

BETWEEN

THE MINISTER OF RAILWAYS } PLAINTIFF ;  
AND CANALS..... }

1908  
Oct. 31.

AND

THE QUEBEC SOUTHERN RAIL- }  
WAY COMPANY AND THE } DEFENDANTS.  
SOUTH SHORE RAILWAY COM- }  
PANY..... }

*In re* EDWIN HANSON, AND OTHERS } APPELLANTS ;  
(CLAIMANTS)..... }

AND

THE BANK OF ST. HYACINTHE } APPELLANTS ;  
(CREDITOR)..... }

AND

THE MINISTER OF RAILWAYS }  
AND CANALS (PLAINTIFF)..... } RESPONDENT.

*Railway—Bonds held as security by creditor—Transfer—Purchase of rail-  
way by trustee—Breach of trust—Judgment by original bond-holder  
against railway—Hypothec—Collocation of claim upon moneys received  
by vendor of railway.*

H. had a claim guaranteed by bonds against a railway. It was agreed between H., together with certain other creditors, and D. that the latter would purchase the railway at Sheriff's sale in trust for such creditors, and that after the purchase D. would execute a mortgage in favour of these creditors, H. to benefit by such mortgage to the amount of his claim guaranteed by the bonds. To facilitate such arrangement H. transferred the bonds to D. The railway was purchased by D. but thereafter he refused to execute the mortgage as agreed. H., on the 4th April, 1901, obtained a judgment against the railway directing D. to execute in his favour a valid hypothec upon the railway, and in default thereof that the judgment should stand in lieu of such hypothec. D. not complying with the direction, H. registered this judgment. D. having allowed a bank, for whom he professed to act in

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purchasing the railway, to assume the right to dispose of the same, the bank sold the road to a company incorporated for the purpose of acquiring it, and D. conveyed the road to the company on the 7th August, 1900.

*Held*, that although H., upon the facts, was not entitled to assert his claim as a hypothec against the railway in the hands of the company, inasmuch as the bank had guaranteed the purchaser a clear title the claim was allowed to be collocated upon the moneys coming to the bank from such sale.

**T**HIS is an appeal by the Bank of St. Hyacinthe from the finding of the Registrar, acting as Referee, upon the claim of Hanson Bros. and also an appeal by Hanson Bros. from the finding of the Referee upon their own claim, in respect of which the Bank of St. Hyacinthe and the Minister of Railways and Canals were respondents.

The following facts of the case are taken from the two reports (provisional and final) of the Referee :

“ Edwin Hanson, of the City and District of Montreal, and William Hanson, of the Town of Westmount, District of Montreal, Financial Agents, carrying on business as such in Montreal aforesaid under the firm name and style of Hanson Brothers, and Frederick G. Finlay, Dame Emma Gault, Frank D. Adams, M.D., and Alexander G. Watson, in their quality of executors to the late Samuel Finlay, in his life time of the same place, Gentleman, are the Claimants.

“ Claim \$19,722.09, in capital, interest and costs.

“ The claimants allege that the United Counties Railway Company are indebted to them in the said amount and that they hold a hypothec for the same upon that portion of the Quebec Southern Railway running from St. Hyacinthe towards Sorel.

“ Under a certain deed of agreement *sous seing privé* of the 11th January, 1900, between Lady Marie Louise King et al., Parties of the first Part; the said Claimants, Parties of the second Part; the Bank of St. Hyacinthe, Party of the third Part; and George C. Dessaulles, Party

of the fourth Part:—it was covenanted and agreed that the said G. C. Dessaulles would purchase, as Trustee, at a Sheriff's sale, then advertised to take place on the 25th January, 1900, the United Counties Railway and that he would, immediately after obtaining from the Sheriff a title to the said road, execute a first mortgage in favour of the said Lady Mary Louise King et al. to the amount of a bond held by them, with interest, viz.: about the sum of \$150,000 and which said mortgage should be held by them as collateral security for whatever amount of money there may be found to be due to them and the present claimants by the said Railway Company. This mortgage was to be executed upon that portion of the road as above mentioned and the present claimants were to rank for the amount of their claim immediately after the claim of the parties of the first part; the said parties of the first part and the claimants jointly holding at the time a first mortgage bond upon the said property for the said sum of \$150,000 as collateral security for their claims, which said mortgage bond was to be delivered to the said George C. Dessaulles for delivery to the Sheriff as representing the purchase price of the road, if the same became necessary, in order to settle for the purchase price.

“The said parties of the first and second parts further agreed to discharge any claims which they might have against the said road on receipt by them of the amount respectively due to them and secured by the mortgage bond of \$150,000 with interest to date of payment, they becoming mortgage creditors to the amount of their respective claims with interest.

“The said G. C. Dessaulles purchased the said railway at the Sheriff's sale on the 25th January, 1900, and delivered, as alleged, to the Sheriff, as part payment of the purchase price thereof, the said bond of \$150,000 and

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obtained a deed of sale from the Sheriff on the 1st May, 1900.

“It appears the said George C. Dessaulles, after acquiring the property, refused to execute the mortgage, as agreed upon, in favour of the said parties of the first part and the said Claimants. On the 30th January, 1901, the said parties of the first part instituted an action against the said G. C. Dessaulles to compel him to execute in their favour a mortgage upon the said road for the sum of \$150,000, and in default of his so doing the judgment to be rendered should avail in lieu and stead of such hypothec.

“The present claimants intervened in the said action and also asked that the said G. C. Dessaulles should execute the said mortgage for \$150,000 to cover their claim for any money due them and secured by the said bond as well as the claim of the plaintiffs therein.

“By the judgment of the 4th April, 1901, the said G. C. Dessaulles was ordered, within 24 hours after the service of the said judgment, to execute, in favour of the said claimants, a good and valid hypothec upon the said property for the sum of \$150,000, to be as security for whatever amount of money there might be found to be due them, and that failing the said G. C. Dessaulles to execute said hypothec within such delay after the service of the judgment, that such judgment should avail in lieu and stead of such hypothec, *à toutes fins que de droit*. Service of the said judgment was accepted on the 10th April, 1901.

“The said G. C. Dessaulles having failed to execute the said deed of hypothec in accordance with the said judgment, the said judgment was duly registered against the said property and the said hypothec and registration have never been discharged.

“This claim appears to have originated in a loan of \$8,000 made on the 23rd of March, 1893, to the United Counties Railway by the present claimants.

“ On the 9th December, 1895, the United Counties Railway Company, by a deed of agreement, duly signed by the President and Secretary and under its seal, admitted their liability and indebtedness, at that date to the said claimants, in the sum of \$9,868.30, which would appear to represent the principal and the interest accrued at that date. The railway company after admitting and confirming the debt, transferred and conveyed to the claimants as collateral security for the same, the bond of \$150,000. This bond was given, subject to a first charge of \$43,000 and interest in favour of the Honourable J. A. Chapleau,—as collateral security for the amount of \$9,868.30 and interest, subject further to releasing the said bond to the said company after the payment of the said amount.

“ The indebtedness is clearly admitted, the amount cannot, it seems, be now questioned. The bond is a valid one. (See. 59 Vict., ch. 60.) When the above-mentioned judgment was registered against the property, the latter stood upon the registers of the Registration Division in the name of the said G. C. Dessaulles, who was the whole time acting for the Bank of St. Hyacinthe, as appears upon the finding of claim No. 66.

“ The road was sold by the Bank of St. Hyacinthe free and clear from all debts, liabilities and incumbrances.

“ The bank was bound to discharge all incumbrances before being entitled to the purchase price from the Quebec Southern Railway. The claim of the Estate Chapleau, which stood in a similar position as the present one, was duly discharged by the bank. The present claim will be paid out of the amount coming to the Bank of St. Hyacinthe, the latter being liable therefor under its contract.

“ The sum of \$9,868.30, mentioned in the deed of agreement of the 9th December, 1895, will be allowed with interest from that date to the 8th November, 1905,

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deducting therefrom, however, any payment made on account.

“ But it may be said the claimants are not entitled to interest for more than five years. The holding of the bond as collateral security civilly interrupted prescription up to the time it was handed over to G. C. Dessaulles, to be used as part of the purchase price of the railway, and was up to that time an acknowledgment by the debtor of the right of the claimants against whom prescription might run. Art. 2227 C.C.

“ This principle was followed in the case of *La Banque du Peuple v. Huot*, (1) when it was held that the fact of the debtor who gave a pledge to his creditor assuring the payment of his debt, leaving this pledge in the hands of the creditor, constituted a constant and incessant acknowledgment of his obligation which interrupts prescription for such time as the pledge remains in the hands of the creditor.

“ The bond was parted with only in 1900 when the prescription began to run against the interest, and as interest can only be allowed up to the 8th November, 1905, date of the sale, no part thereof is prescribed.

“ The undersigned having been informed that the claimants, at the time the loan was made, had been given by Mr. Maze, President of the United Counties Railway, as collateral security for such loan, a certain number of shares of the said company, and for which the said claimants at the time of the sale, by the sheriff, of the United Counties Railway, threatened to file an opposition and thereby stop the sale, and that in view thereof the Bank of St. Hyacinthe, with moneys belonging to F. D. White, and at the request of the latter, paid on the 20th January, 1900, to the claimants the sum of \$6,300 for those shares and in reduction of the present loan.

(1) [1897], R. J. Q. 12 C. S. 370.

“This fact, having been communicated to the claimants’ solicitors, was duly confirmed, as will appear by their letter to him of the 10th November, 1906 filed herein, when they allege the following receipt was given therefor:

‘24th January, 1900.

Received from J. N. Greenshields the deposit receipt of the Bank of St. Hyacinthe in our favour for \$6,300 for 950 shares of the capital stock of the United Counties Railway, which we will transfer to F. D. White, or his nominee. We will assign to you our lien on the bond of \$150,000 for the \$6,300 to rank after we have been paid the balance of our claim against the road amounting to \$6,300. This deposit receipt when it matures three months from now we agree to take 25 per cent. of it in cash and deposit receipt at three months for the balance, if the bank so desires.

(Sgd) HANSON BROS.’

“From the statement of account between the bank of St. Hyacinthe and F. D. White, procured by the undersigned from the bank and which is filed with F. D. White’s claim under No. 12, it appears that the sum of \$6,300 was actually paid to Hanson Bros., by order of F. D. White, on the 20th January, 1900.

“This payment of \$6,300 was actually paid to Hanson Bros., by order of F. D. White, on the 25th January, 1900.

“This payment of \$6,300 is also given credit for by the Bank of St. Hyacinthe in its claim under No. 66 on account of the purchase price.

“Under the circumstances the present claim is allowed at the sum of..... \$9,868.30.

Upon which interest will be allowed from the 9th December, 1895, to the 24th January, 1900, at 6 per cent, amounting to ..... \$2442.98

Out of this sum of \$6,300 so paid on

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account on the 24th January, 1900, will be deducted the interest (see Art. 1159 of the Civil Code) ac- crued up to that date, leaving a balance of.....	3,857.02
which will be deducted from the principal.	<hr/>
leaving a balance of.....	\$6,011.28
with interest thereon from the 24th January, 1900, to the 8th November, 1905.....	2,087.99
	<hr/>
“Making a total sum of.....	\$8,099.27

which will be allowed in settlement of the claim and paid out of the collocation of the Bank of St. Hyacinthe (Claim No. 66) for the reasons above mentioned, and paid over to the claimants upon their giving a discharge of the amount of their claim upon the said bond.”

“The Bank of St. Hyacinthe, a creditor collocated herein, being dissatisfied with the above finding made upon the claim of Hanson Bros. by the Registrar’s Provisional Report, filed a contestation of the same within the delays assigned by the said Report. Hanson Bros. filed a plea in answer to the said contestation and joined issue upon the same.

“Although the Bank of St. Hyacinthe, in its present contestation, has added to the style of cause, after the name of Hanson Bros., the above mentioned creditors collocated herein, the name of “The Marble Savings Bank et. al.”, nothing has been said with respect to these parties, either by its pleading upon the said contestation by the said bank, in adducing evidence or in the argument of the case. No reason has, at any time, been disclosed why “The Marble Savings Bank et. al.” have been made parties herein, or which of their rights or

interests are affected by the present contestation. Therefore the undersigned will not mention the claim of The Marble Savings Bank et. al., beyond saying that presumably the Bank of St. Hyacinthe served them with the contestation, because these creditors would be materially affected in case the privilege of *bailleur de fonds* were given the bank for the full amount of its claim. Because in such a case there would be no moneys left or available to the bondholders (or those holding the bonds as collateral security as in the case of The Marble Savings Bank) on the old Quebec Southern, and such bondholders would only come in under section 4 of ch. 158, 4-5 Ed. VII *au marc la livre*, without any privilege, receiving thus only a very small percentage of their claim.

“The bank, by its pleadings, alleges, *inter alia*, (a) That the sale of the United Counties Railway by the Sheriff on the 25th January, 1900, has discharged any liabilities in virtue of the first mortgage bonds above referred to; (b) Because no valid hypothec could be created under the circumstances; (c) Claim not valid against United Counties Railway; (d) because the advances made by Hanson Bros. were made to Maze personally and not to the railway; (e) because any legitimate claim Hanson Bros. may have had has been paid long prior to the filing of the claim.

“With some few additions the claimants Hanson Bros. in answer to the contestation, re-assert their claim as mentioned in the Provisional Report.

“The circumstances under which the loan in question was made, are related in Maze’s evidence taken at San Francisco under “Commission Rogatory.” He says: ‘When we had finished ten miles of the road, we did not get the subsidies at once, but had to wait, and in order not to delay the construction, the Bank of St. Hyacinthe concluded to let us have some money. I did not exactly remember how much at that time. They began to be impa-

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tient about the Government not paying the subsidies and refused to give us any more money. That was only for a short time though, and, in the meantime, I needed money to continue the construction of the railroad and I borrowed that \$8,000 from Hanson Bros. and Samuel Finlay. Hanson Bros. asked me for my personal endorsement and I gave them that ..... the \$8,000 ..... was expended for the construction of the road.'

"The evidence further disclosed that at the request of the Bank of St. Hyacinthe he also gave his own note and guarantee when borrowing from the Bank of St. Hyacinthe.

"In what relation did Maze stand to the company at the time he made the loan? This should be determined, as before making any pronouncement we ought in fairness look at all the surrounding circumstances.

"Maze was the President of the United Counties Railway between 1892 and the end of 1899: he owned the whole road; was the engineer and manager, building the road without contract, at the expense of the company, which was practically himself, the interests being the same. He owned all the stock of the company, with the exception of a few shares he had given to a few persons to qualify them as directors.

"L. F. Morrison, a Director of the United Counties Railway, called as a witness by the bank, tells us in the course of his testimony that the United Counties Railway was originally incorporated by persons who subsequently sold all their interests to Maze, who, after a time, owned the whole thing. He further tells us Maze built the road, negotiated loans for that purpose and gave his personal guarantee for such loans.

"In whatever aspect we look at all these transactions, we cannot fail to see that Maze at the time was the individual owner of the whole enterprise, managing and conducting it by himself. As we will hereafter see, Maze

had full general power to borrow money for the purpose of the company. He was acting for the company, the latter receiving all the benefit of the moneys advanced, and when Maze did act, although seemingly contracting in his own name, he in reality contracted for the company. He placed in escrow in the hands of Hanson Bros. 95 per cent. of the stock of the company as collateral for the loans in question. Nothing stood in his way to have these transactions ratified by the company as he went along, if he cared; and nothing stood in his way to have them adjusted and ultimately ratified when the agreement of December, 1895, was entered into.

“It is alleged by the contesting party there was no privity of contract as between Maze and the company. But under Art. 1716 C.C. a mandatary who acts in his own name is liable to a third party with whom he contracts without prejudice to the rights of the latter against the mandator or principal. A person may act for and bind an undisclosed principal; it is only a question of proof. And we have evidence that the railway was Maze’s individual enterprise and business at the time, and that the company reaped the benefit of the loan in question herein. *Canada Central Ry. Co. v. Murray* (1). In acting as he did Maze was acting in the interests of the company and had clearly no personal interest conflicting with that of the company, since he was the company himself.

“Now considerable evidence has been adduced in going through the books of the claimants, Hanson Bros., and efforts made by the bank to show that the claimants had already been paid. Much has been said about the fact that the account was originally entered in Maze’s name and subsequently changed into the name of the United Counties Railway Company, which fact Mr. W. Hanson explains by saying that they had had private dealings with Maze before making loans to the railway, and as a

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(1) 8 S.C.R. 313, 320.

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matter of convenience continued the account in his name. However, in consideration of the view the undersigned takes of the case, it is deemed unnecessary to go into the merits of these entries made in the course of business, and the further question as to how far these entries are evidence unless they are corroborated by other circumstances which render it probable that the facts therein recorded really occurred. But disentangling the main question from the details of bookkeeping which have no bearing on the present decision, to my mind the case resolves itself into an interpretation of the agreement of the 9th December, 1895, which reads as follows, viz. :—

‘MONTREAL, December 9th, 1895.

MESSRS. HANSON BROS.,  
 Montreal.

DEAR SIRS.—As collateral security for the debt to you of this company amounting to \$9,868.30 and which debt is hereby admitted and confirmed, we hereby transfer and convey to you all our interest in and to one hundred and fifty thousand dollars of this Company's Bonds, and which constitute a first mortgage on that part of the company's road from St. Hyacinthe to Sorel more particularly described in a Deed dated 15th September, 1894, and which were issued on 15th September, 1894, under the terms of said above mentioned deed. This transfer, however, is subject to the following conditions :—

“(1) That the said Bonds shall be subject to a first charge in favor of the Honorable J. A. Chapleau of the sum of \$43,000 and interest thereon until paid.

“(2) That after you have been paid the amount of your claim of \$9,868.30 and interest thereon you shall release to this company any further claim on said bonds or on the proceeds of the sale of said bonds.

“(Sgd.) CHARLES D. MAZE,

“Prest. U. C. Ry.

‘[SEAL]

“(Sgd.) J. F. DAWSEY,

“Secy. U. C. Ry.’

“Maze and Hanson contend there was a special resolution passed authorizing this agreement and to borrow that money. The resolution would have been written out, signed and delivered to Maze by the Secretary and shewn to Hanson Bros. Hanson swears having seen it. After the resolution would have been so shewn to Hanson Bros., it would have been taken back to be entered in the Minute Book of the company. But it was not entered, although a blank page had been left for the purpose, and is still there to-day, as will appear by reference to the Minute Book. Maze says in his evidence he can only account for the resolution not appearing in the ordinary Minute Book of the company, that the Secretary was negligent in not entering it after it had been returned to him for that purpose.

“We have on the one hand Maze and Hanson swearing positively as to this special resolution, and we have Morrison and Brillon swearing they do not remember any such resolution, and that it cannot be found in the Minute Book. The practice in such cases is to accept the positive evidence in preference to the negative. And, perhaps, in view of the well known fact that Maze was the company, its manager, president and engineer, that the company was his own enterprise and that Morrison and Brillon were only two directors qualified by Maze himself, it is probable that Maze would not, in his financial transactions, pay much heed to these directors, would not always consult them, but take for granted they would approve what he was doing.

However, was that special resolution necessary in face of the resolution of the 21st January, 1891? That resolution reads, *inter alia*, as follows: ‘The President is appointed ‘manager, and is especially authorized to make, in the ‘name of the company and for its benefit, all purchase of ‘ties, sleepers, pickets for fences, rails, lumber, iron, and ‘to sign all notes, bonds, cheques, necessary contracts to

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‘that effect and to take all proper measures for the build-  
 ‘ing of the railway of the company.....’

“Again by the resolution of the 12th August, 1892,  
 the President is vested with further power. The follow-  
 ing extract therefrom reads as follows: ‘The President is  
 ‘authorized to make all necessary financial arrangements  
 ‘to procure (*se procurer*) to himself the funds required for  
 ‘the construction of *his* railway, with the Bank of St.  
 ‘Hyacinthe or all other banks and to guarantee all  
 ‘advances..... and to give and sign, in favour of the  
 ‘said bank all necessary promissory notes for the purpose  
 ‘of ascertaining such loans and advances made by the  
 ‘said bank and to have the same countersigned by the  
 ‘Secretary-Treasurer of the said company.’

“Now does not the whole case turn and rest upon this  
 agreement of the 9th December, 1895? Here is a docu-  
 ment signed by the President and Secretary of the com-  
 pany, bearing the seal of the company, by which the  
 latter recognized being indebted to Hanson Bros. in the  
 sum of \$9,868.30. The document is practically an account  
 stated as between the parties to this agreement. It is a  
 perfectly legal document in the hands of Hanson Bros.  
 which the company is estopped from attacking. Hanson  
 Bros. are not called upon to enquire into the regularity  
 of the internal management of the company—what Lord  
 Hatherley called the ‘indoor management’. The docu-  
 ment appears complete, and the officers subscribing thereto  
 appear also to have been acting within the scope of their  
 powers, and further the seal of the company is there  
 affixed to remove any doubt. See *Palmer's Com-  
 pany Precedents* (1). In the case of *Montreal Light, Heat  
 and Power Co. v. Robert* (2), Lord Macnaghten lays down  
 the principle that the power given to borrow by irregular  
 meetings does not affect third parties. The company is  
 estopped and cannot set up any irregularities depending

(1) 9th ed. pp. 68, 71.

(2) [1906] A. C. 196.

upon the internal administration of the company.' See also *Thompson v. Brantford Electric Co* (1) *Mahoney v. East Holyford Mining Co.*, (2) *Bernardin v. Municipality North Dufferin*, (3) *Re David Payne Co.*, (4).

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“For the reasons above mentioned, both on the present contestation and in the Provisional Report, the undersigned is unable to see any grounds upon which his finding in the Provisional Report should be altered or varied. The undersigned, therefore, finds that the contestation of the Bank of St. Hyacinthe is unfounded in law and dismisses it with costs.

Therefore the said claimants, Hanson Bros., are entitled to recover the said sum of... \$8,099.27  
 from which should be deducted the sum of 150.00  
 the amount of A. Geoffrion's costs on the  
 contestation between the plaintiff. ....  
 and the present claimants, leaving the net  
 sum of..... \$7,849.27”

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APPEAL BY HANSON BROS. UPON THEIR OWN CLAIM.

The following facts respecting the contestation by Hanson Bros., of the Provisional Report, of the collocations or findings made in their favour are taken from the final report of the Referee:—

“Being dissatisfied with the Registrar's Provisional Report with respect to the collocation therein mentioned in favour of Hanson Bros., the latter filed on the 8th March, 1907, a contestation of the same.

“The Bank of St. Hyacinthe joined issue upon the contestation and filed an answer thereto.

“The plaintiff, acting under the direction of the Court, in the interests of the creditors at large, also joined issue upon the contestation and filed an answer thereto, seeking to maintain the said Provisional Report, and asked for the dismissal of the contestation.

(1) 25 Ont. A. R. 340 ;

(3) 19 S.C.R. 581.

(2) L. R. 7 H. L. 869 ;

(4) [1904] 2 Ch. D. 608.

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“After hearing the evidence and what was alleged by Counsel aforesaid, the undersigned submits as follows:—

“The pleas to the contestation both by the bank and the plaintiff, respectively, have been treated separately and distinctly, and separate argument has been heard on each issue as between the bank and Hanson Bros. in the one case, and as between the latter and the plaintiff in the other case.

“Dealing first with the contestation as between Hanson Bros. and the bank, it should be stated at the outset that the evidence and the exhibits on this contestation by the Bank of St. Hyacinthe of the claim of Hanson Bros. have been, by consent, made common to both these contestations.

“For the reasons mentioned in the disposal of both the contestations by the Bank of St. Hyacinthe of the claim of Hanson Bros. (which is to be found at page 93), and of the contestation by the Bank of St. Hyacinthe of its own collocation in the Provisional Report (page 61), the undersigned finds that the contestation by Hanson Bros. of the claim of the Bank of St. Hyacinthe, whereby said Hanson Bros. seek to have the bank’s claim ‘rejected, set aside or amended or varied in such a way that they be collocated prior thereto for the full amount of their claim, interest to date, and all costs’ should be, and the same is, hereby dismissed with costs in favour of the Bank of St. Hyacinthe.

“2ndly: Coming now to the contestation as between Hanson Bros. and the plaintiff, it must be borne in mind that under an order of the 6th November, 1907, the evidence adduced by the Bank of St. Hyacinthe on its contestation of the claim of Hanson Bros. is to be used on the present contestation so far as it is applicable to the issue between the plaintiff and the said Hanson Bros.

“We find upon this contestation that Hanson Bros. ask to be collocated for the full amount of their claim and for a larger amount than that allowed by the Provisional Report. They contend that notwithstanding the fact that White, by a separate and distinct claim, seeks to recover the said sum of \$6,300, that it should be paid to them. Perhaps, in addition to what has already been said by the undersigned on the two above mentioned contestations, the following observations may be made with respect to this sum of \$6,300. Both claims of F. D. White and of the Bank of St. Hyacinthe have been filed by plaintiff as Exhibits P-1 and P-2, whereby it appears that White himself is claiming these \$6,300 and that they are given credit for in the claim of the Bank of St. Hyacinthe.

“Now, under the circumstances discussed elsewhere in this Report, we are met with a claim by White for these \$6,300 which were paid out, at his request, by the Bank of St. Hyacinthe out of White’s moneys at the time therein deposited, in full settlement of the purchase of 950 shares of the United Counties Railway, with the object of carrying out, without opposition, the sale by the sheriff of the United Counties Railway.

“Clearly the Quebec Southern Railway Company cannot be asked to pay twice. If White elects to claim direct, when he might, if he had cared, have claimed through Hanson Bros., it is not open to Hanson Bros. to claim the same amount. White having claimed, in his own name, his claim was fully entertained under his own contestation. It may here be said by way of explanation that the amount of his claim is really paid to him, as payment may be made by way of set-off or compensation as well as in specie, the former expression being the one used in the Civil Code.

“When White bought the stock from Hanson Bros. he did not only receive the stock but he also secured a claim

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against the company for these \$6,300; therefore, since Hanson Bros. agreed to give White such a claim against the company and since the company must pay White, Hanson Bros. cannot ask the company to pay them when the company is paying White.

“On the question of interest, the undersigned cannot see any good reason why Hanson Bros. should be treated differently and in a more favourable manner than the rest of the creditors and be allowed interest until payment. While a bond held as collateral security may interrupt prescription, as above-mentioned, the undersigned is not aware that an hypothec can have that effect. The bond in question was parted with at the time of the sheriff's sale of the United Counties railway, therefore, they cannot recover more than the amount found due to them under the judgment which has been registered against the railway, and which, although attacked, is taken in the present instance to avail as if in full force and effect and valid for all the purposes herein until set aside.

“For the above-mentioned reason, and also for those mentioned in the disposal of both the contestations by the Bank of St. Hyacinthe of the claim of Hanson Bros. (page 93) and of the contestation by the Bank of St. Hyacinthe of its own collocation in the Provisional Report (page 61), the undersigned finds that the present contestation by Hanson Bros. as between themselves and the plaintiff, whereby they seek ‘to have the Provisional Report set aside, amended or varied in such manner that in the report to be finally adopted the said Hanson Bros. may be collocated for the total amount of their claim with interest to date of payment and all legal and other expenses incurred by them’ should be and the same is hereby dismissed with costs *distracts* in favour of the said A. Geoffrion, Esq., K.C’, which said costs, for the purpose of avoiding delay, are hereby fixed at the lump sum of \$150, which said sum should be primarily deducted from the amount coming to the said Hanson Bros.”

September 23rd and 30th, 1908.

These appeals now came on for hearing at Montreal.

*F. L. Beique, K.C.*, for the Bank of St. Hyacinthe ;

*R. C. Smith, K.C.*, for Hanson Bros.

*A. Geoffrion, K.C.*, for the Minister of Railways and Canals.

*F. L. Beique, K.C.*, submitted that it was not open to Dessaulles to register any mortgage against the property. It is the French doctrine that a conventional hypothec cannot be created by a party who is not the owner or in possession. So far as judicial hypothec is concerned the question of registration does not arise at all. (Cites Arts. 2131 and 2034 C. C. P. Q.)

While the Bank of St. Hyacinthe did not desire to attack the validity of the judgment of 4th April, 1901, because the Chapleau claim had been recognized and paid, the bank refused to recognize Hanson Bros.' claim. This refusal went to the merits of the claim and was grounded as the fact that the advances were not made by Hanson to the railway but to Maze personally. There was no privity of contract between Hanson Bros. and the railway company.

*R. C. Smith, K.C.*, contended that the judgment recovered against Dessaulles on the 4th April, 1901, and registered on the 12th April, 1901, by which Dessaulles was ordered to execute a hypothec upon the United Counties Railway for the sum of \$150,000 in favour of Hanson Bros., became valid and binding upon the railway from the time of its registration because the railway was then a provincial railway and the property therein stood in the name of Dessaulles. Before the Act of 1905 (P.Q.), c. 27, a railway could be sold in the same way as any other immovable, and there was nothing to prevent a vendee from operating the railway without organizing a

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company. (Cites *Great Eastern Railway Company v. Lamb* (1).

By the deed, or agreement, of 11th January, 1900, Dessaulles was constituted a trustee for all concerned to purchase the Railway. The claim of Hanson Bros. on the bond (See 59 Vict. P.Q. c. 60) was part of purchase price so far as they were concerned. Dessaulles was bound to execute the mortgage referred to in the agreement, but he refused. If he had power to sell the railway, surely he had power to mortgage it and so carry out and execute the trust he had accepted.

As to the point that Hanson Bros. made the advances to Maze personally and without reference to the railway, the fact is that Maze held all the shares of the United Counties Railway except such as were given to qualify the directors. (Cites *Canada Central Railway v. Murray* (2); and 51-52 Vict. c. 95, s. 14).

When the Bank of St. Hyacinthe lent money to the railway, it always took Maze's note, and Hanson Bros. did the same.

A. Geoffrion, K.C., contended that the Referee's finding upon the Hanson Bros.' claim ought not to be disturbed. It is clearly in the interest of all the creditors. It would be inequitable to re-open the proceedings on the reference now and allow interest to Hanson Bros., or any other preferential creditors, to whom the Referee has not allowed interest by his final report.

CASSELS, J. now (October 31st, 1908,) delivered judgment.

The Appeals of the BANK OF ST. HYACINTHE against the claim of HANSON BROS. and the appeal of HANSON BROS. against the disallowance of part of their claim.

(1) 21 S. C. R. 431.

(2) 8 S. C. R. 313 at p. 325.

The facts connected with these appeals are complicated and it is necessary to unravel them to obtain a clear conception of the points involved.

I have set out in dealing with the former appeal the history of the railways.

It appears that prior to the sale of the United Counties Railway, Hanson Bros. were secured creditors of the United Counties Railway.

Prior to the sale by the sheriff taking place it was deemed necessary to avoid all opposition from Hanson Bros. and others, and accordingly an agreement was entered into, dated the 11th January, 1900, as follows:—

“ This Deed of Agreement made and executed at the City of Montreal, this eleventh day of January, 1900,

*Between :*

Lady Mary Louise King, widow and executrix of the late Sir Adolphe Chapleau, in his lifetime of the City of Montreal, duly assisted by the Honourable Mr. Justice Wurtele, Henry Barbeau and A. J. Brown, parties of the first part,

*And*

The Commercial Firm of Hanson Bros., and Samuel Finlay, all of the City of Montreal, herein represented by Edwin Hanson, parties of the second part,

*And*

The Bank of St. Hyacinthe, a body corporate and politic, herein acting and represented by its President, G. C. Dessaulles, for the purposes hereof duly authorized, party of the third part,

*And*

G. C. Dessaulles, of the City of St. Hyacinthe, party of the fourth part.

WHEREAS the said parties of the first, second and third parts are the secured creditors of the United Counties Railway,

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And whereas the said railroad is advertised to be sold by Sheriff's sale on the twenty-fifth day of January instant,

And whereas the said parties of the first and second parts have an interest in the bonds issued on that portion of the road running from St. Hyacinthe towards Sorel, in all about thirty-one miles ;

And whereas the said parties of the third part have an interest in the bonds issued upon the portion of the road running from St. Hyacinthe to Iberville ;

And whereas the parties hereto are desirous of coming to an arrangement for the protection of their several interests as they now exist ;

Now Therefore this Agreement Witnesseth :

1. That the said road shall be bought in at the Sheriff's sale by said party of the fourth part as trustee under the terms of the present agreement.

2. The said party of the fourth part will, immediately after obtaining from the Sheriff a title to the said road, execute a first mortgage to and in favour of the parties of the first part to an amount of the bond at present held by them with interest, to wit, about the sum of one hundred and fifty thousand dollars (\$150,000), and which said mortgage shall be held by said parties of the first part as collateral security for whatever amount of money there may be found to be due by the said railway company to said parties of the first and second parts, said mortgage to be executed upon that portion of the line presently covered by the bond of one hundred and fifty thousand dollars, and more particularly running from St. Hyacinthe towards Sorel and described in statute 52 Victoria, chapter 60.

3. The said parties of the second part to rank for the amount of their claims against said railway company immediately after the party of the first part, on the said mortgage to be given as aforesaid.

4. The said party of the fourth part will also execute to and in favour of the party of the third part a mortgage upon the remaining portion of the line, to wit, from St. Hyacinthe to Iberville, for the amount of the bonds held by them with interest, to wit, about two hundred thousand dollars (\$200,000).

5. The said party of the fourth part agrees to bid on the said road at said sale up to an amount sufficient to protect the interest of the parties of the 1st, 2nd and 3rd part. The expenses of the sale and whatever amount of money may be required to get the title to said road shall be borne by the parties hereto in proportion to their respective interests, which amounts so paid by them shall be added to their existing claims and will rank with the same priority.

6. The parties of the first, second and third parts will deliver to the said party of the fourth part their respective bonds for delivery to the sheriff as representing the purchase price of the road, if the same becomes necessary in order to settle for the purchase price.

7. The said trustee does not, however, undertake any personal obligation under the said mortgages so to be executed, which are given solely in his capacity as trustee, the said parties limiting themselves to their recourse against the said road for the payment of their respective claims in accordance with their respective privileges and such other recourses as they may have.

8. The said parties of the first and second parts agree to discharge any claims which they may have against the said road on receipt by them of the amounts respectively due to them and secured by the said mortgage of one hundred and fifty thousand dollars (\$150,000) with interest to date of payment thereof, and the present agreement shall not in any way be construed as vesting the said parties of the first and second parts with any right of property in the said road, their only claims being

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mortgage creditors to the amount of their respective claims, with interest.

And the parties hereto have signed.

(Sgd.) MARY L. CHAPLEAU.

J. WURTELE.

HY. BARBEAU.

G. C. DESSAULLES, Pres. B. of St. Hyacinthe.

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G. C. DESSAULLES."

The sale by the sheriff took place. The effect of this sale was to wipe out all claims against the railway including claims of bondholders of the railway prior to its sale. The effect of this sale, therefore, was to take away from Hanson Bros. any right they might otherwise have had against the United Counties Railway.

I have already pointed out that subsequently the Quebec Southern Railway Company was incorporated; that the East Richelieu Valley Railway became part of the Quebec Southern Railway; that subsequently the South Shore Railway Co. amalgamated with the Quebec Southern. The railway was operated for years and eventually was sold and the proceeds of sale are being distributed by this Court.

The terms of the agreement of 11th January, 1900, were not carried out by Dessaulles. Dessaulles failed to execute the mortgages as provided for in the said agreement. I do not understand how he could legally execute any such mortgage. He had, as I have pointed out before, only a qualified interest in the railway. It became necessary to obtain an act of incorporation. Failing to obtain such act the railway was to be dealt with by the Minister. Could the purchaser meanwhile charge and encumber the railway? I think not. However, he did not execute the mortgage and by the conveyance of 7th

August, 1900, he conveyed the United Counties Railway to the Quebec Southern Railway Co. This conveyance was not registered until 20th June, 1901. An action was commenced in the Courts of the Province of Quebec and a judgment was obtained on the 4th day of April, 1901, which reads as follows:—

“ Canada, }  
 Province of Quebec, } SUPERIOR COURT.  
 District of St. Hyacinthe. }

St. Hyacinthe this fourth day of April, one thousand nine hundred and one.

*Present:*

The Hon. LOUIS TELLIER, J.S.C.

No. 1.

Lady Mary Louise King, of the city and district of Montreal, widow of the late Sir Joseph Adolphe Chapleau, in his lifetime of the said place, herein acting in her quality of sole executrix and usufructuary under the last will and testament of the said late Sir Joseph Adolphe Chapleau, and the Honourable Jonathan L. C. Wurtele, one of the Judges of the Court of King's Bench, Henri Barbeau, Banker, and Albert J. Brown, Advocate, all three of the said city and district of Montreal, and herein acting in their capacity of advisers of the said Lady Mary Louise King, named as such under the will of the said late Sir Joseph Adolphe Chapleau, for the purpose of exercising any rights that they may have in said capacity.

*Plaintiffs;*

*vs.*

George C. Dessaulles, of the city and district of St. Hyacinthe,

*Defendant;*

*vs.*

Edwin Hanson of the city of Montreal aforesaid, and William Hanson of the town of Westmount, in said district, provincial agents, carrying on business together

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as such at Montreal aforesaid under the firm name and style of "Hanson Bros," and Samuel Finlay, also of the city and district of Montreal, gentleman,

*Mis-en-cause;*

*vs.*

The said Edwin Hanson, *et. al.*,

*Intervenants.*

The court having heard the parties, by their respective counsel upon the merits of the action and intervention, which have not been contested, having taken communication of the admissions fyled, examined the proceedings and deliberated :—

Considering that by a certain deed of agreement *sous seing privé*, made at the City of Montreal, on the 11th day of January, 1900, passed between the said plaintiffs, parties of the first part, and the commercial firm of Hanson Bros. and Samuel Finlay, parties of the second part, to wit, the *mis-en-cause*, and the Bank of St. Hyacinthe, a body corporate and politic, party of the third part, and the said defendant, party of the fourth part, the said defendant covenanted and agreed that he would purchase at sheriff's sale that was to be held on the 25th day of January then instant, a certain railway known as the United Counties Railway, and that he would immediately, after obtaining from the sheriff a title of the said road, execute a first mortgage to and in favour of the said plaintiff to an amount of a certain bond held by them with interest, to wit, for about the sum of \$150,000, which said mortgage should be held by the plaintiffs as collateral security for whatever amount of money there might be found to be due by the said railway company to them and to the *mis-en-cause*, the said mortgage to be executed upon that portion of the line then covered by the bond of \$150,000, and more particularly running from St. Hyacinthe toward Sorel and described in the Quebec statute, 59 Victoria, chapter 60, the said *mis-en-*

*cause* to rank for the amount of their claims against said railway company immediately after the plaintiffs on the said mortgage to be given as aforesaid, the expenses of the sale and whatever amount of money might be required to get the title to the said road to be borne by the parties to the deed in proportion to their respective interests, the whole upon the terms and conditions more fully set forth in the said deed.

Considering that the parties admit,

“(1). That the defendant received from the plaintiffs the mortgage bond for \$150,000, referred to in paragraph two of plaintiffs’ declaration, for the purpose of delivering the same to the sheriff as therein stated.

“(2). The defendant admits that he did purchase the railway at sheriff’s sale on the 25th January, 1900, and delivered to the sheriff in part payment of the purchase price said bond of \$150,000 as mentioned in paragraph three of plaintiffs’ declaration.

“(3). The defendant admits that he has not passed the deed of mortgage in favour of plaintiffs, though he has been requested to do so, as mentioned in paragraph four of plaintiffs’ declaration.

“(4). That the defendant has not, up to the time of service of process herein, furnished plaintiffs with a statement of the amount due to him, and referred to in paragraph six of plaintiffs’ declaration.

“(5). The defendant admits that the description of the portion of the said railway covered by the said mortgage bond and the said trust deed of the 11th January, 1900, is correctly mentioned and given in paragraph seven of plaintiffs’ declaration.

Considering that the parties admit that since the institution of the present action the defendant has rendered plaintiffs an account of the moneys expended by him in connection with the sheriff’s sale of the United Counties Railway, and has received from them the sum of (\$2,000)

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two thousand dollars toward the payment of the expenses of said sale subject to adjustment of reimbursement.

Doth maintain the action and order that the said defendant within twenty-four hours after the signification of the present judgment, do execute in favour of the said plaintiffs a good and valid hypothec upon that portion of the United Counties Railway Company's railway between the city of St. Hyacinthe and the town of Sorel, and which is now particularly known and described as (1) lot number 1408 on the official plan and book of reference of the parish of St. Hyacinthe, in the County of St. Hyacinthe; (1a) that portion of the road extending from official lot number 1408 to the first switch between the Grand Trunk Railway and the United Counties main line to St. Damase, in the City of St. Hyacinthe; (2) lot No. 1060 of the official plan and book of reference of the parish of St. Judes, in the County of St. Hyacinthe; (3) lot number 310 on the official plan and book of reference of the parish of St. Barnabé, in the County of St. Hyacinthe; (4) lot number 659 on the official plan and book of reference of the parish of St. Robert, in the County of Richelieu; (5) lot number 642 on the official plan and book of reference of the parish of St. Aime, in the County of Richelieu; (6) lot number 286 on the official plan and book of reference of the parish of St. Louis, in the County of Richelieu, said hypothec to be for the sum of \$150,000 and to be as security for whatever amount of money there may be found to be due by the United Counties Railway Company to the plaintiffs and to the *mis-en-cause*, the said *mis-en-cause* to rank for the amount of their claims immediately after the plaintiffs, and that failing the defendant executing such hypothec within such delay of twenty-four hours from the signification upon him of this judgment, that such judgment do avail in lieu and stead of such hypothec *a toutes fins que de droit*; the whole with costs against said defendant in any

event; and doth grant *acte* of the allegations and conclusions of the interventions, which are to the same effect as the allegations and conclusions of the action, but without costs as well in favour of the intervening parties as against them.

True copy.

(Sgd.) ROY A. BEAUREGARD,  
P. S. C.”

The Quebec Southern Railway Co., were not parties to this action. It is contended, however, that because the deed was not registered until the 26th day of June 1901, the United Counties Railway never passed to the Quebec Southern Railway Co.

I fail to understand how a judge can by judgment create a mortgage against a railway. As I have said Dessaulles could not have executed the mortgage himself. I agree with Mr Beique that in any event the provisions of the Code do not cover hypothec created by judgment. They seem to provide for a judgment for a specific sum of money and whatever effect such judgment may have as creating a charge in favour of the judgment creditor, the judgment creditor is entitled to the benefit. See Civil Code, Arts. 2024, 2037 and 2040. Also the case of *Connolly v. The Montreal Park & Island Ry. Co.* (1). Moreover in view of the provisions of the Railway Act and the statute of the Dominion incorporating the Quebec Southern Railway Co., Hanson Brothers were put on enquiry. I think the remedy of Hanson Bros. was against Dessaulles for breach of his covenant and that the claim should not have been entertained in these proceedings.

The Bank of St. Hyacinthe assume responsibility for the liabilities of Dessaulles created under this agreement of 11th January, 1900. Under the agreement with the Quebec Southern they are bound to give a clear title.

(1) Q. R. 22 S. C. 322.

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The bank in the proceedings before the Referee admitted that whatever claim was found due Hanson Bros. should be paid out of the amount found due to them. They have allowed the claim to be filed and presented and large expense incurred, and I think they should be held to their undertaking if Hanson Bros. so elect. If Hanson Bros. decline to accept the offer of the bank then I think their claim should be dismissed, with costs to be paid by them of such proceedings as were occasioned by their contestations.

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I think it better with the view to end the litigation to deal with the appeals.

The question raised by the bank is as to an item of \$2000 which item the bank claims should be disallowed on the ground that it was not open to Hanson Bros., or Maze to reapply this money.

I think the Referee was right in his finding. It is purely a question of fact, and I think the facts proved in evidence justify his finding.

I also think the finding of the Referee as to the amount due Hanson Bros. is justified by the evidence.

The appeal of the bank and the cross-appeal of Hanson Bros. are dismissed with costs.

*Judgment accordingly.*

Solicitor for plaintiff: *A. Geoffrion.*

Solicitors for defendants; *Greenshields, Greenshields & Heneker.*

Solicitors for Bank of St. Hyacinthe: *Beique, Turgeon & Beique.*

Solicitors for Hanson Bros.: *Smith, Markey & Skinner.*