1921
February 17.

THE CITY SAFE DEPOSIT AND AGENCY COMPANY, LTD.....PLAINTIFF;

VS.

THE CENTRAL RAILWAY COMPANY OF CANADA.....DEFENDANT;

AND

CHARLES N. ARMSTRONG.....CLAIMANT;

AND

THE SAID PLAINTIFF.....CONTESTANT.

Railways—Receiver—Manager's salary—Rights to privilege and priority therefor—"Working Expenditure"—Effect of Receivership on salary of manager—Resolution of Board—Interpretation.

Held: 1. That where by resolution of a Company the yearly salary of one of its officers is fixed, and it is further provided that "the said salary is to be paid from time to time as the Board direct," such salary, though fixed, does not become payable or exigible until the Board so direct.

2. That while the Court will not interfere with the domestic affairs of a company so long as the company does not impair the funds necessary to meet the creditors' claims, it will refuse priority and privilege to the claim of the manager of a Railway for the payment of $10,000 a year salary for managing a railway that is not a going concern, has no railway to operate and has no revenue.

That such salary was not, under the circumstances of this case, "working expenditure" as defined by the Railway Act.

3. That where a receiver has been appointed to a railway company the person formerly acting as manager of said company cannot claim salary as such since the said appointment, as against the assets or fund in the receiver's hands, the management of the company being then in the receiver's hands.

REPORTER'S NOTE:—The Appeal from the Report of the Referee herein (post p. 354) was dismissed.

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Reasons for Judgment.

Audette J.

THIS was an appeal from the report of the Registrar of the Court, (Charles Morse, K.C.,) acting as Referee.

January 11th, 12th, 13th and 14th, 1921.

Appeal now heard before the Honourable Mr. Justice Audette, at Ottawa.

John W. Cook K.C. for plaintiff contesting.

E. W. Westover, for claimant.

The facts are stated in the Report of the Referee (post: p. 354 et. seq.) and the reasons for judgment.

AUDETTE, J., now (February 21st, 1921) delivered judgment.

The claimant contends the defendant company is indebted to him in the sum of $109,947.41, being, he alleges, "the balance due him under a settlement of June 29th, 1912, of $50,000, for services and expenditures to October 18th, 1911, with interest from that date to be added, $45,000, and for salary and travelling expenses and disbursements to September, 1919, as per statement following:—

1. Balance of account on June 30th, 1913, as per ledger.....$	42,315.55
2. Salary, June 30th, 1913, to December 31st, 1917, 4½ years at $10,000 per annum.....	45,000.00
"3. Services January 1st, 1918, to September 1st, 1919—20 months at $250 per month.....	5,000.00

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"4. Expense accounts:

"October 18th, 1911, to December 31st, 1911	657.97
"January 1st, 1912, to October 28th, 1912	2,514 50
"November 1st, 1912, to December 31st, 1912	752.85
"January 1st, 1913, to June 30th, 1913	1,140.13
"July 1st, 1913, to October 18th, 1913	1,056.78
"October 18th, 1913, to December 31st, 1915	2,545.04
"January 1st, 1916, to August 2nd, 1917	4,852.04
"August 2nd, 1917, to February 26th, 1918	1,399.44
"February 26th, 1918, to April 30th, 1918	400.20
"May 1st, 1918, to March 15th, 1919.	1,178.96
"March 15th, 1919, to September 1st, 1919	1,133.95
	$ 109,947.41

"5. I have a further claim against the company defendant in connection with disbursements made in England for the company and for the expenses of the London office, and in connection with the scheme of arrangement, etc., but I am unable to make up this claim until I can go to England and get the necessary information. For the same reason I cannot at present make up the account in connection with the sale of rails, ties, etc., at Vankleek Hill.

"6. I hold $75,000 of first mortgage bonds of the Central Railway Company of Canada as security for the balance of $45,000 under the settlement of 29th June, 1912.

"7. This claim is privileged and has priority over other claims."

The claimant, in the course of the proceedings before the referee, varied somewhat the amount of his claim, but not materially. This variation, however, in the view I take of the case is of no moment or importance.

Approaching the consideration of this claim in seriatim order, the first item presented reads as follows:—

1st. *Balance of account on June 30th, as per ledger*.....$ 42,315.55

This last amount is the balance of the $50,000 above referred to, which is claimed under a resolution of the executive committee of the defendant company, bearing date the 27th June, 1912, (Exhibit No. 6), and which reads as follows:—

"Resolved: That the amount of compensation to be allowed to C. N. Armstrong for his services to the company up to October, 1911, and for the balance due him for disbursements made by him on behalf of the company, after deducting any sums already paid to him, be and it is hereby fixed at fifty thousand dollars, and that the said sum be paid to C. N. Armstrong out of the first monies which the company shall receive, which can be applied to said payment, and that pending said payment the sum of seventy-five thousand dollars in first mortgage bonds of the company shall be given to C. N. Armstrong as collateral security for said payment, it being understood and agreed that the Bellevue property at Carillon is to be transferred and made over to C. N. Armstrong in further consideration of the payment of ten thousand dollars.

"Mr. Raphael dissented.

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"Resolved: That in accordance with the terms of settlement with C. N. Armstrong the property at Carillon, formerly belonging to the Ottawa River Navigation Company, and known as the Bellevue property, as fully described in the deed of transfer from Charles F. H. Forbes to the Ottawa River Navigation Company, 6th August, 1873, be transferred, made over and assigned to C. N. Armstrong, in consideration of the payment of the sum of ten thousand dollars, to be payable in ten annual instalments of one thousand dollars each, with interest. The wharf and all land necessary for the right-of-way for the railway to be reserved by the company.

Mr. Raphael dissented."

Whether the $75,000 in first mortgage bonds of the company were ever given to Mr. Armstrong as collateral security for the payment of the $50,000, or whether the said arrangement has ever been carried out or not, has not been proved. The claimant has totally failed to establish by any evidence whether or not the company has handed him these bonds, and finally and especially the claimant has not filed these bonds in support of his claim, through which he claims privilege and priority.

The claim of privilege and priority of this balance of $42,315.55, attaching to the bonds in question fails for want of evidence. There is not a tittle of evidence in support of such allegation or contention, and the claim for privilege and priority is therefore disallowed.

2nd item—*Salary, June 30th, 1913, to 31st December, 1917, 4½ years at $10,000 per annum*.....$ 45,000

This item is founded upon (Exhibit 4) a resolution passed at a meeting of the directors of the company, held on the 19th September, 1912, and reads as follows:—

"Resolved: That the salary of C. N. Armstrong as managing director be the sum of ten thousand dollars per annum to be computed from the 18th October, 1911, *the said salary to be paid from time to time as the board direct.*"

While it is quite regular to appoint executive officers to a company in course of formation, such as president, vice-president, secretary and board of directors, it is quite another matter to appoint a manager, at a salary of $10,000 a year, to a railway company that is not a going concern, that has no railway to operate.

There is no justification to allow a salary of $10,000 a year to such manager, as against bona fide creditors of the company. How could it be reasonably contended that $10,000 be paid to the manager of a non-existent railway out of the capital—because it has no revenue—in preference to creditors? Stating the case, is answering it.

But there is more. The resolution of the 19th September, 1912, fixes the salary, but, undoubtedly having in mind there was then no occasion to pay such salary at once, it also provides that "*the said salary is to be paid from time to time as the board direct.*" That is to say, the salary, whilst fixed, is not now payable, but is only so, when the board will direct.

There is no evidence adduced showing that any resolution was ever passed directing the payment of such salary. And it is what should be expected. A captain is not appointed to manoeuvre a vessel, with a salary to date from the time the keel is laid on the ways of the shipyard. His salary will be paid when the vessel is constructed and afloat. It is the same for a railway. A manager can reasonably be appointed only when the railway is in existence.

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A court will not interfere with the domestic affairs of a company, provided the company does not impair the necessary funds to meet the creditors' claims; but a claim like the present one cannot be allowed with privilege and priority. It cannot under the circumstances be placed in the class of working expenditures as defined by the Railway Act.

The claim for priority is disallowed.

Item No. 3. *Services—January 1st, 1918, to September, 1919. 20 months at $250 per month*.....$ 5,000.00

Suffice it to say that this is a claim for salary as manager since the appointment of the receiver, in whose hands the management of the company's business is now placed.

The claim was not insisted upon on the appeal, and was, by counsel at bar, practically withdrawn.

This item is disallowed.

Item No. 4—*This is an item for the claimant's expenses from 18th October, 1911, to 1st September, 1919,* composed of several amounts.

All items since the appointment of the receiver must obviously be disallowed for the reasons above mentioned

Then, with respect to the balance, to the other amounts of the item, I find that there has been no vouchers filed, no resolution of the company recognizing such expenditure,—in other words, beyond the claimant's statement, that these amounts represented, in a conservative degree his expenses,—there is no evidence proving the same.

However, there is more. The claimant stated in his evidence (p. 263) that he has already received $4,458.35 on account of travelling expenses for seven

years and the total sum of $24,569 (p. 264) on account of salary and expenses. Furthermore, witness Midgley, a chartered accountant engaged by the claimant and the company to make an examination and report on the affairs of the defendant company, to open the necessary books and furnish a report concerning the financial position of the company, states in his evidence, that "Giving Armstrong credit for everything he would be able to establish, he would be indebted to the company for a considerable amount . . . . I have no doubt that it is a very large sum of money. Do not think the company owes Armstrong a single cent. I would say, if everything was in, it is my opinion he would be indebted to the company, in a very considerable sum of money."

The claimant has also received $3,067 for some property of the defendant company, sold about the time the rails were also sold, and has never accounted to the company for the same. That previous to the entries in the books of the company by witness Blagg, —who said he made the same,—did such posting refusing to accept any responsibility in respect of the same, "as he did not know whether it was right or wrong," a very large amount was standing against the claimant.

If the claimant has any meritorious claim with respect to this item,—which he has failed to establish by evidence,—the amount thereof will be set off, as against what he owes the company.

This item cannot, under any of the circumstances of the case, be allowed with privilege and priority as claimed under the head of working expenditure.

This item will be disallowed.

Therefore, there will be judgment dismissing with costs the appeal from the referee's report, and directing

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that judgment be entered dismissing with costs the claim of C. N. Armstrong for any priority and privilege in respect of the above statement of claim.

Judgment accordingly.

Report of the Referee.

The report of the Referee follows:

This was a claim for one hundred and nine thousand nine hundred and forty-seven dollars and forty-one cents ($109,947.41) as remuneration for certain services alleged to have been rendered to, and certain expenditure alleged to have been incurred on behalf of, the defendant railway company in this action. The claim was filed on the 9th September, 1919, and was contested by the plaintiff company. The hearing of the contestation took place in Montreal on the 17th December, 1919, and at Ottawa on the 23rd December, 1919. Mr. J. W. Cook, K.C., and Mr. A. Magee appeared for the plaintiff contesting, and Mr. Armstrong appeared in person. On the 10th May, 1920, the claim was reopened to allow Senator Domville to contest it.

I approach the task of preparing my finding on this claim with some diffidence—not because I am not confident as to how it should be determined on the facts, but because the facts themselves are of such a character that to stir them up does not tend to sweeten the atmosphere of business ethics in this country.

I have said that the claim was for a certain sum, but that needs to be qualified by the statement that certainty was lost as soon as the hearing of the contestation began. A perusal of the evidence *passim* will show that the claim never became static in amount before the undersigned. At the very outset of his evidence Mr. Armstrong, no doubt unintentionally, throws a veil of uncertainty and obscurity over his claim. I quote from pp. 227 and 228, Proceedings on Reference:

"When does the claim begin? A. In the books of the company it dates back as far as October 18th, 1911, and it is continued in the books of the company up till 1st March, 1919. It then showed a balance to my credit of $57,940.21.

"Q. That appears in the books? A. I cannot accept that account as correct, but I am taking it at that amount. On checking over the account last night, I found two errors in connection with the travelling expenses. In one case my wife had accompanied me on the passage across the Atlantic, and in charging the amount the two passages were charged $271.

"Q. You correct that? A. Yes. One-half should not have been charged. I had frequent passages, and in another account my passage across had not been charged, so that it makes a difference of about $85, which should have been credited to the company. That amount would have to come off.

"Q. Off that balance of $57,940.21? A. Well, out of the total claim of $109,000. The total claim is $109,947.41.

"Q. What is the amount to be deducted? A. $79.85. There is an overcharge of $175.85, and an undercharge of $85, so that $79.85 should be credited to the company. There are in the company's books a number of charges made against me.

"Q. $109,857.56 is your net claim before me? A. Yes. There are a number of items charged against me in that account of the company which I have not given credit for. One or two of them are correct, and one or two of them I would want some information about before giving credit for them, and that information I can only get from the books of the company. There is one large item charged on the 15th September, 1913. It is 'To W. Owens $14,926.09.'

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"Q. What do you say ought to be done with that? A. Apparently this is a payment which Mr. Owens claimed he had paid to me and wished the company to assume. I think that amount is correct.

"Q. Then that should be deducted? A. I think so, but I would like to see if there was a resolution at that time.

"Q. You might reserve all these mistakes to the end of the case, and tell me what the net claim before me is? A. The net claim is, of course, as I have sworn to here, but these different amounts altogether would come to $19,817.

"Q. To be deducted from your claim? A. Yes, if they are correct. Two of them, one item of $55.17 and another of $500 are correct.

"Q. I will ask you to file a statement showing the difference between the claim as sworn to and the exact amount you contend is due? A. Yes, that will be quite satisfactory."

Mr. Armstrong did not furnish me with a formal amended statement of claim in writing; but he did put in certain exhibits having a corrective bearing (e.g. Ex. No. 18) on his original statement, which unfortunately did nothing but add to its uncertainty as a whole.

Now, in view of these facts and bearing in mind that Mr. Armstrong, during the period for which he claims, was a director of the railway company (for the whole time he was managing director and for certain periods was vice-president and president) and as such stood in a fiduciary relation to the company and its creditors (See per Lindley, L.J. in re *Lands Allotment Company* (1), his remark that "the claim is a very simple one," serves to reinforce the point of the French epigram: "Les affaires? C'est bien simple: c'est l'argent des autres."

(1) [1894] 1 Ch. 616 at p. 632.

"A president and managing director is not only the executive and confidential agent of the company, he is also a trustee for the company's money and property." See *Rogers Hardware Co.* v. *Rogers* (1), citing *Great Eastern R. Co.* v. *Turner* (2), *Gluckstein* v. *Barnes* (3).

It will be useful at this stage to state briefly the history of the railway company and Mr. Armstrong's connection with it. The company was organized in 1903 to build a railway from Montreal to Grenville, P.Q., being incorporated by 3 Edw. VII (Dom.) c. 172, under the name of the Ottawa River Railway Company. By an amending Act, 4 Edw. VII, c. 112, it was authorized to extend its line from Grenville to Ottawa. By 4-5 Edw. VII, c. 79, the name was changed to the Central Railway Company of Canada and authority was given to extend its line from Ottawa to a point on Georgian Bay at or near Midland, and to construct certain branch lines. Thus it will be seen that the company had valuable charter privileges which with honest and efficient management might have been turned into great profit for the shareholders. Senator Domville, in giving evidence on his own claim before the undersigned, did not hesitate to characterize the company as "conceived in sin and born in iniquity." I pointed out this serious indictment to Mr. Armstrong, as will appear from the following extract from the evidence: (D. p. 190). "Q. Although you were not responsible for the conception of this company in sin, you had something to do with ushering it into the world in some way? A. Yes, I was a sort of midwife."

(1) [1913] 10 D.L.R. 541.
(2) [1872] L.R. 8 Ch. 149.
(3) [1900] A. C. 240.

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The first event of importance after the formation of the company was the borrowing of 20,000 pounds in London, one-half of which was applied on account of the purchase of fifty miles of an existing railway, a purchase which was capriciously abandoned and the money so paid forfeited to the vendor (See Mr. Hogg's evidence in the Domville claim, pp. 101, 102). That was the beginning of a long history of wasteful and incompetent management of the affairs of the company. It was not until 1911 that the company succeeded in launching its first bond issue. On the 18th October, 1911, Mr. Armstrong was appointed managing director and vice-president of the company. (Ex. No. 3 on Ref.; and see Proc. on Ref. pp. 227, 228 and 374.) The road was never in operation because it was never physically completed. The company was never a "going concern." On May 3rd, 1916, the company filed a scheme of arrangement with its creditors, which was never confirmed by the court, but was dismissed by an order of December 6th, 1917. In the month of June, 1917, Mr. Armstrong purporting to act on behalf of the company, proceeded to sell certain steel rails to the Government of Canada, without the authority of the trustee for the bondholders, although such rails were covered by the trust deed of May 5th, 1914. Mr. Hogg, the solicitor of the company, had advised Mr. Armstrong that the consent of the trustee for the bondholders was necessary before the rails were sold (Ex. R.). The amount received from the government on the sale of the rails was $93,170.49. On or about the same time (Proc. on Ref., p. 258) there was certain other property sold to one St. Denis upon which Mr. Armstrong realized $2,652. (Ex. No. 16). Certain plant and material belonging to the company,

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but mortgaged to the bondholders under the said trust deed, were also sold by Mr. Armstrong to the Royal Agricultural School, a moribund if not insolvent institution of which he was president (Proc. on Ref. p. 257) for the sum of $415. The purchase price of the rails was paid into the Exchequer Court of Canada by the Government on the 22nd January, 1918, there being a proceeding then before the court wherein the trustee for the bondholders asked for a sale of the railway and the appointment of a receiver of the road until the sale became effective. Mr. Armstrong never paid the moneys he received from the sales above mentioned into court. He never paid the moneys over to the company, alleging as a reason that the company owed him. (Proc. on Ref., p. 255). He did not credit them in his statement of claim filed, but he is willing to do so now. (Proc. on Ref. p. 257).

Mr. Armstrong became president of the railway company in 1917. On the 6th December of that year, Mr. F. Stuart Williamson was duly appointed interim receiver, and his appointment was made permanent by the order of this honourable court on the 9th October, 1918. By the terms of the last-mentioned order, the undersigned was appointed referee for the purpose of making enquiry and report as to the amount and nature of the claims of creditors against the said railway company.

In response to a public advertisement calling upon creditors of the defendant company to file their claims before the undersigned, Mr. Armstrong filed the claim which is now before me for consideration, and it was contested by the plaintiff company as hereinbefore mentioned.

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Mr. Armstrong's claim is one for salary, travelling expenses and disbursements as managing director of the defendant company, down at least to his assumption of the position of president of the company in 1917. The administration of the affairs of the company was irregular from the start, for although it appears (Proc. on Ref., p. 228 and Ex. No. 3) that he was appointed vice-president and managing director on the 18th October, 1911, it seems that he had been working in some capacity for the company before that. Furthermore although Mr. Armstrong was appointed to the above-mentioned offices in October, 1911, he was not authorized to be paid any salary or remuneration until 19th September, 1912. On that date (Ex. No. 4) it was resolved at a meeting of directors "that the salary of C. N. Armstrong, as managing director, be the sum of ten thousand dollars per annum, to be computed from the 18th October, 1911, the said salary to be paid *from time to time* as the board directs." Now it must be borne in mind when considering this resolution that the company was not at the time a "going concern." Is was not proved before me by Mr. Armstrong that this meeting was regularly called or that a quorum was present apart from Mr. Armstrong himself. (*In re Greymouth Point Elizabeth Ry., etc.* (1); *In re North Eastern Ins. Co., Ltd.* (2); *In re Webster Loose Leaf Filing Co.* (3). Having verified Exhibit No. 4 by reference to the original I find that there were five directors only present of whom Mr. C. N. Armstrong was one. Now by referring to the by-laws of the defendant company which were put in in the Domville claim as Ex. E, and made part of the evidence in the con-

(1) [1904] 1 Ch. D. 32. (2) [1919] 1. Ch. D. 198.
(3) [1917] 240 Fed. Rep. 779.

testation of the present claim, it will be found that the Board of Directors must consist of nine, of whom a majority shall form a quorum. There was then no quorum present at the meeting in question if we exclude Mr. Armstrong. Under such circumstances there could be no valid by-law or resolution passed by the Board. See per Rose J. in *Cook* v. *Hinds* (1); per Street J. in *Birney* v. *Toronto Milk Co.* (2); Mulvey *Dom. Comp. Law*, p. 370; *Enright* v. *Heckscher* (3). But even if it were conceded that this meeting of directors was in every respect regular and valid, there are two features of it that require consideration in relation to the sufficiency of proof of Mr. Armstrong's rights under it. In the first place he has not satisfied me that the salary was paid "from time to time as the board directs." On the contrary he seems to have paid himself whenever he got hold of the company's funds. For instance, I have already pointed out that in connection with the sale by him of property and plant at McAlpine in the summer of 1917, he received on his own admission over $3,000 in cash (Ex. No. 16 and Proc. on Ref., p. 255). When asked by Mr. Cook why he had not paid it over to the company, his answer was: "Because I had a claim against the company, and a heavy one, *and I took what I could get out of that for myself.*" To make this clear the undersigned asked him: "For arrears of salary and disbursements made on behalf of the company?" His answer was "Yes." (Proc. on Ref. 255). He also cashed certain coupons of bonds in his possession. (Proc. on Ref., p. 446).

(1) [1918] 42 O.L.R. 273, at p. 306. (2) [1902] 5 O.L.R. 1, at p. 6.
(3) 240 Fed. Rep. 863.

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The other feature that requires proof from Mr. Armstrong is that the resolution of directors of the 19th September, 1912 (Ex. No. 4) was approved by a resolution of the shareholders duly convened. For authority setting forth the requirement of the law that to constitute the valid payment of salary to a director of a company there must be a resolution of the shareholders, I need go no further than the clear statement of the principle by the learned referee (now the Honourable Mr. Justice Audette) in *Minister of Railways* v. *Quebec Southern Ry. Co.* (1); affirmed by Cassels, J., 12 Ex. C.R. at pp. 58, 59, and by the Supreme Court of Canada, 15th February, 1910.

It should not be overlooked that the action of the Board of Directors in settling the remuneration to be paid to Mr. Armstrong for his services was forestalled by the Executive Committee of the company in a meeting of that body held on the 27th June, 1912, Mr. Armstrong himself being in the chair. Ex. No. 6 is a certified copy of the Minutes of the said meeting of this Committee. Among others it sets out the following resolution:—

"RESOLVED: That the amount of compensation to be allowed to C. N. Armstrong for his services to the company up to October, 1911, and for the balance due him for disbursements made by him on behalf of the company, after deducting any sums already paid to him, be and it is hereby fixed at fifty thousand dollars, and that the said sum be paid to C. N. Armstrong out of the first moneys which the company shall receive, which can be applied to said payment, and that pending said payment the sum of seventy-five thousand dollars in first mortgage bonds of the company shall

(1) [1908] 12 Ex. C.R. 11, at pp. 14, 15 and 16.

be given to C. N. Armstrong as collateral security for said payment, it being understood and agreed that the Bellevue property at Carillon is to be transferred and made over to C. N. Armstrong in further consideration of the payment of ten thousand dollars.

Mr. Raphael dissented."

"RESOLVED: That in accordance with the terms of settlement with C. N. Armstrong the property at Carillon, formerly belonging to the Ottawa River Navigation Company, and known as the Bellevue property, as fully described in the deed of transfer from Charles F. H. Forbes to the Ottawa River Navigation Company, 6th August, 1873, be transferred, made over and assigned to C. N. Armstrong, in consideration of the payment of the sum of ten thousand dollars, to be payable in ten annual instalments of one thousand dollars each, with interest. The wharf and all land necessary for the right of way for the railway to be reserved by the company.

Mr. Raphael dissented."

The company not being a "going concern" no such undertaking could be validly made by or on behalf of the directors. (See per Lindley L.J. *in re George Newman & Co.* (1); *Burland* v. *Earle* (2); Mitchell on *Can. Com. Corp.*, p. 1040. See also my reasons in the Domville claim.) It may be remarked in passing that as a result of this benevolent action of the Executive Committee towards Mr. Armstrong, Senator Campbell resigned from the Board of Directors. (See Ex. M.) His letter is quoted in full later on. Now the Executive Committee is, as Mr. Cook graphically put it in

(1) [1895] 1 Ch. D. 674, at p. 686. (2) [1902] A.C. 83 at p. 93.

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his argument, "a sort of cabinet of the directors," Mr. Armstrong in this instance being one of them. Notwithstanding provision being made for it in the by-laws (sec. 34) this committee lacked the authority of the board of directors so far as administering the affairs of the company is concerned. Mulvey, *Dominion Company Law*, p. 26 says: "The affairs of the company are managed by the board, and all powers given to the company by the charter are exercised by the directors subject to the restrictions provided by the Act. * * * The duties of the directors having the nature of those of a trustee may not be delegated. *It is illegal to appoint an executive committee* to perform the duties imposed by the Act upon the directors." So much for the Executive Committee, and its handsome treatment of Mr. Armstrong. In this connection it is interesting to refer to by-law No. 42 of the defendant company (see Ex. E in Domville claim) which enacts that the office of director shall become vacant "if he accepts any other office of profit under the company, and is or becomes interested directly or indirectly in any contract with the company." This throws an important light upon the facts hereinafter stated.

Returning to Ex. No. 4, Mr. Armstrong attempts to put the generosity of the board of directors as therein expressed on a sure foundation by a document (Ex. C) purporting to be minutes of an adjourned meeting of shareholders of the Central Railway Company of Canada, held on the 30th September, 1912. It is also worthy of mention that Mr. Armstrong was one of the *four* shareholders present, and that he did not omit to bring many proxies with him. The first resolution reads: "Resolved: That the minutes of all meetings of the directors and executive committee held since the last annual meeting of the shareholders

be and the same are hereby approved and confirmed." The last resolution, too, is not unmindful of Mr. Armstrong, as it reads: "Resolved: That the sale and transfer of the Bellevue property at Carillon to C. N. Armstrong be and the same is hereby approved and confirmed." Now, it may be that the maxim "*Expressio unius est exclusio alterius*" should be applied here, as there is a specific sanction of one only of the benefits conferred upon Mr. Armstrong by the directors in Ex. No. 4; but on the other hand it is well to seek authority as to the sufficiency of the first resolution for the purpose of approving the action of the directors in giving Mr. Armstrong a salary of $10,000 per annum. It is a blanket resolution, indefinite in its terms, and giving no assurance that the shareholders (with the obvious exception of Mr. Armstrong) had their minds directed to the fact that they were dealing with the managing director's salary. I asked Mr. Armstrong (Proc. on Ref., p. 260), whether the minutes of meetings of directors prior to that date were read at this meeting of the shareholders, and he could not say that they were. There is nothing to show on the face of Exhibit "C" that they were. Now it is to be noted that Ex. "C" shows the meeting was an adjourned one. There was an annual meeting called (Proc. on Ref., pp. 456, 457) for September 3, 1912, and it was adjourned to September 30. There is nothing before me to show that it was not postponed by the directors without the shareholders convening, which would be invalid. (Mulvey: *Dom. Company Law*, p. 47.) But apart from that the meeting would seem to have been incompetent to ratify Mr. Armstrong's salary, because that item would not come within the ordinary agenda of an annual meeting, and it was not

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proved before me that there was any notice to shareholders, as required by sec. 3 of the by-laws of the company, setting out specifically the proposed business. See per Fry J. in *Hutton* v *West Cork Ry. Co.* (1):— "The notice should set out specifically the proposed business. It is not necessary that a by-law proposed to be approved, or a resolution, should be set out *in extenso*. But it is necessary that the gist of it should be given. * * * Only such business as is referred to in the notice may be transacted, and every shareholder is entitled to notice."

. . . Again, "A meeting may be adjourned. But only such business as the meeting itself was called to decide may be considered at the adjourned meeting, unless a further notice is duly given for the consideration of other business." Mulvey, op. cit. pp. 46, 47; *Birney* v. *Toronto Milk Co.* (2). Mitchell's *Canadian Commercial Corporations* at p. 1031, says: "The general rule is that unless authorized by the charter, or by the company's regulations or memorandum of association, *or by the shareholders at a properly convened meeting*, directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves, out of the company's assets." And see the judgment of Kelly J. in *McDougall, et al.* vs. *Black Lake Asbestos & Chrome Co. Limited, et al.* (3) Kelly J. says: "Of transactions intended to be dealt with but not covered by a general notice of an annual meeting, special notice should be given. * * * The notice must contain sufficient statement of the facts which are to be considered by the corporation at the proposed meeting.

(1) [1883] 23 Ch. D. 654 at p. 659. (2) [1903] 5 O. L. R. 1.
(3) (1920) 47 O.L.R. 328

"There was here a special reason why the attention of the shareholders should have been drawn to the nature of the business intended to be transacted at the meeting, viz., *the proposal for payment of moneys to the president of the company personally.* Where a contract is to be submitted to a meeting for confirmation, and the directors of the company are interested therein, it has been held that the notice convening the meeting should give particulars as to that interest" (pp. 333,334). See Mitchell, op. cit., at p. 1031:—"The shareholders in general meeting assembled may vote remuneration to the directors for past services, *but the company must be a going concern.* Remuneration for past services of directors cannot be voted at an ordinary general meeting unless special notice be given of the intention to propose such a resolution."

It is obvious that these last observations obtain as well against the resolution affecting the Carillon property in Exhibit No. 4 as against the so-called blanket resolution.

It is under these corporate acts of the company, over which the shadow of Mr. Armstrong's dominance looms largely, that he asserts his right to be paid the major portion of his claim, i.e., for salary or remuneration from October, 1911, down to January, 1918. Let me say here that if my finding in disallowing this whole claim as against the fund in the receiver's hands had to depend on the invalidity of these resolutions voting him salary or remuneration, I would have little difficulty in holding them invalid. The law does not favour methods by which company directors can make easy money at the expense of shareholders and creditors. On the other hand, even conceding for the sake of argument, that the aforesaid resolutions of the executive committee and the directors were

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regular in all respects, and that there was a proper ratification of them by the shareholders, I would have to reject this claim in its entirety because the facts of the case conclusively show that instead of the company owing Mr. Armstrong anything, Mr. Armstrong owes the company a very considerable sum of money which he ought, both in good conscience and as a matter of law, to repay to the company. All this will appear later on.

To return to the items of his statement of claim. The claim for salary down to December 31, 1913, depends for its validity upon the impugned acts of the directors and shareholders of the company embodied in Exhibits "4," "6" and "C" respectively; I shall not labour the case further as to those documents.

Mr. Armstrong's claim for remuneration from January, 1918, to September, 1919, "twenty months at $250 per month," resolves itself purely into a question of *quantum meruit*. At p. 291, Proc. on Ref., Mr. Cook questions Mr. Armstrong, as follows: "Q. Now we come to services from the 1st of January, 1918, to the 1st September, 1919, 20 months at $250 per month. What services did you render to the company during that period, remembering that Mr. Williamson was appointed on the 6th of December, 1917? A. Mr. Williamson was appointed receiver, but that in no way did away with the company, nor the necessity for the company protecting itself and the creditors and shareholders.

"Q. And so you charge $250 a month for exercising supervision over its affairs? A. And I would not do it again for four times that amount. I have lost more than four times the amount by being tied down to the company instead of attending to my own business. I consider that that is a very, very small charge to make—very small. My whole time has been taken up.

"Q. I suppose you claim as a *quantum meruit*, the value of services? A. Yes.

"Q. What do you consider you have accomplished for the company during that period? A. I made several trips to the other side during that time, one particular reason being the claims against Wills & Son, and I may say it is an outrage that that claim was not pressed. We had a perfectly good claim for damages there for hundreds of thousands of dollars. Unfortunately the solicitor for Wills was the solicitor for the receiver."

After Mr. Armstrong's attempts to justify his charge of $250 per month since the receiver was appointed (and it is to be noted that he values his services at the same figure as the receiver's compensation was provisionally fixed at) by reciting services for the company, some of them works of supererogation and most of them unauthorized by any mandate of the directors,—on pp. 293, 294 of Proc. on Ref., we have the following answers by him to questions by Mr. Cook.

"Q. On the 6th December, 1917, the Exchequer Court saw fit to appoint a receiver to manage this company? A. Yes.

"Q. How can you charge for services of this character in view of the fact that the court saw fit to take the management of the concern out of your hands and place it in the hands of a receiver? A. No, they did not take it out of our hands at all; the company remains intact—

"Q. Its property and assets are in the hands of the court—? A. But the assets were neglected by the receiver and the company had a right to try and collect everything that is due to it.

"The Registrar—That is a reflection on the court."

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Now, as we have seen, Mr. Armstrong bases this part of his claim on a *quantum meruit*. The authorities show that he must fail on that head.

Mitchell, *Canadian Commercial Corporations*, p. 1031, says: "Directors are not to be considered as servants of the company, and as such entitled to remuneration for their labour according to its value, and cannot, therefore, recover on a *quantum meruit*." (And see *Brown & Green Ltd.* v. *Hays* (1).

"In the absence of a provision of the charter or of a special contract, a director is not entitled to compensation. See *Ogden* v. *Murray* (2). There is no implied promise to pay such an officer either for regular or extra services; to subject the corporation to liability it must be shown that the services were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for." See *Pew* v. *Bank* (3), followed in *Fitzgerald and M. Const. Co.* v. *Fitzgerald* (4); per Rose J. in *Cook* v. *Hinds* (5). And see my reasons in Domville claim.

Beyond all this it is quite certain that nothing Mr. Armstrong did since the appointment of the receiver enured to the benefit of the creditors by protecting or augmenting the fund now in the receiver's hands for the liquidation of the company's obligations.

Dealing next with the question of the company's liability for Mr. Armstrong's "expense accounts" from October, 1911, to the date of the appointment of the receiver, the claimant is forced to rely on the resolution of the executive committee of 8th October, 1913. As that resolution was never ratified by any

(1) [1920] 36 T.L.R. 330.
(2) 39 N.Y. 202.
(3) 130 Mass., 391.
(4) 137 U.S. 98.
(5) [1918] 42 O.L.R. at pp. 304, 305.

valid meeting of the shareholders, I would refer to what I have already said about the executive committee and its lack of authority to bind the company. But even this last resolution of the executive committee was not complied with by Mr. Armstrong as he did not, so far as the proof before me shows, *render monthly expense accounts to the company as required by that resolution;* and, moreover, the resolution does not purport to be retroactive, while Mr. Armstrong carries his expense accounts back to October 18, 1911.

On the other hand, if Mr. Armstrong seeks to ignore this resolution and recover expenses and disbursements on an implied contract, he cannot do so, as I have shown in considering the question of *quantum meruit* above. Nor can he recover anything for expenses for his voluntary peregrinations since the appointment of a receiver. His whole claim for expenses, etc., amounts to something over $17,000; and as he has presented neither vouchers nor any admission of liability for them by the company I must disallow them all.

I have already stated that even if Mr. Armstrong's claim for remuneration for his services were buttressed by a proper ratification of the shareholders and in every way responded to the formal requirements of the law, yet upon the facts he is not entitled to recover anything. Before I proceed to establish this by citations from the evidence, I think it proper to show how Mr. Armstrong's conduct as managing director of the company,—occupying as such the position of a trustee for the company, and, after its declaration of insolvency, a trustee both for the company and its creditors—disentitles him to the consideration of the court when he seeks a right of priority over the bondholders, which, although expressly given by statute, yet has its foundation in equity. In Mitchell's

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Canadian Commercial Corporations, p. 1058, we have the following propositions of law laid down:—"The common law liability of directors in respect of misfeasance is contained in sec. 123 of the Dominion Winding-up Act, which creates no new liability. Thus a director is liable to the company where he 'has misapplied or retained in his own hands, or become liable or accountable for, any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company,' and must repay or make compensation to the company for the loss." And at page 1060: "There are certain broad general rules governing the conduct of directors. They must act in good faith and exercise reasonable care in the discharge of their duties. They must not allow their private interests to conflict with the duty they owe to the company. The courts cannot lay down any precise rules, but must deal with each particular case on its own merits." And at p. 1061: "The law of Quebec does not differ from the English decisions in respect of directors' responsibility, for these decisions are based, not upon any special rule of English law, but upon the broadest considerations of the nature of the position and the exigencies of business."

Accepting this as a correct statement of the law, how does Mr. Armstrong stand in relation to it?

In the first place bearing in mind the provisions of sec. 6 of Art. 4 of the Trust Deed of 1914, if not officially responsible as managing director for the irregular way in which the books of the company were kept, he actively contributed to their unreliability. The late Mr. J. D. Wells, who was secretary of the company, when testifying in support of his own claim (Proc. on Ref., pp. 49, 50) spoke as follows:—

"A. The entries that were made there were very irregular and not made by my book-keeper.

"Q. Is it not a fact that the books were under your charge as secretary of the company since the year 1912? A. No, they were not. They were not in my charge half the time.

"Q. In whose charge were they? A. Well, different parties.

"Q. Whom do you mean by different parties? A. Well, Mr. Armstrong, for one, had charge of them for a while, not as book-keeper. *He had them in his care.*

"Q. At all events, you allowed them out of your possession? A. They were not in my possession. I never allowed them out of my possession, because they never were handed over to me practically or theoretically."

And see the receiver's evidence in the plaintiff company's claim (Proc. on Ref., p. 177).

Now, Mr. Armstrong, as I have before indicated, complains of the irregularity of the books, but it is noteworthy that most if not all of the irregularities enure to the benefit of Mr. Armstrong, rather than to that of the unfortunate people who have lost money in this enterprise. At p. 263, Proc. on Ref., Mr. Armstrong admits that he had never rendered at any time to the company, a complete statement of his account, although he was handling a very large amount of the negotiable securities of the company. The books could not be regular without such an account appearing therein. But, the evidence shows yet more clearly Mr. Armstrong's intimate connection with the books and accounts of the company. He had pre-

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pared a balance sheet of the company's affairs, which drew forth the following letter (Ex. L) from Mr. A. K. Fisk, of the firm of A. K. Fisk & Co., consulting accountants and auditors of Montreal, who had been engaged to audit the books of the company. I quote the letter *in extenso* in fairness to all parties concerned.

"Montreal, May 9, 1912.

"C. N. Armstrong, Esq.,
London, Eng.

"Dear Mr. Armstrong:

"I was surprised to see from your cable of this morning that you wished me to sign the balance sheet that you had prepared to December 31, of your company's affairs. You will remember when we discussed this matter before, that I told you it would be impossible for me to sign any balance sheet of the company in its present condition.

"I am quite clear in my own mind that your viewpoint and mine are not going to agree with regard to this company's affairs; and after investigating, as I have had to in the course of my audit up to date, the past history of your company, I have come to the conclusion that I cannot see my way to sign any balance sheet prepared by the company which throws into construction of the railway the expenditure incurred prior to the last issue of bonds. Again, the allotment of the capital stock of the company prior to that bond issue is to my mind very open to question as to its legality, and I have decided not to take the responsibility of passing the corresponding assets to these stock issues as shown in the books, as construction assets.

"Turning to the more recent transactions of the company, there seems to have been a considerable amount of looseness in the handling of funds, which to my mind should have been rigidly placed to the credit of the company's own bank account and chequed under authority of directors' resolution. Instead of this, I find the funds received from the trustees, etc., to have been sometimes handled by individuals apparently in trust, and chequed out at their pleasure. In one notable case there was a specific amount taken care of by two of the officials of the company which was to have been applied for a specific purpose, but cheques were immediately drawn in favour of one of these gentlemen operating the account, as payments on account of services rendered, although I am not aware of any particular resolution having been passed entitling this gentleman to any specific sum, nor have I seen an account such as an auditor could pass for such services as a bona fide voucher.

"Again, I have already raised an objection to the personnel of the office staff. It is quite impossible under modern conditions to give a satisfactory audit in an office where there appears to be no organization. My connection with Mr. Langlois has been very unsatisfactory, also with Mr. Raphael, and it further is quite obvious that your secretary-treasurership should be in the hands of a railway man of modern views and up-to-date methods.

"I see by a resolution of directors that I was instructed to open up a new set of books. This was no doubt following a suggestion made by myself to that effect, but the difficulty lies in the fact that the past records of the company cannot be verified sufficiently to entitle them being brought into the new books as correct assets and liabilities, and the only

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medicine that I can see that would meet this point would be by a return to the treasury of the capital stock issued prior to the new bond issue, and to wipe out corresponding assets to that effect. I do not assume for a moment that this will meet with your concurrence, and I have therefore decided to withdraw from the audit without asking for any fees for my services to date, in order that it will leave you with an entirely free hand to make a fresh appointment. I value your personal friendship far more highly than I do any fees that I might be able to earn from the audit of this company's affairs.

"I enclose copy of a letter that I have addressed to the president and directors, resigning from my position under to-day's date, and I hope you will appreciate the motives that have led to my resignation and that this will make no difference whatever to our personal friendship.

"I will return all papers in my hands to Mr. Wells without delay, and would suggest that you consider this letter as confidential between us.

"Yours sincerely,

"A. K. Fisk.

"Enclos."

A few months after this intrepid protest against the extraordinary system of book-keeping that marked Mr. Armstrong's regime as managing director of the company, we have a further criticism of his methods. Referring to the action of the executive committee on the 27th June, 1912, in giving Mr. Armstrong $50,000 and the Bellevue property at Carillon, the late Honourable Archibald Campbell, Senator, writes the following letter to Mr. Armstrong on the 5th August, 1912 (Ex. M.).

"Toronto, Aug. 5, 1912.

"C. N. Armstrong, Esq.,

"Winchester House,

"Old Broad St., London, E.C.

"Dear Mr. Armstrong:

"I have your favour of the 25th ult., and in reply I cannot see what there was in my letter to Sir Frank Crisp and the other persons named to give you such a shock. It was simply a notice to them that I had resigned my position as director and president of the company and that I would not be responsible for what had been done, or which might be done in the future, 'only that and nothing more.'

"It is quite true I sent my resignation some days before the 21st June, but at your earnest request I went to Montreal and attended a meeting on the 21st of June so as to form a quorum, but at the close of the meeting I formally resigned, although you requested me to let my resignation stand over until the annual meeting, but I positively refused to do so, and you promised before you left you would have a meeting of the directors and formally accept my resignation and elect a new president, whom you thought would be Mr. Smith. But instead of that you left without having a meeting of the directors, but called a meeting of the executive instead and had them pass a resolution to convey to you the Bellevue farm and voting you $50,000 for your services, and in the meantime handing you over $74,000 of the company's bonds as security for the $50,000. This action of the executive seemed to me so outrageous and so

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unjustifiable that I felt in justice to myself I should make known the fact that I was no longer an officer of the company, and not responsible for its actions, more especially as I learned you had made no mention in London of my having resigned but were still using my name as president. Under the circumstances, I think I was perfectly justified in sending the formal notice I did.

"Had I known at the time that a notice of my resignation appeared in the Montreal 'Herald' I would have simply mailed them a marked copy of the paper instead of writing a formal notice. I resent your statement that 'I took special pains to wreck the company.' I did nothing of the kind as you may well know. Had I wanted to wreck the company I think a simple statement from me as to how the company's money and bonds had been disposed of would have had that effect. I give you full credit for your energy and ability in promoting this railway for some years, but I remember that this was only one of the different enterprises you had on hand and which engaged your time and ability, and I cannot forget that you have through one source or another drawn considerable sums of money and have also received a good round lot of bonds of the company, and it seemed to me you ought to have been satisfied until *there was a Central Railway*. At present it only exists on paper, and although a start has been made in building it you must not forget that there are many rivers to cross and obstructions to remove before trains are running on the road.

"Yours truly,

"Arch. Campbell."

This letter constitutes an interesting aid to the interpretation of Ex. No. 20, which purports to be a copy "of the minutes of a meeting of directors held on June 21st, 1912." Mr. Armstrong sets much store by Ex. No. 20, saying (Proc. on Ref., p. 400): "It is only fair to myself that the opinion of the directors who knew what I had done should be put on record." It is true that the document is milder in its references to Mr. Armstrong than Senator Campbell's letter, but it will be noted that the minutes set out in Ex. No. 20 are signed by Senator Owens, who was not present at the meeting. However, they manage to record the fact that Senator Campbell was not impressed with the "equity of Mr. Armstrong's claim against the company." But the causes of Senator Campbell's resignation of the presidency and retirement from the board are euphemistically stated as compared with the terms of the Senator's letter to Mr. Armstrong (Ex. M), which is a document later in date and, from what I have learned of the methods of the directors, impresses me as a much safer record of Senator Campbell's reasons for severing his connection with the company.

There are other documents (such as Ex. No. 6 in the Domville claim) to show that the company was not always in accord with Mr. Armstrong, although generally there is too much compliance with his methods apparent upon the proceedings of the directors to render his colleagues on the board free from criticism. Exhibit "D" is a certified copy of an adjourned annual meeting of shareholders on October 13th, 1914, whereby it appears that Mr. Armstrong had tendered his resignation as managing director. The meeting resolved that "Mr. Armstrong be informed that his resignation

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cannot be accepted until he renders his account, reports on the administration of the affairs of the company, and returns to the company the company's bonds in his possession as shown in the auditor's statement." Mr. Armstrong (Proc. on Ref., p. 266) says that this meeting of shareholders was composed of "a little clique that did not represent the shareholders at all." The auditor referred to here is Mr. Midgely who had previous to this date filed a report (Ex. "N"), which led up to the action of the shareholders at this time. When examined as to the account demanded by the shareholders in Exhibit "D," Mr. Armstrong said that he did not render an account in accordance with this resolution, because "there was no account to render." Later on, explaining this, he says:—"I said there were no accounts to render, because they had already been rendered." Now the fact is that he had at that time only rendered a statement of his bond transactions, not of his general account with the company. (Proc. on Ref., pp. 264, 266, 267.)

Turning now to Mr. Midgely's connection with the case, it is well to state that Mr. Midgely was employed by the directors of the company to examine and audit the books so that a financial statement could be made. This was after Mr. Fisk had declined to go on with his audit. (Ex. "L."). Mr. Midgely filed two reports (Ex. "N" and Ex. "O"), which contain certain statements concerning Mr. Armstrong's dealings with the bonds of the company, as well as his "lack of proper vouchers for payments made," which caused Mr. Armstrong to stigmatize them as false. "He was employed by the company to make a report, and he made a false report." "His report is false and proved to be false." (Proc. on Ref., p. 268). And yet on

the very same page of the proceedings he states that "I was the very one who recommended him;" and on p. 291, in speaking of errors in his statement of claim, he says: "I may be wrong on some of the items. I am quite willing to be corrected by Mr. Midgely if there is anything wrong," and on p. 286, "I believe Mr. Midgely and I could settle it in half an hour." Mr. Midgely's character being thus restored out of Mr. Armstrong's own mouth, let us hear what Mr. Midgely says in Ex. "O," p. 3. "It is impossible to adjust Mr. Armstrong's account under present conditions." "Debit balance per ledger, $289,713.57." "This account is obviously of such an important and urgent character that no time should be lost in dealing effectively with same."

Now, Mr. Midgely, in his effort to systematize the books of the company, prepared a statement of Mr. Armstrong's account. (Ex. "X" and pp. 269, 270, Proc. on Ref.). And this is the pivot upon which one of the most extraordinary episodes in the strange history of this company revolves. In this statement of account Mr. Midgely charged Mr. Armstrong with bonds to the amount of $229,999.50. When, however, the company was preparing its scheme of arrangement in 1916 (Proc. on Ref., p. 262) Mr. Armstrong evidently thought it inexpedient to have his account stand in this awkward light, and we find Mr. Blagg, the accountant of the Ottawa River Navigation Company, brought in to amend the account as it was framed by Mr. Midgely as the authorized auditor of the company. (Proc. on Ref. p. 271). Mr. Blagg transmuted, by a process no more subtle than the bold stroke of a pen, the debit entry of $229,999.50 into a credit entry of

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the same amount (Ex. No. 1). Thus the bond indebtedness that Mr. Midgely found against Mr. Armstrong was wiped out. This was in February, 1916. Now Mr. Armstrong asserted that this was done under the authority of the directors (Proc. on Ref., p. 271); but there was no resolution to that effect produced. (Proc. on Ref., pp. 322, 395). On the other hand it was shown that the instructions were given to Mr. Blagg by Senator Owens and Mr. Armstrong himself. This will appear from the extracts from Mr. Blagg's testimony which I subjoin. Senator Owens is dead, and no good purpose would be served by discussing his motive in departing so strangely from his duty as a trustee towards the insolvent company and its creditors; but Mr. Armstrong is here to bear the consequences of his conduct. It seems that Mr. Carmichael, another director, was also present when Mr. Blagg carried out the behests of Owens and Armstrong; but just what part was played by Carmichael is not quite clear. Exhibit "Q," embodying the written instructions given to Mr. Blagg by Mr. Armstrong, is as follows:

"Credit C. N. Armstrong,

Charged wrongly.

"Sept. 15-13, coupon interest.....	$ 10,692.00
"Oct. 31-13, bonds, £3,175.....	15,430.53
"No. 4 coupon.....	1,041.86
"Bonds.....	229,999.50
	$ 257,163.89"

Let me quote Mr. Blagg's story of the transaction from pp. 409 et seq. of Proc. on Ref.

Examined by Mr. Cook.

"Q. Will you please look at the journal of the Central Railway Company of Canada, at pages 70 and 71, and say whether any entries appear in that journal made by you? A. They are all my entries.

"Q. Will you also look at the ledger account of Mr. C. N. Armstrong, being number 73, and state whether any entries appear in that account made by you? A. Yes from here down.

"Q. The entries in that account from the entry which is headed 27th June, 1914, down to the end of the account were all your entries? A. Yes.

"Q. And they were all made in February, 1916? A. Yes, at one time anyway.

"Q. So that, although the entries bear different dates they were all written in February, 1916?

"A. Yes, I suppose within a day or two.

"Q. Under whose instructions did you make those various entries to which you are now referring? A. Senator Owens.

"Q. Did you receive any instructions from Mr. Armstrong in connection with these entries? A. *Well, Mr. Armstrong gave me the statement that I wrote in here.*

"Q. So that the actual entries were made on a statement furnished you by Mr. Armstrong? A. Yes.

"Q. Will you look at the statement filed as Exhibit "Q" and state whether that was the statement? A. I have the word here 'ent.'—

"Q. Was that the statement handed you by Mr. Armstrong. A. I presume it was.

"Q. And the letters 'ent' are in your writing? A. Yes, and the figures.

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"Q. Meaning that those figures were entered and the total of the figures is in your handwriting? A. Yes.

"Q. By that memorandum Exhibit 'Q' you were crediting Mr. Armstrong's account with the sum of $257,163.89? A. Yes.

"Q. You were writing that into his ledger account from your journal entries? A. Yes.

"Q. And where did you get your authority to place that sum of $257,163.89 to the credit of Mr. Armstrong in the journal and in his ledger account? A. I got no other authority except through Senator Owens and Mr. Armstrong and Mr. Carmichael, and they asked me to do the posting, and I said I would accept no responsibility, as I did not know whether it was right or wrong.

"Q. You said you would accept no responsibility? A. Yes.

"Q. As a matter of fact, you do not pretend to say whether the entries which you made are correct, or the reverse? A. I could not say.

"Q. You merely entered them because you were instructed to do so? A. Yes.

x x x x

"Q. I would like to ask you, Mr. Blagg, if you wrote up the account headed 'Contractors, St. Agathe Branch, Suspense Account,' and being account number 79 in the ledger? A. These two items, February 12th, 1916, are in my handwriting.

"Q. They were entered by you? A. Yes.

"Q. The first giving a credit to the account of $59,501.80 and the second giving a debit to the account of $6,813.33? A. Yes. (Exhibit "P").

"Q. Under whose instructions did you make those entries? A. The same parties.

"Cross-examined by Mr. Armstrong:

"Q. You stated that you had instructions from Senator Owens and that Mr. Carmichael and Mr. Armstrong were also present. You have not stated whether Mr. Wells was there or not? A. Yes, Mr. Wells was there.

"Q. Mr. Wells had charge of the books and produced the books for you? A. He did.

"Q. And helped you to work out the items? A. No. I do not think he helped me. I do not remember Mr. Wells helping me at all. He gave me their old cash book written in pencil.

"Q. He gave you any explanations you required to make the entries? A. No, I do not think he knew anything about it. I do not remember asking Mr. Wells anything.

"Q. Was not Mr. Wells there the whole time? A. He was there. I do not remember Mr. Wells saying anything in that way.

"Q. You have been shown a little memorandum 'Q.' Will you swear this was not given to you by Mr. Wells? A. I could not say.

"Q. It is very important. A. I do not remember Mr. Wells giving me anything. I think that must have been given to me by you.

"Q. You have stated that you thought so? A. I am not going to swear who gave me that, but I think it was you. I know Mr. Wells did not hand me anything.

"Q. *It is in my writing, and the question is whether I prepared it for you or for Mr. Wells*? A. Yes, I am pretty sure you gave me that, and Mr. Owens gave me another, but it is so long ago I cannot swear.

"Q. You will not swear it was not handed to you by Mr. Wells? A. It might possibly have been, but I thought it was you.

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"Q. Do you know this handwriting? A. That is my own handwriting. *That was evidently given me by you.* (Exhibit 21.)

"Q. These are part of the same figures of Exhibit 'Q,' and these are figures taken in your own handwriting. Where did you get those figures? A. I must have got those instructions from you.

"Q. It is not a question of instructions. I am asking you where you got those figures? A. *I will say from you. No one else would give me that. I could not get them out of my head.*

"Q. You said Mr. Owens was there and Mr. Wells. You had a good deal of discussion with Mr. Carmichael while you were preparing this? A. Yes.

"Q. And he took an active part in the matter? A. He did.

"Q. In fact you thought he took too active a part? A. I told you and Senator Owens that I would not be responsible for any of these entries, because I did not know anything about them. *They might all be true or they might be concocted, but I would write them in and accept no responsibility.*"

I shall supplement Mr. Blagg's evidence with the following excerpts from Mr. Midgely's oral testimony, at pages 423, 424.

"By Mr. Cook:

"Q. Had you anything to do with the entries that were made by Mr. Blagg in February, 1916, and following? A. No, I had absolutely nothing.

"Q. I see that these entries of Mr. Blagg have apparently the effect of almost entirely reversing the entries which you had previously made; is that correct? A. Well, one entry, the $229,999.52 reversed the largest item in the account.

"Q. What was that item? A. For the bonds which had been charged to Mr. Armstrong under the authority of the various resolutions, and in accordance with my report. A further explanation might be found in the Journal, page 65. Here is an entry charging Mr. Armstrong—and this is in my writing—so that the most important item in Mr. Armstrong's account was in my own writing; that is, the foundation of it was in my own writing; $229,999.52 for bonds, the value of £60,825 taken by him, less £3,175 and £10,325 already charged, as per his letter of December 10th, 1913.

"The Registrar: That will be filed as Exhibit "X."

At p. 425:

"But your making charges did not depend on the interpretation of any written document? A. No, but it remained for Mr. Armstrong to justify his having taken the bonds. I found that Mr. Armstrong had the bonds; consequently, I charged him very properly with having the bonds.

"Q. He said the reason was found in the interpretation you placed on the contract? A. No, the reason I charged him with the bonds was that I found he had *received the bonds and he admitted that.*

"By Mr. Cook:

"Q. He admitted that he had the £60,250 of bonds? A. Absolutely, but so far as the credit to which Mr. Armstrong was entitled, I did not pretend to interpret what credit he should have, and my understanding was that Mr. Armstrong was later to bring to me a full statement of his account. I was to go into it with him, but I never saw it.

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At page 428:

"Q. Will you please turn to Mr. C. N. Armstrong's account number 73, Exhibit "T," and state how much the credit made by Mr. Blagg in February, 1916, amounts to? A. Well, the total credits—do you want them on that particular day? Because he has made several credits. He has made about a dozen. Do you want them all?

"Q. I only want the total of them, in account number 73. A. $304,881.77.

"By the Registrar:

"Q. What does that represent? A. That represents the total of the credits entered into this account of Mr. Armstrong by Mr. Blagg.

"By Mr. Cook:

"Q. Is there anything, in your opinion as an expert accountant, that justifies those credit entries? A. Well, I should certainly have hesitated to make them myself, *because I do not think they are justified.*

"Q. Have you been able to find any resolutions of the board of directors of this company, or of the executive committee, that would justify such credit entries in this account? A. I have not seen any.

At page 439:

"By Mr. Armstrong:

"Q. You have made a statement under oath that you do not believe that I am entitled to sufficient credit to make up the amount of the debit, and that, instead of me being a creditor of the company, I am a debtor. I ask you on what you base that statement, and I ask you whether the credit here, which is passed by resolution of the board of £11,725 should not have been credited, and cancelled the charge which you

made of those bonds against me? A. I should have to make very sure, Mr. Armstrong, for this reason: the condition of the accounts as I found them at the time I went into them, and all the circumstances in connection with the company, which caused me a tremendous amount of worry, and in which I endeavoured to do you full justice, would certainly lead me to make most careful examination and investigation *before I would pass any amount to your credit.*

"Q. You are not aware of the amount of work that had been done on that road? A. I never saw any engineers' certificates, never, and that would be my authority for passing a credit to your account.

"By the Registrar:

"Q. Did you ever make any search for the certificates? A. I had access to all the papers, and examined every scrap at one time or another up to the time of making my report.

"Q. You never saw anything which would justify you making a credit to Mr. Armstrong? A. No, except the Allen contract. No doubt he was entitled to some credit in connection with that, but it was never determined to my satisfaction. I never could get down to what he should be credited with, and I mentioned that in my report. It was of a very vague and nebulous character to my mind."

I doubt if this deliberate tampering with the books of the company by Blagg at the instance of Armstrong, and in his interest, has any parallel in the history of corporations in Canada.

Now to show that the minds of the directors in February, 1916, were not disposed to settle Armstrong's account in the summary way he himself did it through

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the instrumentality of Blagg, we have the following appearing in the minutes of the meeting of the directors on the 12th of that month:—

"Mr. C. N. Armstrong's account as submitted by the auditor was considered and held over until a further statement of expenditures in London now on the way was supplied." (Ex. "P").

I have discussed Mr. Armstrong's conduct at great length, because to my mind not only has it a very important bearing on his right to recover remuneration for his services, but it is in the public interest to know just how the affairs of this unfortunate company have been conducted by its managing director. Lord Cairns, in his luminous judgment in *Gardner* v. *London Chatham & Dover Ry. Co.* (1), described a railway company as a "fruit bearing tree," but thought that under the English statute law as it applied to the case the debenture-holders, while entitled to the fruit of the tree, could not proceed to the length of cutting it down. In view of the facts of this case, and especially recalling the reference to "wrecking" in Senator Campbell's letter (Ex. "M") it would seem that Mr. Armstrong has been able to do here what Lord Cairns would not admit to be within the power of debenture-holders in England. But I am free to say that in view of his own conduct as established in evidence in these proceedings, and again having especial reference to Senator Campbell's letter, Mr. Armstrong's pretext for claiming remuneration at $250 per month after the year 1917, namely, that "the assets were neglected by the receiver, and the company had a right to try and collect everything that is due to it" (Proc. on Ref., p. 204) is a masterly adventure in cynicism.

(1) [1866] 2 Ch. App. 201 at p. 217.

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But I am not obliged to rest my finding against Mr. Armstrong's right to rank in priority on the fund in the receiver's hands on the ground of his maladministration as managing director or vice-president of the affairs of this company. I prefer to place my finding on the evidence which shows that the company is not as a matter of cold fact indebted to him at the present time. Not only has Mr. Armstrong failed to prove his right to recover any portion of his claim against the company, but quite apart from the fact that the resolutions of the executive committee and the board of directors granting him remuneration were not properly ratified by the shareholders, and the evidence given by Mr. Midgely on behalf of the plaintiff contesting, I cannot find that Mr. Armstrong has established by satisfactory proof that he is entitled to any definite amount as against the company. I must find as a fact that he had no proper authority from the shareholders under which to make a claim for salary, travelling expenses or disbursements between the 18th October, 1911, and the 31st December, 1917. I must also find that he has proved no legal claim to remuneration for services rendered between the 1st January, 1918, and 1st September, 1919, or for expenses incurred between those dates. This disposes of his whole claim.

I wish to support my finding as above stated by referring to Exhibit "P" which has an especial bearing on his claim as asserted after the 12th February, 1916. This exhibit embodies a resolution, *inter alia*, that "all officials of the company be notified that their services are no longer required and that no person be employed in future unless he gives an undertaking to hold the directors free from any personal obligation

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to pay any salary or wages to him." Now the question at once arises is a managing director an "official" or an officer of the company? Sec. 78 (d) of the Dominion Companies Act (R.S. 1906, c. 79) enacts: "The directors shall, from time to time elect from among themselves a president and if they see fit, a vice-president of the company; and may also appoint all other *officers* thereof." In *Hutton* v. *West Cork Ry. Co.* (1), Cotton J. L. uses this language:—"Then comes the question as to the directors. I was not quite satisfied that the vote for compensation to the *officials, etc.*" Per Baggallay, L. J. (p. 680):—"It may be said, and I think very properly said, that until such time as a general meeting has fixed the amount of remuneration of the directors or of the treasurer or secretary, *or any other officer*, the person so indicated has not any right to demand his remuneration." Then we have the explicit statement by Mr. Mitchell in his *Canadian Commercial Corporations*, p. 1112: "A managing director is an officer." Finally sec. 42 of the by-laws of the defendant company treats a director as the holder of an "office," which may be vacated by the director accepting "any other office or profit."

So that Ex. "P" has an important bearing on Mr. Armstrong's right to recover salary or remuneration between the 12th February, 1916, and 1st September, 1919, a period involving a large portion of his claim. Without relying on the language of Ex. "P" to exclude the items of his claim on and after the 12th February, 1916, I wish to refer to it as one of the obstacles which Mr. Armstrong has to surmount before he has discharged the burden of proof that rests upon him.

(1) (1883] 23 Ch. Div. 654, at p. 666.

Another fact in evidence, which negatives Mr. Armstrong's contention that the documentary evidence establishes acquiescence by the directors in his claim for a large amount of money due him, is embodied in Exhibit "G," being a certified copy of the minutes of a meeting of directors on 4th July, 1913. (Mr. Armstrong being present and concurring in the action of the Board so far as the evidence shows). These minutes concern proceedings on *saisie arrêt* in the suit of *Nash* v. *C. N. Armstrong*, and declare, *inter alia*:—

"That the Central Railway Company of Canada has an open account with the defendant C. N. Armstrong, but does not admit that any amount is due by the company to the said C. N. Armstrong."

Mr. Armstrong did not attempt to say that this minute does not correctly describe the situation between himself and the company on the 4th July, 1913; but he ventures to treat the corporate act of the board lightly, and says:

"They did not want to be called upon to pay out any money; that is a good way to get out of it." (Proc. on Ref., p. 277). In this connection (Proc. on Ref., p. 278) Mr. Armstrong makes a statement which goes to strengthen the contention of the plaintiff contesting that there never was at any time after the year 1912 a specific acknowledgment by the company of any amount due him. The following evidence refers to his account as mentioned in Ex. "G:"

"Q. You were present at that meeting? A. Well, I asked you that question. I do not know. Yes, I was present at that meeting.

"Q. You do not remember anything about it? A. No, I do not.

"Q. Did you take any objection to that entry being made? A. There is no objection recorded.

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"By the Registrar:

"Q. Is it a mere scrap of paper? A. Well, there is nothing to it. They simply say they cannot admit anything until the account is made up.

"By Mr. Cook:

"Q. And the account never has been made up? A. Well, it is before the court now.

"Q. But it was never made up to the company? A. No, I was away most of the time in England, and no object in making up an account if you could not get any money out of them."

Mr. Armstrong has not been able to adduce affirmative evidence of a credible character to establish his claim. We have seen how far the proof which he was tendered on his own behalf fails to support it. I have already quoted from certain evidence of Mr. Midgely, the accountant, who was called in by the company to prepare a reliable financial statement for it, the effect of which in a general way displaces any right of Mr. Armstrong to recover against the company. I will conclude my enquiry by quoting some explicit statements by Mr. Midgely, upon which I shall rest my finding that Mr. Armstrong has failed to establish any claim against the company.

Before doing so I wish to point out that before I closed the hearing Mr. Armstrong filed an informal statement in typewriting and pencil (Ex. No. 18) reducing his claim to $105,729.08. But throughout the hearing, as I have stated, the exact amount he claimed was very much in doubt.

I quote first from Mr. Midgely's direct examination by Mr. Cook on pp. 432, 433, Proc. on Ref.

"Q. Will you please state what, in your opinion, according to the books of the company, should be the debit balance standing against Mr. Armstrong to-day in dealing with the books.

"The Registrar: The amount which you stated before?

"A. The amount would be the same as my report, $298,713.57, which Mr. Armstrong might be entitled to reduce under the Allen contract or by any engineer's certificate he could produce for the St. Agathe branch contract.

"The Registrar: "Mr. Armstrong claims $109,000 odd, less a possible reduction of $3,000. If I so decide, and you find that upon the books of the company he should be debited with $298,713.57, less any other credits he might possibly establish—?

"Witness: "Yes, absolutely. I think I mentioned that he might be allowed certain credits for expenses, and I suggested that a committee be appointed to go into that, but it would be up to Mr. Armstrong to establish the credits he is entitled to.

"By the Registrar:

"Q. But, giving him credit for everything he would be able to establish, he would be indebted to the company in a considerable sum? A. He would in my opinion.

By Mr. Cook:

"Q. You have no doubt about that? A. I have no doubt that it is a very large sum of money, and I do not see how Mr. Armstrong could justify such a large amount.

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"Q. So that the net result of your evidence is that, instead of the company owing Mr. Armstrong, Mr. Armstrong is heavily indebted to the company? A. I do not think the company owes Mr. Armstrong a single cent.

"By the Registrar:

"Q. That is, even admitting his claim as filed before me as being correct and a substantial one in law; that is that $105,000 that I have mentioned that his claim amounts to? A. In my opinion there is nothing due to Mr. Armstrong by the company. I would say if everything was in, it is my opinion he would be indebted to the company.

"Q. In a very considerable sum? A. I think in a very *considerable sum of money.*"

In cross-examination by Mr. Armstrong at pp. 447, 448.

"By Mr. Armstrong:

"Q. From what you have seen since, are you prepared to modify the statement you made earlier that I owed the company a large amount of money instead of the company owing me? A. I give it as my opinion that if everything was in the accounts pro and con the company would not owe you a dollar.

"Q. And on what do you base that? A. By my knowledge of what I found at the time.

"Q. Up to the time you made your report in January, 1914? A. Yes.

"Q. And you do not know what has taken place since? A. I am not cognizant of those resolutions first hand that you refer to, but in order to give a further opinion about it I should have to know all the circumstances leading up to this.

"By the Registrar:

"Q. You have not seen anything to cause you to depart from the statement you made, which has been brought out on cross-examination? A. No, I take this position: Mr. Armstrong had an opportunity to come to me to settle this account; it was an account that caused me a tremendous amount of worry. I was anxious to settle it, and to render justice to himself and the company. It was never done. I had no information to enable me to come to the conclusion that Mr. Armstrong was entitled to all those amounts he was credited with, and to my knowledge I do not think he was entitled to such heavy credits."

It remains to be stated that on the hearing of the contestation of the claim of Senator Domville (viz., on the 10th of May, 1920) I allowed the contestation of this claim to be reopened for the purpose of permitting certain evidence to be adduced by Senator Domville as a contesting party herein. Such evidence will be found in the proceedings in the Domville claim, and it will serve no useful purpose to summarize it here.

In conclusion the undersigned has the honour to report that

(a) The claim of C. N. Armstrong against the defendant company for the sum of $109,947.41, as filed herein on the 9th September, 1919, is not entitled to be paid out of the fund in the receiver's hands in priority to the claim of the trustee for the bondholders.

(b) That the defendant company does not owe the said C. N. Armstrong the sum of $109,947.41 or any other sum of money.

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The undersigned, therefore, begs further to report that in his opinion the claim of the said C. N. Armstrong, filed herein as aforesaid, should be dismissed by this honourable court, and that the costs of and incidental to the contestation of the claim before the undersigned should be ordered to be paid to the plaintiff contesting by the said C. N. Armstrong.