LA COMPAGNIE DE VILLAS DU CAP GIBRALTAR ..... } APPELLANTS;

AND

GEORGE A. HUGHES *esqualité* ..... RESPONDENT.

1883

*Nov. 15.

1884

*June 23.

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

Con. Stat. L. C., ch. 69—*Building Society by-law—Purchase of Land —Intra vires.*

L. Cie. de V., a building society incorporated under ch. 69, Con. Stat. L. C., by its by-laws, on the 21st August, declared that the principal object of the society was to purchase building lots, and to

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

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build on such lots cottages costing about $1,000 each for every one of its members. In order to obtain its object, the company through its directors, obeying the instructions of the shareholders, on the 7th October, 1874, purchased the particular lots described in the by-laws and contracted for the building of twenty-four cottages at $1,250 each, the amount that each of the shareholders had agreed to pay. A year elapsed, during which the cottages are built and drawn by lot for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages, borrowed money from the Dominion Building Society, and transfered to the same as collateral security the moneys due them by the appellants in virtue of the deeds of purchase and building contract. The appellant company accepted the transfer and paid some monies on account, and finally a deed of settlement *acte de reglement de compte* was executed between the two companies, upon which was based the suit by H., the respondent, as assignee of the Dominion Mortgage Loan Company (which name was substituted for that of "The Dominion Building Society," by 40 Vic., ch. 80, D.), against the appellants.

The question argued on the appeal was whether the purchase of the lots and contract for building entered into by the directors was *intra vires* of the appellant company.

Held, affirming the judgment of the court below,—that as the transaction in question was for the purpose of carrying out the objects of the society in strict accordance with its views, it was not *ultra vires*, Strong and Gwynne JJ. dissenting.

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

The facts and pleadings are fully set out in the head note, and judgments hereinafter given.

Chrysler for appellants:—

The principal question is whether the appellants, a non-permanent building society, organized under ch. 69 Con. Stats. of Lower Canada, has power, immediately after organization and before any money had been paid upon the stock subscribed, to make the purchase of 100 building lots and to enter into a contract for the building of houses thereon.

(1) 3 Dorion's Rep. 175.

The appellants submit that they have not such power. See ch. 69, sec. 2; sec. 4, ss. 1 and 2. Secs. 10, 11 and 13 are all in favor of this view, and in effect they provide that the society cannot invest in real estate, except by way of loan or advance upon property of the borrower. *Victoria Permanent Benefit Society* (1); *In re National Permanent Benefit Building Society* (2).

The second question is whether the Dominion Mortgage Loan Company, represented here by their assignee, the respondent, had the right to take the assignment of the mortgage from the appellants' company to Desmarteau and others. The first objection is to the power of the Dominion Parliament to incorporate what is a building society empowered to transact business in only the Province of Quebec.

Sec. 2 provides that the company shall have, hold and continue to exercise the powers, &c., enjoyed by the Dominion Building Society (a provincial society), and no other powers are conferred, nor is the Act declared to be one for the general advantage of Canada. Further, the Dominion Building Society had no power to lend money upon security in the nature of personal security.

A. Ouimet, Q.C., for the respondent:—

As to the last question: Permanent building societies are, in effect banking institutions, and not local corporations dependent upon provincial legislation. Further, the appellants cannot contest, by incidental procedure, the legal status of a corporation, but such status must be regularly attacked under 12 Vic., ch. 41, art. 997, C. C. (L. C.) See *Union Building Society* v. *Russell & Moran* (3).

As to the first question: A transaction by a corporation which is but a mode of attaining more easily the object of its creation, is not *ultra vires* when authorized

(1) L. R. 9 Eq. 605. (2) L. R. 5 Ch. 309.
(3) 8 L. C. R. 276.

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by the rules and regulations. *Mulloch* v. *Jenkins* (1); *Grimes* v. *Harrison* (2); *Bateman* v. *Ashton under Lyne* (3); *Hughes* v. *Layton* (4); *Brice* (5); *Richardson* v. *Williamson* (6); Art. 358 C. C. (L.C.)

J. Doutre, Q.C., followed for respondent.

A. Geoffrion, Q.C., for appellants, in reply.

Sir W. J. RITCHIE C.J.—Although no direct evidence to that effect has been edduced, it may well be presumed that the real organisation of the appellant company took place on the 21st of August, 1874. On that day, the by-laws were adopted and signed. On the 7th of October next following, the company through its directors, obeying the instructions of the shareholders, purchased by notarial deed, the particular lots described in the by-laws and contracted for the building of twenty-four cottages. The prices were precisely those determined by the rules and regulations of the society, $1,000 for each cottage, and $250 for the lots, being for each shareholder $1,250, the amount that each of them had agreed to pay. Moreover the amount was payable by instalments corresponding with the quarterly payments of the shareholders.

A year elapse during which the cottages are built and drawn by lot for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages, Desmarteau and others, happening to be shareholders in the Dominion Building Society, borrow money from the latter and transfer to the same as collateral security the moneys due them by La Compagnie de Villas du Cap Gibraltar, in virtue of the above deeds. The latter company accepted the transfer, paid some monies on

(1) 14 Bear. 628.
(2) 26 Bear. 435.
(3) 3 H. & N., 323.
(4) 10 Jur. N. S. 513.
(5) 2 Ed. 256.
(6) L. R. 6 Q. B. 276.

account now and then until 1877, when an action in recovery of the arrears then due was taken out against them in the Superior Court. On the 12th of January, 1877, judgment was entered condemning the present appellants to pay to the Dominion Building Society $4,703.09 with interest.

A few months after that judgment, which was accepted as final by both parties, the deed of settlement (acte de règlement de compte) upon which is based the present action was executed.

Building Societies are of course subject to articles 358 and 366 of the Civil Code. They possess only the powers specially conferred upon them by their charter or Act of Incorporation, and those that are necessary to attain the object of their creation; and they are subject to the disabilities arising from the law and comprised in the general laws of the country respecting mort-mains and bodies corporate, prohibiting them from acquiring immovable property except for certain purposes only.

The appellants were incorporated under cap. 69 of the Consolidated Statutes of Lower Canada, intituled: "An Act respecting Building Societies." This act deals with two kinds of building societies, non-permanent and permanent.

Their object is the same: to raise by periodical subscription from members a capital to be afterwards lent by the society upon hypotheque to facilitate the purchase of real estate or the building of houses. Both have the power of taking and holding real estate in certain cases: non-permanent building societies, for the purpose only of securing advances made to their members, or debts due to the society; and permanent building societies for these objects and also up to a certain fixed sum, for establishing thereupon a place of business.

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The following clauses of the said act are common to the two kinds of building societies:

Sect. 1, §2.—Such Society shall be constituted for the purpose of raising, by monthly or other periodical subscriptions of the several members of the said society, in shares not exceeding the value of four hundred dollars for each share (and by subscriptions not exceeding four dollars per month, for each share), a stock or fund for enabling each member to receive out of the funds of the society the amount or value of his share or shares therein, for the purpose of erecting or purchasing one or more dwelling houses, or other freehold or leasehold estate, such advance to be secured by mortgage or otherwise to the said society, until the amount or value of his share or sharesis fully paid to the said society, with the interest thereon, and with all fines or liabilities incurred in respect thereof.

§3.—The several members of such society may.....make and constitue rules and regulations for the government and guidance of the same.....so as such rules be not repugnant to the express provisions of this Act or to the laws in force in *Lower Canada*.....

Sect. 4, §1.—Every such society shall, by one or more of their said rules, declare all and every the interests and purposes for which such society is established; and shall also in and by such rules direct all and every the uses and purposes to which the money from time to time subscribed, paid or given to or for the use or benefit of the said society.

§2.—But the application of such money shall not in any wise be repugnant to the uses, interests or purposes of such society, or any of them to be declared as aforesaid.

This latter section has been taken from the Act. 12 Victoria, Ch. 57, Sect 4, which is in the following terms:

And be it enacted, that every such society so established as aforesaid shall in or by one or more of their said rules, declare all and every, the interests and purposes for which such society is intended to be established; and shall also in and by such rules direct all and every the uses and purposes to which the money which shall from time to time be subscribed, paid or given to or for the use or benefit of the said society, or which shall arise therefrom, or in any wise shall belong to the said society, shall be appropriated and applied; and in what shares or proportions and under what circumstances any member of such society or other person, shall or may become entitled to the same, or any part thereof; provided that the application thereof shall not in any wise be repugnant to the uses, interests or purposes of such society, or any of them to be declared as aforesaid.

Sect. 10.—Any such society may take and hold any real estate or securities thereon *bonâ fide* mortgaged, assigned or hypothecated to the said society, either to secure the payment of the shares subscribed for by its members, or to secure the payment of any loans or advances made by, or debts due to such society, and may also proceed on such mortgages, assignments or other securities, for the recovery of the moneys thereby secured, either at law or in equity or otherwise; and such society may invest in the names of the president and treasurer for the time being, any of its surplus funds in the stocks of any of the chartered banks, or other public securities of the province.

Sect. 11.—Any such society may, from time to time, lend and advance to any member or other person, money from and out of its surplus funds, upon the security and mortgage, (*hypothèque*) of real estate.

Sect. 12.—Whenever any such society has received from any shareholder a mortgage or hypothec, or an assignment or transfer of any real estate belonging to him or her, to secure the payment of any advance, and containing an authority to the society to sell such real estate in case of nonpayment of any stipulated number of instalments, or sums of money (as every such society is hereby authorized to do).....such society may cause the same to be enforced by an action or proceeding in the usual course.

Sect. 13.—Every such society may advance, in the usual manner moneys or any real estate whatsoever of any member of the said society, as well for the actual purchase of the same and for the erection of buildings thereon, as generally upon the security of any real estate belonging to any such member, at the time of his borrowing such moneys, and may take a mortgage, hypothec or assignment of all such real estate whatsoever in security for such advances.

All the clauses of the Act, from section 21 onwards, relate only to permanent building societies, and among them are the following:

Sect. 24.—No such society, by its rules, regulations and by-laws authorized to borrow money, shall borrow, receive, take or retain, otherwise than in stock and shares in such society from any person or persons, any greater sum than three-fourths the amount of capital actually paid in on unadvanced shares and invested in real securities by such society; and the paid in and subscribed capital of the society shall be liable for the amount so borrowed, received or taken by any society.

Sect. 26.—Any such society may advance to members on the

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security of investing on unadvanced shares in the said society, and may receive and take from any person or body corporate, any real or personal security of any kind whatever, as collateral security for any advance made to members of the society.

Sect. 27.—Any such society may hold absolutely real estate for the purposes of its place of business, not exceeding the annual value of six thousand dollars.

The Act under which the Building Society (appellants) was incorporated, the object for which it was formed, and the manner in which its capital was to be employed, are mentioned in articles 1, 2, 3, 4, 5, 6 and 7 of its by-laws, viz:—

By-Laws of the Villa Association of Cape Gibraltar, (Lake Memphremagog,) adopted at the general meeting of the 21st August, 1874:

Art. I.—The society shall be called "the Villa Association of Cape Gibraltar, Lake Memphremagog:" La Campagnie de Villas du Cap Gibraltar, Lac Memphremagog.

It is incorporated in virtue of Ch. 69 of the Consolidated Statutes of Lower Canada, entitled: "An Act concerning Building Societies."

Its office shall be at Montreal.

Art. II.—The object of the society is to offer to its members a sure and advantageous means of investing their savings, to aid them in acquiring cottages on certain lots of land of one hundred feet frontage and three hundred feet depth, situate at Cape Gibraltar, Lake Memphremagog, county of Brome, Province of Quebeb, being a portion of the property known as the Furniss property.

Art. III.—The present capital of the society is $100,000, being the first issue. The directors may increase the capital when they may deem it necessary and fix such conditions of payment and other conditions that they may consider expedient. Each increase of capital shall be designated according to its issue.

Art. IV.—The present capital of the company forms the first issue and is divided into shares of one hundred dollars each, called the fixed stock; this issue is also composed of an indeterminate amount of accumulating stock.

The shares are divided into a certain number of accounts or numbers, each account or number consisting of ten shares.

Shareholders shall pay during ten years at the office of the society, for each account or number which they owe, the sum of one hundred dollars per annum in three instalments of $33.33\frac{1}{3}$; such instalments

shall represent the fixed stock. They shall moreover pay $25.00 per annum in three instalments of $8.33⅓; such instalments shall represent the accumulating stock, and they shall be continued until the expiration of the society.

Art. V.—The capital or funds of the society shall be employed—1st for the cost of administration; 2nd to purchase building lots on the property known as the "Furniss property" situate on the shores of Lake Memphremagog; 3rd to build on such lots cottages costing about $1,000.00 each for every one of its members or shareholders.

Art. VI.—These cottages shall be erected under the care and direction of the directors according to plans and contracts approved by them.

Art. VII.—As soon as one or more of such cottages shall be built as the directors may decide, there shall be a drawing by lot to designate the number or shareholder to whom such house and the lot upon which it is built shall belong.

These by-laws were approved of and signed as appears by plaintiff's exhibit A, viz:

"Nous, les soussignés, après avoir lu et examiné les règlements de la Compagnie de Villas du Cap Gibraltar, Lac Memphrémagog, les approuvons, les signons, et nous nous engageons de nous y conformer ainsi qu'aux changements et amendements qui pourront y être faits et nous y souscrivons le nombre de parts inscrites vis-à-vis nos noms respectifs.

No des Livres	Signatures des membres.	Occupation.	Domicile.	Nombre de Parts.	Montant
1	Chs. Pariseau.....	Marchand..	Montréal.	2	$2500.00
2	"	" ..	" ..		
3	C.G. Gaucher.....	" ..	" ..	2	2500.00
4	U.Emard,D.L.C.Q.&B	" ..	" ..		
		&.,	&c.,	&c."	

After much consideration I have come to the conclusion that the judgment of the Superior Court, confirmed by the Queen's Bench on appeal, is right and should be affirmed. It cannot be denied that when an incorporated company has certain limited powers it can only be bound when acting within the limits of those powers. Any acts or agreements outside of these powers are

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ultra vires, and for which the corporation will not be liable, or as Mr. Bryce puts it, "a corporation incurs no liability by engaging in transactions *aliunde* those for the prosecution of which it has been created"—and as corporations can be bound only within certain limits, outside those limits they are not bound, and therefore, as he says, "neither at law nor in equity will the other contracting parties obtain any redress in any form of suit upon the engagement itself from the corporation, whatever be the fraud or however unjust the refusal of such redress."

And as Jervis C. J., in the *East Anglian Railways Co.* v. *The Eastern Counties Railway Co.* (1) says:—

> If the contract is illegal, as being contrary to the Act of Parliament, it is unnecessary to consider the effect of dissentient shareholders; for, if the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity or render liable their corporate funds.

In *Riche* v. *Ashbury Railway Carriage Co.* (2) Mr. Justice Blackburn expresses himself thus:—

> I do not entertain any doubt that if on the true construction of a statute creating a corporation, it appears to be the intention of the legislature, express or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified.

And Lord Cairns in the *Ashbury Railway Carriage & Iron Co.* v. *Riche* (3), citing that passage says: "that sums up and exhausts the whole case." And by Lord Cranworth in the *Eastern Counties Railway Co.* v. *Hawkes* (4), and by Lord *Selborne* in the *Ashbury Railway Carriage & Iron Co.* v. *Riche* (5), it has been stated as settled law

(1) 11 C. B. 813.
(2) L. R. 9 Ex. 262.
(3) L. R. 7 H. L. 693.
(4) 5 H. L. Cas. 331.
(5) L. R. 7 H. L. 693.

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that a statutory corporation created by Act of Parliament for a particular purpose, is limited as to all its powers by the purposes of its incorporation as defined by that act.

The simple question then is as to the competency and power of the company to make this contract; if it was beyond the objects for which it was incorporated it was beyond the powers of the company to make it and was therefore void from the beginning and as if no contract at all had been made, and therefore could not be ratified though every member had originally sanctioned the action of the directors and authorized the placing of the seal of the company to the contract, or had subsequently ratified and confirmed the transaction. If, therefore, the contract in this case is of a nature not included in the memorandum of association, it would be *ultra vires* not only of the directors, but of the whole company, so that the subsequent assent of the whole body of shareholders would have no power to ratify it, because it is in its inception void or beyond the provisions of the statute. Has the corporation in this case then gone beyond the objects and purposes expressed or implied in the act? It must be borne in mind that there is a clear distinction as to what may be *ultra vires* the directors of the company and of the company itself, because there may be acts *extra vires* the directors and yet *intra vires* the corporation.

In the *Eastern Counties Railway Co.* v. *Hawkes* (1) Lord St. Leonards said:—

> The mere circumstance of a covenant by directors in the name of the company being *ultra vires*, as between them and the shareholders, does not necessarily dis-entitle the covenantee to sue upon it.

In *Bateman* v. *Mayor, &c.*, of *Ashton-Under-Lyne* (2), Martin B. says:—

> I do not at all mean to differ from any of the cases cited on the

(1) 5 H. L. Cas. 331 at p. 372. (2) 3 H. & N. 337.

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argument. I am content to take the law as laid down in *The East Anglian Railway Company* v. *The Eastern Counties Railway Company* (1), and in *McGregor* v. *The Official Manager of the Dover and Deal Railway Company* (2), in conjunction with what I have already referred to as being stated by Lord *Wensleydale* in *The South Yorkshire Ry. Co.* v. *The Great Western Ry. Co.* (3), and Mr. Justice *Erle* in *The Mayor of Norwich* v. *The Norfolk Ry. Co.* (4). The cases in equity which were cited were as between the companies and their shareholders, where the question is very different from that between a third person and the company, being a corporation, upon a *bonâ fide* contract.

The real question then will be: What were the objects for which the corporation was established? For those objects and those alone is the company in existence. The object is thus expressed in article II., "The object of the society is to offer to its members a sure and advantageous means of investing their savings, to aid them in acquiring cottages on certain lots of land of 100 feet frontage, situate at cape Gibraltar, lake Memphremagog, county Brome, province of Quebec, being a portion of the property known as the Furnis property."

Now, practically, is not the object to be attained by this arrangement and purchase identical with the object the act of incorporation and rules agreed on were intended to attain only in a different manner from that generally adopted by benefit building societies? Is there then anything in the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactments, expressly or impliedly forbidding the making of the contract sought to be enforced, and thus showing that such an arrangement or contract was *ultra vires*, that is, that the legislature meant that such a contract should not be made, or, as Lord Wensleydale expresses it (5):—

> Whether it can be reasonably made out from the Statute that this covenant is *ultra vires*, or, in other words, forbidden to be entered into.

(1) 11 C. B. 775.
(2) 18 Q. B. 618.
(3) 9 Ex. 84.
(4) 4 E. & B. 413.
(5) 9 Ex. 85.

And again at p. 88

It not being made out that the Act prohibits such a bargain the contract must be enforced.

Adopted by Erle J., and also by Martin and Channell BB., in *Bateman* v. *Mayor, &c., of Ashton-under-Lyne* (1)?

This contract was unquestionably made *bonâ fide* on both sides—there is no pretence for saying there was any breach of trust as against the shareholders, or that the agreement was in fraud of the proprietors of shares. On the contrary, all that was done in reference to this transaction was with the unanimous consent and concurrence of the shareholders, so that the simple question is: Was what has been done illegal as being forbidden by law, that is, not authorized by the act of incorporation and therefore prohibited by the act? So far from there being anything in this transaction unconnected with the object of the incorporation, or calculated to defeat the purposes of this incorporation, the object seems to me to be directly in furtherance of what the parties had in view, therefore I fail to see how it can be said that the transaction is prohibited by implication. If the purposes to be accomplished were substantially the same, then the means and modes by and through which such purposes are to be effected would not make the transaction *ultra vires*.

See the *Mayor of Norwich* v. *The Norfolk R'ly Co.* (2), as to the "distinction between a difference of purposes and a difference of means and modes by and through which the same purpose is to be effected." And in *Bateman* v. *The Mayor, &c.* (3), Bramwell B., who differed from the Court in the final conclusion, says at page 340:—

I in no way doubt the correctness of what Lord Wensleydale said in the *North Yorkshire R. Co.* v. *The Great Northern Railway Co.* (3)

Coleridge J., in *Mayor of Norwich* v. *Norfolk Railway*

(1) 3 H. & N. 335-6.

(2) 4 E. & B. 397 at p. 432.

(3) 9 Ex. 84.

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Co. (1), in speaking of the well considered judgment of Lord Langdale in *Colman* v. *Eastern Counties R'y Co.* (2) says:

This language points to an undenied distinction between a difference of purposes and a difference of means and modes by and through which the same purpose is to be effected, and where in any particular instance the lawfulness of a change is in question it will be discussed accordingly on different principles.

And after speaking of a corporation attempting to carry on or substitute a purpose different from that for which it has been created, he says:

If once you establish the substantial difference of purpose there is therefore no longer any question of degree or convenience. But where the corporation merely adopts different means or modes by or through which the original purpose is to be effected, the question will turn, not on the want of power, but on the interests and consent or otherwise of those affected by the change, and all considerations of degree and convenience will be material.

And again he says:

When one considers the immense extension and increase of corporate bodies in modern times, the vast variety of purposes for which they are created, the complication of circumstances under which they are to act, the liability to error in the formation of prospective plans as to detail, and the ever arising improvements in the means and appliances of mechanics and science, it would seem that public convenience and policy, as well as good sense and justice, require that, within the limits of a substantial adherence to purpose, the empowering clauses of incorporating instruments should be construed largely and liberally, so as not to defeat the purpose by a too narrow restriction of the means.

And Lord Campbell C. J. says:

In *South Yorkshire Railway and River Dun Co.* v. *Gt. Northern Railway Co.* (3), (I believe the most recent case upon the subject), my brother Parke, after observing that individuals and corporations which are the creations of law are bound by their contracts as much as all the members of a partnership would be by a contract in which all concurred, goes on to say: But where a corporation is created by Act of Parliament for particular purposes, with special

(1) 4 E. & B. 432.

(2) 10 Beav. 1-16.

(3) 9 Ex. 55, 84.

powers, then indeed another question arises, their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*, that is, that the legislature meant that such a deed should not be made.

The question then appears to me to be simply this, whether it can be reasonably made out from the statute that this covenant is *ultra vires*; or, in other words, forbidden to be entered into by either the plaintiffs or defendants.

There is no doubt a distinction between a benefit building society and a freehold land society.

Kindersley V. C. thus speaks of benefit building societies (1):

Their object is that any individual member may borrow money from the society to enable him to buy or build a house, mortgaging it to the society as security for the money borrowed, and ultimately making it absolutely his own by paying off the mortgage out of his subscription.

In *Grimes* v. *Harrison* (2), Sir John Romilly said:

There is in my opinion a great distinction between a freehold land society and a benefit building society. A freehold land society buys land with the funds contributed by the members of the society and then divides it amongst them; but a benefit building society advances to its borrowing members money derived from the subscriptions and which the borrowing members themselves lay out in the purchase of land or buildings, and then mortgage them to the society. But this is quite clear, that in both cases the members must be bound by the rules constituting the society to which they have become parties and upon which they have acted.

The case of *Queen* v. *D'Eyncourt* (3), seems to me to be on all fours with this case, and to establish that there was no change of purpose, but simply a carrying out of the purpose contemplated by different modes and means.

The object of the society in that case, registered in 1852, under the 6 and 7 William IV. cap. 32 for the registration of Benefit Building Societies, as a benefit

(1) In *re* Kent Building Society, 1 Dr. & Sm. at p. 422.

(2) 26 Beav. 435.

(3) 4 B. & S. 820.

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building society, was to enable its members by weekly subscriptions to purchase freehold property in shares; that every member upon receiving the money advanced to him should execute a mortgage of the property offered as a security for all payments due or to become due according to the rules, upon his share or shares. In 1853 the directors purchased a freehold estate partly by the subscriptions of the members and partly with money borrowed for that purpose, and it was divided into allotments among such of the members as desired to have land.

In 1855 *L.*, who was a subscribing member, agreed to take two allotments and to continue his weekly subscriptions. In 1858 the company decided not to receive any further subscriptions from investing members, but to consider them as withdrawing members. After March, 1855, L. discontinued the payment of his weekly subscriptions, and after notice of arbitration, pursuant to one of the rules and 10 Geo. 4 ch. 56 s. 27, an award was made against him for payment of £69 8*s.* 4*d.* Upon his refusal to pay that sum an application was made to a Police Magistrate to enforce the award, which he declined to do. Upon a rule calling upon the magistrate to enforce the award, it was held: "That the society had not ceased to exist by reason of the purchase of the land; that if that was a mis-application of the funds the remedy for members who had not assented to it was in a Court of Equity."

In that case, as in this before us, the society purchased land, instead of its members doing so, with money advanced to them. It was contended, as in this case, that the society ceased to be a Benefit Building Society and lost the statutory powers given by Statute 6 & 7 Wm. 4 ch. 32. But it was established that converting the society from a benefit building society into a free hold land society was not illegal, and was not a contract

contrary to the policy of the act, and though the society could not compel a member to take an allotment instead of money, the members might agree among themselves that instead of the members receiving money the funds and credits of the society should be applied in the purchase of a tract of land to be afterwards allotted to them.

Cockburn C.J. thus speaks in *The Queen* v. *D'Eyncourt* (1) :—

This was a society registered as a Benefit Building Society under Statute 6 & 7 W. 4 ch. 32, and according to the rules, which have been duly certified, subscriptions and fines became payable by Layton, who was a member, and he has not paid them.

The main answer to the claim of the society is that it has been dissolved. It is said that by an arrangement among themselves the members have changed the purposes of their society and converted themselves into a Freehold Land Society, by applying the funds in the purchase of land, and therefore the society is put an end to. But that does not follow. If there has been a mis-appropriation of the funds contributed by the members, that is a case for the intervention of a Court of Equity on the application of any member who thinks himself aggrieved. But the society does not cease to exist because it does something which its rules do not warrant. A Court of Equity would restrain the directors from mis-applying the money recovered under the award, but so long as the society exists the members are bound by the rules, and the question of an alleged misapplication of its funds is foreign to the jurisdiction of the magistrate under the statute.

Crompton J. (2) :—

The converting the society from a Benefit Building Society into a Freehold Land Society is not in the nature of an illegal conspiracy. The society took certain powers under the Act of Parliament, by which its members received an amount of money to enable them to purchase land, and afterwards arranged among themselves that land should be purchased and allotted among them. There is nothing illegal, immoral, or vicious in that, so as to be void: it does not even amount to a contract contrary to the policy of the Act. The society could not compel a member to take an allotment instead of money; he would have a right to say: "I do not claim through this arrangement for allotting the land, but under the rules of the society,"—he traces his title from the arrangement made when he entered the society.

(1) At p. 831. (2) At p. 833.

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Blackburn J. (1):—

How has Layton, who had become a shareholder, taken himself out of the provisions of the Benefit Building Society Act? The rules of this society are framed with the view of enabling the members to purchase land. In fact the members have agreed among themselves that, instead of the members receiving money, the funds and credit of the society shall be applied in the purchase of a tract of land to be afterwards allotted among them. That was so far illegal, that under the rules they had no right to do it; it was a breach of trust. But Layton was a party to that proposal, and agreed to take part of the land so purchased on the terms of his paying his weekly subscriptions as usual. If that agreement had been carried out he would have got an allotment; and it would have been the same as if he had paid for it and the society had returned the money to him by way of loan.

I therefore think this transaction, thus carrying out the objects of this society in strict accordance with its rules, is not *ultra vires*—that is, in the language of *Parke*, B., (2) "it is not forbidden expressly or by implication by the Acts of Parliament relating to these companies, and I am happy to find that the law of this case coincides with the honesty of it, and does not sanction the breach by the defendants company of the solemn contract into which they have fairly entered and from which they are trying to escape."

STRONG J.—I am compelled to dissent from the majority of this court as well as from the court below. The opinion of Mr. Justice Cross, who differed from the other members of the Court of Queen's Bench, seems to be in all respects well founded. It appears that the purchase of lands by the appellants and the contract with Desmarteau and others for building the 24 cottages, entered into upon the 7th of October, 1874, as well as the deed of arrangement of the 10th of September, 1877, founded on the previous deed, were all *ultra vires* of the appellants and void.

(1) At p. 834.

(2) *South Y. Ry. Co.* v. *Gt. N. Ry. Co.* 9 Ex. 89.

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Taking this view of the case, it will be unnecessary to consider the question raised as to the status of the respondents.

The appellants are a non-permanent building society incorporated under the Con. Stats. L. C. ch. 69, from which their powers are to be ascertained. The principal matter for our determination is, therefore, whether that Act conferred upon them power to enter into contracts for the purchase of lands for the purposes for which the lands in question were avowedly acquired, and whether they have power to enter into building contracts such as that for the construction of the twenty-four cottages which Desmarteau agreed to build for them by the second agreement of the 7th October, 1874. The general law as to the power of corporations in the Province of Quebec is contained in art. 358 of the Civil Code which is as follows:—

The rights which a corporation may exercise besides those specially conferred by its title, or by the general laws applicable to its particular kind, are all those which are necessary to attain the object of its creation; thus it may acquire, alienate and possess property, sue and be sued, contract, incur obligations, and bind others in its favor.

The law of England upon the subject of the powers of corporations is stated by the Lord Chancellor (Cairns) in a late case (1), in the House of Lords, approving the definition of the rule laid down by Mr. Justice Blackburn in the same case in the Exchequer Chamber; Lord Cairns there says:

I do not entertain any doubt that if, on the true construction of a statute creating a corporation it appears to be the intention of the legislature, express or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified.

(1) *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R. 7 H .L. 673.

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It thus appears that the law of England is less strict than that of the Province of Quebec, as explicitly declared by the code; for, whilst by the latter a corporation is deemed to possess no powers except such as are expressly or impliedly conferred upon it by the instrument of its creation, by the English law a corporation is held to have all legal powers which are possessed by a natural person, except such as are either by express words or by implication prohibited by the statute, (either general or special) charter, or articles of association which has called it into legal existence.

A late American work on the law of corporations (1), points out that the decisions of the American courts have laid down a rule on this subject identical with that which had been adopted by the Quebec code, and therefore a rule which in its mere terms of statement differs from the definition adopted by the House of Lords in *Riche* v. *Ashbury Railway Carriage and Iron Co.*, but adds that the law is substantially the same in both countries in its effects and result, inasmuch as a power which, according to the doctrine of the Supreme Court of the United States would be considered as so foreign to the proposed objects of a corporation as not to be impliedly conferred upon it, would equally, according to the English rule, be *extra vires* as impliedly prohibited. I mention this apparent distinction merely to show that there is no reason why English authorities should not apply, not of course directly as binding decisions, but so far as they appear to have been well decided as guides in a case like the present.

There has been some confusion in the cases arising from the use of the term *ultra vires* being indiscriminately applied to the Acts of corporations or the governing bodies of corporations objectionable on very different grounds; it is sometimes applied to acts in which the

(1) Morawetz on Private Corporations, P. 149 *et seq.*

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governing body of the corporation, such as a board of directors, have transcended the powers delegated to them, though the Act objected to was not beyond the powers of the corporation itself; in other cases, it has been applied to acts of the corporation itself, which, though not beyond the capacity conferred upon it by the Act of incorporation, exceeded the powers to which the by-laws or constitution had limited the exercise of their powers; but in its more general and proper signification it is applied to acts in excess of the powers conferred on the corporation by its Act of incorporation or charter. I refer to these distinctions for the reasons that most of the cases cited in the appellant's factum belong to the first and second, and not to the last of these classes.

The enquiry which we must make in the present case is thus confined to this, does the Con. Stats. L. C. ch. 69 give authority to non-permanent building societies, formed pursuant to the provisions of that Act, to enter into such contracts as those of the 7th Oct., 1874, for the purchase of these lands and the building of cottages.

It is to be observed, in the first place, that no authority to hold real estate is given to the society otherwise than by the 10th section, which empowers the society to take and hold real estate mortgaged, assigned or hypothecated to it, to secure payment by the members of the shares, or to secure loans or advances made by the society. This is the only express power on the subject.

The purpose for which such societies are constituted are declared in the second sub-section of the 1st section of the Act, as follows:

> Such society shall be constituted for the purpose of raising by monthly or other periodical subscriptions of the several members of the said society, in shares not exceeding the value of $400 for each share, (and by subscriptions not exceeding $4 per month for each share), a stock or fund for enabling each member to receive out of the funds of the society the amount or value of his share or shares therein for the purpose of erecting or purchasing one or more

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dwelling houses, or other freehold or leasehold estate, such advance to be secured by mortgage or otherwise to the said society until the amount or value of his share or shares is fully paid to the said society with the interest thereon, and with all fines or liabilities incurred in respect thereof.

This section contains all that is to be found in the Act as to the object and design of the society; and it is manifest that it does not confer power to purchase or acquire land, or to build houses. The objects are very plainly stated; they are to carry on the society until, by means of the monthly subscriptions of the members, the interest in loans, fines, and other legitimate sources, the capital stock or fund is realized, when the society will terminate, and members who have not by borrowing received their shares in advance will be entitled to be paid the full amount of the shares for which they subscribed; and a further object is, to advance on sufficient security upon freehold or leasehold lands, the amount of their shares to borrowing members, the security being not of course to re-pay the loan, but to continue the monthly payments or subscriptions on the borrower's shares, interest and fines, until the termination of the society in the manner before mentioned. It is true, it is said, that the intention is to enable members to lay out the amount of their shares advanced to them, in purchasing or building houses, but there is nothing in the Act making it obligatory upon them so to apply the money which they may raise by borrowing upon, or taking their shares in advance, for they may, as, in practice, is constantly done, use the money in any way they may think fit, and there is nothing authorizing the society to lay out the money for them in the purchase of land or in building houses. So far from the Act conferring any power upon the society to acquire land or enter into building contracts, we find the 10th section giving express power to take land in the only way, and for the only purpose, contemplated by the legislature, namely,

as security for money advanced. And even as regards surplus moneys, by which I mean moneys in the hands of the society arising from subscriptions and other legitimate sources authorized by the Act, and not taken up by borrowing members, and which, therefore, the interests of the society require should be invested in some manner in order that a profit may be derived, we find that the only investments of such moneys authorized are those indicated in the 10th section, namely, mortgages of real estate, the stock of chartered banks, and other public securities of the province. From this 10th section I think it is evident that it was not the intention of the legislature to empower building societies to invest in the purchase of land or in the building of houses. If they can so invest, it can only be because some implied power to do so is to be inferred, but I have read the Act many times and have failed to find any ground for such an implication, and the respondents have failed to point out any particular clause from which it may be inferred. If we were so to hold, we should be obliged also to hold that it was open to the society to invest in any securities they might think fit, and to construe the 10th section as in no way restrictive, but as merely expressing what was already implied. Such a mode of construction is not, in my opinion, admissible. I think the only use to which the moneys of the society can be put before its termination, is loans on mortgages to borrowing members, and investments in mortgages, bank shares and public securities.

That I am right in this view of the construction of the Act is, I think, confirmed by the consideration that the scheme which these societies were intended to carry out was borrowed from the early Building Societies Acts in England, and it is clear that without special powers they were not authorized to purchase land.

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That the object of the English societies was the same as this, appears from the case of The Kent Benefit Building Society (1), when Kindersley V.C. describes the object of such societies to be:—

> That any individual member may borrow money from the society to enable him to buy or build a house, mortgaging it to the society as security for the money borrowed, and ultimately making it absolutely his own by paying off the mortgage out of his subscription.

The same case also shows that it was not within the scope of the powers conferred by the Act of parliament authorizing the creation of such societies that they should themselves acquire land by purchase.

In short, the conclusion I come to is, that whilst the expressed object of the society is to enable members to buy or build houses, yet that object is to be attained, and attained only, in the mode of operation pointed out by the act, namely, by borrowing money from the society, and with the money purchasing or building houses, and that this mode of carrying out the scheme of the act is essential, and one to which its purposes are to be restricted; and I cannot agree that this prescribed mode of proceeding can be set aside, and the same result secured by the society itself purchasing houses and lands or building houses and reselling them to members.

Therefore, these contracts of the 7th October, 1874, were, *ipso jure*, void and inexisting, and being so void were not susceptible of confirmation, and consequently the deed of arrangement of the 10th September, 1877, was likewise void, and this action must therefore fail.

It is said, however, that the former judgment of the Superior Court rendered on the 12th May, 1877, in an action brought to recover the amount of instalments alleged to have become due on the contracts of the 7th October, 1874, is sufficient to establish the defence of

(1) 1 Dr. & Sm. 417.

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chose jugée pleaded to the present action, I am unable to assent to this. The defence now pleaded that the contracts were *ultra vires* was not raised in that action. But it appears from the judgment itself that there never was any actual adjudication in favor of the plaintiff in the former action of any disputed questions, on the contrary the "*considérants*" of the judgment show that the action would have been dismissed, upon the ground that all payments received from shareholders up to the time of the institution of the action had been paid over according to the contracts, if the defendants (the present appellants) had not consented to a judgment for the sum of $4,703.09. A judgment thus rendered by consent cannot have the effect of *chose jugée*, as to the legal validity of the obligation sued upon, in a subsequent action upon the same obligation, for it amounts to nothing more than this, that there being certain matters in dispute between the parties, an arrangement or "transaction" takes place between them, which is by consent confirmed and made exigible by the judgment of the court. Such a judgment cannot have the effect of a judgment recovered adversely, and no more concludes the appellants from now setting up the defence of *ultra vires* to another demand founded on the same deed than the voluntary payment of the amount for which the judgment was allowed to pass, would have done. Further, a judgment in respect of one instalment, portion of the debt, does not constitute *res judicata* as regards subsequent instalments, being other portions of the same debt. Merlin Rep. tit. *chose jugée p.* 320. See Laurent, vol. 20, p. 16.

I am of opinion that the appeal should be allowed.

FOURNIER J.—Le présent appel est interjeté d'un jugement de la cour du Banc de la Reine, siégeant en appel pour le district de Montréal, confirmant celui

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que la Cour Supérieure pour le même district avait rendu le 29 avril 1881, condamnant l'appelante à payer à l'intimé la somme de $3,920.28, pour un versement avec intérêt, dû par l'appelante, en vertu d'un règlement de compte fait par acte authentique du 10 septembre 1877, à la Compagnie de Construction de la Puissance. Cette compagnie d'abord organisée en vertu du ch. 69 des Statuts Refondus, B. C., reçut une extension de pouvoirs, en vertu d'un acte de la Puissance, 40 Vict., ch. 80, amendant sa charte et changeant son nom en celui de Compagnie de prêts hypothécaires de la Puissance. Devenue insolvable, elle est actuellement représentée par l'intimé comme syndic à sa faillite.

La Compagnie des Villas a été aussi organisée en vertu du chapitre 69, Statuts Refondus, B. C. Elle ne possède que les pouvoirs conférés par cet acte et par les règlements faits en conformité d'icelui.

Peu de temps après son incorporation, la dite compagnie, par le ministère de son président et vice-président, acheta par acte de vente en date du 7 octobre 1874, de Desmarteau et autres, promoteurs de la dite compagnie, cent lots à bâtir, situés sur les bords du Lac Memphrémagog, contenant chacun cent pieds de front sur trois cents de profondeur, pour la somme de $25,000, payables en dix ans, par paiements trimestriels de $625, chacun.

Par marché et devis, passés le même jour, entre la dite compagnie et Desmarteau et autres, ces derniers s'obligeaient à construire, pour la somme de $24,000, 24 cottages (villas) sur les lots achetés par l'acte précité.

Par acte d'obligation et transport en date du 14 octobre 1875, Desmarteau et autres se reconnurent endetté envers la susdite société de construction de la Puissance en diverses sommes mentionnées au dit acte, et, pour en assurer le remboursement, transportèrent à la dite société, les deux sommes, ci-dessus mentionnées,

de $25,000 et de $24,000, dues aux dits Desmarteau et autres par la compagnie appelante, en vertu des deux actes ci-dessus du 7 octobre 1874.

Après ces diverses transactions les deux compagnies, parties en cette cause, firent le 10 septembre 1877 un acte d'arrangement par lequel la compagnie appelante se reconnut endettée envers la Compagnie des prêts hypothécaires de la Puissance en la somme de $40,599.32, balance restant due en vertu de l'acte de vente et de l'acte de devis et marché dont les montants respectifs dus par l'appelante à Desmarteau et autres avaient été par eux transportés, comme ci-dessus dit, à la dite Compagnie de prêts hypothécaires avant que son nom eût été changé comme susdit. A l'action de l'intimé l'appelante a plaidé : 1o. l'inconstitutionalité de l'acte de la Puissance 40 Vict., ch. 80, incorporant l'intimé; et 2o. la nullité des actes de vente et de marché et devis, en date du 7 octobre 1877, en alléguant que par l'acte en vertu duquel elle est incorporée (ch. 69, Statuts Refondus, B. C.), elle n'avait aucun pouvoir d'acquérir des immeubles ni de faire construire des maisons, parce qu'elle n'avait pas alors en caisse, les deniers suffisants pour payer les dites acquisitions et constructions.

Le montant de la créance réclamée n'est pas contesté. Les seules questions à résoudre sont celles que je viens d'indiquer sommairement.

Quant à la première, celle de la constitutionalité de l'acte 40 Vict., ch. 80, il est inutile de s'en occuper, car la question a été, depuis que cette cause a été plaidée, tranchée par une décision du Conseil Privé.

Il ne reste que celle de la validité ou nullité des procédés adoptés par la compagnie appelante pour parvenir au but qu'elle s'était proposé, savoir : de procurer à chacun de ses membres le moyen de recevoir à même les fonds de la dite société, le montant de ses actions pour construire ou acheter un ou plusieurs immeubles,

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Les actionnaires de la compagnie appelante, tous également pressés d'entrer en possession de leurs villas, n'attendirent pas pour la réalisation de leurs désirs, que la caisse de la dite compagnie fût remplie au moyen du procédé trop lent de la rentrée des souscriptions périodiques. Ils crurent devoir adopter un mode beaucoup plus expéditif que celui indiqué par le ch. 69, en vertu duquel ils s'étaient incorporés. Ils eurent recours à l'emprunt d'une manière indirecte, comme on l'a vu par les actes ci-haut cités, pour se procurer de suite les fonds nécessaires pour la construction de 24 villas. Les deniers nécessaires à cette fin leur furent avancés par l'intimé, en vertu des actes ci-dessus cités, consentis par les officiers de l'appelante, dûment autorisés à cet effet par les règlements de la dite compagnie, signés par tous et chacun des actionnaires. L'illégalité invoquée par l'appelante consisterait donc dans le fait d'avoir outrepassé ses pouvoirs en empruntant pour acheter des terrains, pour faire construire des villas, suivant les règlements de la dite société,—au lieu d'avoir suivi le mode indiqué par le chapitre 69, de ne procéder à l'acquisition d'immeubles et de ne faire des avances aux actionnaires qu'avec le capital fourni par la rentrée des souscriptions périodiques, but des sociétés de bâtisse, et le mode de procéder. La section 2 du chapitre 69, énonce ainsi qu'il suit le mode de procéder:

Sect. 1. § 2.—Such Society shall be constituted for the purpose of raising, by monthly or other periodical subscriptions of the several members of the said Society, in shares not exceeding the value of four hundred dollars for each share (and by subscriptions not exceeding four dollars per month, for each share), a stock or fund for enabling each member to receive out of the funds of the Society the amount or value of his share or shares therein, for the purpose of erecting or purchasing one or more dwelling houses, or other freehold or leasehold estate, such advance to be secured by mortgage or otherwise to the said Society, until the amount of value of his share or shares is fully paid to the said Society, with the interest thereon, and with all fines or liabilities incurred in respect thereof,

Le but de la société appelante est énoncé comme suit en l'article 2 de ses règlements :—

Art. II.—The object of the society is to offer to its members a sure and advantageous means of investing their savings, to aid them in acquiring cottages on certain lots of land of one hundred feet frontage, situate at Cape Gibraltar, Lake Memphremagog, county of Brome, Province of Quebec, being a portion of the property known as the Furniss property.

Comme on le voit, le but de la société appelante est conforme à celui du ch. 69 :—faciliter aux actionnaires l'acquisition d'immeubles. Le mode adopté pour y parvenir, est différent, il est vrai de celui indiqué par l'acte ; mais il a été délibérément accepté par tous les actionnaires qui ont donné à cet effet aux officiers et au bureau de direction de la dite compagnie, tous les pouvoirs nécessaires pour adopter le mode de l'emprunt qui a été suivi comme on l'a vu plus haut. L'article suivant des dits règlements autorisait les dites transactions :—

Art. XXXIII.—The president, and, in his absence, the vice-president, and secretary-treasurer, on deliberation of the board of directors, thereto authorizing them, may in the name of the society negotiate all sales or purchases of bank stock or public funds, lend and contract all loans deemed necessary and useful by the directors, on such conditions, and under such restrictions, as may be approved by them; they may, in the same manner, and on similar deliberation, accept, acquire, hold, sell, alienate, transfer, bind and mortgage for and in the name of the society, all real estate, heritages, moneys, merchandise, moveables and effects whatsoever, and all titles, deeds, and other instruments bearing obligations for moneys, transfers, cessions and subrogations, acts or titles, and all other effects, and all rights and claims, which the society may lawfully accept, acquire, hold, sell, alienate, transfer, bind and mortgage, in virtue of the law, make abatements, in part and compound with all persons whatsoever, for claims of which they may consider the recovery doubtful, or more or less uncertain or distant, make abatement, in certain cases, of fines incurred and all acts required to give effect to the above, shall be signed by the president, or in absence, or if he be personally interested, by the vice-president, and also counter-signed by the secretary-treasurer, and if the latter be absent,

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or personally interested, by the assistant-secretary-treasurer, or by any other person specially authorized by resolution of directors.

Il est à remarquer que la nullité des procédés n'est invoquée que par l'appelante. Aucun des actionnaires ne semble avoir voulu s'en prévaloir, car, dans les nombreux procès que l'appelante a eu pour soutenir cette prétention, aucun actionnaire n'a jugé à propos d'intervenir pour en prendre avantage. On comprend qu'un actionnaire qui n'aurait pris aucune part à la confection des règlements et qui ne les aurait jamais ratifiés puisse être reçu à invoquer ces moyens de nullité, mais la compagnie elle-même, autorisée à faire ces transactions, qui les a complétées en recevant les deniers empruntés de l'intimé et à laquelle il ne reste plus qu'à en faire le remboursement, ne le peut certainement pas. La loi ne peut tolérer un aussi étrange et aussi injuste procédé. Aussi fait-elle la distinction entre les nullités qui sont contraires au but de la loi et celles qui n'affectent que les moyens employés pour parvenir au but de loi.

Dans le cas actuel, la transaction attaquée ayant été complétée, il n'est pas au pouvoir de la compagnie appelante, d'invoquer son incapacité, comme l'établit l'autorité suivante :—

But when a transaction of the kind now under consideration is completed on the part of the other contracting party, every principle of common sense and equity requires that the corporation should not be permitted to repudiate payment therefor, or the other party due completion thereof by itself on the ground that the transaction, though admitted to be within its possible capacities, it outside its actual powers then called into existence. The very defence discloses fraud. Brice (1).

When a contract to which a corporation is a party has been fully executed on the other part, and nothing remains to be done but the payment by the corporation, it will not be allowed to set up that the contract was *ultra vires*. *Oil Creek, etc, R. R. Co.* v. *Passenger Transp. Co.* (2).

A corporation is estopped from setting up the defence in an action

(1) 2nd Ed. p. 833. (2) 83 Pen. St., 160.

to recover money loaned to it that the money was borrowed and expended in a business beyond the corporate powers, that the lender knew the use intended was *ultra vires* makes no difference, so long as the purpose was not in itself one of an immoral or illegal character.

L'appelante a cité plusieurs décisions des tribunaux d'Angleterre qui maintiennent ses prétentions jusqu'à un certain point. Elles sont fondées sur le statut 6 et 7, William 4, ch. 32, qui déclare que les *Benefit Building Societies* sont formées dans le but de créer, au moyen de souscriptions périodiques, un fonds pour permettre aux actionnaires :

To erect or purchase one or more dwelling houses, or other real or leasehold estate to be secured *by way of mortgages* to such society until the amount of his or her share shall have been fully repaid.

Le chapitre 69 de nos statuts, qui a été modelé sur le statut impérial 6 et 7 William 4, ch. 32, a donné aux société de bâtisses, organisées en vertu de ses dispositions, la faculté d'assurer leurs avances, non-seulement par hypothèque (*by way of mortgage*), mais aussi par tout autre moyen,

Such advance to be secured by mortgage or otherwise to the said society,

tandis que le statut impérial n'admet que le moyen de l'hypothèque (*mortgage*). En conséquence de cette extension de pouvoir les précédents cités par l'appelante n'ont guère d'application dans la présente cause. Cependant malgré les termes restrictifs de l'acte 6 et 7, William 4, on trouve la cause de La *Reine* v. *d'Eyncourt et al.* (1), parfaitement analogue au cas actuel, dans laquelle il fut décidé que l'acquisition d'immeubles contrairement au mode indiqué par l'acte 6 et 7 William 4, ch. 32, n'avait pas eu l'effet de mettre fin à l'existence de la société.

La société dont il s'agit dans la cause de La *Reine* vs. *D'Eyncourt*, après avoir été organisée, comme la compagnie appelante, pour l'acquisition de propriétés au

(1) 4 B. & S. 820.

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moyen de souscriptions périodiques, en vertu de l'acte 6 and 7 William 4, ch. 32, dont les dispositions sont en grande partie reproduites dans le ch. 69, Stat. Ref., B.C., acheta, partie avec l'argent reçu des souscripteurs, et partie avec de l'argent emprunté à cet effet, des terrains qui furent ensuite divisés en lots et partagés entre ceux qui voulurent s'en porter acquéreurs. Ceux qui n'avaient point reçu de lots continuèrent comme membres déposants (*investing members*) à la différence de ceux qui avaient reçu des lots. Laxton, l'un de ceux qui avait pris des lots et continué sa souscription, fut averti comme les autres que la société ne recevait plus de souscription des membres déposants, mais qu'elle les considérerait comme des membres retirés. Après cet avis il cessa de payer sa souscription et une sentence arbitrale (*award*) fut prononcée contre lui pour la somme de £60-8-4, montant de ses arrérages. Sur son refus de payer, une demande fut faite au magistrat pour faire exécuter la sentence ; mais celui-ci refusa de l'accorder. Sur une règle de cour pour ordonner au magistrat d'exécuter la sentence, la cour du Banc de la Reine décida que la société n'avait pas cessé d'exister en conséquence de l'achat de terrains, que s'il y avait eu emploi illégal des fonds de la société, le moyen d'y remédier pour les membres qui n'y avaient pas donné leur consentement était de s'adresser à la cour de Chancellerie, et que la sentence arbitrale avait été duement prononcée. Voici comment s'exprime à ce sujet Cockburn, C.J., (1).

This was a society registered as a benefit building society under statute 6 and 7 *William* 4, c. 32, and according to the rules which have been duly certified subscriptions and fines became payable by Laxton who was a member, and he has not paid them.

The main answer to the claim of this society is that it has been dissolved. It is that by an arrangement among themselves the members have changed the purposes of this society and converted

(1) 4 B. & S. p. 831.

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themselves into a freehold land society, by applying the funds in the purchase of land, and, therefore, the society is put an end to. But that does not follow. If there has been a misappropriation of the funds contributed by the members, that is a case for the intervention of a court of equity on the application of any member who thinks himself aggrieved. But the society does not cease to exist because it does something which its rules do not warrant. A court of equity would restrain the directors from mis-applying the money recovered under the award, but so long as the society exists the members are bound by the rules, and the question of an alleged misapplication of its funds is foreign to the magistrate under the statute. It is also said that the resolution of the directors not to call on the investing members for further subscriptions left no shareholders but those participating in the freehold lands scheme. I think that if such a resolutien was within the scope of the power of the directors it did not disolve the society, but only made the number of members less than originally contemplated. I think, further, that such a resolution was inoperative and that investing members might insist upon paying up their subscription and getting the benefit of the society, unless they had precluded themselves by concurring in the resolution to treat themselves as withdrawing members. But all these matters are for the consideration of a court of Equity. The magistrate had only to consider, first, whether the society on whose behalf the application was made was in existence; secondly, whether the person against whom the application was made was a member; and thirdly, whether he had become liable, under the rules of the society, to pay the sum for which the award was made.

Crompton, J. :—

The converting the society from a benefit building society into a freehold land society is not in the nature of an illegal conspiracy. The society lost certain powers under the act of parliament by which its members received an amount of money to enable them to purchase land, and afterwards arranged amongst themselves that land should be purchased and allotted among them. There is nothing illegal, immoral, or vicious in that, so as to be void; it does not even amount to a contract contrary to the policy of the act. The society could not compel a member to take an allotment instead of money; he would have a right to say: "I do not claim through this arrangement for allotting the land, but under the rules of the society," he traces his title from the arrangement made when he entered the society.

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I think it was purposely made (the award). How has *Layton* who had become a shareholder, taken himself out of the provisions re. the Benefit Building Society Act? The rules of this society are framed with the view of enabling the members to purchase land. In fact the members have agreed among themselves that, instead of the members receiving money, the funds and credit of the society shall be applied in the purchase of a tract of land to be afterwards allotted among them. That was so far illegal that under the rules they had no right to do it; it was a breach of trust. But *Layton* was a party to that proposal, and agreed to take part of the land so purchased on the terms of his paying his monthly subscriptions as usual. If that agreement had been carried out he would have got an allotment; and would have been the same as if he had paid for it and the society had returned this money to him by way of loan.

Les raisonnements de ces honorables juges au sujet de la validité des achats de terrain faits contrairement aux dispositions de l'acte 6 et 7 William 4, ch. 32, sont parfaitement applicables à cette cause et démontrent d'une manière évidente que ce qu'il y avait d'irrégulier dans les procédés de l'appelante a été couvert par le consentement des actionnaires L'appelante doit être renvoyée avec dépens.

HENRY J.—I have not written a judgment in this case; but I entirely agree with the Chief Justice and Judge Fournier that this appeal ought to be disallowed for the reasons given by them.

GWYNNE J.—According to my understanding of the statute by force of which the appellants were author ised to act, the contract made by the company for the purchase of the land in question was wholly *ultra vires* and no action against the company upon that contract can be maintained. The appeal, in my opinion, therefore, should be allowed.

Appeal allowed with costs.

Solicitors for appellants: *Beique & McGoun.*

Solicitors for respondent: *J. Ald. Ouimet.*