

UNIVERSITY OF LONDON  
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24 OCT 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

29461

In the Privy Council.

No. 33 of 1896.

ON APPEAL FROM THE SUPREME COURT  
OF CANADA.

BETWEEN THE GREAT NORTH-WEST CENTRAL RAILWAY  
COMPANY, 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), and LOUISA  
H. MANSFIELD - - - - - (*Plaintiffs*) *Appellants*,

AND

ALPHONSE CHARLEBOIS, ALEXANDER MAC-  
DONALD, WILLIAM ALFRED PRESTON, JOHN  
S. SCHILLER, FRANK S. NUGENT, THE COM-  
MERCIAL 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 Will  
of JAMES CROSSEN, Deceased - (*Defendants*) *Respondents*.

**Case of the Respondents,**

MACDONALD, PRESTON, SCHILLER, NUGENT and THE COMMERCIAL BANK OF  
MANITOBA.

1. This is an Appeal by the Plaintiffs, by leave, from a Judgment of the Supreme Court of Canada in favor of the Respondents (Defendants) dismissing the Action of the Plaintiffs (the present Appellants), whereby they sought to set aside two Judgments dated respectively 28th of September 1891, and the  
46637 Rec. p. 862.  
Rec. p. 29.

Rec. p. 36. 29th of February 1892, obtained in the Chancery Division of the High Court of Justice for Ontario by the Respondent Charlebois against the Appellant Railway Company, but varying the amount of the judgment debt thereby recovered.

2. These Respondents, while relying on the Reasons presented in the case of the other Respondents, claim that by reason of the facts hereinafter set out, they have separate and substantive rights against the Appellant Company in support of the validity of the judgment obtained by the Respondent Charlebois to the extent of Seventy-two thousand eight hundred and twenty-nine dollars (\$72,829). By the terms of the judgment, Eight thousand four hundred dollars (\$8,400) of this amount is payable to the Respondent Preston, and the balance (\$64,429) to the Respondents, Macdonald and Schiller. Macdonald and Schiller subsequently assigned their interests in the judgment to the Respondent Nugent who holds the same in trust for all these Respondents except Preston.

Rec. p. 29.

Ex. 108 vol. 3  
p. 180.

3. On the 16th day of September 1889, the Appellant Company made an Agreement with the Respondent Charlebois for the construction of fifty miles of the Company's Railway (hereinafter sometimes called "the Works" for which the Company agreed to pay the Respondent Charlebois Fifty thousand pounds sterling (£50,000) at the time of the execution of the Agreement, and the further sum of One hundred and fifty thousand pounds sterling (£150,000) upon the Minister of Railways and Canals being satisfied that the said fifty miles had been completed so as to comply with the Agreement of the Company's Contractor with the Government of Canada and as in the said Agreement more particularly set forth.

Rec. p. 67

4. It was provided *inter alia* in this Contract that Charlebois should procure and pay for the land for the Right of Way of fifty miles of railway and build the railway thereon, and by Section 4—

Rec. p. 69

"The Contractor shall have, in addition to such protection and lien, "if any, as the law allows and accords him, a full and complete lien and "first charge upon and over the said first fifty miles of railway and its "appurtenances, including rails, ties, buildings, equipments, road-beds, "right of way, right to the land grant thereto appertaining if and when "fully earned, right of operation of said railway and upon the whole "property, enterprise and undertaking, including the works already in "course of completion, until he, the said Contractor is and shall be paid "the said full sum of One hundred and fifty thousand pounds sterling "(£150,000) as aforesaid, nor shall the Company be at liberty to take "possession of or exercise any acts of possession over or respecting the "said fifty miles of railway or its appurtenances aforementioned, while or "so long as any sum remains due and unpaid to the Contractor under "this contract, and the full absolute and sole possession thereof shall, in "such case, remain and be vested meanwhile in the Contractor."

5. On the Third day of October 1889, the Respondents Macdonald and Schiller entered into a sub-contract with the Respondent Charlebois, to construct

Ex. 17, vol. 3,  
p. 54.

a certain portion of the works, which recited the agreement between the Respondent Charlebois and the Appellant Company and was specifically made as a sub-contract thereunder.

6. This sub-contract between the Respondent Charlebois, therein called the Employer, and the Respondents Macdonald and Schiller, provided *inter alia*, by Section 10, that—

Ex. 17, vol. 3,  
p. 59.

“ In the event of the employer neglecting or refusing to pay *the current estimates, the sub-contractors can cease work and retain a lien on works by them done and materials by them supplied hereunder until such estimates are paid, and a time corresponding with the delay thus caused shall be allowed for the completion to the sub-contractors.*”

7. The Respondents Macdonald and Schiller completed the works under the said sub-contract, and by reason thereof the Respondent Charlebois became indebted to them on and prior to the Twenty-eighth September 1891, in the sum of \$64,429·00.

Rec. p. 449,  
l. 3.  
Rec. p. 29,  
l. 37.

8. To enable them to complete their said works, and to furnish the necessary supplies therefor, Macdonald and Schiller borrowed from time to time during the progress of the works from the Respondents the Commercial Bank of Manitoba, on their promissory notes, the sum of \$33,260·71.

Rec. p. 449,  
l. 23.

9. On the 28th of September 1891, the indebtedness to the Bank on these notes, with interest, amounted to about \$38,000·00. This indebtedness is still unpaid and is not disputed.

Rec. p. 466,  
l. 5.

10. As the works progressed, estimates therefor were from time to time given by the Engineer of the Respondent Charlebois; and the balance due the Respondents Macdonald and Schiller on estimates on the 28th September 1891, after deducting all payments made on account thereof, amounted to \$60,040·00, which amount, with interest thereon, made up the sum of \$64,420 aforesaid.

Rec. p. 449,  
l. 4.

11. The Respondents the Commercial Bank of Manitoba made the said advances to the said Macdonald and Schiller, relying on the contract between the Appellant Company and the Respondent Charlebois, and on the sub-contract between the said Charlebois and the said Macdonald and Schiller, and on the liens to the contractors given thereunder and on the said estimates; which estimates and contracts were produced to the said Bank from time to time when the advances aforesaid were obtained.

Rec. p. 466,  
l. 6.

Rec. p. 449,  
l. 30.

12. Under the contract between the Respondent Charlebois and the Appellant Company only Fifty thousand pounds (£50,000) was paid on the execution thereof, the balance, One hundred and fifty thousand pounds (£150,000) being payable on completion; and in order to assist Charlebois in providing money to construct the works, the Company, after the execution of

Rec. p. 67.

the contract, agreed to accept orders drawn by Charlebois in favour of third parties, payable out of the balance due him on completion of the works.

Ex. 35, vol. 3,  
pp. 64 & 241.

13. On the Seventh October, 1889, the following resolution was passed by the Company in pursuance of this agreement:—

“ 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, on 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, as aforesaid.”

Ex. 55, vol. 3,  
p. 110.

14. On the Tenth of June 1890, the Respondent, Charlebois, gave an order on the Company on account of the indebtedness then due by the said Charlebois to the said Macdonald and Schiller, which order was in favor of the said Macdonald and Schiller, and directed payment to them or their order of the sum of Twenty thousand dollars (\$20,000.00). This order is in the word and figures following:—

“ 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 of September 1889, for the first fifty miles of the said Company’s line, and payable to me upon the completion thereof, pay to Macdonald and Schiller, contractors of Brandon, Manitoba, or order, the sum of Twenty thousand dollars (\$20,000.00), and charge the said amount to me upon my said contract. This to be and to be deemed a complete equitable assignment of so much of said money.

“ Dated at Ottawa, this 10th day of June A.D. 1890.

“ (Sgd.) A. CHARLEBOIS,

“ Contractor.”

Macdonald and Schiller endorsed the said order to the Respondents, The Commercial Bank of Manitoba, who accepted the same as collateral security for the said indebtedness, and caused the same to be presented to the Appellant Company, whereupon the said Company accepted the said order and gave the Bank the following undertaking to pay the same.—

Ex. 55, vol. 3,  
p. 110.

“ The Great North West Central Railway Company, pursuant to resolution of the Board passed on the Seventh October 1889, hereby accept the foregoing order and assignment, and agree to pay the same out of the moneys therein mentioned. Dated 10th day of June 1890. As witness the corporate seal of the said Company.”

15. On the Twenty-eighth September 1891, and prior thereto, the said Macdonald and Schiller had completed their part of the said sub-contract in all respects and had obtained estimates as therein provided. Rec. p. 449,  
l. 1.  
Rec. p. 449,  
l. 27.
16. These estimates were not paid and the said Macdonald and Schiller, under the terms of the said sub-contract and by the common law, retained a lien on the works done by them and material supplied. Ex. 17, vol. 3,  
p. 59.
17. During the completion of the said works and thereafter until the Judgment of the Twenty-eighth September 1891, hereafter referred to, the said Macdonald and Schiller were in actual physical possession of the said works and materials, holding the same as security for the payment of the amount due them. Rec. p. 449,  
l. 7.
18. The Respondent Preston had a sub-contract from the Respondent Charlebois under which the Respondent Preston agreed to construct a certain portion of the works, namely, fencing along the right-of-way. Ex. 63, vol. 3,  
p. 212, l. 8.
19. On the 28th September 1891, the said Preston had completed his Contract, and there was due to him the sum of Eight thousand four hundred dollars (\$8,400.00), and the Respondent Preston was in actual possession of the portion of the works constructed by him until the 28th September 1891. Rec. p. 472,  
l. 5.  
Ex. 63, vol. 3,  
p. 215, l. 26.
20. On the 26th September 1891, the Appellant Company, by its President and one of its Directors, gave the following acknowledgment in writing to these Respondents:— Rec. p. 91,  
l. 12.
- “ Toronto, 26th September 1891,
- “ The Great North-West Central Railway Company, by J. A. Codd, as  
“ its President and D. McMichael as Director, hereby undertakes and agrees  
“ that Macdonald and Schiller and W. A. Preston, be allowed to remain  
“ in possession of its first 50 miles of railway and works now constructed  
“ until they are paid the sum of Sixty-five thousand dollars (\$64,429.00)  
“ to the former or their order, and the sum of Eight thousand five hundred  
“ and thirty-nine dollars (\$8,400.00) to the latter or his order, on account  
“ of their claims against A. Charlebois as Sub-Contractors under him.  
“ And they further agree that the said Company will forthwith pay the  
“ above sums to the said persons or their order, it being clearly understood  
“ and agreed that upon payment of the said Sixty-four thousand four  
“ hundred and twenty-nine dollars the Twenty thousand dollar order given  
“ said Macdonald and Schiller by said Charlebois on the Company shall  
“ be surrendered to the Company.
- “ Signed J. A. CODD, as President  
“ G. N. W. C. Railway Co.
- “ Signed D. McMICHAEL, as Director  
“ G. N. W. C. Railway Co.”

Ex. 31, vol. 3.  
p. 18.

21. The Government of the Dominion of Canada agreed with the Company to grant them in aid of the construction of the said works a free grant of land from out of the lands belonging to the Dominion of Canada, of Six thousand four hundred acres for each mile of railway constructed.

Ex. 134, vol. 3.  
p. 92.

22. By reason of the construction of the works the said Government on the 19th of March 1890, passed an Order granting Three hundred and twenty thousand acres of said land to the Company.

Rec. p. 29.

23. On the 12th September 1891, the Respondent Charlebois commenced an Action in the Chancery Division of the High Court of Justice for Ontario against the Railway Company, which Action resulted in the Judgment of the 28th September 1891, hereinbefore referred to, whereby the Court declared that the Respondent Charlebois had as Contractor for the 50 miles a lien on all the property of the Appellant Company, including its line of railway, lands, land grant and other assets for the sum of \$622,226.00, being the amount agreed upon as due the Respondent Charlebois which sum was directed to be paid on the 31st of March 1892, and at the request of the said Respondent Charlebois the said sum was declared to be payable as follows:—

“ (a) To Macdonald & Schiller, the sub-contractors of the road,  
“ \$60,640.00 and \$3,789.00 for interest on the said sum to date,  
“ in all \$64,429.00, which sum includes the Order for 20,000 dollars,  
“ dated the 10th June 1890, accepted by the Defendants, and now in  
“ possession of Frank S. Nugent, Esquire, which lien the said parties  
“ represented herein by their Solicitor and Counsel, the said Mr. Nugent  
“ agreed to accept as cash and to credit the same in the suit now  
“ pending in the Courts of Manitoba by the said Macdonald & Schiller  
“ against the said Plaintiff as if paid into Court in the said suit. The said  
“ sum is paid as the amount found due by the final certificate of  
“ J. H. E. Secretan, Civil Engineer, the Plaintiffs’ Engineer, with interest  
“ as agreed upon, the said Macdonald & Schiller being at liberty to continue  
“ their Action in the Province of Manitoba for the recovery of any alleged  
“ balance that may be claimed by them against the Plaintiff.

“ (b) To W. A. Preston, fencing contractor, \$7,810.00, and for  
“ interest \$590.00, in all \$8,400.00, the said Preston hereby accepting  
“ the provisions of this Judgment by the said Solicitor and Counsel, the  
“ said Nugent consenting thereto in full of his claims against the Plaintiff.”

Rec. p. 31.

Paragraph 4 of the said Judgment is as follows:—

“ And this Court doth further order and adjudge that the immediate  
“ possession of the said line of railway, rolling stock, property and all the  
“ assets connected therewith in its present condition, subject to the said  
“ lien or charge and right of the Plaintiff to have possession upon default  
“ on the order of this Court, are hereby vested in the said Defendants, who  
“ are entitled to immediate possession and control thereof until default  
“ should be made in the conditions of this Judgment.”

24. These Respondents consented and agreed to the said Judgment in consideration of the rights and priority conferred upon them by Section 2, Sub-section A and B of the Judgment aforesaid, and relying upon the protection of their interests afforded by said Judgment, consented that Judgment might be signed directing the delivery up of possession of the works to the Company. Rec. p. 29,  
Rec. p. 467,  
l. 18.

25. These Respondents had no knowledge of any of the alleged infirmities of the contract which has been attacked in the Plaintiff's action.

26. These Respondents thereafter, at the request of the Company, relying on the said Judgment gave up possession of the said works and material, and but for said Judgment and the priority given them therein they would have retained possession thereof. Rec. p. 450,  
l. 12, p. 467,  
l. 18.

27. On or about the 6th day of October A.D. 1891, the said Macdonald and Schiller assigned their interest in the said Judgment to the Respondent Nugent, who gave in return a declaration of trust, by reason whereof the Respondent Nugent was made a party Defendant to this action. Ex. 108, vol. 3,  
p. 180.

28. At a meeting of the Directors held on the 30th November 1891, the President reported that the Company had been notified on the 6th day of October last of the assignment by Macdonald and Schiller of the \$64,429 and interest payable under the Judgment in the suit of A. Charlebois *v.* The Great North-West Central Railway Company to Frank S. Nugent, which notice he, the President, had acknowledged by letter at that date, and that the said Nugent now desired the receipt of notice to be acknowledged by the Board under the seal of the Company, whereupon it was resolved— Vol. 3, p. 256,

“ That the President and Secretary be authorised to give Mr. Nugent  
“ a formal acknowledgment of the receipt of the notice of assignment  
“ to him by Macdonald and Schiller of the sum of \$64,429, with interest  
“ thereon payable to said Macdonald and Schiller under and by virtue  
“ of the Judgment by Justice Ferguson, dated 28th September 1891,  
“ in the suit of Charlebois *v.* The Great North-West Central Railway  
“ Company, and that the Secretary is hereby authorised to attach the  
“ seal of the Company to such acknowledgment.”

29. Pursuant to the said resolution the President and Secretary of the Company acknowledged to the Respondent Nugent, under seal of the Company, that notice of the said assignment had been received by the Company. Ex. 86, vol. 3,  
p. 184.

30. Prior to the said Judgment the Respondent The Commercial Bank of Manitoba had been pressing Macdonald and Schiller for payment of their said indebtedness. Relying on the Judgment the said bank ceased to press said Respondents for payment. Rec. p. 466,  
l. 13.

31. These Respondents are entitled to have the Judgment in the suit of Charlebois against the Appellant Railway Company upheld, at all events to the

extent of their interest therein, and that in the event of any inquiry being directed as to the amount due in respect of the matters referred to in the said Judgment on a *quantum meruit* or otherwise, that any such order of reference should contain a provision that the amount directed to be paid by the said Judgment should not be reduced so as to affect the payment of the amount secured by such Judgment to these Respondents.

32. These Respondents submit that the Judgment of the Supreme Court of Canada should be affirmed with costs, save that these Respondents should be awarded their costs, for the following reasons in addition to those presented in the case of the other Respondents.

#### REASONS.

- (a.) Because these Respondents, Macdonald, Schiller and Preston, relying on the security of the Judgment, changed their position by giving up the possession of the works and material to the Appellant Company, and by accepting the lien for \$72,829 created by the said Judgment released the Respondent Charlebois from his indebtedness to them to that extent.
- (b.) Because the Appellant Company on the 26th September 1891, admitted the amount secured to these Respondents by the said Judgment to be due by the Company, and undertook to pay the same to these Respondents.
- (c.) Because the moneys payable under the Contract between the Respondent Charlebois and the Appellant Company were made assignable by the terms of the Contract itself and as to the claim of the Respondents, the Commercial Bank of Manitoba, represented by the Order for Twenty thousand dollars, the said moneys were in fact duly assigned for value to the said Bank, which had no knowledge of any of the alleged infirmities of the Contract.
- (d.) Because, as to the claim of the said Bank, the Appellant Company had, prior to the recovery of the said Judgment, admitted its indebtedness and agreed to pay the same to the said Bank, so that, apart from the Judgment, the Bank's contract with the Appellant Company entitled the Bank to a Judgment against the Company for Twenty thousand dollars (\$20,000.00) in any event.
- (e.) Because the Respondents the Commercial Bank of Manitoba, relying on the Judgment, forebore from taking independent



proceedings against the Appellant Company for the said Twenty thousand dollars.

- (f.) Because the Appellant Company is estopped as against the said Bank 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 thereunder to pay the Twenty thousand dollars represented by the claim of the said Bank.
- (g.) Because the claim of the said Bank is for money advanced for the purposes of the construction of the railway, and went into the work.
- (h.) Because, whether the Respondent Charlebois' contract was originally partly invalid or not, the Judgment obtained has been adopted by the Company, which has accepted benefits thereunder, and the Company cannot now dispute its validity as against these Respondents, who are *bonâ fide* beneficiaries thereunder.
- (i.) Because the Judgment of the Supreme Court ought to be affirmed, save that these Respondents, being *bonâ fide* chargees and assignees *pro tanto* of the original Judgment debt, should be awarded their costs.

J. STEWART TUPPER,

Counsel for the Respondents Macdonald, Preston, Schiller,  
Nugent, and The Commercial Bank of Manitoba.

In the Privy Council,

No. 33 of 1896.

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ON APPEAL FROM THE  
SUPREME COURT OF CANADA.

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THE  
GREAT NORTH WEST CENTRAL  
RAILWAY COMPANY AND OTHERS

*v.*

CHARLEBOIS AND OTHERS.

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*Case of Respondents,*  
MACDONALD AND OTHERS.

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BOMPAS, BISCHOFF, DODGSON, COXE & BOMPAS,

*4, Great Winchester Street, E.C.*