THE BANK OF TORONTO .....APPELLANTS ; 1882

AND *Nov. 13,14.

ARTHUR M. PERKINS, *es-qual.*, *et al*...RESPONDENTS. 1883

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE). *April 30.

The Banking Act, 34 *Vic.*, *ch.* 5, *sec.* 40—*Advances on Real Estate.*

B., on the 19th January, 1876, transferred to the Bank of *T*, (appellants) by notarial deed an hypothec on certain real estate in

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

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Montreal, made by one *C.* to him, as collateral security for a note which was discounted by the appellants and the proceeds placed at *B's.* credit on the same day on which the transfer was made. The action was brought by the appellants against the insolvent estate of *C.*, to set aside a prior hypothec given by *C.* and to establish their priority.

Held—(affirming the judgment of the Court of Queen's Bench) that the transfer by *B.* to the Bank of *T.* was not given to secure a past debt, but to cover a contemporaneous loan, and was therefore null and void, as being in contravention of the Banking Act, 34 *Vic.*, ch. 5, sec. 40.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) (1).

This action was brought against the respondents by the appellants as the assignees of an obligation granted by *Samuel S. Campbell* to *Walter Bonnell* on the 19th January, 1876, and on the same day transferred by *Bonnell* to appellants, to have declared fraudulent, illegal, null and void certain agreements and covenants in the declaration mentioned, to wit, an obligation executed by the said *Samuel S. Campbell*, on the 14th June, 1875, in favor of dame *Lucy Jane Stevens*, whereby he hypothecated in her favor, for considerations set forth in the said obligation, his certain real property therein described, an obligation by the said *Campbell* to *Brackley Shaw* aforesaid executed on the 1st June, 1876, whereby for security of a loan of money made to him by said *Shaw*, he hypothecated to *Shaw*, among other the real property hypothecated as above in favor of the said *Lucy Jane Stevens*; and lastly, a covenant in the obligation to *Shaw* whereby the said *Lucy Jane Stevens* gave to *Shaw* priority of his mortgage over that previously granted to her upon the said real property.

Perkins, as assignee of the insolvent estate of *S. S. Campbell*, one of the respondents did, not plead to the action; and *Lucy Jane Stevens*, *Campbell's* wife, and

(1) 1 Dorion's Q. B. R. 357.

Brackly Shaw severed in their defence. *Lucy Jane Stevens* pleaded that the obligation of the 14th June, 1875, was passed in good faith and for valuable consideration.

Shaw pleaded: 1st. That the said plaintiffs are not now and were not at the date of the institution of the present action, hypothecary creditors on the said lot of land mentioned and described in plaintiff's declaration. That the said obligation and hypothec from the said *Samuel S. Campbell* to the said *Walter Bonnell*, and which is alleged to have been transferred to plaintiffs, was transferred as security for the payment of a promissory note of the said *Walter Bonnell*, which has long since been paid by the proceeds of other collaterals, transferred to plaintiffs by the said *Walter Bonnell*, as security for the payment of the said promissory note.

2nd. That no legal consideration was ever given by the said *Walter Bonnell* to the said *Samuel S. Campbell* for the said obligation and hypothec, and the said *Samuel S. Campbell* was not then and never has been since indebted in any sum to the said *Walter Bonnell*, the said obligation and hypothec having been consented to by the said *S. S. Campbell*, simply to enable the said *Walter Bonnell* to borrow money on the security of the land thereby hypothecated. That the said mortgage and hypothec was transferred to the said plaintiffs by the said *Walter Bonnell* for money loaned and advanced by plaintiffs to the said *Walter Bonnell* on the said mortgage and hypothec, and as and for advances then and there directly and indirectly made by the said plaintiffs to the said *Walter Bonnell* on the security of land, the whole against the statutes in such case made and provided, and beyond the power and authority of the said the bank. That the allegations in the said transfer contrary and in opposition to the foregoing allegations are false and made with a

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fraudulent intent of avoiding the provisions of the statutes and the law of the Dominion respecting banks and banking.

3rd. That the obligations and hypothec by *Campbell* to his wife, was for good and valid consideration and that she could grant priority over her hypothec without binding herself for the debts of her husband.

4th. *Shaw* put in a general issue.

The answers of the appellants to these several pleas were general.

Issue being joined, the parties proceeded to evidence, and it was proved that *Campbell* gave the mortgage for $25,000 to *Lucy Jane Stevens*, his wife, for the price of the stock in trade belonging to her in a partnership which had existed between her and one *Charles Hagar*, including $10,000 to $11,000 interest on said price. That the mortgage given by *Campbell* to *Bonnell* on the 19th January, 1876, was transferred by deed executed before *T. Doucet*, N. P., by *Bonnell* to the appellants on the same day as collateral security for a note of $26,000, dated 26th December, 1875, and discounted on the said 19th January, 1876, the bank receiving at the same time other collaterals to secure the payment of the note, viz: an obligation due to him by one *Routh* for the sum of $6,145.00, and one due by *Girard* for $24,000. That *Bonnell* failed in 1876 and the bank fyled its claim against *Bonnell's* estate on the 20th April, 1877, for $78,682, valuing the three mortgages by them held as security for $25,000. That the bank collected $6,145 with interest under the *Routh* mortgage.

The Superior Court dismissed the appellant's action as to the three defendants by three separate judgments.

On appeal to the Court of Queen's Bench the judgment of the Superior Court was confirmed.

The appeal in this case was determined on the question whether the transfer by *Bonnell* to the bank of an

hypothec to secure a note discounted on the same day is null and void, as being contrary to the Banking Act 34 *Vic*, ch. 5, sec. 40, and therefore arguments of counsel on the other questions raised by the pleas need not be referred to.

Mr. *Laflamme*, Q.C., for appellants:

The taking of security in this case cannot be construed as being against public policy. If *ultra vires*, it is not necessarily illegal, and then it might be voidable but not void. It was not a direct transaction in violation of the statute. The bank never advanced the money on the security of the real estate, the original party to the mortgage had completed the transaction and advanced the money, and the bank, long afterwards, received this claim as security for advances made on a promissory note in the regular course of business.

All the circumstances connected with the granting of these securities, prove conclusively that the bank obtained them to guarantee the advances then made to *Bonnell* on bills and notes discounted, "a debt contracted to the bank" in the course of its business. The transfer states it in positive terms.

"Whereas the said *Walter Bonnell* stands indebted to the said bank of *Toronto* in the sum of twenty-six thousand dollars as represented by a certain promissory note signed by the said *Walter Bonnell*, and payable to his own order and endorsed by him."

"And whereas the said *Walter Bonnell* desires to furnish the said bank with collateral security for the due and faithful repayment of his said indebtedness assigns, &c."

When he gives the promissory note as representing his indebtedness fixed at $26,000, he authorizes the bank in the letter addressed to the manager to retain the note for collateral security for bills there or thereafter to be discounted.

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Banks as well as all joint stock companies with limited liability, first attained the most practical and complete organization and their fullest development and efficiency, in the *United States*, and there the courts were called to lay down the rules defining their powers and restricting them within the limits of their proper legal action.

Every bank charter in that country contains the provisions of our Banking Act, confining their operation to legitimate banking business, and prohibiting them from dealing in goods, wares and merchandise, and from loaning money on the security of land.

Nevertheless, the highest judicial authorities thought themselves bound to give a fair interpretation to these provisions, establishing restrictions and prohibitions in the interest of the commercial community and society generally, and universally held that the prohibition only applied when the receiving of goods was a direct purchase, or when the taking of security had, for direct object, the advance of money on security of real estate, and not when the security was given to secure regular banking facilities for genuine ordinary commercial transactions. See *Angell* and *Ames* on Corporations (1); *Bryce—Ultra vires* (2); *Ayers* v. *South Australasian Banking Company* (3).

Mr. *Benjamin*, for respondent.

The Banking Act of this Dominion (4) declares:—

"That a bank shall not either directly or indirectly lend money or make advances upon the security, mortgage, or hypothecation of any lands or tenements, &c."

Article 13 of the Civil Code of *Lower Canada* declares: "No one can by private agreement validly contravene the laws of public order and good morals."

(1) §§ 156, 264, 157.
(2) Pp. 208, 209, 210.
(3) L. R. 3 P. C. 548.
(4) 34 *Vic.*, c. 5, sec. 40.

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Article 14th of same Code declares:—"Prohibitive laws import nullity, although such nullity be not therein expressed."

Article 15th of same code declares: That the word "shall" is to be construed as imperative," &c.

The transfer by *Bonnell* to the appellants, of the *Campbell* hypothec is an evasion of the law as above cited, therefore the hypothec claimed by the appellants under such transfer is null and does not exist in their favor, and consequently their right of action, as an hypothecary creditor, never existed.

RITCHIE, C.J.:

This was an appeal from a judgment of the Court of Queen's Bench (appeal side), Province of *Quebec*, affirming a judgment of the Superior Court, dismissing the appellant's action. [The learned Chief Justice then read a statement of the case.]

The plaintiffs based their claim on the validity of this mortgage, and the question of its validity is distinctly raised on the pleadings.

I agree with Chief Justice *Dorion* that the transfer made to the appellants of a mortgage to secure an advance made on a promissory note discounted at the same time that the transfer was made, was on the part of the bank in violation of the Banking Act, a clumsy attempt at evasion of the 34th *Vic.*, ch. 5, sec. 40, which enacts that:

> The bank shall not, either directly or indirectly lend money or make advances upon the security, mortgage or hypothecation of any lands and tenements.

And the same prohibition in the very same words, is contained in the charter of the Bank of *Toronto* 20 *Vic.*, ch. 160, sec. 28, which enacts that:

> The said bank shall neither directly or indirectly lend money or make advances upon the security, mortgages, hypothecation of any lands or tenements, &c.

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This prohibition, as Chief Justice *Dorion* justly remarks, is a law of public policy in the public interest, and any transaction in violation thereof is necessarily null and void; no court can be called upon to give effect to any such transaction or to enforce any contract or security on which money is lent or advances as thus prohibited are made.

It would be a curious state of the law if, after the Legislature had prohibited a transaction, parties could enter into it, and, in defiance of the law, compel courts to enforce and give effect to their illegal transactions.

STRONG, J.:

The evidence of *Joseph R. Hutchins*, a witness for the defendants, shews beyond question, in the entire absence of any contradictory proof, that the several notarial deeds of the 19th January, 1876, whereby *S. S. Campbell* transferred certain hypothecary claims or vendor's privileges to *Bonnell*, and *Bonnell* transferred the same claims to the bank as security for the payment of the promissory note of the 30th December, 1875, were both made in pursuance of an arrangement with the bank, whereby the bank agreed to discount the note on the faith of the security afforded by the transfer, that the deeds were parts of one and the same transaction, and that *Bonnell* was a party interposed to give the loan by the bank a colour of legality. Further, the evidence shews that the loan was, in fact, made directly to *Campbell*, and was not made until after the deeds of transfer were completed.

Mr. *Smith*, the manager of the bank, states distinctly that "the note was passed through the bank on the 19th January, 1876;" in other words, that it was discounted on that day. From this it is apparent that the bank on the last-mentioned day lent to *Campbell* $26,000,

less discount deducted, on what was substantially the security of a mortgage of landed property.

By the 40th section of the General Banking Act of 1871, it is enacted that—

> The bank shall not, either directly or indirectly, lend money or make advances upon the security, mortgage or hypothecation of any lands or tenements.

By the 41st section of the same Act the bank is empowered to take mortgages upon real property as additional security for debts contracted to the bank in the course of its business.

The question therefore arises, whether this advance of the proceeds of the note for $26,000, discounted as before mentioned, having been made upon the security of the hypothec mentioned, that security, which is the foundation of the present action, is now valid in the hands of the bank, so as to entitle them to maintain this action for the reduction of a prior mortgage upon the same subject.

Although it appears that *Campbell* was primarily indebted to the bank, there is no pretence for saying that the mortgage in question was given as a security for the old debt, and that the transaction was a mere giving of time and forbearance during the currency of the note, for it distinctly appears from the evidence of both the manager, Mr. *Smith*, as well as from that of Mr. *Hutchins*, who acted in the matter for *Campbell*, that there was a new advance to the amount of the proceeds of the note, which, though bearing an earlier date, was not discounted until after the security was completed and in the hands of the bank.

The question we have to determine is therefore reduced to one of law, arising on the construction and effect of the 40th section of the Banking Act, and all we have to decide is, whether a bank, making an advance or loan of money on a mortgage of real property

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in violation of the prohibition contained in the section referred to, is notwithstanding entitled to the benefit of the security. The only ground for an argument that the security is not invalidated, is that the Act does not in express words enact that it shall be void. This distinction, however, though it must be admitted to have the support of considerable American authority, cannot avail the appellants in the face, not only of the principles which the English courts have applied to the construction of statutes in analogous cases, but also of the decision of the Privy Council upon an enactment in all respects identical with the present.

In the *National Bank of Australasia* v. *Cherry* (1), the question arose as to the validity of an equitable mortgage of lands by deposit of title deeds originally given to secure advances to be made by a bank which was prohibited from lending money on such security by a provision in its statute of incorporation expressed in these words:—

> Provided always, that, save and except as hereinbefore specially authorized, it shall not be lawful for the said corporation to advance or lend any money on the security of lands or houses.

It was argued that this prohibition was not founded on any considerations of public policy, but was simply a regulation for the internal management of the bank, and therefore a security taken in infringement of the proviso was not void in the hands of the bank, and might be enforced as effectually as if it had been given to secure a past debt. The Privy Council, however, although holding under the particular facts of that case, that by force of a subsequent arrangement the security originally given for future advances had been converted into one for a pre-existing debt, virtually held that the clause of the Act there in question, although not in express words avoiding a mortgage for future advances

(1) L. R. 3 P. C. 299.

given in violation of its terms, did, in effect, make such a security void in the hands of the bank. It is true that in a case, reported in the same volume, of *Ayers* v. *The South Australian Banking Company* (1), the Privy Council expressed doubts as to the effect of a similar clause in the charter of a bank; whether the consequences of an infraction of it invalidated the security, or had any greater or other effect than to warrant proceedings on the part of the crown for a forfeiture of the charter. But the distinction between this last case and that first referred to consists in this, that whilst in the first case the prohibition was embodied in an Act of Parliament, in the latter it was a mere provision of a Royal Charter, so that it could not be said to be illegal in the sense in which a direct contravention of a statutory prohibition is to be so regarded.

In the case of the *National Bank* v. *Matthews* (2), the Supreme Court of the *United States* held, that under a provision in the National Banking Act prohibiting securities by way of mortgage (the language of the Act, however, not being so stringent as in the present case) the security was not avoided. This decision, however, proceeded upon a principle of statutory construction peculiar to the American courts, which admits considerations of the policy of an enactment as influencing its interpretation to an extent to which the decisions of the English courts are distinctly opposed (3). Whenever the doing of any act is expressly forbidden by statute, whether on grounds of public policy or otherwise, the English courts hold the act, if done, to be void, though no express words of avoidance are contained in the enactment itself.

In *Bartlett* v. *Vinor* (4) Lord *Holt* says:

> Every contract made for, or about any matter or thing which is

(1) L. R. 3 P. C. App. 548.
(2) 98 U. S. 621.
(3) *Cope* v. *Rowlands*, 2 M. & W. 157.
(4) Carthew 252.

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prohibited or made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.

In *Cope* v. *Rowlands* (1) Baron *Parke* says, with reference to a distinction formerly made between acts done in violation of statutory provisions made for the protection of the revenue and those based on grounds of public policy:

> Notwithstanding some dicta apparently to the contrary, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any other object.

And Mr. *Sedgwick*, in his work on statutory construction, approves of this doctrine as a general rule of statutory construction, saying, this would result in a simple and uniform rule, making void all contracts, growing out of acts forbidden by law, and barring all actions upon them; and he condemns the opposite doctrine, as acted upon in the American case of *Harris* v. *Runnels* (2), as introducing "a distinction too nice and refined to be susceptible of practical application."

Numerous other authorities might be quoted to the same effect (3). If, however, it should be considered requisite to show that the clause in question prohibiting the taking of security on lands for contemporaneous advances was introduced to sustain some purpose of public policy, the observations of Lord *Cairns*, in delivering the judgment of the Privy Council in the case of the *National Bank of Australasia* v. *Oherry*, already cited, are directly in point. Lord *Cairns* there says:

> Now, in the first place, it was contended that the enactments contained in this clause were not founded upon any considerations of public policy, but were simply regulations for the internal management of the bank as between itself and its shareholders, and that

(1) 2 M. & W. 157.
(2) 12 Howard 79.
(3) In *Rex* v. *Gravesend* 3 B. & Ad. 240. *R.* v. *Hipswell*, 8 B. & C. 460. *Fergusson* v. *Norman*, 5 Bing. N.C. 76.

they were to be considered as rules merely for the conduct of the directors, and altogether unaffected by those considerations of public policy which might lead to a wider construction of the Act.

Their Lordships are unable to adopt that argument. They cannot but see in this clause that there was some object on the part of the Legislature to regulate, indeed, the internal management of the affairs of the bank, but to regulate those affairs not merely, if at all, with reference to the interests of the shareholders, for it is difficult to see how the interests of the shareholders could be prejudiced by taking securities of this kind, but rather to regulate those affairs with some regard to the interests of the public, who, for some reason or other, which it is not for their lordships to speculate upon, are, by this Act, supposed to have an interest in confining the bank to making advances of money without these solid items of security which are specified in this clause.

It appears, therefore, to their lordships that there are considerations of public policy involved in this clause, but it is also true to say, that those considerations of public policy look to and deal with the management of the bank, and have for their object the limitation of the powers and authorities of the bank.

This judgment of the Privy Council, therefore, warrant us in determining that the transfer made to the bank in the present instance was wholly avoided by the 40th section of the Banking Act.

The foregoing considerations are founded on the principles of statutory interpretation which are established by English law, which would appear to be applicable to the construction of a statute of the Dominion applying alike to all the provinces, and in the present case applied to limit the powers of a corporation domiciled in the Province of *Ontario*. If however this is an incorrect assumption and the interpretation of the statute is to be governed by the law of the Province of *Quebec*, the question is not open for discussion, for it is expressly concluded by the 14th article of the Civil Code, which declares that "Prohibitive laws import nullity, although such nullity be not therein expressed."

Had it been established in evidence that the proceeds of the promissory note for $26,000, which, according to

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the terms of the letter of *Campbell* to Mr. *Coulson*, the then manager of the bank, dated the 19th January, 1876, the day on which the mortgage was given him, were to be held by the bank as security for bills discounted, or thereafter to be discounted, or that any part of that amount had in fact been applied to take up bills upon which *Campbell* was at the time liable to the bank, that might have made the mortgage, wholly or *pro tanto*, as the case might be, a security for a pre-existing debt, and have thus taken it out of the operation of the 40th section, but I am unable to find the slightest proof of this. We must therefore take the transaction to have been a mortgage given, not to secure a past debt, but to cover a contemporaneous loan, and therefore void under the statute.

The other questions which were discussed in the Court of Appeal, namely, the question of the payment or satisfaction of the appellants' debt and the validity of the transaction between *Campbell* and his wife, therefore become immaterial, for the appellants must wholly fail in their action, if we determine the mortgage to be void under the Banking Act.

For these reasons I am of opinion that the appeal should be dismissed with costs.

FOURNIER, J.:—

A new debt was really created by this $26,000, which was only discounted upon the security of this transfer. This certainly is in contravention of the Banking Act.

On this ground alone, I think the appeal should be dismissed.

HENRY, J.:—

I entirely concur in the views of my learned brothers. I think the act intended, though not clearly expressed,

to void all such documents. There are other grounds on which, I think, the respondent would be entitled to judgment, but as this embraces the whole case, I think it is unnecessary to advert to them.

TASCHEREAU, J. :—

I am of opinion also that the judgment of the two courts below should be confirmed, and the appeal should be dismissed.

GWYNNE, J. :—

This is an action instituted by the Bank of *Toronto* against *Arthur M. Perkins* in his capacity of assignee of the estate of *Samuel S. Campbell*, *Lucy Jane Stevens*, wife duly separated, as to property from the said *Samuel S. Campbell*, the said *Samuel S. Campbell* and *Brackley Shaw*, defendants.

The plaintiffs in their declaration allege that by an indenture of mortgage duly executed upon and bearing date the 19th January, 1876, the said *Samuel S. Campbell*, since become insolvent, acknowledged himself to be indebted to one *Walter Bonnell* in the sum of $15,000, and for security for the said amount hypothecated in favor of the said *Walter Bonnell*, his heirs and assigns, certain property therein described, and that by another deed executed upon the same 19th day of January, 1876, the said *Walter Bonnell* being indebted as mentioned in the said deed to the plaintiffs in the sum of $26,000 as represented by a certain promissory note signed by the said *Walter Bonnell* and payable to his own order and endorsed by him, dated the 30th day of December, 1875, payable twelve months after the date thereof at the bank of *Toronto* and bearing interest at the rate of seven per cent. per annum, for collateral security for the repayment of the sum of $26,000, said amount of the said promissory note, or any balance or renewal thereof, the said *Walter*

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Bonnell assigned to the plaintiffs the said $15,000 secured by the mortgage of even date from *Campbell* to *Bonnell*.

That by deed of mortgage duly executed and bearing date the 14th day of June, 1875, in consideration of the said *Samuel S. Campbell* having, in manner therein alleged, become indebted to his said wife, Dame *Lucy J. Stevens* or *Campbell* in the sum of $25,000, he, the said *Samuel S. Campbell* for securing payment to his said wife of said debt of $25,000, mortgaged and hypothecated to, and in favor of his said wife certain real property therein mentioned, comprising the land described in the mortgage from *Campbell* to *Bonnell* of the 19th June, 1876, so as aforesaid assigned to the plaintiffs. That by a deed duly executed by the said *Samuel S. Campbell* and bearing date on the 9th day of November, 1875, certain errors of description of some of the lands in the said mortgage of the 14th June, 1875, were rectified.

That subsequently, and on the 1st day of June, 1876, the said *Samuel S. Campbell*, by a deed of obligation then executed by him, acknowledged himself to be indebted to the defendant *Shaw* present and accepting in the sum of $45,000, and for security of the payment thereof in one year from the date of the said deed, the said *Samuel S. Campbell* thereby mortgaged and hypothecated certain property therein described, which he declared to belong to him, comprising, among other property, the land hypothecated to *Bonnell* by the mortgage of the 19th January, 1876; and that the said *Lucy J. Stevens*, wife of the said *Samuel S. Campbell*, at the execution of the said deed of the 1st June, 1876, intervened and granted priority of hypothec to the said defendant *Shaw* over her claim of $25,000 created by the obligation in her favor of the 14th June, 1875.

The plaintiffs do not seek in this action to enforce payment out of the estate of *Samuel S. Campbell* of any part of the amount of $15,000 received by the mortgage

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of the 19th January, 1876, so as aforesaid assigned to the bank; they merely insist that the mortgage and obligation of the 14th June, 1875, should be declared to be fraudulent, null and void as against the plaintiffs, for, the following, amongst other reasons: because by law no sale nor contract can be effected between husband and wife;—that the said mortgage and hypothec amounts to and must be considered as a sale by the wife effected in favor of her said husband for the supposed interest and value in a stock-in-trade in a business carried on by the wife previous to such sale or hypothec;—that, moreover, the said wife of the said *Samuel S. Campbell* never having conveyed or transferred to her said husband any property or assets of the value described or mentioned in the said deed of mortgage and obligation by him granted to his wife, the value of such assets was fictitious, simulated and collusively made with the view to defraud the creditors of the said insolvent;—that the said *Lucy J. Stevens* never had or possessed any interest to the amount stated in said deed; and further, that the said obligation and hypothec is null and void with respect to the plaintiffs as regards the property hypothecated, inasmuch as the declaration of ratification subsequently made by the said *Samuel S. Campbell* in favor of his wife, constitutes virtually a new hypothec which was never assented to or accepted by his said wife, who was not authorized in any legal manner to accept, execute or receive the same, and that the obligation and mortgage contained in the deed of the 1st June, 1876, executed by *S. S. Campbell* in favor of the defendant *Shaw*, and more particularly the declaration made by the said *Lucy J. Stevens*, granting priority of hypothec to the said defendant *Shaw* over her claim for $25,000 should be declared null and void with respect to the plaintiffs for the following amongst other reasons: Because the said obligation and

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mortgage was granted by the said *S. S. Campbell*, when insolvent, to the knowledge of the said defendant *Shaw*, and because by the said deed the said *S. S. Campbell*, with the concurrence of his wife, pretends to grant to the said *Shaw* a priority of mortgage or hypothec over the pretended hypothec obtained by her illegally as aforesaid, and that even in the event of such mortgage obtained by the said *Lucy J. Stevens* being valid and legal, she could not grant any priority of hypothec to the said *Shaw*, but could only renounce in his favor to the hypothec by her obtained, and the said plaintiffs are entitled to have it declared that the said defendant *Shaw* cannot claim or pretend to have any priority of mortgage by virtue of the pretended renunciation of the said *Lucy J. Stevens*; the prayer of the plaintiffs' declaration is limited to the above purposes.

To this declaration *Perkins*, the assignee of *Campbell*, did not plead. *Lucy J. Stevens*, in short substance, pleaded that the deed of obligation and mortgage of the 14th June, 1875, sought to be set aside, was made in good faith and for valuable consideration, and after authority had been had to that effect from the court, and that the same was, and is, legal and valid, and ought not to be set aside.

The defendant *Shaw* pleaded among other pleas: 1st. That the plaintiffs were not, at the date of the institution of the present action, hypothecary creditors on the lot of land described in plaintiffs' declaration, that the said obligation and hypothec from *Campbell* to *Bonnell* and which is alleged to have been transferred to plaintiffs, was transferred as security for the payment of a promissory note of the said *Bonnell*, which has been long since paid by the proceeds of other collaterals transferred to plaintiffs by the said *Bonnell* as security for the payment of the said promissory note; and, 2nd. That the plaintiffs

cannot by law pretend to be hypothecary creditors on the lot of land mentioned in the plaintiffs declaration as being hypothecated by *Campbell* to *Bonnell*, and which is pretended to have been transferred to the plaintiffs, inasmuch as neither *Bonnell* nor *Campbell* were indebted to the said plaintiffs for the said sum of $26,000 mentioned in said deed of transfer from *Bonnell* to the plaintiffs, and no legal consideration was ever given by *Bonnell* to *Campbell* for the said obligation, and *Campbell* was not then, nor has he since, been indebted in any sum to *Bonnell*, the said obligation and hypothec having been consented to by *Campbell* simply to enable *Bonnell* to borrow money on security of the land thereby hypothecated, and that the said mortgage and hypothec was transferred to the said plaintiff by *Bonnell* for money loaned by plaintiffs to him on the security of the said mortgage and hypothec, and as and for an advance then made directly and indirectly on the security of land against the Statutes in such case made and provided and beyond the power and authority of the bank, and that the allegations in the said transfer to the contrary are false and made with the fraudulent intent of avoiding the provisions of the Statutes respecting banks and banking.

Evidence having been entered into upon the issues joined upon the above pleadings, the judge of the Superior Court, before whom the case came, being of opinion that the plaintiffs had failed to invalidate the mortgage from *Campbell* to his wife, and the grant of priority of hypothec in the obligation and mortgage from *Campbell* to *Shaw* of the 1st of June, 1876, dismissed the plaintiffs action as against Mrs. *Campbell* and defendant *Shaw* respectively with costs and against the defendant *Perkins* without costs.

Upon appeal from this decision the Court of Queen's Bench in *Montreal*, Mr. Justice *Monk* dissenting,

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affirmed the judgment of the Superior Court, not, however, for the reasons stated in that judgment, but upon the ground that as the Court of Queen's Bench found the fact to be that the bank had been paid the amount of the promisory note for $26,000 in full, and had, therefore no interest in contesting the hypothec given by *Campbell* to *Shaw*, nor the priority of hypothec given to him by Mrs. *Campbell*. The learned Chief Justice of the Court of Queen's Bench was of opinion that the deed of the 4th June, 1875, by which *Campbell* acknowledged to owe to his wife a sum of $25,000, and gave her a mortgage on his property for that amount, is null and void, and cannot be invoked against *Campbell's* creditors; that a married woman, separated as to property, could give to a creditor of her husband priority over her own claims upon the property; and lastly, that the transfer made to the plaintiffs of a mortgage to secure an advance made on a promissory note discounted at the same time that the transfer was made is an evasion of the Banking Act 35 *Vic.* ch. 5, s. 40, which forbids banks to advance on the security of real estate, and that this prohibition being in the public interest, a law of public policy, the transfer made by *Bonnell* to the plaintiffs was null and void.

The issue joined upon the above second plea of the defendant *Shaw* appears to be the primary issue to be disposed of, for if that issue should be determined against the plaintiffs, they have no *locus standi in curiâ*, and in such case it would not be proper to adjudicate in respect of the other issues upon the record as it is framed. If the plaintiffs have no *locus standi in curiâ* for the reason stated in the above plea of the defendant *Shaw*, the question whether anything, or if anything, how much, remains due to the plaintiffs upon the note for $26,000 or otherwise, is one which can arise only be-

tween the plaintiffs and the estate of *Bonnell*, and not between the plaintiffs and the parties to this record, and for the same reason the plaintiffs would have no right to call in question the validity of the mortgage executed by *Campbell* in favor of his wife, so that no valid judgment upon that point could be rendered upon this record. Now that *Shaw*, as a hypothecary creditor of *Campbell*, has such an interest in the land in question as entitles him to dispute the title of the plaintiff thereto, cannot, I think, admit of a doubt, and he has done so by a plea specially framed for the purpose. In *Ayers* v. *The South Australian Banking Co.* (1), a similar point was made upon a clause in a bank charter, which said that it should not be lawful for the bank to make advances upon merchandize, but as a decision was unnecessary for the determination of the case, none was given. Lord Justice *Mellish*, delivering the judgment of the Privy Council in that case, says:

> Unquestionably, a great many questions might be raised on the effect of that clause in the charter which may be of great importance, but which also, being of great difficulty, their lordships do not think it necessary to given any opinion upon. There may be a question as to what are the transactions which come really within the clause, and whether this particular case does come within it. There may also be a question whether, under any circumstances, the effect of violating such a provision is more than this, that the crown may take advantage of it as a forfeiture of the charter.

Their lordships, however, expressed no opinion upon the point. In the same volume, however, is reported a case more directly in point of *The National Bank of Australasia* v. *Cherry* (2). In that case it appeared that one *White*, who had an account with the bank in 1861, obtained leave to overdraw to the extent of £10,000 on the security of the deposit of certain title deeds respecting lands; having, however, in 1866 overdrawn to an amount exceeding £13,000, the bank brought an action

(1) L. Rep. 3 P. C. 559. (2) L. R. 3 P. C. 299.

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against him for that amount and recovered judgment, but agreed not to enforce such judgment in consideration that the title deeds so deposited should remain as security for the money then due, for which judgment was to be signed after the then approaching harvest, and the land sold for the liquidation of the debt. *White*, having become insolvent before sale of the land, a bill was filed by the bank against his assignees in insolvency, claiming the benefit of the security, to which the assignees demurred upon the ground that the deposit of title deeds was for future advances contrary to the provisions of the Act constituting the charter of the bank; the demurrer having been allowed by the Supreme Court of *Australia*, the case was appealed to the Privy Council, where it was held that there being in 1866, when the bank recovered their judgment, a valid subsisting debt between the bank and *White*, the agreement then made was within the enabling part of the 7th sec. of the Act. by which the bank was authorized, among other powers, to take and hold, but only until the same can be advantageously disposed of for reimbursement only, and not for profit, any freehold or leasehold lands and hereditaments and any real estate and any merchandise in ships which may be taken by the said corporation in satisfaction, liquidation or discharge of any debt due to the said corporation, or in security for any debt or liability *bonâ fide* incurred or come under previously, and not in anticipation or expectation of such security.

Provided always that save, and except as hereinbefore specially authorized, it shall not be lawful for the said corporation to advance or lend any money on the security of lands or houses or ships or on pledges of merchandise.

Lord *Cairns* in giving the judgment of the Privy Council in that case, says at page 306 (1):

(1) See citation in *Strong*, J's. judgment at foot of p. 614.

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And again he says (1):

It would seem to have been the object of the legislature in this clause, not to make void the contracts for such advances as between the bank and their customers, in the same way, that in former times contracts open to the objection of the usury laws were made void, but rather to make it something *ultra vires* the bank to take, upon the occasion of contracts for those advances, securities of the kind mentioned in this section. And this construction of the section would harmonize with what was very properly, as their lordships think, admitted at the bar on behalf of the respondents, that upon a transaction of the kind described in this bill the contract for the loan of money would be perfectly valid, and the question would be confined to a question as to whether the bank had the power to take the security which it took for the advance.

He then proceeds to show that in 1866 at a time when *White* might have resisted any claim of the bank founded upon the deposit of the deeds, he preferred for valuable consideration to make a fresh agreement with the bank by which he authorised the bank to retain the deed and promised that they should stand as security for the sum for which judgment was about to be signed; and he concludes that the transaction fell within the enabling part of the 7th sec. There is not here a word of a suggestion that no person but the crown by process to forfeit the charter could raise the point. The whole judgment of the Lord Chancellor excludes the possibility of such an opinion being entertained by the Privy Council; however, all doubt, if there were any upon the point, was put an end to four years afterwards by the case of *Riche* v. *Ashbury Railway Carriage Co.* (2), which passed through the Courts of Exchequer and Exchequer Chamber and the House of Lords.

From the judgment of Lord Chancellor Lord *Cairns*, in which latter case a short extract is all that is necessary to establish upon the authority of the

(1) P. 307.

(2) The judgment in the two former courts being reported in L. Rep. 9 Ex. 224, and in the House of Lords L. R. 7 H. L. 653.

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House of Lords the principle applicable to this case. At p. 673, he says, and this is the principle upon which the judgment in the case rests :

I find Mr. Justice *Blackburn*, whose judgment (in the Court of Exchequer Chamber) was concurred in by two other judges who took the same view, expressing himself thus : I do not entertain any doubt that if, on the true construction of a statute creating a corporation it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of Law or Equity, is bound to treat a contract entered into contrary to the enactment as illegal, and, therefore, wholly void and to hold that a contract wholly void cannot be ratified.

My lords, that sums up and exhausts the whole case. In my opinion, beyond all doubt, on the true construction of the Statute of 1862 creating this corporation, it appears that it was the intention of the legislature not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description. If so, according to the words of Mr. Justice *Blackburn*, every court, whether of Law or Equity, is bound to treat that contract entered into contrary to the enactment, I will not say as illegal, but as *extra vires*, and wholly null and void, and to hold also that a contract wholly void cannot be ratified.

Now, the Act which constitutes the plaintiffs' charter is the Dominion statute 34 *Vic.*, c. 5, which enacts in sec. 39 that the bank shall have the power to acquire and hold real estate for its actual use and occupation and the management of its business, and to sell and dispose of the same and other property to acquire in its stead for the same purpose.

In sec. 40, that the bank shall not, either directly or indirectly, lend money or make advances upon the security, mortgage or hypothecation of any lands or tenements, or of any ships or other vessels, nor upon the security or pledge of any share or shares of the capital stock of the bank, or of any goods, wares or merchandise except as authorized by this Act ; and in Sec. 41, that the bank may take, hold and dispose of mortgages and hypotheques upon personal as well as real property by way of additional security for debts

contracted to the bank in the course of its business. Upon an Act similarly worded the late Sir *John Robinson*, C. J., in the Court of Appeal of the late Province of *Upper Canada* in *The Commercial Bank* v. *The Bank of U. C.* (1) thus expresses himself:

When it is shown that the mortgage in any case was taken by a bank "as an additional security for a debt contracted to it in the course of its business," then the question occurs whether that can only be taken to mean a debt that had been previously incurred with it in the course of its business, or whether a mortgage may not be taken as an additional security for a debt that had no previous existence, but which the bank were about to allow a party to contract by advancing him money at that time in the proper course of their business, as for instance if any merchant had brought to the bank on the 21st May, 1855, for discount, a bill drawn by *Henry Bull*, jun., on *Bull* brothers, and accepted by the latter, could the bank properly have taken a mortgage from either party to the bill, or from the person who brought it and got the money, to secure them in the money which they advanced upon the bill? That is not this case, and I shall only, therefore say, that as the words of the statute are not against it, so I think it might perhaps be held that the spirit and intention of the Act are not opposed to it, and that a mortgage so taken might be upheld when it appears that the mortgage was really and in truth taken to secure the transaction upon the bill, and not that the bill was created for the mere purpose of upholding and giving colour to the mortgage, that would be a question of fact upon which the conclusion that a jury might come to would be in general so uncertain that I dare say the banks will not think it prudent to risk their money on a real security in any such case, where the nature of the transaction might appear to be at all equivocal.

Now, I do not desire to call in question any part of the opinion of the learned Chief Justice as here expressed as to the validity of a mortgage *bonâ fide* given or assigned to a bank by way of collateral security for an advance made by the bank upon regular business paper, or in the ordinary course of their business as bankers, concurrently with the giving or assigning to them of a mortgage upon lands as additional security, or

(1) 7 Grant 430.

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to express any opinion upon that point inasmuch as sitting here as a juror, and having the duty imposed upon me of finding the facts in the case, I have been unable to bring my mind to the conclusion that this is such a case; on the contrary, the conviction formed in my mind by the facts is that the transaction between *Bonnell* and the bank, of the 19th January, 1876, was primarily based upon the security of the mortgages upon real estate assigned to the bank by the deed of that date. That the note for $26,000 recited in that deed had not then been, if ever it was, in fact, discounted or agreed to be discounted as an ordinary banking transaction. A note made by one payable to his own order twelve months after date is not ordinary business paper; that the note did not then constitute any debt due from *Bonnell* to the bank; that it was not made for the purpose of being discounted by them in the ordinary course of their business as bankers, but was given existence for the mere purpose of upholding and giving color to the assignment of the mortgages, the whole having been assigned, and contrived for the purpose of evading the statute, and the mortgages were not assigned really and in truth to secure an independent banking transaction on the note.

The transfer of the mortgage is based upon the following recital in the deed of transfer:

Whereas the said *Walter Bonnell* stands indebted to the said Bank of *Toronto* in the sum of twenty-six thousand dollars currency as represented by a certain promissory note signed by the said *Walter Bonnell*, and payable to his own order and endorsed by him, and dated at *Montreal*, the 30th day of December, 1875, and payable at twelve months from from the date thereof at the bank of *Toronto*, and bearing interest at the rate of seven per centum per annum; and whereas the said *Walter Bonnell* desires to furnish the said bank with collateral security for the due and faithful repayment of his said indebtedness.

The deed then assigns, among other things:

The sum of $15,000 currency being the amount of a certain mortgage granted by *Samuel S. Campbell* to the said *Walter Bonnell*, passed before the said undersigned notary, and bearing even date herewith and hypothecating lot No. 446 on the official plan of the *St. Antoine* ward, of the said city of *Montreal*.

Now, no such debt as that here recited did, in truth, then exist; no such note as that here recited had then been discounted by the bank or constituted a debt due from *Bonnell* to the bank, but upon the same day as the execution of the mortgage from *Campbell* to *Bonnell*, which was executed under instructions from the bank manager, and its transfer to the bank, namely, the 19th January, 1876, *Bonnell* addressed a letter to the bank manager enclosing to him the note for $26,000, which letter is as follows:

Montreal, January 19th, 1876.

To the Manager, Bank of *Toronto*, *Montreal*:

I hereby hand you my promissory note for twenty-six thousand dollars, made payable to my own order one year after date with interest at the rate of 7 per cent. per annum, the above note bearing date the 30th December, 1875, the proceeds of which you are hereby authorized to retain as collateral security for any sterling bills of exchange now or hereafter to be discounted by the bank of *Toronto* for me made by *L. J. Campbell & Co.*, on Messrs. *Hutchins* and *Macdonald* of *London*, *England*, or other parties in *Great Britain*, and bearing my endorsement.

(Signed) *Walter Bonnell.*

Thos. Doucet, witness.

The signature of Mr. *Doucet*, who was the notary before whom the mortgage and transfer of it was executed, indicates the time when the note was made, and that it was ante-dated for the purpose of upholding the recital in the transfer, is apparent. Now, the only drafts which are shown to have had then any existence upon which was *Bonnell's* name in any character were the following:—a draft dated 19th January, 1876, by *Bonnell* (not said upon whom) for £1,458 5*s.* sterling, endorsed by *L. J. Campbell and Co.*, payable in 90 days; another of same date by *Bonnell* upon *Hutchins* and

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MacDonald, also at 90 days for £2,000, also endorsed by *L. J. Campbell & Co.*; also notes drawn by *Campbell & Co.*, and endorsed by *Bonnell* for $1,850, $1,100 and $3,000 respectively.

Now, it will be observed that none of these drafts or notes come within the description of the drafts which, by the letter of the 19th January, 1876, endorsing the note for $26,000, were contemplated as drafts collateral to which the proceeds of the note for $26,000 were, by that letter, authorised to be held and applied. All drafts, such as those referred to in the letter, had, therefore, yet to come into existence. The note, therefore, for $26,000 had no original as collateral to which it could be held or applied, at the time it was enclosed to the bank; but further, a note payable at twelve months to one's own order, and endorsed to the Bank as collateral security for the payment of drafts and notes at ninety days discounted by the bank, upon which as drawer, maker or endorser, the bank had already the security of the maker of the note at twelve months, can, with no propriety, be said to be a banking transaction in the ordinary course of business, nor could the bank going through the form in their own books of putting the proceeds of an apparent discount of such note to the credit of the maker of it, to be held, however, by the bank as security for the due payment of the drafts actually discounted as banking paper, be said, with any propriety, to constitute a debt due to the bank contracted in the due course of banking business and due to the bank on the 19th January, 1876, when the note was first placed in their hands. Then, on the 20th April, 1877, when the bank manager, who negotiated the whole of this transaction, proves in *Bonnell's* insolvency for the debts due to the bank by *Bonnell*, no claim whatever is made as for a debt due to the bank upon this note for $26,000.

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Upon the whole, therefore, as I have said, I can come to no other conclusion than that the note was given existence for the sole purpose of upholding and giving colour to the mortgage and its transfer, which latter contained a false recital of a debt due for the purpose of eluding a discovery of the true nature of the transaction; for this reason, I am of opinion that the bank has no *locus standi in curiâ*, and that, therefore, we should not express any opinion upon the other points, which can only come into judgment if the bank had a *locus standi*, and that for the above reason, and not for those relied upon, either in the Superior Court or in the Court of Queen's Bench in appeal, the plaintiffs action should be dismissed, as also should this appeal, with costs.

Appeal dismissed with costs.

Solicitors for appellants: *R. & L. Laflamme.*

Solicitor for respondent: *L. N. Benjamin.*