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*Dec. 9.
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*Feb. 23.

SHERMAN E. TOWNSEND, ASSIGNEE OF THE ESTATE AND EFFECTS OF JOSEPH E. BRETHOUR (PLAINTIFF) ..... APPELLANT;

AND

THE NORTHERN CROWN BANK (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Banks and banking—Loans—Security—Wholesale purchaser—"Products of the forest"—"Bank Act," s. 88.

By sec. 88(1) of the "Bank Act" a bank "may lend money to any wholesale purchaser * * * or dealer in products of agriculture, the forest, etc.; or to any wholesale purchaser * * * of live stock or dead stock and the products thereof, upon the security of such products or of such live stock or dead stock and the products thereof."

Held, affirming the judgment of the Appellate Division (28 Ont. L.R. 521) which affirmed the decision of a Divisional Court (27 Ont. L.R. 479) by which the judgment of the trial Judge (26 Ont. L.R. 291) was maintained, that a person who purchases lumber by the carload having on hand at times 200,000 or 300,000 feet and sells it by retail or uses it in his business is a "wholesale purchaser" within the meaning of the above provision.

Held, also, that sawn lumber is a "product of the forest" on which money can be lent under said provisions. *Molsons Bank* v. *Beaudry* (Q.R. 11 K.B. 212) overruled.

Held, per Duff and Anglin JJ.—The words "and the products thereof" at the end of the above sub-section mean the products of live or dead stock and not of the other articles mentioned.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

(1) 28 Ont. L.R. 521.

judgment of a Divisional Court(1), which maintained the judgment for the defendants at the trial(2).

The appellant is assignee of one Brethour, who carried on business as a builder and contractor and as such applied to the respondent bank for a line of credit and advances "on the security of the cordwood, lumber, cement, nails, glass and other articles used in the business of building and contracting, etc." In carrying on his business Brethour bought his lumber by the carload, selling some to other persons in the village and using the rest in his business. Having become insolvent he made an assignment for benefit of his creditors and the assignee brought action to set aside the security held by the bank on the assets. The main grounds on which he relied in this action were, that Brethour was not a "wholesale purchaser," and that the lumber purchased by the insolvent was not a "product of the forest" both within the meaning of sec. 88(1) of the "Bank Act." The trial judge and both Appellate Courts below held in favour of the bank on both grounds and decided other points raised mainly in the same way.

Laidlaw K.C. and *Atwater K.C.* for the appellant. Sawn lumber is not a "product of the forest" within the meaning of that term in sec. 88(1) of the "Bank Act." *Molsons Bank* v. *Beaudry*(3).

The "Ontario Bills of Sale and Chattel Mortgage Act" makes a mortgage of personal property void as against creditors unless it is registered. The "Bank Act" cannot, and does not, purport to override this provision. See *Montreal Street Railway Co.* v. *City of Montreal*(4), at page 228.

(1) 27 Ont. L.R. 479.
(2) 26 Ont. L.R. 291.
(3) Q.R. 11 K.B. 212.
(4) 43 Can. S.C.R. 197.

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The insolvent Brethour was not a "wholesale purchaser" of the lumber under said sec. 88(1).

The bank's advances were for past due debts and not authorized by the "Bank Act." See *Bank of Hamilton* v. *Halslead*(1).

Arnoldi K.C. for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed for the reasons given in the court below.

DAVIES J.—I concur in dismissing this appeal, though I confess with much doubt on the question as to whether the advances made by the bank and for which the security under the "Bank Act" was taken were really *bonâ fide* contemporaneous advances as required by the "Bank Act."

Being in doubt on the point I confirm the judgment appealed from.

DUFF J.—Considering the facts of this case together with the course of the proceedings in the Ontario courts I think the only points requiring discussion are the points raised by the appellant relating to the construction of sec. 88 of the "Bank Act," R.S.C., 1906, ch. 29. These questions arise upon the first (unnumbered) paragraph of that section, which is in the following words:—

> 88. The bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock and the products thereof, upon the security of such products, or of such live stock or dead stock and the products thereof.

(1) 28 Can. S.C.R. 235.

The loans in question were made upon the security of certain lumber, the property of one Brethour and the first question is whether Brethour was a "wholesale purchaser, or shipper of, or dealer in" these commodities. The evidence shews that Brethour purchased in carload quantities, storing the lumber purchased in his yard, making use of it very largely in his own business which was that of a builder, and selling in comparatively small quantities to the general public. Whether Brethour was strictly a wholesale "dealer" may be open to question. But "wholesale purchaser" is used in contradistinction to "wholesale shipper" and "wholesale dealer," and I think that the circumstances being such as I have mentioned, Brethour is within the intendment of the phrase "wholesale purchaser."

The second question is whether lumber is an article which falls within the phrase "products of * * * the forest" as the words are used in this enactment. I may say at the outset that I have been unable to read the section in the manner in which it is read by the Chief Justice of the Common Pleas. I think the words "products thereof" in the last line are connected both grammatically and by the general sense of the paragraph with the words "such live stock or dead stock" immediately preceding them. Is lumber then a "product of the forest" for the purposes of this section? According to the narrow construction which the appellant asks us to give effect to when pressed to its logical conclusion, timber ceases to be a product of the forest as soon as it has been subjected to any process of manufacture. That is almost a *reductio ad absurdum,* and Mr. Laidlaw, of course, did not assume any such untenable position, rather he tried to escape

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from it. He did not, as I understood him on the oral argument before us, dispute that what are commonly known as saw-logs would be "products of the forest," within the meaning of the "Bank Act." But why draw the line at the saw-logs? Logs are frequently reduced to lumber at the very place, or at all events, within a short distance of the very place where they are felled, by means of portable saw-mills. The appellant's answer, of course, to this mode of argument is that the line must be drawn somewhere and that if you admit dressed lumber as a "product of the forest" you cannot logically stop short of admitting the articles into which the lumber is further manufactured.

I concur with much that is said as to the difficulty of drawing an abstract line. This is only one example of the class of cases in which the court being loath and refusing to attempt to draw an abstract line, finds itself compelled to decide whether a particular concrete case falls on one side or on the other side of the line which theoretically must be found somewhere within given limits. In this particular case I prefer to say that according to the common understanding the articles in question would fairly be comprised within the description "products of the forest," and I think they are within the contemplation of the enactment we have to interpret.

I may add a sentence respectfully recording my inability to agree with the decision of the majority in *Molsons Bank* v. *Beaudry* (1).

The appeal should be dismissed with costs.

ANGLIN J.—On the two questions as to the construction of section 88 of the "Bank Act" (R.S.C.

(1) Q.R. 11 K.B. 212.

1906, ch. 29) involved in this appeal I respectfully agree in the conclusions reached in the Appellate Division of the Supreme Court of Ontario.

Sir William Meredith C.J., who tried this action, was of the opinion that

> part of the business which (the insolvent) Brethour carried on was that of a wholesale dealer in lumber.

While, because of the limitations resulting from the fact that the community in which he did business is comparatively small, Brethour's transactions were not as extensive as a wholesale dealer in a large centre of population would naturally be expected to have, the evidence discloses that his purchases were not of a retail character. They were by the carload, and his yard at times held from 200,000 to 300,000 feet of lumber. Most, if not all, of his sales were, no doubt, by retail and it may be that he could not properly be described as a "wholesale dealer in lumber." But the statute uses the word "purchaser" apparently in contradistinction to the word "dealer" and it was, no doubt, intended to cover the case of the man who purchases by wholesale, although he may either himself use the material which he purchases in his business as a contractor, or may dispose of it by retail sale. In my opinion, Brethour was properly held to be a wholesale purchaser of lumber.

While I am, with respect, unable to accept what I understand to have been the view of Meredith C.J., that the words "and the products thereof," which occur in the 5th line of sub-section 1 of section 88, and again in the last line,

> apply to all the articles previously mentioned in the sub-section and, therefore, apply to the products of the forest

and think that, upon their proper grammatical con-

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struction and, read in the light of the context, they relate only to "live stock or dead stock," I am of the opinion that the other words in the sub-section, "products of the forest," are wide enough to include lumber, which is sometimes sawn in a portable saw-mill situate at or near the limits where the trees from which it is made grew and sometimes in a permanent mill situate at some other convenient point. I have fully considered the judgment of the Quebec court of appeal in *Molsons Bank* v. *Beaudry*(1), relied upon by counsel for the appellant. With great respect, I cannot agree with the conclusion there reached. The construction of section 88 which excludes planks or boards because they are not "products of the forest" is, in my opinion, too narrow.

Counsel for the appellant further urged that the evidence established that the debt for which the bank obtained the securities in question was then past due and that the loans for which such securities were taken were, therefore, not within section 88. He stated that this point was taken in the provincial courts. No allusion is made to it either in the judgment of the learned trial judge or in the opinions delivered in the Divisional Court and the Appellate Division, and counsel for the respondent insisted that it was urged for the first time at bar in this court. However that may be, assuming this ground of appeal to be open, it is, I think, sufficiently clear from the copy of the bank account in evidence that the indebtedness in respect of which the bank claims to hold the impeached securities is for advances made at or subsequently to the respective dates at which such securities were taken, and that the loans were made upon such securities.

(1) Q.R. 11 K.B. 212.

I agree with the views expressed by Mulock C.J., as to the re-pledging of the securities when renewal notes were given.

The appeal, in my opinion, fails and should be dismissed with costs.

BRODEUR J.—The trial judge having found that the business which Brethour carried on was that of a wholesale purchaser in lumber and that finding having been confirmed by the Divisional Court and the Appellate Division we should accept it.

The question has been raised by the appellant that that lumber was not a product of the forest within the meaning of section 88 of the "Bank Act" and that no valid security could be given by Brethour to the respondent under that section.

It is contended also by the appellant that the power to pledge products of the forest should reasonably be limited to the original resources and should not be extended to the product of a product.

Section 88, in my view, never contemplated that security should be given on standing lumber, and if there was any doubt as to that we will find the answer in the "Bank Act" of last session which, in section 84, made a special provision authorizing banks to lend money upon the security of standing timber.

That power to the banks to lend money on the security of natural resources has reference specially to the nature or to the volume of the trade carried on by one who gives the security.

In view of the fact that Brethour was a wholesale lumber purchaser, I think the respondent was entitled to receive from him the security in question.

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The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *William Laidlaw.*
Solicitors for the respondents: *Arnoldi & Grierson.*