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In the Privy Council.

No. 33 of 1896.

On Appeal from the Supreme Court of Canada.

BETWEEN

THE GREAT NORTH WEST CENTRAL RAILWAY COMPANY, JAMES BOGLE DELAP, individually and as a Shareholder on behalf of himself and all other Shareholders of the Great North West Central Railway Company (except the Defendant John Arthur Codd) and LOUISA H. MANSFIELD (Plaintiffs) - - - - - APPELLANTS

AND

ALPHONSE CHARLEBOIS, ALEXANDER 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 Will of JAMES CROSSEN deceased (Defendants) - - RESPONDENTS

CASE FOR THE APPELLANTS.

1. This is an Appeal by the Plaintiffs in the action from a Judgment of the Supreme Court of Canada pronounced upon the Appeal of the above-named Respondents dated the 28th day of March 1896, by which the Judgment of the Court of Appeal for Ontario affirming the Judgment of the Chancellor of Ontario in favour of the Appellants was reversed and their Cross Appeal was dismissed.

2. The action was brought by the Appellants in the Chancery Division of the High Court of Justice for Ontario by a Writ issued on the 1st day of December, 1892, seeking to set aside a Judgment purporting to be by consent of parties (which is hereinafter called the impeached Judgment) entered in a former action brought in the said Chancery Division by the Respondent Charlebois against the Appellants, The Great North West Central Railway Company (hereinafter called the Company) enforcing the remedies claimed by

Charlebois under a certain contract between him and the Company (hereinafter called the contract); and also seeking to set aside an order founded upon and carrying out the terms of the said Consent Judgment and also seeking to have the contract declared void; and for other relief.

3. The Appeal raises questions of *ultra vires* and of fraud affecting the contract and the consent to the Judgment, purporting to effectuate the contract. There are also questions as to the validity of a pledge of the bonds of the Company for advances, alleged to be antecedent, and as to the relative rights and priorities of the bondholders and the Defendant Charlebois under the contract. An intelligible statement of the issues involves a reference to the leading facts connected with the origin of the Company, the contract, and the impeached Judgment.

4. The Company is a public Company chartered under authority of the General Public Act of Canada 49 Vic. chap. 11 by Letters Patent from the Crown dated the 22nd of July, A.D. 1886, confirmed and set forth in the Act of Canada, 51 Vic. chap. 85.

5. 49 Vic. chap. 11 contains the following sections relating to the Company :

" (2.) The Governor in Council may grant to the North West Central " Railway Company, or to such other company as may undertake the " construction of the railway or a railway from a point on the Manitoba " and North Western Railway, via Rapid City, westward, Dominion lands " to the extent of 6400 acres for each mile of the Company's railway, for the " whole distance from Brandon Station on the Canadian Pacific Railway, or " from such point on the Manitoba and North-Western Railway as aforesaid, " to Battleford, in the Provisional District of Saskatchewan, about 450 miles.

" (4.) The said grants, and each of them may be so made in aid of the " construction of the said railways respectively, in the proportions and " upon the conditions fixed by the Orders in Council made in respect " thereof, each of the said enterprises being respectively subject to any " modification thereof which may hereafter be made by the Governor in " Council; and, except as to such conditions, the said grants shall be free " grants, subject only to the payment by the grantees respectively of the cost " of survey of the lands and incidental expenses at the rate of 10 cents " per acre in cash on the issue of the patents therefor.

" (5.) And whereas it may become necessary for the construction of " the railway in respect of which the granting of a subsidy is authorised " by the said section of this Act, that a Company should be incorporated " with the powers requisite for such construction, and for making financial " arrangements for the purposes thereof: Therefore it is hereby further " enacted as follows :—

" For the purpose of incorporating the persons undertaking the con- " struction of the said railway, or a railway from a point on the Manitoba " and North-Western Railway, via Rapid City, westward, and for the " incorporation of those who shall be associated with them in the under- " taking, the Governor in Council may grant to them, under such corporate " name as he shall deem expedient, a charter conferring upon them the

" franchises, privileges and powers requisite for the said purposes which " shall be similar to such of the franchises, privileges and powers granted " to railway companies during the present session, as the Governor shall " deem most useful or appropriate to the said undertaking; and such " charter, being published in the Canada Gazette, with an Order or Orders " in Council relating to it, shall have force and effect as if it were an Act " of the Parliament of Canada: Provided always that in the event of a " company being so incorporated, it shall be provided in the charter that " such company shall be subject to all the present legal obligations of the " North West Central Railway Company, in relation to the said railway."

6. The said charter contains the following recitals and provisions:—

" And whereas it is in and by the said Act further enacted that " inasmuch as it may become necessary for the construction of the railway " in respect of which the granting of a subsidy is authorised by the second " section of the said Act, that a company should be incorporated with the " powers requisite for such construction, and for making financial arrange- " ments for the purposes thereof; therefore, that for the purpose of " incorporating the persons undertaking the construction of the said railway, " or a railway from a point on the Manitoba and North-Western " Railway, via Rapid City, westward, and for the incorporation of those " who shall be associated with them in the undertaking, the Governor in " Council may grant to them, under such corporate name as he shall deem " expedient, a charter conferring upon them the franchises, privileges and " powers requisite for the said purpose, which shall be similar to such " of the franchises, privileges and powers granted to railway companies " during the present Session, as the Governor shall deem most useful or " appropriate to the said undertaking; and such charter, being published " in the Canada Gazette, with any Order or Orders in Council relating to " it, shall have force and effect as if it were an Act of the Parliament of " Canada; Provided always, that in the event of a company being so " incorporated, it shall be provided in the charter that such company shall be " subject to all the present legal obligations of the North-West Central " Railway Company, in relation to the said railway: 51 Vic. cap. 85 can. Schedule.

" Now Know Ye, that, by and with the advice of the Privy Council " for Canada, and under the authority of the hereinbefore in part recited " Act, and of any other power and authority whatsoever in Us vested in " this behalf, We do, by these Our Letters Patent, grant a charter unto " the persons hereinafter mentioned by name and to those who may be " associated with them for the purposes hereof, conferring upon them the " franchises, privileges and powers hereinafter set forth, that is to say:—

" (1.) Honorable Francis Clemow, of the city of Ottawa, senator, " Charles Thornton Bate, of the same place, esquire, William Anderson " Allan, of the same place, contractor, James Murray, of St. Catharine's, " contractor, and Alphonse Charlebois, of the city of Quebec, contractor, " together with such other persons as may become shareholders in the " company to be hereby incorporated, are hereby declared to be a body

" corporate and politic by the name of 'The Great North-West Central " Railway Company'—hereinafter called the Company—and the said " railway and the works hereby authorised are hereby declared to be for the " general advantage of Canada

" (4.) The capital stock of the Company shall be two millions of " dollars (with power to increase the same in the manner provided by 'The " Consolidated Railway Act, 1879,' and the Acts amending the same) to be " divided into shares of one hundred dollars each; and the money so raised " shall be applied in the first place to the payment of all expenses and " disbursements connected with the organisation of the Company, and " other preliminary expenses, and making the surveys, plans and estimates " connected with the works hereby authorised, and all the remainder of " such money shall be applied to the making, completing and equipping " and maintaining of the said railway and other purposes of this charter, and " no other purpose whatsoever.

" (11.) The said Company may, for the purposes of the railway, receive " from the Government of Canada, from any Government, person or body " corporate, in aid of the construction, equipment and maintenance of the " said railway, grants of land, bonuses, loans or gifts of money or securities " for money, and may from time to time purchase from the Government of " Canada land in the North West Territories, and may sell, convey and " mortgage the same for the purpose of raising money for the prosecution " of the undertaking.

" (14.) The directors of the Company, under the authority of the " shareholders to them given by a resolution of a special general meeting " called for that purpose, are hereby authorised to issue bonds under the " seal of the said Company, signed by its president or other presiding officer " and countersigned by its secretary and treasurer, and such bonds shall be " made payable at such times and in such manner and at such place or places " in Canada or elsewhere, and bearing such rate of interest as the directors " shall think proper: and the directors shall have power to issue and sell " or pledge all or any of the said bonds at the best price and upon the best " terms and conditions which, at the time, they may be able to obtain, for " the purpose of raising money for prosecuting the said undertaking: " Provided, that the amount of bonds so issued, sold or pledged shall " not exceed twenty thousand dollars per mile to be issued in proportion to " the length of railway constructed or under contract to be constructed. " Provided also, that no such bonds shall be issued until at least five " hundred thousand dollars shall have been subscribed to the capital stock " and ten per centum of the same bonâ fide paid thereon; but notwith- " standing anything in this charter contained the Company may secure the " bonds to be issued by them by a mortgage deed, creating such mortgages, " charges and incumbrances upon the whole of such property, assets, rents " and revenues of the Company, present or future or both, as shall be " described in said deed; but such rents and revenues shall be subject in the " first instance to the payment of working expenses of the railway; and by

" the said deed the Company may grant to the holders of such bonds " or to the trustee or trustees named in such deed all and every the powers " and remedies granted by this charter in respect of said bonds, and all " other powers and remedies not inconsistent with this charter, or may " restrict the bondholders in the exercise of any power, privilege or remedy " granted by this charter as the case may be ; and all such powers, rights " and remedies as shall be so contained in such mortgage deed shall be " valid, binding and available to the bondholders in the manner and form " as herein provided.

" (15) The bonds hereby authorized to be issued shall, without " registration or formal conveyance, be the first preferential claims and " charges upon the said Company and the undertaking, tolls and income " and real and personal property thereof now or at any time hereafter " acquired, save and except as is provided for in the last preceding clause ; " and each holder of the said bonds shall be deemed to be a mortgagee or " incumbrancer upon the said securities, and shall have priority as such."

" (19.) The lands to be acquired by the Company or granted by the " Government and held for sale for the purposes thereof may be conveyed to " trustees to be held and conveyed by them upon the trusts and for the " purposes herein declared in reference to such lands, and all moneys " arising from the sale of such lands shall be held and applied in trust " for the purposes following that is to say : first in payment of the expenses " connected with the acquisition, survey, management and sale of the " lands ; secondly, in payment of dividends and interest on the bonds from " time to time payable in cash by the Company ; thirdly, in payment and " redemption of the said bonds when and as they become due respectively ; " fourthly, for the general purposes of the Company.

" (20.) All lands sold and conveyed by the said Company or by the said " trustees after a conveyance thereof to them upon the trusts aforesaid and " which have been paid for in cash shall be for ever released and discharged " from all mortgages, liens and charges of any kind or nature by this charter " or by the said Company created ; and the purchase money arising from the " sale of such lands by the Company or trustees shall be applied in the " first place in the satisfaction of any mortgage thereon created by the " Company, and after payment of any such mortgage or lien created by " the Company thereon, shall be applied in accordance with the trusts in the " next preceding clause declared.

" (27.) Provided always that the Company hereby incorporated shall be " and remain liable for, and shall pay and discharge all debts which were " due on or before the 2nd day of June last past by the North-West Central " Railway Company, and the Souris and Rocky Mountain Railway Company " or either of them for railway construction, and which have not since been " paid and discharged,and the said Company hereby incorporated in accepting " this charter, do for themselves and their successors covenant, promise and " agree to and with Her Majesty the Queen, Her heirs and successors, " that they will fully pay and discharge all such debts, and will cause all just

" claims for labour, board of labourers employed in or about such construc-
" tion, and building materials in respect of such construction due by contrac-
" tors to be paid by such contractors."

Original Rec. Vol. III. p.18.

7. The Company upon its incorporation entered into a contract with the Crown in terms of the Authorising Act, stating the conditions upon which the subsidy to the Company should become available. But prior to entering into this contract and accepting the charter the liabilities under the 27th section thereof for previous construction were enquired into and settled by a contract with the persons ascertained to have been the sole contractors of the former railway therein referred to, and were declared by the Company and the Government to be sufficiently secured by a deposit with the Government of 50,000 dollars which was provided by the Company.

8. Section 14 of the charter was subsequently amended by enlarging the bonding power from 20,000 dollars to 25,000 dollars per mile.

9. The amended charter was confirmed by 51 Vic. cap. 85 Canada to which it was scheduled.

10. With reference to the provision in Clause one of the charter that :—
" The Consolidated Railway Act of 1879 and the Acts amending the same shall
" as hereby modified apply to the said Railway as if this charter were an Act of
" the Parliament of Canada," it is to be observed that although the Consolidated Railway Act of 1879 and the amendments thereto were in force at the date of the charter, those Acts were repealed by the Revised Statute of Canada of 1886, chapter 109, which came into force in lieu thereof on the 20th March 1887, and was in force when the confirming Act 51 Vic. was passed.

In the same session 51 Vic. the Railway Acts were again consolidated by
" The Railway Act," 51 Vic. c. 29, which enacts in section 309 as follows :—
" This Act shall be substituted for the 'Revised Statutes Chapter 109 which
" with the Act 50 and 51 Vic. entitled, An Act to amend the Railway Act
" is hereby repealed," and also enacts by Section Three as follows :—' This
" Act subject to any express provisions of the special Act and to the
" exception hereinafter mentioned "(which has no relation to this case) " applies
" to all persons companies and railways within the legislative authority of the
" Parliament of Canada, except Government railways."

All the Courts below have correctly treated the last mentioned Railway Act (51 Vic. c. 29) as applying to the Company.

11. In addition to the special provisions of the charter, The Railway Act 51 Vic. provides as follows :—

" (2(q).) The expression "railway" means any railway which the Company
" has authority to construct or operate, and includes all stations, depots,
" wharves, property, and works connected therewith, and also any railway
" bridge or other structure which any company is authorized to construct
" under a special Act."

" (2(w).) The expression 'the undertaking' means the railways and
" works, of whatsoever description, which the Company has authority to
" construct or operate."

" (35.) The capital stock of the Company, the amount of which

" shall be stated in the Special Act, shall be divided into shares of one " hundred dollars each: and the money so raised shall be applied, in the " first place, to the payment of all fees, expenses and disbursements for " procuring the passing of the Special Act, and for making the surveys, " plans and estimates of the works authorized by the Special Act; and all " the remainder of such money shall be applied to the making, equipping, " completing and maintaining of the said railway, and other purposes of " the undertaking."

" (93, Sub-section 2.) The Directors may issue and sell or pledge all " or any of the said bonds, debentures, or other securities, at the best price " and upon the best terms and conditions which at the time they may be " able to obtain, for the purpose of raising money for prosecuting the said " undertaking."

" (276.) No company shall, either directly or indirectly, employ any of " its funds in the purchase of its own stock, or in the acquisition of " any shares, bonds, or other securities issued by any other railway company " in Canada," etc.

12. Of the authorised capital stock of the Company of 2,000,000 dollars 500,000 dollars was subscribed and issued. Thirty per cent. was paid thereon, and applied in part towards the construction of the railway, prior to the occurrences in the month of September, 1889, hereinafter mentioned. The remaining 1,500,000 dollars of the authorised stock was then and still is unsubscribed and unissued. Four hundred miles of the Company's railway have yet to be constructed, and capital has yet to be raised therefor. Rec. p. 622.

13. The Respondent Devlin having been at the outset substituted for Bate, one of the original corporators, the whole issued stock of 500,000 dollars was on and prior to the 12th day of September, 1887, and until the 16th of September, 1889, held in different amounts by the Respondents Charlebois, Allan, and Devlin, and the Defendants Clemow and Murray, and these persons were also the Directors of the Company during that period. Rec. pp. 621 and 622.

14. These five Director shareholders, hereafter called "the five," in 1887 and 1888 ascertained the total cost of constructing and equipping the first fifty miles of the railway to be, as it in fact was, under 450,000 dollars. Rec. pp. 624-626. Original Rec. Vol. III., p. 209, l. 35, pp. 210, 212 and 213, l. 20, and p. 214, l. 30.

15. A contract was entered into on the 12th day of September, 1887, by the Company with one, Sproule, and with the Respondents Macdonald and Preston, as his bondsmen, for the construction of this fifty miles at 4000 dollars per mile, in all 200,000 dollars, apart from rails, equipment, and certain other items the total additional cost of which Charlebois alleges to be 284,000 dollars, though it was really much less. The contractors were to, as they did, provide their own capital for the construction, repayable under progress estimates. Under this contract the work proceeded from that time, until suspended by the Company in 1888 for lack of funds to supply the rails. Original Rec. Vol. III. p. 6. Rec. pp. 452 and 453. Original Rec. Vol. III., p. 235 l. 22

16. Negotiations took place in 1887 and 1888 between the five and the Defendant Codd, resulting in an option given to him for the sale to him of the subscribed shares for £200,000 sterling. In this connection a contract in writing, dated the 6th day of March 1888, was entered into between the five Rec. p. 625, l. 46, and p. 626, l. 2. Original Rec. Vol. III., p. 57, l. 26.

individually and personally, and Codd, agreeing that upon the sale and payment for the said shares at £200,000 sterling, 173,133 dollars should belong to Codd as a commission in case the sale was effected and payment of the purchase-money in full procured and not otherwise.

Rec. pp. 6 and 7

Rec. pp. 452 and 453

17. Codd, who had previously made or threatened some unfounded pretence of undefined claims against the Company or the Vendors, expressly released any claim or pretence of claim upon the Company on receiving this contingent agreement for commission to be payable out of the proceeds of the sale if effected.

Original Record Vol. III, p. 23

18. On the 9th day of April, 1888, in pursuance of the understanding, the five individually and personally entered into an agreement or option in writing with Codd, the Company being no party thereto. The five individually purported to agree to sell their said shares to Codd, and they also expressly agreed as part of the consideration on their part to construct and equip completely at their own cost the first fifty miles of the said railway, on receiving an advance payment on account of the price of the shares of £50,000. Thus Codd was to pay for the shares, which would represent the said fifty miles of railway completely constructed and equipped, the sum of £200,000; and the agreement provided that on payment of the first £50,000 by Codd, coupled with the production of a banker's guaranty for the balance, the shares were to be transferred to him or his nominees free from incumbrances.

Rec. p. 60 Original Record Vol. III, p. 22

19. The £50,000 first payment above-named was sufficient, having regard to previous expenditure, and to the terms of the Company's existing contract with Sproule, to put the vendors in funds to make the necessary progress payments to the contractor to effect the construction and equipment of the fifty miles of railway by the time stipulated in the contract with Codd. The transfer of the shares to Codd was with the view to enable him to finance upon the security of the shares for the first payment of £50,000, by placing him in a position to transfer the shares absolutely free from vendors' lien or other incumbrance.

Rec. p. 9

20 Codd accordingly procured from Delap, who resided in England, an agreement for the loan of £50,000 upon the security of a pledge by Codd to Delap of 90 per cent. of the shares.

21. The advance was to be made only when the shares should be transferred to Delap or to whom he should appoint, free of incumbrances, thus carrying to the transferee nine-tenths of the undertaking and assets of the Company unincumbered.

22. The balance of 10 per cent. of the said shares was reserved to Codd in order to enable him as owner of the shares from time to time to qualify and constitute a Board of Directors.

23. Codd failed to obtain the stipulated security for the balance purchase-money under the agreement of 9th April 1888, and in September, 1889, he, being still unable to provide such security, on the proposition of Charlebois an agreement in writing was come to between him and Codd, which is as follows:—

Rec. pp. 11 and 12

"Heads of proposed agreement between Mr. Charlebois and Mr. "Codd:

" (1.) Mr. Charlebois to arrange with Clemow, Allan and Devlin that " they will assign to him all their interest in the undertaking, provided that " when the fifty thousand pounds is paid, Clemow, Allan and Devlin shall " take thereout such amounts as Mr. Charlebois shall agree to pay them.

" (2.) Mr. Charlebois to obtain Mr. Murray's consent to the above " agreement or to purchase his share in the same way as the others.

" (3.) Mr. Charlebois and Mr. Murray (or Mr. Charlebois as the case " may be), to carry out the terms of the agreement of the 9th of April, 1888, " subject to the present modifications, and Clemow, Allan and Devlin to " join in guaranteeing that the stock is free of debts.

" (4.) Mr. Charlebois to take up and pay for the 1160 tons of rails " already lying at Montreal, but the balance of the rails to be delivered to " Mr. Charlebois will be delivered in due time for the execution of the " contract, chargeable to the balance due at the rate of £5 13s. 6d. free in " Montreal.

" (5.) Mr. Charlebois to transfer the whole of the stock as per present " agreement of 9th April, 1888, but on completion of the first fifty miles to " have paid him an additional 50,000 dollars, or at Mr. Codd's option to " transfer to Mr. Charlebois its equivalent in stock of the Company.

" (6.) Mr. Charlebois to be repaid the amount paid by him for rails on " or before the 1st October.

" (7.) The purchaser to give, within thirty days, satisfactory evidence " to Mr. Charlebois' bankers that all payments will be made according to " the terms of present agreements.

" The above terms to be embodied in an agreement to be supplemented " to the present agreement of 9th April, 1888, and subject to D. McMichael's " approval.

" Dated at Toronto, 9th September, 1889.

" J. A. CODD,"
" A. CHARLEBOIS."

" Witness,
" G. DUVAL,"

" Approved 16th September, 1889,
" D. McMICHAEL."

24. This agreement in terms only proposed to make Charlebois an intervening vendor of the whole of the shares and to secure to Charlebois a bonus of 50,000 dollars which was to be transferred by Codd out of the 173,133 dollars coming to him under the agreement of 6th March 1888. Rec. p. 648, ll. 39 to 44.

25. The agreement of the 9th of April, 1888, could as all the parties knew have been carried out by the payment in full of the 500,000 dollars subscribed stock, which would have supplied the balance of the 484,000 dollars required to complete the fifty miles. Thus the Company would have been put in the position of having the first fifty miles of its road built and equipped without any liability or burden existing upon the Company which would on the one hand have issued 500,000 dollars of stock fully paid Rec. p. 627, ll. 25 to 42. Rec. p. 644, ll. 44 to 48 Rec. p. 645, ll. 33 to 38. Rec. p. 646, ll. 5 to 17. Rec. p. 648, ll. 18 to 24. Rec. p. 655, ll. 41 to 46. Rec. p. 657, ll. 9 to 14. Rec. p. 657, ll, 26 to 28. Rec. p. 657, l. 43. Rec. p. 658, ll. 1 to 6.

and on the other hand have acquired fifty miles of completed and equipped railway.

26. But in fact a new arrangement was at this time made between the five and Codd under which the Company was to be made a debtor for a larger sum so as to cover the price agreed to be paid for the shares, say £200,000 for the benefit of the Defendant Codd.

27. For this purpose it was arranged that the contract with Sproule, which would have resulted in the completion and equipment of the fifty miles for 484,000 dollars or less, should be ostensibly got rid of, and that the transaction between Charlebois and Codd should be made to assume the form of a construction contract in respect of the first fifty miles of the Company's road, to be entered into by the Company with Charlebois, for the fictitious sum of £200,000 to be expressed as the price of construction; and that it should be arranged that Sproule should complete the construction on his original terms as a sub-contractor for Charlebois.

Original Record Vol. III, Trial Exhibit 6, Clause 3, p. 36, et infra.
Rec. p. 602, l. 6.
Rec. p. 605, l. 20.

28. It was further arranged that the five should retire from the directorate so as to permit Codd and his nominees to take their place for the purpose of making such contract on behalf of the Company with Charlebois as a nominal contractor.

29. It was further arranged that Codd's commission less the agreed bonus to Charlebois should be received by him through Charlebois on the original terms of the agreement of the 6th March 1888, but only upon Charlebois receiving the full purchase money in the form of contract price from the Company.

Original Record Vol. III, Trial Exhibit 1, p. 21.

30. The agreements between the five had been prepared for execution by the Vendors' solicitors prior to the transfer of the shares at the meeting on the 16th of September 1889, hereinafter mentioned.

Rec. p. 606, ll. 38 to 44.
Rec. p. 607, ll. 1 to 4.
Original Rec. Vol. III, Trial Exhibit 5, p. 33, Trial Exhibit 6, p. 36.

31. The first agreement, as executed, contains the following passages:

Original Record Vol. III, Trial Exhibit 5, p. 33.

"Articles of Agreement entered into this 16th day of September, "A.D. 1889, between the Honourable Francis Clemow, William Anderson "Allan and Robert James Devlin, all of the City of Ottawa, in the "Province of Ontario, Dominion of Canada, Esquires, and James Murray, "of the City of Saint Catharines, in said Province and Dominion, Contractor, "(hereinafter called "former Shareholders,") of the First Part, and Alphonse "Charlebois of the City and Province of Quebec, Contractor (hereinafter "called the "Contractor,") of the Second Part.

"Whereas the parties hereto were on the 11th day of September 1889, all "and the only shareholders in or subscribers to the capital stock of the Great "North West Central Railway Company.

"And whereas prior to that date instead of and in full substitution "for a certain agreement made between the parties hereto and one, J. A. "Codd, dated 9th April, 1888, and with the full assent of the said J. A. "Codd and his associates, in lieu of the carrying out thereof which was "found impracticable and which thereby lapsed, the said contractor, himself, "entered into an agreement with the said J. A. Codd and other parties, "to acquire and thereupon to sell and assign to them or their assigns all the "shares in the capital stock of said Company, and to afterwards, himself,

" enter as a contractor into a contract with the said Company, then " composed of the parties to whom he proposed selling and assigning " said shares, undertaking himself to build, equip and complete the first " fifty miles for the consideration and on such terms as may have been " arranged between said prospective shareholders and said contractor.

" And whereas the said former shareholders respectively agreed on the " 11th September, 1889, with the contractor, but with no other person or " persons whatsoever, to sell and assign their respective holdings of stock " in said Company to him, the said contractor, and his assigns for and in " consideration of certain present payments and the balance of the " consideration moneys payable hereafter as has been agreed, and to give " to said contractor or his assigns a certain guaranty that they, the " former shareholders, will (in the ratio as between themselves of their " former stock holdings) indemnify and save the said party of the second " part and his assigns harmless with respect to the payment and liquidation " of the debts and claims mentioned in the 27th Section of the Company's " Charter, so that the feature of the said shares of stock should be " indemnified with respect thereto, the said party of the second part, himself, " agreeing to assume and bear his share of such responsibility, indemnity " and payments in the ratio of his former holdings along with the former " shareholders.

" And whereas it is agreed that the said party of the second part " should on transfer of said shares, himself, alone bear, pay and satisfy all " other debts, obligations, charges due, owing or heretofore incurred by " the Company when composed of all parties hereto, so that said shares " should in all other respects be free and clear at that date of transfer " (save and except with respect to the contract with Government.)

" And whereas with respect to the claim of Macdonald & Preston, " being one of the claims or alleged debts due under the 27th Section of " the Company's Charter aforementioned, the Company formerly entered " into a contract with said claimants on the conditions therein named to pay " or deliver to the said claimants certain bonds or their equivalent in " settlement thereof at the times and in the way therein appearing.

" And whereas one of the terms and consideration of the said contractor's " prospective construction contract is the payment to him of the 24,119 ' dollars 15 cents, now in the hands of the Government, as and when paid " to the Company by the Receiver-General.

" And whereas the former shareholders have assigned their said " shares to the said party of the second part or his assigns or nominees.

" Now therefore these presents witness that," etc.

Then follow the covenants and terms of indemnity and the conclusion is:

" In witness whereof the parties hereto have hereunto set their hands " and seals the day and year first above written.

" Signed, Sealed and De- " livered in the presence " of	" FRANCIS CLEMOW,"	(L.S.)
	" W. A. ALLAN,"	(L.S.)
	" R. J. DEVLIN."	(L.S.)
	" J. MURRAY."	(L.S.)
" J. TRAVERS LEWIS."	" A. CHARLEBOIS."	(L.S.)

Original Record Vol. III, Trial Exhibit 6, p. 36.

32. The second (but contemporaneous) agreement is in the words and figures following:

"Articles of agreement made and entered into this 16th day of September, "1889 (nine),

"BETWEEN

"Alphonse Charlebois, of the City of Quebec, contractor, hereinafter called "'Charlebois,' of the first part;

"AND

"The Honourable Francis Clemow, William Anderson Allan, and Robert "James Devlin, all three of the City of Ottawa, Esquires, and James Murray, "of the City of St. Catharines, Esquire, hereinafter called the "former share- "holders," of the second part.

"Whereas the parties hereto were on the 11th day of September instant, "all and the only shareholders in or subscribers to the capital stock of the Great "North West Central Railway Company.

"And whereas by offer and acceptance of said last-mentioned date the "former shareholders agreed to sell, and Charlebois agreed to buy from them "all their said shares in said Company for certain present and deferred pay- "ments and on certain terms.

"And whereas contemporaneously with the execution and delivery "hereof the former shareholders do assign and sell to Charlebois their "said respective shares.

"And whereas by instrument bearing even date herewith and delivered "contemporaneously herewith the former shareholders in conformity with "their bargain with said Charlebois, enter into a covenant of indemnity "regarding their respective shares of said stock with Charlebois, and his assigns "touching the debts and claims mentioned in recital thereof, and in the "27th section of the said Company's charter, in the ratio of their former "stock holdings, Charlebois bearing his share of such indemnity in the pro- "portion between themselves of his former stock holding, upon the terms "and conditions and otherwise as therein set out.

"And whereas all parties hereto desire that the terms and conditions "of said sale of shares should be herein stated and the last mentioned "agreement supplemented and modified hereby before delivery:—

"Now, therefore, these presents witness that in consideration of the "premises, of the mutual covenants herein contained, of the assignment of "said shares herewith, and of the payments and considerations hereinafter "referred to, the parties hereto, each for himself and his personal repre- "sentatives, agree as follows.—

"(1.) The said parties of the second part, the Honourable Francis "Clemow, being the owner of one thousand (1,000) shares of one hundred 'dollars each in the capital stock of the Great North West Central Railway "Company, the said William Anderson Allan being the owner of sixteen "hundred of said shares, the said Robert Devlin being the owner of twelve "hundred of said shares, and the said James Murray being the owner of five "hundred of said shares, which each of said parties of the second part with "regard to his own shares declares and covenants with the party of the first

" part, to be heretofore unassigned by him to any other and to be free from " all mortgages pledges or hypothecations, do each sell and assign to said " Charlebois their said respective shares of stock as same now stand in the " books of the company, and subject to all the obligations and liabilities " thereof and thereto appertaining for the following considerations respectively, " namely :—To the said Francis Clemow, twenty-nine thousand one hundred " dollars ($29,100), the receipt whereof he hereby acknowledges from the " said Charlebois, and the further consideration hereinafter referred to; to " the said William Anderson Allan, forty-six thousand three hundred and " forty dollars ($46,340), the receipt whereof he hereby acknowledges from the " said Charlebois, and the further considerations hereinafter referred to; to the " said Robert James Devlin, thirty-five thousand, five hundred and eighty " dollars ($35,580), the receipt whereof he hereby acknowledges from the " said Charlebois. and the further considerations hereinafter mentioned ; and " to the said James Murray, the sum of fourteen thousand, nine hundred and " twenty-five dollars ($14,925), the receipt whereof he hereby acknowledges " from the said Charlebois, and the further considerations hereinafter " referred to.

" (2.) The further considerations referred to in the last clause hereof " consist of the covenants and agreements in said agreements made between " the parties hereto in recital mentioned of even date herewith, of the " covenants and agreement hereof and of the delivery by the said Charlebois to " each of the former shareholders of an equitable assignment, or order made " by him on the said Great North West Central Railway Company to pay out " of the first moneys payable to him, the said Charlebois upon, or in respect " of a certain construction contract into which he is about to enter with said " company, when he shall be no longer himself a shareholder, the following " sums of money to the former shareholders respectively: To the said " Honourable Francis Clemow, the sum of twenty-three thousand four " hundred and fifteen dollars and seventy-nine cents ($23,415.79); to the " said William Anderson Allan, the sum of thirty-seven thousand, four " hundred and sixty-five dollars and twenty-seven cents ($37,465.27); to the " said Robert James Devlin the sum of twenty-eight thousand and ninety- " eight dollars and ninety-four cents ($28,098.94); and to the said James " Murray, the sum of eleven thousand seven hundred and seven dollars and " eighty-nine cents ($11 707.89), which said four equitable assignments or orders " the said Charlebois hereby covenants with the former shareholders to " execute and deliver to them when and so soon as he obtains said construction " contract and before delivery thereof, to cause same to be accepted duly by " the said company with whom he will contract, which aforementioned cash " payments and the amounts of said orders made in all in amount the sum of " two hundred and twenty-six thousand, six hundred and thirty-two dollars " and eighty-nine cents ($226,632.89), the sums of money mentioned in said " order to bear interest from this date until paid.

" (3.) The said Charlebois shall assume and he hereby agrees to assume, " bear and pay (himself alone) and satisfy and discharge all debts, liabilities,

" obligations, claims, charges and demands due, owing, or heretofore incurred " by the said company when composed of the parties hereto (including also the " contract with Sproule), and to defend and save harmless the parties hereto " of the second part of, and from the same and in respect thereof, should any " liability attach to them, or any of them as former shareholders in said " company, so that said shares, if same should be forthwith further assigned " to others by the said Charlebois, shall and will be in all respects free and " clear of liabilities incurred theretofore, save as hereinafter mentioned.

" (4.) The said Charlebois and his assigns shall assume, and he hereby " agrees to assume, bear, pay and discharge all debts, obligations, responsibility " and liabilities of the former shareholders (if any) and of the said Great North " West Central Railway Company under, by virtue of, and with respect to the " construction contract with J. C. Sproule of 12th September, 1887 (seven) " both past and future or accruing, and to indemnify the said former " shareholders and said Company with respect thereof.

" (5.) The parties hereto confirm all agreements and covenants contained " in their agreement in recital mentioned bearing even date herewith but with " respect to the liability therein assumed by said Charlebois to satisfy and " pay Macdonald & Preston whatever shall be due them and whenever same " shall be due under their agreement of 12th September, 1887, and with " respect to the agreement of all parties thereto and hereto to bear and pay " in the ratio of their former stock-holdings all debts and claims lawfully " payable under the 27th section of the Company's charter, it is now " agreed hereby that Charlebois shall not pay, settle with, pay on account " or in full, or otherwise deal with the said Macdonald & Preston with respect " to said agreement of 12th September, 1887, with them, without the consent " in writing of the former shareholders, and that if Charlebois shall do so he " shall thereupon become alone personally responsible for all debts and claims, " which but for his doing so would have been chargeable against Macdonald & " Preston under said agreement and shall not (in such event) look to the " former shareholders for their proportionate shares of such debts and claims, " and it is further agreed that respecting all claims of creditors of Macdonald " & Preston which the Company, or the parties hereto as the Company's " guarantors, may be called upon to pay by Government or by suit, or in the " judgment and discretion of the parties hereto be deemed payable, the said " Charlebois shall and will himself alone pay, satisfy, and discharge the same, " charging all such payments to Macdonald & Preston on account of what " may hereafter be due the latter under said agreement by said Charlebois, " and the said Charlebois shall not consequently require the former shareholders " to contribute for such purpose.

" (6.) The said Charlebois agrees himself alone to perform and fulfil the " term of a certain agreement dated 6th March, 1888 (eight), made by all parties " hereto agreeing that if they would enter into a certain contract with the " Company, as contractors, then portion of the consideration moneys of said " contract should be paid as therein stated (said agreement being now in the hands of Dr. McMichael, Q.C.) and to indemnify and save the former share-

"holders (who have no interest in any such contract) harmless in respect of "such agreement or order, and further to obtain from one J. A. Codd, and "from said Dr. McMichael their respective releases of said former shareholders "in that regard.

"(7.) The said Charlebois agrees that he will recover from John Arthur "Codd (if practicable) the sum of seven thousand eight hundred dollars "($7,800), and that when so recovered the sum shall be divided between the "parties hereto in the proportion of their former stock-holdings in said "Company.

"(8.) Should the transfers required by the Statute of the shares of stock "sold as aforesaid to said Charlebois have to be made, or at said Charlebois' "direction or assignment be made by the former shareholders to others, his "nominee or assigns, in order to avoid the possible lapsing of the Company for "lack of five shareholders, or for other reasons, the fact that said shares were "not actually transferred to Charlebois himself shall not affect this agreement "or that hereinbefore referred to made between the parties hereto of this "date, nor anything therein contained, nor shall the acceptance by said "former shareholders in future of said equitable assignments create any "partnership between said former shareholders and Charlebois with respect "to said contract, or any liability or obligations on the part of the former "upon or with respect to said contract or the works thereunder.

"(9.) Should the Company make default in payment of the equitable "assignments hereinbefore referred to, according to the tenor thereof, after "same have been duly accepted by the Company and delivered to the former "shareholders by Charlebois, the latter shall not be responsible or liable "personally for the payment of same, which are to be accepted by the former "share-holders instead of the said Charlebois' personal liability for the "amounts therein named; but the said Charlebois will do all in his power to "cause said orders to be duly paid, and shall not himself take or receive any "money of the fund thus partially assigned until said orders or assignments "are paid in full.

"In witness whereof the parties hereto have hereunto set their hands "and seals the day and year first above written (at Ottawa).

"Signed, Sealed and Delivered "in presence of (Signed) "J. TRAVERS LEWIS."	(Signed) "A. CHARLEBOIS."	(L.S.)
	" "FRANCIS CLEMOW."	(L.S.)
	" "W. A. ALLAN."	(L.S.)
	" "R. J. DEVLIN."	(L.S.)
	" "J. MURRAY."	(L.S.)

33. It was understood that Charlebois was to have out of the contract price of £200,000 the same bonus in respect of his shares as the others of the five were receiving in respect of their shares in the price Charlebois was to pay to them. This made the price of Charlebois' shares 36,893.00 dollars which added to the 226,632 dollars, the price of the rest of the shares made a total of 263525.00 dollars as the price of all the shares. Rec. p. 218, ll. 3 to 12. Rec. p. 124.

34. It thus appears that the five occupied the position of the only directors of the Company; knew that under Sproule's existing construction

contract the total cost of construction including Sproule's contract was and would be under 484,000 dollars; knew that the Company could not be made liable for the purchase-money of the shares; knew that Codd had not earned any commission, and was in no case entitled to any claim against the Company, yet agreed with each other and with Codd by means of the contemplated construction contract to oblige the Company to pay to Charlebois a fictitious sum of £200,000, and the 24,119 dollars 15 cents balance unexpended in the hands of the Government of the deposit as aforesaid made by the Company, and this for the express purpose of providing out of the Company's funds for the purchase money of the shares and Codd's commission.

35. The result to the Company would be as follows:

Construction price £200,000	$973,000·00
Balance Government deposit	24,119.15
Total to go to Charlebois	$997,119.15
Which was intended to be disposed of as follows:	
(1.) Actual cost of construction, say, including amount already expended by Company, and including price of rails to be supplied by the Company, under ...	$484,000.00
(2.) To pay purchase money of shares to retiring directors, including Charlebois	263,525.00
(3.) Codd's commission, including his bonus to Charlebois	173,000.00
(4.) Additional profit to Charlebois	76,594.15
	$997,119.15

36. Taking the cost of actual construction at Charlebois' figures 484,000 dollars, the Company was thus to be obliged to pay 513,119 dollars 15 cents which the Company was not liable to pay, and for purposes not authorised, and prohibited by the Company's Charter and the Railway Act, and which moneys it was therefore *ultra vires* of the Company to agree to pay.

37. The five and Codd proceeded on the 16th September, 1889, to carry out the transaction by the aforesaid and certain other acts and agreements hereinafter set forth.

38. Delap's advance of £50,000 was obtained and used in the transaction without his consent in the following manner:

Rec. p. 289
Rec. p. 293 l. 1

39. Delap had entrusted to one C. R. Stevens, his solicitor in England £50,000 for the purpose of making the advance of that sum to Codd under the agreement between Codd and Delap already referred to. The advance was to be made when Stevens received for Delap ninety per cent. of the shares of the capital stock as Delap's security free from encumbrances and carrying the undertaking and assets free from encumbrances. Stevens had come to Canada with the £50,000 to carry out these instructions, and he had no further authority from Delap.

Rec. p. 293, ll. 1 to 12
Rec. pp. 300, 301 and 302

40. Prior to the 16th day of September, 1889, Stevens (without the knowledge or consent of Delap, who only heard of the matter shortly before the institution of this suit) on his own behalf and for his own benefit, entered into a partnership agreement with the defendant Codd in respect of the purchase of the shares, and this agreement was reduced to writing on the 16th September, 1889.

Rec. p. 603
Rec. p. 338, l. 29
Rec. p. 287, ll. 38 to 48
Rec. p. 288, ll. 1 to 4
ll. 33 to 47
Rec. pp. 289 and 290
Rec. p. 483, ll. 13 to 35

41. On the said 16th September, 1889, the five met at the Company's head office in Ottawa, as a meeting of the directors of the Company, but not as a general meeting of shareholders. The solicitor, acting for the Company and for the five as vendors, one J. Travers Lewis, participated in and advised the proceedings. There were present also throughout the meeting Codd and his solicitor McMichael, who was also Trustee for Codd under the agreement of the 6th of March, 1888. There was also present Stevens and his clerk, one Gregson.

Rec. pp. 287, 288, 289 and 290

42. Delap was in England and had no knowledge or notice of the agreement for a commission to Codd, or of Codd's not having provided a personal guarantee to the vendors for the balance payable by him to them, under the agreement of 9th of April, 1888, or of the intention to substitute or of the substitution in fact of the Company as debtor in respect of the £200,000, or of anything done or agreed to by Stevens beyond his authority and instructions already stated.

43. The learned Chancellor the trial judge found as is the case that Delap had no actual notice of these transactions and that he was not after the date of the said understanding between Stevens and Codd affected by constructive notice through Stevens as his solicitor.

Rec. p. 127, l 32

44. At this meeting Codd and Stevens having claimed to have the shares transferred as fully paid-up shares, after discussion all present agreed to this and it was accomplished as follows:

Rec. p. 330, l. 10
Rec. p. 594, l. 47.

45. As already stated, thirty per cent. had been paid upon the shares, and chiefly expended in construction under the Sproule contract and in effecting the deposit with the Government. The payment of the balance on the shares was then agreed to be effected by paying forty-five per cent. thereon and by allowing a discount to the shareholders of the remaining twenty-five per cent. under powers vested in the Directors by virtue of a shareholders' resolution passed at the then last annual meeting under clause 10 of the charter 51 Victoria chapter 85.

Rec. p. 331
Rec. p. 606, ll. 33 to 44
Rec. p. 607, ll. 1 to 18
Rec. p. 342, ll. 15 to 27
Rec. p. 437, l. 28
Rec. pp. 438 to 440
Rec. pp. 368, and 369
Original Record, Vol. III, p. 236

46. The first proceeding of the meeting was the passing by the five of the resolution for this purpose.

47. Then 228,000 dollars of the £50,000 in Stevens' hands to be loaned by Delap to Codd was by arrangement with the five advanced by Stevens to the Company in the form of cheques to the Company's Bankers for the several amounts required to pay up the forty-five per cent. upon the shares, these cheques were deposited to the credit of the Company and the accounts of the five in the Company's books were written by the secretary of the Company the Defendant Allan as paid up by these sums.

Original Record, Vol. III, Exhibit 104, p. 32
Rec. p. 437, l. 28
Rec. p. 438, ll. 4 to 21
Original Record, Vol. III, pp. 30-31
Rec. p. 330, ll. 27 to 48
Rec. p. 331, ll. 1 to 14.
Rec. pp 368 and 369
Rec. p. 427, ll. 33 to 40
Rec. p. 438, l.15

48. The balance of the £50,000, 15,158 dollars, 33 cents was at a later period of the same meeting advanced by Stevens and accepted by the new Directors

Rec. p. 330, l2. 13 et seq.
Rec. p. 595, l. 43
Rec. p. 602, l. 3

and paid into the Company's bank as a loan to the Company. The Company having thus become possessed of the whole £50,000, was placed in funds to pay the first £50,000 of the contract price for which it was intended to make the Company debtor under the construction contract to be granted to Charlebois. The Company had no other cash than this £50,000.

49. Charlebois, expecting, as all parties knew, to be recouped by the £50,000 which he was to receive on the same day from the Company, handed to the others of the five his own cheques for the amounts they were to receive in cash on the transfer of their shares, amounting to 125,945 dollars

Original Record, Vol. III, Exhibit 104, p. 32 Exhibit 89, p. 43

50. The shares were transferred at the instance of Charlebois to Codd and his nominees as and being in fact fully paid-up shares, Stevens receiving by Codd's direction 90 per cent. of the said shares, being the amount he was to hold as security for Delap's advance of £50,000.

Rec. p. 9

51. Codd's nominees for his board of directors were qualified with the 10 per cent. of the shares reserved for that purpose and were one by one substituted for the five as the latter successively resigned their directorships.

52. Codd was one of the new directors chosen, but his appointment was illegal, since he was disqualified, as the five knew, by reason of his interest in the contract in respect of the shares and his claim to the 173,133 dollars commission to be received by him upon its completion, a violation of the Railway Act of 1888, 51 Vic. cap. 29, sec. 57, which enacts:—

> "No person who holds any office or employment in or who is concerned or interested in any contract under or with the Company or is surety for any contractor shall be capable of being chosen a director or of holding the office of director."

Rec. p. 607, l. 1

53. After the constitution of the new directorate, but still at the same meeting, the construction contract between the Company and Charlebois, which had been prepared in advance, was presented, confirmed by resolution of the new Board, and ordered to be and was executed under the seal of the Company; and the first payment of £50,000 under the contract was by resolution directed to be and was paid to Charlebois by the Company's cheque.

Rec. p. 70. Original Record Vol. III, Trial Exhibit 12, p. 36.

54. Accompanying was a collateral contract on behalf of the Company undertaking to procure the existing Company's contractor Sproule to subordinate his contract for the same work to that now given to Charlebois at the increased sum.

Original Record, Vol. III, p. 36

55. Charlebois supplemented the contract by an agreement to take payment of £100,000 of the contract money in bonds of the Company at eighty cents in the dollar.

56. In addition to the cash payment of 125,945 dollars which Charlebois had made to the others of the five substantially out of the £50,000 the new directors by resolution authorised and caused to be executed an acceptance of equitable assignments executed by Charlebois to the others of the five of the contract moneys expressed to be payable to Charlebois to the extent of 100,687 dollars, 89 cents in satisfaction of the balance of the price of the shares

of the others of the five in accordance with Charlebois' agreements with them : but Charlebois was not to be personally liable for this portion of the purchase money which was to be payable only out of the contract moneys if and when received from the Company.

Original Record, Vol. III, Trial Exhibit 6, clauses 2 and 9, p. 36, et supra

57. The meeting was continuous throughout on the 16th day of September, 1889, and all parties, including Lewis, Stevens, and McMichael, were present throughout.

58. The minutes are as follows :—

Original Record, Vol. III, p. 237

"Meeting of Directors held this Sixteenth day of September, 1889.

"Present : Hon. F. Clemow in the chair.

"R. J. Devlin.

"T. Murray.

"A. Charlebois.

"W. A. Allan.

"The minutes of the previous meeting having been read and confirmed, "it was moved by Mr. Murray, seconded by Mr. Allan.

"Whereas at the Annual General Meeting of the Company, held on "the 4th day of June last, a resolution was passed by the Company's Share- "holders authorising the Company's Directors, pursuant to the 10th section "of the Company's charter, to accept payment in full for the stock from all "present subscribers thereof, at any time before the making of a final call "thereon, and to allow such percentage or discount as they, the directors, "may deem expedient and reasonable and thereupon to issue to such "subscribers scrip to the full amount of such stock subscribed.

"And whereas all subscribers to the stock, being all the shareholders "of the stock of the Company, have offered to pay their stock in full less "a discount of twenty-five per cent.

"And whereas we consider such a percentage, allowance, and discount "expedient and reasonable.

"Be it resolved that payment is accordingly accepted in full from all "stockholders less said discount, and that the President and Secretary- "Treasurer be hereby authorised accordingly, and directed upon such pay- "ment made to issue to such subscribers and shareholders scrip or stock "certificates to the full amount of such stock subscribed. Carried.

"It was moved by Mr. Allan and seconded by Mr. Devlin, that the "form of transfer given in the 74th section of the Railway Act be hereby "adopted as the form of transfer for paid up shares with any additional "words which may in any case be necessary or fitting. Carried.

"Moved by Mr. Murray, seconded by Mr. Devlin, that Mr. Allan "having sold and assigned his stock in the Company and tendered his "resignation as a director of the Company, be it resolved that his "resignation be accepted, and that Mr. Stevens, being duly qualified, be "elected a director of the Company in his stead. Carried.

"Moved by Mr. Murray, seconded by Mr. Stevens, that Mr. Devlin "having sold or assigned his stock in the Company and tendered his "resignation as a director of the Company, be it resolved that his resigna- "tion be accepted. Carried.

"Moved by Mr. Stevens, seconded by Mr. Charlebois, that Mr. Murray "having sold and assigned his stock in the Company and tendered his "resignation as a director of the Company, be it resolved that his resigna- "tion be accepted and that Mr. Codd, being duly qualified, be elected a "director of the Company in his stead. Carried.

"Moved by Mr. Stevens, seconded by Mr. Codd, that Mr. Charlebois "having sold and assigned his stock in the Company and tendered his "resignation as a director of the Company, be it resolved that his resigna- "tion be accepted and that Mr. H. S. K. Gregson, being duly qualified, be "elected a director of the Company in his stead. Carried.

"Moved by Mr. Stevens, seconded by Mr. Codd, that Mr. Clemow "having sold and assigned his stock in the Company and tendered his "resignation as a director of the Company, be it resolved that his "resignation be accepted and that Dr. Mc.Michael, being duly qualified, be "elected a director of the Company in his stead. Carried.

"Moved by Mr. Codd, seconded by Dr. McMichael, that Mr. G. A. B. "Aird be appointed a director in the place of Mr Devlin. Carried.

"All the new directors being present, it was moved by Dr. "McMichael, seconded by Mr. Gregson, that Mr. Clemow having resigned "as a director, and the office of president being vacant, Mr. Charles R. "Stevens be elected President of the Company. Carried.

"Mr. Stevens then took the chair.

"Moved by Mr. Gregson, seconded by Mr. Aird, that Mr. J. A. Codd "be Secretary-Treasurer of the Company. Carried

"Mr. Stevens, the President, having offered to loan the Company the "sum of 15,158 dollars, 33 cents repayable at call, it was resolved to accept "said loan.

"It was moved by Mr. Gregson and seconded by Dr. McMichael, "that the two several contracts between the Company and A. Charlebois for "and respecting the completion of the first fifty miles of the Company's "line (which are now for identification duly initialed by the Chairman of this "meeting) be hereby confirmed and the President and Secretary authorised "to affix the Company's seal thereto under their hands as the act of the "Company. Carried.

"It was moved by Mr. Gregson and seconded by Mr. Aird, that the four "several equitable assignments of Mr. A. Charlebois the first moneys "hereafter payable to him on his construction contract duly executed and "delivered to-day, be hereby accepted by the Company (amounting in the "aggregate to 100,687 dollars, 89 cents) and that the President and Secretary "of the Company be authorized in each case to give and execute under the "Company's seal the acceptance in writing now approved as follows :

"The Great North West Central Railway Company pursuant to "resolution of the board passed to-day, hereby accept this order and "assignment and agree to pay same out of the moneys therein mentioned. "Dated 16th September, 1889.

(Sgd.) CHAS. RICH. STEVENS, President.
(Sgd.) J. A. CODD, Secretary.

"It was moved by Mr. Gregson, seconded by Dr. McMichael, "that the President and Secretary be authorized to sign and issue a cheque "to Mr. A. Charlebois,Contractor, for 243,333 dollars 33 cents. Two hundred "and forty-three thousand three hundred and thirty-three dollars and thirty-"three cents on account of his construction contract this day entered into.

(Sgd.) CHAS. RICH. STEVENS, Chairman."

59. The construction contract bears date the 16th day of September 1889, and purports to be a contract for the construction of 50 miles of the Company's railway.

10 The consideration therein expressed is £200,000 sterling, whereof £50,000 is therein acknowledged to have been paid, and the balance of £150,000 sterling is thereby made payable on the completion and delivery to the Company of the first 50 miles of the Company's road. Original Record, Vol. III, Trial Exhibit 16, p. 48

60. The conversion of the Company's existing contract with Sproule into a sub-contract with Charlebois in the names of the Defendants Macdonald and Schiller was effected shortly after the 16th September. Trial Exhibit 13, p. 51 Trial Exhibit 17, p. 54

61. The contract between Charlebois and the Company is it is submitted illegal in other respects besides the inclusion of unlawful sums in the consideration.

20 That contract provides, among other things, that Charlebois "shall "have in addition to such protection and lien, if any, as the law allows and "affords him a lien and first charge upon and over the said first 50 miles of "railway, and its appurtenances, including rails, ties, buildings, equipments, "road-bed, right of way, right to the land grant thereto appertaining, if and "when fully earned, right of operation of said railway, and upon the whole "property enterprise and undertaking including the works then already in "course of operation," until he the said Charlebois shall be paid the full balance of the contract money being the sum of £150,000 sterling.

62. It is submitted that the "lien and first charge" which the contract 30 so purported to give Charlebois was *ultra vires* of the Company. This provision of the contract was in effect an attempted bonding of the Company's road and property by a meeting of Directors, not purporting to be, nor being in fact, a Special General Meeting of shareholders called in compliance with the conditions and steps required for bonding by section 14 of the charter.

63. Delap had already, on the instant of the transfer, and before any of the unlawful resolutions or acts of the new Directors in the name of the Company become holder as pledgee of 90 per cent. of the shares. Had the requisite steps by publication under clause 14 been taken he might have received notice and would have been entitled to intervene to protect himself by preventing 40 such action of the Company.

64. If the contract cannot be supported as a bonding it must fail unless it can be supported as a mortgage.

But it is submitted that except under the provisions and conditions as to bonding the Company had no power to mortgage its property to Charlebois. It is submitted that the power to mortgage under section eleven of the charter is confined to certain lands therein mentioned, which the Company might "from "time to time purchase from the Government of Canada," etc., and that even these lands could be mortgaged only for the purpose of purchasing the same or raising money for the prosecution of the undertaking. ante p. 4.

65. The Government of Canada had granted this charter and was subsidizing this road by a large land grant, in the public interest, for the construction of a railway from Brandon to the Rocky Mountains, 450 miles, as a through line, permitting them to draw their land grant as construction proceeded by sections of fifty miles. The scheme so authorized and created would be entirely frustrated by the grant of a power to mortgage sections of the line for the construction of a particular part of the line.

66. The land grant was dedicated to the construction of the whole line and until that object was accomplished could not be diverted into a source of profit to the shareholders.

67. The contract is directly contrary to the public interest and to the policy of the general public Act under which the lands were appropriated and the charter authorized as means to an end namely the construction of the railway in the interest of the public.

Rec. p. 203, ll. 1 to 5, and ll. 11 to 19
Rec. p. 210, ll. 44 to 47
Rec. p. 211, ll. 1 to 23
Rec. p. 212, ll. 47 and 48
Rec. p. 213, ll. 1 to 13 and ll. 43 to 48
Rec. p. 214, ll. 37 to 43
Rec. p. 217, ll. 30 to 48
Rec. p. 218, ll. 1 to 30
Rec. p. 219, ll. 33 to 43
Rec. p. 221, ll. 8 to 22 and ll. 27 and 28
Rec. p. 222, ll. 40 to 46
Rec. p. 223, ll. 1 to 4
Rec. p. 233, ll. 1 to 45
Rec. p. 248, ll. 39 to 46
Rec. p. 249, ll. 17 to 25
Rec. p. 250, ll. 2 to 7 and ll. 11 to 17
Rec. p. 252, ll. 23 to 27
Rec. p. 260, ll. 20 to 29

68. It is submitted that the whole transaction resulting in the said contract was also fraudulent against the Company under the circumstances disclosed in the evidence and cannot be sustained. See Charlebois' evidence.

69. The Directors having pursuant to their agreement procured the Company's original contractors to transform their contract into a sub-contract under Charlebois, the sub-contractors proceeded with the work of building the fifty miles of road.

Original Record Vol. III, Trial Exhibits 88, 134, pp. 88, 89 and 92
Rec. p. 68, ll. 8 to 42

70. In 1891 Charlebois induced the Government of Canada to pass orders in Council amending the contract between the Company and the Crown so as to waive completion in some respects, and thus the land grant of 6,400 acres per mile for the fifty miles was made available, but he never fully completed the work under his contract with the Company.

Original Record Vol. III, p. 65

71. On or about the 16th day of October, 1889, a further contract was entered into by the Company with Charlebois for the construction of a second fifty miles of the Company's line.

Original Record Vol. III, p. 242, l. 32

72. On the 21st of October, 1889, the issue of land grant bonds to the amount of £515,600 sterling was authorised by a resolution of a meeting of the shareholders of the Company.

Original Record Vol. III, p. 226
Rec. pp. 290 et seq.
Rec. p. 294, l. 22
Rec. p. 483, l. 41
Rec. p. 484, ll. 46 to 48
Rec. p. 485, ll. 1 to 9 ll. 21 to 38
Rec. p. 305, ll. 15 to 22
Rec. p. 312, ll 6 to 10
Rec. p. 315, ll. 31 et seq
Rec. p. 495

73. The Plaintiff Delap with the knowledge of Charlebois made further advances direct to the Company for the purchase of the Company's rails to the amount of about £36,000, and also certain additional advances including £3500 for engines, upon the agreement that he should be repaid out of the proceeds of sale of the Company's bonds, and that he should be secured by a deposit or pledge of the bonds in the meantime until realisation by the Company.

74. The Plaintiff Mansfield also on a like agreement and security made advances to the Company of several thousand pounds. Original Record, Vol. III, p. 330, l. 32, p. 331, p. 335, l. 35

75. In May, 1890, an attempt was made by the Company to obtain subscriptions for the bonds of the Company in the market, for the purpose of paying their advances but without success, and no allotment took place. Subsequently the bonds of the Company to the amount aforesaid were duly issued and a mortgage to Gifford and Curzon to secure the same was duly executed and registered. Original Record. Vol. III, p. 105 Exhibit 6, pp. 102-4, p. 115 Rec. pp. 517 and 518 Rec. pp. 524 and 525 Rec. pp. 569 and 570 Rec. pp. 575 and 576

76. The bonds were deposited in pursuance of the agreement aforesaid to secure Delap and Mansfield for their advances, and also to secure others who had made advances to the Company.

77. This deposit took place in July 1890, and contemporaneously with such deposit a further sum of £1,500 sterling was actually advanced to the Company in consideration thereof by the said solicitors for the Plaintiffs Delap and Mansfield, out of the funds of the Plaintiff Mansfield and upon the express stipulation and contract that the whole issue of bonds should be as the same were handed to the solicitors for the said two Plaintiffs to secure, pursuant to the understanding, the payment of all advances previously made by either of them. Rec. p. 523, l. 28

78. The bonds remained deposited as security for the said advances of Delap and Mansfield and others from the month of July 1890, thenceforward and were so deposited when Charlebois commenced the action in which the Judgment impeached in the present proceedings was pronounced. Rec. pp. 524, l. 26 to 525

79. Stevens before the commencement of the action in which the judgment impeached in these proceedings was entered had transferred to his client Delap the bulk of the shares held by him in trust for Delap, and Delap has ever since been the holder thereof.

80. Codd, notwithstanding his interest in the contract and contrary to the Statute, acted as Director and President of the Company from 1889 till declared disqualified by Order of Court in 1893, after this action was brought as hereinafter mentioned.

81. While Codd was so continuing to act as President Charlebois in September 1891, brought an action in the High Court of Justice for Ontario, wherein he was sole Plaintiff and the Company sole Defendant for the recovery of the balance of £150,000 which he claimed to be payable under the contract, and he procured the judgment impeached in the present proceedings by means of a consent given in the said action by the defendant Codd presuming to act and give such consent as President of the Company. The action of Codd was never authorised or ratified by the Directors or shareholders of the Company.

82. Charlebois and his counsel were aware before the said Judgment was consented to that many of the shares had been transferred and were held by parties in England, and were also aware that Stevens had been and that some other person then was a trustee in respect of the shares Stevens had held for some person in England, not present at the making of the said contract and not in Canada at the time of bringing said action and procuring said Judgment; Original Record, Vol. III, Trial Exhibit 80, pp. 134, 135, ll. 1 to 10 p. 140, l. 30

and were also aware of the issue and pledge of the said bonds in favour of the said parties then in England. The writ of summons in the said action by Charlebois was served upon Codd only. No pleadings were filed, but a motion for injunction was made. None of the facts in relation to the question of the said contract or of the said consent being *ultra vires* or fraudulent against the Company or as to the issue and pledge of the bonds were shown or raised before the Court, and though it then appeared and was admitted that Charlebois had not finished the work under the contract, Codd and his solicitor and counsel McMichael instructed counsel to and counsel did consent to the motion for injunction being turned into a motion for Judgment and to the Judgment impeached being immediately pronounced.

Rec. p. 362, ll. 25 to 37
Original Record, Vol. III, p. 166, l. 10, p. 168, l. 20 p. 170, l. 20

83. J. Travers Lewis, the solicitor for Charlebois, who had participated in and advised all the proceedings of the 16th of September 1889 relating to the contract, was present instructing counsel for Charlebois throughout the proceedings and at the hearing, and also appeared as one of his counsel in settling the terms of the impeached Judgment.

Rec. p. 29

84. The impeached Judgment was as before stated pronounced upon consent, the Court bestowing no judicial examination upon the merits of the questions involved, and on the face of the Record giving judgment by consent of parties.

85. The impeached judgment declared Charlebois to be entitled to the lien and charge provided for in the contract for the sum of 622,226 dollars, and adjudged that the Company should pay within six months from the date of the judgment the last-mentioned sum with interest as in the judgment provided or directed at the request of the plaintiff Charlebois, the said sum to be paid in part as follows:—

(a.) To the present defendants Macdonald and Schiller ... $64,429
(b.) To the present defendant W. A. Preston 8,400
(c.) To the present defendants the executors of the Crossen Estate 39,000
(d.) To the present defendant Charlebois 380,397

And it further provided as follows:—

(e.) "The third and last charge on the said fund is to be the residue, "namely, the sum of 130,000 dollars, with interest thereon to date, "payable to D. McMichael, Esq., Q.C., as trustee in full satisfaction "of all claims in a certain order or agreement" (being the agreement "of the 6th day of March, 1888 hereinbefore mentioned) "for the "payment of a sum stated therein at 173,133 dollars 33 cents. in full "adjustment of all matters in dispute between the said parties hereto, "J. A. Codd, the said Daniel McMichael, Trustee, the defendants" (the Company) "and all other persons waiving and declaring all "personal claims against the plaintiff" (Charlebois) "under the said "order or agreement as satisfied and discharged."

86. McMichael was trustee for the defendant Codd of the sum payable to him as commission.

The payees, named in the impeached Judgment, other than Charlebois were not parties to the action.

87. The impeached Judgment further provided that in default of such payments by the Company within the time thereby limited Charlebois should be entitled to exercise all his rights as chargee, which rights are thereby declared to be "the full right of a mortgagee with judgment for sale."

88. It further provided that the proceeds of any sale of the land grant should be applied as contemplated by the charter and mortgage deed for the benefit of the bonds of the Company, but that so much of the proceeds of the said bonds as might be necessary should be applied to pay the indebtedness of the Company to Charlebois, forthwith after such sale, and that no part thereof should be applied in any other way till such payment should have been made.

89. It further provided that the whole of the said bonds should be deposited and remain, as in the said judgment mentioned until the sale or pledge thereof and should not be applied except to pay Charlebois' claim and that in case of failure to deposit the whole of the said bonds within one month from the date of the judgment, such non-deposit should be a default, making the whole of the moneys under the impeached Judgment at once due and payable, and that the lien and charge of Charlebois should thereupon at once be enforceable.

90. An order (also impeached in the present proceedings) was made in the said action on the 29th day of February 1892 consequential on the impeached Judgment by reason of the failure of the Company to deposit the Bonds as directed by the impeached Judgment, enjoining the Company its officers and agents from offering the Bonds for sale and prohibiting the conveyance of the land grant to the Defendants Gifford and Curzon, the Trustees under the mortgage to secure the Bonds and ordering a sale of the constructed portion of the Company's line the land grant and the Company's property generally "or a competent part thereof" without reserve, with liberty to Charlebois to bid at such sale for the purpose of paying the judgment debt of Charlebois as a first charge on the property ordered to be sold. Rec. p. 36

91. It is submitted that it was equally *ultra vires* of the Company to consent to the impeached Judgment enforcing the contract as it was to enter into the contract itself. It was an attempt on the part of the *de facto* but disqualified President to effect in his own interest a ratification of an illegal and *ultra vires* contract. Neither the contract nor the consent to judgment were capable of ratification by the Company or its Directors or its shareholders. The Supreme Court, which holds the contract *ultra vires*, has held that the judgment by consent is an absolute estoppel against the Company. On this ground alone the appeal of Charlebois was allowed. This holding, it is submitted, is erroneous.

92. The same frauds upon the Company which brought about the contract permeated the consent to the judgment, and in addition there was further actual fraud in obtaining the judgment, as will appear from a brief statement of what took place.

93. Charlebois and his solicitor Lewis knew that Codd was legally incapacitated from acting as President or Director and that he was not authorized to consent to the judgment.

94. The impeached Judgment was deliberately and fraudulently arranged to adjudge the debt to be paid more by about 47,778 dollars than Charlebois could or can be found entitled to even on the basis of his own extravagant and unfounded and illegal claim. This appears on the face of the paper admitted by the Defendants to be the statement on which the figures of the Judgment were arrived at. It appears from it also that as a term of the consent to the Judgment Charlebois allowed to Codd a further personal consideration out of the Judgment moneys in the form of a remission of one-half of the 50,000 dollars bonus formerly stipulated to be transferred to Charlebois out of Codd's 173,000 dollars commission.

Rec. pp. 714 to 715
Rec. pp. 11 and 12

95. On the face of the items in this statement the account between Charlebois and the Company would stand thus :—

Contract price		$973,333	
Paid thereon	$243,333		
Rails, &c.	129,574	372,907	
			$600,426
		$600,426	
Extras claimed by Charlebois		... 5,128	
		5,940	
		1,444	11,212
			$611,638
Less admitted deficiencies in fulfilling contract :—			
Engines	$20,000		
Fencing	13,000		
Right of way ..	3,000		36,000
			$575,638

It being admitted that the contract was incomplete, no interest would be due to Charlebois.

96. On the other hand, the private account between Charlebois and Codd stands as follows :—

Commission to Codd			$173,333
Less bonus		$50,000	
„ order		28,000	
„ „		4,866	
„ loan to Codd		10,000	
			92,866
			$80,467
Rebate agreed to be returned to Codd out of bonus			25,000
			$105,467

97. These two accounts were mixed together and manipulated as follows :—

Commission to Codd...		$173,333.00	Rec. p. 715
Engines	$20,000.00		
Fencing	13,000.00		
Right of way	3,000.00		
Rebate on Bonus	25,000.00		
		61,000 00	
Allowance to Codd and Com.		$234,333.00	
Less—			
Bonus	$50,000.00		
Order	28,000 00		
Order	4,866.00		
Cost of surveys	5,128.00		
Extra cost of spikes	5,940.00		
Loan to Codd	10,000.00		
Duty on Rails	144.00		
		$104,078.00	
Total amount payable to McMichael and Codd as per Group C.		$130,255.00	

98. Codd thus receives 130,078 dollars instead of 105,467 dollars, or 24,611 dollars in excess. To balance the concessions to Codd without reducing the amount receivable by Charlebois, a lump item of 22,000 dollars is allowed for interest, making the Company pay upwards of 47,000 dollars more than the true amount.

99. Codd, if he had not consented to the impeached Judgment against the Company, would have lost any claim or expectation in respect of the commission, and his personal indebtedness to Charlebois would have remained unpaid; whereas the Judgment accelerated his remedy or expectation through the immediate liability imposed upon the Company by the Judgment and liquidated his debt to Charlebois at the Company's expense.

100. Delap and Mansfield were made Co-Plaintiffs with the Company in this action as having a common interest with the Company in setting aside the Judgment and order affecting the sale and priority of the bonds.

101. Power to dispose of the bonds for the liquidation of the liabilities of the Company, including the debts to the pledgees Delap and Mansfield, resided in the Company, and its exercise was obstructed by the impeached Judgment and order, to the injury of the Company and of Delap and Mansfield.

The title of both the Company and Delap and Mansfield to sell and dispose of the Bonds was clouded by the impeached Judgment and order to their injury.

102. Delap was made a Co-Plaintiff in this action as a shareholder on behalf of himself and the other shareholders because Codd was continuing to act as President and was threatening to and did obstruct the said action in the name of the Company, until, some time after the action was commenced, he was removed from being President and Director and declared incapacitated by Rec. p. 687

reason of his interest in the said contract under judgments of the High Court of Justice for Ontario.

103. Delap is the holder of 90 per cent. of the shares of the Company as pledgee free from all claims of any of the parties in this litigation.

No question as to Delap's title to the said shares held by him as security was set up in the pleadings by any of the Defendants or argued at the trial or subsequently. The learned trial judge in error on this point made certain statements in regard to the matter in his reasons for Judgment, but subsequently withdrew that part thereof on a motion before him in regard to the minutes on the 22nd January 1894, and then settled the terms of the Judgment as they now appear.

104. As to the former shareholders Clemow, Allan, Devlin and Murray, they received in respect of their shares the consideration for which they had agreed with Charlebois on the transfer, and Charlebois also received all he stipulated for. None of the five can now be heard to complain or to make any claim because part of what they got as the stipulated consideration was worthless by reason of the transaction so far as the Company was concerned being *ultra vires.*

105. If the five or any of them could maintain against the purchasers from them any claim in respect of the shares or their purchase money, they cannot properly do so against the innocent pledgee Delap.

106. Much less would they be entitled to any relief against Delap in respect of the said shares without repaying to him the money which by arrangement with them was paid to the Company in order to make and by which the shares were made fully paid up shares before transfer.

107. Nor can they or any of them, having regard to their own fraud in the transaction by which the construction contract was saddled on the Company be now heard to claim any relief in respect of the said shares.

108. Delap was not a party to the purchase or to the fraudulent transaction in regard to the Company, and was, as held by the learned trial Judge, not affected with notice thereof,

Rec. p. 127 l. 32.

109. Delap had no notice until in or about July 1892, of the partnership between his solicitor Stevens and Codd, or of the particulars of the transaction of September 1889, or of the action brought by Charlebois, or of the impeached Judgment, or of the consequential Order; so soon as he obtained such knowledge he took steps for the bringing of this action.

110. The fifty miles of the Company's railway so far constructed are situate in the Province of Manitoba.

Rec. p. 687
Rec. p. 45, ll. 20 to 34
Rec. p. 89 ll. 3 to 13

111. Prior to the commencement of this action, Charlebois filed a bill in the Queen's Bench, in Equity, in the Province of Manitoba, against the Company, praying that possession might be given him and a sale ordered of the said railway, in pursuance of the impeached Judgment. Subsequently the said Bill was amended by adding as Defendants the Defendants Macdonald, Preston, Schiller, Nugent, the Commercial Bank of Manitoba, the Union Bank of Canada, Allan, Devlin, William James and Frederick Crossen, and John Henderson, Clemow, Murray and McMichael, alleging that they were assignees

of Charlebois in respect of certain of the moneys ordered by the impeached Judgment to be paid.

All the said parties appeared and filed answers to the said Manitoba Bill, claiming to be entitled to the benefit of the impeached Judgment, and they were made Defendants to the present action because of their said claim and to bind their alleged interest.

112. The railway is in the possession of a Receiver for all parties under an Order in the said Manitoba Bill, appointed by consent of all the parties to this action. Before the appointment of the Receiver the Company had been in possession of the railway from a date about three months after the date of the consent Judgment. Possession was not obtained by the Company from Charlebois under or in pursuance of the said Judgment. Charlebois was never in a position to give and did not give possession under the terms of the said Judgment. The Company obtained possession from the sub-contractors (Macdonald and Schiller), who were in actual possession, and who refused to give possession to Charlebois or the Company on the terms of the judgment.

113. The sub-contractors delivered possession under the following circumstances :—The sub-contractors (Macdonald and Schiller) had not received the balance due to them by Charlebois under their sub-contract. By clause 10 thereof they were entitled to hold possession of the railway against Charlebois until paid, and they were at the time of the consent Judgment and subsequently forcibly defending their possession against Charlebois and the Company.

Original Record Vol. III, p. 59

Rec. p. 463, ll. 9 to 16

Rec. p. 467, l. 11

114. Codd entered into two separate agreements with these sub-contractors, one before and the other after the date of the consent Judgment.

115. The first is in the following terms :—

"Toronto, 26th September, 1891.

"The Great North West Central Railway Company, by J. A. Codd as "its President and D. McMichael as Director, hereby undertakes and agrees "that Macdonald and Schiller and W. A. Preston be allowed to remain in "possession of its first fifty miles of railway and works now constructed until "they are paid the sum of sixty-five thousand dollars (64,429.00 dollars) to "the former or their order and the sum of eight thousand five hundred and "thirty-nine dollars (8,400 dollars) to the latter or his order on account of "their claims against A. Charlebois as sub-contractors under him. And "they further agree that the said Company will forthwith pay the above sums "to the said persons or their order.

Rec. p. 463, ll. 9 to 16
Original Record Vol. III, p. 177
Rec. p. 91, ll. 12 to 32

"It being clearly understood and agreed, that upon payment of the said "64,429.00 dollars, the 20,000.00 dollars order given said Macdonald and Schiller "by said Charlebois on the Company shall be surrendered to the Company.

(Signed) "J. A. CODD,
"as President G. N. W. C. Ry. Co.
(Signed) "D. McMICHAEL,
"as Director G. N. W. C. Ry. Co."

116. The second is in the following terms :

Rec. p. 467, ll. 4 to 12 Rec. p. 469, l. 39 Original Record Vol. III, p. 275 Exhibit 110.

"Toronto, 2nd December, 1891.

"J. A. Codd, Esq., Ottawa, Ont.

"My dear Sir,—In order to place you in a position to carry out your "arrangement with your English syndicate by being able to assure them that the "first 50 miles of the Great North West Central Railway is in reality a running "concern, on behalf of my clients Macdonald & Schiller, I hereby consent for "you to enter upon the operation of the said road, notwithstanding the "agreement that they should be first paid upon the express understanding "that if the 64,429 dollars and interest thereon, payable to them or their order, "under the judgment in the suit of Charlebois *v.* Great North West Central "Railway Company, be not paid on or before the 1st February, 1892, that your "right to operate said 50 miles shall cease, and the said agreement that they "should be first paid before delivery up of said 50 miles shall be deemed "and be in full force and effect as if this letter had never had any existence.

"Very truly yours,

"FRANK S. NUGENT."

117. These terms differ materially from the terms and conditions of the impeached Judgment, under which possession was to be delivered by Charlebois forthwith, and under which also the Judgment was not to be payable until six months after the date of the Judgment.

118. Neither Macdonald, Schiller, nor Preston were parties to the action in which the impeached Judgment was entered.

119. The Company obtained possession from the Defendants representing the Crossen Estate of certain rolling-stock.

120. The balance going to Charlebois under the Judgment of the learned Chancellor in this action exceeds the sums due to Macdonald Schiller, Preston, and the executors of the Crossen Estate, and the Company has always been willing that they should be paid those sums which can and should be paid out of the said balance.

121. Gifford and Curzon are the trustees mortgagees to whom the mortgage to secure the land grant bonds was made by the Company.

122. Neither Clemow, Murray, Codd, McMichael, Gifford, nor Curzon appealed from the judgment of the trial Judge, and none of them were made parties in any of the appeals in the courts below

123. The learned Chancellor of Ontario, by whom this action was tried, found, as it is submitted correctly, in so far as his findings are in favour of the Appellants, as follows:—

That on the 16th September, 1889, 45 per cent. had been paid upon the shares with the loan from Delap in addition to the 30 per cent. previously paid up, and that the shares had been duly declared to be paid up by allowing a discount, and were transferred as, and in fact were, fully paid-up shares.

That the £50,000 paid to Charlebois on the 16th day of September, 1889, was the money of the Company, and that Charlebois was bound to give credit for the same upon whatever amount should be found properly payable to him in respect of the contract.

That the £200,000 embraced in the contract was in part made up of the following amounts :

Agreed to be paid by Charlebois to his co-vendors for their share	$226,632
The value, including bonus, which Charlebois placed upon his own shares	36,893
Codd's commissions	173,133

That none of these sums were debts of or properly chargeable to the Company.

That the contract and the consent to the impeached Judgment were respectively *ultra vires* in respect of the said amounts.

That the work under the contract had not been completed by Charlebois at the date of the impeached Judgment.

And that the amount of the impeached Judgment should be reduced by the amounts aforesaid and interest, if any, in respect thereof, included in the said Judgment, and also by the value of the work not done.

That the lien and charge granted by the contract to Charlebois was *ultra vires* of the Company and void except in respect of surplus lands.

That the Government land grant was surplus lands and that the lien in respect of what was properly payable to Charlebois covered the same.

That the order of the 29th of February, 1892, was consequential upon the said impeached Judgment and was therefore not sustainable and should be vacated.

That Macdonald, Preston, Schiller, Nugent, the Commercial Bank of Manitoba, the Union Bank of Canada, Allan, Devlin, Clemow, Murray and the executors of the Crossen Estate had not any of them any better right or position than Charlebois in respect of the matters in question.

That if notice to Delap was material he was not affected with notice from the time his solicitor Stevens entered into partnership with Codd.

That Codd and his trustee McMichael had no claim against the Company.

That the Company's bonds to the amount of £515,600 were validly issued and were validly pledged to the Plaintiffs Delap and Mansfield for advances to the Company for purposes of construction and prosecution of the undertaking.

124. Charlebois, Allan, Devlin, the Union Bank of Canada, and The Commercial Bank of Manitoba and the executors of the Crossen Estate appealed to the Court of Appeal for Ontario and from the Court of Appeal to the Supreme Court of Canada.

125. The plaintiffs cross appealed in each Court, their grounds being as follows:

That the trial Judge should have set aside entirely the impeached Judgment and the contract and have relegated Charlebois to a *quantum meruit* for whatever he had earned.

That the trial Judge should have declared the Bonds a first preferential lien and charge over the land grant as well as the other property of the Company in priority to Charlebois.

That no preference or priority over the moneys secured by the pledge of the said bonds should be accorded to anyone for construction debts of the Company.

126. The result of the appeal and cross-appeal from the Chancellor's judgment to the Court of Appeal for Ontario was that the Chief Justice except as to Delap's claim on the bonds, and Osler, J., in all respects agreed with the judgment of the Chancellor. Burton and Maclennan JJ. differed.

As to the claim of Delap as pledgee of the bonds the Chief Justice and Burton and Maclennan JJ. reversed the Chancellor's finding, holding that the bonds had not been validly pledged to Delap because the pledge was in their view of the evidence for an antecedent debt, and therefore invalid.

127. Thereupon the said several parties appealed and cross-appealed to the Supreme Court of Canada. The result of that appeal and cross-appeal was that, of the five judges who heard the appeal, four—viz., Justices Taschereau, Sedgwick, King and Girouard sustained the Chancellor's findings of fact, and his view that the contract was *ultra vires;* but they held that notwithstanding the contract was *ultra vires,* the impeached Judgment was a conclusive estoppel against the Company and the other Plaintiffs.

The same Judges agreed with the holding of the Court of Appeal that the bonds were not validly pledged to Delap on the ground that a pledge of the Bonds to secure antecedent advances was invalid and they came to the same conclusion as to the pledge to Mrs. Mansfield.

The same Judges however disallowed the sum of 130,000 dollars by the Consent Judgment directed to be paid by the Company to McMichael trustee for Codd in respect of his commission of 173,133 dollars.

King Justice delivered the judgment of the majority. He first distinctly affirms the finding that the contract was *ultra vires* in all the particulars stated in the judgment of the learned trial Judge. He then gives the grounds of his judgment as follows :—

" But now we come to a wholly different question. Charlebois was not " suing upon the contract. That has become merged in the judgment rendered " upon it and the present proceedings are to set aside that judgment or to " restrain its enforcement.

" The learned Chancellor was of the opinion that the Judgment has no " greater validity than the contract because it was determined by consent, and " the Company could not validly give a consent to treat as valid what was " *ultra vires.*

" In the case of re South American and Mexican Trading Company, 1 " Chancery, 1895, 37, decided subsequently to the Chancellor's Judgment, " it is held that a Judgment by Consent creates an estoppel to the same extent " as a Judgment where the Court has exercised a judicial discretion. Then as " to the issue of the bonds. The issue to Mrs. Mansfield seems scarcely to " rest on stronger grounds than those which the Court of Appeal thought " insufficient in the case of Mr. Delap."

Mr. Justice Gwynne, the remaining judge, differed, holding that there had been fraud in obtaining the contract and judgment to the extent of 173,000

dollars, and that Charlebois' claim should be reduced to 427,093 dollars; and he also differed as to the pledge of the bonds, holding that the question was not properly before the Court for decision.

128. The Appellants claim :—

That the Supreme Court erred in holding that the impeached Judgment was a conclusive estoppel; and in not finding that there had been fraud in procuring the contract and Judgment and also in holding that the bonds were not validly pledged to Delap and Mansfield.

That the case of re South American and Mexican Company relied upon by the Supreme Court of Canada is the case of a perfectly valid transaction, which when entered into could have been confirmed by a meeting of the Company at any time, and the attack upon the Judgment in that case was not based upon the contention that the transaction which was the foundation of the Judgment was *ultra vires.*

That the amount of the debt under the impeached Judgment was properly reduced by the Judgment of the trial Judge and such reduction should be sustained.

That the evidence proves advances by Delap and Mansfield respectively of very large amounts to the Company for purposes of construction and prosecution of the undertaking some prior to the issue and actual delivery in pledge of the bonds under the agreement that the advances should be repaid out of the proceeds of sale of the bonds, and that until sale the bonds should be, as they were, pledged to secure the same, and also proves large advances contemporaneously with the delivery of the bonds in pledge and also thereafter expressly upon the security of such pledge.

That the Plaintiffs Delap and Mansfield are respectively validly pledgees of the Bonds of the Company.

That the bonds are in the hands of the pledgees Delap and Mansfield a lien and charge prior to that of Charlebois or any other of the Respondents by virtue of the contract and impeached Judgment.

That the land grant is not "surplus lands."

That the Plaintiffs Delap and Mansfield are not bound by the terms of the impeached Judgment.

That the Plaintiffs are entitled to have the restrictions imposed by the impeached Judgment and order upon the dealing by the Plaintiff Company with the said bonds forthwith removed.

129. On the 29th day of June 1896 leave was given to the appellants to appeal to her Majesty in Council.

130. The appellants submit that the present appeal ought to be allowed for the following among other reasons :—

REASONS.

(1.) The findings of fact of the learned trial Judge upon the evidence should not be disturbed.

(2.) The finding of the learned judges of the Courts below

that the contract in question was *ultra vires* of the Company is correct in fact and in law.

(3.) The consent to the impeached Judgment was equally *ultra vires* of the Company.

(4.) The learned trial Judge correctly states the law in the following passage of his reasons for judgment.

"A Company created by Act of Parliament has no right "to spend a penny of its money except in the manner provided "by the Act. The expenditure of money for a purpose "unauthorised by the Act, is *ultra vires* absolutely. Such an "expenditure cannot be validated by promoters, directors or "shareholders for the time being, nor can it be sanctioned by "the Company itself. It follows that, if the act is beyond the "power of the Company to do or ratify, no judgment obtained "by the consent of the Company treating it as anthorized can "remove its invalidity, for the virtue of such judgment rests "merely on the agreement of the parties and the incapacity "to do the act involves the incapacity to consent that it be "treated as valid. I think, therefore, that the judgment by "consent obtained by the Defendant Charlebois against the "Company (upon which depends the subsequent judgment in "invitum) forms no obstacle to the Plaintiffs if the transaction "impeached is inherently *ultra vires.*"

(5.) The impeached Judgment can have no higher validity than the agreement of the parties.

(6.) The estoppel if any is removed by proof that the contract and consent were alike *ultra vires.*

(7.) The Judgment by consent does not constitute the matter thereby dealt with *res judicata.*

(8.) There was fraud in obtaining the contract and Judgment, and they should be set aside.

(9.) The Order of 29th February, 1892, consequential upon alleged default by the Company in depositing the bonds as required by the terms of the impeached Judgment should fall with that Judgment. In any case that Order should be declared void and set aside as improper in authorising a sale as therein set forth.

(10.) The impeached judgment and order are subversive of the scheme of Parliament in the interest of the public for the construction of a through line of 450 miles. If they are allowed to stand, the land grant given by the Crown with the authority of Parliament for the purpose of a through road of 450 miles in the public interest is to be sold and the proceeds are to go into Charlebois' pocket; Not only this, but the fifty miles of road built as a part of the through line of 450 miles subsidised for public purposes is to be sold piecemeal and the whole public scheme thus effectually frustrated.

The impeached Judgment and order are contrary to public policy.

(11.) The bonds issued by the Company are by the Charter 57, Vic. c. 85, ss. 14 and 15, and by the Railway Act of 1888 a first preferential claim and charge upon the Company and the property thereof, and Delap and Mansfield as pledgees are entitled to priority for their advance to the Company over the claim of theRespondents.

The pledge of the bonds to Delap and Mansfield is proved in evidence. The finding of the trial Judge on this question of fact ought not to be disturbed.

The advances were all for purposes of construction and prosecution of the undertaking, and in so far as the pledge is contended to have been for antecedent advances, the Company could and did make it properly under the agreement under which these advances were made—viz.: That they should be repaid by sale or secured by pledge of the bonds. The Company could have paid their indebtedness by giving bonds to Delap and Mansfield in satisfaction, and failing to make such sale they could pledge for the indebtedness.

The advances at the time of and subsequent to the delivery in pledge sustain the pledge.

The pledge is not in any event impeachable by the Respondents who as creditors have no *locus standi.*

Delap and Mansfield, pledgees of the bonds, not having been parties to the action of 1891, and their pledge being prior to that action, are not bound by the Consent Judgment but are entitled to have the same and the consequential order of the 29th February 1892 removed as clouds upon their title to the bonds and to have the Company freed from restriction in dealing with the said bonds for the purpose of paying off indebtedness of the Company.

EDWARD BLAKE.
FRANK ARNOLDI.
O. A. HOWLAND.

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*

— *v.* —

CHARLEBOIS AND OTHERS - *Respondents.*

CASE FOR THE APPELLANTS.

GADSDEN & TREHERNE,
28 Bedford Row
W.C.