

UNIVERSITY OF LONDON
W.C. 1
24 OCT 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

No. 33 of 1896.

On Appeal from the Supreme Court of Canada. 29463

BETWEEN—JAMES BOGLE DELAP (individually and as a Shareholder on behalf of himself and all other Shareholders of The Great North West Central Railway Company, (except the Defendant John Arthur Codd), LOUISA H. MANSFIELD, and THE GREAT NORTH WEST CENTRAL RAILWAY COMPANY (*Plaintiffs*) - - APPELLANTS

AND

ALPHONSE CHARLEBOIS, ALEXANDER MACDONALD, WILLIAM ALFRED PRESTON, JOHN S. SCHILLER, FRANK S. NUGENT, THE COMMERCIAL BANK OF MANITOBA, THE UNION BANK OF CANADA, WILLIAM ANDERSON ALLAN, ROBERT J. DEVLIN, and WILLIAM JAMES CROSSEN, FREDERICK JOHN CROSSEN, and JOSEPH HENDERSON Executors of the last Will and Testament of JAMES CROSSEN deceased (*Defendants*) - - - - - RESPONDENTS.

AND

THE HONOURABLE FRANCIS CLEMOW, JAMES MURRAY, DANIEL McMICHAEL, JOHN ARTHUR Codd, and THE RIGHT HONORABLE EDRIC FREDERICK, BARON GIFFORD, and ROBERT LOTHIAN CURZON DEFENDANTS.

CASE OF THE RESPONDENTS

WILLIAM JAMES CROSSEN, FREDERICK JOHN CROSSEN, and JOSEPH HENDERSON (Executors of the last Will and Testament of JAMES CROSSEN deceased.)

1. This is an Appeal by the Plaintiffs, by leave, from the Judgment of the Supreme Court of Canada, in favour of the Respondents, dated 28th March 1896, dismissing the action brought by the Plaintiffs, (the present Appellants) to set aside two Judgments obtained in the Chancery Division of the High Rec. p. 862.

Court of Justice for Ontario, by the Respondent Charlebois, dated respectively the 28th September 1891, and the 29th February 1892, against the Appellant Railway Company.

2. The above named Respondents William James Crossen, Frederick John Crossen, and Joseph Henderson, are hereinafter called "These Respondents."

Rec. p. 691. 3. James Crossen, of Coburg, Ontario, car builder, having duly made and
 " p. 693. executed his Will, and thereby appointed these Respondents his Executors,
 " p. 698. died on the 9th December 1890, and his said Will was duly proved by these Respondents.

Rec. p. 693. 4. Prior to the month of January 1890, the said James Crossen built
 certain passenger cars and other rolling stock for the Respondent Charlebois, who intended to supply the same to the Appellant Railway Company. The said James Crossen accordingly shipped the said cars and rolling stock to his Bankers order, with directions that the bill of lading for the same should be given to the Respondent Charlebois, on the payment of a Bill of Exchange for \$35,026.00, drawn by the said James Crossen, on the Respondent Charlebois, for the price of the said cars and rolling stock. The said Bill of Exchange was not accepted or paid, and the said cars and rolling stock were consequently not delivered to the Respondent Charlebois.

Rec. p. 693. 5. On the 13th January 1890, a Contract under seal was entered into
 between the said James Crossen and the Respondent Charlebois, whereby it was amongst other things agreed, that, on the acceptance and payment in cash by the Respondent Charlebois of the Bill of Exchange therein mentioned, the property in the said cars and rolling stock and therein particularized, should pass to the Respondent Charlebois, and that in default of such acceptance and payment the property in the said cars and rolling stock, should remain and be in the said James Crossen, and possession thereof be forthwith assumed and taken by him, and retained and kept as his property.

Rec. p. 694. 6. The last mentioned Bill of Exchange was neither accepted nor paid,
 " p. 697. nor were the said cars and rolling stock otherwise paid for, and
 " p. 698. during the period between the date of the death of the said James Crossen and
 " p. 708. the 28th September 1891, these Respondents kept pressing the Respondent
 " p. 709. Charlebois for payment, and some communications passed between these Respondents and the Appellant Railway Company with a view to selling the said cars and rolling stock to the Appellant Railway Company for the amount then due to these Respondents from the Respondent Charlebois namely, \$39,287 or thereabouts.

Rec. p. 29. 7. The said Judgment of 28th September 1891, was delivered by Mr,
 " p. 30. Justice Ferguson in an action in the Chancery Division of the High Court of Justice for Ontario commenced in September 1891 by the Respondent Charlebois, as Plaintiff, against the Appellant Railway Company, as Defendant; and it was by the said Judgment declared that the Respondent Charlebois had a lien on all the property including the line of Railway lands grant and other assets of the Appellant Railway Company as set out in the Construction Contract for the sum of \$622,226, which sum, with interest thereon, was also declared to have priority over any Mortgage or bond or other incumbrance

made by the Appellant Railway Company and was ordered to be paid at the request of the Respondent Charlebois, to the following persons in the following order of priority—(a) To the Respondents Macdonald and Schiller \$64,429 (b) To the Respondent Preston \$8,400 and (c) To these Respondents \$39,000 ; and the said Judgment directed that the three preceding claims were to rank as between themselves *pari passu* and be payable by the Appellant Railway Company in six months from the date of the said Judgment with interest on their respective sums of principal from the said date ; and the said judgment contained the following provision—“and these parties accepting the provisions

10 “ hereof, do so in full of all other liens now claimed and deliver up possession “ of the said Railway and all the property thereof to the Defendants,” meaning by “ the Defendants,” The Appellant Railway Company : and the said Judgment also contained divers provisions dealing with the balance of the said sums of \$622,226 and other matters.

8. On the 16th October 1891, Mr. Riddell Q.C. a member of the firm of Messrs. Riddell, Armstrong and Nesbitt, the Solicitors for these Respondents, received a letter from Mr. B. B. Osler, Q.C. one of the Counsel for the Respondent Charlebois in the said action of Charlebois v. The Great North West Central Railway Company, stating that such action had been settled and

20 asking these Respondents to accept the terms of the said Judgment of 28th September 1891. On the 17th October 1891, the Respondent Charlebois wrote to the Solicitors of these Respondents urging these Respondents to accept the terms of the said Judgment of 28th September 1891.

9. In answer to a letter of the 3rd November 1891, sent to these Respondents by the Appellant Railway Company, the Solicitors of these Respondents wrote on the 4th November 1891, to the President of the Appellant Railway Company as follows :—“ Our Clients the executors of the “ estate of the late James Crossen have accepted the decree you refer to in your “ letter of yesterday so far as it vests in you the property as you state. We

30 “ do not rely upon our lien on the cars which we have or had under our Agree- “ ment with Mr. Charlebois. We come in under and accept the decree.

“ Of course as against Mr. Charlebois, we shall expect him to pay us the “ balance not secured us by the decree, but that of course, does not concern “ your Company, it being merely a personal claim as against Mr. C.

“ We wrote your Solicitors some days ago accepting the decree.”

10. To this letter the Appellant Railway Company replied on the 6th November 1891. “ We have received your letter of the 4th which is satis-
factory.”

11. These Respondents were without knowledge of any alleged infirmity

40 in the said Judgment, and agreed to take the benefit of the same in good faith and to give up their lien on and pass the property in the said cars and rolling stock to the Appellant Railway Company on the said terms.

12. On the 1st December 1891, the Appellant Railway Company being then prepared to operate their railway, applied to these Respondents for and obtained from them a proper authority for the Appellant Railway Company to use the said cars and rolling stock and the same were taken over in the month of December 1891, and have been used by the Appellant Railway Com-
pany ever since as part of its equipment and in operating the said Railway.

Rec. p. 694.
Rec. p. 701.

Rec. p. 702.

Rec. p. 694
Rec. p. 695.
Rec. p. 705.
Rec. p. 706.

Rec. p. 706.

Rec. p. 706.
,, p. 707.

13. As regards the bonds which are alleged to be secured by an Indenture dated the 2nd of June, 1890, and made between the Appellant Railway Company, of the one part, and the above-named Defendants Edric Frederick Baron Gifford and Robert Lothian Curzon, of the other part, these Respondents say (1) that the said Indenture is a floating charge on the property, assets, rents, and revenues, both present and future, of the Company and expressly made subject to the payment out of such rents and revenues of the working expenses of the railway; (2) that until the security created by the said Indenture attached on the said property, assets, rents and revenues, subject as aforesaid the Appellant Railway Company might hold and enjoy the same and carry on its business and operate its railway; and (3) that the said security had not attached on the property therein comprised at the time when these Respondents agreed with the Respondent Charlebois and the Appellant Railway Company to deliver up the said cars and rolling-stock to the Appellant Railway Company and accept the terms of the said Judgment of the 28th September 1891. 10

14. These Respondents submit that they have a specific charge on the whole property and undertaking of the Appellant Railway Company as security for the payment to these Respondents of their said debt of \$39,000 and interest and such costs as are hereinafter mentioned, and that, so far as this Appeal seeks to interfere with or prejudice such security, the said Appeal should be dismissed with costs and these Respondents should be allowed to add both their costs here and those in the Courts below to their said debt and interest, and to enforce payment of the same under the said Judgment of the 28th September 1891. 20

REASONS.

Because these Respondents, who had no notice of any fraud on any of the Appellants, gave up all their rights in respect of the said cars and rolling stock to the Appellant Railway Company and in lieu thereof accepted the said Judgment of 28th September 1891 under a bonâ fide and valid agreement between the Appellant Railway Company the Respondent Charlebois and these Respondents, and it is impossible to restore these Respondents to their former position. 30

Because the said Judgment of 28th September 1891 has been entered and acted upon and the benefit thereof taken and still enjoyed by the Appellant Railway Company and the Appellant Railway Company cannot now dispute the validity of that Judgment so as to prejudice the rights of an innocent third party. 40

Because these Respondents are entitled to priority over the bond holders of the Appellant Railway Company.

Because the Judgment of the Supreme Court of Canada, so far as it established the rights of these Respondents under the said Judgment of the 28th September 1891, was right and ought to be affirmed.

A. D. MACLAREN.

In the Privy Council.

No. 33 of 1896.

*On Appeal from the Supreme Court of
Canada.*

BETWEEN

THE GREAT NORTH - WEST
CENTRAL RAILWAY COM-
PANY AND OTHERS - - *Appellants*

— AND —

CHARLEBOIS AND OTHERS - *Respondents.*

CASE OF THE RESPONDENTS.

W. J. CROSSEN, F. J. CROSSEN, AND
J. HENDERSON (Executors of J. CROSSEN
deceased).

HARRISON & POWELL,

5, Raymond Buildings,

Gray's Inn.

for Respondents

the Executors of James Crossen, deceased.