

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Imperial Paper Mills of Canada, Limited, and another v. The Quebec Bank and others, from the Court of Appeal for Ontario (Privy Council Appeal No. 38 of 1913); delivered the 7th August 1913.*

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PRESENT AT THE HEARING:

LORD ATKINSON.

LORD SHAW.

LORD MOULTON.

LORD PARKER OF WADDINGTON.

[DELIVERED BY LORD SHAW.]

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This is an Appeal from the Judgment of the Court of Appeal for Ontario dated the 28th June 1912, which affirmed the Judgment of the High Court of Justice for Ontario, dated the 11th August 1911, dismissing the Appellants' Action.

In September and November 1903 the Imperial Paper Mills Company executed certain mortgage deeds of trust to secure first and second mortgage bond issues for sums of 100,000*l.* and 200,000*l.* respectively. Nearly all the bonds comprised in both issues were at the time of the Action outstanding and unpaid.

The Appellant, Mr. Clarkson, was at that time receiver of the assets of the Paper Mills Company comprised in these bond mortgages, having been appointed in a Bond-holders' Action on the 7th October 1907. In the following year, namely, on the 26th September 1908,

the Paper Mills Company was declared insolvent and ordered to be wound up, Mr. Clarkson being appointed Liquidator on the 19th November following. He thus represents all the rights of the Imperial Paper Mills Company and of the mortgage bond-holders. The mortgages were granted over "generally the whole assets real and personal and the property undertaking and franchises of the Company now owned or enjoyed by the Company or in which the Company has any right or interest, or which may hereafter be acquired by the Company (excepting logs on the way to the mill)."

The matter in issue is the right to the proceeds of certain spruce and balsam logs cut by the Imperial Paper Mills Company. These logs at the time of the Action had been brought down the tributaries of the Sturgeon River to McCarthy Creek. They are claimed by the Respondents, the Quebec Bank, under certain securities which were granted by the Imperial Paper Mills Company but are subsequent in date to the bond mortgages referred to. On the other hand the Paper Mills Company and the Receiver claim that these Bank securities are unavailing as against the rights under the mortgages. These rights, they maintain, cover all the logs in question which were not "on the way to the mill" at the date of the mortgage. Being "on the way to the mill" only at subsequent dates, it is contended that they are not excepted from the assets which the mortgages cover.

The first question in the case is, what is the meaning and scope of this exception? Is it confined to logs on the way to the mill at the date of the mortgage, or is it a general reference to the present and future of the

Company and an exception of logs on the way to the mill in the ordinary course of their current business?

A later portion of the mortgage declares that the instrument is intended to cover all the property, assets, &c., "and the right to operate the said undertaking in business as a going concern, but except as hereinbefore expressly excepted." In a still subsequent passage the language of charge is in this form—"And the Company hereby charges in favour of the trustees its other assets for the time being both present and future, including its uncalled capital (if any), calls in arrear and its undertaking, but excepting logs on the way to the mill," the charge to be a floating charge.

In the opinion of their Lordships, the Courts below have come to an entirely correct conclusion as to the scope of this exception. It was not limited to logs on the way to the mill at the date of the mortgage. It was an exception made truly in the interest of all parties and with the distinct view of facilitating those ordinary financial arrangements which were only possible if advances could be made upon logs in transit during the general and regular course of the trade. To exclude logs on the way to the mill from time to time, which logs provided a means of furnishing a legal security for periodic advances, might be to arrest the industry and to operate seriously to the prejudice of all concerned, including the mortgagees themselves.

The evidence substantially shows that the mode of conducting business was as follows:—  
(1) An application for advances to cover the expenses in connection with cutting and floating of the timber; (2) in the general case, an inspection by the representatives of both parties; (3) a proportioning of the advances so as to

meet the financial requirements; (4) the advance itself—an advance made by instalments and at short intervals; and (5) an accumulation of these instalments into the security granted over the logs. When the logs reach the mill, the final stage takes place in the usual case, namely, that the advances are paid, and the logs, thus, so to speak, on the verge of the open market, are accordingly released. This manner of trading is largely bound up with the success of pioneer or development work. As already mentioned, this whole scheme of working and development would be arrested unless the logs during the whole course of the contract were excepted from the general mortgage upon the Imperial Paper Mills Company's assets, and were left available as a security for advances proceeding also during the whole course of the contract.

Their Lordships are further impressed by the fact that on this, which is pre-eminently a matter of business in which local knowledge is of high advantage, all the Judges in the Courts below are in no manner of doubt.

The next point in the case is this: it is said on behalf of the mortgagees that, even although it should be found that the logs in transport during all the course of the contract were excepted from the mortgage over the general assets, yet the form of the security to the Quebec Bank was bad.

A very lengthy argument was presented to the Board upon this subject, but towards its conclusion it came to resolve itself into this, that the security taken was disconform to section 88 of the Bank Act of Canada, the Statute being Chapter 29 of the Revised Statutes of 1906. It should be premised with reference to this Statute that under section 76 (2),

“except as authorised by this Act the Bank shall not lend money or make advances upon the security, mortgage, &c., of lands.” This exception as to the provisions of the Act being thus made, the subsequent sections then proceed in positive terms to give very large and indeed comprehensive powers for taking, holding and disposing of mortgages upon real or personal, immovable or movable, property (section 80); and in section 88 there are two portions, namely, subsections (1) and (3), which seem completely to cover the present case. The first subsection provides that “the Bank may lend money to any . . . dealer in products of . . . the forest.” Subsection (3) provides that “the Bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods,” &c. And by subsection (5) it is provided that the security may be taken in the form set forth in Schedule C. The Schedule appears to be not compulsory but optional and a guide. It is further provided (subsection (6)) that “the Bank shall by virtue of such security acquire the same rights and powers in respect to the goods . . . as if it had acquired the same by virtue of a warehouse receipt.” Schedule C, however, was also founded upon, being the form in which the security is to be taken. The concluding passage of it is as follows:—“The said goods . . . are in (*place or places where the goods are*) and are the following (*description of goods assigned*).”

Samples of the securities taken are given in the Record, and the description, which according to the argument must be held to be too vague, is as follows:—“The said goods, wares and merchandise are now owned by us

“ and are now in the possession of us and are  
 “ free from any mortgage, lien or charge thereon,  
 “ and are in and on the banks of the Sturgeon  
 “ River and tributaries, and are the following,  
 “ ‘40,000 cords of logs.’”

In their Lordships’ opinion, the argument presented to the Board on this subject of vagueness in description is entirely met by the well-known rules of law laid down in *Tailby v. The Official Receiver* (13 A.C. 523).

“Mere difficulty in ascertaining all the things which are included in a general assignment, whether in esse or in posse, will not affect the assignee’s right to those things which are capable of ascertainment or are identified. Lord Eldon said in *Lewis v. Madocks*, ‘If the Courts find a solid subject ‘ of personal property they would attach it rather than ‘ render the contract nugatory.’”

In the case of *Tailby*, in fact, it was held that the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently defined. And reference may be made to the analysis of the Case Law on the subject in the Judgment of Lord Macnaghten. He affirms broadly the proposition that the vagueness in the case being dealt with did not void the security, and uses this language:—

“When the consideration has actually passed, it is difficult to suppose anything less consonant with equity than a rule which should lay down that a man who has had the benefit of the contract may escape from its burthen merely because he has promised what he can perform and something more too, and promised it all in one breath, and in the most compendious language.”

So far as the Paper Mills Company are concerned, they have had the advantage of the advances: and the objection to the form of security granted by the Mills Company, when it proceeds from Mr. Clarkson as liquidator of that Company, would seem to be open to Lord

Macnaghten's observation as to its being not consonant with equity.

But in so far as the Appellant represents the mortgagees, a different consideration might possibly come into play were it not that the facts of this case appear conclusively to demonstrate, not only that the security was not vague, by reason of the subject of it, namely, the particular logs, being incapable of ascertainment, but that in point of fact, the logs were ascertained. They were known and denominated as "the McCarthy Creek logs." What happened to them, for instance, was this, according to the admissions of Mr. Craig, one of the interim receivers:—

"Q. The plan was that a letter of promise was taken, and then the supplies or men were sent into the bush, and you drew a cheque for whatever you needed on the Quebec Bank, and ultimately, when the logs came out and were skidded and scaled, the security was taken; that is the general course of operations. Now, were these McCarthy Creek logs always recognised as being pledged to the Bank?"

"A. Yes, they were all included in the general security to the Bank.

"Q. Always recognised by you as managing director?"

"A. Yes.

"Q. And as receiver, as being pledged to the Bank?"

"A. Yes.

"Q. Your answer to that is yes?"

"A. Yes, pledged by the Company to the Quebec Bank. They were part of the securities supplied to the Quebec Bank recognised by the Company."

The evidence need not be gone into at length, for it appears that the logs came to be known, not only as "the McCarthy Creek logs" but also as "the Quebec Bank logs," and that, not only Mr. Craig, but, as he says, everybody, called these McCarthy Creek logs "Quebec Bank logs."

The logs, being thus known to everybody, were known to the Government, and in the beginning, for instance, of 1907 it appears from

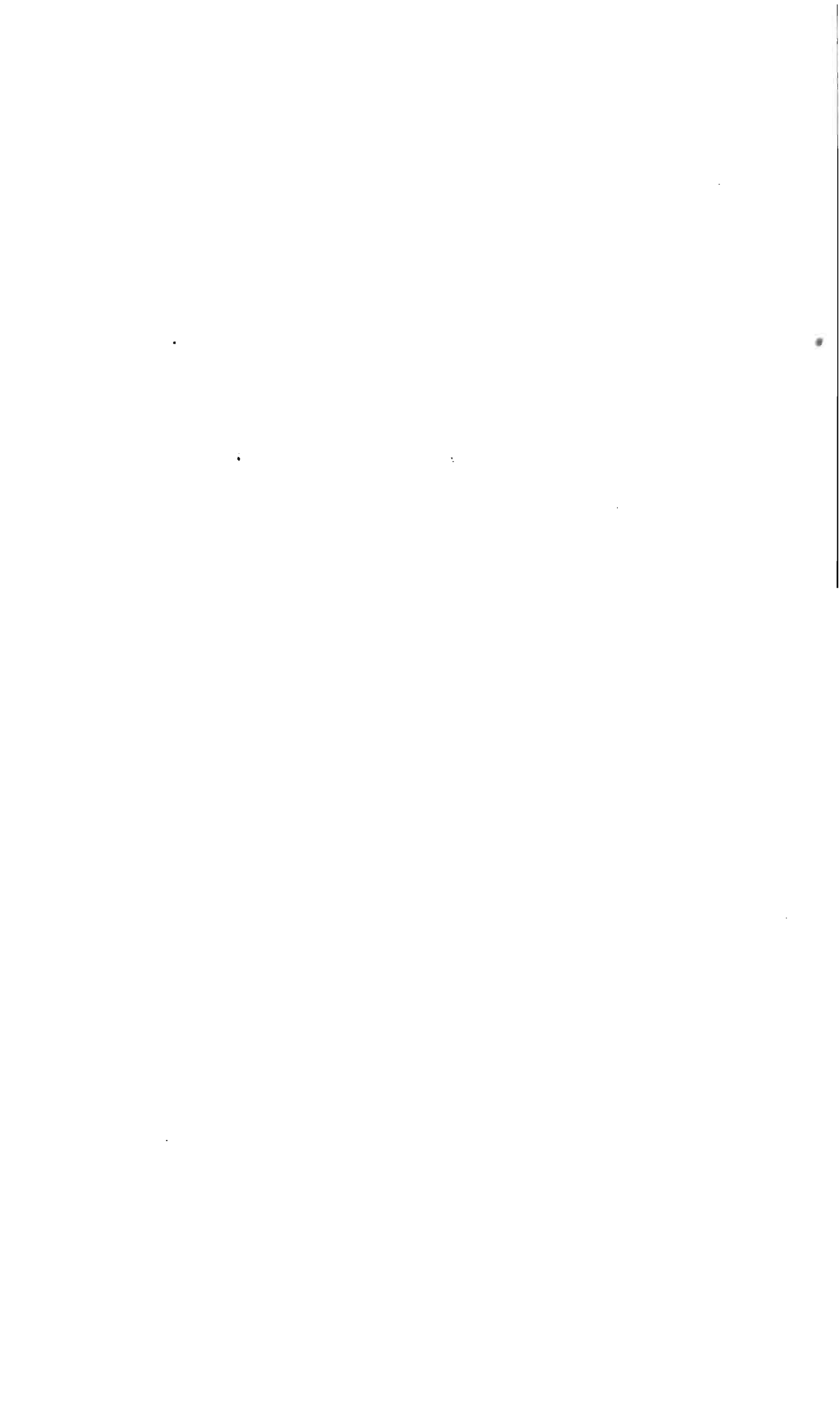
an official communication dated the 5th January and addressed to the General Manager of the Bank that the Bank, under pressure by the Department, had made payment of the Crown dues upon the logs of no less a sum than \$21,017. In Mr. Cochrane's official letter the Bank is described as "holders of the wood" and "the Department has no objection to your ranking upon the wood and assuming the same position that the Crown held with regard to the same to the extent of the amount paid by you."

It is unnecessary to pursue the matter further. Not only were the logs identifiable, they were identified. Not only were they identified, but they were specifically taxed and the tax had been paid. All this had been done by the Respondent Bank as security holders. The Board has no hesitation in thinking that the Courts below have come to a correct conclusion.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed with costs.

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In the Privy Council.

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THE IMPERIAL PAPER MILLS OF  
CANADA, LIMITED, AND ANOTHER,

2.

THE QUEBEC BANK AND OTHERS.

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DELIVERED BY LORD SHAW.

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