpwood whether draw shaved, rossed or sap peeled. The particular designations, if I understand the matter, only serve to indicate the season of the year in which the wood is cut; nothing more. If cut in the spring while the sap is running freely, and the bark can be easily removed, it is sap peeled wood. If cut in the fall and winter, when the sap has stopped running, the bark is more firmly attached to the tree trunk, and another method of removing it has to be resorted to; it is then called rough draw shaved or rossed, but to say that it is an entirely different commodity from the sap peeled wood is, I think, a fallacy.

I am of opinion that the description in the securities objected to is sufficient.

Upon the basis of the respondent's own figures, as contained in its factum, the total advances made by the appellant, after deducting all sums received by it from the respondent, left a balance of approximately the principal sum claimed by the appellant in this action, $8,000. As security for the repayment of this sum together with interest thereon, the Bank, under subsection 7 of section 88, had acquired the same rights in respect of the logs as if it had acquired the same by virtue of a warehouse receipt; that is, in the circumstances, all the right and title of the owner, Atkinson (section 86). Notwithstanding that the respondent had notice of the Bank's rights, it converted the logs to its own use and is therefore liable in damages for such conversion; i.e., the value of the logs at the time and place of conversion.

No evidence was directed to the determination of the proper amount of damages on that footing. The respondent, however, submitted a statement showing the value of the logs at the place they were to be delivered by Atkinson to the respondent under his contracts with it. The appellant has accepted this value as correct, although it was arrived at only after certain amounts had been expended by the respondent subsequent to the conversion.

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The items deducted by the respondent from the value in its statement are as follows:

1. Moneys paid to E. C. Atkinson before assignment of the Draw Shaved contract and moneys subsequently paid to E. C. Atkinson and/or the Royal Bank which were received by the bank....	$11,096 56
2. Wages paid by Port Royal.....	9,631 11
3. Supplies	4,482 31
4. Stumpage, Workmen's Comp., taxes, etc.	7,376 56
5. Rent, housing men	26 00
6. Freight on wood received under the contracts	5,607 81
	$38,220 35

No question arises as to the first item, and I understood counsel for the appellant to admit the propriety of allowing the fourth item. In no case did it challenge the accuracy of the amounts or the fact that they had been paid for the purposes mentioned. I have no doubt, however, that Item 2, being the amount paid by the respondent as wages in the manufacture of the logs to a point where they acquired the value accepted by the appellant; Item 3, being the amount paid for supplies in connection with the same work, Item 5, being rent for housing the workmen, and Item 6, being the freight on the wood to the point of delivery, should all be allowed. In case I misunderstood counsel's admission, I should add that in my view Item 4 is in the same position.

This is not a claim for detinue such as arose in *Glenwood* v. *Phillips* (1), but the general rule applicable is stated in *Reid* v. *Fairbanks* (2), as epitomized in the Second Edition of Halsbury, Vol. 10, page 138, paragraph 178:

> The value of a chattel which was converted whilst in an unfinished state is estimated by ascertaining what would have been its value in a complete state at the place where it was converted and deducting the amount which it would have cost to complete it.

An allowance for freight under the circumstances has been justified ever since the decision in *Morgan* v. *Powell* (3),

(1) [1904] A.C. 405.
(2) (1853) 13 C.B. 692.
(3) (1842) 3 Q.B. 278.

which was approved in *Burmah Trading Corporation* v. *Mirza Mahomed* (1).

In addition to the items to which I have referred, the respondent seeks to deduct from the value of the logs the balance of an old claim under the first contract between it and New Lepreau Limited and which it claims Atkinson authorized it to set off against the amount that would ultimately be due him by the respondent under the later contracts of 1934 and 1935. Even with Atkinson's consent it can have no right to deduct this sum from the amount of damages that it should properly pay.

Respondent's statement shows that, excluding this sum, it paid out $38,220.35 and that the increased value of the logs was $43,008.97. The balance of $4,788.62 represents the value at the time and place of the conversion. As assignee of Atkinson's rights under the two contracts, the appellant can claim no greater amount, and I would, therefore, allow the appeal and direct that judgment be entered for this sum together with interest thereon at five per cent. per annum from July 31st, 1935, being the date agreed upon in the pleadings of each party by which the respondent had received the last of the logs. The respondent should pay the costs of the action and of the appeal to this Court but they are entitled to their costs of the appeal to the Appeal Division.

HUDSON, J.—I agree that this appeal should be allowed and judgment at the trial restored, with costs throughout, for the reasons given by my brothers Crocket and Davis.

Appeal allowed with costs.

Solicitors for the appellant: *Hanson, Dougherty & West.*
Solicitors for the respondent: *Sanford & Teed.*

(1) (1878) L.R. 5 Ind. A. 130 at 134.