BETWEEN

THE MINISTER OF RAILWAYS AND CANALS FOR THE DOMINION OF CANADA ..... } PLAINTIFF; 1908 Oct. 31.

AND

THE QUEBEC SOUTHERN RAILWAY COMPANY AND THE SOUTH SHORE RAILWAY COMPANY ..... } DEFENDANTS.

In re

HIRAM A. HODGE.....CLAIMANT (CONTESTING);

AND

THE BANK OF ST. HYACINTHE, THE ATTORNEY-GENERAL FOR CANADA AND HIS MAJESTY THE KING..... } INTERVENING PARTIES ANSWERING CONTESTATION.

In re

FRANK D. WHITE.....CLAIMANT (CONTESTING).

AND

THE BANK OF ST. HYACINTHE, THE ATTORNEY-GENERAL FOR CANADA AND HIS MAJESTY THE KING .... } INTERVENING PARTIES ANSWERING CONTESTATION.

Railways—Rights of purchaser at sale—Incorporation of company—51 Vict. chap. 29—Promoter—Fiduciary relationship to company—Profit on sale of railway—Directors' salary—Set-off.

A purchaser of a railway does not acquire an absolute right to the railway. What he acquires is an interim right to operate the railway to be followed up by incorporation as provided by sec. 280 of 51 Vict. c. 29. (See now sec. 299 of the *Railway Act*, R. S., 1906, c. 37.)

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2. While an independent purchaser buying with his own money and selling at an enhanced price to a company, with full disclosure and without fraud, can claim his profit, promoters, who stand in a fiduciary relationship to the company, cannot take such profit. Hence, where promoters bought with the moneys of a company incorporated by themselves, to whom they turned over the property, they were not permitted to recover against the company any profits on the transaction.

3. A resolution of shareholders is necessary to authorise the payment of salaries to directors of a company.

4. Having regard to the provisions of Arts. 1031 and 1187 C. C. P. Q., creditors were allowed by the Referee to set off the claims of certain debtors, officers of the company, for salaries taken by them without proper authority, and for expenditures made by them out of the company's funds for a purpose *ultra vires* of the company. No objection was taken to this ruling before the Referee, and the court, on appeal from his report, confirmed such ruling, but expressed some doubt as to the jurisdiction of the Referee to set off such claims.

APPEALS from the report of the Registrar acting as Referee.

The general facts of the proceedings before the court, as well as before the Referee, appear in the reasons for judgment; but it is necessary to a clear understanding of the general issues involved to state them with some detail here.

On the 21st March, 1904, a Receiver was appointed for the above-mentioned railways. The railways having been sold by order of court (1) under the authority of 4–5 Edw. VII, c. 158, the Registrar was empowered by order of court to make enquiry and report as to the Receiver's account and to ascertain and investigate the claims of the several creditors.

On the 12th December, 1906, the Referee made a provisional report upon the evidence then before him, for reasons therein set out, and sent a copy of the same to all the creditors, with a request that all those who might be dissatisfied with that report should file their contestations,

(1) See *Minister of Railways and Canals* v. *Quebec Southern Railway Co. et al.*, 10 Ex. C. R. 139.

also giving them notice that otherwise such report would become absolute.

Eight contestations were then filed. Evidence respecting such contestations was received, and the Referee's findings upon the same were embodied in a final report, dated the 25th May, 1908, together with his findings upon all the claims. The final report dealt with three hundred and sixteen claims in all, but the findings upon six only of the contestations were made the subjects of appeal to the Judge of the Exchequer Court.

In respect of the appeals of Hodge and White, the following facts are taken from the Referee's provisional and final reports herein.

Frank D. White, of the City of Vermont, U.S.A., filed before the Referee four claims as follows:

1. A claim for $3,945 representing an alleged loan to the original Quebec Southern Railway Company on or about the 3rd July, 1900, together with the sum of $945 as interest thereon.

2. A claim for the sum of $193,750 and interest, alleged to be due him in respect of 193¾ 4 per cent. bonds of what was known in the proceedings as the $900,000 issue.

3. A claim for $23,845.30 representing the sum of $19,137.99 alleged to have been paid by him to the Bank of St. Hyacinthe on the 2nd December, 1902, to cover amount of Quebec Southern Railway Company's overdraft, together with $5,607.36 interest thereon, less certain sums received on account.

4. A claim for $1,500 and interest, for salary as Vice-President and Treasurer of the amalgamated Quebec Southern Railway Company for a certain period.

5. A claim for $370,000, representing $42,000 of what was called the $3,500,000 bond issue, and $328,000 of the income bonds.

Amounting in all to the sum of $593,040.30.

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Hiram A. Hodge, of Boston, Mass., was President of the Quebec Southern Railway before the road was placed in the hands of a Receiver. He filed two claims, as follows:—

First, for salary as such president ($200 per month) and expenses, amounting to $1,596.17.

Secondly, for the value of bonds to the value of $193,750 of what was known as the 900,000 issue; $42,000 of the $3,500,000 issue, and $328,100 of the income bonds, in all amounting to.....$ 563,750 00

The total of Hodge's claim being.....$ 565,346 17

By his final report, the Referee dismissed both the claims of Hodge and White in respect of unpaid salaries on the following grounds:—

"The first item of Hodge's claim is for salary, at the rate of $200 per month from 1st October, 1903, to 21st March, 1904, amounting to $1,150, together with $446.17 balance of expenses still remaining unpaid, making the total sum of $1,596.17.

"Hodge began paying himself a salary at such rate from the time he took actual possession of the road during August, 1900, and although he was still receiving his salary of $6,000 to $7,000 a year as Traffic Manager of the Rutland Railroad Company up to November or December of that year. The total amount of salary so paid would appear, from Plaintiff's Exhibit P–12, to have been the sum of $7,825.00.

"With respect to this question of salary, the undersigned can only repeat what he has already said in his provisional report. Under what authority was the salary paid, is the first question which suggests itself. There was no resolution of any kind either from the shareholders or the directors to that effect. Without any resolution of the shareholders authorizing such payment to directors, no such salary can be paid. Hodge being a direc-

tor could not pay himself a salary without a resolution from the shareholders. *Earle* v. *Burland*, 1902, A. C. 101, has been cited by both parties on this point. The Court in that case allowed Burland's salary as Secretary to continue when he was appointed Vice-President, but it was because there was a resolution fixing his salary as Secretary, and that notwithstanding the change in the distribution of offices, Burland continued to do the same class of work as he had done as Secretary. It is obvious from the judgment that their Lordships of the Privy Council reached this conclusion on their theory that no salary can be paid to a director without resolution. *Lindley on Companies* has already been cited in the provisional report upon this point, but a few additional citations therefrom may be given, viz : Vol. 1, 6th ed. p. 419 : "Directors have no power to vote themselves fees for salaries," etc. Apparently the shareholders have that power, but not the directors. The individual consent of directors cannot avail inasmuch as this is a matter of internal management, and inasmuch also as Hodge and White were not ignorant of the informality. The case of *Dunston* v. *Imperial Gas Co.*, 3 B. & Ad. 125 (cited at p. 512 of *Lindley*) is further authority that directors are not impliedly entitled to any pay for their services. Citing *Lindley* again at pp. 539, 540, we find : 'Directors of companies are generally allowed compensation for their trouble by express agreement; but where there is no such agreement they cannot, without the sanction of the shareholders, charge the company anything for their services.'

"The salary claimed as remaining unpaid covers the period of the amalgamation, when Hodge and White were no longer the whole company. The minority interest, or shareholders, has or have never shown any consent to such payment, as they very likely never knew of it.

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"The position of President of a company is not *de jure* one of remuneration, it requires the votes of shareholders to make it so. It might perhaps be different if the President had been at the same time General Manager. Sec. 1, ch. 9 of 59 Vic. (amending sec. 58 of ch. 29, 51 Vict.) the Act in force at the time of this transaction, provides that the directors may make by-laws and pass resolutions for the appointment of all officers prescribing their duties and the *compensation to be made therefor.* The same provision is also to be found in sec. 80 of *The Railway Act*, 1903. This is the only provision respecting remuneration for services which can be found in the Railway Act, and surely it cannot be contended that under this provision directors could vote salaries to themselves. That is a matter for the shareholders exclusively, and in the present case there is no resolution whatsoever either from the Directors or the shareholders. *Abbott's Railway Law of Canada*, at p 25, par. 35, says: "Directors of "companies are generally allowed compensation for their "time and attention to the company's business by *express* "*agreement*; but where there is no such agreement, they "cannot, without the sanction of the shareholders, charge "the company anything for their services." And the sanction of the shareholders can only be had by a resolution.

"The claim for salary is therefore dismissed, and the said amount of $17,825.00 unduly paid Hodge in the past for salary, and the balance of expenses still remaining unpaid and due him, will be set off against such amounts as are hereinafter mentioned as either due or accountable by the company to him. ....

"All of the above which is said respecting the question of salary, ... equally applies to the claim of White. He was, however, Vice-President and Treasurer; but being a director, he cannot recover without a resolution authorizing a salary. The office of Treasurer may

be said to be remunerative *per se*, but being a director, in the absence of a resolution, he cannot recover unless he could come within the case of *Earle* v. *Burland*." (*supra.*)

The Referee, by his provisional report, having disallowed the claims of both Hodge and White, they subsequently filed contestations of such report.

With regard to the claims of Hodge and White in respect of shares and bonds held by them the following is taken from the Referee's report:—

H. A. Hodge's Claim.

"Under section 93 of the Railway Act, 1888, (51 Vict. ch. 2) the directors, subject to the provisions therein mentioned, are given power *for the purpose of raising money for prosecuting the undertaking to issue or pledge the bonds at the best price and upon the best terms and conditions which*, at the time, they may be able to obtain.

"The first mortgage bonds issued by the company were for the sum of $900,000, at the rate of $10,000 per mile, under Deed of Trust of 7th March, 1902. These are the bonds referred to in the Deeds of the 2nd day of December, 1899, issued by the company as composed of the United Counties and the East Richelieu Valley Railways.

"The second mortgage bonds were for $100,000 under Deed of Trust also of the 7th March, 1902. These bonds were never issued beyond the passing of a Trust Deed, and were never even printed. The issue was subsequently cancelled.

"The third issue was made by the company when composed of the United Counties, the East Richelieu Valley and the South Shore Railways, under Deed of Trust of 10th June, 1902, for the sum of $3,500,000, at the rate of $12,000 per mile, and was to extend over the road and the territory covered by the franchise of the South Shore Railway. And whatever bonds of this issue were signed—a great number are still in the hands

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of the printer—were so signed about three weeks before the appointment of the Receiver. Hodge and White each claim 42 of these bonds.

"There was also an issue of $2,000,000 Income Bonds upon which Hodge and White made claim originally, but that claim was abandoned in the present contestation.

"Under one of the deeds of the 2nd December, 1899, between the Bank of St. Hyacinthe and H. A. Hodge, it is, among other things agreed that the former sells to the latter the United Counties Railway for the sum of $400,000, payable as follows:—

In cash.....	$ 25,000 00
In promissory notes	75,000 00
And the sum of..... ..	300,000 00
in First Mortgage four per cent. Gold Bonds of an issue upon the entire system not exceeding $10,000 per mile.....	
	$400,000 00

"Under the other deed of even date, between the same parties, which deeds are agreed to be read together, it is also, among other things, agreed that the bank under the conditions therein mentioned, will endeavour to sell to Hodge the East Richelieu Valley Railway for the sum of $100,000, and that the *consideration or price shall be of first mortgage four per cent. gold bonds of an issue upon the entire system* not exceeding $10,000 per mile, which system including the two lines of railway, with sidings and branches, is fixed, as between the parties, at 99 miles or an issue of $900,000 on the entire system. And it is further agreed that if the bank is obliged to pay for the East Richelieu Valley Railway a sum in excess of the amount stipulated, that Hodge will pay half of the said excess up to $25,000 in bonds, making a total amount payable to the said bank for both lines of railway of $500,000, or $512,500, as the case may be.

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"The East Richelieu Valley Railway was subsequently sold on the 30th May, 1900, for the sum of $125,000, calling for cash, or its equivalent, to M. E. Bernier as Trustee of the Quebec Southern Railway.

"In addition to such consideration price for the United Counties Railway stipulated in the concurrent agreement at $400,000, it was agreed that Hodge would give a further sum of $100,000 of bonds of *like issue*, provided a reasonable traffic agreement with the Intercolonial Railway and the United Counties Railway has been entered into. Such contract was duly entered into and such traffic arrangement obtained.

"Recapitulating these two deeds of the 2nd December, 1899, we find the payments thereunder are as follows:—

Cash	$ 25,000
Promissory Note	75,000
Bonds U. C.	300,000
Bonds E. R. V.	112,500
Bonds I. C. R.	100,000
	$612,500

"That is $100,000 practically in cash and $512,500 in bonds. Subsequently thereto, on the 7th August, 1900, another deed between Dessaulles and the Quebec Southern Railway Company was passed, under the rather peculiar circumstances known to the parties, by which Dessaulles, going partly beyond the mandate he held to discharge the obligations contained in the deed of the 2nd December, 1899, bartered the United Counties Railway at an increased price. G. C. Dessaulles, the President of the Bank of St. Hyacinthe, under deed of January, 1900, between the Bank, Hodge and himself, had agreed and undertaken to purchase the United Counties Railway at Sheriff's sale to carry out the terms and conditions of the Deeds of the 2nd December, 1899, and on

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the 25th January, 1900, he actually did purchase at Sheriff's sale the United Counties Railway, when he gave possession of the railway to Hodge and White, under a new lease, and on the 7th August, 1900, was asked and did sign this deed of even date by which the price of sale had been changed to the following figures:—

In paid up non-assessable stock.....	$ 749,000
In First Mortgage Bonds bearing interest at 4 per cent. to be issued.....	750,000
And in promissory notes payable one year after date of issue..	151,000
	$1,650,000

"All these deeds are referred to in the case of the Bank of St. Hyacinthe at pages 5 and following. Under the deed of the 7th August, 1900, the railway passed out and out to the Quebec Southern Railway, with full possession.

"On reference to the Minute Book of the Quebec Southern Railway, we find, among other things, that at the very first meeting of the Provisional Directors on the 5th January, 1901, confirmed at subsequent meetings, Hodge and White take, hold and appropriate to themselves, in the relative proportion of 1,250 shares or $125,000 each, all the shares of the company without any consideration whatever.

"Then, two days later, at the meeting of the subscribers of the stock, on the 7th January, 1901, composed practically again of Hodge and White, resolutions are passed by which the Directors are empowered to purchase the United Counties and the East Richelieu Valley Railways, for a sum not exceeding $1,900,000, payable as follows (Exhibit 6, Deed 7th August, 1900):—

In paid up shares.....	$ 749,000

Bonds of the $900,000 and of the $100,000 issue	1,000,000
and	
In promissory notes the sum of.....	151,000
Making a total of.....	$1,900,000

"The Directors were further empowered and authorized to issue and allot to the vendors the said 7,500 shares in consideration of the transfer to the Quebec Southern Railway of the said railways.

"Coming to the Bonds, we find that, at the same meeting, the Directors, after the issue of $1,000,000 four per cent. bonds, of which $900,000 were to be first mortgage and $100,000 to be second mortgage, they are authorized to use the said bonds in part payment for the acquisition of the two railways and of such other property, services and contracts as they may decide.

"Then at the meeting of the Directors of even date, at which Hodge is elected President, and White Vice-President and Treasurer, the balance of the issue of the first mortgage bonds, to wit, $150,000 and the entire issue of the second mortgage bonds of $100,000, (these $100,000 are claimed herein by Hodge and White in proportionate ratio on the $3,500,000 issue at $84,000) are given to Hodge and White for the purpose of effecting and perfecting the purchase and acquisition by the Quebec Southern Railway of the East Richelieu Valley, and of the contract with the Government of Canada and for certain other contracts, franchises, privileges, properties and services for the benefit of the company.

"At another meeting of the same date (7th January, 1901), intituled "A meeting of the Subscribers of the Stock of the Company," Hodge and White are again directed to purchase the two railways in question, and are given the stocks, bonds and notes for that purpose, but they also engineer the following gift in their favour,

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by authorizing the directors to pay to Hodge and White the sum of $250,000 as follows:—

In cash ..... $ 25,000
and the sum of 225,000

by issuing in their favour 2,500 paid up shares of the company, in respect of which it is alleged they have already paid $25,000, and discharging them of any further liability in respect of the said shares—the whole alleged to be in order to pay and reimburse Hodge and White their outlay on behalf of the company, materials, and services of engineers and contractors, for fees, expenses and disbursements in procuring the passing of the Special Act of incorporation of the company, and for surveys, plans, estimates, reports, audits, accounts, legal and notarial charges, travelling expenses, and all other matters, and things in connection with the acquisition of the property acquired and the organization of the company.

"Then at the meeting of the Directors this substantial gift of $25,000 in cash and $225,000 in 2,500 paid up shares, as above mentioned, upon which the bold statement of a payment by them of 10 per cent. is repeated, is confirmed and effected.

"From the above and from the perusal of the pleadings it will be seen that the stock is of no value, as even alleged by Hodge and White in their own pleadings. Clearly it is of no value, but because the law has been avoided. If the stock had been sold for consideration, instead of being appropriated without consideration by Hodge and White, and the proceeds thereof put into the company for its improvement, the stock would have been worth par. However, as between Hodge and White and the creditors, the stock has its par value. Under Art. 1031 C. C. creditors can exercise all the rights of their debtors; so, if the company could complain, the creditors would also have that right. They have the right to make Hodge account, and that is what is done here by refusing them

their large undue profits. Hodge and White have to-day to account to their creditors for their shares. The stock is of no value, because Hodge and White issued it without consideration; and, indeed, there is no company which could afford doing so without taking away any value the stock might have; and the very allegation by Hodge and White that the stock has no value is a plain admission that it is the result of their dealings and in thus pocketing the stock to the detriment of the creditors. The fact that Hodge and White were the only shareholders at the beginning and at the time they transferred the stock to themselves, is no answer; they were not free to impair in this manner the stock of the company, they were bound to think of future subscribers who would necessarily come in. *Society of Illustration of Practical Knowledge* v. *Abbot* (1); *Lindley on Companies* (2).

"It is true under sec. 39 of 51 Vict. ch. 51, (the Railway Act in force at the time in question,) that the directors may allot and hand over shares of the company in payment for right of way, plant, rolling stock or materials of any kind and also for the services of contractors and engineers; but in the resolution making a gift to Hodge and White of $25,000 in cash and of the 2,500 shares, it is alleged these shares are given for a good many purposes, among which materials and services of engineers and contractors would come within the statute. However, most of the consideration mentioned in the minutes for which these shares are given do not come within the scope and provisions of the statute, and Hodge was examined upon each of these items, and to say the least, his testimony upon this point was very unsatisfactory. So much, however, which can be conceived to have been proved as expended within the scope of the statute might be deducted from the total amount.

(1) 2 Beav. 559.

(2) Ed. 1902, vol. 1, pp. 509, 510.

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leaving still a very large balance, for which they will have to account.

"Dealing with the bonds, and turning to the above extract from the Minute Book and the two deeds of the 2nd December, 1899, it will clearly appear from the latter deeds that the purchase price is payable by the company partly by its note and partly by its bonds, and that Hodge on that occasion is acting as agent for a company he undertakes to incorporate. The consideration named for the purchase price of the East Richelieu Valley is also the bonds of the company. Hodge was buying for the company and was under an obligation in pursuance of the deed to transfer the railway to the company at the price agreed upon and the vendors accepting bonds in payment. The vendors were interested to protect the value of the bonds and Hodge could not re-sell to the company at any fancy price, because he could thus destroy and annihilate completely the value of the bonds, to the great detriment of the vendor, and under paragraph 10 of the deed of the 2nd December, 1899, he could not sell at a higher price.

"It also appears from the minutes of the company that in such purchase Hodge and White are acting under a specific mandate from the company, and that the company hands them the bonds for the very purpose of purchasing these two railways. Assuming as good the resolution giving all these bonds to Hodge and White in the very terms of the resolution, are they entitled after paying the purchase price of these two railways, to retain for their own use and as their property the residue of such bonds and thereby injure and impair the very value of the bonds themselves? Indeed, by claiming these bonds to-day they further defeat payment to the vendors, who have the right to be paid first, and to be free from prejudice at the hands of purchasers who have appropriated the bonds without consideration. (See Arts. 1158 and 1159

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C. C.) How can Hodge and White come to-day and claim the price of bonds upon a property they bought and never paid for? See Art. 2014 and Notes 19, 20 and 21.

"It will be noted that sec. 39 of the Railway Act only applies to shares, and that, under sec. 93 thereof, the bonds can be disposed of *at the best price and upon the best terms and conditions and for the purpose of raising money for prosecuting the undertaking.*

"Can Hodge and White to-day contend, ignoring the deeds of the 2nd December, 1899, that they retain and justly make claim for what is left of the bonds, after allowing for the payment of the two railways, in compliance with the resolutions of the 7th January, 1901, and the provisions of sec. 93? Hodge and White were directors of the company and they were to some extent the trustees of the company, and as such were bound to administer it in the interests of the company and with honesty to other people. If they have been misapplying the money or the bonds and shares of the company, they are jointly and severally liable for the losses arising therefrom.

"Again under all the circumstances Hodge is buying for the company, and under his contract he was bound to transfer without profit, and the minutes of the company make this position stronger. The bonds were given to them in trust under a specific mandate, and they are not entitled to profit as they were acting in a fiduciary capacity, and it was their duty as officers of the company to purchase at as low a price as possible. It is well to remember also that the company was not a party to the *contre-lettre* of the 7th August, 1900, under which the shares, bonds and note were put in escrow with the object of distributing the same in such manner as to give Hodge and White $51,000 out of the note of the company and a large number of bonds and shares. This

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contre-lettre is not mentioned in the minutes of the company. It is clear that under all the circumstances the contractual relations between Hodge and White on the one side and the company on the other was that Hodge and White were mere agents acting under a specific mandate, and that they could not pocket stock, bonds and a part of the promissory note.

"This practically disposes of the claim of Hodge, with the exception of the claim for the value of ten shares of stock of the South Shore Railway. These shares again, it must be presumed, were acquired without consideration, but there is no evidence upon that point, and they will be set off, if they are of any value, against what Hodge owes and for which he has to account to the company."

F. D. WHITE'S CLAIM.

"All of the above which is said respecting the questions of salary, shares and bonds equally applies to the claim of White. He was, however, Vice-President and Treasurer; but being a director, he cannot recover without a resolution authorizing a salary. The office of Treasurer may be said to be remunerative *per se*, but being a director, in the absence of a resolution, he cannot recover unless he could come within the case of *Burland* v. *Earle* (1). What did he do as Treasurer? Was not the very duty of Treasurer to protect and look after the finances of the company? But we see him at the outset joining Hodge to spoliate and deplete the very treasury under his care by the depredation of $25,000.

"White further claims the sum of.....$ 3,000 00
with interest thereon from 3rd November, 1900, (amended from original claim which was claiming from 3rd July, 1900, see evidence p. 339).

(1) [1902] A. C. 83.

There is also the further sum of	$19,137 00	
with interest from 2nd December, 1902, to 8th November, 1905, upon which he received on 10th March, 1903 $500 00 and on 22nd August, 1903.. ..... 400 00	$ 900 00	
		$18,237 00
and also by amendment, the further sum of (this sum was not asked in the original claim)		6,300 00
And this latter sum is claimed by privilege, alleging it is covered by the Bond of the United Counties Railway (see Hansons' claim, p. 52, and claim of Bank of St. Hyacinthe, pp. 8 and 9 where the sum of $6,300 is mentioned), making the total sum of		$ 27,537 00
From the above it will be seen that the only meritorious claims made are White's claim for loans amounting to.....		$ 27,537 00
And for Hodge's expenses.....		446 17
		$ 27,983 17

And in either case they are more than set off in the manner hereinafter set out.

"Coming now to the expenditure on the Montreal subway, all that it is necessary to say is that the Quebec Southern Railway had no power to spend its money in getting for Hodge and White the charter of the Montreal Subway Company, which they probably contemplated selling later to the Quebec Southern Railway at an enhanced price. The amount which they have thus spent on the subway is $20,965.25, as appears by Exhibit P–10 (1).

(1) See Lindley on Companies, 6th ed, pp. 520, 537.

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The directors are jointly responsible when they authorize the payment of moneys not justified by the charter; if they spent money out of their charter, fraud or no fraud, they are liable. This actually amounted to a tort under the Civil Code, and the directors are therefore responsible jointly and severally for the same, and it can be set off against what may strictly and legally be coming to them herein.

"Admitting that this sum of $27,983.17 was actually due, there can be no doubt that the creditors have to-day the right to set off against them the several amounts appropriated or misapplied by either Hodge or White, they being both jointly responsible.

"Under the Civil Code this rule as to the imputation of payments under Art. 1161 obtains with respect to set-off as enacted under Art. 1195. That is, where there are several debts overdue, the imputation must be made on the debts that the debtor has the greatest interest to discharge. There cannot be any doubt that the law of set-off obtains here, as provided under Arts. 1187 and following of the Civil Code.

"That brings us to consider the claim of $6,300, and that part of the salary from 1st February, 1904, to 21st March, 1904, during the period of the Railway Act, 1903, which came into force on the 1st February, 1904, and under which the salary would be allowed for that period as privileged under the head of 'working expenditure.'

"This sum of $6,300 claimed as mentioned on this contestation with the privilege attached to the debentures of the Old United Counties Railway, was not asked by the original claim made herein. Without deciding whether or not there would be a privilege attached to the same under the judgment of the 4th April, 1901, as the case of *Connolly* v. *Montreal Park & Island Railway*

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HODGE & WHITE'S CLAIM.

Statement of Facts.

Company (1) decides that in a case like the present one a hypothec cannot be created by a judgment; it is sufficient to state that this amount of $6,300 will be the first to be set off, as it would be the most onerous for the company. One might further say that if the judgment of the 4th April, 1901, did not create a hypothec, there would be no privilege attached to the bond or debenture in question of the United Counties Railway, as it was discharged by the Sheriff's sale during January, 1900.

"The sum of $6,300 is claimed against the company and thus paid back by way of set-off, and the Bank of St. Hyacinthe, on the other hand, gives credit to the company for the same, as part of the purchase price.

"The amounts to be set off against any claim Hodge and White may make, are as follows:

"1. The sum of..... appropriated by Hodge and White and which they actually took out of the company's treasury, under resolution by which they allowed to themselves by their own votes and that of their nominees and which they have been unable to justify to any degree although examined at length on the subject.	$25,000 00
"2. The sum of..... appropriated also by Hodge and White under the same resolution, being the balance which remained unpaid upon the shares and which is still due by them to the company and its creditors.	225,000 00
"3 The salary Hodge paid himself, without any authority, being the sum of.....	7,825 00
"4. The salary White paid himself, without any authority, being the sum of.....	7,100 00
"5. The misapplied amount of..... expended for the Montreal subway.	20,965 25
	$285,890 25

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

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"6. To these amounts must also be added the sum of..... ..... 21,471 33

which the intervenants Pilling *et al.* will recover under the bonds which are here claimed by Hodge himself.

"Making the total sum of..... $307,361 58

to which should also be added the large amount of bonds they appropriated to themselves.

"Not only should this sum of $307,361.58, together with the large amount of bonds appropriated as above mentioned, be set off against the above mentioned sum of $27,983.17, but it is a question for the creditors to decide whether Hodge and White should not be made to disgorge and pay up this large sum, or any part thereof, for which they are responsible and liable to them.

"Admitting that Hodge and White would have rendered some service and made some reasonable outlay within the meaning of the Act and the above mentioned resolution, they have certainly failed to disclose consideration for any substantial amount of this $250,000 mentioned in the resolution of the 7th January, 1901, and supposing a certain portion thereof, in a reasonable measure were allowed, there would still remain more than is necessary to off-set the amount for which they today present a claim deserving consideration.

"From all that has happened does it not clearly appear that Hodge and White came to Canada from the United States, took possession of the Quebec Southern Railway without disbursing a cent (as for the little White ever paid later he is now claiming it back), for a while operated the road in a most unsatisfactory manner, collected the revenues, failed to account for the same in the books of the company, which were kept in a very disgraceful manner, absorbed the spare bonds of the company and

every cent of security on which money could be realized, ran accounts everywhere to the largest amounts they could, brought the company into insolvency, and finally for want of even paying the men's wages, provoked a strike and stopped operation, when the Minister of Railways and Canals acting, in the interests of the public, took proceedings in this Court and had the railway put into the hands of a Receiver. What happens next? These two gentlemen attack in a most extraordinary manner all the proceedings before this Court, and come in with all manner of claims against the proceeds from the sale of the railway, asking to be collocated *pari passu* with their own creditors, their claims being based upon salaries illegally paid to themselves, and bonds and shares appropriated to themselves without consideration. White further claims loans alleged to have been made to the company, so that even to the last cent, invested in an enterprise which was their own—and in which they were the beneficiaries—is now claimed back. But what have Hodge and White done with the revenues of the company? With the substantial loans made from creditors now filing claims? They have illegally used and misapplied some of these monies on the Montreal subway to the extent of over $20,965.25, a private enterprise of their own and absolutely foreign to the Quebec Southern Railway, paid themselves without proper authority salaries to the extent of over $14,000 and are now making claim for the salaries of the few months preceding the receivership.

"Can persons in our days come to Canada, obtain from Parliament a franchise to operate a railway, ignore the duties they owe to the public in the operation of such railway, and with immunity run such an enterprise deeper and deeper into debt every day and then set up claims in the nature of those above mentioned and deprive their creditors from recovering? If the laws of Canada permit

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of any such thing being done, they are more open to criticism than I have hitherto ventured to believe.

"The contestations by Hodge and White are dismissed with costs.

"And on the question of costs it may be said that even if they were successful on these contestations, they should not have costs, because they persistently refused to submit to the jurisdiction of this Court when asked to submit to examination, as set forth in the finding of the Provisional Report herein."

The argument of these appeals was heard at Montreal on the 25th, 28th, 29th and 30th September, 1908.

A. W. Atwater, *K.C.*, and *G. A. Campbell*, appeared for Hodge;

T. C. Casgrain, *K.C.*, and *G. A. Campbell* for White;

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

F. L. Beique, *K.C.*, and *E. Lafleur*, *K.C.*, for Bank of St. Hyacinthe.

A. W. Atwater, *K.C.*, contended, in respect of Hodge, that Dessaulles was the lawfully authorized agent of the Bank of St. Hyacinthe, in fact was the bank itself, in respect of the transactions with the claimants in controversy in these proceedings. Hence it is clear that the excess over and above what the bank agreed to take by its deed for the railways belongs to Hodge. It is not open to the bank under Quebec law to repudiate the act of its agent. The bank cannot now raise the question that the sale of 7th August, 1900, was not valid. (Cites Arts. 1727, 1730 C. C. P. Q.) Hodge gave good consideration for the bonds, namely, his money, his time and his expenses. Hodge was neither an agent of the railways nor a promoter of the company; he stood in no fiduciary capacity. (Cites *Burland* v.

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Earle (1). Dessaulles dealt with Hodge openly and the company knew of it as well as the bank. There was no case of secret profits. (Cites *Palmer's Company Precedents* (2). Hodge was acting for himself only.

As to Hodge's salary there is nothing by statute or common law to prevent directors receiving reward for their services. In any event, Hodge cannot be asked to surrender the amount paid him as salary. Acquiescence for three years by the directors and shareholders in the payment of salary to him constitutes an implied contract to remunerate him for his services while he acted for the company. (Cites *Burland* v. *Earle* (3).

As to White, the whole transaction whereby he became a claimant on bonds was legal and proper. The bank has not the remotest status to question his rights. On the question of White's right to compensation he cites *Ryland* v. *Delisle* (4).

T. Chase Casgrain, K.C., followed, contending that the Minister of Railways and Canals had no status in the present proceedings; he became *functus officio* when the road was sold. The object of the minister is attained when the public utility is made operative again. (Cites C. C. P. Arts. 768, 881 and *Salomon* v. *Salomon & Co.* (5).

G. A. Campbell followed, arguing that the Referee had erred in not distinguishing between the salary of a president of a company and that of a director. The former is entitled to salary as a matter of right. (Cites *Am. & Eng. Ency. of Law* (6). Having accepted the services of an officer, the company is bound on an implied contract to pay for them.

As to the bonds, the Bank of St. Hyacinthe is the only party interested in the proceedings, and we raise an

(1) [1902] A. C. at p. 93.
(2) 9th ed. pp. 108, 109. Arts. 1032, 1039 and 1040 C. C. P. Q.
(3) [1902] A. C. 83.
(4) 14 L. C. J. 12, in Privy Council.
(5) [1897] A. C. 22 at p. 42.
(6) Vol. 21, pp. 906, 907.

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estoppel against the bank. (Cites *Lindley on Companies* (1)).

E. Lafleur, K.C., on behalf of the Bank of St. Hyacinthe, based the contestation on the deed of 2nd December, 1899, and placed the right of the bank, as creditor, on the fiduciary relation subsisting between Hodge and the company. The bank was not bound by Dessaulles' act of August, 1900, because he exceeded his mandate. There is no estoppel created against the bank. We were always ready to convey the property under the contract of 1899. As to the bonds, there was no room in the transaction between the company and Hodge for a profit to be made by the latter. (Cites, *In re Hess Manufacturing Company* (2); *Emma Silver Mining Company* v. *Grant* (3). Hodge was obliged by the contract and by *The Railway Act* to transfer the property to the new company. (Cites *Society for Illustration of Practical Knowledge* v. *Abbott* (4)). We contest Hodge and White's claim in the interest of the company, if the company is loaded down with debts for which it is not legally liable, the railway will never be able to be operated. It would be against public policy to allow Hodge and White's claims. Then, again, to allow the claims would be to sanction a secret profit; they themselves were the only shareholders cognizant of what they were doing. (Cites *Lindley on Companies* (5). As to salary, that can only be paid upon resolution of the company. It is a question of law, not of equity. Art. 1031 C. C. justifies the bank in intervening in behalf of the company. (Cites *Mignault's C. C.* (6). Arts. 1032 and 1033 C. C. have no bearing on this case as it is not an *action paulienne*.

F. L. Beique, K.C., followed. The minutes of the meetings of the company do not disclose any notification such as

(1) 6 ed. vol. 1 pp. 513, 517.
(2) 23 S. C. R. at p. 656.
(3) L. R. 17 Ch. D. 122.
(4) 2 Beav. 559.
(5) 6th ed. vol. 1, p. 491.
(6) Vol. 5, pp. 285, 287.

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that set up by Hodge and White. The bank stands by the deed of 2 December, 1899, but does not recognize that of a later date except in so far as is mentioned in the answer to the protest by this company. The claimants having appropriated salaries to themselves, the Referee was justified in setting-off the moneys so appropriated against any claim they may have on bonds. But with respect to the bonds they never gave consideration for them. (Cites *Great North-West Central Ry. Co.* v. *Charlebois* (1).

A. Geoffrion, K.C., for the Crown, contended that as the Crown as owner of the Intercolonial Railway was a creditor, it had a right to intervene as against Hodge and White's claim, because if that were allowed the assets of the company would be diminished *pro tanto*. The Referee had a perfect right to set off the claim for salary and expenses against the claims, if any, of Hodge and White on the bonds. As to the money advanced for the Montreal Subway that was improper and *ultra vires*, and is set off by operation of law. The rule is that when a debt can be ascertained without completed proof, it is a liquidated debt and capable of set-off. (*Beauchamp's* C. C. Art. 1188, Nos. 89 and 110).

As to the bonds, Hodge and White purchased the railway for the company, and there was a clear fiduciary relationship established. They paid nothing for the bonds and they cannot be collocated on bonds which they so obtained. (*Great North-West Central Ry Co.* v. *Charlebois* (2).

Mr. *Atwater* replied for the claimants. The bank was a party to the agreement of 7th August, 1900, which was the actual instrument of transfer of the railway. The bank is estopped by its deed. (Cites *Robert* v. *Montreal Light, Heat and Power Co.* (3); *Palmer's Com-*

(1) [1899] A. C. 114.
(2) [1899] A. C. 114.
(3) 12 R. L. N. S. 78.

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pany Precedents (1); *North Western Transportation Co.* v. *Beatty* (2.))

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

The appeals from the report of the Referee bearing date the 25th day of May 1908, being twelve appeals and cross-appeals in six cases, were argued before me in Montreal on the 21st September last and following days, the arguments lasting for about eight days.

The questions of law and fact are intricate and difficult. I have been ably assisted by the various counsel and no undue time was occupied in the discussion of these various appeals.

After the very exhaustive statement of facts by the Referee it may be unnecessary for me to repeat, but as it may facilitate an understanding of my views (before dealing with the various appeals), I will state briefly the facts relating to the various companies, the subject-matter of the controversy. The railways in question are the United Counties, The East Richelieu Valley, The South Shore, and the Quebec Southern.

The United Counties Railway Company.

This company was incorporated by statute 46 Vict. cap. 90 of the legislature of Quebec. By statute 59 Vict., cap. 60 of the legislature of Quebec the charter was amended.

The Bank of St. Hyacinthe had advanced large sums of money to this railway, and with the object of securing a portion of the indebtedness procured a sale of this railway by the sheriff under an execution issued at the instance of one Ledoux. At this sale one Dessaulles who was the president of the bank became the purchaser. The sale was made on the 25th January, 1900.

(1) 9th ed. vol. pp. 801 *et seq.* (2) 56 L. J. P. C. 102.

The Quebec Southern Railway Company was incorporated by statute of the Dominion 63-64 Vict., cap. 76. The preamble of this statute recites the fact that the United Counties Railway was at the time of sale a corporation existing under the jurisdiction of the Parliament of Canada. It was assumed on the appeals by all counsel representing clients who have any status that such was the case. The preamble also recites that the purchaser bought and became vested with the said property for the purpose of holding, maintaining and operating the said railway, its property and appurtenances, and also recites "whereas it is expedient to incorporate a company "with all the powers and privileges necessary for the said "purpose, etc." Then follow the enacting clauses. Clause 8 of the statute confers the power to acquire the railway of the United Counties Railway Company mentioned in the preamble. On the 7th August, 1900, Dessaulles conveyed the railway of the United Counties Railway Company to the Quebec Southern Railway Company. This deed was registered on the 26th June, 1901.

In dealing with the various questions raised it will be necessary to consider the provisions of the various documents. At present I am merely tracing the history and manner in which this United Counties Railway was acquired by the Quebec Southern Railway Company.

The East Richelieu Valley Railway Company.

This railway company was incorporated by statute of the legislature of the Province of Quebec, 54 Vict. cap. 91. By section 9 of the statute incorporating the Quebec Southern Railway Company, cap. 76, 63-64 Vict. (Dom.) the Quebec Southern was authorized to acquire the whole of the road of the East Richelieu Valley Railway Co., or the whole of its interest therein as far as the International Boundary line. It might also acquire the charter privileges and franchises of the railway.

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On the 30th May, 1900, the East Richelieu Valley Railway Company purported to convey to one Bernier, notary, acting as trustee for the Quebec Southern Railway Company, the line of railway and property of the East Richelieu Valley Railway Company for the sum of $125,000, payable in cash. This method of conveying a railway is novel. Subsequently the Quebec Southern Railway Company acquired the railway of the East Richelieu Valley Railway Company, which with the United Counties Railway Company became merged into the Quebec Southern Railway Company. No question arises as to the conveyance of the East Richelieu Valley Railway Company, the latter company has been paid the amount due out of the proceeds of sale.

The South Shore Railway Company.

The South Shore Railway Company was incorporated by statute of the legislature of Quebec, 57 Vict. cap. 72. Section 17 of this statute conferred certain powers as to selling or leasing its railway.

By cap. 10, 60 Vict. (Dom.) the railway was declared to be a work for the general advantage of Canada.

Section 11 of 63-64 Vict. cap. 76, the statute incorporating the Quebec Southern Railway Company enacts that the Quebec Southern may amalgamate with the South Shore Railway Company (among other companies). Certain provisions are contained in this section 11 as preliminary requisites to such amalgamation. These will have to be discussed later.

On the 14th January, 1902, a deed of amalgamation was executed between the Quebec Southern Railway Company and the South Shore Railway Company. The shareholders of both companies had previously ratified the agreement.

Section 11 Cap. 76 of 63-64 Vict. required that the agreement should receive the sanction of the Governor in Council.

This sanction was given on the 15th April, 1902, as appears by the Order in Council.

The validity of the amalgamation is attacked by one of the appellants and must be dealt with later.

After this date the Quebec Southern Railway Company was operated—the railway consisting of what were formerly the three railways, namely, the United Counties Railway, the East Richelieu Valley Railway and the South Shore Railway.

On the 10th March, 1904, pursuant to the provisions of 3 Edw. VII, cap. 21 (Dom.) the Minister of Railways and Canals suing as claimant filed a statement of claim making the Quebec Southern Railway Company and the South Shore Railway Company respondents. The statement of claim alleges that both these railways exist under federal statutes. The claimant sets out the following as his reasons for joining the South Shore Railway Company as a party respondent:—

"15. The two said railway companies have under the provisions of section 11 of chap. 76 of the statute 63-64 Vict, Dominion of Canada, amalgamated together under the name of the first mentioned of the said two railway companies, to wit:—The Quebec Southern Railway Company.

"16. Since such amalgamation, the railways of the two said companies have been operated by the said Quebec Southern Railway Company.

"17. As there may be doubts whether the amalgamation is valid and complete, and whether, under its terms, the railway of the South Shore Railway Company has become directly the property of the Quebec Southern Railway Company, the present proceedings for the appointment of a receiver and an order and decree for the sale of the railways of the two said companies, are instituted against the Quebec Southern Railway Company alone, in so far as the railway which did not origin-

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ally belong to the South Shore Railway Company is concerned, but against both companies and against either of them as regards the railway which originally belonged to the South Shore Railway Company, so that the appointment of a receiver and the order and decree for the sale as to the latter railway, be made against both or either of the said railway companies, as may be found necessary."

The claimant prays for the appointment of a receiver until sale, and sale of the railways.

By order of 21st March, 1904, granted by the late Mr. Justice Burbidge, a receiver was appointed for the two railways, with powers of management, etc., as provided by the terms of the order.

The next step is the enactment of 4-5 Edw. VII, cap. 158, intituled an Act respecting the South Shore Railway Company and the Quebec Southern Railway Company. This statute was assented to on 20th July, 1905.

It is well to quote the preamble of this statute in full as well as section 4, as considerable argument was based on these provisions:—

"Whereas, by chapter 10 of the statutes of 1896 (second session), the undertaking of the South Shore Railway Company was declared a work for the general advantage of Canada and the company was constituted a body corporate and politic within the legislative authority of the Parliament of Canada; and whereas, by chapter 101 of the statutes of 1902, the delay for the building and completion of the company's railway, as described in section 8 of the said chapter 10, was extended to the 5th day of October, 1905; and whereas by chapter 76 of the statutes of 1900, the Quebec Southern Railway Company was incorporated by the Parliament of Canada, with power to acquire the railways of both the United Counties Railway Company, and the East Richelieu Valley Railway Company, which railways have since

been acquired, and with power to amalgamate the said railways with that of the South Shore Railway Company; and whereas the said South Shore Railway and its accessories, and the Quebec Southern Railway and its accessories, are in the hands of a receiver, duly appointed according to law, and it is necessary that the said railways be sold under an order of the Exchequer Court; and whereas the said companies have, by their petition, prayed that it be enacted as hereinafter set forth, and it is expedient to grant the prayer of said petition as hereinafter set forth, and to provide for the sale of the said railways: Therefore His Majesty by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows;—

4. In the distribution of the proceeds of the price of sale of said railways, or either of them, the priority according to law, and any amalgamation, merger or sale of either of said railways which might exist, shall not in any way defeat or prejudice any legitimate claim existing against either of the said railways previous to such amalgamation, merger or sale, or affect its priority."

Section 2 of this statute contains provisions as to sale by the Exchequer Court. Orders were made by the late Mr. Justice Burbidge on the 11th September, 1905, ordering a sale of the railways, and an order made subsequently approving of a sale.

By subsequent orders of 19th December, 1905, and of 1st June, 1906, it was referred to Louis Arthur Audette, Registrar of the Exchequer Court, for enquiry and report as to the Receiver's account and to ascertain and investigate the claims of the several creditors.

The Registrar proceeded with his arduous duties and reported on 316 claims referred to in his voluminous report of 25th May, 1908. The purchase money received from the sale was the sum of $1,051.000. This amount has to be distributed when the report is finally settled.

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Of the 316 claims, appeals have been lodged with respect to six of them.

Having set out the above statement of facts I proceed to deal with the various appeals.

Appeals of Hodge and White.

It will be convenient to take up first the appeals of Hodge and White. White became interested with Hodge shortly after the 2nd December, 1899, and can claim no higher right to the stocks and bonds in question on his appeal than Hodge to his stock and bonds. The appeals were therefore argued together.

Hodge and White appeal from the report of the Registrar disallowing their claims as against the Quebec Southern Railway Company for the excess of purchase money which they claim against the Quebec Southern Railway over and above the price at which they purchased the United Counties Railway from the purchaser at sheriff's sale, namely, Dessaulles, the President of the Bank of St. Hyacinthe.

The Registrar has disallowed the claims on the ground that having regard to all the circumstances surrounding the transaction, Hodge and White are not entitled to saddle the Quebec Southern Railway Company with an excess of purchase money to be appropriated to themselves.

The Bank of St. Hyacinthe and others support the finding of the Referee, and in addition to the ground that a promoter cannot make money as against the company he is promoting, the bank claims that by virtue of the dealings between them and Hodge there is an implied covenant that the railway will be turned over to the Quebec Southern Railway Company at the sum agreed to be paid by the agent of the Quebec Southern Railway Company.

The origin of the transaction is as folllows:—

The bank was in jeopardy of losing its claim if the United Counties Railway Company ceased to operate their railway. The bank thereupon entered into an agreement with Hodge evidenced by two documents bearing date the 2nd December, 1899, but which were intended to form one agreement.

It may be well to set out *in extenso* these two documents:—

"This deed of agreement made and executed this second day of December, eighteen hundred and ninety-nine, between the St. Hyacinthe Bank, a body corporate and politic, having its head office and principal place of business in the City of St. Hyacinthe, hereinafter called the 'Bank', party of the first part, and H. A. Hodge, of the City of Rutland, in the State of Vermont, one of the United States of America, party of the second part, witnesseth:

"That whereas the said bank is the creditor in a large sum of money of the United Counties Railway, said railway company owning a line of road extending from St. Robert Junction to Iberville.

"And whereas the said bank is about to take such proceedings as may be necessary to secure a clear title to the said railway and equipment;

"And whereas the said bank is desirous of disposing of the said railway when the same shall have been so acquired;

"And whereas the said party of the second part is willing to purchase the said line of railway, and in the meantime to use and operate the same, upon the terms and conditions as hereinafter set forth.

"Now therefore this agreement witnesseth:—

"1. It is agreed between the parties hereto that the board of directors of the said railway company will be reorganized forthwith and the said bank will use their best endeavours to have elected upon said board three

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directors, two to be named by the party of the second part, and one by party of the first part if they so desire, and at the annual general meeting called for the election of directors, the said bank will support, as far as they can, the election of three directors to be named by party of the second part, and one director to be named by party of the first part.

"2. The net profits to be derived, if any, from the operation of the said railway shall and will belong to the party of the second part, and should the party of the second part have to pay out the same for the purposes of the said railroad for liabilities incurred previous hereto pending the temporary holding under the present agreement, then and in that case the amount so paid out as aforesaid by him shall be deducted from the purchase price of the said railroad as hereinafter stipulated for. No such payment shall, however, be made by party of the second part without the previous consent and approval of the said bank.

"3. The party of the second part shall pay from the earnings of the said railroad the expense of operating the same from the date of his coming into possession thereof with his nominees as such directors under the present agreement.

"4. The bank shall, however, protect and hold harmless the party of the second part from all debts and liabilities of the said railway company created up to the present date, or which may be hereafter created without the consent and approval of the party of the second part, between the date hereof and the time when the said bank shall hand over the title of the railway free and clear to the said party of the second part.

"5. Any and all sums of money which said party of the second part may pay with the approval of the bank, on account of the debts of the railway company, the payment of which is guaranteed under this agreement by

the bank, such sums of money shall be deducted out of the eventual purchase price of the said road from the money payment to be made, or shall be recouped to party of the second part by the bank in the event of this agreement not being carried out.

"6. In addition to the provisions hereinbefore stipulated regarding payment of any of the debts of the railroad by party of the second part, it is further agreed that any amounts paid out by party of the second part by reason of *bons* or time checks of the railway company, the same shall be recouped to him immediately by the said bank, but in the payment of the said *bons* they shall first be submitted to the bank for its approval unless such *bons* or time checks shall be declared valid by A. Ouellette, and the said party of the second part is hereby authorized to pay any *bons* or time checks which the said A. Ouellette declares valid; but there shall not be any obligation on the part of the party of the second part to pay *bons* or time checks of the said railroad unless he sees fit.

"7. When the bank shall have obtained and will be in possession and able to give to party of the second part a deed of said line of railway from St. Robert Junction to Iberville, including all its appurtenances and equipment, and shall have executed said deed to the party of the second part, or his nominee, the said party of the second part will pay for the same a sum of four hundred thousand dollars ($400,000), as follows:—

(*a.*) A sum of twenty-five thousand dollars ($25,000) in cash.

(*b.*) The promissory note of the said railway company (to be organized as hereinbefore provided) endorsed by party of the second part for the sum of seventy-five thousand dollars, payable at one year from the date of the transfer of said railroad, with interest at the rate of four per cent. per annum.

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"(c) A sum of three hundred thousand dollars in first mortgage four per cent. gold bonds, payable at such time in principal as the party of the second part may elect, the principal thereof not being repayable for a period of less than twenty years, nor more than thirty years.

"8. No part or portion of the above named consideration for the purchase of the said United Counties Railway shall become payable or exigible until the bank shall have caused to be executed and delivered over to party of the second part a good and indefeasible title free and clear of all liens to said line of railway and its appurtenances, including all rolling stock, and also subject to the fulfilment of all of the conditions of the present agreement.

"9. The bonds on the said railroad so to be given by party of the second part to the bank as the purchase price of the said railway shall be first mortgage bonds of an issue of the entire system, not exceeding ten thousand dollars per mile.

"10. The party of the second part will with due diligence after the said bank are in a position to transfer the said road cause to be incorporated a company by Act of Parliament to take over the said line and issue the bonds so to be given for the purchase price of the said road.

"11. The trust deed securing the bonds shall be the usual trust deed in use by railroads generally.

"12. The bank will proceed with all diligence possible to secure a title free and clear of all the property and appurtenances of the said road, including all rolling stock now in use on said road whether owned by the railway company or other persons, and when so obtained will deed the same to the party of the second part.

And the parties have signed this agreement at the City of St. Hyacinthe the day, month and year first above written.

(Sgd.) G. C. DESSAULLES, *President.*
" H. A. HODGE."

"This deed of agreement made and executed this second day of December, eighteen hundred and ninety-nine,

Between

The St. Hyacinthe Bank, a body corporate and politic, having its head office and principal place of business in the City of St. Hyacinthe, hereinafter called the "Bank," party of the first part,

And

H. A. Hodge, of the City of Rutland, State of Vermont, one of the United States of America, party of the second part,

Witnesseth:—

"That whereas the said parties hereto have executed this day, of even date herewith, an agreement referring to the purchase of the United Counties Railway;

"And whereas it is desirable in the interests of the said bank that the agreement should be executed as two agreements, but it is understood and agreed between the parties hereto that the true agreement executed between the parties hereto consists of the said agreement referring to the United Counties Railway and the present agreement, which two said agreements shall be read together and all obligations upon either party in either of said agreements are to be taken as referring to both agreements, and the one agreement is absolutely contingent upon the other;

"Therefore the parties hereto agree:—

1. The said bank hereby agrees that the United Counties Railway Company will assign to the party of the second part all and every right and claim which the said Railway Company has, or othir persons have, to any claims to the capital stock of the East Richelieu Valley Railroad, and all other rights of every nature and kind (save and except any personal interest or right which one C. D. Maze may hold) in order to enable the obtaining posses-

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tion and control of the said East Richelieu Valley Railroad.

"2. The said bank will cause to be begun and prosecuted with due diligence all actions, suits and claims which will assist in vesting the said United Counties Railway or their assigns in their rights to the said East Richelieu Valley Railroad, in order that when the said bank shall have by Sheriff's sale, or otherwise, obtained an indefeasible title to the line of railway to the United Counties Railway, they shall also be in possession of an indefeasible title free and clear of all incumbrances to the East Richelieu Valley Railroad, consisting of about twenty-two miles of railway, and running between Iberville and Noyan Junction.

"3. The cost of such litigation looking to the obtaining of a title to the said East Richelieu Valley Railroad shall be borne by the parties hereto in equal proportions, but no litigation shall be commenced or be continued without the consent of the bank.

"4. The bank agrees that the control of the said stock shall be turned over to the said party of the second part, or more than fifty-one per cent. if more shall be obtained.

"5. It is, however, understood between the parties hereto that no litigation shall be commenced until all reasonable means of amicable settlement and negotiations with the East Richelieu Valley Railway Co. have been exhausted.

"6. The said party of the second part agrees that so soon as the bank are in a position to give him title to the said line of railway owned by the United Counties Railway and the line owned by the East Richelieu Valley Railroad, that he will with all due diligence procure a charter for the working of the two systems under the one corporation, and will issue bonds to the said corporation so to be organized and the same to be secured upon the entire system of the East Richelieu Valley Railroad and the United Counties Railway.

"7. The consideration price of the said East Richelieu Valley Railway shall be one hundred thousand dollars of first mortgage four per cent. gold bonds, which shall form a part of the entire issue provided for in the preceding section, making a total issue payable to the said bank for both lines of railway of five hundred thousand dollars of first mortgage bonds.

"8. Should, however, the said bank be obliged to pay for the East Richelieu Valley Railway a sum in excess of the amount stipulated in the preceding section, the said party of the second part will pay one-half of said excess up to an amount of twenty-five thousand dollars in bonds, making the total consideration which said party of the second part will be liable for one hundred and twenty-five thousand dollars.

"9. It is understood and agreed that in the negotiations for acquiring the said East Richelieu Valley Railroad that the parties will meet one another in a fair spirit and will give and take with a view of making mutual concessions in order to the ultimate success of negotiations to acquire said East Richelieu Valley Railroad.

"10. The bonds on said railways so to be given by party of the second part to the bank as the purchase price of the said two railways shall be first mortgage bonds on the entire system not exceeding ten thousand dollars per mile, which system including the two lines of railway, their sidings and branches is fixed as between the parties hereto at ninety miles or an issue of nine hundred thousand dollars on the entire system.

"11. The said party of the second part has entered into the present agreement upon the distinct understanding that both lines of railways must ultimately be conveyed to him and without which this agreement would not have been executed, and if the said bank are unable to give and grant to said party of the second part a title vesting him with the proprietorship, free and clear of incum-

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brances of the lines of railway of the East Richelieu Valley Railway and the United Counties Railway, he shall have the right and option to refuse, if he deems best, to take the title of the United Counties Railway as provided for under the other concurrent agreement, and shall have the right to cancel the present as well as the said other agreement.

"12. In addition to the consideration price for the United Counties Railway stipulated in the concurrent agreement herewith, of four hundred thousand dollars, it is agreed that the party of the second part will give a further sum of one hundred thousand dollars in gold bonds of four per cent. of like issue with the bonds mentioned for the purchase price in said concurrent agreement, provided a reasonable traffic agreement with the Intercolonial Railway has been entered into with the United Counties Railway, or its successors, said contract to be approved by party of the second part.

"13. The said contract must be a contract applicable to the United Counties Railway as the same shall be reconstructed and reorganized and as contemplated under the present agreement.

"14. In the event of the present agreement not being carried out and the road or roads not being acquired by the party of the second part, the party of the second part shall not have the right to demand repayment of any moneys he may have paid out for maintenance of right of way.

"15. In the event of any extraordinary expenditure being necessitated by any unforeseen cause, such as wash out, bridges falling, or other expenses of like nature, happening on either line of railway during their operation under the present agreement by party of the second part, and for which an expenditure of more than five hundred dollars would be required, then such expenditure shall be recouped to party of the second part, but

the works shall be carried on under the joint supervision of the parties hereto.

"16. The said repayment provided for in the preceding clause shall only be made by the bank in the event of the party of the second part not taking over the said roads, but if the present agreement is carried out and the party of the second part acquires the said lines of railway there shall be no returns by the bank to party of the second part of said expenditure.

"17. In the cost of operating the said two lines of railway temporarily under the present agreement the amount payable by the United Counties Railway to the East Richelieu Valley Railway as rental under an agreement between the said two companies shall not be assumed by the party of the second part, and he shall in no way be liable for the same during the time he operates the said two lines of railway under this agreement.

"And the parties hereto have signed the present agreement at the City of St. Hyacinthe the day, month and year first above written.

(Sgd.) G. C. DESSAULLES, *President.*
" H. A. HODGE."

This agreement was followed up by a sale of the United Counties Railway at Sheriff's sale and a purchase by Dessaulles acting for the bank. At the time of the sale and purchase by Dessaulles, the provisions of the Railway Act of the Dominion, 51 Vict. cap. 29, sections 278, 279 and 280, were in force. These sections are as follows:

"278. If, at any time, any railway or any section of any railway is sold under the provisions of any deed of mortgage thereof, or at the instance of the holders of any mortgage bonds or debentures, for the payment of which any charge has been created thereon, or under any other lawful proceeding, and is purchased by any person or corporation which has not any corporate powers authorizing the holding and operating thereof by such pur-

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chaser, the purchaser thereof shall transmit to the Minister, within ten days from the date of such purchase, a notice in writing stating the fact that such purchase has been made, describing the termini and line of route of the railway purchased and specifying the charter or Act of incorporation under which the same had been constructed and operated, including a copy of any writing, preliminary to a conveyance of such railway, which has been made as evidence of such sale, and immediately upon the execution of any deed of conveyance of such railway, the purchaser shall also transmit to the Minister a duplicate or an authenticated copy of such deed, and shall furnish to the Minister, on request, any further details or information which he requires.

"279. Until the purchaser has given notice to the Minister in manner and form as provided by the next preceding section, the purchaser shall not run or operate the railway so purchased, or take, exact or receive any tolls whatsoever in respect of any traffic carried on, but after the said conditions have been complied with, the purchaser may continue, until the end of the then next session of the Parliament of Canada, to operate such railway and to take and receive such tolls thereon as the company previously owning and operating the same was authorized to take, and shall be subject, in so far as they can be made applicable, to the terms and conditions of the charter or Act of incorporation of the said company, until he has received a letter of license from the Minister, —which letter the Minister is hereby authorized to grant —defining the terms and conditions on which such railway shall be run by such purchaser during the said period.

"280. Such purchaser shall apply to the Parliament of Canada at the next following session thereof after the purchase of such railway, for an Act of incorporation or other legislative authority, to hold, operate and run such

railway, and if such application is made to Parliament and is unsuccessful, the Minister may extend the license to such railway until the end of the then next following session of Parliament, and no longer, and if during such extended period the purchaser does not obtain such Act of incorporation or other legislative authority, such railway shall be closed or otherwise dealt with by the Minister as is determined by the Railway Committee."

The effect of these provisions as supporting such a sale is fully dealt with in the cases of *Redfield* v. *Wickham* (1), and *Toronto General Trusts Corporation* v. *Central Ontario Ry. Co.*, (2)—where the learned Chancellor of Ontario deals with the change effected in the law by reason of this enactment.

This judgment was affirmed by the Board of the Privy Council (3) where Lord Davey elaborately deals with the whole subject.

To my mind it is important in considering this question to bear in mind that a purchaser of a railway does not acquire an absolute right to the railway. It is an interim right to operate to be followed up by an Act of incorporation to be obtained as prescribed. If no Act of incorporation is obtained then under section 280 of 51 Vict.. cap. 29. "such railway shall be closed or otherwise dealt with by the Minister as is determined by the Railway Committee." I have not considered the question of the power of the bank to purchase and operate in the name of its President.

No question of the right of the bank was raised before me, and the preamble of the statute incorporating the Quebec Southern Ry. Co. recites the fact of Dessaulles having become the purchaser, and the railways were subsequently conveyed to the Quebec Southern Ry. Co.

(1) 13 App. Cas. 467.

(2) 6 O.L. R. 1.

(3) [1905] A. C. 576.

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This preamble of cap. 76, 63–64 Vict., Dom., is important because it recites the purchase, and proceeds: "whereas the said purchaser bought and became vested with the said property for the purpose of holding, maintaining and operating the said railway its property and appurtenances, and whereas it is expedient to incorporate a company with all the powers and privileges necessary for the said purposes."

By the terms of the agreement of the 2nd December, 1899, there are provisions for interim operation of the railway. By the 7th paragraph of the first half of the document the consideration money to be paid by Hodge is the sum of $400,000. Of this consideration there is to be paid $25,000 in cash.

"6. The promissory note of the said railway company (to be organized as hereinbefore provided, etc.)

(c.) A sum of $300,000 in first mortgage bonds.

"9. The bonds of said railway to be given as the purchase price shall be first mortgage bonds of an issue not exceeding $10,000 per mile."

Then comes clause 10 of the agreement by which it is provided that Hodge will with due diligence cause to be incorporated a company by Act of Parliament to take over the said line and issue the bonds, etc.

It is also provided that in the event of a traffic arrangement with the Intercolonial railway being obtained, $100,000 additional in bonds shall be paid.

It must be borne in mind that the consideration money payable for the United Counties Railway was, with the exception of $25,000 cash, payable by the road to be incorporated, namely, the Quebec Southern Railway Co., a railway which had to be incorporated in order to carry out the agreement of the 2nd December, 1899, and also to enable the purchaser to comply with the provisions of the Railway Act.

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On the 7th August, 1900, Dessaulles conveys to the Quebec Southern Railway Co., the railway of the United Counties Railway Co. The consideration to be paid was the sum of $1,650,000 as follows:—paid up non-assessable stock to the amount of $749,000; first mortgage bonds for $750,000, and promissory notes for the sum of $151,000.

It was contended by the bank that Dessaulles exceeded his mandate and had no right to convey for any greater consideration than that mentioned in the deed of 2nd December, 1899.

As stated on the argument, if under the circumstances of this case Hodge had the right to bargain with the Quebec Southern Railway Company for a higher price then it would be a mere matter of conveyancing. It would be the same as if Dessaulles had conveyed to Hodge for the consideration mentioned in the document of 2nd December, 1899, and Hodge had them conveyed to the railway for the increased price.

The question must depend on whether, having regard to his agreements with the bank and the circumstances surrounding his purchase and the fact that the purchase money was payable by the Quebec Southern Railway Company, Hodge can legally saddle the company with the increased purchase money for his own benefit.

It was contended that the bank is estopped from raising this question by reason of Dessaulles having acted. Dessaulles was not a stockholder nor was he a director at the organization of this company. It is proved that the bank had no knowledge until after the registration of the deed in 1901 that Dessaulles had acted beyond his authority. The bank repudiated. Besides to my mind, estoppel has no bearing on the case. The company is before the court and those representing the company are objecting, and if contrary to law the com-

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pany could repudiate. (See *Great North-West Central Ry. Co.* v. *Charlebois* (1).

The first meeting of the provisional directors was held on the 5th January, 1901. Hodge and White at this time controlled the company. A meeting of shareholders was called for the 7th January, 1901, notice having been waived, Hodge and White the sole subscribers to the stock being present. A directorate was elected, Hodge having assigned a few shares to qualify a few persons so as to enable the election of the necessary number of directors. Then by their own votes the directors ratified the purchase from themselves of the United Counties Railway. At the meeting of shareholders the following resolution was adopted :—

"It was further unanimously resolved that the directors of this company be, and they are hereby, authorized and empowered to carry out and perfect the contract, agreements, bargains and arrangements effected by this company or on its behalf, or for its use and benefit, or on behalf of the promoters or the provisional directors thereof, in the interest of this company, with the following persons, to wit, George C. Dessaulles, H. A. Hodge, Frank D. White, Hon. M. E. Bernier, and the Bank of St. Hyacinthe, all of the said contracts, agreements, bargains and arrangements relating to and necessary for this company; this company ratifying and confirming and agreeing to ratify and confirm whatsoever the Board of Directors may do in virtue hereof."

At the same meeting of the 7th January, 1901, authority was conferred to issue bonds, a portion of which bonds were to be handed over to the bank as the consideration for the sale by them of the United Counties Railway to the Quebec Southern. At the same meeting the following resolution was carried :—

(1) [1899] A. C. 114.

"It was duly proposed and carried that in order to pay and reimburse Messrs. Hiram A. Hodge and Frank D. White their outlay on behalf of this company, materials and services of engineers and contractors, for fees, expenses and disbursements in procuring the passage of the special Act of Parliament incorporating the company, and for surveys, plans, estimates, reports, audits, accounts, legal and notarial charges, travelling expenses and all other matters and things in connection with the acquisition of the property acquired by this company or the organization of this company and of negotiations therefor, the directors be, and they are hereby authorized and empowered, under the authority of all the shareholders of the company to pay the said Hiram A. Hodge and Frank D. White the sum of $250,000 and that the said amount shall be paid as follows:—

"1. As to the sum of $25,000, in cash.

"2. As to the sum of $225,000 by the directors causing to be issued and allotted to the said Hiram A. Hodge and Frank D. White, or their nominees, in such amounts as the said Hodge and White may require, 2,500 shares of the capital stock of this company, as fully paid up and non-assessable and free and exempt from all calls, assessments and liabilities of every nature and kind, and that the said shares, so to be allotted, shall be and be deemed to be the said 2,500 shares for which the said Hodge and White have respectively subscribed, in respect of which they have paid a call of 10 per cent., and that the said Hodge and White are hereby discharged free and exempt of and from any further liability in respect of said shares, the same being by the unanimous vote of the shareholders of the company hereby declared to be fully paid up and non-assessable when allotted, and that the officers of the company to be hereafter appointed are instructed hereby to cause the necessary and proper entries to be made in the books of the company estab-

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lishing the fact that the said shares are fully paid up and non-assessable and have been fully paid for by the consideration hereinbefore stated."

I have thought it well to copy these resolutions in full as they show that Hodge and White in their dealings with the company were not acting as independent vendors but merely as promoters and agents.

The company was completely controlled by these gentlemen. They were ratifying on behalf of the company a contract with the company for their own benefit. The company instead of having available for the purposes of the operation of the railway the bonds over and above the purchase price payable to the bank was passing these bonds to Hodge and White, and so with the stock. By a single resolution the stock was paid up.

It is not difficult to understand how, under the management of these gentlemen, the railway is now before the Exchequer Court.

Having regard to all the circumstances, I am of opinion that the Referee was right in his finding.

The cases in regard to promoters and profit obtained from the company promoted by them depend on the particular facts of each case.

An independent purchaser buying with his own money and selling at an enhanced price to the company with full disclosure and no fraud can claim his profit.

The facts of this case are however very different.

I have given careful consideration to the facts and arguments and authorities cited, and am of opinion the Referee arrived at a correct conclusion.

The appeals are dismissed with costs.

Dealing now with the question of salary, I think the Referee was right at arriving at his finding. I have nothing to add except to cite a case decided by the Queen's Bench Division, Ontario. The judgment was

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delivered by a very careful judge now deceased, the late Mr. Justice Street. *Birney* v. *Toronto Milk Co., Ltd.* (1).

In that case the Ontario statute was relied on but the general law is discussed.

I think the appeals should be dismissed with costs.

So far as Hodge is concerned nothing is due him if my findings are correct. Both as respects Hodge and White I shall have later to deal with the findings of the Referee in charging them with liability to the company in respect of unpaid stock, past salary, etc.

Appeal of White from Report of Referee.

The Referee deals with this claim on pages 105 and following. He assumes at page 105 that there is due to White the sum of $27,983.17. This sum is offset by various items which the referee finds due by White. So far as the items of $7,825 for salaries and the amount paid on account of the Montreal Subway, on the evidence if the company were suing I think they would be entitled to recover. The question arises whether these amounts can properly be allowed against White as an offset. The respondents rely on certain articles of the Code of the Province of Quebec—Article 1031 which in certain cases entitles the creditors to set up the rights of their debtors, and Articles 1187 and following, to show that compensation has taken place.

I should doubt very much whether these claims are "*claires et liquides.*" There may also be doubts as to whether they can be made the subject of set-off as compensation in the Exchequer Court.

In the present case, however, I do not propose to interfere with the finding of the Referee so far as he has concluded that any debt due by White is satisfied by compensation. A mass of evidence has been adduced before the Referee, and what was not "*claires et liquides*"

(1) 5 O. L. R. 1.

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at the commencement of the reference has now become so.

No objection was taken to the jurisdiction of the Referee or to his right to entertain these claims. The railway has been sold and the proceeds are to be paid to the creditors. Had objection been made to the hearing of these claims by the Referee, the Receiver under section 26, sub-section 4 of the Exchequer Court Act, could have taken proceedings and recovered judgment which would have satisfied the present claim.

Sub-section 3 of section 26 of the Exchequer Court Act confers large powers. The court shall have all the powers for "the making of all necessary enquiries, the settling and determining the claims, etc." The orders of the 19th December, 1905, and 1st June, 1906, confer power on the Referee "to investigate the claims, to hear "evidence in respect thereof, or of any objections thereto "or of any contestations thereof."

A full trial has taken place, and it would be inequitable in my opinion to allow White to take a portion ot the creditors' money and leave the company to an action which would result in a judgment which probably could not be realized.

I think any finding in regard to the liability for the stock should be treated as expunged from the report both as regards Hodge and White.

It is only to the extent of compensation the Referee has dealt with the case, and it is unnecessary to deal with that question.

The Appeals are dismissed with costs.

Judgment accordingly.

Solicitor for plaintiff: *A. Geoffrion.*

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

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

Solicitors for Hodge and White: *Hickson & Campbell.*