LANDRY PULPWOOD COMPANY, LTD. (DEFENDANT) ..... } APPELLANT;

AND

LA BANQUE CANADIENNE NATIONALE (PLAINTIFF) ..... } RESPONDENT.

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*May 17, 18.
*Oct. 4.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Sale—Pulpwood—Unfinished product—Loan by a bank—Valid lien—Measuring and stamping by purchaser—Transfer of ownership—Bank Act, s. 88—Arts. 1026, 1027, 1474, 1488, 1489, 1684, 2268 C.C.

Under section 88 of the *Bank Act*, a bank, as security for advances made, may acquire a lien on "products of the forest" as defined by section 2, subsection (*m*) or on goods, wares and merchandise, as defined by section 2, subsection (*g*), to be manufactured, or in process of manufacture, although the finished product will come into existence only after the process of manufacture is completed.

Therefore, the owner of a timber license, who proposes to go into the forest to cut down the trees and transform them into what is commercially known as pulpwood and who may require financial assistance from a bank before the pulpwood is produced in its commercial form, can give the bank which assists him a valid lien on the finished product, although not in existence as such at the time of the loan.

In the present case, the measuring and stamping of the wood done in the forest by the purchaser, while the wood remained in the possession of the seller, did not amount to a sufficient determination of the subject matter of the contract or to a taking of actual possession of the wood, so as to enable the purchaser to claim ownership of the wood against a valid lien obtained by a bank for advances made to the seller.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamond JJ.

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To determine the effect of a lien acquired by a bank under section 88 of the *Bank Act*, the provisions of that Act, and not those of the Quebec Civil Code, should be looked at.

No opinion expressed whether a purchaser in good faith of particular goods, in the usual course of business, such as a table bought from a furniture manufacturer or dealer, acquires a valid title as against a bank's lien.

Judgment of the Court of King's Bench (Q.R. 43 K.B. 435) aff.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, at Quebec, Pouliot J., and maintaining the respondent's action.

The material facts of the case and the questions at issue are stated in the judgment now reported.

J. P. A. Gravel K.C. for the appellant.

E. Baillargeon K.C. for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—In 1923 and 1924, one Silvio Gendron was a lumber merchant dealing in pulpwood. He had obtained timber licenses and his mode of operation was to cut down the trees and saw them into four foot lengths of a diameter of not less than four inches. Either before or after the sawing, the bark was peeled off, and all the contracts filed in the case deal with the pulpwood as peeled pulpwood.

Gendron started cutting operations some time in the summer of 1923 (the evidence does not shew the exact date) on, among other lots, nos. 39 and 40 of the fourth range of the township of Chabot, in the county of Frontenac, in the province of Quebec, being there represented by his brother, who appears to have very grossly exaggerated the quantity of pulpwood he reported as having been manufactured.

Dealing with the facts chronologically, as far as possible, we find Silvio Gendron soliciting, on June 8, 1923, from La Banque Nationale (hereinafter called the bank, and now represented by the respondent) a line of credit of $15,000. On that date, Gendron signed an application to the bank for this line of credit on the security of all the pulpwood peeled or unpeeled, "*brut ou pelé*," of four feet lengths, belonging, or which might belong to him, on these lots and

(1) (1927) Q.R. 43 K.B. 435.

some others, promising to furnish to the bank from time time, and when requested, all security demanded under the form of transfers, according to section 88 of the *Bank Act,* covering in whole or in part the pulpwood in question. At the same time, Gendron signed an agreement with the bank, defining its powers when making advances, and a demand note for $2,400, dated June 8, 1923, was discounted by him with the bank, accompanied by an hypothecation, under section 88 of the *Bank Act,* of the products of the forest described as

le bois sur le lot 39-40 rg. 4 Chabot * * * et sont les suivants: 500 cds. bois pelé et assuré lot 39-40 Chabot.

Undoubtedly the intention was to give the bank the security mentioned in section 88 of the *Bank Act,* and I do not understand the appellant to question the regularity in form of the hypothecations of the pulpwood which Gendron then and subsequently made in favour of the bank. What the appellant contends as to the lien asserted by the bank will be explained later.

The bank subsequently made advances to Gendron and obtained from him similar letters of hypothecation. These advances may be conveniently divided into three series:

First series. The bank advanced $2,400 on June 8, 1923 (this is the advance referred to above), $900 on June 28, and $2,100 on July 10, in all $5,400.

Second series. The bank advanced $1,350 on August 17, 1923, $600 on September 9, $600 on September 27, and $450 on October 10, in all $3,000.

Third series. The bank advanced $450 on November 13, 1923, $1,600 on December 12, $100 on December 26, and $274.15 on January 3, 1924, in all $2,424.15.

It is conceded that the bank cannot assert a lien for its second series of advances, no notice of Gendron's intention to hypothecate his pulpwood having been given and registered as required by section 88*a* of the *Bank Act,* which came into force on August 1, 1923, and does not apply to the first series of advances. No similar objection exists as to the third series, for the necessary notice was registered in due time.

Referring now to the first and third series, each advance made by the bank to Gendron was contemporaneously secured by the hypothecation of a specific number of cords of pulpwood said to be lying on these lots. For instance,

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for it is not necessary to particularize each hypothecation, when the bank advanced $2,100, on July 10, 1923, Gendron hypothecated 700 cords of peeled pulpwood. It is not seriously contended on behalf of the bank that at that time any such quantity of peeled pulpwood existed on the lots. In fact, Mr. Justice Greenshields, referring to the sale made by Gendron to the appellant, on September 12, 1923, of 1,500 cords of peeled pulpwood, finds that the wood was not then in existence other than in standing trees. He also finds that up to the 19th or 20th November there had been manufactured by Gendron 817 cords of pulpwood on lots 39 and 40 of the 4th range of Chabot. On paper, Gendron hypothecated to the bank, to secure the first series of advances, 1,500 cords of peeled pulpwood said to be then on lots 39 and 40, and 3,200 cords to secure the third series. Having carefully read the testimony, I am convinced that at no time during the first or third series of advances was there any such quantity of peeled and sawn pulpwood on the lots. The cutting of the trees began during the summer, and on September 14, the appellant's inspector Turbide stamped with the latter's initials, 176 cords of sawn and corded wood, 100 cords (estimated) not corded, and 925 cords (also estimated) in lengths, and therefore not sawn. My conclusion is that when the bank, on June 8, June 28, and July 10 (to mention only the hypothecations made on these dates), acquired on paper liens on peeled pulpwood stated to aggregate 1,500 cords, no more than a very small quantity, if indeed any at all, of the pulpwood can be said to have been cut, peeled, sawn and corded. Whether this conclusion in fact militates against the lien the bank asserts on the pulpwood which was subsequently hauled from the lots, is a question which will be considered later.

On September 12, Gendron entered into a written contract with the appellant whereby he purported to sell and undertook to deliver to the latter on cars, at Picard station on the Transcontinental Railway, or at any other place where the freight rates were the same, 1,500 cords of pulpwood, free from any government or other dues, the pulpwood to conform to all conditions prescribed by law for its export to the United States, and to be made from living trees and peeled during sap time of the then present season.

It was agreed that the measuring and inspection would be made by the inspectors of the mills to which the appellant would sell the wood, such measuring to be final as to both parties. The shipment of the wood was to begin on the 1st of December, 1923, and to be completed on the 1st of July, 1924, according to shipping instructions to be furnished by the appellant, but all the wood was to be brought to the place whence it was to be shipped not later than the 1st of April, 1924. The sale price was $11.25 per cord, and it was to be paid as follows: An advance of $4 per cord was stipulated payable up to November 15, that is to say $4,000 if all the wood was peeled and 500 cords sawn and corded, and the balance (of such $4 per cord) on the 15th of November if all the wood was sawn and corded at that date. Another advance of $6 per cord was to be made on the bills of lading as the shipping proceeded, but if the shipment could not be effected during the winter,

ce montant de $6 sera payable à terre sur estimé de la partie de seconde part (the appellant) une fois par mois. La balance le 15 de chaque mois pour le bois reçu au moulin le mois précédent.

It was agreed that during the carrying out of the contract the appellant would have the right to stamp the wood at any place where it might be, in its name, or in the name of any person or bank with whom it might have dealings, so as to secure the advances, and that until the wood was delivered on cars, it would be at the sole risk of the seller. By an addition to the contract, it was stipulated that if the wood was not shipped prior to the 15th of April by reason of the purchaser not furnishing shipping instructions, the insurance would be payable by the purchaser but otherwise it would be at the seller's charge.

Immediately after the signing of the contract, the appellant sent its inspector, Turbide, to the lots where the wood was being cut, and on September 14, Turbide, as above stated, stamped with the appellant's initials, 176 cords sawn and corded, 100 cords sawn but not corded, and in lengths, that is to say in trees that had been cut down but not sawn, about 925 cords. The measuring and stamping, Turbide explains, was done as well as was possible, and he did not consider it a final measuring, for "le bois était mal cordé pour être mesuré finalement."

Before entering into the contract, the appellant was assured by Gendron that there were no bank liens on the

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wood, and it demanded a letter to that effect from Gendron's bankers. Gendron furnished the appellant with a letter from the manager of the branch of the Hochelaga Bank (with whom he had not dealt for some time) at Sainte Marie de Beauce, stating that, as far as his branch was concerned, the bank had no lien on the wood. The dealings of Gendron with La Banque Nationale were carried on at its branch office at St. Evariste Station, and of these dealings, or of any lien obtained by La Banque Nationale, the appellant had no knowledge, but effected its purchase in absolute good faith.

After the contract and stamping of the wood, the appellant made the following advances on the contract price to Gendron, who represented that he required the money to pay his men; $3,000 on September 15, $500 on October 29, $656 on November 22, and $500 on December 1, in all $4,656. Previously to the two latter advances, on November 19, the appellant's inspector, C. Landry, measured, and he states that he stamped with the appellant's initials, on lots 39 and 40, 817 cords of pulpwood, sawn and corded, and at Rivière Bleue 46 cords sawn and corded, and 250 cords in lengths. It may be taken, I think, that this represented all the pulpwood that had been manufactured and corded by Gendron and his representatives up to that date.

On January 14, 1924, Gendron admitted his inability to carry out his contract with the appellant, and he then stated that he had in the woods for delivery under that contract, about 1,400 cords, of which 1,100 were deliverable at Picard Station and 300 at Rivière Bleue, but that he could not haul the wood to the stations for want of money. An agreement was therefore made between the appellant and Gendron on that date whereby the former undertook the hauling of the wood, but at Gendron's expense.

Under this agreement the appellant started hauling the pulpwood in January, 1924, and had hauled some 200 cords of wood when, on the 12th or 13th of February, the bank sent two inspectors to stamp the wood in its name. It was only then that the appellant learned that Gendron had pledged the pulpwood to the bank.

Both the appellant and the bank realized that it was of prime importance that the wood should be hauled to the railway station, and on February 16, 1924, they entered into

a contract whereby, while saving their respective rights, it was agreed that the appellant should continue hauling the wood, the expense to be borne, including the 200 cords already hauled, by the party who finally would be held entitled to a first lien on the wood. The appellant completed the hauling, the quantity hauled amounting to 840 cords, and sold the wood for $9,388.45. The actual cost of hauling, as admitted by the respondent and allowed by the Court of King's Bench, was $5,542.79, and the respondent claims the difference, $3,845.66, alleging that it has a valid lien on the wood. On the other hand, the appellant contends that it acquired the ownership of the wood as well by the purchase it made from Gendron, as by its having stamped the wood with its initials. It further argues that when the wood was hypothecated to the bank in June and July, 1923, there was no pulpwood in existence, and no lien could be created, and that any lien acquired by the bank by reason of the third series of advances was subject to the appellant's acquired rights.

The trial court dismissed the respondent's action on the ground that, as to the first series of advances, there was no evidence that the pulpwood hypothecated was in existence, and that at the time of the third series of advances the appellant had an acquired right to the wood. The learned trial judge disregarded the second series of advances for the reason already stated that no notice of intention to hypothecate the wood had been registered as required by section 88*a* of the *Bank Act*.

This judgment was set aside by the Court of King's Bench, which awarded $3,845.66 to the present respondent, that is to say the amount realized by the sale of pulpwood, less the cost of hauling. The majority of the learned judges (Greenshields, Bernier and Hall JJ.) were of opinion that the bank had a valid lien on the wood, except as to the second series of advances, and that the appellant had never become owner thereof. Dorion and Rivard JJ. dissented. They considered that although the present appellant had not acquired the ownership of the wood by the contract of sale, the subsequent stamping by it of the wood with its initials had sufficiently identified the subject matter of the sale, so that the present appellant become thereby vested with a right of ownership or at least a right of pledge over

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the wood. The learned dissenting judges, however, thought that the appellant was not entitled to more than the 276 cords of pulpwood which had been sawn into four foot lengths, corded and uncorded, when Turbide stamped the wood on September 14, 1923. They would have granted the present respondent judgment for $2,568.62, representing 541 cords out of the total quantity, 817 cords, measured by C. Landry on November 19. In their opinion the bank acquired a lien on the wood not stamped by Turbide by virtue of its third series of advances, but not under the first series, the pulpwood not being then in existence.

This appeal brings up two questions:—

1. Did the bank acquire under section 88 of the *Bank Act* a valid lien on the 840 cords of pulpwood hauled by the appellant from lots 39 and 40 of the fourth range of the township of Chabot?

2. Did the appellant acquire ownership of the pulpwood by virtue of its purchase from Gendron or at least by its stamping of the wood, so as to take it free from the bank's lien?

The first and certainly the most important question involves the construction and application of section 88 of the *Bank Act*.

Briefly, this section permits a bank to lend money to, *inter alios*, any dealer in products of the forest upon the security of such products (subs. 1), or to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him (subs. 3). This security confers on the bank the same rights and powers in respect of the products, goods, wares and merchandise, stock or products thereof, as if it had acquired the same by virtue of a warehouse receipt (subs. 7).

The expression " products of the forest " is defined by s. 2, subs. (*m*) as including *inter alia*, bark, logs, pulpwood, piling, spars, railway ties, poles, mining and all other timber, shingles, laths, deals, boards, staves, and all other lumber. Subsection (*i*) of the same section defines " manufacturer " as including manufacturers of logs, timber or lumber, etc. And " goods, wares and merchandise " include " products of the forest " (s. 2, subs. (*g*)).

With respect I am unable to concur in the opinion expressed by Mr. Justice Dorion as follows:

Il est donc nécessaire, pour que la banque ait acquis un droit de gage pour les avances faites le 8 juin, le 28 juin et le 10 juillet, 1923, au montant de $5,400, que ce gage ait eu un objet, c'est-à-dire, qu'il y ait eu, à ces différentes époques, du bois coupé sur les lots 39 et 40 du rang 4 du canton Chabot, comme il est dit dans le contrat: 500 cordes de bois pelé et assuré sur ces lots le 8 juin; 300 cordes sur le lot 40 le 28 juin; et 300 cordes sur le lot 40 le 10 juillet, 1923.

Unquestionably the bank's lien must have an object, but in my opinion it had an object in the three instances mentioned by the learned judge. As I read section 88, a bank, for its advances, may acquire a lien on the products of the forest (as defined) or on goods, wares and merchandise (also as defined) to be manufactured, or in process of manufacture, although the finished product will come into existence only after the process of manufacture is completed.

The present case affords an apt illustration of the object Parliament undoubtedly had in view when it enacted section 88, this object being to come to the assistance both of the manufacturer of goods, and of the bank which lends him money for the purposes of his business. Thus the owner of a timber license proposes to go into the forest, to cut down the trees and transform them into what is commercially known as pulpwood. Before the pulpwood is produced in its commercial form, considerable expense is necessary to cut the trees, peel off the bark and saw them into the required lengths. The manufacturer of pulpwood therefore requires financial assistance from the outset, and unless he can give the bank that assists him a lien on the finished product, although not then in existence, his business cannot be carried on.

This, in my opinion, is a reasonable construction of section 88, and it is not unsupported by authority (see *Royal Canadian Bank* v. *Ross*) (1). It follows that by the first series of its advances and the contemporaneous hypothecation of the pulpwood (and I need not consider the third series), the bank acquired a valid lien on the pulpwood manufactured on these lots. Whether it can set up this lien against the appellant is the second question which must now be considered.

(1) 40 U.C.R. 466, at p. 475.

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I think that the sale by Gendron to the appellant of 1,500 cords of sawn and peeled pulpwood, taken by itself, did not vest in the appellant the ownership of any specific pulpwood. On this point, all the learned judges of the Court of King's Bench have agreed. At the time the sale was made no such quantity of pulpwood was in existence. The most that can be said is that it was then in process of manufacture, and the place where it was to be manufactured was not even mentioned in the contract. Of this there can be no doubt. See articles 1026, 1474 and 1684 of the Civil Code.

Such measuring and stamping of the wood as were done by Turbide, on September 14, and by C. Landry, on November 19 (and Landry's testimony is rather unsatisfactory as to this stamping, the only statement that he then stamped the wood being at the close of his cross-examination), did not, in my opinion, amount to a sufficient determination of the subject matter of the contract, or to a taking of actual possession of the pulpwood. Neither Turbide nor Landry considered that they had finally measured the wood. At the most, what they did was a precautionary measure which later would help to identify the wood on which the appellant had made advances. According to the contract, the object of the marking was not to constitute a delivery into the actual possession of the purchaser, but "afin de garantir les avances faites sur le dit bois." The parties however could not create a lien or pledging outside of the conditions prescribed by law, and the circumstances were not those required by the code to confer on the appellant such a right on the pulpwood which remained, after the stamping, in Gendron's possession.

The appellant at the hearing, urged that at least it had taken actual possession of the 200 cords of pulpwood which it removed from the lots, and with respect to this wood it relied on the second paragraph of article 1027 of the civil code as to the effect of actual possession of one of two competing purchasers on the title derived from a party who has successively obliged himself to both to deliver to each of them a thing which is purely movable property. The appellant also referred to articles 1488, 1489 and 2268 of the Civil Code.

There is no doubt, however, that we must look solely to the *Bank Act* to determine the effect of a lien acquired by a bank by virtue of section 88. Since the enactment of section 88*a* persons dealing with a merchant or manufacturer are protected by the notice which must now be given and registered of the intention to create a lien under section 88. In this case we do not have to determine whether a purchaser in good faith of particular goods, in the usual course of business, such as a table bought from a furniture manufacturer or dealer, acquires a valid title as against the bank's lien. No such case has been made out here. Gendron's undertaking was to sell to the appellant what turned out to be in excess of his whole output, and the appellant realized that it should obtain from him some evidence that there was no banker's lien on the pulpwood. Gendron dishonestly deceived the appellant, but for that the bank was in no way to blame. The lien it acquired was a valid lien which, I think, can be set up against the appellant, even as to the 200 cords which the latter hauled from the lots.

The result is that the appellant is accountable to the respondent for the price it obtained by the sale of the pulpwood, less the cost of the hauling which has been credited to it.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Drolet & Tardif.*

Solicitors for the respondent: *Belleau, Baillargeon, Belleau & Hudon.*