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*March 1.
*June 15.

THE ONTARIO BANK.....APPELLANT;

AND

CHARLES B. McALLISTER AND JANE B. McALLISTER.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Banking—Security for debt—Assignment of lease—Transfer of business—Operation of bank—R.S.C. [1906] *c.* 29, *s.* 76, *s.s.* 1(*d*) *and* 2(*a*), *s.* 81.

By section 76, sub-section 1(*d*) of "The Bank Act" (R.S.C. [1906] ch. 29), a bank may "engage in and carry on such business generally as appertains to the business of banking"; by sub-section 2(*a*) it shall not "either directly or indirectly * * * engage or be engaged in any trade or business whatsoever"; section 81 authorizes the purchase of land in certain cases of which a direct voluntary conveyance by the owner is not one.

Held, affirming the judgment of the Court of Appeal (17 Ont. L.R. 145), Duff and Anglin JJ. dissenting, that these provisions of the Act do not prevent a bank from agreeing to take in payment of a debt from a customer an assignment of a lease of the latter's business premises and to carry on the business for a time with a view to disposing of it as a going concern at the earliest possible moment.

APPEAL from a decision of the Court of Appeal for Ontario(1), reversing the judgment of a Divisional Court and restoring that at the trial in favour of the respondent.

The respondents carried on business in Peterborough as millers under the name of The McAllister Milling Co., leasing their premises from the Peterborough Hydraulic Power Co. at a rental of $3,000 per

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 17 Ont. L.R. 145; sub nom. *Peterborough Hydraulic Power Co.* v. *McAllister.*

annum. The McAllister Co. was heavily indebted to the Ontario Bank, and being unable to pay the following agreements were entered into.

MEMORANDUM OF AGREEMENT entered into the 19th day of September, 1905.

BETWEEN:

THE MCALLISTER MILLING COMPANY, hereinafter called the Company, of the one part, and:

THE ONTARIO BANK, hereinafter called the Bank, of the other part.

Whereas the Company are indebted to the Bank in the sum of $69,200 as part security for which sum the Bank hold a lien under section 74 of the "Bank Act" upon the goods and merchandise of the Company, and also an assignment of all the Company's book debts and other claims, as well as an assignment of a policy on the life of Charles Balmer McAllister, and the Company are unable to pay the Bank in full;

And whereas it has been agreed that upon payment by the Company to the Bank of the sum of $10,000 and the absolute surrender of all its assets, the Bank assuming payment of certain liabilities as set out in the memorandum attached, the Bank shall release the Company and the individuals thereof from all further liability in respect of said indebtedness.

Now, therefore, it is mutually agreed between the parties hereto as follows:

1. The Company hereby surrender to the Bank all their right, title and interest in the assets of the Company as well as in the said policy on the life of Charles Balmer McAllister and agree to assign to the Bank their lease of the Otonabee Mills as well as all claims to damages which they have against The Peterborough

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Hydraulic Power Company and The American Cereal Company and they authorize the Bank to bring such action or actions in their names as may be necessary to recover said damages, the Bank agreeing to indemnify them in respect of all costs relating to the same.

2. The Company shall forthwith pay to the Bank the sum of $10,000, the Bank assuming the payment of certain of the Company's liabilities as particularly set out in the memorandum hereto attached, and will honour the Company's cheques when issued in payment of such liabilities, the intention of this arrangement being that the settlement should be so carried out as not to injure the credit of the said Company or members thereof.

3. The Company and the individual members thereof agree to execute to the Bank such further assignments and assurances as may be necessary to vest in the Bank all of the said assets and policy of assurance.

4. It is hereby expressly agreed that the interest of Jennie B. McAllister in the Lakefield Milling Company is not intended to be transferred or pass to the Bank under this agreement and is not part of the assets of the said Company.

5. In consideration whereof the Bank shall forthwith release the Company and the individual members thereof from all further liability in respect of their said indebtedness to the Bank, and in the event of the said business being hereafter carried on in the name of the said Company as provided in the agreement bearing even date herewith between the Bank and Charles Balmer McAllister or in any similar way the Bank hereby agrees to indemnify the said Company and the

individual members thereof against any and all liabilities then or thereby incurred.

IN WITNESS WHEREOF the said parties have hereunto set their hands.

THE MCALLISTER MILLING CO.,
C. B. McAllister,
J. B. McAllister.

ONTARIO BANK,
John Crane, *Manager.*

Witness:
A. P. POUSSETTE.

MEMORANDUM OF AGREEMENT entered into the 19th day of September, 1905.

BETWEEN:

CHARLES BALMER MCALLISTER, of the McAllister Milling Company, hereinafter called the Company, of the one part, and:

THE ONTARIO BANK, hereinafter called the Bank, of the other part.

Whereas the Company are indebted to the Bank in the sum of $69,200 as part security for which sum the Bank hold a lien under section 74 of the "Bank Act" upon the goods and merchandise of the Company, and also an assignment of all the Company's book debts and other claims, and the Company are unable to pay the Bank in full.

And whereas it has been agreed between the Company and the Bank that for the consideration of $10,000 to be paid to the Bank and the absolute assignment to the Bank of all the Company's assets, the Bank shall release the Company and the individuals thereof from all further liability.

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And whereas for the more convenient liquidation of the said assets and with a view to disposing of the Company's business as a going concern, it has been deemed advisable and has been agreed to enter into the arrangement hereinafter expressed.

Now therefore it is mutually agreed between the parties hereto as follows:

1. Mr. C. B. McAllister shall continue to carry on the said business under the name of the McAllister Milling Company and to manage the same as a going concern, curtailing expenses as far as possible, and collecting the book debts and other claims so that within a short period the amount due to the Bank may be reduced to the lowest dimensions, having in view the intention to dispose of the Company's business as a going concern at the earliest date possible.

2. For his services in this behalf Mr. McAllister shall be allowed out of the business a salary at the rate of one thousand dollars per annum, payable weekly, and he shall not draw any larger sum out of the business.

3. The business shall be under the supervision of Mr. John Crane, manager of the Bank, who shall have constant access to the Company's books and to whom Mr. McAllister shall be accountable for all transactions, but the said McAllister shall not be responsible for any error of judgment in the management of the said business or for any loss or losses incurred thereby.

4. And the said Bank agrees to indemnify the said Company and the members thereof against any liabilities incurred while the business is being continued in the Company's name, as hereinbefore provided.

5. The said Charles B. McAllister agrees that at any time the Bank may desire, he will, if possible, effect an insurance or insurances upon his life in some company or companies selected by the Bank to such extent as the Bank shall name and will from time to time absolutely assign the policy or policies therefor to the Bank—the said Bank being alone responsible for all premiums in respect of same.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands.

C. B. MCALLISTER,
ONTARIO BANK,
John Crane, *Mgr.*

Witness:
A. P. POUSSETTE.

THIS INDENTURE. made the nineteenth day of September, in the year of our Lord one thousand nine hundred and five.

BETWEEN:

THE ONTARIO BANK, of the first part; and

CHARLES BALMER MCALLISTER and JENNIE B. MCALLISTER, trading in co-partnership under the style of the "McAllister Milling Company" as well in their individual as in their partnership capacity, of the second part.

Whereas the parties of the second part are indebted to the parties of the first part in the sum of $69,200 and being unable to pay the full amount of their indebtedness have by instrument bearing even date herewith surrendered to the parties of the first part all their firm assets and have also paid to the parties of the first part the sum of $10,000 in consideration that

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the parties of the first part would release them individually as well as their said firm from all liabilities.

And whereas, there have been divers accounts, dealings, and transactions between the said parties hereto respectively, all of which have now been finally adjusted, settled, and disposed of: and the said parties hereto have respectively agreed to give to each other the mutual releases and discharges hereinafter contained in manner hereinafter expressed.

Now, therefore, these presents witness, that in consideration of the premises and of the sum of one dollar, of lawful money of Canada to each of them, the said parties hereto respectively paid by the other of them at or before the sealing and delivery hereof (the receipt whereof is hereby acknowledged), each of them the said parties hereto respectively, doth hereby for themselves, their successors and assigns, and for himself and herself respectively, his and her respective heirs, executors, administrators, and assigns, remise, release, and forever acquit and discharge the other of them, their successors and assigns, his and her heirs, executors, administrators and assigns, and all his her and their lands and tenements, goods, chattels, estate and effects respectively whatsoever and wheresoever, of and from all debts, sum and sums of money, accounts, reckonings, actions, suits, cause and causes of action and suit, claims and demands whatsoever, either at law or in equity, or otherwise howsoever, which either of the said parties now have, or has, or ever had, or might or could have against the other of them, on any account whatsoever, of and concerning any matter cause or thing whatsoever between them, the said parties hereto respectively, from the beginning of the world down to the day of the date of these presents.

IN WITNESS WHEREOF, the said parties hereto of the first part have hereunto affixed their corporate seal as testified by the hands of their proper officers in that behalf.

Signed, Sealed and Delivered in the presence of

For the Ontario Bank,
C. MCGILL,
General Manager.
[Seal.]

The respondents also executed a power of attorney to the local manager of the bank to execute for them an assignment of the lease which, however, was never acted upon.

The milling business was carried on under said agreements until the bank became insolvent in 1906, when the stock in hand was sold and the premises abandoned. The lease had then over six years to run and the lessors brought action against the respondents for a gale of rent accruing due after such abandonment of possession, and the bank, which had paid it up to that time, was called in as a third party to indemnify respondents. The lessors obtained judgment and an issue was tried between respondents and the bank, the latter setting up several defences against the claim to indemnity, especially the following.

That the said agreements, except the release, not being under its corporate seal were never executed by the bank.

That if executed the indemnity by the bank only covered existing liabilities and did not extend to future rent for which the bank was not otherwise liable having never accepted an assignment of the lease.

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That the agreement to accept an assignment of the lease and carry on the business was contrary to the provisions of the "Bank Act" and void.

That the respondents' claim for rent was barred by the mutual release executed by them and the bank.

The Chancellor who tried the issue gave judgment against the bank which was reversed by the Divisional Court, but restored by the Court of Appeal.

Morine K.C. and *McKelcan* for the appellant. The McAllister Co. agreed to assign the lease but the bank did not agree to accept an assignment, and none having been executed the bank is not bound. See *Dawes* v. *Tredwell*(1); *Ramsden* v. *Smith*(2).

An agreement to assign is not equivalent to an assignment, nor does it necessarily mean to assign the legal title. *Manchester Brewery Co.* v. *Coombs*(3), at page 617, commenting on *Walsh* v. *Lonsdale*(4).

The effect of the judgment of the Court of Appeal is to enforce specific performance of part of a contract which is not permissible and of an unlawful contract which is still less permissible. See *National Bank of Australasia* v. *Cherry*(5); *Small* v. *Smith*(6).

Nesbitt K.C. and *D. O'Connell* for the respondents. Under section 76 of the "Bank Act" the Ontario Bank had power to enter into this agreement. And see *First National Bank of Charlotte* v. *National Exchange Bank of Baltimore*(7); *Royal Bank of India's Case* (8); *Exchange Bank of Canada* v. *Fletcher*(9).

(1) 18 Ch. D. 354.
(2) 2 Drew. 298.
(3) [1901] 2 Ch. 608.
(4) 21 Ch. D. 9.
(5) L.R. 3 P.C. 299, at p. 307.
(6) 10 App. Cas. 119.
(7) 92 U.S.R. 122.
(8) 4 Ch. App. 252.
(9) 19 Can. S.C.R. 278, at p. 286.

As to the agreement to assign see *Hanson* v. *Stevenson*(1).

THE CHIEF JUSTICE.—I would dismiss this appeal with costs for the reasons given by Mr. Justice Osler in the Court of Appeal.

The intention of the parties as evidenced by the three agreements was to substitute an assignment of all the assets of the McAllister Co. for the lien which the bank then held. The bank undertook in consideration of this assignment and of the money payment of $10,000 to discharge the company from all liability and in addition assumed the payment of certain disclosed accounts due to third parties, which apparently included all the business liabilities of the respondents. To liquidate these assets, or to dispose of the business as a "going concern" to advantage, as the bank then contemplated doing, it was necessary to secure the use of the premises in which the milling business was being carried on; and not content with the assignment of the lease which in the circumstances should be considered as included in the assignment of the assets, it was specially stipulated that the company should surrender or assign the lease. It was further found as a fact by the trial judge that the bank entered into possession of the premises, paid the rent for the period of their occupation and obtained, through the company, the lessor's consent for the assignment of the lease for its full term. In these circumstances, I do not understand how the bank could hope to escape liability.

With respect to the alleged violation of the section of the "Bank Act" which prohibits trafficing in or carrying on the business of buying and selling goods,

(1) 1 B. & Ald. 303.

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wares and merchandise, this was an isolated transaction entered into to enable the bank to realize the amount of an indebtedness which had been legally contracted and anything done for that purpose cannot affect the legality of the transaction under which the bank acquired the assets of the company and assumed its obligation under the lease.

DAVIES J.—Two main questions were argued upon this appeal. One was that an agreement to assign the lease in question to the bank without any actual or legal assignment of the lease did not involve an obligation on the bank's part to indemnify McAllister from liability for future rent. We are all of the opinion, however, concurring in that of the Appeal Court of Ontario and of the Chancellor, as stated during the argument, that considering the real nature of the transaction and the actual facts which were intended to occur and did occur, such an agreement to indemnify McAllister against any liability for future rent on the covenants of the lease would be implied.

The principal contention of Mr. Morine, however, was that the bank could not legally take or agree to take an absolute assignment of this lease of the McAllister milling property and the assets of the milling firm because the transaction as evidenced by the several agreements entered into by the parties contemplated expressly the carrying on of the milling business by the bank as a "going concern" for an undefined period, or as expressed in the documents "until the bank could sell and dispose of it as such going concern"; that any such transaction was *ultra vires* of the bank, and in fact a direct violation of the specific provisions of the "Bank Act."

I confess that I have had great difficulty in making

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up my mind whether or no the transaction now impeached as *ultra vires* of the bank was so or not. I am even yet by no means free from doubt, but my conclusion is that, considering its real nature, object and purpose, the impeached transaction may be held to be one of those which may be fairly and reasonably implied as being within the general powers given to the bank by sub-section (*d*) of section 76 of the "Bank Act," and as not being within the excepted prohibitions contained in sub-section 2 (*a*) of that section.

The section reads:

The bank may * * * * * * * * * *

(*d*) engage in and carry on such business generally as appertains to the business of banking.

(2) Except as authorized by this Act the bank shall not, either directly or indirectly,—

(*a*) deal in the buying or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever.

I concede that in order to sustain my conclusion of law I am bound to bring the impeached transaction within the enabling clause and to exclude it from the prohibitory clause of the section.

But I am not bound to shew express words in the statute conferring upon the bank all the powers which it may lawfully use to carry out its legitimate objects or purposes. It is quite sufficient if I can shew they may be derived by fair and reasonable implication from the provisions of the Act and have not been expressly prohibited or excluded from the general powers conferred. That is the law, as I understand it, as laid down in *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1); *Attorney-General* v. *Great Eastern Railway Co.*(2), and *Baroness Wenlock* v. *River Dee Co.*(3).

(1) L.R. 7 H.L. 653. (2) 5 App. Cas. 473.
(3) 10 App. Cas. 354, at p. 362.

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In agreeing to take over the lease and milling business as a "going concern" for a limited time in order to dispose of it to some advantage the bank may be said to have violated in a literal sense the prohibition in the latter part of sub-section 2 (*a*) against engaging in any business whatever. But if the general powers of the bank of engaging in and carrying on "such business generally as appertains to the business of banking" given by sub-section (*d*) are large enough and broad enough to cover such a transaction as that now under discussion, of course it would not come within the prohibitory clause even though the words of that clause literally applied might cover it.

Banks, from the very nature of the business they are expressly authorized to carry on, must necessarily loan to customers and others large amounts of money and frequently find themselves with debts owing to them by persons who are insolvent or unable to pay. The assets of such debtors may, in this country at any rate, consist in part of a "going concern," valuable as such, but of little value if wound up by sale under execution or mortgage, or they may consist of perishable goods on the way to a market or logs cut on timber limits ready to be floated down the river to market or mill, or in process of such flotation.

Such debtors may be quite willing to hand over all their assets to the bank absolutely in compromise or settlement of their indebtedness. To compel the parties to resort in every case to the strict statutory methods permitted of taking security and afterwards realizing on it in due legal form, might in many cases cause great loss without any apparent reason. Perishable goods might not be disposable while on the way to a market except at ruinous loss, and the same may be

said of logs being floated to their mill or market. If the "Bank Act" means that the bank may not take over and accept absolutely in payment of its debt the real and personal property of its debtor, but must in all cases first take security upon it and realize afterwards on such security, there is an end to the argument. No possible loss which may follow the prescribed course can avail the parties. But it does not appear to me the "Bank Act" does say so. There is nothing in the Act which says that though all parties may agree that

> the simplest and least costly way of closing out a hopeless account is to give the debtor an immediate release in consideration of a direct transfer of his property,

such a settlement must necessarily be declared *ultra vires*.

It seems to me that in all such cases it must be a question of fact to be determined by the court on the special circumstances of each case whether there was or was not a violation of the prohibition of sub-section 2 (*a*) against dealing in the buying or selling, or bartering of goods or being engaged in any business whatever; or whether the substance of the transaction was not rather and really a *bonâ fide* compromise or settlement of a debt due the bank, although such settlement or compromise might incidentally involve, in one sense, a buying or selling or an engaging in business. But where the substance of the transaction is found to be a *bonâ fide* compromise or settlement of a past due debt, as under the facts and circumstances I would hold the transaction in question in this case to be, then it seems to me it might fairly be claimed as impliedly authorized by the sub-section (*d*) of section 76, even though

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solely to avoid enormous loss it may involve, as in this case it did, the running of the mill as a "going concern" for what would be deemed a reasonable time in order to dispose of it without ruinous loss.

A strong argument was made against the legality of such an absolute assignment of the milling property and assets of the McAllister Company as was taken by the bank in this case arising out of the 80th, 81st and 82nd sections of the Act, which authorize the bank to take mortgages and hypothecs of realty and personalty as *additional security* for past due debts, and enable it to purchase any real or immovable property offered for sale under execution, etc., or by a prior mortgagee, or by the bank itself under a power of sale, and so enable the bank to acquire an absolute title in lands mortgaged to it either by release or sale or foreclosure of the equity of redemption.

These sections are enabling ones and are intended to confer upon the bank reasonable and necessary powers to take mortgages and hypothecs from their debtors by

> way of *additional security* for debts contracted to the bank in the course of its business,

and to realize upon such mortgages by foreclosure or sale, and acquire and hold the absolute title "either by obtaining a release of the equity of redemption" or otherwise. Their purpose and object was to enable the banks to take and realize *securities* for debts contracted to them. They did not relate to cases where the bank was compromising its debt and accepting something from the debtor in absolute discharge. They should not be construed as being exhaustive of the bank's powers or methods of realizing payment or satisfaction from its debtor's property of the debt due

to the bank, or as taking away from the banks by implication any powers which they might reasonably be held to have arising out of the power to

engage in and carry on such business generally as appertains to the business of banking.

They are not prohibitive sections in any way, but enabling only, and while I recognize the strength and force of the argument as to the intention of the legislature to be derived from them, I am not, on my construction of sub-section (*d*) of section 76 and the powers reasonably to be implied from it, able to say that real or personal property may not be taken by the bank in *absolute payment and discharge of its debt* from an impecunious or defaulting debtor, notwithstanding those sections which provide for the manner in which additional *security* may be taken and realized upon for debts due the bank not by way of compromise and discharge. Banking business in Canada must from the very circumstances of the case, I should imagine, be conducted upon a broader and somewhat more elastic basis than in fully developed business communities such as Great Britain, and in construing the powers conferred upon banks to carry on

such business generally as appertains to the business of banking

it is fair that Canadian conditions should be fully considered and allowed for. Large advances must be made from time to time to lumbermen, fishermen and traders of different kinds to enable them to cut, catch, win and market the natural products of the country and debts and risks necessarily incurred possibly greater than the more conservative systems of Great Britain would approve. It might in many circumstances be unjust and cause unnecessary and unrea-

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sonable loss to confine the banks to the "additional securities" clauses as the only way or means open to them to realize their debts.

In the case at bar I am not able to agree with one at least of the reasons upon which some of the judges of the Court of Appeal support their judgment, namely, that the carrying on of the milling business by the bank after it took over the property from Mr. McAllister was severable from the rest of the transaction between the parties. I think the transaction, as a whole, must stand or fall together. It was a substantive part of the agreement from the first that it should be carried on by the bank as a "going concern" under the management of Mr. McAllister, and it was so carried on. If that part of the agreement which, in my opinion, was substantive and essential is *ultra vires* of the bank, then I do not see how the other part can be upheld. In my judgment, however, as I have attempted to shew, the transaction as entered into by the parties and carried out by them can reasonably be supported by the implied powers arising out of their general banking business (sub-section (*d*), section 76), and as these implied powers are not controlled by any prohibitive section of the Act they are to be given effect to.

I would therefore dismiss the appeal with costs.

IDINGTON J.—The many phases of this case have been so fully and carefully dealt with in the court below that I do not feel as if I could add anything to the symposium of law it has given rise to.

It seems to me to have been the undoubted purpose of the parties that all the assets of the company, of which the lease in question no doubt was at one time a

highly valued part, should be transferred to the appellant, and in consideration of such transfer and an added sum of ten thousand dollars from respondents' friends given expressly to secure the release of respondents from the embarrassments in which they had got themselves involved the appellant was to see them effectually released.

It would be a most melancholy legal result if the law by its necessary operation should defeat the plain purpose of all concerned.

I cannot agree in any interpretation of the contract that would exclude the implication which the entire scope of the whole arrangement indicates to have been part and parcel of the bargain, irrespective of some considerations of minor import and the provisions there anent relied on to exclude the implication of liability in question herein.

The judgment of Mr. Justice Osler seems to me to cover so fully the views I hold and the whole of the matters necessary to be dealt with in the case that I cannot do better than assent thereto.

Since writing the foregoing, shortly after the argument, conflicting views in the court having been presented for consideration, I have re-examined the case. In the result I still agree with Mr. Justice Osler, but to guard against misapprehension of the range of his opinion as I conceive it (though his words may bear another meaning) I may add that I desire to reserve the right to review the question of *ultra vires* when, if ever, presented under different conditions of pleading but similar conditions of fact. I think the *ultra vires* aspect is not open to our consideration here.

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Paragraph 6 of appellant's defence, being the only part thereof that suggests any such questions as *ultra vires* or illegality, does not raise either point as distinctly as it should.

Every act or contract that is *ultra vires* is in a sense illegal. Every illegal act or contract is in a sense *ultra vires.*

Yet something done upon the faith of its being *intra vires* and proving *ultra vires* and hence failing of legal effect, merely for that reason, may be attendant with entirely different results from the same sort of thing done in violation of some legal prohibition either statutory or by virtue of the common law.

In the former case either party may, according to circumstances, have some right to relief; or to ask that conditional relief only be given to him setting up the *ultra vires* plea.

In the latter case neither can have relief if the defence of illegality be set up or has so developed in the trial of the case that the court must take notice of it.

Again, the wilful disregard of the limitations of the power of a corporation may render absolutely illegal that which, if entered into in good faith, might have been merely held and treated as *ultra vires.*

It is difficult to be quite sure what the defence as pleaded aimed at.

But the case is pre-eminently one wherein the plaintiffs were entitled if mere *ultra vires* is relied upon to have it so appear of record in order that they might seek such relief as the justice and facts of the case demand.

The pleading is followed in this late stage by the appellant in its counsel's factum in effect discarding

mere *ultra vires* by relying only upon the acquisition of the land or lease as and for the express purpose of carrying on a flour milling business.

This interpretation of the pleading I am entitled to take as covering all there is to complain of in the judgment below under the head of that plea.

Hence, I think mere *ultra vires* out of the case by this interpretation of the plea set up.

I think the issue as thus raised in the factum is all that is now open to the appellant and that Mr. Justice Osler's reasoning clearly disposes thereof.

It may be that these questions are identical in this case, but I think that is not so clear.

In such a case as we have here a most valuable term might be the only asset and so subject to conditions of assignment as only to be acquired by the will of the debtor.

I doubt if the "Bank Act" stands in the way of a bank, in such dire necessity, accepting a transfer of such an asset, to save a loss arising from a past due debt.

It seems to me that position can only be tenable if at all by construing the Act as prohibitive of any absolute transfer of property in consideration of discharge from the obligation due the bank.

There is enough in the language of the sections dealing with the subject in its various phases to make a plausible argument for such a contention. But it has not been pleaded or argued and possibly is not worthy of notice.

It seems to me as possibly the case that it can only be under some such necessity as arises, in cases like that before us, calling forth what may be called the reserve powers to be implied that the acquisition of

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absolute ownership, in consideration of discharge, can be tolerated, if at all; except in the way and under the circumstances expressly provided for.

I do not in this case think I am under the pleading and all other things that appear, either called upon or expected to decide the point.

I still adhere to Mr. Justice Osler's finding an implied power in a bank to grapple with such a condition of things as arose here and accept, as a solution thereof, the terms proposed, coupled with the acceptance of the transfer of a lease; and I accept his view of the severability of what was done from that which was a necessary part of the contract.

DUFF J. (dissenting).—In my view of this case the main question raised by the appeal is whether the transaction of September, 1905, was or was not *ultra vires* of the Ontario Bank. That bank is one of those named in Schedule A to the "Bank Act," R.S.C. 1906, and the following provision of that Act applies to it:

> 4. The charters or Acts of incorporation, and any Acts in amendment thereof, of the several banks enumerated in Schedule A to this Act are continued in force until the first day of July, one thousand nine hundred and eleven, so far as regards, as to each of such banks:
>
> (*a*) the incorporation and corporate name;
>
> (*b*) the amount of the authorized capital stock;
>
> (*c*) the amount of each share of such stock; and
>
> (*d*) the chief place of business;
>
> subject to the right of each of such banks to increase or reduce its authorized capital stock in the manner hereinafter provided.
>
> 2. *As to all other particulars this Act shall form and be the charter of each of the said banks until the first day of July, one thousand nine hundred and eleven.*

The principles therefore which govern the construction of the powers of statutory corporations are those which must be applied for the determination of the question at issue. These principles are stated in

two judgments in passages I will quote *in extenso;* the first from the judgment of Bowen L.J., in *Baroness Wenlock* v. *The River Dee Co.*(1), is as follows:

At common law a corporation created by the King's charter has *primâ facie*, and has been known to have ever since *Sutton's Hospital Case*(2), the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created. When you come to corporations created by statute, the question seems to me entirely different, and I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law, because that begs the question, and it not only begs the question, but it states what is an untruth, namely, that the statute does create a corporation at common law. It does nothing of the sort. It creates a statutory corporation, which may or may not be meant to possess all or more or less of the qualities with which a corporation at common law is endowed. Therefore, to say that you must assume that it has got everything which it would have at common law unless the statute takes it away is, I think, to travel on the wrong line of thought. What you have to do is to find out what this statutory creature is, and what it is meant to do, and to find out what the statutory creature is, you must look at the statute only, because there, and there alone, is found the definition of this new creature. It is no use to consider the question of whether you are going to classify under the head of common law corporations. Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look to the statute. The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had.

(1) 36 Ch. D. 674, at p. 685. (2) 10 Rep. 1, at p. 13.

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The second from the speech of Lord Macnaghten in *Amalgamated Society of Railway Servants* v. *Osborne* (1), at p. 94:

It is a broad and general principle that companies incorporated by statute for special purposes, and societies, whether incorporated or not, which owe their constitution and their status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purpose foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned.

The principle, I think, is nowhere stated more clearly than it is by Lord Watson, in *Baroness Wenlock* v. *River Dee Co.*(2), in the following passage: "Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act, and solely with a view to carrying those purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions." "That," adds his Lordship, "appears to me to be the principle recognized by this House in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (3), and in *Attorney-General* v. *Great Eastern Railway Co.* (4)."

And again at page 97:

The learned counsel for the appellants did not, as I understood their argument, venture to contend that the power which they claimed could be derived by reasonable implication from the language of the legislature. They said it was a power "incidental," "ancillary," or "conducive" to the purposes of trade unions. *If these rather loose expressions are meant to cover something beyond what may be found in the language which the legislature has used, all I can say is that, so far as I know, there is no foundation in principle or authority for the proposition involved in their use.* Lord Selborne no doubt did use the term "incidental" in a well-known passage in his judgment in *Attorney-General* v. *Great Eastern Railway Co.*(4). But Lord Watson certainly understood him to use it as equivalent to what might be derived by reasonable implication from the language of the Act to which the company owed its constitution; and Lord Selborne himself, to judge from his language in *Murray* v. *Scott*(5) could have meant nothing more.

(1) [1910] A.C. 87.
(2) 10 App. Cas. 354, at p. 362.
(3) L.R. 7 H.L. 653.
(4) 5 App. Cas. 473.
(5) 9 App. Cas. 519.

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The provisions by which are defined the business that a bank subject to the "Bank Act" is permitted to carry on and the powers exercisable by it in doing so, are found in the series of sections beginning with section 76 and headed "The Business and Powers of a Bank." The principal section is 76, which I quote verbatim:

The business and powers of a bank.

76. The bank may,—

(*a*) Open branches, agencies and offices;

(*b*) Engage in and carry on business as a dealer in gold and silver coin and bullion;

(*c*) Deal in, discount and lend money and make advances upon the security of and take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British, foreign and other public securities; and

(*d*) Engage in and carry on such business generally as appertains to the business of banking.

2. Except as authorized by this Act, the bank shall not, either directly or indirectly,—

(*a*) Deal in the buying or selling, or bartering of goods, wares and merchandise, or engage and be engaged in any trade or business whatsoever;

(*b*) Purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank; or

(*c*) Lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise.

The question before us conveniently subdivides itself into two: 1st: Does the transaction fall within the prohibition found in sub-section 2(*a*); and 2ndly: Can it, having regard to the provisions of the Act as a whole, be brought within sub-section 1(*d*)?

The relevant features of the transaction are these. The respondents owed the bank certain moneys which they were unable to pay. They were, however, engaged

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in grain buying and milling, holding their mill under a lease having some years to run; and they proposed to the bank that the bank should take over the business (assuming the existing liabilities) that the respondents should pay $10,000 and that they should be released from their liability. It was objected that the bank had no means of carrying on the business until a purchaser should be found when the respondents proposed that C. B. McAllister should carry it on for the bank for six months if necessary, and on that understanding the proposal was accepted. The substance of the completed arrangements was that the whole of the beneficial interest in the assets of the business should be vested in the bank and accepted by it in full payment; that the business should be carried on by C. B. McAllister for the bank in the old firm name in order to enable the bank to sell it as a going concern; and that the bank should indemnify the respondents in respect of all liabilities to which they might become subject by reason of the use of their names. No formal transfer of the lease was executed. It seems to me, however, to be too clear for argument that the respondents holding this lease for the benefit of a natural person *sui juris* under a like agreement would be entitled to indemnity in respect of their liability on the covenants of the lease; the sole question here being, as I have indicated, that concerning the effect of the provisions of the "Bank Act" as touching the powers of the bank in respect of such a transaction.

I think the applicant entitled to succeed on both branches of the question above stated.

The power of the bank to make the purchase and enter into the obligations entailed by it were chiefly

rested in the court below upon section 30, sub-section (*a*) of the "Interpretation Act" (R.S.C., 1906, ch. 1), which provides that

> 30. In every Act unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall,—
>
> (*a*) Vest in such corporation power to sue and be sued, to contract and be contracted with by their corporate name, to have a common seal, to alter or change the same at their pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purposes for which the corporation is constituted, and to alienate the same at pleasure,

and upon an authority said to be implied in the express grant of authority to carry on such business generally as "appertains to the business of banking." As to the first of these grounds I think it clear that the power to take and hold personalty and to sell it again is a power which can be exercised only in the course of and for the purpose of carrying out the objects of the corporation as defined in the Act from which it derives its powers, and that in its application to the "Bank Act" the clause just quoted adds nothing whatever to the powers expressed by or implied in section 76. Does then the authority to

> engage in and carry on such business generally as appertains to the business of banking,

as conferred by section 76, include the authority to take over a mercantile or other trading business in payment of a debt with the *bona fide* expectation that by carrying it on and selling it as a going concern a loss may be avoided?

Nobody argues that it is a part of the ordinary business of banking to buy a mercantile business either for cash or upon the consideration of the release of a debt. The question is whether such a transaction is justifiable by reason of the ex-

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ceptional circumstance that the debtor is unable to pay and that by taking over his business and carrying it on the bank may ultimately, by selling it, get more than it otherwise could get. I do not think in this case we are concerned with the question whether the belief of the bank's officers was well founded; there is nothing to indicate that the real object and purpose of the transaction was other than what the parties professed it was and its validity must be examined on that assumption.

Now, it is of course a part of the business of banking to make loans on personal security and to take steps to get them repaid. Does the authority to do this which by section 76(*d*) is, I think, expressly conferred as an integral part of the business of banking imply the authority to take specific property (of a kind the bank is not authorized to trade in) in payment in such circumstances as to involve the bank in the necessity of carrying on a distinct business in order to enable it to realize that property? Here let me recall the words of Lord Macnaghten quoted above from *Amalgamated Society of Railway Servants* v. *Osborne*(1), at page 97. The question then is: Can you derive the last mentioned power by reasonable implication from the first mentioned power? The test is not whether the second might be reasonably held to be convenient or conducive to the objects of the bank, but whether it is so necessary for the accomplishment of these objects that the legislature in conferring the first is to be held thereby to have conferred the second. (See last mentioned case at page 96.)

The statute itself provides specially for the taking of security as the normal course where debts already

(1) [1910] A.C. 87.

contracted are not paid; and for giving full effect to the security by taking over the property comprised by it where necessary. But the assumption of the debtor's property in satisfaction in the first instance does not appear to be contemplated; and since the same result might be accomplished through the taking of security (which is specially provided for) it is difficult to see how the power to take over such property except in cases where it is held as security can be said to be necessarily implied. It is not unimportant to observe that the power to take over mortgaged property in payment of the mortgage debt is not confined (as Garrow J. appears to have thought) to real property but is expressly made applicable to personal property as well.

Whatever might have been said respecting the effect of the sub-section standing alone it seems to me to be impossible to give it this effect when read together with the second subsection (*a*).

The only express exception is confined to cases which are "authorized by the Act" itself. It is, I think, an unwarrantable extension of the meaning of those words to say that such transactions as this — though not necessary — are convenient in the exercise of the business of banking and therefore "authorized by the Act."

The history of the legislation and of the judicial decisions confirms this view. Section 7 of 13 & 14 Vict. ch. 21, reads as follows:

> And be it enacted, that the business of banking shall, for the purposes of this Act, mean the making and issuing of bank notes, the dealing in gold and silver bullion and exchange, discounting of promissory notes, bills and negotiable securities, and such other trade as belongs legitimately to the business of banking, but any company or party who may lawfully exercise the business of banking under this Act, shall also have power to take and hold any property

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which shall have been *bonâ fide* mortgaged, hypothecated or pledged to such company or party, as security for debts previously incurred in the course of their lawful dealings as aforesaid, and sold under any writ, order or process of any court of law or equity and bought at such sale by the company or party, and to re-sell or otherwise alienate or dispose of the same; but except as aforesaid, no such company or party shall deal in the buying, selling or bartering of goods, wares or merchandise, or engage or be engaged in any trade whatever; and the word "bank" in this Act shall mean and include any company or party carrying on the business of banking under this Act, unless such meaning be inconsistent with the context.

Such transactions as the present were evidently not intended to make part of the business of banking under this definition. An Act passed in the same year, chapter 22, for the first time gave a general authority to incorporated banks to take security on personal as well as real property and thereafter to acquire the rights of the debtor in such property. But from the year 1840 to the present I have found not the slightest indication on the part of the legislature that such transactions as that under consideration were regarded as forming a part of the ordinary business of banking. In *Radford* v. *Merchants' Bank* (1), it was held that it was *ultra vires* for a bank to take over unfinished goods, finish them, and then sell them, with a view of preventing a loss in respect of a loan. Since the date of that decision (1893) the "Bank Act" has been several times re-enacted, but its relevant provisions have remained the same.

I cannot agree with the view that (for the purpose of determining the competence of the bank to enter into the transaction) you can separate the taking over of the business from the object and purpose of taking it over. The ultimate purpose was to realize the debt; but to do so by carrying on the business until it could be sold as a going concern. The

(1) 3 O.R. 529.

taking over of the business as a going concern for that purpose was plainly in my opinion an infringement of the prohibition against "dealing in buying and selling" unless as I have said it can be justified as a mere subsidiary transaction. That point I have just dealt with; but looking at the purchase as distinct from the arrangement to carry on, then (if I am right in the view that the prosecution of the business contemplated by the parties would, even in the special circumstances of this transaction, be within the prohibition) the transaction is clearly within that class of bargains which have been held to be invalid as entered into with the purpose by the one party known to the other of accomplishing an illegal object. Transactions entered into in contravention of section 76, sub-section 2(*a*), are of course not only *ultra vires*, but illegal in the narrower sense.

The rule is stated,—I venture to think correctly—in Pollock on Contracts (3 Am. ed.), at pages 485, 487, in these words:

> *Intention to put property purchased, etc., to unlawful use.* We have in the first place a well marked class of transactions where there is an agreement for the transfer of property or possession for a lawful consideration, but for the purpose of an unlawful use being made of it. All agreements incident to such a transaction are void; and it does not matter whether the unlawful purpose is in fact carried out or not. The later authorities shew that the agreement is void, not merely if the unlawful use of the subject-matter is part of the bargain, but if the intention of the one party so to use it is known to the other at the time of the agreement. Thus money lent to be used in an unlawful manner cannot be recovered. It is true that money lent to pay bets can be recovered, but that, as we have seen, is because there is nothing unlawful in either making a bet or paying it if lost, though the payment cannot be enforced. If goods are sold by a vendor who knows that the purchaser means to apply them to an illegal or immoral purpose, he cannot recover the price; it is the same of letting goods on hire. If a building is demised in order to be used in a manner forbidden by a building Act, the lessor cannot recover on any covenant in the lease. * * * It does not matter whether the seller or lessor does or does not expect to be paid out of the fruits of the illegal use of the property.

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Here the illegal purpose to carry on the business was not only known, but was participated in to this extent at least that, under the agreement, the bank acquired authority to carry on the business under the name of the vendors. There can be no doubt, I think, that for the purpose of applying this rule the distinction between *malum prohibitum* and *malum in se* has, to use the words of Best J., in *Bensley* v. *Bignold* (1), been long since exploded.

ANGLIN J. (dissenting).—The Ontario Bank having been found liable as a third party to indemnify the defendants, the original lessees, against the payment of rent, under a lease which they had agreed to assign to the bank, appeals to this court for relief on three grounds:

(*a*) That in the absence of an express undertaking the bank is not under any obligation to indemnify the defendants;

(*b*) That it is *ultra vires* of a bank to take from its debtor in payment or part satisfaction of his debt an assignment of leasehold premises; and

(*c*) That its agreement with them is illegal because it contemplates that the bank shall carry on a trade or business.

(*a*) By intimating to counsel for respondents that we did not desire to hear them on the first point, we expressed our concurrence in the judgment of the Court of Appeal for Ontario on that part of the case;

(*b*) The question as to the legality of the acquisition by the bank of the lease of their debtors has occasioned me some difficulty. The argument against it, based on the provisions of sections 79, 80(2), 81 and

(1) 5 B. & Ald. 335.

82 of the "Bank Act," is somewhat formidable. The statute confers upon banks, in respect of personal or movable property mortgaged to them the same rights, etc., as they are by the Act declared to have in respect to real or immovable property mortgaged to them (section 80(2)). They are expressly given special powers to purchase real or immovable property of their debtors sold under execution, in insolvency, under order or decree of a court, or by a prior mortgagee or by themselves under a power of sale (section 81). They are also expressly given power to take releases of equities of redemption and to foreclose mortgages held by them (section 82). The inquiry naturally suggests itself — if banks have the right to acquire such property directly from their debtors in satisfaction of debts due to them, why are these special powers conferred? The sections containing them appear to contemplate that, except

> for its actual use and occupation and the management of its business (section 79)

a bank shall acquire an absolute title only to real property which has been already mortgaged or hypothecated to it as security. Does this implication extend to personal or movable property?

In several of the authorities relied upon by the respondents in support of their contention that it does not so extend, we find that the banks there before the courts had express powers given them to take their debtors' property in payment. Thus in the case of the *First National Bank of Charlotte* v. *The National Exchange Bank of Baltimore*(1), the statute provided that real estate might be accepted in good faith as security for, or in payment of debts previ-

(1) 92 U.S.R. 122.

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ously contracted (p. 127); and in *Bank of New South Wales* v. *Campbell* (1), the banking company had the power to take, hold, etc., any lands, etc., in satisfaction, liquidation or discharge of, or in security for any debt due, or to become due (p. 192). Again in the *Royal Bank of India's Case* (2), much relied upon by the respondents, the bank merely took over the shares which had already been pledged to it as security. The only case cited at Bar in which, without express statutory authority, a bank was held entitled to take in payment of a debt due to it property upon which it had not previously held a mortgage or lien as security, is *Sacket's Harbour Bank* v. *Lewis County Bank* (3).

Counsel for the respondents also rely upon the provision of section 30(*a*) of the "Interpretation Act," R.S.C., ch. 1, that a corporation shall be vested with power

> to acquire and hold personal property or movables for the purposes for which the corporation is constituted, and alienate the same at pleasure.

Having regard to the words "for the purposes for which the corporation is constituted," I incline to the view that this statutory provision was not intended to enable a body corporate to acquire its debtor's property in payment of a debt, but was rather designed to enable it to take and hold personal property for purposes similar to those for which a bank is by section 79 of the "Bank Act" enabled to acquire real estate. At all events this provision of the "Interpretation Act" can add nothing to the powers conferred by the "Bank Act" itself, which defines the purposes for which banks

(1) 11 App. Cas. 192. (2) 4 Ch. App. 252.
(3) 11 Barb. (N.Y.) 213.

are constituted and the powers which Parliament intended they should possess and exercise.

The special provisions of sections 79, 81 and 82 relate, however, only to the acquisition of real or immovable property.

The defendants' leasehold was personalty; and as such the mortmain laws would not prevent the appellant bank acquiring it. Grant on Corporations, pages 127 *et seq.* and 614. All that is provided in the "Bank Act" with regard to personal property is that the bank shall have in respect of personal or movable property mortgaged or hypothecated to it the same rights, powers and privileges which it is by the Act declared to have in respect to real or immovable property mortgaged to it (section 80(2)). Except the inhibitions against dealing in the buying or selling or bartering of goods, wares and merchandise or engaging in any trade or business and against lending upon or dealing in the shares of its own capital stock or in the capital stock of any other bank, there is no express prohibition in the "Bank Act" against a bank acquiring personal or movable property. The express prohibition against dealing in goods, wares or merchandise, affords a cogent argument in support of the bank's right to acquire such property in a manner and under circumstances which do not constitute such a dealing, or to acquire other personal property in any manner.

Moreover, by first taking a mortgage from its debtors and then a release of their equity of redemption, the Ontario Bank could undoubtedly have acquired their property without departing from the very letter of the provisions of the "Bank Act," assuming that, by virtue of section 80(2), all that is expressed and implied in sections 79, 81 and 82 applies to per-

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sonal or movable property as well as to real property and that the presence of these sections in the Act (apart altogether from the provisions of the mortmain statutes) by implication excludes the right of a bank to acquire real or immovable property of its debtors in satisfaction or payment of their debts. The Ontario Bank has only done directly that which it might thus have done indirectly.

The good faith of its advances to the defendants not having been questioned and the honesty of its avowal that in acquiring their business and leasehold premises its sole purpose was, if possible, to avoid a loss and to endeavour to realize its claim against them by selling the business as a going concern not having been challenged, I am not prepared to hold that in the mere acquisition of the defendants' lease the bank violated the letter or the spirit of the "Bank Act." I should have been better satisfied, however, had I found in our "Bank Act" a provision explicitly conferring on our banks power to acquire their debtors' property in satisfaction of the banks' claims similar to that given to other banks mentioned in some of the cases to which I have alluded.

(*c*) The documents in evidence and the oral testimony admissible for that purpose, make it quite clear that the intent of the officers of the bank when acquiring the defendants' business and leasehold term, was to carry on the business for a time in order to sell it with the benefit of the lease as a going concern, and that this intention was well known by the defendants. It is too well established in English jurisprudence to admit of question that illegality of purpose on the part of one party to an agreement, known at the time it was made to the other party, is a fatal bar when the

latter seeks to enforce the agreement or any part of it, or any claim arising out of it. *Pearce* v. *Brooks*(1). The test of his right to recover is whether or not, in the presentation of his case, he must rely upon the tainted agreement as the basis of his claim. If so, he cannot succeed, because

> no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is clearly brought to the attention of the court, and if the person invoking the aid of the court is himself implicated in the illegality. *Scott* v. *Brown, Doering, McNab & Co.*(2).

By section 76(2) of the present "Bank Act" (section 64 of the Act of 1890) it is enacted that

> except as authorized by this Act, the bank shall not, either directly or indirectly,—
>
> (*a*) deal in the buying or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever.

It is suggested that, as subsidiary to the realization of its claim against the McAllisters, which was incurred in due course of banking, and under the power to

> engage in and carry on such business generally as pertains to the business of banking (section 76(1)(*d*)),

notwithstanding the explicit prohibition of sub-section 2 of section 76, it was lawful for the bank to carry on for a reasonable time the milling business acquired from the defendants, in order to dispose of it to the best advantage as a going concern. Had there been no prohibition such as that in clause (*a*) of sub-section 2 of section 76, I should doubt the sufficiency of such general words as those of clause (*d*) of sub-section 1 to authorize a bank to carry on any mercantile or manufacturing business. But having regard to the very drastic

(1) L.R. 1 Ex. 213. (2) [1892] 2 Q.B. 724, at p. 728.

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and comprehensive language in which the prohibition in clause (*a*) of sub-section 2 is couched, it would in my opinion require terms much more pointed and specific to bring the carrying on of such a business within the words of exception by which the prohibitory clause is introduced. If a bank might carry on a mercantile business to save itself from a loss where money loaned by it is in jeopardy, the prohibition of sub-section 2(*a*) would be practically removed from the statute. With respect, I am unable to concur in the view that engaging in a mercantile business for a reasonable time in order to prevent or minimize a loss is something which "appertains to the business of banking" and is permissible as subsidiary to the legitimate purpose of realizing a valid banking claim. Apart from the objection that this suggestion involves the introduction of the unsatisfactory test of "a reasonable time" for the determination of the legality or the illegality of engaging in any trade or business which a bank might deem it desirable to carry on, there is the still more formidable objection that in order to hold legitimate the bank's carrying on of the business for any period, however reasonable, we must qualify the absolute prohibition of section 76, (2) (*a*) by the addition of a proviso excluding from its operation a case which, as the prohibitory clause reads in the statute, is clearly within it. For this I can find no justification whatever its consequences — and in the present case I fully appreciated the hardship. I see no escape from the conclusion that the carrying on of the milling business of the bank was a prohibited engaging in trade or business.

Then it is suggested that the provisions made for carrying on the business are severable from the agreement to transfer the business and the lease. It is true

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that the actual engagement of C. B. McAllister by the bank for this purpose is evidenced by a separate document. But the reference to this document in the instrument of transfer itself sufficiently establishes the existence of the intent of the bank's officers to carry on the business and the knowledge of it by the defendants. McAllister's evidence shews that the provision for carrying on the business was part and parcel of the arrangement for taking it over, and was an inducement held out to the bank and practically a condition on which the McAllisters' offer was accepted. But if a case of actual participation in the illegal purpose is not made out — if upon the evidence this should be regarded merely as a case of illegal intent of one party known to the other, I am, with respect, unable to concur in the view that any real severability exists which would justify the court in holding that the agreement for the transfer of the lease and the consequent implied undertaking of the bank to indemnify the assignors against payment of future rent to accrue due thereunder were not affected by the taint of illegality infused into the entire arrangement by the known intent with which the bank officials entered into it. It matters not that the contemplated disregard of the prohibition of the "Bank Act" was merely a means to a lawful end — the realization of a valid claim. The legality of the end never hallows the use of illegal means to attain it.

If the contract were still wholly executory on the part of the bank, as parties not in *pari delicto,* because the prohibition of the statute is directed against the bank and it alone is penalized (section 146), the McAllisters might possibly have recovered the $10,000 paid the bank and have got their business and pro-

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perty back. *Williams* v. *Hedley*(1). But the fact that the contract is in its most substantial parts an executed contract, that the contemplated illegality has been consummated and that rescission is now impossible would prevent the granting of this questionable relief if it were sought. *Kearley* v. *Thomson*(2).

Again, if the right to indemnity, which the defendants assert, flowed simply from the fact that the leasehold term had become vested in the bank, as it probably had, *Ayers* v. *South Australian Banking Co.*(3); *Exchange Bank of Canada* v. *Fletcher*(4); the defendants' claim might be entertained because they would then not require to invoke the illegal transaction to make out their case. *Taylor* v. *Chester* (5). But it is, I fear, impossible for the defendants to escape from the position that their claim to indemnification rests entirely upon an implied term of the very contract by which the bank acquired the lease and business. As part of their case against the bank they must set up and prove that contract. As an integral part of that contract the implied stipulation for indemnification is vitiated as to the McAllisters by the illegality of the use to which the officials of the bank contemplated putting the property which formed the subject of the contract, because the McAllisters were fully cognizant of the purpose, if, indeed, they did not, as a term of the bargain, pledge their active assistance to the bank in accomplishing it.

Neither may the court refuse to give effect to the bank's plea of illegality on the ground that public policy will be advanced by refusing to permit it to take

(1) 8 East 378.
(2) 24 Q.B.D. 742.
(3) L.R. 3 P.C. 548, at p. 559.
(4) 19 Can. S.C.R. 278.
(5) L.R. 4. Q.B. 309, at p. 314.

advantage of its own misdeed. The hardship of the present case is that, having had the full benefit of the illegal contract, the bank now escapes liability and leaves the defendants to bear an incidental burden, its assumption of which was a material part of the consideration for which they transferred to it their business and paid $10,000 in addition. But this is a situation with which the court is confronted very frequently, when a plaintiff, who has wholly executed his part of an illegal contract, seeks to enforce performance by the defendant of that for which he has received full consideration. It is of greater importance to maintain intact the rule of the court that it will never lend its aid to the enforcement of an illegal contract than to endeavour to do complete justice in favour of suppliants who are themselves without fault. And the rule is the same in equity as at law.

Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a court of equity as it is in a court of law. *Per* Giffard L.J. in *Re Cork and Youghal Railway Co.*(1).

Because they require the aid of the court to compel the complete execution of an agreement vitiated by illegality of purpose, of which they were fully cognizant, if they did not in fact agree to aid in carrying it out, the defendants cannot, in my opinion, maintain their claim against the third party, and on this ground

(1) 4 Ch. App. 748, at p. 762.

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the appeal of the latter should be allowed and the third party proceeding should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Bicknell, Bain & Strathy.*
Solicitors for the respondents: *O'Connell & Gordon.*