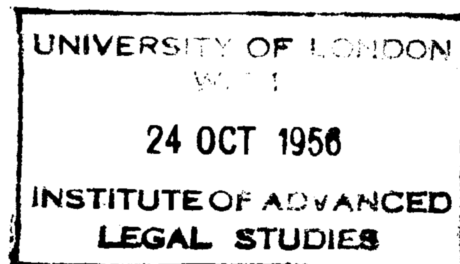
UNIVERSITY OF LONDON
24 OCT 1956
INSTITUTE OF ADVANCED LEGAL STUDIES
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In the Privy Council.

No. 33 of 1896.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN—JAMES BOGLE DELAP (individually, and as a shareholder on behalf of himself and all other shareholders of THE GREAT NORTH WEST CENTRAL RAILWAY COMPANY, except the Defendant John Arthur Codd) LOUISA H. MANSFIELD and THE GREAT NORTH WEST CENTRAL RAILWAY COMPANY (*Plaintiffs*) APPELLANTS,

AND

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

AND

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

CASE OF THE RESPONDENTS

ALPHONSE CHARLEBOIS, WILLIAM ANDERSON ALLAN and ROBERT J. DEVLIN.

1.—This is an Appeal by the Plaintiffs, by leave, from the Judgment of the Supreme Court of Canada in favour of the Respondents, dated the 28th March, 1896.

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

2.—This action (brought by James Bogle Delap individually, and as a Shareholder on behalf of himself and all other Shareholders of the Great North West Central Railway Company, hereinafter called "the Company"), Louisa H. Mansfield and the said Railway Company on the 6th day of December, 1892, was instituted for the purpose substantially of setting aside a Judgment, as fraudulent and void against the Plaintiffs (the Appellants), obtained by the

Record, p. 46.

Defendant, the now Respondent Alphonse Charlebois, in the Chancery Division of the High Court of Justice of Ontario on the 28th day of September, 1891, against theCompany, and to set aside an Order made thereupon by the same Court on the 29th day of February, 1892.

3.—There were various other claims made in the action, but none are important save as to the prayer that the lien given to the Respondent Charlebois, by the 4th Clause of his contract with the Company for the first 50 miles of the railway, and on the right to the land grant thereto appertaining, for the payment of the contract price for the work to be done under and in pursuance of the contract for the construction of the said 50 miles, should be declared to be *ultra vires* of the Company.

Record, p. 46, l. 35.

4.—The Judgment recovered by the Respondent Charlebois against the Company is for the sum of $622,226, being the sum agreed to by him in full of the balance due him on the contract he had from the Company for the completion of the first section of fifty miles of the Company's railway, and declaring that he had a lien on the railway rolling stock and plant and on the land grant appertaining to the said fifty miles for the amount recovered by the said Judgment.

Record, p. 29.
Record, p. 29, ll. 15, 22.

5.—The Defendants, with the exception of Baron Gifford and Curzon, are interested in the said Judgment as parties to whom portions of the money ordered to be paid thereby were payable. The Defendants Baron Gifford and Curzon are Defendants as Trustees under a certain Mortgage made by the Company for the purpose of securing an issue of Bonds made by it.

Record, p. 106.
Record, p. 110.
Record, p. 114.
Record, p. 26. l. 13.

6.—The Company was incorporated on the 6th day of November, 1886, by the Governor General in Council, under authority conferred upon His Excellency by Statute passed in that year, being Chapter 11, and by the same Statute the Governor in Council was authorised to grant to the Company lands to the extent of 6,400 acres for each mile of railway constructed for the distance of 450 miles mentioned in the Act.

51 Vic. (Canada), cap. 85.
49 Vic. (Canada), cap. 11.

7.—The original corporators of the Company were the Respondents Charlebois and Allan and the Defendants Clemow and Murray and one Charles T. Bate, the latter being ultimately succeeded by the Respondent Devlin who acquired his shares.

8.—Before accepting the Charter the original corporators entered into an agreement with Macdonald and Preston, also Respondents hereto, with the Defendant John Arthur Codd, and one Archibald Young, dated the 26th day of February, 1887, whereby they, Codd and Young, agreed to postpone any claims they might have against the Company, for the time and upon the terms in the said agreement particularly set forth. This agreement was rendered necessary by a condition under which the Charter for the Company was made, to the effect that the Company should be subject to all the then legal obligations of certain Companies which had theretofore been authorised and empowered to construct a railway between the same terminal points and which Companies were known as The Souris and Rocky Mountain Railway Company and The North West Central Railway Company.

Ex. 79, Vol. 3, p. 3.
Record, p. 238.
Record, p. 404.
Record, pp. 418-419.
Record, p. 425.
Record, p. 430.
51 Vic. cap. 85 (Schedule, sec. 27).

9.—On the 12th September, 1887, the same year, an agreement was entered into between the Respondents Macdonald and Preston and the Company with reference to the claims of said Respondents as to the liability of the Company, under the provision hereinbefore referred to, with reference to

Record, p. 51.
Record, p. 452, l. 12.
Vol. 3, p. 231, l. 25.

the obligations of the North West Central Railway Company and the Souris and Rocky Mountain Railway and asserting a claim in respect thereof for the sum of $126,000 and interest.

10.—These arrangements having been made with reference to the liability 5 to be assumed by the Company, in pursuance of the Act of Parliament under which the Governor in Council had power to grant its Charter, the Company on the date last-mentioned entered into a contract with the Minister of Railways, which provided that the Company should construct a railway for a certain distance and between the places therein named, and in consideration 10 therefor should receive the land grant which the Governor in Council was authorised to make of 6,400 acres per mile as therein provided.

Ex. 31, Vol. 3, p. 18, l. 28.

Vol. 3, p. 231, l. 32.

11.—The Company thereupon entered into a contract with one J. C. Sproule for the building and completion of the first 50 miles of the Company's railway; and, during the remainder of the year 1887 and the following year, a 15 large amount of work was done upon the said 50 miles, at an expenditure by the Company (then composed of the five original corporators) of $147,000 and upwards, including the $50,000 security deposited with Government upon the issue of the Charter.

Ex. 4, Vol. 3, p. 6.
Record, p. 205, l. 48.

Record, p. 59.

12.—At this time the Shareholders of the Company were—

20	The Respondent Allan holding	1,600	shares
	The Respondent Devlin	1,200	,,
	The Defendant Clemow	1,000	,,
	The Respondent Charlebois	700	,,
	and		
25	The Defendant Murray	500	,,
	In all ...	5,000	,,

of $100.00 each, or a total of $500,000 of subscribed capital. Upon their share capital about 30 per cent. had then been paid by them, and it was by means of this money that the Company had been enabled to give security for 30 the discharge of the liability it had assumed to the creditors of the old companies and also to prosecute the construction of a portion of the first 50 miles of its proposed line of railway.

Record, p. 201, l. 25.

13.—The transaction which gives rise to the litigation in this action has its origin in an agreement dated the 9th day of April, 1888, entered into by 35 the Respondents Allan, Devlin and Charlebois along with the Defendants Clemow and James Murray, since deceased, with the Defendant John Arthur Codd.

Record, p. 60.

14.—Codd had been concerned in, and asserted a claim against, the Souris and Rocky Mountain Railway Company and the North West Central Railway Company, which claim, if valid, was a liability 40 that the Company was answerable for, but which the Defendant Codd had agreed, on 26th February, 1887, not to press against the Company until at least 25 miles of the railway should be built and equipped and passed by the Government; the intention of that agreement of February, 1887, being that any claim held by Codd against either the Souris and Rocky Mountain Railway 45 Company or the North West Central Railway Company should not be preferred or pressed against the Company until the Company should have perfected such financial arrangements as would enable it to build and equip to the Government's satisfaction at least 25 miles of its proposed line of Railway.

Ex. 79, Vol. 3, p. 3.

Record, p. 246, l. 21.

15.—At the date of the agreement of the 9th April, 1888, the shareholders of the Company, who were parties thereto, had paid on account of their shares in or about $150,000 and a considerable amount of work had been done on the first 50 miles of the road which the Company had been chartered to construct.

Record, p. 59.

Record, p. 60.

16.—The terms of this agreement of the 9th April, 1888, were to the effect following :—The Defendant Codd had made an offer to purchase all the shares of the Capital Stock of the Company for the sum of £200,000 sterling, in consideration of which sum of £200,000 (to be paid as therein provided) the contracting shareholders were to assign and set over to the Defendant Codd all the shares of the Capital Stock of the Company, and further they were to contract and agree to complete the 50 miles of the Railway (already partly constructed) before the 1st day of August then following to the satisfaction of the Government of Canada. Further, the contracting Shareholders were to guarantee that their shares were clear of all liability imposed upon the Company by the terms of the 27th section of its Charter (that is to say, from the liability assumed for the debts and obligations of the Souris and Rocky Mountain Railway Company and of the North West Central Railway Company), and also from any liabilities incurred by them (the Shareholders) to the date of transfer other than the agreement made by the Company with the Dominion Government as to the construction of the railway.

17.—The payment of the £200,000 Sterling was to be made at the times and in the manner stated in the agreement, which it is unnecessary to set forth further than that upon payment of £50,000 thereof the stock or shares of the contracting Shareholders were to be assigned to the Defendant Codd or his nominees, and the contracting Shareholders were to enter into a contract to build, equip and complete the first 50 miles of the railway to the satisfaction of the Dominion Government, such work to be completed on or before the said 1st day of August then following. And, lastly, it was agreed that unless Codd should, within one month from the date of the said agreement or within such further time as might be thereafter accorded by the said contracting Shareholders, deposit in a Bank the sum of £50,000 for the purpose of carrying out the agreement, the same should become and be absolutely null and void for all purposes whatsoever.

Vol. 3, p. 23.

18.—In consideration of the execution by the Defendant Codd, of a release under seal dated 8th April, 1888, whereby he released the Company from all claims and demands which he then or ever had against either the Souris and Rocky Mountain Railway Company or the North West Central Railway Company, and for which the Appellant Company might, under its said Charter, be liable to him, the contracting shareholders, by a contemporaneous instrument, agreed to pay to the Defendant McMichael, as trustee, for the use of the Defendant Codd, the difference between $800,000 and £200,000 sterling, amounting to about $173,333, in the event of the sale of the said railway being effected for the latter sum, the said difference to be paid only out of and upon payment of the proceeds of such sale.

(6th March, 1888)
Record, p. 60.

19.—The Defendant Codd failed to carry out the terms of the agreement of the 9th April, 1888, which, by reason of his default, lapsed and became inoperative as against the contracting Shareholders; but after it had so lapsed, and without the knowledge of the Shareholders, the Defendant Codd entered into negotiations with various persons in London, which ultimately culminated

Record, p. 227, l. 1.
Record, p. 242, l. 21.
Record, p. 262, l. 1.

Record, p. 294.

in an agreement made in England between the Defendant Codd and the Appellant Delap bearing date the 20th July, 1889, whereby the Appellant Delap agreed to guarantee to the Defendant Codd the payment of the first sum of £50,000 mentioned in the agreement of the 9th of April, 1888, on the terms particularly therein set forth. In consideration therefor, Codd agreed to pay Delap the sum of £5,000 in cash, out of the proceeds of the first issue of Bonds which it was proposed by Codd that the Company should thereafter make, and to transfer to Delap $5,000 in shares of the Company's Stock; and further that, if the Appellant Delap should be called upon to pay the sum of £50,000, then Codd should pay him interest thereon at the rate of 10% per annum, and also an additional sum of £5,000 in cash.

Record, p. 9, l. 19.
Record, p. 297, l. 20.
Record, p. 300.

20.—This agreement between the Defendant Codd and the Appellant Delap was, as already stated, made *without* the knowledge or authority of the then Shareholders in the Company or of the Company, but by the Defendant Codd wholly upon his own responsibility; he, it is presumed, assuming that the Shareholders would be willing to carry out the agreement which they had made with him on the 9th day of April, 1888, notwithstanding that by the lapse of time the same was no longer binding upon them.

21.—The contracting Shareholders knew nothing of the said agreement of Codd with Delap; but, in the early part of the month of September following, the Defendant Codd, together with one Charles Richard Stevens, a member of a firm of English Solicitors (Stevens, Bawtree & Stevens) who accompanied him from England, intimated to the Respondents Charlebois, Devlin and Allan and the Defendant Clemow that he was desirous of an interview with them in Toronto for the purpose of seeing whether the agreement of the 9th of April, 1888, could not be carried into effect.

Record, p. 243, l. 6
Record, p. 225, l. 22.
Record, p. 243, l. 6.
Record, p. 243, l. 31.

22.—The Respondents and Defendant named in the last paragraph accordingly met the Defendant Codd and were then introduced to the said Charles Richard Stevens, whom they did not know at the time but who they understood was a capitalist or the representative of some capitalists to them unknown, and with whom they assumed Codd had some arrangements with respect to the railway. The result of the interview was that the contracting Shareholders, parties to the agreement of the 9th April, 1888, announced that they were not prepared, but on the contrary declined, to carry out the terms of that agreement, and that the contract between them and the Defendant Codd had lapsed and was to be considered at an end, as it in fact was.

Record, p. 245, l. 21.
Record, p. 263, l. 10.
Record, p. 420, l. 10.
Record, p. 405, l. 20.
Record, p. 445, l. 9.
Record, p. 420, l. 13.
Record, p. 243, l. 36.
Record, p. 230, l. 22.

23.—Thereupon the Respondent Charlebois entered into negotiations with Codd and Stevens upon his own account, and these negotiations ended in an agreement being come to between Charlebois and Codd and Stevens whereby the Respondent Charlebois (unknown to his co-shareholders) agreed to carry out the terms of the contract of the 9th of April, 1888; that is, to transfer the shares in the Company to the Defendant Codd and to undertake the construction or the completion of the construction, of the first 50 miles of the Company's railway, in consideration of the payment of the said sum of £200,000 sterling; but upon the understanding and agreement that the Defendant Codd, out of the $173,333, which he was to receive thereout, was to abate or accept $78,000 less, and was to receive $95,333 instead of $173,333, and that the Respondent Charlebois was to advance the money to pay for 1,160 tons of rails which Codd and Stevens had in anticipation shipped for

Record, p. 233, l. 1.
Record, p. 11.
Record, p. 244, l. 41.
Record, p. 252, l. 17.
Ex. 7, Record, p. 12.
Ex. 19, Vol. 3, p. 29.
Record, p. 246, l. 49.
Record, p. 211.
Record, p. 233, l. 15.
Ex. 117, Vol. 3, p. 271.

Canada and which were then lying at Montreal, the money so advanced by Charlebois to be returned to him on or before the first day of October then following.

Record, p. 244, l. 42.

24.—At this time the Respondent Charlebois had no authority to bind the Respondents Clemow, Allan or Devlin; but he undertook to arrange with 5 Clemow, Allan and Devlin that they would assign to him all their interests in the undertaking, provided that when the £50,000 cash was paid, Clemow, Allan and Devlin should take thereout such amounts as Charlebois should agree to pay them; and as to the other Shareholder Murray, since deceased, Charlebois was either to acquire his shares, or to get Murray to join with him 10 in carrying out the agreement with Codd which was then entered into.

Ex. 7, Record, p. 11, l. 42.

25.—It may be confidently stated that up to this point there is no substantial dispute between the parties to this litigation. The main facts in connection with the history of the transaction, which it has been necessary to state in order that the questions involved in the dispute may be properly 15 understood, are not in contest.

Record, p. 245, l. 8.
Record, p. 12.

26.—The agreement between the Respondent Charlebois and Codd was entered into on the 9th September, 1889, at the Queen's Hotel, Toronto; and it was then arranged that the parties should meet at the City of Ottawa the week following, for the purpose of seeing whether the agreement could be 20 carried out; and, if so, to have the shares transferred and the contract for the completion of the fifty miles executed.

Record, p. 248, l. 39.
Record, p. 250, l. 11.
Ex. 7, Vol. 3, p. 28, l. 35.

27.—Before parting, in Toronto, the said Charles Richard Stevens endorsed the agreement which had been then made between the Respondent Charlebois and Codd with an undertaking agreeing to prove to the satisfaction 25 of Charlebois' Bankers that all payments which would become due under the agreement would be paid at the times mentioned, that the rails would be provided as arranged, such proofs to be in such form as the Respondent Charlebois' Bankers might desire, and to be given within 30 days.

28.—Under these circumstances, Charlebois agreed to purchase the shares 30 of his former co-shareholders, at his own risk, with the expectation, no doubt, that he would himself enter into a contract with Codd and Stevens; but the transaction included two distinct bargains. One, in which Charlebois agreed to purchase the shares of the then four shareholders, other than himself; and the other a bargain for the transfer of shares by Charlebois to Stevens and 35 Codd, and the taking by Charlebois of a contract from the new Company for construction.

Record, p. 252, l. 14.

29.—The arrangement made at Ottawa on the 16th September, 1889, where the parties accordingly met, has formed the pretext for the Appellants' present action. 40

30.—The Respondent Charlebois had, on the 11th September, 1889, contracted with his fellow Shareholders Clemow, Devlin and Allan (and ultimately with the remaining Shareholder, the late James Murray) for the purchase of their shares at the price, in all, of $226,632.89 (of which $125,945.00 was to be paid to them in cash by Charlebois, and the balance of 45 $100,687.89 was to be secured to the satisfaction of the said four co-shareholders), and was therefore in a position to carry out the agreement he had made with the Defendant Codd, as hereinbefore stated; but, when the Respondent Charlebois, the Defendants Codd and McMichael and Charles

Record, p. 249-250.
Record, p. 420.
Record, p. 443, l. 47.
Record, p. 423, l. 11.
Record, p. 407, l. 11.

Richard Stevens tried to carry the said agreement into execution, a difficulty presented itself which for a time threatened to make it impossible for the parties to agree on the mode of carrying it out. The difficulty was that Stevens insisted that the stock of the Company, which Charlebois had agreed to transfer, 5 should be transferred as fully paid-up stock; the Respondent Charlebois on the other hand contended that, by his agreement of the 9th September, 1889 (founded on the Agreement of 9th April, 1888, except where modified by the last mentioned document), he had only agreed to transfer the stock as it stood, namely, as having had 30 per cent. paid thereon, but free, however, 10 from the liabilities referred to and set forth in the agreement of the 9th April, 1888. This difference represented the sum of $350,000, or such lesser amount as under the provisions of the Charter might be accepted by the Company for a cash payment of the uncalled amount unpaid upon the said shares. The Respondent Charlebois adhered to his understanding of the bargain, and 15 would not accept any interpretation of the agreement which would lessen (by more than a third) the price that he was to receive for his shares and for the contract work which he was to perform. In the end the difficulty was adjusted, the Respondent Charlebois receiving the £200,000 stipulated for in his agreement.

Record, p. 406, l. 40.
Record, p. 421, l. 9.
Record, p. 439, l. 6.
Record, p. 339, l. 26.
Record, pp. 594 and 606.
Record, p. 339, l. 5.
Record, p. 246, l. 21.
Record, p. 246, l. 44.
Record, p. 251, l. 8.

20 31.—The course adopted was suggested by the said Stevens, who, whilst supposed by the Respondents to be a capitalist, was in fact (as it subsequently appeared) acting as the Solicitor for the Appellant Delap and apparently for Codd. It was that the £50,000 to be paid down at the time, and which (as it now turns out) was the money guaranteed or loaned by the Appellant Delap 25 to Codd, should so far as required be paid to the Company in the names respectively of the old Shareholders as purporting to be payment by them of the amount remaining unpaid on their respective stock holdings, that the residue of the said £50,000 should be loaned to the Company, and that, after the transfer of all the shares to Codd and Delap, the Company should agree to pay 30 the whole of the £200,000 to the Respondent Charlebois for the work to be done by him in finishing the 50 miles of the railway already partly constructed and in earning the land grant appurtenant thereto.

Record, p. 407, l. 4.
Record, p. 360, l. 11.
Record, p. 245, l. 21.
Record, p. 263, l. 10.
Record, p. 420, l. 10.
Record, p. 421, l. 34.
Record, p. 595, l. 28.
Record, p. 277, l. 18.
Record, pp. 341-342.

32.—When this arrangement was come to, suggested by the said Stevens and acquiesced in by the Defendant Codd, the position of the parties interested 35 was as follows: the Respondents Devlin, Allan and the Defendants Clemow and Murray had agreed for the sale of their shares as they then stood, namely with 30 per cent. paid thereon, to the Respondent Charlebois for the sum, in all, of $226,632; the Respondent Charlebois was to receive for the agreement on his part to complete the first 50 miles of the railway, as well as in payment 40 for all the shares of the Company (including those acquired from his fellow Shareholders as well as those held in his own right with 30 per cent. paid thereon), the sum of £200,000 sterling, out of which sum Charlebois on his part was to allow Codd the sum of $95,333, as agreed on between Charlebois and him; and the Defendant Codd was the purchaser of all the shares and was 45 to be thereafter practically the owner of the Company and of the land grant appertaining thereto; and the Appellant Delap (unknown to the old Shareholders) was the lender of the £50,000 to Codd, Delap being then represented by his solicitor Charles Richard Stevens and his clerk, one H. K. Gregson.

Record, p. 357, l. 33.
Record, p. 359, l. 26.
Record, p. 361, l. 46,

33.—Whatever the legal aspect of the case may be, it cannot be suggested that there was any fraud or fraudulent design contemplated by any of the parties in the carrying out of the plan which Stevens proposed. All parties interested were represented on the occasion, and those who understood what was being done did not suppose for a moment that they were thereby participating in any fraudulent transaction or aiding in any fraudulent design. The Defendant Codd, along with Stevens, fully discussed the whole matter with the Respondents Allan, Devlin and Charlebois, and the Defendants Clemow and Murray, the then sole five shareholders and Directors of the Railway Company, with the result that the five shareholders in writing assigned their respective shares (but without covenant or warranty whatsoever) to Stevens and other nominees of Codd; whereupon Charlebois paid his former co-shareholders for their shares the $125,945 cash, already agreed upon with them, and agreed to secure them for the balance of the purchase price by orders on the Railway Company, as presently stated.

Record, p. 349, l. 15.
Ex. 5, Vol. 3, p. 35, l. 13.
Record, p. 423.

Vol. 3, p. 237-8.

34.—The form which the transaction took was, as appears from the minutes of the meeting of the Directors of the 16th September, 1889, as follows :—

Record, p. 421, l. 32.

35.—The Directors passed a resolution, reciting that the shareholders had offered to pay their stock in full less a discount of 25 per cent., which offer was accordingly accepted by the Board, and authorising the President and Secretary upon such payment to issue to the shareholders scrip or stock certificates to the full amount of the stock subscribed. At the same time Stevens, to whom the £50,000 had been entrusted by the Appellant Delap, made out, in favour of the Company's Bankers or bearer, five cheques for the sums following, namely :—

Record, pp. 331-3.

(a)	...	$45,900
(b)	...	$73,660
(c)	...	$54,420
(d)	...	$22,575
(e)	...	$31,620

and these cheques were deposited to the credit of the Company, thereby placing the aggregate amount thereof $228,175 as a balance to the Company's credit.

Vol. 3, p. 238-9.

36.—Then each of the Shareholders who were also Directors of the Company retired from the Board; first, the Respondent Allan, whose place was filled by the election of the said Stevens; next, the Respondent Devlin, whose place was taken by one J. A. B. Aird a nominee of Codd and Stevens; then the Defendant James Murray, replaced by the Defendant Codd; then the Respondent Charlebois, replaced by Stevens' clerk Gregson; then the Defendant Clemow, replaced by the Defendant McMichael, who was acting as Counsel for Codd and Stevens; and Stevens was thereupon elected President of the Company and the Defendant Codd Secretary and Treasurer.

Ex. 66, Vol. 3, p. 35.
Record, p. 253, l. 42.
Record, p. 421, l. 34.

The stock of the Company, by the direction of Stevens, was transferred to the said Stevens and to the other parties whose names have been mentioned as the new Directors of the Company.

Vol. 3, p 239, l. 3.

37.—Then, as recorded in the minutes, "Mr. Stevens, the President, "having offered to loan the Company the sum of $15,158.33 re-payable at call, "it was resolved to accept said loan." This sum was, in point of fact, the balance of the £50,000 sterling which was payable in cash to the Respondent Charlebois according to the terms of his agreement with the Defendant Codd.

38.—A contract was contemporaneously prepared between the Company and Charlebois whereby the latter agreed to cause the first 50 miles of the Company's line, already partially built, "to be constructed, equipped and "running to the satisfaction of the Minister of Railways and Canals and of "the Chief Engineer of Government Railways" (of Canada), "on the 1st day "of December, 1889, or, should good and satisfactory progress be made and "further time be requisite for the completion of said 50 miles and be accorded "by the Government, then on or before the 31st December, 1889;" for which the Railway Company agreed to pay the Respondent Charlebois the sum of £50,000 sterling, at the time of the execution of the contract, and the further sum of £150,000 sterling, upon the Minister of Railways and Canals being satisfied that the said 50 miles had been completed so as to comply with the requirements of the Company's contract with Government, and as in the said agreement more particularly set forth.

Record, p. 68, l. 11.
Record, p. 68, l. 27.

39.—This contract was accordingly passed, on motion of Mr. Gregson seconded by the Defendant McMichael, two of the new Directors; and, after the whole Directorate had been changed, was duly confirmed and the President and Secretary authorised to affix the Company's Corporate Seal thereto; and, further and as the last act at that meeting of the board, the President and Secretary were authorised to issue and sign a cheque to the Respondent Charlebois, for $243,333.33, being the currency value of the £50,000 sterling, to be paid in cash to him in pursuance of his agreement with Stevens and Codd.

Vol. 3, p. 239, l. 5.
Vol. 3, p. 239, l. 21

40.—The amounts (aggregating $226,632.89) payable by the Respondent Charlebois to the Respondents Allan and Devlin and to the Defendants Clemow and the late James Murray for their shares, were, as already stated, partly paid by Charlebois in cash on the transfer of their shares, and the balances amounting to $100,687.89 were settled with them by orders on the Company given by Charlebois in favour of his four co-shareholders respectively, payable so soon as, under the terms of the contract, he should be entitled to the payment of the £150,000 balance; and the Company on resolution thereupon duly accepted under the Company's seal these four orders or equitable assignments made by the Respondent Charlebois in favour of his former co-shareholders, payable "out of the *first* moneys arising from (said) construction contract."

Vol. 3, p. 239, l. 10.

41.—Thenceforth the Company passed under the control and was managed by Stevens and his representatives Codd becoming President on Stevens' departure from Canada in the following month of October. Codd was elected a Director and President of the Company with a full knowledge on the part of all the new shareholders of all the foregoing facts as to the interest of the Defendant Codd.

Vol. 3, p. 242. l. 4.
Ex. 66 (Eng. **Ex.** 60).
Vol. 3, p. 41, ll. 8-16.
Record, p. 610, l. 44.
Ex. 47, Vol. 3, p. 52. l. 41.
Record, p. 616, l. 33.

42.—The Respondent Charlebois on his part proceeded with the work of construction, or rather the completion of the work of construction, in pursuance of the terms of his contract; and by the 12th March, 1890, the work was with some trifling exceptions reported to be completed by the Government Chief Engineer. The Company, availing itself of this report, thereupon applied for and obtained an Order-in-Council on the 19th March, 1890, allotting the land grant of 320,000 acres to the Company, in accordance with the conditions of the contract between it and the Government.

Ex. 34, Vol. 3, p. 89.
Ex. 134, Vol. 3, p. 92.

Ex. 34, vol. 3, p. 116

43.—Finally, on the 10th August, 1890, the Chief Engineer of the Government made a further report that the section of the road which had been under contract was completed, equipped and in good running condition, and the Minister of Railways and Canals reported his satisfaction therewith.

Record, p. 260.
Record, p. 263, l. 36.
Record, p. 264, l. 4.

44.—Beyond the sum of $243,333 paid to the Respondent Charlebois at 5 the time the contract was entered into, as above stated, the only payment received by him on account of his contract were rails of the value of $129,574; and, although repeatedly sought by him, he was unable to obtain any further payment from the Company. He was hence obliged to institute an action against the Railway Company for the recovery of the balance due him upon 10 his contract. This action was not however commenced until the 11th September, 1891, although his contract was completed, according to the strictest interpretation of the contract, in the month of March, 1890, and certainly by the 10th of August of that year.

Record, pp. 351, 353.
Ex. 92, Vol. 3, p. 264

45.—From the time that the contract was, as contended by Charlebois, 15 completed, he was demanding payment, and was at arm's length with the Company, who was availing itself of various pretexts for the purpose of evading or delaying the payment claimed to be due by it to the Respondent Charlebois.

Record, p. 350, l. 34.
Record, p. 350, l. 45.
Record, p. 351, l. 37.
Eng. Ex's, 5 and 6.
Vol. 3, p. 102.
Vol. 3, p. 117.
Vol. 3, p. 262.

46.—During all this period while the Company in Canada had been managed by Defendants Codd and McMichael, Q.C., and those who were 20 associated with them, who were in constant communication with the Appellant Delap's English solicitors, the Company was endeavouring to raise money by the sale or hypothecation of its Bonds; and it is perfectly clear upon the evidence that, from the time that the agreement was made between the Appellant Delap and the Defendant Codd, it was assumed by both these parties 25 that, so soon as the Company became entitled to the land grant on the completion of the first 50 miles of the railway, the Bonds of the Company could be sold and the Company thereby placed in funds to discharge its liabilities.

Record, p. 10.
Vol. 3, p. 270.
Vol. 3, p. 272.
Vol. 3, p. 278.
Vol. 3, p. 279.

47.—Out of the proceeds of these Bonds it was further contemplated by Codd and Delap that Codd should pay to the Appellant Delap the advance he 30 had made. Delap's transaction was to be in the nature of a loan, and it was apparently not intended that he was to be other than a mortgagee of the shares of the Company; but, since unfortunately the Bonds of the Company could not be disposed of, there was no means whereby the Company could meet its liabilities, nor were funds otherwise forthcoming to enable Codd to repay the 35 advances obtained by him from the Appellant Delap.

Vol. 3, p. 222.

48.—On the 30th July, 1891, Stevens transferred 1,575 of the shares held in his name to the Appellant Delap and 1,625 to one Arthur Codd. He had already on the 18th December, 1889, transferred 1,250 of his shares to one J. G. Bristow, on the request of the Appellant Delap's solicitors, so that it 40 will be seen that the stock of the Company had been held by the Appellant Delap, his solicitor Stevens, and Codd, or those in trust for them, during the period that the Respondent Charlebois was performing his contract.

Record, p. 68, l. 23.
Record, p. 69, l. 8.

49.—It was one of the terms of the contract with Charlebois for the construction of the railway that Charlebois should procure and pay for the 45 land for the right of way of the 50 miles of railway and build the railway thereon, and that he should have, in addition to such protection and lien (if any) as the law allowed, a full and complete lien and first charge upon and over the said first 50 miles of railway and its appurtenances, and on the

Company's right to the land grant thereto appertaining, together with the right of operation of said railway, and upon the whole property, enterprise and undertaking including the works already in course of completion, until he should be paid the full sum of £150,000 sterling; and the Respondent Charlebois purchased and procured the lands comprising the right of way (taking deeds thereof to and in the name of the Railway Company) and as his security, had retained possession of the right of way and of the railway for the work done by him thereon, and the whole thereof was in his possession at the time that he brought his action against the Company in the Chancery Division of the High Court of Justice on the 11th September, 1891, the Railway Company having itself already commenced an action in the same Court against the Respondent Charlebois, claiming damages for non-completion of his work and for other alleged breaches of contract.

- Record, p. 352, l. 15.
- Record, p. 494, l. 41.
- Vol. 3, p. 179, l. 34.
- Record, p. 386. l. 1.
- Vol. 3, Ex. 98, p. 131.

50.—On the 12th day of September, 1891, the Respondent Charlebois applied for and obtained an interim Injunction against the Appellant Company, restraining it from transferring or in any way encumbering the 320,000 acres allotted to it by Order in Council, and from dealing with the said land grant in any way, or from issuing or negotiating Mortgage Bonds or Debentures upon or purporting to cover the first 50 miles of the Company's railway. When the motion to continue the said injunction came on before the Court, and after a great deal of evidence had been taken by affidavit and cross-examination thereon, it was, at the suggestion of the learned judge before whom the same was heard, turned into a motion for Judgment, under the rules of Court in that behalf; and the Company, as well as those who claimed to have rights superior to the Respondent Charlebois so far as his claim to have a first charge upon the said roadbed and right of way was concerned, were duly represented. The discussion having lasted for several days before the learned judge, and some of the matters in dispute appearing to be as to whether or not the Respondent Charlebois had fully completed his contract and whether his right of lien was to prevail against the Respondents Macdonald and Schiller and Preston, Sub-contractors, the disputes were (at the suggestion of the Court) adjusted and determined between the contending parties; and a judgment in pursuance thereof was entered up, whereby the Court declared that the Respondent Charlebois had, as contractor for the 50 miles of railway, 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, being the amount agreed upon as due to the Respondent Charlebois, which said sum was directed to be paid on the 31st day of March, 1892, at the bank of Montreal, in the city of Ottawa; and, at the request of the said Respondent Charlebois, the parties interested in connection with the said work were to be paid out of the said sum in the order of priority mentioned and set forth in the said Judgment.

- Record, p. 27.
- Record, p. 354, l. 10.
- Vol. 3, Ex. 76, p. 132.
- Record, p. 352, l. 1.
- Record, p. 353, l. 40.
- Record, p. 354.
- Record, p 360, l. 23.
- Record, p. 362, l. 16.
- Record, p. 265, l. 57.
- Vol. 3, Ex. 80, p. 134.
- Record, p. 466, l. 30.
- Vol. 3, Ex. 81, p. 161.
- Vol. 3, Ex. 82, p. 173.
- Record, p. 468, l. 26.
- Vol. 3, p. 170, l. 23.
- Record, p. 29.

51.—The Defendant Codd was at this time the President of the Company, being in that position by the authority of Stevens and those acting for the Appellant Delap, and his interest was adverse and opposed to the Respondent Charlebois, as under the arrangement if it had been carried out as it was intended, he was in effect to have become the owner of the stock and bonds of the Company; although, as was known to Stevens prior to the 9th September, 1889, Codd was to receive out of the £200,000 sterling the sum of $95,333 from the Respondent Charlebois so soon as the latter was paid the full contract

- Vol. 3, p. 242, l. 4.
- Record, p. 469, l. 25.
- Vol. 3, p. 41, l. 16.
- Record, p. 610, l. 44.
- Vol. 3, p. 52, l. 40.
- Record, p. 617, l. 6.

price payable to him for the transfer of the shares in the Company and the completion by him of the construction and equipment of the first 50 miles of the Company's railway ; and provision is accordingly made in the said Judgment for the payment of the balance due Codd, as adjusted between them.

Record, p. 30, l. 28.

52.—By the Judgment it was also decreed and ordered that the Bonds were to be deposited forthwith, or to remain if already deposited, with the Safe Deposit Company, No. 1 Queen Victoria Street, London, England, under the terms of the Judgment, and were not to be pledged except to pay Respondent Charlebois' claim. 5

Record, p. 335, l. 19.
Record, p. 351, l. 38.
Record, p. 353, l. 40.
Record, p. 354.
Vol. 3, p. 161.
Record, p. 466, l. 28.
Record, p. 364, l. 34.

53.—Although the Judgment was ultimately entered by consent of 10 Counsel, it was after evidence taken as already stated and after prolonged argument and negotiations, in which the matters in difference were fully discussed by Counsel for the contending parties respectively. And, notwithstanding that the Respondent Charlebois had completed his contract to the satisfaction of the Minister of Railways and Canals, which entitled him 15 under its terms to the payment of the balance of the price agreed upon, yet he nevertheless abated no less a sum than $100,000 (as estimated by the Company's counsel) from the full amount to which he contended he was entitled ; and also released a contract he then held under advantageous terms from the Company for the construction of a second 50 miles of the Company's 20 railway, and surrendered possession of the 50 miles of railway which up to that time he had retained.

Ex. 87, Vol. 3, p. 179, l. 32.
Record, p. 257, l. 31.
Record, p. 365, l. 14.
Record, p. 495.
Ex. 24, Vol. 3, p. 65.
Record, p. 364, l. 22.
Record, p. 495, l. 3.

Record, p. 335. l. 19.

54.—A leading Counsel of the Ontario Bar was acting for the Company in the case, and he reported the result of the Judgment as entered, to the President of the Company, as a triumph in many respects for the Company's 25 interest. Counsel pointed out, as the fact was, that under its terms the Court directed that the Company should have immediate possession of all the property ; and that, as the contract was not completed, there was deducted from the claim of the Plaintiff, the Respondent Charlebois, over $100,000 ; and that the Company had been accorded six months' further time to pay 30 Charlebois the reduced amount coming to him, Charlebois, upon giving up possession being given a charge upon the property for the payment of this reduced amount.

Ex. 87, Vol. 3, p. 179.

Record, p. 353, l. 43.
Record, p. 361, l. 46.
Record, p. 362, l. 16.
Record, p. 466, l. 40.
Record, p. 469, l. 29.

55.—It may, therefore, be asserted without fear of contradiction that this Judgment was obtained without collusion on the part of the Company or its 35 representatives, and in spite of and after the strongest opposition which the Company was able to offer against the claim of the Respondent Charlebois.

56.—It has been urged indeed that as the Defendant Codd had an interest in the contract price, that is to say an interest in a sum of money not to be paid to him until the amount was received by the Respondent Charlebois, that 40 his interest was in that respect adverse to that of the Company of which he was President ; but it must be remembered that Codd's interest was well known to Stevens, the solicitor for the Appellant Delap ; was not concealed in any way ; and that, notwithstanding it, Codd had continued to oppose in every way the payment to the Respondent Charlebois of the amount claimed by him 45 for the work he had performed.

57.—The Company, having disobeyed the order of the Court in not fulfilling the requirements of the Judgment of the 28th September, 1891, in that the bonds of the Company had not been deposited as directed within the

Record, p. 355, l. 34.
Ex. 80, Vol. 3, pp. 184 to 205.

time limited, a motion was made on the 15th February following, on behalf of the Respondent Charlebois, for an Order for the immediate payment of the sum directed to be paid to him by the Judgment. This motion was vigorously opposed by Counsel upon material supplied by the Defendant Codd and under instructions from Stevens, and evidence was again taken by oral cross-examination on affidavits filed; but in the end the motion was successful, the Court declaring that default had been made by the Company in not depositing the Bonds as directed by the September Judgment, in consequence of which the Court adjudged that the $622,226 and interest was due and payable forthwith, and that the Respondent Charlebois was entitled to enforce his rights and remedies under the Judgment forthwith. From this order or judgment the Railway Company appealed to the Chancery Divisional Court, which dismissed their appeal upon the ground that it had no jurisdiction; whereupon the Company gave notice of Appeal from said judgment to the Court of Appeal for Ontario, but did not further prosecute its appeal.

Ex. 90, and Ex. 91, Vol. 3, p. 206.

Record, p. 379, l. 8.

Record, p. 379, l. 17.

58.—By this final judgment of 29th February, 1892, the Court further ordered that the Company should forthwith deliver up to the Respondent Charlebois immediate possession of the constructed line of its railway and of all the rolling stock, property and assets theretobefore taken possession of by the Company under the September Judgment, and further directed the sale of the said line of railway and land grant, and perpetually enjoined the Company from negociating, pledging, selling or dealing with the Bonds or Debentures belonging to the Company or in any way dealing with the land grant of 320,000 acres allotted to the Company.

Record, p. 35.

59.—Including the advance made to the Defendant Codd of £50,000, the Appellant Delap claims to have paid out altogether the sum of £134,139, made up against other items of a sum paid to Codd, being the amount he had agreed to advance in order to release the rails which had arrived in Montreal in September, 1889. It appears that the Appellant Delap was unable to make further advances, and was in danger of losing the large sum he had already paid. Under these circumstances, he appears to have been advised that his only hope of recovering the moneys he had paid or for which he had become responsible was by contending that he had been imposed upon by what had occurred at Ottawa in September, 1889, under the direction of his own solicitor Stevens. He accordingly in 1892 commenced this action in his own name, and in that of the Company without its authority, and he also took proceedings against Codd to have such of the stock as was held in Codd's name transferred to him (Delap). This he succeeded in doing; and, having thus obtained the control of the Company in 1893, elected himself and his nominees directors and continued the prosecution of this action, thereby seeking in effect (while retaining the stock which his solicitor Stevens had obtained from Charlebois for him and all benefit of the arrangements of September aforementioned) to nevertheless at the same time repudiate in the name of the Company the whole transaction, at the expense of these Respondents and the other parties thereto.

Record, p. 382, l. 40.

Vol. 3, p. 258.

60.—The action came on for trial at the Ottawa Sittings of the Court before the Chancellor of Ontario on the 31st day of October, 1893, and was continued on the 1st to the 4th November, inclusive, and subsequently at Toronto on the 13th to the 17th days of November, Judgment being then

Record, p. 122.

reserved until the 25th of November, 1893. The Chancellor then delivered Judgment to the effect that the September Judgment was $310,867 in excess of the amount due by the Company, but that the stock of the Company was chargeable with the amounts of $226,000 and $37,000 for the benefit of the former Shareholders, the Respondents Charlebois, Allan and Devlin and the Defendants Clemow and Murray, in the proportion in which they were entitled to the stock; and further it declared that the Judgment in question, so far as it allowed to the Respondent Charlebois the lien on any property of the Company other than the land grant of 320,000 acres, was void.

Record, p. 129.
Record, p. 133, l. 43.
Record, p. 124, l. 10.
Record, p. 128, l. 19.

61.—The formal judgment, which was not entered up until the 22nd of January, 1894, in some respects differed from the Judgment as originally pronounced by the learned Chancellor, more especially in reserving all questions as to what rights, charges and interests the parties were respectively entitled to, in or upon the subscribed capital stock of the Company until after the Master had made his report, instead of charging it with the amounts due to the original shareholders, as first proposed.

Record, p. 123, l. 37.
Record, p. 124, l. 10.

62.—The learned Chancellor's reasons for the conclusion which he reached were that the sums of money, for which he held that the Judgment was in excess of the true amount due by the Company to the Respondent Charlebois, were moneys directed to be paid by the Company *ultra vires* of its powers, as not being moneys for the purpose of "making, completing, and equipping and maintaining the railway," but were sums added to the contract for the purpose of paying the balance due to the Company on its subscribed stock. The Chancellor realizes that "the effect of this" (to quote his own language) "will be to leave the stock in the hands of Delap unpaid for; but," he proceeds, "the true way of working out relief is to let this claim for the "purchase money of the stock remain as a personal or individual claim against "Delap;" and, he added, "Delap being a joint Plaintiff with the Company, "there arises no difficulty on this head. The stock should also be charged "with this amount." It is difficult to understand why the learned Chancellor did not adopt the more natural and much simpler course of determining that the stock in Delap's hands was unpaid beyond the sum of 30 per cent. thereon.

63.—The other conclusion upon the facts, and it is submitted the proper finding, would be that the stock was not under the circumstances really paid up in full, but that there remained and remains due thereon the 70%, which, by the scheme suggested by Stevens, was credited as being satisfied by the discount allowed and by a payment which in truth and in fact was not made.

Record, p. 152.

64.—From the Judgment of the learned Chancellor an appeal was made by the Respondent Charlebois and the other the Respondents herein to the Court of Appeal, and the appeals to the Court of Appeal were argued on the 14th to the 21st November, 1894, inclusive; and, on the 14th of the following month of May, Judgment was delivered by that Court; the result of which was that, as the four Judges constituting it were equally divided, the appeal was dismissed, except in so far as the claim of the Appellant Delap being entitled to hold the Bonds as the pledges thereof was concerned, as to which the Court of Appeal determined that the Bonds had not been pledged to the Appellant Delap and that he had no lien or charge thereon, and the action of the said Appellant to enforce the same was dismissed.

Record, p. 153.

65.—The learned Chief Justice of the Court of Appeal, in substance agreed

with the views of the learned Chancellor, and Mr. Justice Osler adopted the Chancellor's judgment. Mr. Justice Burton and Mr. Justice Maclennan, on the other hand, held that the appeals ought to be allowed, Mr. Justice Burton being of opinion that the alleged payment of the stock was, as between Charlebois and the Company in this action, perfectly immaterial, however it might affect the liability of other parties; and further that, as all the transactions including the contract made by the new Board of Directors, had been concurred in by the Shareholders, it was difficult to understand how they could have been at any time impeached on the ground of fraud, still less on the ground of *ultra vires*, and he felt at a loss to see how any one was hurt by the transaction. Mr. Justice Burton pointed out that the shares so said to be paid up were transferred to the Appellant Delap or to his agent Stevens, who thus have the benefit of such payment; but that the balance due to the Shareholders on the sale has never yet been paid. And, finally, that under no circumstances could it be said that there was any diversion of the Company's funds and that the Judgment recovered by the Respondent Charlebois could not be impeached except on the ground of fraud, of which there was no evidence. The learned Judge further reasoned that the Judgment was conclusive, not merely as to the amount due but also as to the right of the Company to contract for the lien in the Respondent Charlebois' favour, which the Court decreed should be enforced.

Record, p. 176, l. 20.
Record, p. 162.
Record, p. 174.
Record, p. 168.

66.—Mr. Justice Maclennan was of the opinion that upon the facts of the case the construction contract could not be said to be *ultra vires* of the Company. It might, he said, be improvident, the contract price might be excessive, it might even be fraudulent; but it was not *ultra vires*. And, further, the learned Judge finds that it was the purchasers Codd and Stevens who were to make the shares paid up shares by means of the discount and the payment of the money paid by them to the credit of the Company; that the Appellant Delap must assume responsibility for all that his agent Stevens did in acquiring the shares and whatever the Company could do in its corporate capacity; that the right of the Company, if that right had been prosecuted immediately after the 16th September, 1889, was against these two Directors Codd and Stevens to make them account to the Company for the value of the shares so bought with the Company's money, but that there was no right or remedy against the Respondent Charlebois, who was entitled to receive all the money that was payable to him.

Record, p. 179, l. 19.
Record, p. 180, l. 32.
Record, p. 180, l. 41.

67.—From this decision of the Court of Appeal an appeal was taken by Charlebois and others to the Supreme Court of Canada; and the case was argued before the Supreme Court on the 6th to the 15th November, 1895, judgment being reserved. On the 28th March, 1896, Judgment was delivered by the Supreme Court allowing the appeal and dismissing the Plaintiffs' action.

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

68.—The Court consisted of five judges, of whom Mr. Justice Taschereau, Mr. Justice Sedgewick, Mr. Justice King and Mr. Justice Girouard concurred in allowing the appeal and dismissing the Plaintiffs' action (subject to the deduction from the original judgment of the amount payable to Codd), Mr. Justice Gwynne dissenting and being of opinion that the appeal should be dismissed and the judgment of the Chancellor varied.

69.—The formal judgment of the Supreme Court of Canada (28th March, 1896), from which the present appeal is taken, declared (1) that the Company's

bonds were not validly pledged to either of the present Appellants Delap and Mrs. Mansfield and that their action to enforce payment thereon of their alleged advances to the Company should be dismissed; (2) that the $130,000, payable to the Defendant Codd by the terms of the Judgment of 28th September, 1891, belongs to the Railway Company and not to Codd, and that 5 the said sum be not recoverable under the judgment against the Company; (3) and that in other respects the appeal of the present Respondents to the Supreme Court should be allowed and the Plaintiffs' action dismissed.

Supreme Court (Canada) Reports. Vol. 26, p. 238.

70.—Mr. Justice King delivered the judgment, in which the majority of the Judges of the Supreme Court concurred. Although he agrees with the 10 opinion of the learned Chief Justice of Ontario that the original contract was *ultra vires* of the Company, *pro tanto*, as respects the price of the shares which he holds was included therein, he is of opinion that "the contract has become "merged in the judgment rendered upon it," . . . . . "that the judgment "forms a new obligation having a character of its own"; that "it is not *ultra* 15 "*vires* of a Company to pay the amount of a judgment recovered against it"; that "on principle it does not differ, apart from fraud or collusion, if the "Company for one reason or another abstains from raising the question of "*ultra vires* . . . . and the Company is bound the same as others by what it "does and by what it leaves undone; that between the same parties or privies, 20 "and in respect of the same cause of action, the judgment binds not only as to "defences in fact raised, but as to such as might have been raised, ... "notwithstanding any change in its governing body; and that the effect of a "judgment must be the same whether the claim sued on is *ultra vires* or not." The learned Judge points out that "none of the judges have found fraud or 25 "collusion in respect of the obtaining of the judgment; and that the Company "was not, without its fault, prevented from presenting its case." As to the Contractor's lien, Mr. Justice King (and the other three judges who concurred with him) agree with the judgments of Mr. Justice Burton and Mr. Justice Maclennan in the Court of Appeal; and, further, that Delap and Mrs. 30 Mansfield had no title to the Bonds.

Supreme Court (Canada) Reports. Vol. 26, p. 226.

71.—Mr. Justice Gwynne, dissenting, holds that, as the action was framed the question of whether Delap was a holder and pledgee of bonds of the Company ought not to be determined herein. The learned Judge also holds that it was no concern of the re-organised Company, nor of the persons 35 forming it, what amount Charlebois might have to pay to his co-shareholders for their shares, "nor as to the manner in which, nor as to the funds out of "which, he should pay such amount," nor as to what amount of profit Charlebois would probably derive from his contract, if they did not consider his price excessive. It might well be, the learned Judge adds, that the price 40 Charlebois had to pay for his co-shareholders' shares would be more than he would be prepared to pay in cash, and he might require such payments to be deferred until he had built the railway and had received the full amount then to be paid to him. Further, that the question whether Charlebois was to transfer the shares as paid-up, or otherwise, was not material, for Stevens did 45 pay them up with Delap's money, but not on Charlebois' behalf. Mr. Justice Gwynne adds that there is "no ground for imputing fraud to Charlebois, or to "any person, as regards the amount paid by Charlebois for the shares, or "for avoiding the contract with the Company as *ultra vires* in whole or part,"

or by reason of Charlebois having re-imbursed himself in his contract price for the amount he had to pay for the shares. The learned Judge, however, in dissenting, *holds* that the fact of the amount payable to Codd being included in
5 the judgment against the Company constitutes a fraud on the Company, "as "the consent judgment appears to have been obtained solely upon the consent "of President Codd," and that the judgment must be set aside *quoad* that sum; and also that the judgment should be reduced by the amount (if any) with which Charlebois should be charged for the non-completion of his work, if on
10 enquiry it shall be found not to have been completed.

72.—The Appellants Delap and Mansfield also claimed to be entitled to hold certain Bonds of the Company for advances made on their security. The Respondents' contention, in respect of these Bonds, is that they had never been issued, and, in any event, had not been delivered to either the Appellant Delap
15 or the Appellant Mansfield, who consequently had no charge thereon.

Record, p. 26, l. 8.
Record, p. 42, l. 27.
Record p. 173, l. 2.

73.—As to the Appellant Delap, the Court of Appeal held that he was not a chargee of the Bonds, and the Supreme Court held that the Bonds had never been delivered to the Appellant Mansfield, and that she was not entitled to hold the same or to make any claim in respect thereof.

Record, p. 153, l. 11.

20 74.—The Respondents, in addition to Charlebois, who join in this case are W. A. Allan and R. J. Devlin. They are the holders of Charlebois' orders on the Company, in the nature of equitable assignments, given to them by Charlebois and accepted by the Company on the 16th September, 1889, for \$37,465.27 and \$28,098.94 and interest, respectively, being the balances due
25 them by Charlebois on his purchase of their shares of stock; such orders being payable "out of the first moneys arising from or under the construction "contract," and payable on completion thereof. They are all interested in sustaining the Judgment of September, 1891, as assignees of the Respondent Charlebois, and these Respondents are included in Sub-section (d) of
30 Paragraph 2 thereof, whereby it was ordered that the second charge on the said fund (\$622,226) is to be the sum of \$380,397, with interest thereon, which is payable to the Plaintiff (the Respondent Charlebois) for his own use, or for the use of any person or corporation to whom he may have theretofore assigned the moneys payable to him under his said contract, according to their several
35 priorities, if any.

Record, p. 423, l. 1.
Ex. 6, Vol. 3, p. 37, l. 30
(Form) Ex. 103, Vol. 3, p. 30.
Record, p. 30, l. 21.

75.—The Respondents Allan and Devlin, relying upon the said equitable assignments and on the Company's acceptance of them, released Charlebois from the payment of the sums thereby secured, being the balance of purchase-money due them on the sale of their respective shares to him; and thereafter
40 relied wholly thereon as their only source of payment.

Vol. 3, p. 39, l. 15.
Record, p. 407, l. 38.

The said Respondents submit that the original Judgments attacked in the Appellants' action are right, and that this Appeal and the said action ought to be dismissed with costs; for the following (among other)

REASONS.

45 1.—Because the arrangement of the 16th September, 1889, by which £200,000 was to be paid to the Respondent Charlebois on his construction contract was made by and with the consent of all parties (including all the shareholders), and

without fraud or fraudulent design, and (not being *ultra vires*) cannot be impeached by the Company.

2.—Because the construction contract of the 16th of September, 1889, was not in whole or in any part *ultra vires* of the Company; and because, the contract having been executed could not be set aside by the Company after having accepted the benefit of it, except upon the terms of making restitution *in integrum*. 5

3.—Because the proper conclusion in respect of the transactions of the 16th September, 1889, is that the stock of the Company was not paid up, but remains with seventy per cent. unpaid thereon. 10

4.—Because the Respondent Charlebois was entitled to receive, for (1) the shares of the Company and for (2) the work of construction he agreed to perform and has performed, the full sum of £200,000; while the Appellant Delap and the Defendant Codd were not entitled to fully paid up shares, but only to the shares with thirty per cent. paid thereon; and the Company's remedy, if the transaction were *ultra vires* or impeachable on any ground, is against the Appellant Delap and the Defendant Codd, and not against Charlebois. 15 20

5.—Because the Company, if it at any time had a right of action against the Respondent Charlebois (which he denies) could not, after he (in reliance on the arrangement) had parted with his shares and had fully performed his contract, compel him to account for the money used by Stevens in seeking to make payment of the balance due on the shares. 25

6.—Because, even if the Company were entitled, notwithstanding what is above contended, to have successfully disputed the amount claimed and sued for by Charlebois, it cannot, after Judgment has been recovered without collusion or fraud, impeach the transaction thus translated into a Judgment. 30

7.—Because the Judgment is conclusive on the Company as well as against Charlebois in respect of the amount sued for, not only in regard to the matters actually brought up as a defence, but also in regard to all grounds open to the Company as a defence at the time the original judgment was obtained, and which might, if presented, have formed a valid defence thereto. 35

8.—Because, in any case, the judgment is binding at law, and any proceedings to set it aside must be made by the way of an application to the equitable jurisdiction of the court in the original action itself, and relief could thus only be granted upon terms of restoring the parties to the position they were in when the judgment was obtained. If this could not be done, no relief could be obtained. 40 45

9.—Because a judgment by consent, in the presence and at the suggestion of the Court is *res judicata*, as completely as a judgment *in invitum*.

10.—Because the judgment of 28th September, 1889, was the result of a compromise, in which the Respondent Charlebois yielded much (a) in money, (b) surrendered possession of the property of the Company which he then retained, under his contract, (c) released the Company from a contract he held from it for the construction of a second fifty miles and (d) extended the time for payment of the amount found due for six months from the date thereof; and the Company is estopped from impeaching the Judgment without restoring him to his former position.

11.—Because, even if the agreement to pay more for the work contracted for than it was worth is *ultra vires* of the Company, the defence which the Company actually made to Charlebois' action and the manner of it were *intra vires* of the Company, the right to plead and be impleaded being one of the main attributes of a Corporation; and hence the Judgment is as conclusive on a Corporation as it would be on a natural person.

12.—Because, as to the agreement to give Charlebois a lien for his work, it was *intra* and not *ultra vires* of the Company, as the Company had the right, in execution of its powers, to pledge or mortgage its property, if in the opinion of the Company's governing body that was a wise thing to do.

13.—And because the powers to borrow money by the sale of its Bonds or Debentures prescribed by the Charter of Incorporation are not exclusive of, but additional to, the implied or express power conferred on the Company to borrow money or mortgage its property.

14.—Because the Company's Bonds were never lawfully delivered or pledged to the Appellants Delap and Mansfield, and neither of them is a lawful holder or pledgee thereof.

15.—Because the Company's said bonds were not lawfully issued, and because the Mortgage purporting to secure said Bonds was invalid.

16.—Because, in any event, the lien or charge which the Appellant Charlebois has by contract is prior and paramount to the Company's said Bonds, which are subject thereto.

17.—Because the provisions respecting the sale of the railway contained in the Judgments of September, 1891, and February, 1892, are *intra vires*, since a Canadian "railway "or a section of a railway may as an integer be taken in "execution and sold for the debts of the Company which "owns such railway" (Redfield vs. Wickham, L. R., 13 Ap. C. 476).

18.—Because, in addition to the foregoing reasons, the Respondents Allan and Devlin have, in reliance of the Company's acceptance of Charlebois' assignments in their favour, released him from his indebtedness to them.

DALTON McCARTHY.

In the Privy Council.

No. 33 of 1896.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE GREAT NORTH WEST CENTRAL RAILWAY COMPANY AND OTHERS *Appellants*

—AND—

CHARLEBOIS AND OTHERS ... *Respondents.*

CASE OF THE RESPONDENTS

CHARLEBOIS, ALLAN AND DEVLIN.

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