

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Quebec Central Railway Company v. Robertson, from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 17th November 1894.*

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Present :

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

By an Act 49-50 Vict. cap. 82 of the Legislature of the Province of Quebec, passed on the 21st June 1886, the Charter of the Quebec Central Railway Company was amended by authorising the provisional directors of the Company named in the Act to issue 3,000 prior lien bonds of 100*l.* sterling each, payable in 20 years, to be a first charge on the property of the Company, and providing that upon the coming into force of the Act the powers of the directors should cease, and the affairs of the Company be administered by a board of provisional directors, consisting of the persons named therein, until a permanent board of directors should be elected as was provided. The Act was to come into force by proclamation of the Lieutenant-Governor, to be issued on a declaration of the Company that it was assented to by two-thirds of the shareholders to be given before the 1st June 1888.

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In order to ascertain the condition of the Company prior to the passing of the Act one Thomas Swinyard had been employed to examine the books of the Company, as well as the railroad, and to report thereon. In December 1885 he made a report, in which he showed that the direct liabilities of the Company, apart from the bonded debt of which the interest had been guaranteed by the Provincial Government, but which guarantee had expired or was about to expire, were \$113,285. 66; of which \$50,000 were estimated to be due on a claim of the Ontario Car Company for the price of rolling stock for which the railway had been attached on a judgment in favour of the Ontario Car Company; \$22,677 as due to James Ross and Company on what may be termed the locomotive account, being the price of locomotives bought of James Ross and held by him but used by the Company; and \$40,608. 66 other liabilities, as per balance sheet of August 1885 accompanying Mr. Swinyard's report, and certified to by Mr. Power, accountant, being accounts due to tradesmen for supplies, advertising, and amounts due to other railroads on traffic account. Negotiations were entered into for a settlement of these claims, with a view of obtaining legislation and possession of the railway, of which Robertson, who was a large shareholder and had control of the stock, was then President, and a Mr. Woodward was the manager. On the 9th October 1885, pending the investigation by Swinyard, Woodward made in England a statement of the affairs of the railway. The negotiations were between Mr. Hall, one of the provisional directors in Canada, and Robertson, and were communicated by Hall to the directors who were in England on the 27th March 1886, with a view to prevent legal proceedings by which the bond-holders in England would endeavour

to foreclose the mortgage and take possession of the railway. After the lapse of a considerable time, on the 2nd April 1887, an agreement was made in England between Robertson and his co-directors, of whom the majority were in England, of the one part, and Robertson individually of the other part, represented by Hall who was then in England. The agreement was provisionally signed by Hall for Robertson, and was afterwards ratified by Robertson.

The question in this appeal arises upon this agreement. It recites the Act, and the power to issue the 3,000 prior lien bonds, and that certain debts set forth in the first and second parts of the first schedule to it were due or claimed from the Company, and proceeds as follows:—

“ And whereas the Honourable Joseph Gibb Robertson who  
 “ is the chairman of the Company has agreed to settle and  
 “ discharge all the said debts for the sum of two hundred  
 “ and fifty thousand dollars to be provided in manner herein-  
 “ after mentioned. And whereas the parties of the first part  
 “ are mentioned in said Act as the board of provisional  
 “ directors of said Company upon the coming into force of  
 “ said Act and it is deemed necessary that formal declaration  
 “ and agreement should be made on their part that they will  
 “ take the necessary steps to provide the said sum of two  
 “ hundred and fifty thousand dollars and subject to the con-  
 “ ditions hereinafter named will provide or pay over the same  
 “ to the said Joseph Gibb Robertson as follows:—

“ 1st. That they will with all possible despatch after the  
 “ coming into force of the said Act cause the prior lien bonds  
 “ designated in said Act to be executed in the form of the  
 “ second schedule hereunder written and deliver five hundred  
 “ and eighty-eight thereof to the Honourable George Irvine  
 “ Judge of the Court of Vice-Admiralty residing in the City  
 “ and Province of Quebec to be held by him under the  
 “ conditions hereinafter expressed.”

2nd. After providing for the payment or deposit of cash in lieu of the bonds which was not done the agreement says that the cash or bonds shall be administered by Mr. Irvine as follows:—

“ Upon the said Honourable Joseph Gibb Robertson  
 “ delivering to the said Honourable George Irvine a statutory  
 “ declaration made by himself, by James Robertson Woodward  
 “ one of the firm of Bowen and Woodward and by the present  
 “ auditor of said Quebec Central Company to the effect that  
 “ the liabilities mentioned in a list to be annexed thereto and  
 “ corresponding with the list contained in the said first  
 “ schedule hereto comprise all the debts due and claimed from  
 “ the said Company (other than liabilities for working expenses  
 “ of the railway incurred within six months before the coming  
 “ into operation of the Act) and all the liabilities of the  
 “ contractors which arose from or were connected with their  
 “ contracts for the construction and equipment of the said  
 “ railway and stating whether any and if any what part of the  
 “ receipts of the Company have been used for the liquidation  
 “ of any principal or interest in respect of the said debts  
 “ enumerated in the second part in the said first schedule then  
 “ said Honourable George Irvine may pay over and deliver to  
 “ the said Honourable Joseph Gibb Robertson the said cash  
 “ or bonds as the case may be upon the said Honourable  
 “ Joseph Gibb Robertson procuring and delivering up to said  
 “ Honourable George Irvine complete discharges from the said  
 “ several debts due or claimed as mentioned in said schedule  
 “ or an amount of said cash or bonds from time to time in the  
 “ proportion which the discharges produced shall bear to the  
 “ total liabilities mentioned in the said schedule. Provided  
 “ however that said Honourable George Irvine shall retain  
 “ and pay to the Company in cash or in bonds a sum equal to  
 “ so much of the receipts of the Company as shall appear from  
 “ the said declaration to have been used in liquidation of any  
 “ principal or interest in respect of any of the debts enumerated  
 “ in the second part of the said first schedule. \* \* \*

“ 3rd. In consideration of the premises the said Honourable  
 “ Joseph Gibb Robertson hereby indemnifies the Company  
 “ against all liabilities and claims upon the Company other  
 “ than (a) the bonded debt of the Company (b) the liabilities  
 “ of the Company for the satisfaction of which Article IV  
 “ provides and (c) liabilities for working expenses of the  
 “ railway incurred within six months before the coming into  
 “ operation of the Act.”

The Act was proclaimed on the 3rd November 1887, and on the 16th February 1888 the 588 bonds were entrusted to Mr. Irvine; the railway was handed over to the English directors on the 14th November 1887, Mr. Woodward remaining their manager. On the 14th November 1888 Mr. Walsh, auditor of the Company, made a statutory declaration that the \$40,608. 66 had been paid, except \$54. 18,

but not stating by whom or when. It appears that this payment had been made out of the earnings of the railway from time to time between the 31st August 1885 and the 14th November 1887, nearly all of it in 1885 and 1886. Statutory declarations were also made about the same time by Mr. Robertson and Mr. Woodward and Mr. Walsh, stating that the sums mentioned in the lists attached thereto comprised all the debts due and claimed from the Company on the 31st of August 1885, other than the bonded debt and the debts excepted with it in the agreement, and that only \$3,273. 51 had been paid out of the earnings of the road on what were termed contractors' liabilities since the 2nd April 1887. Upon these declarations, and certain vouchers as discharges being given to Mr. Irvine, he in November and December 1888 handed over to Robertson, or to Woodward who transacted his business, 534 bonds, retaining 8 to cover the \$3,273. 51 paid from earnings on contractors' liabilities, and leaving 46 in his hands.

On the 30th March 1889 Mr. Robertson brought an action against Mr. Irvine, alleging that in pursuance of the agreement he had paid the larger portion of the outstanding debts referred to in it, and had delivered to the Defendant the statutory declarations required by it, and had received from the Defendant a number of bonds from time to time in the proportion which the discharges produced bore to the liabilities mentioned in the schedule; that in or about the month of January 1889 he delivered to the Defendant discharges for an amount of the liabilities which would entitle him to recover and receive from the Defendant forty-three of the bonds, which the Defendant refused to deliver although duly requested to do so; that since the 31st of January he paid liabilities and

delivered discharges to the Defendant which would entitle him to three additional bonds, which the Defendant also refused to deliver to him; and he prayed that the Defendant might be ordered to deliver to him forty-six of the bonds, or in default to be condemned as his debtor in the value thereof.

The Defendant appeared but did not plead, and subsequently deposited the bonds in Court. On the 30th April 1889 the Quebec Central Railway Company filed a petition in intervention, and having been allowed to intervene, stated in their grounds of intervention that previously to the 2nd April 1887, the day of the execution of the agreement, the debts mentioned in the first part of the first schedule to it had been in a large measure settled and paid by the Company out of its own revenues, that between the 2nd April and the 3rd November 1887 the Company paid all its debts, and after the coming into force of the Act large sums exceeding \$30,000 were taken from the funds of the Company and expended in the payment of debts which the Plaintiff was bound to pay. The summary of the Plaintiff's answer to this is given in the reasons of Mr. Justice Brooks for the judgment in the Superior Court. He says:—"Plaintiff on  
 " the other hand says ' It is true a large amount  
 " ' was paid out of the earnings of the road but I  
 " ' had a right to pay it so, and am entitled to  
 " ' the benefit of it. You were aware of it, and  
 " ' acquiesced in it, and ratified it; your manager  
 " ' here Mr. Hall consented to it, and you cannot  
 " ' complain. It was a going concern; I as pre-  
 " ' sident had a right and was bound to pay from  
 " ' earnings, pending negotiations and during the  
 " ' long delays, on account. You knew it. I only  
 " ' agreed to procure discharges of these debts,  
 " ' and I agreed to indemnify you against all  
 " ' claims except certain claims mentioned in

“ ‘Agreement. I abide by my Agreement, and  
“ ‘there are now other claims, notably that  
“ ‘of commercial taxes, amounting to upwards of  
“ ‘\$18,000 which you call upon me to pay.’ ”

A difficulty arises from the statement by Mr. Swinyard of liabilities on the 31st August 1885 having been made the basis of the agreement in April 1887; but that cannot alter the meaning of the words in the agreement that Robertson had agreed to settle and discharge all the debts set forth in the first schedule, which was the consideration for his having the bonds delivered to him. The intention of the parties was that Robertson should take upon himself personally the settlement and discharge of these debts. Payment with the funds of the Company, and delivering to Mr. Irvine discharges obtained by such payments, was not performance by Robertson of his agreement or indemnifying the Company against these debts which he expressly agreed to do. The consent of Mr. Hall, the manager in Canada, would not make any difference, as he had no power to alter the agreement or dispense with the performance of it. Their Lordships are of opinion that the Plaintiff failed to show that he was entitled to the 46 bonds, and that the action was properly dismissed in the Superior Court by Mr. Justice Brooks; and his judgment having been reversed by the Court of Queen's Bench for reasons with which their Lordships cannot agree, they will humbly advise Her Majesty to reverse the judgment of that Court, and order that the appeal to it be dismissed with costs and to affirm the judgment of the Superior Court.

The Respondent will pay the costs of this appeal.

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