

quiesced in it and ratified it; your manager here Mr. Hall, consented to it, and you cannot complain. It was a going concern; I as president had a right, and was bound to pay from earnings, pending negotiations, and during the long delays, on account. You knew it. I only agreed to procure discharges of these debts, and I agreed to indemnify you against all claims except certain claims mentioned in the agreement. I abide by my agreement, and there are now other claims, notably that of commercial tax amounting to upwards of \$18,000 which you call upon me to pay.

The main difficulty arises from the delays which took place, from the time the arrangements were first discussed and their completion, and the taking of the statement made by Mr. Swinyard of liabilities, August 31, 1885, as the basis of agreement in April, 1887, when there could be no doubt that there had been a change in the amount of the indebtedness, the road having continued to be operated under the presidency of the plaintiff and the management of Mr. Woodward. As to the pretension of the intervenants that the contract was improvidently made, and should be set aside, I do not see in the evidence any grounds for so setting it aside. Take for example the alleged non-liability for part 2 of schedule, contractors' liabilities. They knew that they were not claimed against the company (see Mr. Swinyard's report), though it was represented to them that probably some of them might be considered privileged, and subsidies held for their payment, but a statement was given, and understanding their nature they agreed to pay them, or rather they stipulated with plaintiff that for the consideration of \$250,000, he would pay or rather settle them, as well as the direct liabilities. It is somewhat strange that they should not have directly settled these claims as best they could, for it was understood that a reduction could be had on settlement, but they arranged with plaintiff to do this, giving him the amount of \$250,000 to settle \$291,000, and he agreed to do it.

What was he bound to do? The words of the contract are, alleging that the debts are due and claimed as in the schedule, plain-

tiff undertook like as in the preamble, for the consideration of the funds to be handed over to him, to *settle and discharge said debts due or claimed*, or as it is in section 2 of contract, upon plaintiff *procuring and delivering complete discharges* from the said debts due and claimed. The main contestation and that upon which plaintiff's right to the 46 bonds depends, as the case is presented to the Court, is this: Were the earnings of the road which continued to be operated under the presidency of the plaintiff and management of Mr. Woodward, and subsequently under the management of Mr. Hall, available for the fulfilment of plaintiff's obligation? Plaintiff says, you knew they were so being applied, and consented to it, and I am entitled to the benefit of it. There is no doubt that the ordinary working expenses of the road during the time between the report and the assumption of the road by intervenants must have been paid, and there is no doubt that it was so understood by them and known by the company intervenants, but would this apply to what may be called capital account? If you look at the part first of schedule it will be found that there are two items amounting to \$72,677 which may be, I think, called debts on capital. They are the very debts which in the Act of 1886, 49-50 Vic., cap. 8, sec. 1, are referred to as not affected by the prior lien bonds; *being liens and rights upon floating stock and equipment owned by or in use upon the said railway*. Plaintiff agreed to settle and discharge these claims or to procure and deliver up complete discharges for the same. What was done? The first item of \$50,000 was purchased by Mr. Ross at \$40,000, and intervenants were made aware of this. See plaintiff's exhibit No. 19. Mr. Hall's letter of July 1, 1886. This may fairly be said to have been made for the benefit of whomsoever it might concern, and I think that plaintiff should have the benefit of it on his contract. This was acquired by Mr. Ross, July 1886, by giving four notes of \$10,000 each, and taking a transfer of the claim of the Ontario car company, and agreeing to divide any profit which might be made on it with Messrs. Woodward and Hall, but none was made, and he entered into an agreement by which the company