

30,1941

In the Privy Council.

No. 75 of 1939.

ON APPEAL FROM THE SUPREME
COURT OF CANADA

BETWEEN

PORT ROYAL PULP AND PAPER COMPANY LIMITED

(Defendant) Appellant

AND

THE ROYAL BANK OF CANADA

(Plaintiff) Respondent.

CASE FOR THE APPELLANT.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 19th December 1938 (Cannon, Crocket, Davis, Kerwin and Hudson, JJ.) allowing an appeal by the Respondent from a judgment of the Supreme Court of New Brunswick, Appeal Division (Baxter, C.J., Grimmer and Fairweather, JJ.) dated 11th June, 1937 and restoring a judgment of the Supreme Court of New Brunswick, King's Bench Division (Barry, C.J.) dated the 5th February, 1937 whereby judgment was given in favour of the Respondent for \$8,897.53 and costs. The judgment of the Supreme Court of New Brunswick, Appeal Division, was that the sum of \$8,897.53 should be reduced to \$192.02 with the costs of the action and that the Appellant should have the costs of the appeal to that Court.

RECORD.
pp. 198-199.

p. 105.

p. 96.

2. The Appellant is a company duly incorporated under the laws of the Dominion of Canada having its head office and chief place of business in the parish of Lancaster in the County of Saint John, New Brunswick. The Respondent is a chartered bank of Canada with a branch in Fredericton, New Brunswick.

3. The appeal raises the question of the Respondent's rights (if any) in certain pulpwood or the sale price thereof to which the Respondent claimed to be entitled as security for loans made to one Ewart C. Atkinson or under an assignment by the said Atkinson. The Appellant contends that under the relevant Canadian legislation and on the facts admitted or proved in evidence Atkinson was not the owner of the pulpwood, that no valid charge

APPELLANT'S CASE

RECORD. on the pulpwood was created in favour of the Respondent and that no rights in the pulpwood or the sale price thereof passed to the Respondent by reason of Atkinson's assignment.

p. 222, l. 36.
 p. 46, l. 29-p. 47, l. 2.
 p. 116, ll. 21-25,
 p. 137, ll. 43-45.
 p. 47, ll. 3-24

4. Atkinson was the president of New Lepreau Limited, a company incorporated under the laws of New Brunswick. Of the 489 issued shares he appears originally to have held all the shares except two. At the material time, however, the Appellant held 241 shares and Atkinson only 247, the share certificates for which he had indorsed in blank to the Respondent to be held by the Respondent as general collateral security. Nevertheless Atkinson in the relevant transactions acted on the view given in his evidence that "I am the New Lepreau Limited" and "I don't think it made any difference to the bank whether I borrowed in the name of the New Lepreau Limited or Ewart C. Atkinson because it is all one and the same thing. I always considered that I owned the New Lepreau Limited and it does not make any difference." The Respondent's manager took the same view. 10

p. 78, l. 14.
 p. 82, l. 8.

p. 79, ll. 27-35.

p. 77, l. 45-
 p. 78, l. 10.

p. 78, ll. 2 &
 3.

p. 88, l. 42-
 p. 89, l. 4.

5. New Lepreau Limited held licences under the Crown Lands Act from the Minister of Lands and Mines of New Brunswick to cut pulpwood over an area of 62 square miles of Crown lands in Charlotte County, New Brunswick. With the exception of 522 cords cut in trespass on adjoining lands of a stranger all the pulpwood claimed by the Respondent was cut on the said New Lepreau Limited limits. The Appellant settled a claim in respect of these 522 cords. 20

p. 71,
 ll. 32-35.

p. 92, l. 12-p. 93,
 l. 22; p. 308.

p. 84,
 ll. 16-28.

6. In the spring of 1933 the Appellant bought from New Lepreau Limited a quantity of pulpwood to be delivered during the autumn of 1933 and the spring of 1934 at the Appellant's mill at Fairville, New Brunswick. The Respondent advanced money to New Lepreau Limited to finance the operations necessary under that contract and in January 1934 the Appellant at Atkinson's request paid the Respondent \$5,350.00 in full settlement of the outstanding balance of these advances. When the last of the wood under this contract was received by the Appellant about the end of May 1934 it was found that the overpayment by the Appellant to or for the account of New Lepreau Limited amounted to \$5331.91. 30

p. 221.

p. 222, l. 22.

p. 222, l. 30.

7. On the 31st October 1933 the Appellant made a further contract with New Lepreau Limited for the purchase and delivery to the Appellant of from 1,000 to 4,000 cords of draw shaved or rossed pulpwood to be cut on lands owned or controlled by the New Lepreau in Charlotte County at a price of \$6.50 per cord. The contract provided that advances would be made by the Appellant to New Lepreau Limited from time to time as the work of preparation of the wood progressed. It also provided that if there were any incumbrances or Government dues on the wood, the Appellant should deduct these from remittances to New Lepreau Limited. 40

p. 30,
 ll. 20-34.
 p. 47,
 ll. 11-19.

8. In January 1934 Atkinson applied to the Respondent for advances for the purpose of his pulpwood operations. Atkinson was already heavily indebted to the Respondent, and the Respondent required security. The

powers and rights of banks to take security are, however, strictly controlled by the Bank Act 1934 (24 and 25 George V chapter 24) which re-acted chapter 12 of the Revised Statutes of Canada, 1927, with amendments. The relevant sections, other than section 75, are printed with other relevant legislation in the Record at pages 186 to 198. Section 75 (2), pp. 186-198. so far as material, is as follows :

“ Except as authorised by this Act, the bank shall not directly or indirectly

10 (c) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immoveable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise.

By section 88 (1) the bank may lend money to any wholesale purchaser or shipper of or dealer in forest products on the security of such products, but by subsections (5), (6) and (17) the security must be given by the owner of the products in a specified form, after notice of his intention to give such security. By subsection (18) this notice must be registered. If 20 security is given in the prescribed manner the bank, by virtue of section 88 (7), section 86 (2) and section 89 (2) acquires all the right title and interest in the products of the person giving the security, subject to a charge for wages of employees but free from any claim by an unpaid vendor other than a lien of which the bank had notice when the security was given.

9. On the 20th January 1934 in compliance with the Bank Act a notice of Atkinson's intention to give security was executed and on the 22nd January 1934 was registered in the proper office at Saint John. The notice was in Atkinson's own name and did not specify the security. On 30 the 24th January 1934 Atkinson made formal written application to the Respondent for a revolving line of credit for his pulpwood business of \$5000.00 and agreed to give security to the respondent on all pulpwood of specified kinds which he then owned or which might thereafter be owned by him while any advances under the application remained unpaid and which was then or might afterwards be in the Lawrence flowage in New River in the County of Charlotte or elsewhere. Atkinson by the application appointed the bank manager his attorney to give the Respondent the security promised and to execute assignments under section 88 of the Bank Act. He also executed an agreement by which the security was available 40 for any and every liability of Atkinson to the Respondent and by which Atkinson undertook *inter alia* to keep the goods insured and authorised the Respondent forcibly to break open, enter upon and occupy and use the premises and property of or used by Atkinson in connection with the goods, to appoint a receiver to act as Atkinson's agent to deal with the goods,

RECORD. and irrevocably appointed the Respondent his attorney so long as any
p. 228, l. 8. liability to the Respondent remained.

p. 78,
ll. 11-14. 10. Atkinson had no arrangement with New Lepreau Limited for the
cutting of pulpwood or for the passing of any property in the licences or
the pulpwood to himself, and, as stated above, he acted on the basis that
p. 194, l. 7. he and the Company were one and the same. By section 19 of the Crown
Lands Act all lumber cut within the limits of any licence remains the
p. 359, l. 15 ;
p. 94, ll. 1-12. property of the Crown until the stumpage thereon is paid. Stumpage
was not paid on the pulpwood in dispute until after the 1st October, 1934.

p. 35, l. 28.
pp. 327-348. 11. The Respondent immediately started making advances to Atkinson 10
and Atkinson on receiving each advance gave security for such advances
by promissory notes secured by purported assignments under section 88
pp. 229-307. of the Bank Act of Canada covering pulpwood owned or thereafter to be
owned by him situate in the said Lawrence flowage. By the 1st March,
1934 the Respondent's new advances to Atkinson totalled \$2,000.00,
p. 36, l. 5-p. 37,
l. 6. and on the 1st March the Appellant at the request of Atkinson agreed
p. 309. to change the name of the contractor in the contract of 31st October, 1933
from New Lepreau Limited to E. C. Atkinson personal account, charging
against the contract the amount already advanced.

p. 310. 12. On the 10th March, 1934 Atkinson assigned to the Respondent 20
p. 310, l. 42. all moneys due or to become due under the contract dated the 31st October,
1933 and agreed that any money received by him from the collection of
p. 311, l. 3. the debt should be received in trust for the Respondent, and that the
Respondent might apply any money received against any obligation of
Atkinson to the Respondent. A copy of this assignment was sent to the
p. 313,
p. 48, ll. 17-21
p. 49, ll. 37-45. Appellant and received on the 16th March, 1934. The Respondent was
aware that the contract provided for advances by the Appellant in respect
of the purchase price of the pulpwood. At the time of the notice of the
said assignment the Respondent asked the Appellant what moneys had
p. 313, l. 15. been advanced by the Appellant under this contract and the Appellant 30
p. 313, l. 34. replied that it had advanced \$484.90 and it had also at Atkinson's request
charged as an advance against that contract about \$4,000.00 (being the
then estimated balance) owing by New Lepreau Limited to the Appellant
p. 314. on the spring contract. The Respondent replied stating that the Respon-
dent had at that time advanced Atkinson \$3,000.00 under section 88 and
insisting that the Respondent had priority over the advances of the
p. 315. Appellant. The Appellant denied any such priority and claimed a first
p. 89, ll. 32-36. charge on the wood for its advances. To this denial the Respondent did
not reply.

p. 316. 13. On the 26th April, 1934 the Appellant entered into a further 40
contract with Atkinson personally for the purchase of 10,000 cords of
peeled pulpwood. The contract was in the same form as the contract of
the 31st October, 1933 with the exception that the price was stated as
\$7.25 per cord and the provisions for payment and advances were different.
The supply of pulpwood under the three contracts was treated as one
p. 84, ll. 29-44. continuous operation. The Appellant financed the operator up till October
p. 69, ll. 4-7.

1934 by sending cheques payable to the Respondent and Atkinson and after September 1934 by paying wages and bills for supplies direct by the Appellant's cheques. The respondent knew from Atkinson of the Appellant's intention to make these direct payments, and made no objection.

RECORD.
p. 68, ll. 29-33.
p. 59, ll. 13-32.

10 14. On the 27th May, 1934, Atkinson assigned to the Respondent all moneys due or to become due to him under the contract of the 26th April, 1934 on the same terms as his previous assignment. On the 17th July, 1934 notice of this assignment was given by the Respondent to the Appellant. At this time the advances by the Appellant to Atkinson amounted to \$10,975.62 including the \$5,330.91 over-advanced on the spring contract of 1933. In the meantime the Respondent had been making further advances and by the end of June after crediting payments to the discharge of Atkinson's notes in order of date they had reached a total authorised credit of \$5,000.00.

p. 318.
p. 327, l. 10.
p. 91, l. 44-p. 92,
l. 5.
p. 59,
ll. 1-11.
p. 257.

20 15. On the 16th July, 1934 Atkinson made application to the Respondent for an additional \$10,000 credit and further advances were made by the Respondent. The total amount outstanding, apart from interest, never exceeded \$8,005.00. After receiving notice of the respective assignments by Atkinson to the Respondents of the moneys due under the contracts the Appellant (although paying wages and bills for supplies from the 1st October, 1934 to enable the operation to continue) made no payments to Atkinson but made all payments (amounting in all to \$10,691.17) to the Respondent. These payments by the Appellant were used by the Respondent to discharge Atkinson's notes and as each note was discharged he was allowed further advances, so that the total amount outstanding remained \$8,000, plus interest on the unpaid notes, at all material times. After the 13th August, 1934 the Respondent advanced no fresh money of its own, but renewed notes until finally the outstanding notes were dated from the 17th July, 1934 to the 29th January, 1935.

p. 321, l. 28.
pp. 277-285.

30 16. During the summer or early autumn of 1934 the managers of the Appellant and Respondent discussed the situation which had arisen, it then becoming apparent that there would not be sufficient wood to meet the advances made by both parties, and an attempt was made to reach a settlement but this failed and the respective rights of the parties were not changed. The Respondent's manager however stated that the Respondent would make no further advances to Atkinson. In mid-September of 1934 the Appellant refused to make any further advances to Atkinson or to send further moneys to the Respondent. The Appellant suggested that the Respondent arrange to finish the operations, but the Respondent did not do so, and the Appellant therefore proceeded to pay the current expenses of the operation. These expenses included stumpage and taxes. The expenses and previous advances by the Appellant on the three contracts amounted to \$43,551.26.

p. 54, l. 29-p. 55,
l. 26; p. 95, ll.
25-29.

pp. 287-307, p.
43, ll. 19-21.
p. 74, ll. 27-39. .
p. 307.

p. 74, l. 41-p. 75,
l. 44; p. 80, l. 31-
p. 81, l. 44; p. 89,
l. 42-p. 90, l. 17;
pp. 350-353.

p. 80, l. 43.
pp. 351, 353.

p. 353, l. 35.
p. 90, ll. 9-11;
p. 93, l. 23-p. 94,
l. 12.

pp. 359, 360; p.
83, ll. 27-34.

17. Some wood under the contracts of October 1933 and April 1934 was delivered to the Appellant in November and December 1934 and the balance during the late spring or early summer of 1935. All the wood was

p. 60, ll. 17-27;
p. 94, ll. 13-46.
p. 64, l. 20-p. 65,
l. 8.

- RECORD. marked with the Appellant's mark before being driven. In the meantime the Respondent had been pressing for payments of its account and on the 15th May, 1935, notified Atkinson by letter not to move any of the pulpwood until its advances were fully paid. This letter was shown to the Appellant's manager on the 15th or 16th May. The Respondent, however, at no time took possession or purported to take possession of any of the pulpwood. The contract value of all the pulpwood delivered was \$43,008.97 or \$542.29 less than the total amount advanced or expended on the operation by the Appellant.
- p. 358.
p. 65,
ll. 19-27.
- p. 359,
ll. 18-24.
- p. 1.
p. 3.
- p. 15, l. 41-
p. 17, l. 25.
- p. 96.
- pp. 96-103,
p. 98, ll. 1-33.
- p. 98, l. 34-p. 99,
l. 29.
- p. 99, l. 30-p.
100, l. 8.
- p. 100, l. 9-p.
102, l. 9.
- p. 102, ll. 10-46.
- p. 103, ll. 1-10.
p. 103, ll. 11-32.
18. On the 22nd February, 1936 the Respondent issued a writ against the Appellant which as amended claimed damages for the conversion of pulpwood and also the purchase price of goods sold and delivered under the contracts of the 31st October, 1933 and the 26th April, 1934. The amended statement of claim limited the amount claimed to \$8,366.66 including interest to the 24th February, 1936.
19. The action was tried before the Honourable Mr. Justice Barry Chief Justice of the King's Bench Division, Supreme Court of New Brunswick sitting without a jury who gave judgment in favour of the Respondent for the full amount of its claim and costs. In his reasons for judgment the Chief Justice after summarising the claim and defences, held that the Appellant could not charge the deficit on the earlier 1933 contract with New Lepreau Limited against the later contracts with Atkinson personally. He then pointed out that the later contracts were not sales but agreements to sell and deliver and held that until the loading shipping and consigning was consummated the Appellant had no legal title to the pulpwood. Expressing the view that no bank would lend to a pulpwood operator to carry on an operation unless satisfied that he had a contract for the output at a commercially attractive price, the learned Chief Justice described as paradoxical the contention which he attributed to the Appellant that the Respondent could not under the Bank Act take security on the pulpwood because to the Respondent's knowledge the pulpwood had been sold to the Appellant. He then rejected any distinction relevant to the Respondent's security between sap peeled and draw shaved or rossed wood and held that the title to all the spruce and fir pulpwood of whatever description got by Ewart C. Atkinson was pledged to the Respondent. Moreover in his view the Respondent could take additional security on renewing notes. The Appellant had full knowledge of what was going on between the bank and Atkinson, and he had no difficulty whatever in holding the Respondent entitled to recover the amount claimed.
20. The Appellant respectfully submits that the learned Chief Justice, apart from the question raised by the renewal of notes, entirely failed to direct his mind to the difficulties in the case, and in particular did not deal with the following points which the Appellant had raised :
- (1) That under Section 88 of the Bank Act security on products of the forest may be given only by the owner thereof and that Atkinson was at no time the owner of the pulpwood in question.

(2) That Atkinson had no legal or equitable interest in the pulpwood to give any person ; that the Respondent had never been in possession of the pulpwood and the Appellant being in possession could set up a jus tertii in New Lepreau Limited and in the Crown.

(3) That the Respondent by taking an assignment of the purchase price of the said wood had adopted the sale thereof by Atkinson to the Respondent and could not thereafter claim in conversion but was limited to an action for any balance of purchase price that might be owing.

10 (4) That the Respondent knowing that the wood was subject to an agreement of sale at a stated price could not validly take security the effect of which would be to prevent the Appellant from obtaining the pulpwood except at an increase of price.

(5) That if Atkinson had any interest in the wood in question it was equitable only and any rights which he might have given to the Respondent by his assignments under Section 88 of the Bank Act were subject to the equitable rights of the Appellant under the said contracts which had arisen previously, such equitable rights being that the Appellant was entitled upon payment of the purchase price of the said wood in accordance with its agreements to obtain it free from any incumbrances.

(6) That on the alternative claim for the payment of the purchase price the Appellant had paid all moneys which it was liable to pay and in pursuance with the terms of the contracts had properly applied part of the purchase price in paying incumbrances or Government dues on the wood.

(7) That the rights of the Respondent as assignee from Atkinson were no greater than the rights of Atkinson himself against the Appellant and that the Appellant owed nothing to Atkinson.

30 21. An appeal to the Appeal Division of the Supreme Court of New Brunswick (Baxter C.J., Grimmer and Fairweather JJ.) was allowed with costs and the judgment in the Respondent's favour was reduced to \$192.02 and costs. Chief Justice Baxter delivered the reasons of the Court. After summarising the facts the Chief Justice noted that there was

40 no agreement between Atkinson and New Lepreau Limited and that the contract of the 31st October 1933 in its original form was clear evidence that the limits did not belong to Atkinson or at least that the lands which were to provide the wood were owned or controlled by New Lepreau Limited ; yet the Respondent did not examine the licences or make any enquiries. The controlling shareholders in a company cannot therefore assume to act as the company, and security under Section 88 of the Bank Act can only be given by the owner. It was incumbent on the Respondent in taking security to see that it was from an owner, and Atkinson was not an owner. Accordingly the claim based on Section 88 failed. On the claimed based on the assignment of moneys payable under the contracts the

p. 105.

pp. 195-110.
p. 105, l. 26-p.
107, l. 29.
p. 107, ll. 30-47.p. 107, l. 47-p.
108, l. 6.

p. 108, ll. 7-44.

p. 108, l. 45-p.
109, l. 25.

RECORD.

Chief Justice held there was sufficient evidence to justify incorporating the deficit on the spring contract of 1933 in the contract of the 31st October, 1933, but not in the contract of the 26th April, 1934. The agreement so to charge it was before the assignment. The Chief Justice then applied his views to the figures given in evidence and held that though Atkinson was on balance indebted to the Appellant, if the third contract were isolated the Appellant would owe Atkinson \$192.02. That was the view most favourable to the Respondent and the judgment in the Respondent's favour should be reduced to that amount.

p. 109, l. 26-p.
110, l. 8.

p. 110, ll. 8-20.

22. In the Appellant's respectful submission Atkinson could not by professing to sell and deliver as his own the property of New Lepreau Limited or of the Crown in which he had no right of any kind become entitled to the price thereof. Atkinson was in breach and in the Appellant's submission was not at any material time entitled to any amount under the contracts of the 31st October, 1933 and the 26th April, 1934 or either of them. In view of the smallness of the amount involved the Appellant did not, however, appeal from the judgment of the Appeal Division. The Appellant, however, submitted in the Supreme Court of Canada that the Appeal Division was in error on this part of the case, and the Supreme Court judgment sets aside the judgment of the Appeal Division in its entirety.

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p. 186, ll. 21-28.
p. 199, ll. 4-7.

p. 198.

23. The Respondent appealed to the Supreme Court of Canada which heard the appeal on the 17th and 18th May, 1938 and on the 19th December, 1938 allowed the appeal and restored the judgment of Chief Justice Barry.

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pp. 199-209.

24. In his reasons for judgment (in which Cannon and Hudson JJ. concurred) Crockett J. outlined the facts and the course of the proceedings and expressed the view that the appeal turned entirely on the validity of the Respondent's assignments under section 88 of the Bank Act. On that point he was "in complete accord with the reasons by which Barry C.J. so lucidly and logically supports his judgment." After quoting from the judgment, Crockett, J. concluded by saying that he had no hesitation in holding that Atkinson must be treated as the owner of the pulpwood when cut, and that he could not understand upon what ground the Appellant could claim to deduct any moneys paid by the Appellant.

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p. 206, ll. 19-29.

p. 206, ll. 29-36.

p. 206, l. 38-p.
208, l. 47.
p. 209, ll. 1-11.

25. Davis, J. (with whose reasons Hudson J. agreed) criticising the unbusinesslike conduct of the parties and the gaps in the evidence, summarised the facts, pointing out that although all the parties were perfectly familiar with the position of New Lepreau Limited no one of them paid the slightest attention to the rights of that company. The conclusion seemed to him inescapable that both the Appellant and the Respondent desired to give Atkinson a chance of making money himself in the hope that he might recoup them both, to some extent at least, for their losses. Neither the Crown nor New Lepreau Limited appear to have questioned Atkinson's right to cut on the licence areas. Atkinson, in his view, was virtually in the position of an employee or agent of the Appellant who, beyond his borrowings from the Respondent, advanced money to enable him to carry out the contracts. Atkinson, however, did not make a profit and the Appellant and Respondent were both out of pocket. After dealing with

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pp. 209-213.

p. 210, ll. 13-17.

p. 210, l. 40-p.
211, l. 3.p. 211, ll. 4-22.
p. 211, ll. 23-40p. 211, l. 41-p.
212, l. 3.

the Respondent's claims and the decisions below, Davis, J. found it unnecessary to consider the history and effect of section 88 as it was quite plain to him that Atkinson had a qualified ownership or interest in the wood as soon as it was cut sufficient to support the Respondent's security. The evidence did not satisfy him that the value of the wood when taken was less than the Respondent's advances which the Appellant must therefore pay in full.

RECORD.
p. 212, l. 4-p. 213,
l. 19.
p. 213, ll. 20-28.
p. 213, ll. 29-45.

26. Kerwin, J. referred to the history of section 88 and held that the security must be given by the owner, but he thought the proper inference from the evidence was that Atkinson was the owner who had validly given as security logs which the Appellant had converted and thereby had become liable for their value at the time and place of conversion. Endeavouring to ascertain this value from the evidence the learned judge reached the conclusion that the Respondent was entitled to recover \$4,788.62 with interest from the 31st July, 1935. Kerwin, J. had however overlooked an admission by the Appellant during argument that the value of the wood alleged to have been converted was in September, 1934 as it then lay \$8,000.

pp. 214-217.
p. 214, l. 34-p.
215, l. 8.
p. 215, ll. 4-43.
p. 215, l. 44-p.
217, l. 9.

27. The Appellant respectfully contends that the decision in *Macaura* against *Northern Assurance Company Limited* [1925] Appeal Cases 619, establishes that Atkinson as a shareholder in *New Lepreau Limited* had no ownership or interest of any kind in the pulpwood over which he purported to give security; and that the decision in *Maritime Electric Company Limited* against *General Dairies Limited* [1937] Appeal Cases 610 shows that when the Parliament of Canada has as a matter of public policy prohibited banks from taking such security except from the owner no conduct of the parties can create the position where a non-owner is to be treated as the owner so as to be able validly to give such security. The learned judges while holding that Atkinson must be treated as the owner or that he had a qualified ownership or that he was the owner do not set out the grounds on which they base their several views, and in the Appellant's respectful submission the evidence discloses no grounds on which any of these views can validly be supported. But even if, contrary to the Appellant's contention, any title to the pulpwood could be found in Atkinson the equitable rights arising from the established facts would, in the Appellant's respectful submission, take priority to the Respondent's claim.

28. The Appellant also respectfully contends that the alternative claim based on the assignment of moneys by Atkinson should fail because no moneys were at the respective dates of the assignments or at any time thereafter due to Atkinson from the Appellants. If Atkinson was ever entitled to any moneys under the contracts the Appellant seeks to uphold the view of the Appeal Division that the over-advance on the spring contract of 1933 was by agreement set-off against any sums due under the Contract of the 31st October, 1933; but the Appellant contends that the evidence of Atkinson shows that the right of set-off applied equally

p. 76,
ll. 20-24.

RECORD.

to sums due under the contract of the 26th April, 1934 and that the three contracts were so interwoven as to form one operation. Furthermore by ordering Atkinson not to deliver the pulpwood and by claiming in conversion the Respondent caused or sought to cause a fundamental breach of Atkinson's contracts to deliver the pulpwood and thereby, in the Appellant's respectful submission, the Respondent repudiated the contracts and debarred itself from relying on them or the assignment of rights under them. In any event the Appellant claims to be entitled in addition to other credits to credit for its expenditure from the 1st October, 1934 which was necessary to mitigate its loss from Atkinson's inability thereafter to deliver any pulpwood. 10

29. The Appellant therefore submits that the judgment of the Supreme Court of Canada was wrong and should be reversed, and that the Respondent's action should have been dismissed with costs for the following amongst other :—

REASONS

1. Because the Respondent's security was void as the Respondent could validly take security only from the owner of the pulpwood in question and Atkinson was not the owner of the pulpwood. 20
2. Because in taking security from Atkinson the Respondent failed to comply with the provisions of the Bank Act.
3. Because if any title in the pulpwood was acquired by the Respondent such title was subject to superior equities in the Appellant.
4. Because no moneys were due from the Appellant to Atkinson under the contracts or either of them at the respective dates of Atkinson's assignments to the Respondent or thereafter.
5. Because if any moneys were so due the Appellant had a valid set-off, available against the Respondent as assignee, exceeding 30 any amount due to Atkinson.
6. Because of the other grounds mentioned in paragraphs 20, 27 and 28 of this Case.

FRANK GAHAN.

In the Privy Council.

No. 75 of 1939.

ON APPEAL FROM THE SUPREME COURT
OF CANADA.

BETWEEN

PORT ROYAL PULP AND PAPER COMPANY
LIMITED- - - (*Defendant*) *Appellant.*

AND

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

CASE FOR THE APPELLANT.

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