

MAN.

C. A.

TRADES
HALL CO.
v.
ERIE
TOBACCO
CO.

Cameron: J.A.

of the contract but collateral to it, then an implied promise to repay might well be raised.

Then, in the case of goods sold on an *ultra vires* contract, we are surely *a fortiori* justified in imputing a promise to make restitution or compensation. The property has passed and as pointed out in the decisions of the Supreme Court of the United States above cited, the action is not maintained on the original contract but on an implied and collateral contract to return or make compensation for property it (the corporation) has no right to retain. "To maintain such an action is not to affirm, but to disaffirm the unlawful contract." The action is not *in personam* to enforce the terms of the contract of sale. And the property having passed proceedings *in rem* and the equitable remedy of the tracing order are inapplicable. In the result, in my opinion, the plaintiff, having disposed of the goods, must make compensation.

It would follow, if we adopted the rule applicable to *ultra vires* loan transactions, as laid down, to *ultra vires* transactions involving the sale of goods, that a perfectly solvent corporation could be held liable only if it had retained the goods or obtained their proceeds, if sold, in some form such as promissory notes into which the goods could be traced. If, on the other hand, that solvent corporation received the proceeds in cash and applied them in payment of its own current obligations, then it would have no liability whatever. The result would be a manifest injustice.

I have, therefore, come to the conclusion that the plaintiff company must account to the defendant company as set out in the defendant company's set-off. The result is that I would affirm the judgment appealed from. Whenever the defendant company's claim is liquidated by payment, the accounts held by it should be re-assigned to the plaintiff company. Any sums received by the defendant company on those accounts, in addition to those for which credit is given in the set-off, should be applied on its claim.

Appeal dismissed.