Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Great North-West Central Railway Company and others v. *Charlebois and others, from the Supreme Court of Canada; delivered* 1*st April* 1898.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.
SIR HENRY DE VILLIERS.

[*Delivered by Lord Hobhouse.*]

This suit was instituted for the purpose of invalidating a contract purporting to be made on the 16th of September 1889 between the Plaintiff Company and the Defendant Charlebois, and a judgment obtained upon it by him against the Company on the 25th September 1891. The main questions are; 1st, whether the contract was a breach of trust by the Company's Directors and Charlebois as alleged in the claim, or was *ultra vires* of the Company according to the majority of judicial opinions below; and if so, 2ndly, whether the judgment obtained on it could be impeached. There is also another judgment or order passed in February 1892; but that, it is agreed on all hands, is only supplemental to the earlier one and must stand or fall with it.

The Chancellor of Ontario who presided at the trial held that the contract was as to certain payments covered by it *ultra vires*, and that the judgment having been obtained by consent was

impeachable to the same extent as the contract. On appeal the Ontario Court, consisting of four Judges, was equally divided. Two Judges, differing in their reasons, thought that at least the judgment of 1891 ought not to be impeached. But the Chief Justice and another learned Judge concurred with the Chancellor. The appeal therefore stood dismissed. Then the case was carried to the Supreme Court of Canada, consisting of five learned Judges. Mr. Justice Gwynne differing from the rest of the Court thought that the decree below should be maintained in some important particulars. The other four, whose views are stated by Mr. Justice King, held that, though the contract was as regards the payments complained of *ultra vires*, the judgment of 1891 was not impeachable except as to one item amounting to 130,000 dollars. To that extent therefore the Plaintiff Company has got relief; but in other respects their suit stands dismissed, though without costs.

The suit is framed in a very unusual way, because the Company has joined to it as co-Plaintiffs, Mr. Delap who sues not only as a shareholder on behalf of himself and all others but also in the character of a holder or pledgee of the bonds, and Mrs. Mansfield who sues as another holder or pledgee. The objection of misjoinder was not taken successfully in the Courts below, and it must be taken as decided between the parties in this suit that misjoinder is not fatal to it. As the matter is treated by the Supreme Court no embarrassment arises from the joinder of bondholders, but in the view of their Lordships there is difficulty in deciding the issues raised by their presence.

The history of the contract has been loaded with a vast amount of preliminary detail which may have been necessary in the first instance for

the exact understanding of its nature, but is quite unnecessary now. There is little dispute upon any material matter of fact. The facts necessary to found their Lordships' judgment are mostly stated by Mr. Justice King in delivering the views of the majority of the Supreme Court. The contract is on the face of it quite legal and regular. It is for the construction by Charlebois of 50 miles of railway in consideration of 50,000*l.* paid down by the Company, and 150,000*l.* more to be paid by them on completion. The objections to it are founded on extraneous circumstances.

The Company was formed in the year 1886 under the Public Statutes and a Charter from the Crown. The nominal capital is two million dollars. In 1887 five thousand shares of the nominal value of 100 dollars each had been issued and 30 per cent. paid up on them. They became all vested in five persons who were also Directors of the Company: viz. Charlebois, Clemow, Allan, Devlin, and Murray. In 1888 those five persons agreed with one Codd that for the sum of 200,000*l.* they would sell him all their shares and also construct the first 50 miles of railway, but Codd was to have a bonus for himself equal to 173,000 dollars out of the 200,000*l.* Codd could not find the money, nor was any forthcoming till Delap took the matter up in 1889 and offered to find 50,000*l.* In September of that year one Stevens acting for Delap, Codd, and the five shareholders, made arrangements among themselves to the following effect: Charlebois was to buy up 4,300 shares held by the other four at the price of 226,000 dollars: these shares and the remaining 700 belonging to Charlebois himself, valued on the same principle at 37,000 dollars, were to be transferred to Stevens or his nominees: 45 per cent. or 225,000 dollars was to be paid upon the 5,000 shares,

which, after allowing a discount of 25 per cent. in consideration of immediate payment, would make them fully paid-up shares; and certificates of paid-up shares were to be issued: Stevens was to pay 50,000*l.* reckoned as 243,000 dollars, to the Company's credit at their bank: the transferees of the shares were to become Directors of the Company and Stevens to be President: then the Company so reconstituted was to make a contract with Charlebois, in form a simple construction contract, for 50 miles of road at the price of 200,000*l.*: 50,000*l.* (being in fact the sum paid to the Company by Stevens) was to be handed over to Charlebois immediately: out of it he was to pay over to his four colleagues at once sums aggregating 126,000 dollars, and he was to secure to them the balance of the price of their shares by assignments of portions of his contract price, equal to 100,000 dollars more: Codd also was to have his old bonus of 173,000 dollars out of the contract price. In stating these sums of money their Lordships have for brevity used round figures.

All these arrangements were carried into effect in due form on one day, viz. the 16th September 1889. The effect on the Company was this: that it was saddled with the payment of 200,000*l.* ostensibly for the construction of 50 miles of road; and it was made to appear as getting a length of road valued at 200,000*l.*, whereas in point of fact that sum was not paid or estimated for construction, but was calculated to cover Codd's bonus and the price of shares, which had nothing to do with construction.

The only argument which the Defendants' counsel can find to support the transaction is founded on a contention that the 50,000*l.* never became the money of the Company but remained the property of Stevens till it passed to Charlebois. How far that would affect the substantial rights

of the case need not be discussed because it cannot be maintained as a matter of fact. Mr. Macarthy cannot resist the conclusion that if the shares became paid-up shares the money must have passed to the Company. He is therefore driven to argue that the careful processes employed to give the shares the character of paid-up shares were all a farce and are to go for nothing; and that the shares remained liable in the hands of their transferees to calls of 70 per cent. Such a suggestion did not meet with favour in any of the Courts below and their Lordships do not view it with any greater favour. They have no doubt whatever that the 50,000*l.* became, and was intended to become, the property of the Company, and as such served a very material purpose; although it was the common intention of the limited groups of outgoing and incoming shareholders to pay it back immediately to Charlebois. That being so, it was unlawful to apply the money to purposes which had nothing to do with construction under the veil of a construction contract.

This conclusion is also the conclusion arrived at by the Supreme Court. That Court further holds that so far as regards a sum of 130,000 dollars part of the 173,000 ordered to be paid to Codd the judgment of 1891 cannot be enforced. But as regards the other subjects of dispute the Supreme Court holds that the contract has become merged in the judgment, and that the judgment ought to be enforced. This then is the next question to be considered.

In stating the material facts that relate to the judgment their Lordships again refer to the statements of Mr. Justice King. On the 9th September 1891 the Company sued Charlebois for breach of contract, and two days afterwards Charlebois sued the Company to recover the balance due on his contract and to establish a lien on the road which the

contract purports to create in his favour. He then moved for an injunction, when affidavits were filed and Codd who was then President of the Company was cross-examined. After about a week's discussion the parties came to an understanding with one another; the motion for injunction was turned into one for judgment, which was passed accordingly on the 28th September and is the judgment in question. It is agreed at this Bar that nobody except Codd was served with notice in the suit; that there is no trace of any meeting or action of anyone else connected with the Company; that no pleadings were filed; that the question of the contract being *ultra vires* was not raised; nor were the facts stated on which it could be raised.

The judgment declares that Charlebois has a lien on the Company's railway and other property for the sum of 622,226 dollars, and it orders the Company to pay that sum with interest. At the request of Charlebois that sum is to be distributed in various channels: to himself, for his own use or for the use of any person or corporation to whom he might have assigned the moneys payable under his contract, 380,397 dollars with interest; to Mr. Macmichael as trustee for Codd 130,000 dollars, to which Codd's original bargain for 173,000 dollars had been reduced by dealings between him and Charlebois; and three other sums to three sets of claimants under Charlebois, either as sub-contractors or purveyors of rolling stock.

Of course those Judges who think that the contract though improper was not *ultra vires* have no difficulty in holding that the judgment is binding, whether by way of ratification or by its own force. But the difficulty is to reconcile an opinion that the contract is *ultra vires* with an opinion that a judgment obtained as this was is a binding judgment. The authorities referred to by the Supreme Court do not relate to

contracts *ultra vires*. It is quite clear that a Company cannot do what is beyond its legal powers by simply going into Court and consenting to a decree which orders that the thing shall be done. If the legality of the Act is one of the points substantially in dispute, that may be a fair subject of compromise in Court like any other disputed matter. But in this case both the parties Plaintiff or Defendant in the original action and in the cross action were equally insisting on the contract. The President who appears to have been exercising the powers of the Company had an interest to maintain it, and took a large benefit under the judgment. And as the contract on the face of it is quite regular, and its infirmity depends on extraneous facts which nobody disclosed, there was no reason whatever why the Court should not decree that which the parties asked it to decree. Such a judgment cannot be of more validity than the invalid contract on which it was founded.

The next question is how to deal with a contract vitiated in such important respects. The Courts in Ontario held that the payments *ultra vires* could be so separated from the lawful payments for construction, that it was open to them to maintain the contract while disallowing the wrongful payments. The Appellants object to that course, and so do the Counsel for Charlebois; both preferring that the contract should be wholly set aside, and that Charlebois should be left to recover the value of his work. Not only is that the more direct and usual course, but it seems to their Lordships that to resolve the consideration for the contract into its component elements is not a simple thing, and they are not satisfied that justice is done by it. It might well be that Charlebois was satisfied with the round sum of 200,000*l.* because it covered large items in the complicated arrangements between

he various parties; and he may have given to the Company works the value of which is greater than the contract price diminished by the unlawful payments to Codd and for the shares. Their Lordships think that the contract and the judgment should be set aside, and that there should be an enquiry how much is due to Charlebois over and above the 50,000*l.* which was paid to him on the 16th September 1889.

There has been a great deal of argument about the validity of the lien adjudged to Charlebois. The case is a very peculiar one. By his contract Charlebois was to have a full and complete lien and charge for the unpaid 150,000*l.* upon the road and its equipments, and upon the land grant earned by it, with a right of operating the railway. At that time no road was made. In September 1891 Charlebois or his sub-contractors gave up to the Company the use of the road then made, and the Company thereby earned and received a land grant. That was one of the terms of the judgment of September 1891. The same judgment affirmed his right to the lien as granted, and went on further to declare that he had the full rights of a mortgagee with judgment for sale, and that the Company were to be subject to the order of the Court as to any conveyance required.

Independently of the infirmity which affects the judgment on the grounds before stated, it is difficult to maintain the lien so expressed. The land is stated to be in Manitoba, and the sale of it cannot be conducted nor possession given by an Ontario Court, nor of course has either the Supreme Court of Canada or Her Majesty in Council, sitting in appeal from an Ontario Court, any wider jurisdiction. In point of fact their Lordships are given to understand that a receiver appointed by the Manitoba Court is in possession. Moreover it

is not contended by Mr. Macarthy that Charlebois could exercise the power of operating the road. If he had retained possession on the ground that he was unpaid, the property would have remained idle and useless to everybody.

Their Lordships do not now discuss the somewhat intricate questions as to the powers which the Company have to create charges on their line or on their land subsidy under the Charter and the Acts of 1879 or 1888. They think that the lien must share the fate of the rest of the judgment which creates it. As between the Company and Charlebois, Mr. Blake undertakes on behalf of the Company that directly they can float the bonds which they have power to issue and are trying to issue, he shall have a sufficient amount to secure him the balance ultimately found due to him. No doubt it is hard upon him not to be paid for his work; but the hardship comes of his having a debtor who is without funds and without personality, and restricted in legal capacity; and it cannot be remedied by retaining an illegal judgment, even if that could be of any effectual service to him.

It is now necessary to advert to the other Respondents. Mr. Macarthy appears for the Union Bank of Canada, and he contends that as regards advances made by them to Charlebois the Company are estopped from disputing the validity of the contract. The Bank was not a party to the suit of 1891, nor is it named in the judgment of that year, but it claims to be one of the persons or corporations to whom Charlebois assigned money and for whose use 380,000 dollars were to be paid to him. Its case is that in October 1889 the Directors of the Company passed a resolution to accept Charlebois' orders for payment to third parties, provided they did not exceed the balance due to him; that Charlebois then applied to the Bank to advance

150,000 dollars; that he drew orders upon the Company in favour of the Bank to be paid out of the moneys arising from and payable under the construction contract; that the Company accepted those orders, and at the same time stated that there was sufficient margin to meet them in the amount due to Charlebois over and above similar orders previously accepted by the Company. This is represented as a distinct undertaking on the part of the Company that the sum paid to Charlebois shall be sufficient to meet the advances of the Bank. It seems to their Lordships that the Bank cannot stand on a higher footing than Charlebois himself, and that indeed is the view which has prevailed in the Courts below. The terms of the judgment certainly do not place the Bank on any higher footing; for the payment is to be to Charlebois for the use of himself and his unspecified assignees. And the statement of the Company which has been relied upon does not amount to more than this, that the previous charges were not such as to reduce the amount estimated as coming to Charlebois below 150,000 dollars. It is straining the effect of the correspondence to say that the Company entered into a positive engagement that the Bank should have 150,000 dollars whatever the state of the accounts under the contract might prove to be, or that the Company have precluded themselves from showing the true facts which affect the contract.

The executors of Crossen have a different case. He supplied rolling stock to Charlebois which has never been paid for. By special contract made with Charlebois in January 1890 the property in that stock was to remain in Crossen until paid for. The Crossen executors were not parties to the suit of 1891, nor did they appear on the 28th September. The judgment orders that the Company shall pay to them 39,000 dollars; and in November 1891 the

solicitors of the executors wrote to the Company, saying that they accepted the decree so far as it vests the property in the Company, and that they waived their lien on the cars. The cars have since been used for the road by leave of the executors.

The other Respondents are in a very similar position. Macdonald and Schiller constructed part of the road under a sub-contract with Charlebois. On the 28th September 1891 the sum of 64,429 dollars was owing to them, and they were in actual possession of the road. The Commercial Bank of Manitoba has advanced money to them on the security of these interests. Nugent is the assignee of their interests in trust for them and the Bank. Preston is another sub-contractor for part of the road, who on the 28th September 1891 remained in possession, 8,400 dollars being due to him. None of these persons were parties to the suit of 1891, but Nugent appeared in Court as solicitor for Macdonald Schiller and Preston on the 28th September. The judgment orders the Company to pay the sum of 64,429 dollars to Macdonald and Schiller, and the sum of 8,400 dollars to Preston. The Company agreed by writing under the hands of its President and a Director that until payment the sub-contractors should remain in possession.

It will be seen that each of these parties, who had no share in the illegalities of Charlebois's contract, possessed in September 1891 rights and interests which though not capable of being turned into immediate profit for themselves, it was important for the Company to acquire for the purpose of beginning the work of the railway. Those rights were surrendered on or soon after the date of the judgment, and it would be unjust to their possessors not to place them in a position as good as circumstances

admit. The difficulties of maintaining the lien have been stated before, but their Lordships conceive that justice will be done, and the position of the Crossen executors and of the sub-contractors and the Manitoba Bank will be no worse, if it is now declared that they are to have *pari passu* the first charge on whatever sum is found due to Charlebois. This was the course adopted by the Ontario Courts.

Though the Union Bank does not stand upon the same footing with the other Respondents, there is no reason why it should not as against Charlebois be declared entitled to the next charge on his debt; and their Lordships understand that Mr. Macarthy, who represents both these parties in this appeal, is desirous that such a declaration should be made.

It remains to deal with the suit so far as it is the suit of Delap in his character of bondholder, and of Mansfield. Their Lordships have intimated that the joinder of these parties is embarrassing. It may be that, for the time, and for the one purpose of asserting the priority of bondholders over Charlebois's lien, the interests are identical. In other respects, as for instance in the questions raised whether or no the bonds are valid, and whether or no they have been pledged, the interests of the co-Plaintiffs viz. the Company or the body of shareholders whom Delap represents on the one hand, and of the bondholders on the other hand, may be found at variance with one another. It is not averred that the bondholders have attempted to take possession of the property, and have been shut out by Charlebois' lien. All they aver is the abstract proposition that they have the first charge on the Company's assets, and that to give priority to Charlebois was not within the competence of the parties or of the Court in the suit of 1891. And they pray no

relief whatever in respect of the contract or judgment, except that which is prayed by the Company.

Under these circumstances their Lordships must express their concurrence in the view taken by Mr. Justice Gwynne on this head. It seems to them that in a suit constituted as this is, it is unnecessary and undesirable to affirm or to deny that Delap and Mansfield are the creditors of their co-Plaintiffs, and that the action of the Court should be confined to the issues between the Company and the Defendants.

Delap also sues on behalf of himself and all other shareholders. So far as the interests of all shareholders as a body are concerned, it is difficult to see how they differ from those of the Company. But the learned Chancellor of Ontario dealt with Delap's position separately in the following passage of his judgment:—

"In taking the accounts Charlebois must give credit for the "first payment of 50,000*l.* sterling as paid upon the con- "struction contract. The effect of this will be to leave the "stock in the hands of Delap unpaid for; but the true way of "working out relief is to let this claim for the purchase "money of the stock, $226,000 plus $70,000 remain as a "personal or individual claim against Delap, by Charlebois "and the other transferors. Delap being a joint Plaintiff "with the Company, there arises no difficulty on this head; "the stock should also be charged with this amount."

And in his decree he reserved the consideration of questions affecting the charges of Plaintiffs or Defendants on the stock or shares of the Company, by way of further directions in the suit.

That part of the Chancellor's decree was affirmed by the Court of Appeal. In the Supreme Court it was reversed as a necessary consequence of the view taken by that Court of the judgment of 1891. Their Lordships entertain a different view of that judgment; but they cannot concur with the Ontario Court in the propriety of their decree on the points now under consideration. They agree with the learned

Chancellor that the immediate effect of the transactions of 16th September 1889 was to leave the shares or the bulk of them in the hands of Delap or of Stevens his agent unpaid for. If the rights of all parties had been declared at that moment, it seems that Charlebois, having his 50,000*l.* attributed to construction, might have claimed against Stevens on account of the shares. What has taken place since that time to affect such claims is unknown so far as this litigation is concerned. The matter may be very simple, or may be very complicated. It is one with which the Company as such is not concerned, nor can the shareholders viewed as an aggregate body be concerned in it. It raises questions between Delap as an individual shareholder, and perhaps other individual shareholders, on the one hand, and Charlebois on the other hand. This suit was not framed to raise such questions, and their Lordships cannot think it right to bring them in by way of further enquiry. Charlebois should be left to prosecute his claims independently of this suit. Their Lordships have before intimated that relief should be confined to questions between the Company on the one hand, and Charlebois and the interests derived from him on the other. That seems to them a necessary condition of efficiency and finality for such decree as can be passed.

Their Lordships wish to add how strongly they are impressed with the difficulty of working out justice to the parties in this suit, or indeed by any judicial process. The case seems to be one of those in which all parties alike have been thrown out of their calculations by the small returns of an enterprise expected to be more lucrative. In such a case the process of working out legal rights by litigation leads to lamentable delay and expense. That process must be followed if no better offers, but it would be better if the parties concerned could see their

way to some just and comprehensive arrangement which could receive legislative sanction.

Their Lordships think that it may assist the parties if they indicate in detail the frame of the decree which they will humbly advise Her Majesty in Council to make. As regards costs in the Courts below they have followed the views of those Courts in many particulars, departing from them only when obliged to do so by the difference of their view from that of the Supreme Court on the main question of the judgment, and from that of the Ontario Courts in giving relief to or against bondholders and individual shareholders.

As regards the costs of this appeal their Lordships think that it would not have been safe for the Executors of Crossen or for the claimants under sub-contracts not to appear. In point of fact they do retain important interests under the decree now proposed, though they cannot keep the legal position given to them by the judgment of 1891. The conclusion is that so far as costs arise solely between the Appellants on one hand and the Respondents Macdonald Schiller Nugent, Preston, the Bank of Manitoba, the Executors of Crossen Allan and Devlin on the other, the parties should bear their own costs. So far as the costs of the Appellants have been increased by the appearance and opposition of the Union Bank of Canada, their costs should be paid by those Respondents. All other costs of the Appellants should be paid by the Respondent Charlebois.