Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of La Banque Jacques-Cartier v. *La Banque d'Épargne de la Cité et du district de Montreal, from the Court of Queen's Bench for Lower Canada, in the province of Quebec; delivered November 4th*, 1887.

Present:

LORD FITZGERALD.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

THE appeal now before the Committee, in which La Banque Jacques-Cartier is Plaintiff and Appellant, and La Banque d'Épargne is Defendant, appears to their Lordships to involve no question of importance or difficulty, or in its result to affect any interests save those of the litigants in respect of the sum of 25,000 dollars, the subject of the loan of the 13th of September 1873.

The parties have now no controversy, save as to the liabilities of the one party, or the rights of the other arising out of that one transaction, and its attendant or following circumstances. They have wisely, by consent, limited the inquiry, and thus relieved the courts below and their Lordships from complications and apparent difficulties. The case is one depending mainly on matters of fact, and their Lordships do not think it to be necessary to take any further time for consideration.

The Plaintiffs represent a bank incorporated by a Canadian statute and governed by the

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rules which the statute enacts or incorporates, and amongst others, by section 40, which in negative words prohibits the Banking Company from trafficking in its own shares. The words of the 40th section are these: "The bank shall "not either directly or indirectly lend money "or make advances upon the security, mortgage, "or hypothecation of any lands or tenements, "or of any ships or other vessels, nor upon the "security or pledge of any share or shares of "the capital stock of the bank." It then defines what they may deal with, and in a subsequent section, which it is not necessary to refer to more particularly, gives them authority to lend money on the shares of other banks, but not their own.

The Defendant bank, as its name indicates, is a savings bank incorporated under another Canadian statute to which it is not necessary now to refer. The two banks seem to have had large and legitimate transactions prior to the 13th of September 1873, and also subsequent to that date down to the 15th of June 1875, when the Appellants stopped payment, and closed their doors. The general course of dealing was that the savings bank from time to time deposited large sums in the Plaintiffs' bank, to be held by the latter at call, or for short stated periods at interest, but without security. This practice and course of dealing continued to the end of 1874, when there being 500,000 dollars due to the Defendants' bank by the Plaintiffs' bank, and the latter requiring further aid to meet pressing engagements, their cashier Cotté agreed with the Defendants on the 16th of February 1875 for a further advance of 143,000 dollars with collateral security. It is unnecessary to pursue this further, as the Plaintiffs received the amount of these loans, and they have been repaid to the Defendants. They are referred to only as reflecting

some light on the transaction of the 13th of September 1873, to which their Lordships now return.

The obligations and rights of the parties must now depend on the facts as established, and as to the material facts it seems to their Lordships that there is no real controversy.

The facts are very clearly stated in the judgement of Judge Mathieu, pp. 7 and 8 of the Record, and the results are ascertained by his seven absolute findings which their Lordships adopt for the purposes of their judgement. They generally concur in those propositions, but especially in the fifth, which is to the effect that Cotté had no authority to pledge the Plaintiffs' securities to the Defendants for his personal debt. There is no real difference as to the material facts between Judge Ramsay in the Court of Appeal (Queen's Bench), and Judge Mathieu, but there is one statement of Judge Ramsay which their Lordships cannot adopt. Judge Ramsay, referring to the transaction of the 13th of September, is represented to have said "that the cashier Cotté had "actually borrowed for his bank, if not in an "identical manner, at all events in a somewhat "similar manner, nearly 500,000 dollars." That statement seems to their Lordships not to be sustained by the evidence, and to be, in fact, contrary to it.

Their Lordships now return to the transaction of the 13th of September 1873, and pay special attention to the written records which disclose its true character. Their Lordships desire to observe in passing that where, in reference to transactions of this character, there is a conflict of verbal testimony, they would generally give weight to the written records which exist, and which rarely err.

The contemporaneous written evidences all reach the same point. The loan made on the

13th of September 1873 was beyond all doubt or question a loan to Cotté personally, and on his personal security, with a collateral pledge of the 500 shares in the Banque Jacques-Cartier. The form of the loan, the promissory note of Cotté that accompanied it, the collateral security and the payment of the amount to Cotté, on cheques payable to him personally, and the entries then made in the books of the Defendants, all tend to the same point.

It was urged that Cotté took up this money for the Banque Jacques-Cartier, which got the benefit of it, but this allegation is manifestly unfounded. Cotté had not, and does not pretend that he had, any authority to negotiate this loan on behalf of the Plaintiffs, and the proceeds were received by Cotté and immediately applied to liquidate his own debt to his own bank.

Then again it was alleged that the 500 shares deposited by Cotté with the Defendants, and actually transferred by him to them as part of the transaction, were the property of the Plaintiffs, though standing in the name of Cotté. There is no reliable proof of this allegation which could have been established beyond any manner of doubt if it was true, and it seems to their Lordships that the evidence is entirely the other way. Their Lordships, therefore, are obliged to assume that in law the Plaintiffs could not be, and in fact were not, the owners of these 500 shares. Their Lordships desire to point out that if the loan of the 13th of September was a loan made to the Plaintiff bank, and on its credit, there seems to be no reason why the prior practice should have been departed from, or why security should have been required. The Banque Jacques - Cartier then owed nothing to the Defendants, and the Defendants subsequently deposited with the Plaintiffs sums amounting to over 500,000 dollars without any security.

The loan of the 13th of September became repayable on the 13th of December 1873, but was not repaid by Cotté, and on that day a further agreement was entered into between him and the Defendants, which is set out in the record and speaks volumes by itself. It is observable, without reading it, that Cotté is here described as "Esquire of Montreal," and it is signed by him as "H. C. Cotté," not as cashier or manager, but "H. C. Cotté" simply — but it is signed, on the other hand, by E. J. Barbeau, who describes himself as the manager for the Defendants.

No alteration is made in the books of the Defendants to indicate that the Plaintiffs are in any way connected with this extension of the loan, and the documentary proof is consistent with an extended credit to Cotté personally and to him alone.

From September 1873 to June 1875, when the Plaintiffs' bank shut its doors, there is not to be found a shred of documentary proof that the Plaintiffs' bank were in any way interested in or liable for this loan of 25,000 dollars, or that Cotté had any authority whatsoever to bind the Plaintiffs' bank in respect of it, and it seems to their Lordships that under such circumstances it is unnecessary to investigate whether the statement alleged to have been made by Cotté to Judah on the 13th of September 1873, or to Barbeau on the 13th of December 1873, were so made as represented, for if made they could be of no avail.

It seems not improbable that some such statement may have been made on the 13th of December, and that Judah has confounded one date with the other. There is nothing in what their Lordships say that is meant as an impeachment of Judah, but their Lordships think he made a mistake.

The bank stopped payment in June 1875, and up to that event there is nothing in the case to indicate that the Defendants alleged that the loan of the 13th of September 1873 or its extension was a loan to the Plaintiffs, or on their credit, or that they knew in fact of its existence. The Defendants and Cotté had knowledge of the transaction, but the Banque Jacques-Cartier seems to have been in entire darkness as to it. Barbeau in his evidence, alluding to the statement of Cotté, alleged to have been made on the 13th of December, makes use of this expression that it never entered into their minds to consider the liability of the Banque Jacques-Cartier in respect of it.

The Banque Jacques-Cartier having shut its doors, and Barbeau, the manager of the Defendant bank, as its principal creditor, having been somehow appointed as administrator of its affairs, then commences under his management and direction what has been called a manipulation of the books of both establishments, which their Lordships do not find it necessary to examine in detail or to assign to it its proper name and character.

If it had not been for these subsequent details, and if the case stood as it was when the Banque Jacques-Cartier shut its doors, it seems plain that the Judgement of the Appellate Court in Canada would have been in accordance with the decision of the Primary Court.

Their Lordships do not find it necessary to refer at length to the transaction of February 1875. Judge Ramsay in his Judgement, after dealing with the case up to the point which their Lordships have now reached, and dealing with the acts of Barbeau, says: "I think that no "unauthorised act of Mr. Barbeau could alter "the relations of the two banks while he repre- "sented both. I think, therefore, that while

" Mr. Barbeau was managing the Jacques-Cartier " bank, nothing has been proved to have taken " place which could alter the original condition " of the transaction, which, on its face, was a " loan to Mr. Cotté personally." In those observations of Judge Ramsay their Lordships concur. Then he goes on; " But the Appellant has " another line of defence which presents a ques- " tion of greater delicacy, upon which the " Judgement of this court definitely turns. The " account was transferred in the books of the " Jacques-Cartier bank on the 23rd of June " 1875, at latest on the 29th of July it was " altered in the pass book. In September 1875 " Mr. Barbeau ceased to have any authority in " the Banque Jacques-Cartier. Its affairs were, " in December, transferred to a new, and it must " be presumed, a vigorous administration, yet it " was not till the 5th of August following that " they repudiated the debt entered in their books " on the 23rd of June of the previous year. Ad- " mitting to the fullest extent that Mr. Barbeau's " position in the Banque Jacques-Cartier, so long " as he remained there, was a disturbing element " in estimating the presumption of acquiescence " in a transaction entirely in favour of the Banque " d'Épargne, how can we account for the silence " of the administration during more than nine " months?" Accordingly the learned Judge proceeds to determine the case against the present Appellants on the ground of acquiescence as their Lordships understand his Judgement, and upon that and that alone, that is to say, that by their silence for so lengthened a period, the directors of the Banque Jacques-Cartier had acquiesced in the change of the accounts, and in that very dubious and singular entry in the pass book without any explanation.

The old and debilitated, and what might be called the paralysed and negligent board that

existed at the time that this bank stopped payment, is put aside, and a new and vigorous directorate is appointed, and an investigation ensues, and the real character of the transactions is ascertained, that the loan of September 1873 was a loan to Cotté on his personal security for his own purposes, and not for the benefit of the bank, save to this extent, that it enabled him to pay off or diminish his debt to the Banque Jacques-Cartier. Judge Ramsay puts it upon the doctrine of acquiescence or ratification, though it is difficult to say where acquiescence becomes ratification, but he fixes the period of acquiescence from the election of the new board to the time of the resolution and protest. The new board seems to have done its duty, as it appears to their Lordships, with activity. There was a great deal of complication, and a great deal to be investigated. There were accounts running over a long period, so complicated by the entries of Barbeau, that the parties think it necessary to load the record with nearly 300 pages of accounts. Acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction. But this is not the character of the present case. Their Lordships are dealing with the assets of a company which it is to be borne in mind had stopped payment, and everything done in the nature of acquiescence or relied upon as such is something that occurred after that bank had stopped payment, and during the time when a struggle was being made by the new directorate to realise the assets of the bank for the payment of its real creditors and the protection of its shareholders. It is said that under such circum-

stances as these there can be acquiescence. But in what? Acquiescence in the appropriation of the money of the shareholders to pay the debt due by Cotté to the savings bank.

Their Lordships are inclined to adopt entirely the argument that such an acquiescence, even if it had been proved, would be *ultrâ vires* of those representing the bank after its stoppage, when their duty and their business was to protect the shareholders, to pay the creditors, and to collect the assets of the bank for that purpose, and not for the purpose of paying the debt of Cotté, who was already a defaulter to the amount of 50,000 dollars.

Mr. Normandy, in his argument at considerable length, rested upon the transactions of February 1875. Statements were no doubt then made, but whether they were made to Judah or to Barbeau, or to others connected with the bank, does not appear to their Lordships to matter very much; but it is alleged that there was Cotté's statement that this was a transaction with the bank entered into for their benefit, and to raise money for their necessities. If such statements were made, their Lordships have no proof of the existence of those facts, and above all they have not the slightest proof of the authority of Cotté to take up this money for the bank, and clearly he had no authority whatever to pledge the securities of the bank for the debt that he himself owed.

Entertaining these views their Lordships do not think it necessary to go further into the details of the case. The real keystone of the whole is the original transaction. Once its true character is ascertained, it appears to their Lordships that everything else follows. Their Lordships are therefore of opinion that Judge Mathieu took the true view of the case, and they are prepared to adopt his conclusions; and they will therefore humbly advise Her Majesty

to reverse the decision of the Court of Queen's Bench for Lower Canada, and to reinstate the Judgement of the Superior Court with costs.

Their Lordships think that the Appellants should have the costs of this appeal; but on the taxation of the costs here they desire that their officer should have regard to the fact that the record has been cumbered with over 200 pages of accounts of no use whatever on the appeal, and but one or two items of which have been read. If this most unnecessary expense was occasioned by the default of the Appellants, they ought not to have the costs thus occasioned.