J. B. ROLLAND AND OTHERS.....APPELLANTS; 1895

AND *Feb. 25.
*May 6.

LA CAISSE D'ECONOMIE NOTRE-DAME DE QUÉBEC..... } RESPONDENT.

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

Debtor and creditor—Loan by savings bank—Pledge of securities for—Validity of—Insolvency of borrower—Right of curator to impugn transaction—R. S. C. c. 122 s. 20.

L. borrowed a sum of money from a savings bank which he agreed to repay with interest, transferring in pledge as collateral security letters of credit on the Government of Quebec. L. having become insolvent the bank filed its claim for the amount of the loan, with interest, which the curator of the estate and, on appeal, the appellants, as creditors of L., contested on the ground that the said securities were not of the class mentioned in the act relating to savings banks, (R. S. C. c. 122 s. 20), and the bank's act in making said loan was *ultra vires* and illegal.

Held, that L., having received good and valid consideration for his promise to repay the loan, could not, nor could the appellants, his creditors, who had no other rights than the debtor himself had, impugn the contract of loan, or be admitted to assail the pledge of the securities.

Assuming that the act of the bank in lending the money, on the pledge of such securities, was *ultra vires*, although this might affect the pledge as regards third parties interested in the securities, it was not, of itself and *ipso facto*, a radical nullity of public order of such a character as to disentitle the bank under arts. 989 and 990 C.C. from claiming back the money with interest. *Bank of Toronto* v. *Perkins* (8 Can. S. C. R. 903) distinguished.

APPEAL AND CROSS-APPEAL from a decision of the court of Queen's Bench for Lower Canada (appeal side) (1), varying the judgment of the Superior Court (2), in favour of the respondent bank.

*PRESENT :—Sir Henry Strong C.J. and Fournier, Taschereau, Sedgewick and King JJ.

(1) Q. R. 3 Q. B. 315.
(2) Q. R. 4 S. C. 65 sub nom. *Langlais* v. *La Caisse d'Economie Notre-Dame de Quebec.*

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The material facts giving rise to the litigation in this case are as follows:

On the 11th February, 1891, one J. A. Langlais, then a stationer, in a large way of business in Quebec, borrowed from the Caisse d'Economie, respondents, the sum of twenty-two thousand five hundred dollars, which he agreed to return within one year from that date with interest at 7 per cent. To secure the payment of this sum and the interest, the borrower transferred to the bank as collateral security, a document described as a letter of credit signed by the Provincial Secretary, and dated 10th February, 1891.

Subsequently, on the 23rd February, 1891, Langlais borrowed two further sums of thirty thousand dollars each from the Caisse, and again as collateral security transferred to the bank, two other documents called letters of credit signed by the then Prime Minister, Hon. H. Mercier.

Subsequently, before returning these loans, Langlais become insolvent, made an abandonment of his property (763*a* C. P. C.) for the benefit of his creditors, and to this abandonment one Docithé Arcand was appointed curator, and the bank filed a claim with the curator for the amount of Langlais' indebtedness.

Langlais' estate having been disposed of by the curator, the latter prepared a dividend sheet for the purpose of distributing the moneys realized among the creditors as their rights appeared, and the bank was collocated on the dividend sheet for the amount of its claim, namely, for the sum of eighty-seven thousand five hundred and four dollars and seventy-six cents. This claim was contested by the curator, and this contestation was tried before Mr. Justice Andrews in the Superior Court at Quebec, and dismissed. From this judgment an appeal was taken to the Court of Appeal, not by the curator, but by a creditor, Mr. Rolland, the

appellant herein, and the Court of Queen's Bench, sitting at Quebec, allowed the appeal in part, holding that the bank was entitled to rank as a creditor upon Langlais's estate for the amount loaned to Langlais, but that it was not entitled to interest on the claim. From this latter judgment both sides have appealed.

The Caisse d'Economie is a savings bank, incorporated by 34 Vic., chap. 7, and the law applicable to savings banks at the time this contract was entered into will be found in chap. 122 of the Revised Statutes of Canada, section 20 of which is as follows:

The bank may also loan such moneys, upon the personal securities of individuals, or to any corporate bodies, if collateral securities of the nature mentioned in the next preceding section, or British or foreign public securities, or stock of some chartered bank in Canada, or stock in any incorporated building society, or bonds or debentures, or stock of any incorporated institution or company, are taken in addition to such personal or corporate security, with authority to sell such securities if the loan is not paid.

The creditors of Langlais contended that the letters of credit pledged to the bank were not securities of the kind mentioned in this section and that the loan was, therefore, *ultra vires* of the bank and the estate was not liable to pay it.

Drouin Q.C. for the appellants Rolland and others. The Caisse d'Economie is governed by statute law and has no powers other than those conferred by statute. Brice on *Ultra Vires* (1); *Ashbury Railway Co.* v. *Riche* (2).

The pretended loan is a radical nullity affecting public order. Brice on *Ultra Vires* (3); Arts. 989 and 990 C. C. And see *Bank of Toronto* v. *Perkins* (4); *Bank of Montreal* v. *Geddes* (5).

The contract being contrary to public order the bank cannot enforce payment any more than it could claim performance if it were executory. 31 Demolombe (6); Troplong (7); Pothier (8); Aubry & Rau (9).

(1) 3rd ed. p. 27.
(2) L. R. 7 H. L. 653.
(3) 3rd ed. p. 37 et seq.
(4) 8 Can. S. C. R. 603.
(5) 3 Legal News 146.
(6) Pp. 335 337.
(7) 3 Louage No. 818.
(8) Obligations nos. 43, 45.
(9) Vol. 1 p. 118.

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Langelier Q.C. and *Fitzpatrick* Q.C. for La Caisse d'Economie. Whether or not the loan was *ultra vires* is immaterial. There was an advance by the bank to Langlais which created a valid debt, and the courts will not aid the debtor to repudiate it. *Bank of Australasia* v. *Cherry* (1); *Ayers* v. *South Australian Banking Co.* (2); *Grant* v. *La Banque Nationale* (3).

The creditors are in no different position than Langlais would have been if sued personally. *Tourville* v. *Valentine* (4).

The judgment of the court was delivered by:

TASCHEREAU J.—The principal appeal must fail. I would have dismissed it at the hearing, without calling on the respondent. Such an attempt to plunder this bank in the name of public order and public policy, such a self-constituted championship of public interests in order to defeat a legitimate claim, cannot receive the countenance of a court of justice. The appellants' contention that Langlais received no legal consideration for his undertaking to pay the bank the sum of $82,500, with interest, is to me an astonishing one.

Was not the good, legal coin to that amount (less discount) advanced to him by the bank, a consideration? And a most valid and substantial one? On a contract of loan (*mutuum*) the thing lent is the consideration for the borrower's promise to pay, the *cur promisit* as Demolombe calls it (5). And in the case of a loan of money, the use and enjoyment of the amount lent for the time agreed upon is the consideration for the payment of the interest in addition to the amount lent. The word "consideration," I may here notice, in arts. 989 and 990 of the Quebec Code, is clearer than

(1) L. R. 3 P. C. 299.
(2) L. R. 3 P. C. 548.
(3) 9 O. R. 411.
(4) Q. R. 2 Q. B. 588.
(5) 24 Demol. nos. 346, 350, 354.

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the word "*cause*" in the corresponding articles of the French Code.

Assuming that the bank had not the power to lend him that money, did not Langlais, nevertheless, receive, as a matter of fact, a good and valid consideration for his promise to pay both capital and interest?

Can he say that he gave his note without consideration, or for an illegal consideration?

Is it not the converse, and he, or the appellants for him, who want to pocket over $82,000 of the bank's funds, without ever having given any consideration for it to the bank?

He gave his note for value received. Did he not receive this value? Is there anything illegal in his promise to pay it back? The illegality, it is plain, would be the other way; he would, if the appellants' contentions prevailed, have got richer by $82,500 to the clear detriment of the bank.

Then there is no direct prohibition in the statutory provision affecting this case, as there was in *Bank of Toronto* v. *Perkins* (1); and nullities of the nature of those in question in that case must be restricted to the narrowest limits. Solon, Nullites (2); *Duncomb* v. *N. Y. Housatonic and N. Rd. Co.* (3); *Sistare* v. *Best* (4). But, say the appellants, the statute does not empower the bank to effect loans on the pledge of such securities as those taken from Langlais, and consequently it acted *ultra vires* in the matter.

But assuming this to be so, that might perhaps affect the pledge as regards third parties interested in the securities pledged, but it does not bear in the least upon Langlais' contract to pay; and the appellants cannot avail themselves of it to repudiate Langlais' liability towards the bank.

(1) 8 Can. S. C. R. 603.
(2) Vol. 1 nos. 307, 314, 431, 435.
(3) 84 N. Y. 190.
(4) 88 N. Y. 527.

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The contract of loan and the contract of pledge, are so far reciprocally independent that one may stand and the other fall. They are separable contracts. See per Miller J., *National Bank* v. *Matthews* (1).

A borrower cannot be allowed to cheat his lender, under the pretext that the lender had not the power to loan. Such a plea does not lie in his mouth; he is estopped from relying upon it: *il n'a pas de qualité pour s'en prévaloir.* "*Pas de nullité sans griefs*," says Solon, Nullités (2). Still less, would I say, "*de nullité*," to cover a glaring fraud.

The proposition laid down in Randolph (3), that "One who borrows money from a corporation cannot in his own defence question its power to lend," is based on principles which must necessarily prevail through all the civilized world.

And, as put by Sedgwick on Stat. Constr. (4):

> Where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains.

The appellants' case rests on a fallacy. They assume as law the untenable proposition that the *ultra vires* act of the bank, always assuming that *ultra vires* there was in lending this money to Langlais, is, by itself and *ipso facto*, a radical nullity of public order of such a character as to disentitle the bank, under arts. 989 and 990 C. C., to claim it back, and free Langlais for ever from his contract to repay it.

Pothier (5), speaking of a case where a lender had no right to lend, says:

(1) 98 U. S. 621.
(2) Vol. 1, No. 407.
(3) Vol. 1, par. 333.
(4) 2 ed. vol. 2, p. 73.
(5) Du prêt de consomption, nos. 5 and 21.

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Néanmoins, si de fait l'emprunteur a de bonne foi consommé l'argent ou les autres choses qu'il a reçues, cette consomption supplée à ce qui manquait à la validité du contrat, et oblige l'emprunteur envers le prêteur, à la restitution d'une pareille somme ou quantité que celle qu'il a recue, de la même manière que si le contrat eut en toute sa perfection. * * * La consomption qu'en fait l'emprunteur répare le vice qui naît de l'incapacité que le prêteur avait de contracter ou d'aliéner.

And in the case of the loan of a thing not belonging to the lender, where the borrower has had the delivery of the thing lent, the contract is perfectly good between the lender and the borrower. The owner is the only party entitled to complain (1).

On the same, or kindred principles, a depositary is estopped from controverting the depositor's title (2), an agent is precluded from questioning his principal's title to the subject matter of the agency, a bailee of any kind from disputing his bailor's rights, and a lessee from disputing the title of his landlord to the premises demised. If Langlais had leased a house from the bank, he could not refuse to pay the rent on the ground that the bank is not, by its charter, empowered to own real estate, supposing that to be so. And, even where by its charter a corporation is not empowered to contract but under seal, yet, where a contract, within the purposes for which it has been created, has been executed and the corporation has received the benefit of it, it is not permitted to claim exemption from liability upon the ground that the contract was not under the corporate seal (3).

Some modern writers seem to controvert Pothier's views as expressed in the passage I have quoted; (it seems to be thought a mark of distinction nowadays,

(1) Pothier, Idem. no. 34; 26 Laurent, nos. 494, 497, 498; Gillouard, prêt, nos. 75 à 78; 6 Boil. 398.

(2) 27 Laurent, no. 84; Guillouard, dépôt, no. 32; arts. 1800, 1808 C. C.

(3) *Bernardin* v. *North Dufferin*, 19 Can. S. C. R. 581.

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among a certain class of writers in France, to controvert Pothier). But we adopt his opinion as a correct exposition of the law. Then, no book goes to the length of saying that the borrower is at liberty to avail himself of his lender's legal incapacities, of whatever nature, in order to repudiate the repayment of the loan, when the lender's part of the contract has been executed by the delivery of the thing lent to the borrower, and its consumption by him. Of all the possible pleas to an action *ex mutuo* (1), the appellants have the merit of having found a novel one. That is the only merit of their case.

It is an incontrovertible proposition that no private individual has the right to institute legal proceedings against a corporation, on account of *ultra vires* acts of the said corporation, however great the detriment caused by these acts to the public or to others than himself, unless he has, himself, been personally damnified.

Now, as a general rule, what cannot be used as a weapon cannot be resorted to as a shield, and any one who has incurred liabilities under an executed contract with a corporation of which he has got the benefit, cannot get rid of his liabilities on the sole ground that the corporation acted in the matter beyond its powers, though within the purposes for which it was created, unless he has a legitimate interest to do so, or has suffered, or is exposed to suffer, from the alleged infringement of the corporation's charter.

And here, not only has Langlais not suffered any prejudice or been damnified in any way by the act of the bank, but it is to damnify the bank and burden it with the loss of over $80,000 that, in the name of public order and public interests, he, or the appellants for him, impugn his dealing with the bank as *ultra vires* in

(1) Pothier, prêt, no. 47.

order to repudiate his promise to pay, after having had the full benefit of the contract. A more flagrant misapplication of the doctrine of *ultra vires*, it is hardly possible to conceive. If the bank had lent this money to Langlais without any security whatever, the appellants would contend, forsooth, that Langlais was not bound to repay it, because the bank is not authorized to lend without security; they would contend that a party can go to a bank, get his note discounted, and at maturity refuse to pay it on the ground that the bank had no authority to advance him that money, and had acted beyond its statutory powers in doing so.

They were not able, as might be expected, to find any authorities to support their contentions, though their case was presented to us with great ability and learning. Those they cited have no application. *Collins* v. *Blantern* (1), and that class of cases under the English law, are clearly distinguishable, and the authorities under the French law do not give them more assistance.

And it is not merely the contract of loan that Langlais, and the appellants for him, are precluded from impugning. The pledge itself of these securities, likewise, they cannot be admitted to assail. For, Langlais is, in law, the warrantor of the bank upon this contract of pledge; a pledge implies a warranty from the pledger, and even if these securities had not belonged to Langlais, yet this pledge would have been perfectly valid as between him and the bank (2). Now, though here the alleged incapacity to contract is in the pledgee, the rule still applies, it seems to me, that as pledger, Langlais cannot impeach the contract of pledge on the ground of that incapacity. He is presumed in law to have known of that incapacity when

(1) 1 Sm. Lead. Cas. 9 ed. 398. (2) Pothier, Nantissement, nos. 7, 27.

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he effected this loan. And had he, on any ground whatever, even for nullity of public order, if any such nullity there be, at any time claimed the restitution of the securities pledged, he never could have obtained it, in the terms of art. 1975 C.C., until full payment in principal, interest, and costs of his note to the bank. And, on the other hand, upon such payment, the bank would have been bound to return the pledge to him, and would never have had the right to refuse to do so on the ground that their contract of pledge with him was null for reasons of public policy, as *ultra vires* on their part.

Their attempt to prove that Langlais had not benefited from this loan was rightly checked by the Superior Court. The bank was not bound to see what disposition Langlais made of this money. He had the *jus utendi et abutendi* over it; it is, for the lender, a matter of total indifference whether the borrower doubles the amount lent, or keeps it idle, or throws it in the river. As to the appellants' contention, that as creditors they have the right to invoke the nullity of their debtor's contract in the matter, though their debtor himself might not have had the right to do so, it has been correctly rejected by the two courts below. There is no foundation for it in this case. Unquestionably, in cases of fraud, and of contracts made in fraud of creditors, the curator's or assignee's and creditors' interests are adverse to those of the insolvent, and they do not represent him when acting to set aside his fraudulent dealings; but here, there is nothing of the kind; and the appellants have no other rights than those their debtor himself had; and the rule that "aequum est neminem cum alterius detrimento fieri locupletiorem" applies to them as it did to their debtor. His insolvency has substituted them to all his rights, but they must, with his rights, bear the burden

of his liabilities. They are seized with his estate, but *cum onere*. That estate is the common pledge of what is due to the bank by Langlais, as it is of what is due to themselves; they are on an equal footing.

The appellants' contestation of the bank's claim was, in my opinion, rightly dismissed with costs *in toto* by the Superior Court, whose judgment must be restored.

Appeal dismissed with costs. Cross-appeal allowed with costs. Costs in Queen's Bench against appellants.

Appeal dismissed with costs and cross-appeal allowed with costs.

Solicitor for Rolland, *et al.*: *F. X. Drouin.*

Solicitors for La Caisse d'Economie: *Hamel, Tessier & Tessier.*