

*Judgment of the Lords of the Judicial Committee  
of the Privy Council, on the Appeal of  
Ruggles and others v. Greene, from the  
Supreme Court of New Brunswick, delivered  
29th July 1893.*

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Present :

THE EARL OF SELBORNE.

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The sole question arising on this appeal relates to the order in which certain creditors of the Grand Southern Railway Company are to be paid. The Company has become insolvent; its property has been sold, and the assets are being distributed. Lewis Greene, the Plaintiff in the suit, claims to be paid 50,000 dollars in priority to the Defendants, who are holders of the Company's bonds, by virtue of an agreement into which the Defendants entered for the purpose of raising money. There is some complication in the history of the Company's affairs, but all that is necessary to show the nature of the agreement is to be found on the face of the agreement itself.

That instrument bears date the 12th June 1884, and runs as follows,—

“Whereas the Grand Southern Railway Company of New Brunswick, on the first of January, 1877, made its mortgage to the Honourable Samuel L. Tilley and Benjamin R. Stevenson, as trustees, to secure bonds to the amount of \$10,000 per mile of completed road, and \$825,000 of such bonds have been

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issued, and whereas the said Samuel L. Tilley has resigned as trustee, and Horace M. Ruggles has been duly appointed his successor, and whereas the subscribers to this instrument are the holders of the first mortgage bonds aforesaid as security for loans or owners to the amounts set opposite their names respectively, and whereas there are outstanding claims against the Company for labour and material furnished and for right of way to the amount of upwards of \$50,000, a considerable part of which, it is claimed, is entitled to a preference, and it is proposed to borrow a sum not exceeding \$50,000, to be used and expended in paying such claims, and to enable the Company to be operated without embarrassment therefrom, and to secure the persons advancing such money by a lien upon the railway and property of the said Company, which shall have preference over the claims of the subscribers as holders of said bonds.

“Now, therefore, it is mutually agreed by and between the subscribers to this instrument (holders of bonds of said railway Company), the said Stevenson and Ruggles as trustees as aforesaid and their successors, and the said railway Company as follows, that is to say:—

“First.—That whenever, under the provisions of said mortgage, the said trustees shall enter and take possession of the railway and property of the said Company, they shall hold the same primarily and in preference to the claims of bondholders as security for the payment and discharge of the sum or sums of money not exceeding in the aggregate fifty thousand dollars, which may be advanced by any person or persons to the said Company for the purpose herein-before expressed, and in case the trustees of the said mortgage shall foreclose the same by legal proceedings, and the said railway and property shall be sold thereunder, the proceeds of such sale shall be first used in payment of the said sum of \$50,000 and interest, or so much thereof as shall then be unpaid, before any part of such proceeds shall be applied to the payment of the claims of bondholders.

“Second.—That after the expiration of eighteen months from the date hereof, the person or persons loaning or advancing the said sum of \$50,000 or any part thereof, shall have the right to cause legal proceedings to foreclose the said mortgage, to be commenced by the said trustees, and the subscribers hereto as bondholders will upon demand take any steps that may be required of them to cause such proceedings to be instituted by the trustees of said mortgage.

“Third.—The said Company shall give its promissory notes payable on or before the first day of December 1885, with interest at the rate of six per cent. to the order of the person or persons advancing the said sum or any part thereof, each of which notes shall be authenticated by a certificate of the trustees to the effect that it is one of the notes given for said advance or loan of \$50,000.”

Then follows another provision not now material, and the signatures of persons holding bonds to the extent of 757,800 dollars.

Both of the Courts below have found that the Plaintiff advanced money on the footing of the agreement which was applied in payment of the outstanding claims against the Company. The only difference between them is that the first Court has not ascertained the amounts so advanced and applied, and the Court of Appeal has done so.

In the view of the learned Judge who presided in the first Court it was not necessary to enquire into the precise amount or the application of the Plaintiff's advances, because he construed the agreement to mean that each bondholder signed it upon the faith that all other bondholders would come in and be bound by it; and that as there are bondholders to the amount of 111,300 dollars who never did come in, nobody was bound, and the agreement became nugatory. Therefore he dismissed the suit.

The Court of Appeal took a different view. They held that each bondholder bound himself, so far as his own interest was concerned, to give priority to the person who should advance the money they desired to raise. They found that the Plaintiff had paid 50,000 dollars, and that all but 6,430. 76 dollars was applied for the purposes of the agreement. They therefore declared that the Plaintiff was entitled to be paid the sum of 43,569. 24 dollars with interest and costs out of the proceeds of the sale of the Company's property; and they directed a reference to ascertain in what proportions the Plaintiff should be paid by, or out of the share of, each of the subscribers to the agreement. The bondholders appeal from that decree.

Their Lordships have no doubt that the decree appealed from is right. It is argued that

the preamble of the agreement means that the subscribers are the holders of the first mortgage bonds, meaning all the holders of all the bonds, and therefore unless all subscribe nobody has agreed to anything. But that is a misconstruction of the preamble. It says, quite distinctly as their Lordships think, that the subscribers are the holders of the first mortgage bonds to the amounts set opposite their names respectively, and that they hold the bonds either as security for loans or as owners. Each therefore binds the interest that he can bind.

As for other arguments suggested at the bar, to the effect that neither Stevenson nor the Company executed the agreement, that the money advanced did not belong to the Plaintiff but to his father, that the name of one Simpson was used in making the advance, that the Plaintiff had not got promissory notes in the form contemplated by the agreement, they appeared to their Lordships to be wholly unsubstantial, and were sufficiently disposed of during the argument. The Appellants' counsel did not attempt to impugn the findings of the Appeal Court as to payment and application of the money, and the appeal cannot be sustained on any other ground.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed and the judgment appealed from affirmed. The Appellants must pay the costs of the appeal.

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