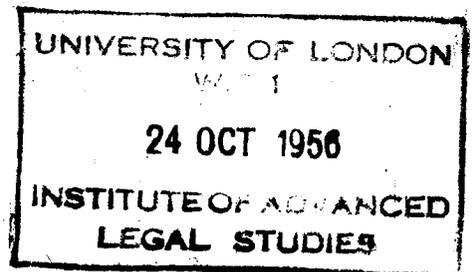


In the Privy Council.

No. 33 of 1896.

ON APPEAL FROM THE SUPREME COURT  
OF CANADA.



29462

**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, & The Right Honourable EDRIC FREDERICK, Baron GIFFORD, and ROBERT LOTHIAN CURZON Defendants.

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CASE OF THE RESPONDENTS  
THE UNION BANK OF CANADA.

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Supreme  
Court  
(Canada)  
Reports, vol  
26, p. 221.

Rec. p. 29.

Rec. p. 86.

1. This is an appeal by the Plaintiffs, by leave, from a judgment of the Supreme Court of Canada in favour of the Respondents (Defendants), dated 28th March, 1896, dismissing the action of the Plaintiffs (the present appellants), whereby the latter sought to set aside two judgments obtained in the Chancery Division of the High Court of Justice for Ontario by the Respondent Charlebois, dated respectively the 23th September, 1891, and the 29th February, 1892, against the appellant Railway Company, but varying the amount of the judgment debt thereby recovered.

2. The Respondents the Union Bank of Canada do a general banking business throughout Canada; and claim \$150,000, and interest, from the Appellant Railway Company on the grounds hereinafter set out, and under Section 2 (d) of the Respondent Charlebois, judgment against said Company of the 28th September, 1891, which reads as follows:—

Rec. p. 80,  
1. 21.

“The second charge on the said fund is to be the sum of \$380,397.00, with interest at 6 per cent. on \$271,555.00, and at 4 per cent. on \$108,842.00, which is payable to the Plaintiff for his own use, or for the use of any person or Corporation to whom he may have heretofore assigned the moneys payable to him or a portion thereof under his said contract, according to their several present priorities if any, payment to any holder of any such order or orders to be considered as payment to the Plaintiff (Charlebois), by the Defendants (the Railway Company).”

Rec. p. 266.  
p. 214  
p. 270  
p. 370  
p. 373  
Rec. p. 672-3

3. This sum of \$150,000 is nearly one fourth of the Respondent Charlebois' judgment debt, and represents money borrowed on the 2nd November, 1889, from the Respondent Bank by the Respondent Charlebois to enable him to carry out his contract for the completion of 50 miles of the Company's Railway. It was thus borrowed about seven weeks after the contract was signed, under the circumstances hereinafter mentioned.

Rec. p. 798 &  
797.

4. The Respondent Bank asserts that it has, by contract, in addition to the reasons put forward by the Respondent Charlebois why his judgment should be upheld, separate and substantive rights against the Appellant Railway Company in support of the validity of that large part of Charlebois' judgment debt, which is payable to the Bank by the terms of the judgment. The Bank relies on the Respondent Charlebois case, so far as applicable, but also desires to enforce its own additional rights of action subsisting prior to the

said judgment of the 28th September, 1891, as well as its rights under such judgment.

5 5.—When the Respondent Charlebois made his agreement with  
the Defendant Codd in Toronto, on the 9th September, 1889, agreeing  
with certain variations to carry out the old Shareholders' Agreement  
of the 9th of April, 1888, it was provided therein, by clause 7, as  
follows: "The purchaser to give, within thirty days, satisfactory  
evidence to Mr. Charlebois' Bankers that all payments will be made  
10 according to the terms of present agreement." This agreement of  
the 9th September, 1889, was at the same time endorsed by Mr. C. R.  
Stevens, the Appellant Delap's Solicitor and Agent, as follows:—  
"With reference to the within Heads of Agreement, I hereby under-  
take that, so soon as within arrangements are carried out, I will  
15 "take the necessary steps to prove to Mr. Charlebois' Bankers that all  
"payments which will become due under the said agreement will be  
"paid at the times mentioned, and that the rails will be provided as  
"arranged, such proofs to be in such form as Mr. Charlebois' Bankers  
"may desire, and to be given within thirty days."

Rec. p. 790.

Rec. p. 12,  
line 22.

Vol. 3, p. 21,  
line 35.

(Sgd.) "CHARLES R. STEVENS."

20 6. The Respondent Charlebois' Construction Contract, between  
himself and the Company, was subsequently executed on the 16th  
September, 1889. This Contract, on the face of it, is a construction  
contract for £200,000, of which £50,000 is acknowledged to have  
25 been paid in cash; and, by Sec. 2 thereof, the Company agrees with  
Charlebois, upon the completion and equipment of the fifty miles of  
railway to the satisfaction of the Government, "to pay at the City  
of Ottawa to the said Contractor, his executors, administrators, *or*  
"assigns, the further sum of one hundred and fifty thousand pounds  
30 "sterling money (£150,000), making in all the sum of £200,000, in  
"full payment for said completed fifty miles of railway, to be delivered  
"to the said Company after said inspection and approval thereof."

Rec. p. 67.

Rec. p. 68,  
line 36.

35 7. The Respondent Charlebois' contract did not provide for pay-  
ment of the usual progress estimates. He received in money only  
£50,000 altogether from the Appellant Company, out of which he  
then paid upwards of £26,000 to his former co-shareholders in part  
payment for their shares. He had therefore to raise more money to  
enable him to build and equip the 50 miles of railway. And so he  
was obliged to borrow \$150,000 from the Respondent Bank for  
that purpose.

Vol. 3, p. 223

Rec. p. 266,  
line 31.

8. Notwithstanding his agreement with Charlebois in Toronto

Rec. p. 264,  
line 23.

on 9th September, 1889, Stevens failed to give satisfactory evidence that the payments provided for in the Construction Contract would be duly met ; but, in substitution therefor or as a temporary expedient, just before he left Canada for England, Stevens, who was then President of the Appellant Company, caused the following resolution to be passed by the Board of Directors, on the 7th October, 1889, Stevens, the President, and Gregson and Codd, two of the creditors, being then present :—

Ex. 85, vol. 8,  
pp. 64 & 241.      “ Moved by Mr. Gregson, seconded by Mr. Codd : That the  
“ contractor, Mr. Charlebois, having informed the Company that he  
“ was desirous of giving orders to the Company to pay to third  
“ parties various amounts out of the balance payable to him upon  
“ completion of the first fifty miles of railway, and having requested  
“ the Company to accept such orders when received, that the  
“ Company do accept such orders, provided they do not exceed in the  
“ aggregate the balance due to Mr. Charlebois.—Carried.”

Rec. p. 265,  
line 26.      9. A certified copy of this resolution having been handed to  
the Respondent Charlebois by Stevens, the President, Charlebois  
applied to the Union Bank to advance him \$150,000 for his contract  
work ; and the Respondent Bank's claim against the Appellant  
Company is upon three orders drawn on the strength of the said  
resolution of the 7th October, 1889, by Charlebois upon and accepted  
by the Company under seal on the 2nd November, 1889, aggregating  
\$150,000 which orders the Bank took and held as collateral security  
for repayment by Charlebois of the said \$150,000 borrowed from the  
Bank on that day, for the purpose of enabling him to proceed with  
his contract for completion of fifty miles of the railway.

Rec. p. 791.      10. One of the orders, with the Company's acceptance of it,  
reads as follows :—

Vol. 8, p. 73.      “ To The Great North West Central Railway Company :—Out of  
“ the moneys arising from and payable to me under my Construction  
“ Contract with The Great North West Central Railway Company  
“ (dated the 16th day of September, 1889, for the first fifty miles of  
“ said Company's line ) and payable to me upon completion thereof,  
“ pay to the Union Bank of Canada, or order, the sum of Seventy-five  
“ Thousand Dollars, and charge said amount to me upon my said  
“ Contract. This is to be and to be deemed a complete equitable  
“ assignment of so much of said moneys. Dated, at Ottawa, this  
“ Second day of November, 1889.

(Signed) A. CHARLEBOIS.”

“ To The Union Bank of Canada ;—The Great North West  
 “ Central Railway Company, pursuant to Resolution of the Board  
 “ passed on the 7th October, 1889, and of the By-Laws of the  
 “ Company, hereby accept the foregoing Assignment, and agree to pay  
 5 “ the same *out of the moneys therein mentioned*. Dated at Ottawa,  
 “ the Second day of November, 1889.

Rec. p. 98.

“ As witness the Corporate Seal of The Great North West  
 “ Central Railway Company.” (L. S.)

The two other orders in favour of the Respondent Bank, for  
 10 50,000 dols. and 25,000 dols. respectively, are in the same form, and  
 are similarly accepted under the Appellants' Corporate Seal.

11. Before agreeing to make the advances to Charlebois, the  
 Respondent Bank stipulated for and took from the Railway Company  
 the following document, signed by the Company's President :—

Rec. p. 270,  
line 20.Rec. p. 373,  
line 46.

15 “ Ottawa, 2nd November, 1889.  
 “ Manager, Union Bank, Ottawa, Ont.

“ Dear Sir,—In accepting the orders of Mr. Charlebois on our  
 “ Company for (\$150,000) one hundred and fifty thousand dollars  
 “ I beg to state that there is sufficient margin in the amount to be  
 20 “ paid Mr. Charlebois upon completion of his contract for the first  
 “ fifty miles of our road to meet this amount over and above all  
 “ similar or other orders previously accepted by our Company against  
 “ the amount payable to him upon completion of the first fifty miles.”

Vol. 3, p. 74.

12. The Respondent Bank had no knowledge of any of the  
 25 alleged infirmities of the contract which has been attacked in the  
 Plaintiffs' action.

Rec. p. 268,  
line 42.

13. The Respondent Bank submits that the judgment appealed  
 from is correct and should be affirmed, but with costs, for the follow-  
 ing among other

30 REASONS.

(1.) Because the Appellant Company's Resolution of 7th  
 October, 1889, was a direct invitation to the public generally  
 (including the Respondent Bank) to advance the Respondent  
 Charlebois money thereon for the purpose of his contract  
 35 work.

Vol. 3, p. 64.  
Rec. p. 264,  
lines 38 & 43.

(2.) Because the moneys payable under the construction  
 contract were made assignable by the terms of the contract  
 itself, and were duly assigned *pro tanto* to the Respondent  
 Bank.

Rec. p. 68,  
line 36.

Rec. p. 373,  
line 46.  
p. 367, l. 40  
p. 374, l. 13

(3.) Because the Appellant Company is estopped from denying that there was a valid contract subsisting between it and the Respondent Charlebois, or from denying that there was enough money due or to accrue due to Charlebois thereon to pay the 150,000 dols. and interest advanced by the Respondent Bank on the faith of the aforementioned resolution, orders and letter. 5

Vol. 3, p. 74,  
line 12  
p. 64, l. 25  
Rec. p. 98,  
lines 22 & 34

(4.) Because 150,000 dols. of the moneys payable to the Respondent Charlebois under his construction contract and assigned to the Respondent Bank, were so assigned for full value and to innocent holders, and such assignment was, by the terms of the Bank's own agreement with the Railway Company, freed from the equities subsisting between Charlebois and the Company, the moneys thus assigned being absolutely payable upon one condition only, viz :—the completion of the contract works. 10 15

(5) Because "where there is a distinct promise held out by the Company, informing all the world that they will pay to the order of the person named, it is not competent for that Company afterwards to set up equities of their own." (L. R. 3 Chy. 758). 20

(6) Because it was, at all events, competent for the Appellant Railway Company to make a contract for the construction of the Railway; and, as an incident to such power, to arrange with the Respondent Bank to repay advances to be made by it to the Respondent Charlebois to enable him to carry out his contract. 25

(7) Because, apart from the judgment, the Bank's contract with the Appellant Company entitled the Bank to a judgment against the Company for 150,000 dols. and interest in any event. 30

Rec. p. 375  
line 15.

(8) Because the Bank, relying on the assignment of the judgment in the Bank's favour, forbore pursuing any recourse or remedies it had against Charlebois, and also from taking independent proceedings against the Appellant Company. 35

(9) Because, whether the Respondent Charlebois' contract was originally partly invalid or not, the judgment obtained has been adopted and acted on by the Company (which has accepted benefits thereunder) and the Company cannot now dispute its validity as against the Bank, a *bona fide* innocent beneficiary thereunder.

(10) Because the alleged Mortgage-Deed to the Trustees for bondholders is void as against the Bank's claim, since both the alleged holders of the Bonds and Trustee Gifford had notice of Charlebois' prior equitable lien, Rec. p. 804.

5 (11.) And because the judgment of the Supreme Court is right and ought to be affirmed, save that the Respondent Bank being a *bona fide* chargee and assignee (*pro tanto*) of the original judgment debt, should be awarded its costs.

DALTON McCARTHY.

In the Privy Council.

No. 33 of 1896.

On Appeal from the Supreme Court of  
Canada.

THE GREAT NORTH-WEST CENTRAL  
RAILWAY COMPANY & OTHERS,  
*(Plaintiffs) Appellants,*

— AND —

CHARLEBOIS & OTHERS,  
*Defendants (Respondents).*

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**CASE OF THE RESPONDENTS**  
THE UNION BANK OF CANADA.

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HARRISON & POWELL,  
5, Raymond's Buildings,  
Gray's Inn,  
*for Respondents,*  
*The Union Bank of Canada.*