ORIGINAL CIVIL.

Before Mr. Justice Russell and on appeal before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Tyabji.

1900.
March 23.

TURNER (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* THE BANK OF BOMBAY (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Bank of Bombay—Presidency Banks Act (*XI of* 1876), *Secs.* 36 *and* 37 *—Powers of directors to lend money on equitable mortgage.*

The directors of the Bank of Bombay discounted at different times promissory notes for sums amounting in all to about Rs. 60,000 drawn by the firm of Fazulbhoy Meheralli Chinoy in favour of one Meheralli Mahomed Chinoy, who, it subsequently appeared, was a partner in the firm, but was not known to be so at the time of the said transactions. Before discounting the later notes the directors of the Bank obtained from Meheralli an equitable mortgage by deposit of title-deeds on certain immoveable properties situate in Bombay and Mahábaleshvar as security for the then existing and future indebtedness of the said firm or Meheralli to the Bank. The notes became due and were dishonoured, the firm having in the meanwhile become insolvent. The Bank thereupon sued the Official Assignee, as assignee of the firm's estate, to recover the sums due on the notes and for a declaration that it was entitled to a charge on the immoveable properties held by it as security. The Official Assignee contended that under section 37 of the Presidency Banks Act (XI of 1876) it was illegal for the Bank to lend money on equitable mortgage and that no valid charge had been created.

Held that, notwithstanding the provisions of the said Act, the Bank was entitled to realize the securities.

Held, also, that the provisions of section 37 of the Act did not invalidate a charge on immoveable property created as a security for a *boná fide* liability already in existence.

The words of section 37 impose a restriction on making a loan on mortgage of immoveable property, not upon the Bank but upon the directors. As between the directors and the Bank the directors would be liable for any loss resulting from the breach of the provisions of the sections, but the mortgagors could not repudiate the obligation into which they purported to enter, and the Official Assignee was not in a more favourable position.

SUIT by the Bank of Bombay against C. A. Turner, Official Assignee and assignee of the estate of Fazulbhoy Meheralli Chinoy and Goolam Husain Meheralli Chinoy, insolvents, for Rs. 60,390, and for a declaration that the Bank was entitled to a charge on certain immoveable properties held by it as security by way of equitable mortgage and for sale thereof, &c.

* Suit No. 500 of 1899; Appeal No. 1070.

Fazulbhoy Meheralli Chinoy and Goolam Husain Meheralli Chinoy carried on business in partnership as merchants in Bombay under the style of "Fazulbhoy Meheralli Chinoy." It subsequently appeared that one Meheralli Mahomed Chinoy was also a partner, but at the time of the transaction in question in this suit the plaintiff Bank was not aware that he was a partner.

On the 5th July, 1897, the firm of Fazulbhoy Meheralli Chinoy passed a promissory note for Rs. 15,000 in favour of Meheralli, and he, prior to 2nd August, 1897, endorsed it to the plaintiff Bank for value. The promissory note was payable 68 days after date.

On the 2nd August, 1897, Meheralli again applied to the Bank to discount for him another promissory note for Rs. 25,000 payable 93 days after date passed in his favour by the said firm as before. The plaintiff Bank agreed to do it on condition that Meheralli should deposit with them, by way of equitable mortgage, title-deeds of certain immoveable property in Bombay as security to cover all debts owing to the Bank by him and the said firm of Fazulbhoy Meheralli Chinoy then existing as well as those to be incurred thereafter. The title-deeds were accordingly deposited by way of equitable mortgage and the Bank cashed the promissory note to Meheralli.

On the 25th August, 1897, Meheralli and Goolam Husain requested the Bank to discount a third promissory note for Rs. 20,000 drawn in favour of Meheralli by the same firm, and payable 60 days after date. The plaintiff Bank agreed to do so on having an equitable mortgage by deposit of title-deeds of certain immoveable properties situate at Mahábaleshvar in the Presidency of Bombay and of the furniture, &c., therein, and a charge on five shares of Rs. 500 each in the Bank of Bombay in the name of the said Meheralli M. Chinoy as further security for all the then existing and future indebtedness of the said firm, or the said Meheralli or either of them. The above security was given to the Bank by Meheralli and Goolam Husain, and the Bank thereupon discounted to Meheralli the promissory note of the firm, dated 25th August, 1897, for Rs. 20,000 drawn in his favour by the firm payable 60 days after date and endorsed by him to the Bank.

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On the 13th September, 1897, Meheralli Mahomed Chinoy, Fazulbhoy Meheralli Chinoy and Goolam Husain Chinoy as alleged partners in the said firm of Fazulbhoy Meheralli Chinoy were adjudged insolvents and their estates vested in the defendant, C. A. Turner, the Official Assignee.

The above mentioned three promissory notes fell due on the 14th September, 1897, 6th November, 1897, and 27th October, 1897, respectively, and were dishonoured. Notice of dishonour was duly given to the indorser and the Official Assignee.

The Bank now claimed Rs. 60,390-11-3 in respect of the three promissory notes and they prayed judgment for that amount against the defendants, and a declaration that they were entitled to a charge on the properties mortgaged as above stated, and that the same might be sold and the proceeds applied in satisfaction of their claim.

The first defendant in his written statement raised the question as to whether the Bank of Bombay under the Presidency Banks Act (XI of 1876)[1] could accept title-deeds as security. The following clauses of his written statement are material:—

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[1] Sections 36 and 37 of the Presidency Banks Act (XI of 1876):—

"36. The Bank is authorized to carry on and transact the several kinds of business hereinafter specified (that is to say):—

(a) the advancing and lending money, and opening cash credits, upon the security of (after stating the various kinds of Government stock and municipal, &c., debentures, &c.:—) * * * * * * *

(b) Accepted bills of exchange and promissory notes endorsed by the payees. * *

* * * * * * * *

"37. The directors shall not transact any kind of banking business other than those above specified, and in particular they shall not make any loan or advance—

(a) for a longer period than three months;

(b) upon the security of stock or shares of the Bank of which they are directors; or

(c) upon mortgage, or in any other manner upon the security of any immoveable property or the documents of title relating thereto;

Nor shall they (except upon the security mentioned in section 36, paragraph (a), Nos. 1 to 5 inclusive)—

(d) discount bills for any individual or partnership firm for an amount exceeding in the whole at any one time such sum as may be prescribed by the bye-laws for the time being in force, or lend or advance in any way to any individual or partnership firm an amount exceeding in the whole at any one time such sum as may be so prescribed;

"3. This defendant submits that the alleged deposits of title-deeds could not, in law, create any lien or charge in favour of the Bank for payment of any one of the said three promissory notes.

"4. This defendant submits that the dealings alleged by the plaintiff in paragraphs 3 and 4 of the plaint are forbidden by law, *i. e.* section 37 of the Presidency Banks Act, 1876, and are of such a nature that if permitted would defeat the provisions of law, *i. e.* the said section 37, and are opposed to public policy.

"5. This defendant further submits that the alleged deposits on 2nd August and 25th August, 1897, being forbidden by, and opposed to, law and public policy so far as the bills of those two dates, respectively, are concerned, the same are void as to the past and the future indebtedness, also as being parts of an arrangement indivisible in its nature, which arrangement is forbidden by, and opposed to, law and public policy."

At the hearing the following issue was raised on behalf of the first defendant:—

Whether by the alleged deposit of title-deeds any lien or charge in favour of the Bank was created in respect of any of the sums in the plaint referred to under the Presidency Banks Act, 1876, or otherwise.

Macpherson and *Scott*, for plaintiffs.

Anderson and *Raikes*, for defendants.

The following authorities were referred to :—Presidency Banks Act (XI of 1876), secs. 4, 5, 7, 36 and 37 ; *Taylor* v. *Chichester, &c., Railway Co.* [1]; *L. & N. W. Railway Co.* v. *Price* [2]; Pollock

(*e*) Nor shall they discount or buy, or advance and lend, or open cash credits, on the security of any negotiable instrument of any individual or partnership firm, payable in the town or at the place where it is presented for discount, which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership ;

(*f*) Nor shall they discount or buy or advance and lend, or open cash credits, on the security of any negotiable security having at the date of the proposed transaction a longer period to run than three months, or, if drawn after sight, drawn for a longer period than three months ; provided that in the case of the Bank of Madras, &c., &c.—

Nothing contained in this Act shall be deemed to prevent the directors from allowing any person who keeps an account with the Bank from overdrawing such account, without security, to the extent of sums not exceeding at any one time two thousand rupees in the whole."

(1) (1867) L. R., 2 Exch., 356. (2) (1883) 11 Q. B. D., 485.

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on Contracts, p. 691; *Cherry* v. *Colonial Bank of Australasia*[1]; Contract Act (IX of 1872), sec. 23; *Kumola Kant* v. *Kanoo Mahomed*[2].

RUSSELL, J.:—In this case the Bank of Bombay, as plaintiffs, sue to recover against the first defendant, Mr. C. A. Turner, the Official Assignee, as assignee of the estate and effects of Meheralli Mahomed Chinoy, Fazulbhoy Meheralli Chinoy and Goolam Husain Meheralli Chinoy, insolvents, the sum of Rs. 60,390-11-8 and further interest and costs, and they base their claim on three promissory notes, the first of which was dated the 5th of July, 1897, the second of which was dated the 2nd of August, 1897, and the third of which was dated the 25th of August, 1897, of all of which the plaintiffs were holders for value in due course and all of which are made in favour of the insolvent Meheralli Mahomed Chinoy and endorsed by him to the plaintiffs.

It appears that on the 2nd of August, 1897, Meheralli Mahomed Chinoy asked the plaintiffs, the Bank of Bombay, to advance him a further sum of Rs. 25,000, and with regard to that we have the uncontradicted testimony of Chunilal Dharamdas, the Assistant Bill Keeper in the Bank of Bombay, who says that on that occasion security was given by Meheralli Mahomed Chinoy, *viz.*, the title-deeds of the Bombay property; and further it appears that on the 25th of August, 1897, Meheralli Mahomed Chinoy and Goolam Husain Meheralli Chinoy asked the plaintiffs to advance on the third promissory note Rs. 20,000, and that on that occasion they deposited the title-deeds of the property at Mahábaleshvar and also gave a charge on the five shares of Rs. 500 each held by Meheralli Mahomed Chinoy in the Bank of Bombay, the certificate of which was handed to the Bank.

Mr. Chunilal has sworn that at the time of the second advance of Rs. 25,000 the deeds were taken as security for the Rs. 25,000, as well as the Rs. 15,000 which had been previously advanced, and it has also been proved before me that, as on the former occasion, when the deed of the Máhabaleshvar property and share-certificates were taken as further security they were so

(1) (1869) L. R., 3 P. C., 24.

(2) (1869) 3 Beng. L. R., 44 (A. C.); 11 Cal. W. R., 395.

taken as well for the Rs. 20,000 then advanced as for the loan of Rs. 25,000 and Rs. 15,000 already made by the plaintiffs.

The insolvents or rather Mr. C. A. Turner, as the Official Assignee and assignee of their estate and effects, has put in a written statement, and the minor defendant has also put in a written statement on his own account, and the material issue which I have to decide is whether by the alleged deposit of title-deeds any lien or charge in favour of the Bank was created in respect of any of the sums in the plaint referred to under the Presidency Banks Act or otherwise.

The first issue being whether the allegations in paragraphs 3 and 4 of the plaint are true, I must find that they are correct, there being no evidence whatever given to contradict that of Chunilal Dharamdas.

With regard to the second issue, a very important question indeed has been raised upon Act XI of 1876, the Presidency Banks Act, and that is whether, having regard to the terms of that Act, the Bank of Bombay have authority to lend money on the security of deposit of title-deeds of immoveable property.

It is difficult to conceive a question which is more important for the Bank, or in fact for the other Banks—the Bank of Madras and the Bank of Bengal—which are also governed by that Act.

Now before I deal with the sections which deal with the business to be done by the Bank, I must advert to the various definitions and sections referred to by Mr. Macpherson.

Section 3 defines "the Bank" as meaning "the Bank of Bengal, the Bank of Madras, or the Bank of Bombay (as the case may be) as constituted and regulated by this Act;" * * * "shareholders" means the duly registered holders from time to time of the shares of the Bank * * * and "directors" means the directors assembled for the purpose of performing any of their functions under this Act.

Then Chapter II deals with the constitution of the Bank, and section 5 in that chapter deals with the property, moveable and immoveable, securities, claims and demands to be vested in the Banks named respectively.

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Section 7 seems to me very material on this point. I will read the material parts of it: the Bank "may, as such body corporate, acquire and hold either absolutely or conditionally, for a term or in perpetuity, any property whatsoever, moveable or immoveable, and transfer, assign and convey the same."

That, therefore, authorizes the Bank to acquire and hold either absolutely or conditionally, for a term or in perpetuity, any property whatsoever, moveable or immoveable, and I apprehend that the deposit of title-deeds must be treated as a holding of immoveable property by the deposit of title-deeds, conditionally on the amount, for which they have been given as security, being repaid.

Then section 36 deals with the various business with which the Bank is concerned, and there is no doubt that it is to be noticed that there is no express authority here authorizing any one of these banks to do what is a matter, I apprehend, of almost daily occurrence in the history of any bank, namely, lending money on the deposit of title-deeds.

Section 36 deals with what they can do, and Mr. Macpherson, for the plaintiffs, relied upon sub-clause (*i*) of that section which includes in the business the Bank may do "the selling and realising of all property, whether moveable or immoveable, which may in any way come into the possession of the Bank in satisfaction or part satisfaction of any of the claims."

I must confess that it seems to me it could hardly be held that title-deeds deposited as security for a loan came within the definition of property come into the possession of the Bank in satisfaction or part satisfaction of any of its claims, as the word "satisfaction" and the word "security" seem to me to be two different things; but in sub-clause (*n*) we find these words "and, generally, the doing of all such matters and things as may be incidental or subsidiary to the transacting of the various kinds of business hereinbefore specified."

That is what is well known as the *ejusdem generis* clause in a memorandum of association, and I apprehend and it was not argued before me that a loan of money on deposit of title-deeds was not a matter or thing which was not incidental or subsidiary

to the various kinds of business specified, one of which is lending money. It seems to me, therefore, taking that section 7 as far as I have gone and sub-clause (*n*) of section 36, that the Bank is authorized to lend money on the deposit of title-deeds.

Section 37, which was most strongly relied upon on the part of the insolvents, reads thus:—"The directors shall not transact any kind of banking business other than those above specified, and in particular they shall not make any loan or advance (*a*) for a longer period than three months; or (*b*) upon the security of stock or shares of the Bank of which they are directors; or (*c*) upon mortgage or in any other manner upon the security of any immoveable property or the documents of title relating thereto; (*d*) nor shall they lend or advance by discount of bills or otherwise, to any individual or partnership firm (except upon the security mentioned in section thirty-six, paragraph (*a*), numbers (1) to (5) inclusive, any sums of money exceeding in the whole at any one time such sum as may be prescribed by the bye-laws for the time being in force." (This clause has been amended by section 5 of Act V of 1879, but it is immaterial for the present purpose.) And then the section goes on to say: "(*e*) nor shall they discount or advance and lend, or open cash credits on the security of any negotiable instrument of any individual or partnership firm, payable in the town or at the place where it is presented for discount which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership; (*f*) nor shall they discount or buy, or advance and lend, or open cash credits on the security of any negotiable security having at the date of the proposed transaction a larger period to run than three months, or if drawn after sight, drawn for a larger period than three months;" and then there is a provision with regard to the Bank of Madras with which we have no concern.

The first thing to be noticed with regard to this section is that the word used there is not the "Bank" but the "Directors". It is suggested that that was a slip on the part of the Legislature. I do not know, however, that I, sitting in this place, am entitled to say that words in an Act are there as the result of a slip. I apprehend that it is not for me to say that a word is there by

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slip, but to hold that it means what it says and consequently we see that this is a provision with regard to the directors and not with regard to the Bank. That appears to me to be a very important point when we come to deal with the cases on the point. It was argued that that section made any transactions not provided in it illegal. It certainly would be a most extraordinary thing if that argument is correct; for, if the directors of any of these three banks lent money for a longer period than three months, say three months and a day, the logical result would be that the transaction would be an illegal one which would justify the borrower in repudiating it, and similarly with regard to the other provisions in that section. Therefore, it appears to me that, upon the wording of that section itself, it is impossible to say that any dealings such as are there pointed out are illegal. As is pointed out in Palmer's Introductory Notes on the Memorandum of Association (Ed. 1888), "an *ultra vires* contract or transaction is not illegal in the sense that no right of action can arise in connection therewith. It is not, merely because it is *ultra vires*, to be regarded as *mala prohibitum* or *malum in se*—per Lord Cairns, *Ashbury Railway Carriage Iron Co.* v. *Riche*[1]. The contract is void, and no action can be brought on it, but the company can sue for the recovery of its assets wrongfully expended in relation to that contract—*G. E. Railway Co.* v. *Turner*[2]; *Coltman* v. *Coltman*[3]. And the directors and other parties implicated in the transaction may be sued in relation thereto, and may have rights of contribution *inter se.*" Therefore, one must draw a distinction between what the Legislature has said to be *ultra vires* the directors and what is illegal. Now, with regard to that point, there may be said to be four instructive cases, three of which were cited to me by Mr. Macpherson on the part of the plaintiffs.

The first one in point of date is the case of *Ayers* v. *South Australian Banking Co.*[4].

In that case the Australian Act No. 4 of 1855-56 enabled a proprietor of sheep to make a valid pledge of the wool of his next clip, although no possession was given. "A banking company incorporated by charter which contained a clause declaring that

(1) (1875) L. R., 7 H. L., 653.
(2) (1872) L. R. 8 Ch., 149.
(3) (1881) 19 Ch. D., 65.
(4) (1871) L. R., 3 P. C., 548.

it should not be lawful for the company to advance money on the security of merchandize, advanced money on the faith of receiving as security a preferential lien on the wool of an ensuing clip to be shorn from the sheep of the party in whose favour the advances were made, but who was not in the actual possession of the sheep, though a part owner of the sheep and the agent of the other owners for whose benefit the advances have been made:—Held in an action of trover by the company on such agreement giving them a preferential lien that the same was maintainable, and that the banking company were entitled to recover for the value of the wool on such preferential lien."

The suit was brought by the company for trover in respect of the wool, and one of the pleas was that they were not possessed of the wool, inasmuch as they were precluded from making this loan, and it was also argued that it was contrary to the terms of their charter which prohibited advances on merchandize, and that whatever might be rights of others, "the transaction being in violation of the bank charter, the respondents have no right to enforce it as it was *ultra vires*. *The National Bank of Australasia* v. *Cherry* is an authority to show that the powers of the bank charter should be strictly followed to entitle the respondents to the preferential lien they claim." As a matter of fact, in that case the Lords of the Privy Council said this: "Another objection was taken by Mr. Manisty on the terms of the charter—the clause in the charter which says it shall not be lawful for the Bank to make advances on merchandize. Now, unquestionably, a great many questions might be raised on the effect of that clause in the charter which may be of very great importance, but which also being of great difficulty, their Lordships do not think it necessary to give any opinion upon. There may be a question as to what are the transactions which come really within the clause, and whether this particular case does come within it. There may be also a question whether under any circumstances the effect of violating such a provision is more than this, that the Crown may take advantage of it as a forfeiture of the charter, but the only point which it appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not

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prevent property passing, either in goods or in lands, under a conveyance or instrument, which, under the ordinary circumstances of law, would pass it. The only defence which can be set up here (there is no plea of illegality) is under the plea of not possessed, that the right of property and the right of possession never passed to the plaintiffs. Their Lordships are of opinion, that whatever other effect it has, it cannot have the effect of preventing the property passing. If that were otherwise, the consequence might be most lamentable, because if the property never passed to them, they could not themselves convey any property to third persons. Transactions of the most honest description might be set aside. They might do what is a very common thing, make advances and take bills of exchange with the bills of lading attached. If it is to be said that the property in the goods mentioned in the bill of lading does not pass to them, then any purchaser to whom they might sell the goods under the bill of lading, would get no title, and the original owner, who had received the full proceeds of the goods or a large advance upon them, might say, 'Oh, the property never passed to the South Australian Bank, and, therefore, it never passed to you.' Mr. Manisty admitted that he could find no authority for the proposition that any violation of such a condition of charter would prevent the property in goods passing to the person to whom an instrument, otherwise valid, professed to pass it, and their Lordships are of opinion that whatever other effect the violation of such a condition may have, it has not the effect of preventing the property in the goods passing or of preventing an action of trover being maintained if there is a wrongful conversion."

So their Lordships there held that that clause of the charter did not prevent the Bank taking the security offered for this loan.

Then comes the case which was referred to by Mr. Macpherson —that was a prior case—the case of *Taylor* v. *The Chichester, &c., Railway Company*(1). The judgment of the minority in that case was upheld in the House of Lords and that of the majority reversed.

(1) (1867) L. R., 2 Exch., 356.

Consequently, the judgment of Lord (then Mr. Justice) Blackburn, who was in the minority, is worthy of every consideration. He points out what is the distinction between what may be *ultra vires* of the company and of the directors and what illegal, and then he says, at p. 379: "But the Legislature, with a view to public policy, does sometimes expressly, sometimes by implication, prohibit the doing of certain acts by companies thus incorporated, and when an act is thus made *malum prohibitum*, any contract to do it is illegal; and if there is an attempt made to enforce such a contract the defendant, whether a company or an individual, may, if his conscience permit him, set up the illegality to which he was a party; for in *pari delicto potior est conditio defendentis*. Though every shareholder in the company had assented to the making of a particular contract, yet if the Legislature have, not merely for the protection of the shareholders but for the good of the public, forbidden the making of it, it is illegal, and the Corporation, whose shareholders have all assented, is in no worse position for raising the defence than the chairman of the company who has personally entered into the contract, and yet may, as was decided in *Macgregor* v. *Dores and Deal Railway Company*, set up the provisions of the Railway Acts as making his personal contract illegal. The question whether a particular thing is thus prohibited by the statutes must, in every case, depend upon the true construction of them. I think it is very unfortunate that the same phrase of '*ultra vires*' has been used to express both an excess of authority as against the shareholders and the doing of an act illegal, as being *malum prohibitum*, for the two things are substantially different; and I think the use of the same phrase for both has produced confusion."

That, therefore, is the distinction we must bear in mind, *viz.*, whether the acts are *ultra vires* as regards the shareholders or *malum prohibitum*: because they must be treated as two entirely different things.

Another case which seems to me to support the view I take is reported in L. R. 8 Ch., Appeal 149, the *Great Eastern Railway Company* v. *Turner*. That was a case where "the chairman

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of a company, with the assent of the company held in his name shares in another company which had been purchased with the money of the first-named company. The chairman became bankrupt :—Held (reversing the decree of the Master of the Rolls) that, though the purchase by one company of shares in another company was illegal, the shares were not within the order and disposition of the bankrupt so as to pass to his assignees, and that he must transfer them as the company should direct;" and at page 152, Lord Selborne, L. C., says: "The directors are the mere trustees or agents of the company—trustees of the company's money and property—agents in the transactions which they enter into on behalf of the company. In this case without legal authority and, therefore, without the consent of the Corporation whose trustees and agents they were, the directors took a part of the company's money and therewith purchased a property which this contest proves to be of some value—shares in the Lynn Hunstanton Railway Company. Those shares so bought—not a farthing of any other person's money having contributed to the purchase—were placed in the names of three successive chairmen of the company, and were uniformly dealt with as that which they were, the property of the company. True it is that the investment was an unauthorized investment; but I entirely assent to what was said by Sir Richard Baggallay that there is no difference between an unauthorized investment of the money of a public company by its trustees and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous—it would be extravagant to the very last degree—to say, that because the money of the *cestui que trust* has been laid out in an unauthorized manner, that, therefore, they are not to have the benefit of whatever value there is in the property bought with their money."

It seems to me that in this case it would be extravagant to the very last degree to say that because the money of the Bank of Bombay had been laid out in an unauthorized manner they are not to have the benefit of whatever value there is of the property bought with their money. To the same effect is

the case of *In re Coltman, Coltman* v. *Coltman*(1). That was a case of a loan out of the surplus funds of a friendly society by the trustees on the joint and several promissory notes of a person and his sureties who were not members of the society, and on the trustees claiming to prove against the estate of one of the sureties for the amount, Mr. Justice Fry, holding the transaction to be illegal, rejected the desired proof; and it was held on appeal that, as it was not alleged that the money was borrowed for an illegal purpose, the contract was not illegal, but merely unauthorized; that it was not competent to the makers of the note to allege by way of defence that the payees had no authority to lend the money, and that the proof, therefore, must be admitted. The Master of the Rolls, Sir G. Jessel, said:

"I am not satisfied that an express provision in the Act of Parliament that the trustees should not lend money upon personal security would have made any difference. The loan would have been wrong, it would have been an appropriation of the society's money to their own use, but there would not have been any such illegality in the transaction as would preclude the trustees from recovering the money lent. It seems to me that to hold it to be incompetent to maintain an action under those circumstances would be to say that it was incompetent for a trustee who had improperly appropriated the money of the society and lent it in his own name to take steps to enable him to restore it. How the persons who borrowed it, there being no illegality in the borrowing on their part, and no illegality in their agreeing to repay the money so borrowed and no illegality in the purpose to which they were intending to apply it, can set up the doctrine that they are relieved from their liability by reason of the money having originally belonged to a friendly society, is a thing which I am quite unable to understand."

And Mr. Justice Brett says:

"The only objection to this loan is that it was made without authority. But it does not seem to me that the borrower can set up as a defence to an action that the person who lent him the money, and to whom he has made a promise to repay that money, had no authority to lend it to him. That is an objection which it is not for him to take. The contract is, if you will lend me so much money I will pay you that money back on demand. The consideration is the handing over the money. That is not illegal. The promise to pay back money which you have borrowed is not illegal. The money was not borrowed for any illegal purpose, in order to do an illegal or immora thing, and I cannot see that there is anything illegal in the contract. The

(1) (1881) 19 Ch. Div., 64.

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only objection is, that those who made the contract with the debtor had no authority to make it, and that is an objection which he cannot take."

That seems to me to be particularly applicable to the present case where it is contended that it was illegal on the part of the directors to make this advance.

Then in another case reported in (1877) L. R. 2 App. Cas., 366, (the case of *Irvine* v. *Union Bank of Australia*,) it is not exactly in point, but it seems to me that the argument for the respondent in that case is apposite to that for the plaintiffs in the present case.

There Mr. Benjamin argued for the respondent that "the limitation in article 50 on the power of the directors, whether of borrowing or of mortgaging, was not a limitation of the powers of the company or of the whole body of the shareholders. It did not affect the constitution of the company; it simply restricted the agency of the directors. Consequently any act of the directors, whether of borrowing or of mortgaging in excess of their powers, could be ratified by the company; and such ratification was effected in accordance with the rules of the company so as to render the acts of the directors binding upon the company. Moreover, the excess of authority was a matter between the shareholders and the directors and did not affect the respondent." That argument was upheld by the Court of Appeal by whom it was held that the limitation in article 50 on the power of the directors, whether of borrowing or mortgaging, was not a limitation of the general powers of the company, and the acts of the directors in excess of their authority might be ratified by the company and so rendered binding.

An argument was raised on section 23 of the Contract Act wherein it is stated that "the consideration or object of an agreement is lawful unless it is forbidden by law, or is of such a nature that if permitted it would defeat the provision of any law." Now I apprehend that when you read the second clause of that section "or is of such a nature that if permitted it would defeat the provision of any law," you must read it with reference to the law with regard to which you are going to apply it, and if you find that the latter law contains a direction to a person to do

certain things, it is difficult to say that it is to stand on the same footing as what is known as *malum prohibitum.* The effect of section 37 seems to me to be merely a restriction of the general powers of the directors of the bank, but which is consistent with the general purposes for which the bank was incorporated. If that be correct reading of the Act, then I apprehend that you cannot say that the second clause of section 23 of the Contract Act applies to that section (37). If the word in section 37 had been "Bank" instead of "Directors", there might have been a strong support to Mr. Raikes' argument on the case of the *National Bank of Australasia* v. *Cherry*[1]. But that case, which must have been before the Indian Legislature in 1876 (it having been decided in 1870), seems to me to suggest why the word "Directors" and not "Bank" was used in section 37.

It appears to me, therefore, having taken into consideration section 37 and other sections of Act XI of 1876, and the principles laid down in the cases I have referred to, and also the question of the applicability or non-applicability of section 23 of the Contract Act to the facts in question in this suit, I cannot see that the taking of title-deeds as security for the moneys advanced by the Bank, was in contravention of the provisions of Act XI of 1876, and I must, therefore, hold that the equitable security created by the deposit of the title-deeds made in the present case was a perfectly good and valid charge.

Then, with regard to the defendant Rahimbhoy Meheralli Chinoy, the only question with regard to him is as to costs.

I have read very carefully the correspondence annexed to his written statement, and it seems to me that the plaintiffs ought to pay his costs up to and including their attorney's letter of the 27th September, 1899, but that subsequently thereto he ought to bear his own costs, because, although the plaintiffs claim a personal decree against him in the plaint, they then gave him distinct notice that a personal decree was not claimed against him, "and if he has no interest in the firm of Fazulbhoy Meheralli Chinoy or its assets or in the properties in question in this suit," the decree to be taken herein obviously cannot affect him.

(1) (1870) L. R., 3 P. C., 299 (see p. 307, per Lord Cairns).

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Upon the issues I find the first, which is whether the allegations in paras. 3 and 4 of the plaint are true, in the affirmative; and the second, which is whether by the alleged deposit of title-deeds any lien or charge in favour of the Bank was created in respect of any of the sums in the plaint referred to under the Presidency Banks Acts or otherwise, also in the affirmative.

And I pass a decree for the plaintiffs against the defendant C. A. Turner as assignee of the estate and effects of the insolvents in the plaint mentioned.

The first defendant appealed, contending

(1) that the Bank was forbidden by Act XI of 1876 to advance money on security of immoveable property;

(2) that no valid lien was created in favour of the plaintiff Bank by the deposit of title-deeds having regard to Act XI of 1876; and

(3) that the lower Court ought to have held that the loans on a mortgage of immoveable properties advanced by the plaintiffs and their directors or secretary were forbidden by law and were of such a nature that if permitted they would defeat the provisions of law, and that the mortgage of immoveable property taken by them was unlawful.

Branson and *Raikes* for the defendant (appellant).

Lang (Advocate General) and *Macpherson* for plaintiffs (respondents).

The following authorities were cited:—Presidency Banks Act (XI of 1876), sections 36 and 37; *National Bank of Australasia* v. *Cherry*[1]; *Ayers* v. *S. A. Banking Co.*[2]; *G. E. Railway Co.* v. *Turner*[3].

JENKINS, C. J.:—This is a suit brought by the Bank of Bombay to realise certain securities and among them two equitable mortgages by deposit of title-deeds relating to immoveable properties.

The defendants are Mr. Turner, the Official Assignee of the mortgagors, and Ibrahimbhoy Hassumbhoy and Rahimbhoy Meheralli Chinoy, who have not appeared.

(1) (1870) 3 P. C., 299 at p. 307. (2) (1871) 3 P. C., 548 at p. 559.
(3) (1872) L. R., 8 Ch. 149.

The facts for the purposes of this appeal are beyond dispute and are sufficiently stated in the plaint (His Lordship stated the facts and continued :—) The only defence with which we are concerned is Mr. Turner's contention that, having regard to the provisions of the Presidency Banks Act, 1876, the mortgages did not create a valid charge. Mr. Justice Russell held that this defence could not prevail, and accordingly passed a decree in the plaintiff's favour, and it is from this decree that the present appeal is preferred.

The Bank of Bombay is regulated by the Presidency Banks Act, 1876, and under it the Bank is authorized to carry on and transact the business of discountnig and buying bills of exchange and other negotiable securities payable in India, so that the transactions in the suit (apart from the securities that were taken) were within the Bank's power.

It is said, however, that the securities cannot be enforced, because it is provided by section 37 that the directors shall not transact any kind of banking business other than those specified above, and in particular they shall not make any loan or advance upon mortgage or in any other manner upon the security of any immoveable property or the documents of title relating thereto. Notwithstanding the argument advanced by the Advocate General to the contrary, it must, I think, be conceded that the discounting of bills is equivalent to making a loan or advance; that appears to me to follow from the language of sub-section (*d*) of section 37, and it is with that view that I propose to approach the consideration of the case. Now it must be noticed that the expressed restriction contained in section 37 is on making any loan or advance upon mortgage of immoveable property and that the words of that section impose that restriction, not on the Bank but on its directors.

First, then, I will consider whether there is anything in this restriction which invalidates a charge on immoveable property created as a security for a *bonâ fide* liability already in existence. It seems to me that such a transaction does not answer the description of a loan or advance on a mortgage, and, therefore, it does not fall under the express prohibition on which alone the

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argument before us has been based. It is, however, still necessary to see whether there is anything else in the Act which would invalidate such a transaction. No doubt section 37 provides generally that "the directors shall not transact any kind of banking business other than those above specified," and it may be said that taking security for an existing liability is not expressly mentioned in section 36. But, then, section 36 merely specifies the several kinds of authorized business: it does not enumerate all the incidental details. Now I suppose that there can be no doubt that it would be an ordinary incident of a power to buy bills to take reasonable steps for the purpose of securing that the liability under those bills should on maturity be discharged; and it would seem equally clear that it would be a reasonable step for that purpose to take a security on immoveable property. Therefore, as it seems to me, in the absence of an express prohibition there would be nothing unlawful in the Bank so securing itself. I have already expressed the opinion that section 37 (*c*) does not apply, and I have indicated the reasons on which that conclusion is based; but, then, is there anything else in the Act which declares it to be illegal for the Bank to take a charge on immoveable property as a security for an existing loan? It clearly is not illegal for the Bank either to acquire or hold immoveable property either absolutely or conditionally: on the contrary this is expressly sanctioned (see section 7). It, therefore, seems to me that without infringing the provisions of the Act the Bank can acquire and hold immoveable property or an interest in it as a security for an existing liabilty; for it thereby acquires and holds an interest in immoveable property conditionally, the condition being the discharge of the liability. This is within the express words of section 7, and it also receives further countenance from section 36 (*i*) which cannot be explained as referring to proceedings in execution, inasmuch as in execution the sale or realisation is not by the party but by the Court.

If, then, a security on immoveable property to secure an existing debt is not illegal, it will follow that Mr. Turner's defence cannot succeed so far as the Rs. 15,000 are charged on the Bombay property or so far as this same Rs. 15,000 and the Rs. 25,000 are charged on the Mahábaleshvar property, for at the time of the

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charge on the Bombay property the Bank were already holders of the note for Rs. 15,000 and before the charge on the Mahábaleshvar property they had in addition discounted the note for Rs. 25,000, nor does it, in my opinion, make any difference that neither note had actually matured. But it remains to be seen whether, apart from the special considerations applicable to the Rs. 15,000 and Rs. 25,000, the Bank's claim is sustainable.

As I have already remarked, section 37 in terms applies to the directors, and there can be no question that, as between the directors and the corporators, the directors would by virtue of section 37 (*c*) be liable for any loss resulting from the breach of its provisions; but the question is, whether the section has this further operation that the mortgagors can repudiate the obligation into which they purported to enter. I say the mortgagors, for, under the circumstances of this case, there is no reason to ascribe a more favourable position to the Official Assignee.

The appellant has contended that section 37 (*c*) does not merely regulate the management of the directors, but places a limit on the powers of the directors, so that a transaction which offends its provisions is *ultra vires* and incapable of enforcement in a Court of law. For this reliance has been placed on the *National Bank of Australasia* v. *Cherry*[1]. The actual decision in that case in no way helps the appellant, but the appellant seeks to support his argument by what was said by Lord Cairns in the course of the judgment. There, as here, the assignees contended that the Act regulating the Bank prevented the Bank making a valid contract for mortgage, and in reference to this question Lord Cairns said (His Lordship referred to pp. 306, 307 and 308 of the report and continued :—) It will, therefore, be noticed that Lord Cairns refrains from actually holding that the mortgage in that case was bad even if it was part of the contract of advance: he merely assumes that for the purpose of the argument, though no doubt the assumption appears to have been in accordance with the bent of his opinion. But even so, it has to be remembered that this opinion was as to the meaning of an Act wholly different in its phraseology from the present; for the

(1) (1870) L. R., 3 P. C., 299.

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prohibition under consideration was thus expressed: "Provided always that save as hereinbefore specially authorized it shall not be lawful for the said Corporation to advance or lend any money upon the security of lands or houses or ships."

The construction placed on such a clause affords little or no clue to the true interpretation of the statute with which we have to deal. Can it be said that the Bank, which has a general power to acquire and hold either absolutely or conditionally, did not acquire and are not entitled to a charge on this land? It seems to me that the Act does not prevent the actual acquisition by the Bank of the charge, though no doubt the directors acted in breach of their duties. Reading through whole of the section 37, it appears to me that it is concerned with the mode in which the directors were to conduct the business in the interests of the Bank, and did not impose the prohibition in obedience to any principle of public policy dictated by the public interest. Thus it can hardly be supposed that a loan or advance in breach of the conditions indicated in sub-section (*d*) or (*e*) would leave the Bank without remedy and at the same time sub-section (*b*) is strongly suggestive of the view that section 37 merely lays down rules for the guidance of the Bank, and that it is outside its scheme that the non-observance of those rules should prejudice the interests of the Bank or that what is designed for its protection should act to its prejudice. In this connection, I would refer to the language of Lord Selborne in the *G. E. Railway Co.* v. *Turner* [1]: "True it is that the investment was an unauthorized investment; but I entirely assent to what was said by Sir Richard Baggallay, that there is no difference between an unauthorized investment of the money of a public company by its trustees and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous—it would be extravagant to the very last degree—to say that because the money of *cestuis que trust* has been laid out in an unauthorized manner, that, therefore, they are not to have the benefit of whatever value there is in the property bought with their money." So again in *Coltman* v. *Coltman* [2] Sir George Jessel said: "I am not satisfied that an express provision in the Act of Parlia-

(1) (1872) L. R., 8 Ch. 149 at p. 152.   (2) (1881) 19 Ch. D. at p. 69.

ment that the trustees should not lend money upon personal security would have made any difference. The loan would have been wrong, it would have been an appropriation of the society's money to their own use, but there would not have been any such illegality in the transaction as would preclude the trustees from recovering the money lent. It seems to me that to hold it to be incompetent to maintain an action under those circumstances would be to say that it was incompetent for a trustee, who had improperly appropriated the money of the society and lent it in his own name, to take steps to enable him to restore it. How the persons who borrowed it, there being no illegality in the borrowing on their part, and no illegality in their agreeing to repay the money so borrowed, and no illegality in the purpose to which they were intending to apply it, can set up the doctrine that they are relieved from their liability by reason of the money having originally belonged to a friendly society, is a thing which I am quite unable to understand."

While at p. 70 Brett, L. J., says: "The only objection to this loan is that it was made without authority. But it does not seem to me that the borrower can set up as a defence to an action that the person, who lent him the money and to whom he has made a promise to repay that money, had no authority to lend it to him. That is an objection which it is not for him to take. The contract is, if you will lend me so much money, I will pay you that money on demand. The consideration is the handing over the money. That is not illegal. The promise to pay back money which you have borrowed is not illegal. The money was not borrowed for an illegal purpose, in order to do an illegal or immoral thing, and I cannot see that there is anything illegal in the contract. The only objection is, that those who made the contract with the debtor had no authority to make it, and that is an objection which he cannot take."

For these reasons I am of opinion that the defence based on alleged illegality must fail and that the securities are enforceable.

But while I come to this conclusion, I think it right to point out that the directors run considerable risk by entering into a transaction of this class and that they should in future bear this

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in mind. The appeal, therefore, will be dismissed and the decree of the lower Court affirmed with costs.

Attorneys for plaintiffs:—Messrs. *Crawford, Brown & Co.*

Attorneys for defendants:—Messrs. *Daftary and Ferreira.*

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1900. *April 3.*

BALAMBHAT (ORIGINAL DEFENDANT No. 3), APPELLANT, *v.* NARAYANBHAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Res judicata—Co-defendants—Decision in previous suit in which parties were co-defendants, when binding—Such decision not binding when one defendant was only a nominal party.

A judgment in a previous suit is not *res judicata* as between co-defendants so as to bar a subsequent suit brought by one of them, unless there was a conflict of interest between them and the judgment determines the real rights and obligaiions of the defendants *inter se.*

Such previous judgment is not *res judicata* when the plaintiff in the subsequent suit was only a nominal party in the prior suit.

APPEAL against the order of F. C. O. Beaman, District Judge of Belgaum, remanding a suit for trial on the merits to the Court of Ráo Sáheb C. R. Karkare, Subordinate Judge of Athni.

The plaintiff Narayanbhat mortgaged the land in question to one Gundabhat, who in 1895 sued on the mortgage and obtained a decree for possession. When, however, he proceeded to execute the decree, he was obstructed by Narayanbhat's brother, Balambhat, who claimed to be owner of a half share of the land. The Court thereupon under section 331 of the Civil Procedure Code (Act XIV of 1882) registered Balambhat's objection as a suit (No. 581 of 1896) in which Gundabhat the mortgagee was made plaintiff and Balambhat and Narayanbhat (the present plaintiff) were made defendants. This suit was apparently not contested, and a decree was passed in April, 1897, awarding only half the land to Gundabhat.

While that suit was pending, Narayanbhat filed this suit (No. 669 of 1896) against Gundabhat (the mortgagee) and Balam-

*Appeal, No. 2 of 1900, from order.