

MAN.

C. A.

TRADES
HALL CO.v.
ERIE
TOBACCO
CO.

Cameron, J.A.

case of borrowing money. This is the case of sale of goods. That was a case of administration in winding-up, where the Court, as Lord Sumner says, has peculiar authority. This is an action against a solvent corporation.

In the case of an *ultra vires* loan transaction the property in the money remains in the lender. Therefore it became necessary to adopt and enlarge the equity rule as to a tracing order, in order to give the depositors a just and adequate remedy. But in this case the property in the goods did not remain in the vendor, but passed to the purchaser. I find authority for that statement in the judgment of the Privy Council in *Ayers v. South Australian Banking Co.*, L.R. 3 P.C. 548. There the Banking Co., whose charter contained a provision declaring it unlawful for the company to advance money on merchandise, advanced money on the faith of receiving an agreement to give a preferential lien on wool of an ensuing clip. It was held that an action by the company on such an agreement was maintainable and the company entitled to recover for the value, notwithstanding the prohibitory clause in its charter. Lord Mellish holds:—

Whatever effect such a clause may have, it does not prevent property passing, either in goods or lands, under a conveyance or instrument which under the ordinary circumstances of law would pass it.

Otherwise, he says, the consequence might be most lamentable. In this case the tobacco was sold and delivered pursuant to written orders, though the form of the contract cannot surely be material. In this case, as in the Privy Council case, unless the property passed to the first purchaser it could not pass to the second. It seems to me the same reasoning applies in both cases.

Now, as we have seen, the reasoning in *Sinclair v. Brougham*, [1914] A.C. 398 is based on the principle that in an *ultra vires* loan transaction, there being no power to borrow, there has been no transfer of property in the money which remains that of the lender. Here the property in the tobacco has undoubtedly passed to the purchaser, the plaintiff company. The distinction is manifest and its results important. In the case of an *ultra vires* borrowing there can by no possibility be an imputation of a promise to repay, as the property in the money is still that of the lender, according to the judgment in *Sinclair v. Brougham*, to which I have referred. In the other case, the property having

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