Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Henry Atkinson v. *Reverend Henry Usborne* (*and Cross Appeal*) *from the Court of Queen's Bench for the Province of Quebec, Canada, Appeal side; delivered Friday, July 6th,* 1877.

Present:

SIR J. W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.

IN this case there is an appeal and cross appeal against the judgment of the Court of Queen's Bench of Canada in a suit brought by the Appellant, who was the Plaintiff below, against the Respondent, to recover damages for breach of a contract for the sale of timber. The Plaintiffs are owners of saw mills near Quebec. The Defendant, the Rev. Henry Usborne, a clergyman living in England, was the owner of extensive "limits" or tracts of pine forest in Canada, which were managed by George Purvis as his agent. The contract was entered into in February 1870, by George Purvis, acting on behalf of the Defendant, with Henry Atkinson and Co., of Quebec. The contract was in the following terms: "George "Purvis, Esq., attorney for Reverend Henry "Usborne of, &c., sells, and Henry Atkin-"son and Co. of Quebec buy, a quantity of "white pine saw logs, say about 15,000 pieces, "more or less, marked 'P,' made during "this winter on Mr. Usborne's limits upon "the Coulogne, and culled by experienced "cullers under instructions annexed: logs

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" to be driven first open water, and with all " despatch, and to be delivered in booms on " Cheneaux Lake not later than 25th of May " next, there to be counted and received by " Henry Atkinson and Co.; agent or culler " also shall have the right to reject any culls " found among said logs, which seller agrees " to retain. Logs to be delivered free from " all charges whatever, boomage, slidage, " tolls, stumpage, &c. &c., and are guaran- " teed to be equal to or exceed in mea- " surement each a standard log of 20 inches, " 13 feet 6; and Henry Atkinson and Co. agree " to pay for all logs so received by their culler " or agent the price of 8*s*. 6*d*. per log, as follows: " $10,000 by acceptances of seller's draft at " four months' date from 1st May, and balance " by acceptance of seller's draft at four months' " date so soon as quantity shall have been " ascertained, payable in Quebec. It is further " stipulated and agreed that purchasers shall " have the right to send and examine logs " hereby sold, and if report of the same by the " culler is not satisfactory, to cancel this sale, " otherwise to be binding upon both parties." The purchaser sent his culler to examine the logs at the place where they lay; the culler reported in favour of the logs, and the contract became binding upon the parties.

According to the construction which their Lordships put upon the document there was no warranty by the Defendant that the quantity to be delivered at the Cheneaux Lake should amount to 15,000 pieces; but the contract was merely that the whole quantity should be sent down to the Cheneaux Lake at the risk of the seller, to be again counted and culled there; and that the quantity that should be taken there should be paid for at the rate of 8*s*. 6*d*. per log.

The only question now raised is whether

the amount of damages allowed by the Court of Queen's Bench was correct. Mr. Justice Taschereau, who tried the case originally, gave a decree in favour of the Plaintiffs for $18,333. He assumed that there were 13,221 logs, making 11,762 standards, and he made his calculation upon that number of standards. The Superior Court upon revision reduced the damages to $13,500; they calculating upon nearly the same principle as Mr. Justice Taschereau had done, but making their calculation, not upon the basis that 11,762 standards would have been received by the plaintiffs, but that 9,101 only would have been so received.

It appeared that after the contract had been entered into, viz., on the 11th May 1870, the defendants agent Mr. Purvis wrote to the Plaintiffs a letter, in which he stated that at that time the total quantity of saw logs measured by culler, exclusive of culls, was 13,221, making 11,762 standards. At that time then 11,762 was the amount of standards at or on their way to the mouth of the Coulogne. He further stated in his letter that at the time of offering the logs he had made no stipulation to deliver them by the 25th May, and "consequently," to use his own words, "there was "no inducement as you allege, for your purchas- "ing logs for that season, but when you inserted "that date in the contract I did not object, "as at that time I believed there could be "little difficulty in delivering them even earlier "at the Cheneaux. In consequence however "of the ice on the Coulogne lake remaining "this spring so much longer than usual, and "the fact that the excessively high state of "the water in the main stream of the Ottawa "will bring down the large American drives "earlier than usual and than I contemplated, "it will be utterly impossible for me to adhere

" to contract in this respect, as there will be " so great a number of logs in the river and " in 'Snows' boom that I could not separate " them without great loss." He then proposed that the Defendant, instead of receiving the logs at the Cheneaux Lake, should take them at the mouth of the Coulogne river. The Plaintiff refused to receive the logs except at the Cheneaux Lake, and after some further correspondence the Defendant sold the logs to Eddy and gave notice to the Plaintiff that he had resold them. In consequence of that breach of contract the Plaintiff was entitled to damages. The first Court, as already stated, assessed the damages on the basis of 11,762 standards; the Superior Court on review reduced the amount by taking the standards at 9,101; but they like the first Court fixed the amount with reference to the price which the Plaintiffs would have received if they had had the logs and been able to saw and sell them when converted into deals to Messrs. Burstall and Co. under a contract which the Plaintiffs had entered into with them. Both parties appealed to the Court of Queen's Bench, and that Court reduced the damages from $13,500 to $10,000. At page 176 they say, "The Court of Revision " considered that there was error in assuming " that there were 11,762 logs, inasmuch as Eddy, " who purchased this lot of logs of Usborne, " states that he only received 9,101, and that " the evidence which established that 11,762 " logs were made in the forest was inaccurate, " or that 9,101 logs were all that were merchantable. It must be observed also that " Eddy bought the logs at the mouth of the " Coulogne, a distance above Ottawa. Proceeding upon much the same mode of " calculation as was adopted by the Court in " the first instance, except the number of logs

" assumed as susceptible of reaching Atkinson " and Co.'s mills was taken at 9,101 instead of " 11,762, the Court of Review rendered judg- " ment for $13,500. From this latter judgment " both parties appeal. The Court here see " nothing which would warrant the conclusion " that Usborne knew that Atkinson and Co. had " sold these logs to Burstall and Co., and the " contract between Usborne and Atkinson and " Co. should be considered without regard to " the relations between Atkinson and Co. and " Burstall and Co. Strictly speaking, the " damages would be the difference between the " contract price of these logs and that which " Atkinson and Co. would have been required " to pay to procure a like quantity and quality " of logs, or at most what profit they could have " made had the logs been delivered, as prices " of lumber were at the time when they could " have turned them into deals, if the logs " had been delivered according to contract." This passage states two different measures of damage. 1st. The difference between the contract price of the logs and that at which the Plaintiffs might have replaced them by buying similar logs in the market; and 2ndly, the profit which they would have made if the logs had been delivered, estimated according to the market price of lumber. It is, however, proved beyond doubt by the witnesses in the case that the Plaintiffs could not at that time have purchased similar logs from any other person. At page 64, line 40, Mr. McCracken says, " The timber from the Coulogne is of a very " fine quality as a general thing. On the " 25th May of the said year (that is 1870) " I knew of no person who could replace " to me the logs such as specified in the " said contract, because it was too late in " the season. The time for making contracts

" for timber, and getting out timber, such as " that specified as above, is from the middle of " January to the middle of February." Again, at page 67, line 38, Mr. Alexander Fraser says, " On referring to the contract, Plaintiff's exhibit " No. 5, in which the said saw logs are guaran- " teed to be equal to or exceed in measurement " each standard log of 20 inches, and 13.6, " I declare that such logs would be specially " good, and over the average of logs that are " generally for sale, and that the size and " quality of the logs mentioned in the said " contract are such as cannot be found for sale " and could not be purchased in the months of " May and June, or even later, in the said year " of 1870." Again, at page 83, line 9, Mr. Thompson says, describing the logs, " Having " taken communication of Plaintiff's exhibit, " number 5, particularly of that part of it in " which the Defendant guaranteed that the saw " logs contracted for should be equal to or " exceed in measurement each 'a standard log " of 20 in., 13.6,' I declare that such logs " would be superior logs, and a little above the " average, and that if not delivered by the " 15th June at the Snows or Cheneaux Lake " they could not be replaced during that season " on the lakes even at 10 dollars." Their Lordships think that it is sufficiently proved that there was no market to which the Plaintiffs could have gone to replace the logs which they had purchased or agreed to purchase from the Defendant. Therefore their damages cannot be assessed by ascertaining the market value of similar logs. It is proved in evidence that they had got their mills; that they had not got and could not get sufficient logs from other persons to keep their mills at work; that they could not shut up their mills; that the only saving in not cutting the logs which they had

purchased from the Defendant would have been the saving of the labour, and even as to that, one witness stated that they could not discharge their superior workmen, because they might never get them again. The proper measure of damages, therefore, is the profit which they would have made if they had had the logs delivered according to the Defendant's contract, and had cut them into deals and sold them. It was proved that the market price for deals was higher than that at which Messrs. Burstall had agreed to purchase from the Plaintiffs. After remarking on the omission of the Defendant to adduce evidence of a satisfactory character as to the price of logs or deals at the time as they ruled in the market, the Court of Queen's Bench say, " Under the circumstances the Court is under " the necessity of acting upon Atkinson and " Co.'s evidence as to their damage. This mode " of estimating the damage places Usborne " at a disadvantage, and it should be pro- " ceeded upon cautiously ; and as the Court have " no data to arrive at a precise result, it " appears that a duty rests upon it similar to " the discretion to be exercised by a jury in such " case, and while being guided by the general " basis of computation, it must not award a " greater amount than is apparent that Atkin- " son and Co. lose. Several important elements " have been left out of the calculation in the " Court below ; for instance, Eddy, who made the " logs into deals, and must have the best informa- " tion as to their quality, says they were only ave- " rage logs, and were only worth $70 per standard " hundred, while Henry Stanley Smith estimates " them as first quality and estimates them at $72 " per standard hundred deals, two dollars per " standard hundred more than his firm, the firm " of Burstall and Co. would have paid for aver- " age logs. This makes a difference of nearly

" $2,000 in his calculation applied to 9,101 logs " in favour of Usborne. Eddy also says that " only one fourth of the logs would turn out " good deal logs, while King estimates one third. " This would make a considerable difference in " Usborne's favour, as second quality of deals " were worth only two thirds of first quality." On this it may be remarked that the Defendant, by having sold the deals to Eddy, put it out of the Plaintiffs' power to prove the quality and quantity of deals which the logs would have produced; and their Lordships see no reason to give credence to Eddy's evidence in preference to that which was produced on behalf of the Plaintiffs upon that subject. Then, the judgment goes on: " King estimates " each standard log as producing 260 feet board " measure, and this he predicates upon logs " 20 inches in diameter and 13½ feet in length, " and upon experience. According to tables " used in the trade, it appears that such " standard only makes 247½ feet board measure. " This would make considerable difference in " the result in favour of Usborne."

It appears that the tables on which the Court of Queen's Bench thus proceeded were certain tables said to be used in the trade, but which do not appear to have been proved in the cause. There was, however, positive evidence in the cause upon this point. Mr. Patton says at page 90, line 27: " I have been engaged in the " lumber business for 32 years near Quebec. " I get my saw logs, spruce and pine, from the " shores of the Chaudière River. Having taken " communication of Plaintiff's exhibit '7 B,' " also of a letter signed 'Geo. Purvis,' being " Plaintiff's exhibit number 12, also Plaintiff's " exhibit at enquête A. C., and also of Plaintiff's " exhibit marked number 5, and being asked " whether the estimated specification of produce

" of 11,762 standard pine saw logs is or not a " reasonable and accurate approximation to what " such quantity and quality of pine saw logs " when sawed up would produce, I reply as " follows: From the quality of the logs by the " report of Magloire Landry, I think the quan- " tity is not over estimated, and they would " have turned out the qualities as mentioned " in the said paper marked Plaintiff's exhibit " A. C. I saw this very year logs of inferior " description, which produced the same pro- " portion of qualities." The judgment pro- ceeds: "In the computation on which the " judgments in the Court *a quo* are based, " no allowance is made for loss of interest " on the money that would have been advanced " on the logs had they been delivered before " the price of the lumber produced therefrom " would be realised. Nothing is allowed for " the use and wear of the mill or mills in " sawing the logs. The evidence does not place " the Court in possession of what this amount " is, but it is doubtless a considerable sum, and " should be considered as to some extent " lessening the profits of Atkinson and Co., and, " as a consequence, the damages which Usborne " ought to pay. Besides the item allowed for " culls and cuttings, which on 9,101 logs " calculated on the same rates as it was esti- " mated on 11,762 logs would amount to " $3,128 07, is based upon opinion, and not " altogether satisfactory. The Court here, " considering all the evidence and without basing " their judgment upon precise figures in detail " think that in a fair and just estimate of the " evidence taken as a whole, $10,000 is ample " to cover all damages which Atkinson and Co. " can reasonably be presumed to have suffered " from failure on the part of Usborne to carry

" out his contract, and in its judgment reduce " the award to that amount."

It has been admitted by the learned Counsel that no allowance was made by the Superior Court or by Mr. Justice Taschereau for the use and wear of the mills and machinery in sawing the logs, or for interest; but the question is whether, notwithstanding the omission to make such allowances, there are sufficient grounds for reducing the award of the Superior Court from $13,500 to $10,000.

It is not clear that the 9,101 logs which Eddy got were all that the Plaintiffs ought to and would have received. It being admitted that originally there were 11,762 logs, the deduction of 2,661, the difference between that number and 9,101, appears to be too large an allowance for losses in going from the place where the logs were cut to the mouth of the Coulogne, where Eddy purchased them. Their Lordships think that the allowance for losses which the Superior Court on revision made in reducing the 11,762 to 9,101 was more than sufficient to cover the whole loss which would have been sustained in floating the logs from the place where they were cut to the mills of the Plaintiffs, and also the possible rejections on any second culling at Cheneaux Lake pursuant to the contract; and that the reduction in the damages consequent upon making so large an allowance may fairly be set off against the amount which ought to have been allowed for interest, and wear and tear of mills. It is impossible in cases of this nature to ascertain the precise amount of damages; but looking to the whole case their Lordships think that the reduction made by the Court of Queen's Bench is too large.

Under these circumstances, the case comes before their Lordships much in the same manner as if it had been an appeal against the

judgment of the Superior Court on revision. Mr. Justice Taschereau must be taken to have agreed with the Judges of the Full Bench of the Superior Court that the sum of $13,500 was not too much, for he allowed more. There were, therefore, two Courts in favour of allowing at least as much as $13,500. Their Lordships feel that they would not be justified in altering the judgment of the Superior Court without sending the case to a new trial; and looking at the whole case they do not think it one in which they would be warranted in adopting that course. They think that under the circumstances the judgment of the Superior Court ought to be affirmed.

With regard to the cross appeal by which the Defendant raised the question whether the damages awarded by the Court of Queen's Bench were not too high, their Lordships do not think it necessary to say more than that it was not seriously contended at the bar that the Defendant had established a case for reducing the damages so awarded.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the Superior Court upon revision be affirmed; that the judgment of the Court of Queen's Bench be reversed; and that the appeal of each party to that Court be dismissed, each party to those appeals bearing his own costs. The Appellant Henry Atkinson must have his costs of this Appeal, and of the cross Appeal to Her Majesty in Council.