Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Irvine v. *the Union Bank of Australia, from the Court of the Recorder of Rangoon; delivered* 10*th March*, 1877.

Present:

LORD BLACKBURN.
SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from a Decree of the Recorder of Rangoon in a suit in which the Respondents, suing in the name of their Inspector, were Plaintiffs, and the Appellant was one of the Defendants.

The suit was brought to recover the sum of 15,296*l.* 17*s.* 6*d.*, for money advanced by the Bank to the Oriental Rice Company, Limited, and to enforce an equitable mortgage as a security for the advances.

The Plaintiffs prayed, amongst other things, that it might be declared that, by virtue of the deposit by the Company of certain title deeds and the agreements accompanying the same, they were entitled to an equitable lien or mortgage upon certain messuages and premises situate in the town of Rangoon for securing the repayment of the said sum of 15,296*l.* 17*s.* 6*d.*, and that upon non-payment of that amount the Defendant might be foreclosed from his equity of redemption in the said premises, or that the said premises might be sold, and the proceeds applied in payment of the

said sum or such other sum as the Court might find to be due to the Plaintiffs, with interest and costs.

The Company were made co-Defendants in the suit, but they did not appear or defend.

The Defendant (Appellant) claimed the property under a purchase at a sale in execution of a Decree against the Company, by which he acquired the right, title, and interest of the Company, and nothing more. That purchase was made on the 31st May, 1872.

The principal question to be decided is what is the sum for which the Union Bank is entitled to a charge upon the property. On the part of the Bank it was contended that they are entitled to a charge for the full amount claimed, and on the part of the Defendant (Appellant), that the charge is limited to the amount of one half of the actually paid-up capital of the Company, which paid-up capital the Appellant in his written statement alleged was never more than 17,100*l.*

There was some discussion at the hearing as to what really was the actual amount of the paid-up capital.

Their Lordships then expressed their opinion upon the point, and stopped the learned Counsel for the Respondent. They were of opinion that it should be taken at 17,100*l.*, the amount found by the learned Recorder.

The Company was originally formed in the Colony of Victoria by Articles of Association, dated the 25th of April, 1861, and on the 18th of August, 1864, it was duly registered as a Company limited by guarantee under an Act of the Legislature of Victoria which followed and adopted the provisions of the Companies Act, 1862.

By that registration the Company, by virtue of the section of the Colonial Act corresponding with section 196 of the Companies Act of 1862, became subject to all the provisions, so far as they are applicable to the present case, of the Colonial Companies Act, in the same manner in all respects as if it had been formed under that Act.

The Articles of Association contained no restriction or limitation on the Company's power of borrowing.

As regards the Directors, however, their authority to borrow was limited; for it was expressly

stipulated by Article 50 of the Articles of Association, which were registered under the Companies Act, and of which the Bank was bound to take notice, "that subject and without prejudice to the power therein given to the meetings of shareholders and the conditions and restrictions therein contained, the directors for the time being should have, amongst others, the following powers, that is to say, the power of borrowing and taking up on the credit of the said Company or of its property any sum or sums of money from time to time, but so, nevertheless, that the total amount to be so taken up should not exceed in the aggregate, *as an existing debt at the same time*, one-half of the then actually paid-up capital of the said Company, and that for the purpose of securing any sum or sums which might be so borrowed by the Directors, they should be at liberty to mortgage, with or without power of sale, and otherwise to charge and incumber, all or any part of the property, estate, and effects, real and personal, of the said Company, and to accept, make, or indorse, any bill of exchange or promissory note on behalf of the said Company, or to overdraw the account of the said Company at their bankers, or to execute and give any bond, covenant, or other obligation binding the said Company, and the affairs and concerns of the said Company, both in India and Victoria and elsewhere, and that the entire and sole management, conduct, and regulation of the business and affairs of the said Company, both in India and Victoria and elsewhere, according to the provisions and subject to the restrictions of the said Articles of Association, should be confided to and be under the direction of the said Directors for the time being, who should have and might exercise all the powers which might be exercised by the whole of the shareholders."

It was, therefore, clearly beyond the authority of the Directors to borrow or take up upon the credit of the Company as an existing debt at the same time an amount or amounts exceeding one-half of the actually paid-up capital of the Company. There is no doubt that the authority of the Directors, limited as it was by the Articles of Association, was capable of being extended under the provisions of Article 31. But by that Article one-

half of the votes of all the shareholders given at a general meeting called for the purpose was necessary.

The Article is in the following words :—

"One-half of the votes of all the shareholders given at a general meeting called for the purpose shall be competent *and necessary* to make, to enlarge, extend, rescind, alter, or repeal, wholly or in part, all or any of the provisions or powers herein contained, or to remove any Director or Trustee, or to increase or diminish the number of Directors, but that upon all other questions or business to be transacted at any meetings (except as herein specially mentioned) a majority of the votes of the shareholders present in person or by proxy and not declining to vote shall decide."

It was not contended that the authority of the Directors either to borrow or to mortgage was ever extended at a general meeting of the shareholders called for the purpose, but it was contended by the learned Counsel for the Respondents, that the limitation of the power of borrowing and of mortgaging, contained in Article 50, was merely a limitation of the authority of the Directors conferred by the same Article ; that it was not part of the constitution of the Company, which, if the Company had been originally formed under the Companies Act of 1862, must have been contained in the Memorandum ; and, consequently, that it was not a limitation of the general powers of the Company, or of the whole body of shareholders ; and that the acts of the Directors in excess of their authority might be ratified by the Company and rendered binding.

Their Lordships are of opinion that the above contention is correct, and they will proceed to consider whether the acts of the Directors in borrowing in excess of their authority were ever duly ratified by the Company.

The learned Recorder considered that there was sufficient evidence to show that the shareholders acquiesced in and approved of the acts of the Directors in borrowing and mortgaging, and he relied upon what took place at the half-yearly meetings held in 1868 and 1869.

A ratification is in law treated as equivalent to a previous authority, and it follows that as a general

rule, a person, or body of persons, not competent to authorise an act, can not give it validity by ratifying it.

By the 21st of the Articles it is provided that an Ordinary Half-Yearly Meeting shall be held during the months of October and April in each year.

By the 22nd, that an Extraordinary General Meeting may be called at any time for a special object.

By the 25th, that a notice shall be sent to each shareholder, stating the day and place of the meeting, and "also the business proposed to be transacted thereat."

By the 26th, that at every General Half-Yearly Meeting the accounts and a statement of the Company's affairs, &c., shall be laid before the shareholders, and such meeting "may examine, allow, and confirm, or reject the accounts and Report of the Directors or Auditors, so as to bind all the members for the time being of the Company, and all persons claiming under them."

The notice that a Half-Yearly Meeting was to be held would sufficiently indicate that it was for the purposes mentioned in Article 26, but would not indicate that it was for any other purpose.

The Report of the Directors referred to in Article 26 seems to their Lordships the same thing as the statement of the Company's affairs previously mentioned in the same Article. There is nothing in the Articles requiring the Directors to circulate the Reports among the shareholders before the meetings. There is no evidence in the case that the Reports were in fact circulated before the Half-Yearly Meetings, and the form of the Reports bearing dates on the days of the Half-Yearly Meetings looks as if they were produced for the first time when laid before those meetings.

Their Lordships think that it would be competent for a majority of the shareholders present (though not a majority of the shareholders of the Company), at an Extraordinary Meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the Directors in excess of their authority; and they are not prepared to say that, if a Report had been circulated before a Half-Yearly Meeting distinctly giving notice that the Directors had done an act

in excess of their authority, and that the meeting would be asked, by confirming the Report, to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the Half-Yearly Meeting.

But if the object was to give the Directors in future an extended authority beyond what is given by Article 50, their Lordships think that it would be an alteration of the provisions contained in the Articles which, under clause 31, that could only be made by a vote of one-half of all the shareholders of the Company.

There is a wide distinction between ratifying a particular act which has been done in excess of authority, and conferring a general power to do similar acts in future.

This distinction must be borne in mind in considering whether the ratifications at the half-yearly meetings of particular acts done previously to those meetings, gave validity to acts of a similar character done subsequently.

For instance, it is important in considering whether the ratification at the half-yearly meeting held on the 30th April, 1868, of the Act of the Directors in borrowing 13,000*l.* when 10,000*l.* previously borrowed remained unpaid, if made out, so far extended the powers of the Directors as to authorize them to take up as an existing debt at the same time, a further sum of 23,000*l.* when the sums of 13,000*l.* and 10,000*l.* should have been paid off, notwithstanding the provisions of Article 31, which rendered the votes of one-half of all the shareholders to be given at a general meeting necessary to enlarge or extend any of the powers contained in the articles.

Their Lordships are of opinion that the ratification at a half-yearly meeting of a particular act in excess of authority would not extend the authority of the Directors so as to authorize them to do similar acts in future.

Their Lordships have now to apply the above principles to the facts of the case.

The moneys claimed in the present suit were advanced in February 1871, 10,000*l.* under the letter of credit No. 130, and 5,000*l.* under the letter of credit No. 153. (See Mr. Curtayne's evidence, Record, pp. 135, line 23, and the account, p. 4 of

the Record.) The balance remaining due of all sums previously advanced by the Bank had been reduced at the end of 1870 to 8*l.* 8*s.* 9*d.* (See account set out in the plaint, Record, p. 4.)

The last general half-yearly meeting of the Company was held on the 13th October, 1869. At that meeting the Directors submitted their report for the period ending the 30th June, 1869 (Record, pp. 40 and 41), and that report was adopted, (p. 37.)

According to the evidence of Mr. Curtayne (p. 135) the letter of credit No. 153 was issued on the 9th September, 1869. The fact of the Directors having obtained that letter of credit could not and did not appear in the report of the Directors for the period ending June, 1869, and the act of obtaining that letter of credit or of borrowing money thereon does not appear to have been ever reported or made known to the shareholders, or ratified by them. The claim, therefore, as to that 5,000*l.* must be rejected unless the ratification of the act of the Directors in obtaining previous letters of credit for 10,000*l.* and 5,000*l.*, Nos. 150 and 141, as stated in the report of 29th October, 1868, (p. 37), which was ratified at the half-yearly meeting held on that date, authorized the Directors to obtain the letter of credit No. 153 after the letter of credit No. 141 of the 11th September, 1868, for 5,000*l.* referred to in that report had been paid off. (See Mr. Curtayne's evidence, pp. 134 and 135.)

Their Lordships are of opinion that the ratification of the Report of 29th October, 1868, did not authorize the Directors to obtain the letter of credit No. 153, or to borrow the 5,000*l.* now claimed as having been advanced thereon on the 11th of February, 1871. The sum of 5,000*l.* advanced on the 17th February, 1871, on letter of credit No. 153, must therefore be disallowed.

The only item remaining to be considered is the 10,000*l.* advanced on the 11th February, 1871, on the letter of credit No. 150. (Page 4 of Record).

That letter of credit, according to the evidence of Mr. Curtayne, p. 135, was obtained on the 23rd December, 1867. It authorized the Chartered Bank of India, Australia, and China, in Rangoon, they then being the agents there of the Union Bank, to honour the Rice Company's drafts through their manager, Mr. Jamieson, on the Union Bank of

Australia in London to the extent of 10,000*l.*, *at any time until the* 29*th March,* 1869. (Page 135).

The obtaining of that letter of credit was mentioned in the report of the Directors, presented at the meeting of the 29th October, 1868.

The following is the statement contained in the Report:—

"In addition to the Bank credit for 10,000*l.* with which Mr. Jamieson had been hitherto furnished to enable him to conduct the financial wants at Rangoon, another credit for 5,000*l.* has been forwarded, which Mr. Jamieson advises will be of great assistance in his operations." (Record, p. 37.)

That Report was read and adopted at the said meeting. (Record, p. 36.)

It did not necessarily follow because a letter of credit for 10,000*l.* was obtained that the Directors would act upon it, in violation of Article 50, by taking up upon it an amount exceeding in the aggregate as an existing debt at the same time more than one half of the paid-up capital of the Company. The Directors did not exceed the authority conferred upon them by the Articles of Association by obtaining the letter of credit; the excess of authority was in taking up upon it a sum in excess of the amount which they were authorized to borrow.

Under the letter of credit a sum of 5,000*l.* might have been taken up and paid off, and then another sum of 5,000*l.* taken up under it, without an excess of authority.

At the time of the adoption of the Report, on the 29th of October, 1868, the letter of credit then existing was to expire on the 29th March, 1869. It was not mentioned in the Report that the credit obtained was to expire on that day, but every shareholder must have known that letters of credit, in practice, are for a limited time. It is not at all unusual, but it is not a matter of course, to extend the time if the original credit has not been acted upon.

Even if the adoption of the Report mentioning the credit for 10,000*l.* authorized the borrowing at one time of the whole amount (which their Lordships are disposed to think it did not), it by no means follows that it authorized the renewal of the letter of credit and the acting upon it after the time originally limited had expired.

There was nothing in the Report to lead to the supposition that the Directors had any intention to renew the letter of credit or to borrow money upon it after the 29th March, 1869. The shareholders present at the half-yearly meeting might have had very good reasons for considering that it was expedient to obtain a letter of credit for 10,000*l.*, or even to borrow upon it 10,000*l.* at one time during the currency of the letter of credit, without considering whether it would be prudent or advisable to borrow 10,000*l.* at one time on the 11th February, 1871, more than two years after the date of the meeting of October, 1868, and when the Company might possibly consist of an entirely different body of shareholders.

But however this may be their Lordships are of opinion that there was no evidence to show that any sufficient notice of the substance or effect of the reports which were intended to be presented at the half-yearly meetings above referred to, was given to the shareholders of the Company in pursuance of the 25th clause of the Articles of Association so as to lead the absent shareholders to know or even to imagine that the Directors intended to report that they had exceeded their authority, or that, by the adoption of the report of the Directors, to be laid before the meeting, an act of the Directors in excess of their authority could be rendered binding upon the whole body of shareholders.

Their Lordships being of opinion that the act of borrowing in excess of authority was never ratified, it is not necessary to consider whether, if it had been duly ratified, the property of the Company would have become charged as a security for the repayment of the amount.

The case of the Royal British Bank *v.* Turquand, 5 Ellis and Blackburn, 248, and the same case in error 6th id., 327, were cited in the course of argument to show that the excess of authority was a matter only between the shareholders and the Directors, and that it does not affect the rights of the Bank. In that case it was said by C. J. Jervis: "We may now take it for granted that the dealings with these Companies are not like dealings with other partnerships, and that parties dealing with them are bound to read the Statute and the Deed of Settlement;

but they are not bound to do more. The party here (that is in Turquand's case) on reading the Deed of Settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions." In the present case, if the Bank had referred to Clause 50 of the Articles of Association they would have found that the Directors were expressly prohibited from borrowing beyond a certain amount.

The case of The Royal British Bank *v.* Turquand was decided with reference to a Company registered under 7 and 8 Vict., c. 110, and Chief Justice Jervis remarked that the lender finding that the authority might have been made complete by a resolution he would have had a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done. In the present case, however, the Bank would have found that, by the Articles of Association, the Directors were expressly restricted from borrowing beyond a certain amount, and they must have known that if the general powers vested in the Directors by Article 50 had been extended or enlarged by a resolution of a general meeting of the shareholders under the provisions of Section 31, a copy of that resolution ought, in regular course, to have been forwarded to the Registrar of Joint Stock Companies, in pursuance of Section 53 of the Companies Act, and would have been found amongst his records.

Their Lordships are of opinion that the learned Recorder was correct in holding that this case is different from that of The Royal British Bank *v.* Turquand.

It is unnecessary to consider what would have been the rights of the Bank if the amount which they advanced had not been more than one half of the actual paid-up capital, but had been advanced at a time when an unpaid debt on account of moneys previously borrowed from other persons, together with the money lent by the Bank, would have exceeded the amount which the Directors were authorized to borrow. In the present case, the 10,000*l.* and 5,000*l.* were both lent by the Bank itself.

It was argued that the advances made by the Bank under the letter of credit did not amount to a lending by the Bank or a borrowing by the

Directors. There is nothing in that objection. If, however, it was not a borrowing, the Directors had no power to pledge the property sought to be affected by the equitable mortgage as a security for the repaymnt of it. It was only for securing moneys borrowed that the Directors were authorized to mortgage or charge the property of the Company.

For the above reasons their Lordships are of opinion that the Plaintiffs are not entitled as against the Defendant to a charge on the property beyond the amount of one half of 17,100*l.*, the paid-up capital of the Company.

The amount therefore allowed to the Plaintiffs by the Decree of the lower Court must be reduced, and their Lordships will humbly advise Her Majesty that the Decree be reversed, and that it be declared that the Plaintiffs had a valid equitable mortgage on the property mentioned in the plaint for the principal sum of 8,550*l.* only.

It was objected at the hearing on the part of the Appellant that the decree ought to have been for a foreclosure, and not for a sale, but at the close of the case their Lordships were informed that the property had been sold under the Decree, and that the money had been deposited in Court; and that the Appellant does not object to the sale.

Their Lordships will therefore further advise Her Majesty that it be ordered that the costs of the suit in the lower Court, both of the Plaintiffs and of the Defendant respectively, as taxed by the lower Court, be paid to the said parties respectively out of the proceeds of the sale of the property which are now in Court, and that out of the balance of such proceeds there be paid to the Plaintiffs a sum of rupees equivalent, at the rate of exchange current between Rangoon and England at the time of the filing of the suit, to the principal sum of 8,550*l.*, with interest thereon, at the rate of 8 per cent., from the 5th of October, 1872, to the date of the sale of the property, together with a proportionate part of the accumulations, if any, of the proceeds of the sale, and that the residue of the said proceeds and of the accumulations thereon, if any, be paid to the Defendant Appellant.

The Respondents must pay the costs of this appeal.

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