[HIGH COURT OF AUSTRALIA.]

DURACK & OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

WEST AUSTRALIAN TRUSTEE EXECUTOR & AGENCY COMPANY LIMITED . . } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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MELBOURNE, *May* 17, 18.

SYDNEY, *Aug.* 9.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Bills of Exchange—Promissory note—Indorsement before delivery to payee—Intention of indorser—Indorsement by payee below prior indorsement—Bills of Exchange Act 1909-1936 (*Cth.*) (*No.* 27 *of* 1909—*No.* 74 *of* 1936), *ss.* 4, 25, 34, 35, 36, 60, 61, 90, 95.

Companies—Memorandum of association—Loan by company to finance purchase of its shares—Ultra vires.

A person who signs a promissory note on the back thereof with the intention of incurring the liabilities of an indorser is so liable notwithstanding that his signature was made before delivery of the note to the payee and that the payee's indorsement was subsequently made below his signature.

So *held* by *Rich*, *Starke* and *Williams* JJ.

A signed his name on the back of a promissory note before it was delivered to the payee. After delivery the payee indorsed the note below A's signature, which was so close to the edge of the note that there was no room for an indorsement above it. The note was given pursuant to an agreement to which the maker of the note, the payee and A were parties. The agreement provided that, on receipt of the note indorsed by A, the payee would return promissory notes, given under an earlier agreement, which had been indorsed by A "without recourse." The note was not met at maturity by the maker. In an action on the note by the payee against A the trial judge found that A had signed the note with the intention of making himself liable as an indorser to the payee for the amount of the note. Judgment was given for the payee for that amount.

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Held, by *Rich*, *Starke* and *Williams* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), that the judgment was correct. *National Sales Corporation Ltd.* v. *Bernardi*, (1931) 2 K.B. 188, and *McCall Brothers Ltd.* v. *Hargreaves*, (1932) 2 K.B. 423, applied.

Per Rich and *Williams* JJ.: Unless prohibited by the provisions of any statute, a loan by a company, falling within the investment clauses of its memorandum of association, to a person to purchase its shares is not illegal.

Trevor v. *Whitworth*, (1887) 12 App. Cas. 409, distinguished.

Decision of the Supreme Court of Western Australia (*Dwyer* J.) *The West Australian Trustee Executor & Agency Co. Ltd.* v. *Connor, Doherty & Durack Ltd.* (1943) 46 W.A.L.R. 30, affirmed.

APPEAL from the Supreme Court of Western Australia.

In an action brought in the Supreme Court of Western Australia by the West Australian Trustee Executor and Agency Co. Ltd., as executor of the will of Hannah Alicia Connor, deceased, against Connor Doherty and Durack Ltd. (a company incorporated in Western Australia), Michael Patrick Durack and Kenneth James Davidson (executors of the will of John Wallace Durack, deceased) and Eva Kathleen Durack (executrix of the will of Patrick Bernard Durack, deceased), the plaintiff made a claim on an agreement and alternatively on a promissory note. The claim on the promissory note was expressed in the statement of claim as being made by the plaintiff as holder of a promissory note for £11,800 dated 11th August 1932, which had been duly presented for payment and dishonoured and still remained unpaid; the claim was for the amount of the note against the defendant company as maker, and against the other defendants on the basis that their testators were indorsers, of the note. In their statement of defence the defendants pleaded (*inter alia*) that "if any such promissory note were made or indorsed as alleged in the statement of claim (which is . . . denied) . . . the said promissory note was indorsed for the accommodation of the defendant company as maker."

At the trial of the action before *Dwyer* J., it appeared that the defendant company had drawn the note, J. W. and P. B. Durack had signed their names on the back of the note, and it was afterwards delivered to the plaintiff, which was the payee. The plaintiff subsequently indorsed the note below the signatures of J. W. and P. B. Durack, which were close to the top of the note, leaving insufficient space for an indorsement by the plaintiff above them. *Dwyer* J. held that the note was not enforceable against the defendant company inasmuch as the giving of the note was part of a transaction

which was beyond the powers of the company ; but he found that the intention of J. W. and P. B. Durack in signing the note was to become liable as indorsers to the payee, and he gave judgment for the plaintiff against the defendants other than the company for the amount of the note : *The West Australian Trustee, Executor & Agency Co. Ltd.* v. *Connor, Doherty & Durack Ltd.* (1).

From this decision, the defendants against whom judgment had been given appealed to the High Court.

The argument of counsel and further relevant facts appear sufficiently for the purposes of this report in the judgments hereunder.

Durack K.C. and *A. M. Fraser*, for the appellants.

Fullagar K.C. and *Unmack*, for the respondent.

Cur. adv. vult.

Aug. 9.

The following written judgments were delivered :—

LATHAM C.J. Appeal from a judgment of the Supreme Court of Western Australia (*Dwyer* J.) in an action in which the plaintiff is the West Australian Trustee Executor & Agency Co. Ltd. as the executor of Hannah Alicia Connor deceased, and the defendants are Connor Doherty & Durack Ltd., the executors of J. W. Durack deceased, and the executrix of P. B. Durack deceased. J. W. Durack, P. B. Durack, D. J. Doherty and F. Connor were shareholders in and directors of the defendant company. In the action, the plaintiff claimed against all the defendants for principal and interest alleged to be due under a deed dated 27th July 1933 made between the defendant company, the plaintiff company (as trustee of the will of the wife of Connor, who had predeceased his wife), J. W. Durack and the executor of P. B. Durack. Alternatively, the plaintiff claimed against the defendant company as maker and the other defendants as indorsers of a promissory note for £11,800. The action against the company failed, the learned trial judge holding that the agreement sued upon was, when read in conjunction with other agreements to which it referred, an agreement whereby the company undertook to lend money of the company to Doherty, J. W. Durack and P. B. Durack for the purpose of enabling them to buy shares in the company from Connor. It was held that the agreement was void under the principle of *Trevor* v. *Whitworth* (2). The promissory note sued on was given to secure the payment of the moneys agreed to be so provided by the company and accordingly the action against

(1) (1943) 46 W.A.L.R. 30.

(2) (1887) 12 App. Cas. 409.

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the company on the promissory note also failed. As the agreement was held to be void for the reasons stated, the action against the other defendants on the agreement also failed, but judgment was given against the other defendants on the claim based on the indorsement of the promissory note. A counterclaim was dismissed and there is no appeal in respect of it.

The appellants naturally did not challenge in this Court the decision in their favour that the agreement was void. The respondent company also did not challenge that decision, counsel stating that he accepted the proposition that the agreement was void, though, rather than reaching that conclusion on the basis of *Trevor* v. *Whitworth* (1), he preferred to put it on the ground that the transaction represented by the agreement and the promissory note was void because it involved the application of moneys of the company for the private benefit of directors of the company in breach of the duty owed by those directors to the company.

It is therefore strictly unnecessary to consider whether any liability was imposed upon the defendants other than the company by reason of the agreements between the parties. It may, however, be observed that those agreements were evidently drafted with the object of excluding any personal liability of Doherty, J. W. Durack and P. B. Durack in relation to the purchase money for the shares. The terms of the agreements are set out in the reasons for judgment of my brother *Williams*, and it is unnecessary to repeat their provisions in detail.

The agreement of 21st April 1915, clause 2, expressly excluded any liability of those persons in respect of the purchase money for the shares. The promissory notes given under that agreement were indorsed by J. W. and P. B. Durack " without recourse." In the agreement of 5th February 1924 between Mrs. Connor (as personal representative of her husband, from whom the shares were to be bought) and the company, to which agreement J. W. and P. B. Durack were not parties, the company agreed to obtain indorsements of promissory notes " without recourse " and notes were so indorsed by J. W. and P. B. Durack.

The agreement of 11th August 1930 did not purport to impose any liability in respect of the purchase money for the shares upon J. W. Durack and P. B. Durack, nor did it even contain any agreement by them that they were to indorse the promissory note for £11,800. Clause 3 of the agreement provided that upon delivery to the plaintiff company of a promissory note for £11,800 drawn by the company in favour of the plaintiff and duly indorsed by J. W. Durack and P. B.

(1) (1887) 12 App. Cas. 409.

Durack the defendant company would deliver up twenty-four promissory notes to the company. This was a promise by the plaintiff to deliver up promissory notes upon receiving a promissory note for £11,800 indorsed as specified—not a promise by J. W. Durack and P. B. Durack to indorse the note.

The agreement of 27th July 1933, upon which the plaintiff sued, provides that the covenants and conditions contained in the agreement of 11th August 1930 shall apply to the agreement of 1933, save and except as they are modified by the later agreement. The agreement of 1933 contains no promises by J. W. Durack or the executrix of P. B. Durack except in relation to the payment of a sum of £200.

Accordingly there is nowhere in any of the transactions between the parties any agreement by J. W. Durack and P. B. Durack or their representatives to pay the purchase money for the shares, or to indorse the promissory note upon which the defendants have been sued, or to become sureties for the payment by the defendant company of the promissory note. The liability of the defendants other than the company exists, if at all, only by reason of the fact that J. W. Durack and P. B. Durack wrote their names on the back of the promissory note. Unless it is the law that these indorsements create a liability to the plaintiff, the plaintiff must fail in the claim upon the note. The question is purely a technical question arising under the law relating to promissory notes.

The promissory note is in the following terms :—

" Promissory Note.

Due 24th April 1933.

£11,800. 11th August 1932.

Fixed date—On the 24th day of April 1933 We promise to pay The West Australian Trustee Executor & Agency Co. Ltd. or order the sum of eleven thousand eight hundred pounds sterling value received.

Payable at Bank of New South Wales, St. George's Terrace, Perth Branch.

For Connor Doherty & Durack Limited
J. W. Durack, Director.
E. S. Barker, Secretary.

Indorsements.
J. W. DURACK.
P. B. DURACK.
For The West Australian Trustee, Executor & Agency Co. Ltd.
Edmund S. Barker, Manager.
E. Stokes, Accountant.

Without Recourse.
Credit The West Australian Trustee Executor & Agency Co. Ltd.
Trust Account."

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Clause 3 of the agreement of 11th August 1930 shows that it was intended that the note should be indorsed before delivery to the plaintiff. A letter of 11th August 1932 from the plaintiff company to the defendant company acknowledged receipt from the company of the note indorsed as intended. It is quite clear that the note was indorsed before it was delivered by the company to the payee. The *Bills of Exchange Act* 1909-1936, s. 90, provides that a promissory note is inchoate and incomplete until delivery thereof to the payee or bearer. Accordingly this promissory note was incomplete until it was delivered to the plaintiff company. It was therefore incomplete when it was indorsed.

The note was payable to the order of the payee. It could be negotiated by the indorsement of the payee, when the payee became the holder, completed by delivery (*Bills of Exchange Act* 1909-1936, s. 36 (1) (3)). The indorsers were at no time the holders of the note. They never had any rights in relation to the note which they could transfer to the plaintiff, and the plaintiff does not claim, and could not claim, as upon a title derived from them. The question is whether their indorsements, in the circumstances stated, enable the plaintiff to treat them as if they had negotiated the note to the plaintiff, though they did not in fact do so.

If the plaintiff had negotiated the note, the defendants doubtless would have been liable to a subsequent holder in due course, but this action is not brought by a person to whom the note was negotiated by the plaintiff. It is brought by the payee of a note drawn to payee or order indorsed by two persons before the note was delivered to the payee, and so indorsed by them before and above an indorsement by the payee.

In the ordinary sense of the term, the indorsement of a promissory note is an act which is done by the holder of a negotiable instrument. Where a bill or note is payable to order the payee must indorse the instrument before he can negotiate it. If the instrument is indorsed in blank, it becomes payable to bearer and can be negotiated by delivery. If it is specially indorsed, it becomes payable only to a specified person or to the order of that person (*Bills of Exchange Act*, s. 39). Thus indorsement, speaking generally, is a means of bringing about the negotiation of a bill, and, if a stranger to the bill, a person who is not a holder of the bill, writes his name on the back of the bill, he is not an indorser in the strict sense. He is what *Chalmers* (*Bills of Exchange*, 9th ed. (1927), p. 220) calls a quasi-indorser.

In the present case, neither J. W. Durack, P. B. Durack nor their representatives were at any time holders of the promissory note. Their " indorsement " was not necessary for, and was not part of,

any negotiation of the note. There never was any negotiation of the note. Accordingly it was not an indorsement in what I have called the strict sense of the term.

But the *Bills of Exchange Act*, s. 61, provides that where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course. The provisions of the Act relating to bills of exchange apply, with the necessary modifications, to promissory notes (s. 95 (1)). In applying those provisions, the maker of a note is deemed to correspond with the acceptor of a bill (s. 95 (2)). Liability is incurred under s. 61 only to a holder in due course. The payee of a note who is in possession of it (as in the case of the present plaintiff) is a holder of the note (*Bills of Exchange Act*, s. 4). But a payee is not as such a holder in due course. A person can be a holder in due course only where he takes a bill which already is complete (*Bills of Exchange Act*, s. 34) and, as already stated, no promissory note payable to payee or order can be complete until it is delivered to the payee (s. 90). Accordingly the payee of a promissory note as such cannot be a holder in due course. In *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (1), it was held that the original payee of a cheque is not a holder in due course within the meaning of the *Bills of Exchange Act* 1882 (Imp.). The reasoning in the case shows, and the case conclusively establishes, that the payee of a promissory note is not a holder in due course. Accordingly no liability to the payee can be imposed upon the defendants in the present case by reason of the provisions contained in s. 61 of the Act.

If no liability attaches by reason of s. 61, then liability can attach, if at all, only upon some other ground. The only ground that can be suggested is that the individual defendants really are ordinary indorsers of the note, so that it is unnecessary for the plaintiff to rely upon s. 61. The plaintiff would then rely directly upon s. 60 (2), which specifies the obligations of an indorser. But the contract of an indorser is a contract with subsequent parties. An indorser is not a surety for prior parties. As was said in *Steele* v. *M'Kinlay* (2), the indorsement is solely for the benefit of those who take subsequently.

Reliance is placed, however, upon *Ferrier* v. *Stewart* (3), where it was held that a person who indorsed a promissory note after it had been signed by the maker but before it was delivered to the payee became liable to the payee. But in *Ferrier* v. *Stewart* (3) the payee indorsed the note above the indorsement of the defendant, it being held that he was authorized to do this by the provisions of s. 25 (2)

(1) (1926) A.C. 670.
(2) (1880) 5 App. Cas. 754.
(3) (1912) 15 C.L.R. 32.

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of the Act, which authorize a person in possession of a bill or note to fill up the omission of any material particular in any way he thinks fit—if this is done within a reasonable time (sub-s. (3)). So also in *Trimble* v. *Thorne* (1), where a payee succeeded in an action against a person who indorsed a note before the note was delivered to the payee, the plaintiff succeeded because, as payee in possession of the note, he had authority to indorse the note above the indorsement made by the defendant, and actually did so indorse it. In *Gerald McDonald & Co.* v. *Nash & Co.* (2), the plaintiffs (payees) succeeded because they had taken advantage of the corresponding English provision and had, after receiving an indorsed bill, written their own names above the names of the defendant indorsers.

The case is different, however, when a payee does not use the authority conferred by s. 25. In *Jenkins & Sons* v. *Coomber* (3), where a bill was drawn to the plaintiffs' own order and the defendant wrote his name on the back of it and it was later indorsed by the plaintiffs below the indorsement of the defendant, it was held that the defendant was not liable as an indorser under s. 55 of the English Act (s. 60 of the Commonwealth Act) which specifies the liabilities of an indorser, because " the bill was never made complete, as far as he was concerned, by the necessary indorsement of the drawer," the bill being drawn to the order of the drawer. The bill not being complete when the defendant indorsed it, he did not incur the liabilities of an indorser which may arise by reason of s. 56 (s. 61 of the Commonwealth Act). Nor was he liable on a contract of suretyship because the provisions of the *Statute of Frauds* were not satisfied. Accordingly the defendant, though he had indorsed the bill, was not liable on the bill. This decision was approved in *M. T. Shaw & Co. Ltd.* v. *Holland* (4). In that case, as in *Jenkins & Sons* v. *Coomber* (3) and the present case, the plaintiffs " unfortunately " indorsed the bill below the name of the person whom they were suing as indorser (5). It was conceded that if the plaintiffs' indorsement had been above the names of the defendants, no question would have arisen. But both *Hamilton* J. (afterwards Lord *Sumner*) and the Court of Appeal (*Vaughan Williams*, *Farwell* and *Kennedy* L.JJ.) held that the action must fail. The judgments are based on the order in which the indorsements appeared. In *Ferrier* v. *Stewart* (6), the cases of *Steele* v. *M'Kinlay* (7), *Singer* v. *Elliott* (8) and *Jenkins & Sons* v. *Coomber* (3) are distinguished upon the ground that in those cases the indorsement of the third party (defendant) preceded that of the

(1) (1914) V.L.R. 41.
(2) (1924) A.C. 625.
(3) (1898) 2 Q.B. 168.
(4) (1913) 2 K.B. 15.
(5) (1913) 2 K.B., at p. 19.
(6) (1912) 15 C.L.R., at p. 36.
(7) (1880) 5 App. Cas. 754.
(8) (1888) 4 T.L.R. 524.

payee. So also in the present case the indorsement of the defendants precedes that of the payee—and the payee did not thereafter indorse the note above the indorsement by the defendants. Thus *Ferrier* v. *Stewart* (1) and *Trimble* v. *Thorne* (2) are distinguishable from the present case. See *Byles* on *Bills*, 20th ed., p. 173, as to these cases.

But it may further be pointed out that both of these cases were decided upon the basis of the view that the payee of a note was a holder in due course : See in *Ferrier* v. *Stewart* (3) per *Griffith* C.J., and in *Trimble* v. *Thorne* (4) per *Madden* C.J. and per *Cussen* J. (5). Accordingly, in so far as *Ferrier* v. *Stewart* (1) and *Trimble* v. *Thorne* (2) depend upon the view that the payee of a promissory note is a holder in due course, the decisions cannot be supported after the case of *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (6).

M. T. Shaw & Co. Ltd. v. *Holland* (7) was a case, like the present, in which there had been no negotiation of the bill upon which the action was brought. In *In re Gooch* ; *Ex parte Judd* (8), an indorser was held liable upon a bill where his indorsement was above that of the person sought to be made liable. But, in that case, the bill had been negotiated, and this fact is relied upon as distinguishing the case from *M. T. Shaw & Co. Ltd.* v. *Holland* (7)—see *In re Gooch* (9), per Lord *Sterndale* M.R. ; per *Warrington* L.J. (10), and per *Scrutton* L.J. (11).

In the cases of *National Sales Corporation Ltd.* v. *Bernardi* (12) and *McCall Brothers Ltd.* v. *Hargreaves* (13) disapproval was expressed of *Jenkins & Sons* v. *Coomber* (14) and the decisions of the House of Lords in *Gerald McDonald & Co.* v. *Nash & Co.* (15) and of the Court of Appeal in *M. T. Shaw & Co. Ltd.* v. *Holland* (7) were the subject of comment. In the *National Sales Case* (16), it was held that the fact that the drawer of a bill drawn to drawer's order placed his signature upon the bill below instead of above the signature of a third party was a " mere inadvertence " which should not be allowed to affect the rights of the parties. The learned judge quotes (17) what Lord *Sumner* said in *McDonald's Case* (18)—that the bill in such a case (i.e., with the indorsements in the wrong order) " is incomplete till it is filled up . . . and when . . . filled up, *though not before* " (my italics) " it becomes retrospectively enforceable, as if it

(1) (1912) 15 C.L.R. 32.
(2) (1914) V.L.R. 41.
(3) (1912) 15 C.L.R. 32, at p. 38.
(4) (1914) V.L.R. 41, at p. 51.
(5) (1914) V.L.R., at p. 52.
(6) (1926) A.C. 670.
(7) (1913) 2 K.B. 15.
(8) (1921) 2 K.B. 593.
(9) (1921) 2 K.B., at p. 601.
(10) (1921) 2 K.B., at pp. 602, 603.
(11) (1921) 2 K.B., at p. 606.
(12) (1931) 2 K.B. 188.
(13) (1932) 2 K.B. 423.
(14) (1898) 2 Q.B. 168.
(15) (1924) A.C. 625.
(16) (1931) 2 K.B. 188.
(17) (1931) 2 K.B., at p. 192.
(18) (1924) A.C. 625, at p. 648.

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had been complete throughout." The question in *McDonald's Case* (1) was " whether the appellants, being in possession of these bills on February 26, 1921, were, by the provisions of s. 20 of the *Bills of Exchange Act* 1882," (s. 25 of the *Commonwealth Act*) " empowered *to make them complete and enforceable* " (my italics) " against Nash & Co. by indorsing them at that date, in the manner in which they should have indorsed them—namely, in priority to the indorsement of them by the respondents—thus making the instruments effective to do what the parties to them desired and intended them to do in performance of the agreement into which those parties had entered." The whole point of the decision in *McDonald's Case* (2) is that s. 20 enabled the holders of the bill to do that which was necessary to impose any liability upon the third parties by reason of their " indorsement "—namely, to place their signature above that of the defendants, and that they actually did so place their signature. In the *National Sales Case* (3), this fact was wanting—the fact which the House of Lords most explicitly held to be the essential point which enabled the plaintiff in *McDonald's Case* (2) to succeed.

In the *National Sales Case* (4), it is said that in *Jenkins & Sons* v. *Coomber* (5) and in *M. T. Shaw & Co. Ltd.* v. *Holland* (6) " the judgments seem to turn mainly, if not entirely, on the question whether s. 20 of the *Bills of Exchange Act*, 1882, can apply to an instrument in which the only or principal omission was the absence of the drawer's indorsement." But the learned judge nevertheless goes on to say that in *Jenkins & Sons* v. *Coomber* (5) " s. 20 was not actually mentioned either in the arguments or the judgments " (4). It is accordingly only with some difficulty that s. 20 can be regarded as the main, or possibly the only, ground of the decision. It is also stated that " the fact that the drawer's indorsement came below that of the indorser " was not " actually mentioned " in the arguments or in the judgments in that case (4). Reference to the report of *Jenkins & Sons* v. *Coomber* (5) will show that counsel for the appellant argued that " until this bill had been indorsed by the plaintiffs no property in it passed, as it was drawn to their order." Counsel for the appellant contended that " the fact that the plaintiffs here indorsed the bill after and not before the defendant ought not to be allowed to defeat the admitted intention of the parties." *Wills* J. (with whom *Kennedy* J. concurred) bases his judgment on the fact that " when the defendant indorsed it the bill had not been indorsed by the plaintiffs, to whose order it was payable " (7) and he repeats

(1) (1924) A.C., at p. 642.
(2) (1924) A.C. 625.
(3) (1931) 2 K.B. 188.
(4) (1931) 2 K.B., at p. 193.
(5) (1898) 2 Q.B. 168.
(6) (1913) 2 K.B. 15.
(7) (1898) 2 Q.B., at p. 171.

his reference to this fact when he says: "Here, as I have already said, the bill was not a complete negotiable instrument until it had received the indorsement of the drawers" (1). In the Court of Appeal in *Glenie* v. *Smith* (2), *Cozens-Hardy* M.R. said: "With reference to *Jenkins & Sons* v. *Coomber* (3), that was a case in which s. 20 was not cited or referred to either by counsel or the judge, and for a very good reason, namely, that s. 20 could have no application, because it was a case altogether outside that section"—a statement exactly the opposite of what was said about that case in the *National Sales Case* (4). Accordingly I feel justified in respectfully dissenting from the statement in that case that *Jenkins & Sons* v. *Coomber* (3) was decided "mainly, if not entirely" on s. 20 of the Act.

M. T. Shaw & Co. Ltd. v. *Holland* (5), the case in the Court of Appeal, is admitted in the report of the *National Sales Case* (6) to have been treated by that court as a case "in which the third party's indorsement could only be binding if made after an open indorsement by the drawers." The latter indorsement was not in fact made (even if s. 20 would have authorized it) and for this reason the third party was held not to be liable by reason of his indorsement. This case therefore cannot support the decision in the *National Sales Case* (4).

Glenie v. *Smith* (7) was a case the decision in which I have difficulty in understanding. Two bills were sued upon. In one case (a bill for £91 9s.) the indorsement of the drawer was written above that of the defendant and in the other case (a bill for £124 11s.) it was written below it. The learned judge said as to this: "I think the bill for £124 11s. must be read with the other as though indorsed to the defendant by the drawer and re-indorsed by the defendant" (8). I do not understand how one bill can be "read with" another so as to alter the liability upon either bill. In the Court of Appeal, the case was decided upon the basis that the plaintiff was a holder in due course (9). In the present case, the plaintiff is not a holder in due course.

In *McCall Brothers Ltd.* v. *Hargreaves* (10), the indorsement of the plaintiff was below that of the defendants, and the plaintiff succeeded. The plaintiff succeeded because the learned judge held that *Jenkins & Sons* v. *Coomber* (3) was "clearly overruled" (in relation to the importance of the order of the indorsements) by *McDonald's Case* (11)

(1) (1898) 2 Q.B., at p. 172.
(2) (1908) 1 K.B. 263, at p. 267.
(3) (1898) 2 Q.B. 168.
(4) (1931) 2 K.B. 188.
(5) (1913) 2 K.B. 15.
(6) (1931) 2 K.B., at p. 194.
(7) (1908) 1 K.B. 263.
(8) (1907) 2 K.B. 507, at p. 512.
(9) (1908) 1 K.B., at pp. 266, 269.
(10) (1932) 2 K.B. 423.
(11) (1924) A.C. 625.

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and the *National Sales Case* (1). I am unable to agree. *Jenkins & Sons* v. *Coomber* (2) was referred to by Lord *Dunedin* in *McDonald's Case* (3) as representing one recognized category of cases. The decision in the latter case was based upon the fact that an indorsement had been made (as it was held duly) above the indorsement of the third party who was defendant. Thus *McDonald's Case* (4) assumes as correct the principle of the decision in *Jenkins & Sons* v. *Coomber* (2). The *National Sales Case* (1), a decision of a single judge, could hardly " overrule " the decision of a Divisional Court in *Jenkins & Sons* v. *Coomber* (2).

I am therefore of opinion that neither the *National Sales Case* (1) nor *McCall's Case* (5) nor the other cases mentioned in those cases should be regarded as diminishing the authority of *Jenkins & Sons* v. *Coomber* (2) or as qualifying (if that were possible) in any way the decisions of the House of Lords in *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (6) or *McDonald & Co.* v. *Nash & Co.* (7).

In both *Ferrier* v. *Stewart* (8) and *Trimble* v. *Thorne* (9), the decisions were supported by reference to estoppel. In the present case, there is no recital in any of the agreements between the parties which is not consistent with the clear terms of the agreements which exclude personal liability of J. W. Durack and P. B. Durack under the agreements. Minutes of meetings of the directors of the defendant company (including the Messrs. Durack), not shown to have been communicated to the plaintiff or to have induced the plaintiff to change its position, would not have supported any allegation of estoppel. But it is unnecessary to consider what defences would have been available to those defendants if the plaintiff had relied upon estoppel because no estoppel was pleaded, and the defendants were not called upon to meet any case based upon estoppel.

The result, therefore, is that—(1) The agreements between the parties do not create any personal liability of the testators of the individual defendants or of those defendants ; they do not contain any promises by those testators or by the defendants to the plaintiff by way of guarantee or otherwise. Thus the plaintiff cannot succeed in the action upon the agreements. (2) The parties acted upon the basis that they were content to rely upon whatever was the effect in law of J. W. Durack and P. B. Durack indorsing the promissory note. The plaintiff must succeed or fail merely upon the ground that those persons indorsed the note. In my opinion, for the

(1) (1931) 2 K.B. 188.
(2) (1898) 2 Q.B. 168.
(3) (1924) A.C., at p. 635.
(4) (1924) A.C. 625.
(5) (1932) 2 K.B. 423.
(6) (1926) A.C. 670.
(7) (1924) A.C. 625.
(8) (1912) 15 C.L.R. 32.
(9) (1914) V.L.R. 41.

reasons stated, the plaintiff should fail in this claim and the appeal should therefore be allowed.

RICH J. The nature of the action which has resulted in this appeal is stated in the reasons for judgment of the Chief Justice, and my brother *Williams* in his judgment has set out the provisions of the agreements which with certain promissory notes are the foundation of the liability alleged by the plaintiff now the respondent—The West Australian Trustee Executor & Agency Co. Ltd. The effect of the order unappealed from reduces the matter for our determination to the question whether the respondent company, the plaintiff in the action, was entitled to recover against the appellants, the defendants in the action, the amount claimed in these proceedings.

Whether or not the appellants were so liable depends upon certain documentary evidence admitted at the trial. It appears that by an indenture made on 9th August 1916 the widow of F. Connor acquired by assignment certain rights in favour of her husband under a previous agreement made 21st April 1915 between F. Connor, D. J. Doherty, M. P. Durack, J. W. Durack, P. B. Durack and the defendant company—Connor Durack & Doherty Ltd. Subsequently, by an agreement made 11th August 1930 between the defendant company Connor Durack & Doherty Ltd., the respondent company—the executor of Mrs. Connor who had died in the meantime—and Michael Patrick Durack and John Wallace Durack wherein, after various recitals, it was agreed that the respondent company should pay on account of the indebtedness relating to the purchase of F. Connor's shares in the defendant company the sum of £200 to the respondent company, that the due date of the balance of £11,800 should be extended to 24th April 1933, and that the respondent company should deliver up twenty-four promissory notes to the defendant company, Connor Durack & Doherty Ltd., upon payment to it of this sum of £200 and upon delivery to it of a promissory note for £11,800 drawn by the defendant company Connor Durack & Doherty Ltd. in favour of the respondent company and as appears from the promissory note itself duly indorsed by John Wallace Durack and Patrick Bernard Durack. The result of the documentary evidence is that John Wallace Durack and Patrick Bernard Durack were required by the agreement dated 11th August 1930 to indorse a promissory note for £11,800 drawn by the defendant company Connor Durack & Doherty Ltd. in favour of the respondent company. This was accordingly done. As the defendant company was unable to pay this note at maturity, a further indenture dated 27th July 1933 was made between the defendant company, the

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plaintiff company and J. W. Durack and E. K. Durack executrix of the will of P. B. Durack, then deceased, the effect of which was to extend the due date of the promissory note to 24th April 1938 with the proviso that all the covenants and conditions contained in the agreement of 11th August 1930, except such of them as were thereby modified or altered, should apply to this indenture as if they were therein specifically set forth. It thus appears that the purpose of these agreements was to enable the Duracks to purchase Connor's shares in the defendant company and to effect this purpose the defendant company agreed to finance the purchase and become responsible to Connor for the payment of the purchase money and interest. At all relevant dates the *Companies Acts* in force in Western Australia were similar to those in England upon which *Trevor* v. *Whitworth* (1) was founded. The opinions in that case, as I understand them, are directed to the proposition that the payment by a company of its assets for the purchase of its own shares is a reduction of capital not authorized by the legislature (*British & American Trustee & Finance Corporation* v. *Couper* (2)). But, in my opinion, a loan by a company, falling within the investment clauses of its memorandum of association, to a person to purchase its shares is not within the purview of the rule in *Trevor* v. *Whitworth* (1). It was not, I think, until s. 45 of the English *Companies Act* 1929 that financial assistance by a company to a person to enable him to pay for its shares was prohibited : Cf. *In re V.G.M. Holdings Limited* (3), referred to by my brother *Williams*. The appeal from the learned trial judge's decision is restricted in its nature. And the argument submitted to us was that the transactions evidenced by the several indentures and the promissory note in question were made or given for an illegal consideration or for no consideration. This argument was based on the ruling that the contract to purchase the company's shares was ultra vires and void and therefore that any consequential or collateral agreements and the promissory note made pursuant thereto were also invalid. Assuming that the original contract was ultra vires, it must be remembered that the liability of the defendants under the agreement of 11th August 1930 and the promissory note made pursuant to that agreement were absolute in form. The agreement of 27th July 1933 to which the defendants were parties repeats and reaffirms this liability and clearly evidences an intention on their part of becoming liable to the respondent trustee company. Further facts of importance are the letter from the plaintiff company to the defendant company, 11th August 1932,

(1) (1887) 12 App. Cas. 409.
(2) (1894) A.C. 399.
(3) (1942) Ch. 235.

wherein the promissory note is acknowledged as having been duly indorsed by J. W. Durack and P. B. Durack in their personal capacities, and the note to the minutes of the defendant company's meeting, 27th July 1933, to the same effect. And the question being one of intention the evidence to which I have referred supports the conclusion that the defendants held themselves responsible.

The position of the indorsement does not nullify the intention of the parties (*National Sales Corporation Ltd.* v. *Bernardi* (1); *McCall Bros. Ltd.* v. *Hargreaves* (2), cases to which my brother *Williams* has referred). The collateral transactions to which I have referred have been held to be enforceable (*Chambers* v. *Manchester & Milford Railway Co.* (3); *Yorkshire Railway Wagon Co.* v. *Maclure* (4); *Garrard* v. *James* (5)). And I think it may be said that the principle underlying such cases may perhaps be that, where a contract is made collateral to a contract which is ultra vires a company, it is enforceable if absolute in form and is not tainted with illegality (*Matthey* v. *Curling* (6)).

In these circumstances, I am of opinion that the appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of Western Australia for the respondent here for the sum of £17,953 (including interest) and also costs of action against the appellants here, the executors of John Wallace Durack deceased and executrix of Patrick Bernard Durack deceased, *de bonis testatoris* and, as to costs, *et si non de bonis propriis*. The statement of claim alleged two causes of action, one upon an agreement and the other upon a promissory note, and there was also a counterclaim. But this appeal concerns only the claim upon the promissory note, which is in the following form :—

Due 24th April 1933.
£11,800. 11th August 1932.
Fixed date—On the 24th day of April 1933 We promise to pay The West Australian Trustee Executor & Agency Co. Ltd. or order the sum of eleven thousand eight hundred pounds sterling value received.
Payable at Bank of New South Wales, St. George's Terrace, Perth Branch.
For Connor Doherty & Durack Limited
J. W. Durack, Director.
E. S. Barker, Secretary.

(1) (1931) 2 K.B. 188.
(2) (1932) 2 K.B. 423.
(3) (1864) 5 B. & S. 588 [122 E.R. 951].
(4) (1881) 19 Ch. D. 478, at p. 491.
(5) (1925) Ch. 616, at pp. 623, 624.
(6) (1922) 2 A.C. 180, at p. 234.

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Starke J.

Indorsements on back of Note
J. W. Durack.
P. B. Durack.

(These indorsements were close to the top of the note, leaving insufficient space for an indorsement by the payee.)

On 11th August 1932 this note was delivered to the payee, The West Australian Trustee Executor and Agency Co. Ltd., which subsequently indorsed it below the names of J. W. Durack and P. B. Durack, leaving a space (about one inch) between their names and its indorsement, which was as follows :—

For The West Australian Trustee, Executor & Agency Co. Ltd.
Edmund S. Barker, Manager.
E. Stokes, Accountant.
Without Recourse.
Credit The West Australian Trustee
Executor & Agency Co. Ltd.
Trust Account.

Connor Doherty & Durack Ltd., the maker of the note, was also sued, but judgment was given in its favour because, as the learned trial judge said, it had " not lawful power either to use its assets for the purpose of purchasing or trafficking in its own shares, or to lend its money to others for such purposes " : See *Trevor* v. *Whitworth* (1). The plaintiff in the action, the respondent here, has not appealed from this decision. And the counterclaim was dismissed and the defendants — the appellants here — have not appealed from this decision. But, following *Yorkshire Railway Wagon Co.* v. *Maclure* (2) and *Garrard* v. *James* (3), the learned Judge held that the indorsers of the note might be liable notwithstanding the fact that Connor Doherty & Durack Ltd., the maker of the note, had exceeded its powers : See also *McDonald* v. *Dennys Lascelles Ltd.* (4). It is, however, contended that J. W. and P. B. Durack were not indorsers of the note and had not incurred the liability of indorsers to a holder in due course : See *Bills of Exchange Act*, ss. 60, 61. *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (5) decides that the original payee of a bill or note is not a holder in due course. So it must be established that J. W. and P. B. Durack were indorsers or were in the position of indorsers of the note. The argument is that an indorser is a person to whom a bill or note has been negotiated or transferred and who has thus rights on the bill or note which he can and does transfer by subsequent delivery " with the addition of his own credit as

(1) (1887) 12 App. Cas. 409.
(2) (1881) 19 Ch. D. 478.
(3) (1925) Ch. 616.
(4) (1933) 48 C.L.R. 457, at pp. 471, 472.
(5) (1926) A.C. 670.

indorser": See *Bills of Exchange Act*, s. 36 (1); *In re Gooch*; *Ex p. Judd* (1); *Gerald McDonald & Co.* v. *Nash & Co.* (2). So it is concluded that "the persons whose names appeared upon the back of the document were not indorsers in the ordinary sense of the law merchant" who could be sued as such (*Steele* v. *M'Kinlay* (3); *Jenkins & Sons* v. *Coomber* (4); *M. T. Shaw & Co. Ltd.* v. *Holland* (5)). The note was delivered to the payee and was not inchoate and incomplete: the maker could have been sued upon it by the payee: See *Bills of Exchange Act*, s. 90; *Gerald McDonald & Co.* v. *Nash & Co.* (6). But it is true that the note was not a completely negotiable instrument until it received the indorsement of the payee. The authorities, however, make it clear that, if the persons whose names appear on the back of the note intended to make themselves liable to the payee, then the payee had a prima-facie authority to fill up the omission of any material particular in any way it thought fit (*Bills of Exchange Act*, s. 25 (2); *Gerald McDonald & Co.* v. *Nash & Co.* (7); *Glenie* v. *Smith* (8); *In re Gooch* (9); *Ferrier* v. *Stewart* (10); *Erikssen* v. *Bunting* (11)). A note is wanting in a material particular if the payee has not indorsed the same above the signatures of the persons whose names appear on the back of the bill. Therefore the payee, if those persons intended to make themselves liable to him, might write his name above theirs and enforce the note against them as indorsers: See cases *supra*. The trial Judge has found in this case that J. W. Durack and P. B. Durack intended to become liable to the payee as indorsers of the promissory note sued upon and that finding is supported by the evidence, but I shall refer to the evidence more at large in another aspect of this case. And *Wilkinson & Co.* v. *Unwin* (12) makes it clear that in such cases the persons whose names then appear below the name of the payee could not sue the payee as a prior indorser. Further still, the Victorian case *Trimble* v. *Thorne* (13) holds that the payee's indorsement may be made after action brought, a proposition that was advanced in argument in *M. T. Shaw & Co. Ltd.* v. *Holland* (14). But the Act, s. 25 (3), requires that the instrument must be filled up within a reasonable time and strictly in accordance with the authority given. *Steele* v. *M'Kinlay* (3), which is relied upon for the appellants, rests upon its own special facts. The person sought to be made liable as an indorser had written his name across the back of a bill payable to drawer or order

(1) (1921) 2 K.B. 593, at p. 606.
(2) (1924) A.C. 625, at p. 649.
(3) (1880) 5 App. Cas. 754.
(4) (1898) 2 Q.B. 168.
(5) (1913) 2 K.B. 15, at p. 20.
(6) (1924) A.C., at pp. 645, 646.
(7) (1924) A.C. 625.
(8) (1908) 1 K.B. 263.
(9) (1921) 2 K.B. 593.
(10) (1912) 15 C.L.R. 32.
(11) (1901) 20 N.Z.L.R. 388.
(12) (1881) 7 Q.B.D. 636.
(13) (1914) V.L.R. 41.
(14) (1913) 2 K.B. 15, at p. 23.

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before the bill was indorsed by the drawer, who subsequently wrote his name under the signature of the person sought to be made liable as indorser. " But there was no evidence to show why, in what character, for what purpose or object " the person sought to be made liable had written his name across the back of the bill. A like state of facts must be assumed so far as *Jenkins & Sons* v. *Coomber* (1) and *M. T. Shaw & Co. Ltd.* v. *Holland* (2) rest upon the authority of *Steele* v. *M'Kinlay* (3). But, if the evidence in those cases was that the party sought to be made liable as indorser intended to render himself liable as an indorser to the party suing, then those cases are in line with the facts of the present case, for the signatures of the persons who had written their names on the back of the bills appeared above the signature of the drawer to order of those bills. *Jenkins & Sons* v. *Coomber* (4) and *M. T. Shaw & Co. Ltd.* v. *Holland* (2), though the latter case was the decision of a Court of Appeal, if not overruled, are, however, no longer treated as authority in England in cases in which a party whose name appears on the back of a bill or note above that of the payee intended to make himself liable as indorser to the payee or a person in possession of the note. It would be strange, I think, that the mere position of the signatures of the parties altered their rights, and the reasoning of several English judges shows that the contention is not sound. In *Glenie* v. *Smith* (5), one of the bills sued upon had the name of the drawer as indorser placed below that of the defendant who had written his name on the back of the bill, or, in other words, had indorsed it. *Lawrence* J. said :—" I think the bill for £124 11s. must be read with the other as though indorsed to the defendant by the drawer and reindorsed by the defendant to the deceased " (the drawer) " for value received " (6). This means that the signatures were read in the order that gave effect to the intention of the parties and made the bill effective. The Court of Appeal affirmed this decision, which, as *Scrutton* L.J. pointed out in *In re Gooch* ; *Ex p. Judd* (7), seems inconsistent with the reasoning of *M. T. Shaw & Co. Ltd.* v. *Holland* (2). In *In re Gooch* (7), a bill purporting to be drawn to the order of the drawer upon and accepted by Cardbox Co. Ltd. and indorsed by one Gooch was without the signature of the drawer. Judd subsequently signed the bill as drawer and indorsed it but wrote his name on the back of the bill below that of Gooch. *Scrutton* L.J. said :—" Further, by s. 55, sub-s. 2 (*c*), of the Act "

(1) (1898) 2 Q.B. 168.
(2) (1913) 2 K.B. 15.
(3) (1880) 5 App. Cas. 754.
(4) (1898) 2 Q.B. 168.
(5) (1907) 2 K.B. 507 and, in the Court of Appeal, (1908) 1 K.B. 263.
(6) (1907) 2 K.B., at p. 512.
(7) (1921) 2 K.B. 593.

(*Bills of Exchange Act* 1909-1936, s. 60 (2), Australia) " the indorser of a bill by indorsing it is precluded from denying to a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto. Now the debtor " (Gooch) " intended to be an indorser, giving authority to his drawer to fill up the bill as a regular bill. I think the statute estops him from denying to his subsequent indorsee, Judd, who holds because of the debtor's indorsement in blank (not, it is to be noted, to ' a holder in due course ' as in s. 56) " (s. 61, Australian Act), " that the bill when he indorsed it was a valid and subsisting bill " (1). Again that reasoning seems inconsistent with that in *M. T. Shaw & Co. Ltd.* v. *Holland* (2). Further, in *National Sales Corporation Ltd.* v. *Bernardi* (3), bills of exchange drawn to the order of the drawer and accepted were indorsed by a third party, Bernardi, with the intention of making himself liable as an indorser. Subsequently the drawer indorsed the bills, but his indorsement was put below and not above that of the third party (Bernardi) who had indorsed the bills. *Wright* J., as he then was, therefore faced the same position as arises in this case and said :—" In my judgment effect can here be given to the necessary inference that the corporation indorsed the bills to complete them by adding the necessary indorsement between themselves as drawers, and Bernardi as indorser, and on that basis the position of the signatures is immaterial, and the result is just as if the indorsement by Bernardi had been added to the indorsement of the corporation, after in time, and below in space " (4). This is in line with the judgment of *Lawrence* J. in *Glenie* v. *Smith* (5) and also seems inconsistent with the reasoning of *M. T. Shaw & Co. Ltd.* v. *Holland* (2). In *McCall Bros. Ltd.* v. *Hargreaves* (6), *Goddard* J., as he then was, agreed with and acted upon the decision of *Wright* J. just mentioned. He said :—" The bills must be regarded as indorsed by the plaintiffs to the defendant and re-indorsed by him to them : See *Glenie* v. *Smith* (5) " (7).

In this state of the authorities, this Court is bound, I think, to exercise its own judgment. And, to adapt the words of Lord *Sumner* in *Gerald McDonald & Co.* v. *Nash & Co.* (8), " the assumption of an indispensable ritual of transmissibility in time as well as in form " in the negotiation and transfer of bills and notes without reference to any intention of the parties is not a principle of the law merchant.

The intention of J. W. and P. B. Durack in the present case was, the trial Judge found, to become liable as indorsers, and legal effect

(1) (1921) 2 K.B., at p. 607.
(2) (1913) 2 K.B. 15.
(3) (1931) 2 K.B. 188.
(4) (1931) 2 K.B., at p. 193.
(5) (1907) 2 K.B. 507.
(6) (1932) 2 K.B. 423.
(7) (1932) 2 K.B., at p. 430.
(8) (1924) A.C., at p. 649.

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may and should be given to that intention by reading the signatures in the order that gives effect to that intention or by giving effect to the statutory estoppel that arises upon s. 61 of the *Bills of Exchange Act* or by reliance upon both propositions. The first proposition depends upon the application of a principle of law that is not unknown, namely, that effect should if possible be given to the intention of the parties appearing from their instrument and the relevant surrounding circumstances: the second upon the construction of s. 61 of the Act.

Another contention relied upon for the appellants is that the promissory note was given for an illegal consideration. Any attempt, it was said, by a company to finance or any financing by a company of any person to purchase its shares from the company or from another shareholder is illegal and void. The English *Companies Act* 1929 (19 & 20 Geo. V. c. 23), s. 45, was referred to, but this provision is not in force in Western Australia. But it was said that the transactions at which the English section aims would, before it was passed, have been ultra vires and therefore the consideration, if any, in this case, is illegal (*Trevor* v. *Whitworth* (1); *Buckley* on *The Companies Acts*, 11th ed. (1930), p. 102). The argument is, I think, untenable for reasons given by *Cairns* L.C. in *Ashbury Railway Carriage & Iron Co. Ltd.* v. *Riche* (2): "I have used the expressions extra vires and intra vires. I prefer either expression very much to one which occasionally has been used in the judgments in the present case, and has also been used in other cases, the expression 'illegality.' In a case such as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract." So, assuming that the agreements the basis of the note and the making of the note sued upon in this case were ultra vires Connor Doherty & Durack Ltd., the maker of the note, because it was lending its moneys or credit to others for the purchase of its shares or was aiding a breach of the fiduciary duties of its directors, still the question is one affecting the authority and power of the company and not the legality of the consideration.

Lastly, it was contended that there was no consideration for the note or the indorsements of W. J. and P. B. Durack.

(1) (1887) 12 App. Cas. 409. (2) (1875) L.R. 7 H.L. 653, at p. 672.

Prima facie every party whose signature appears on a bill or note is deemed to have become a party thereto for value (*Bills of Exchange Act*, s. 35). But this presumption is displaced, it is said, by the proved facts. The history of the promissory note goes back some twenty-eight years. The maker of the note, Connor Doherty & Durack Ltd., is an incorporated company in which Connor, Doherty and the Durack brothers were in 1915 the shareholders. "Trouble arose," said the trial Judge, "between Connor and his" fellow shareholders "by reason of his large drawings of the company's moneys at Manila, and his establishing a partnership there which was trading with the company that he was representing. The other directors . . . became alarmed and decided that he must be got rid of." Negotiations were carried on to that end, and an agreement was made in 1915 which provided for the acquisition of Connor's shares (20,000) by Doherty and three of the Durack brothers for the sum of £19,000. The consideration was 38 promissory notes of £500 payable 10 years after date and interest at 6 per cent. The promissory notes were to be and were made by the company in favour of the purchasers and by them restrictively indorsed to pay the vendor "Francis Connor only" and without recourse against the purchasers as indorsers. The purchasers, the agreement itself provided, were in no event to be personally liable to pay the said £19,000 and interest or any part thereof. Connor signed transfers of his shares to the purchasers and the scrip certificates and the transfers were lodged with a bank to be delivered up when and as purchase money was paid. The purchasers indemnified Connor against all liability under any guarantee given by him to the Bank on account of the company. The company released Connor from various claims. And Connor covenanted with the company and separately with each of the purchasers that neither he nor any other person firm or corporation in the Philippine Islands with whom he had contracted obligations on behalf of the company would make any claim or demand against the company or the purchasers or any of them for debt compensation or damage other than in respect of certain matters specially excepted. Connor also covenanted with the company and separately with the purchasers and every one of them that his wife would make no claim or demand of any kind against the company or the purchasers or any of them. And Connor also guaranteed the payment to the company of certain moneys mentioned in the agreement. The Duracks did not incur any personal liability to Connor and he was to look to the assets of the company for payment. And, assuming that the agreement was unenforceable against the company for the reason assigned by the learned Judge, still the argument is untenable that there was

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no consideration moving from Connor to the company or to the Duracks. He handed over 20,000 shares to the bank with transfers to the purchasers attached, to be delivered when and as purchase money was paid and the purchasers collected the dividends upon the shares. Connor also entered into various covenants with the company and the Duracks of all of which the company and the Duracks have had the benefit. In 1916 Connor assigned the principal moneys owing or accruing due upon these promissory notes to his wife. The promissory notes matured in 1925, but in February 1924 an agreement was made varying and modifying that of 1915. A sum of £7,000 was paid to Mrs. Connor by the company. The bank was authorized to and did deliver to the company share certificates for 7,000 shares with transfers indorsed, and the purchasers became registered as shareholders in respect of those shares. The thirty-eight promissory notes were cancelled, and the company signed twenty-four fresh promissory notes for £12,000 payable 25th April 1931 in favour of Doherty and the Duracks, and these notes were indorsed by Doherty and the Duracks restrictively, prohibiting further negotiation, and with a direction to pay Alicia Connor only, and without recourse to them. Mrs. Connor died during the currency of these notes, namely, in July 1929. In August 1930 another agreement was made between the company, Mrs. Connor's personal representative —the respondent here—the Bank of New South Wales and J. W. and P. B. Durack. The company agreed to pay the personal representative of Mrs. Connor £200. The personal representative of Mrs. Connor agreed upon payment to it of the sum of £200 and delivery to it of a promissory note for £11,800 in its favour payable on 24th April 1933 and duly indorsed by J. W. and P. B. Durack to deliver to the company the whole of the twenty-four promissory notes. Interest on £11,800 was to be paid at the rate of 7 per cent per annum. This agreement was carried out, and the promissory note sued upon was subsequently given to the respondent here pursuant to that agreement. The agreement itself provided that the note should be indorsed by each of the parties of the fourth part, who were J. W. and P. B. Durack. But, in addition, subsequent correspondence is important. On 5th August of 1932 the respondent here forwarded to the company a copy of the agreement "dated 11th August, 1930." It also enclosed a promissory note "for dating and signature by your firm and for indorsement by Messrs. J. W. and P. B. Durack, after which please return it to us when we shall forward you the promissory notes totalling £12,000 now held by us." The company replied the same day :—"As soon as our Mr. P. B. Durack returns next week we will get his indorsement to the promissory

note for £11,800, and then forward it on to you." On 11th August the respondent acknowledged that it had "received your promissory note of to-day's date for £11,800 due on the 24th April, 1933, payable at the Bank of New South Wales, St. George's Terrace Branch, and duly indorsed by Messrs. J. W. and P. B. Durack in their personal capacities. This will also serve to confirm our Mr. Scahill's having handed you your twenty-four promissory notes totalling £12,000, which were not met on their due date in 1930."

In my opinion, the agreements, the correspondence and the form of the indorsement make it plain that the indorsers, J. W. and P. B. Durack, intended to make themselves liable to the payee of the note, the respondent here and the personal representative of Mrs. Connor. The consideration moving from the respondent here to the company and the Duracks is that arising from the agreements of 1915, 1924 and 1930. In 1933 the time for payment of the promissory note for £11,800 was extended to 1938. Subsequently to the giving of the promissory note both J. W. and P. B. Durack died, and the appellants are respectively their personal representatives. A sum of £22,041 or thereabouts has been paid in respect of the principal becoming due on the promissory notes and interest thereon. But the promissory note for £11,800 was not paid on maturity, and after some further delay and correspondence the respondent in 1942 issued the writ in this action.

In my opinion, the judgment given in its favour for £17,953 (including interest) against the personal representatives of the indorsers of the note for £11,800 is right for the reasons stated and this appeal should be dismissed.

McTiernan J. In my opinion, this appeal should be allowed.

The questions to be decided arise only upon the judgment which was given against the appellants upon the cause of action framed upon the promissory note: this cause of action was alleged alternatively to that framed upon the covenant in the deed dated 27th July 1933.

The former cause of action was alleged against the company as the maker of the promissory note and against the appellants on the footing that J. W. Durack and P. B. Durack, their testators respectively, had each contracted an obligation to the respondent as the indorsers of the promissory note. The cause of action was held to fail as against the company, but to succeed as against the respondents. The Supreme Court held that it was beyond the powers of the company to pay the debt represented by the promissory note, but that the appellants were liable to pay it on the ground that the

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Duracks had indorsed the promissory note so as to contract the liability of indorsers thereon.

The company is the maker of the promissory note : the respondent is the payee and the holder of it. The evidence shows that the Duracks put their signatures upon the promissory note before it was delivered to the respondent and that its indorsation was made below their signatures.

Section 4 of the Australian *Bills of Exchange Act* says that indorsement means an indorsement completed by delivery. " An indorsement in general is a transfer by the holder of the bill to a new holder on whom the property is thereby conferred " (*Steele* v. *M'Kinlay* (1), per Lord *Blackburn* ; *Smith* v. *Commercial Banking Co. of Sydney Ltd.* (2)). A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer (s. 90).

The facts which have been mentioned are insufficient to prove that the Duracks endorsed the promissory note to the respondent and hence contracted an obligation under s. 60 as indorsers. Moreover, they did not, by signing their names upon the promissory note, contract an obligation under s. 61 to pay the amount of the note to the respondent for the reason that the payee of a promissory note is not a holder in due course : *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (3). The signatures of the Duracks would have operated to render them liable to a holder in due course to whom the promissory note was negotiated. But the facts that have been mentioned, although insufficient to prove that the Duracks contracted an obligation on the promissory note as indorsers, do not preclude a finding that they did contract such an obligation.

The question that arises is whether the evidence proves that they did contract with the respondent to be liable to it as indorsers of the note. If this fact is established, then they should be held to have made themselves liable to the respondent as indorsers, notwithstanding that they put their signatures on the promissory note before it was completed by delivery and the signatures appear above the indorsation of the respondent (*Steele* v. *M'Kinlay* (4) ; *Gerald McDonald & Co.* v. *Nash & Co.* (5)).

The evidence does not, in my opinion, justify the inference that the Duracks undertook a liability to the respondent for the amount of the note. It is the balance of the total consideration of £19,000 for which Connor agreed by the indenture of 21st August 1915 to sell his 20,000 shares in the company to Doherty, M. P. Durack, as well as

(1) (1880) 5 App. Cas. 754, at p. 772.
(2) (1910) 11 C.L.R. 667, at p. 680.
(3) (1926) A.C. 670.
(4) (1880) 5 App. Cas. 754, at p. 758.
(5) (1924) A.C. 625, at pp. 636, 649, 650.

J. W. Durack and P. B. Durack. An express term of the indenture is that the purchasers are in no event to be personally liable to pay the sum of £19,000 and interest or any part thereof. The indenture provides that the consideration to be given by the purchasers to the vendor for the shares is thirty-eight promissory notes of £500 each bearing the same date as the indenture and payable ten years afterwards: that interest shall be paid by the company, which is a party to the agreement, on the promissory notes at 6 per cent: and that they shall be made by it in favour of the purchasers and by them respectively indorsed to pay vendor "Francis Connor only" without recourse against the purchasers as indorsers.

Mrs. Connor, to whom her husband made over the promissory notes and his rights under the agreement, delivered to the company for cancellation, before they matured, all these promissory notes pursuant to the agreement made on 5th February 1924 under a term of which the company paid her £7,000 on account of the sum of £19,000 and signed fresh promissory notes for £12,000 due 25th April 1931 in favour of the four purchasers, and obtained their indorsements without recourse on them to pay Mrs. Connor only. It is a term of the agreement that the company should pay interest on the fresh promissory notes at 6 per cent. Another term of the agreement confirmed the provision of the prior agreement of 27th April 1915 whereby Connor and the Duracks agreed to purchase the shares. The latter agreement thus saddled the company with the payment of the balance of the consideration for which Connor sold his shares to them, as did the prior agreement saddle the company with the whole consideration: and the latter agreement, like the former, relieved all the purchasers from the payment of any part of the consideration or any part of the interest.

The purchasers had agreed to a division of the shares and any dividends declared by the company were paid to them. The agreement of 11th August 1930 recites that the company is indebted to the respondent, Mrs. Connor's executor, in the sum of £12,000, and that the indebtedness is represented by the promissory notes which the company had signed in his favour. The agreement provides for the reduction of the company's liability under the promissory notes to the respondent by the sum of £200, and for the delivery, in substitution for them, of one promissory note for £11,800, which the agreement says shall be drawn by the company in the respondent's favour payable on 24th April 1933, "and duly indorsed by each of the parties hereto of the fourth part." These parties were J. W. Durack and P. B. Durack.

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There is no evidence that either of the Duracks undertook to pay the respondent the amount for which the company drew the promissory note which, it has been observed, is the balance of the total consideration of £19,000 which the four purchasers agreed to give Connor for his shares. And there is here no agreement by the Duracks to indorse the promissory note for £11,800 : there is a promise by the respondent upon payment of the sum of £200 and delivery to it of a promissory note for that amount drawn by the company and " duly indorsed " by the Duracks to deliver to the company the whole of the current twenty-four promissory notes.

The evidence fails, in my opinion, to prove that the Duracks indorsed the promissory note to the respondent or that there was any agreement between them and the respondent that their signatures should operate to charge them as the indorsers of it. Having regard to the facts that the Duracks put their signatures on the back of the promissory note before it was delivered to the respondent and that its indorsation is made below the signatures of the Duracks, it would, I think, be in accordance with *Jenkins & Sons* v. *Coomber* (1) and *M. T. Shaw & Co. Ltd.* v. *Holland* (2) to hold that the signatures of the Duracks do not operate to charge them as indorsers of the promissory note.

The present case can be distinguished from *Glenie* v. *Smith* (3) in this material respect that there the person whom it was alleged had contracted the obligation of an indorser to the drawer had not merely put his signature on the bills, but had agreed to guarantee the payment of the price represented by the bills and for that purpose indorsed them.

In the case of *In re Gooch* ; *Ex parte Judd* (4), there is this statement by *Scrutton* L.J. in the course of his judgment : " Now in my view the debtor " (the indorser) " clearly intended and contracted to make himself liable as an indorser for good consideration moving from Judd. He did so not merely as surety for Cardbox Ltd., but as a person interested in that company, giving consideration for time given to that company and himself as a person interested in it " (5). It was alleged in the case that the debtor had contracted an obligation on the note as an indorser. In the present case, there is, in my opinion, no evidence to justify that the Duracks intended and contracted to make themselves liable for the unpaid balance of the consideration for which Connor sold his shares to them and Doherty and M. P. Durack.

(1) (1898) 2 Q.B. 168.
(2) (1913) 2 K.B. 15.
(3) (1907) 2 K.B. 507 ; (1908) 1 K.B. 263.
(4) (1921) 2 K.B. 593.
(5) (1921) 2 K.B., at p. 607

In *Gerald McDonald & Co.* v. *Nash & Co.* (1), it was held that the conclusion which was required by the facts was that the common intention of the appellants and respondents was that the respondents should be liable on the bills and with that object should indorse them.

Again, in *National Sales Corporation Ltd.* v. *Bernardi* (2), it appears that a material fact in the case was that Bernardi intended by indorsing the bills to render himself liable to the corporation if the acceptors failed to pay, he having an interest in Alldays in consideration of time being given.

Lastly, in the case of *McCall Bros. Ltd.* v. *Hargreaves* (3), it was the fact that the bills were indorsed by the defendant in pursuance of an agreement under which the plaintiff sold and delivered goods to the acceptors in consideration of the defendant indorsing the bills with the intention of making himself liable to the plaintiff in the case of default by the purchasers.

It seems to me that, as the facts of the present case do not justify the inference that the Duracks intended and contracted to make themselves liable to the respondent as indorsers of the promissory note, there is nothing in the cases that have been referred to which would justify the Court in holding that the promissory note should be read as if the respondent's signature was written above the signatures of the Duracks.

I have read the analysis which the Chief Justice has made of the cases and agree with it.

The effect produced by the Duracks' signing their names on the promissory note was that they would be liable to a holder in due course if the respondent negotiated it: Compare *Castrique* v. *Buttigieg* (4); *Gerald McDonald & Co.* v. *Nash & Co.* (5).

For these reasons, I think the appeal should be allowed.

It is not necessary for me to deal with the question whether the indebtedness represented by the promissory note sued upon and those which preceded it arose out of a transaction which was not only ultra vires the company but also illegal. I reserve the question whether or not it was illegal for the directors of the company to agree to appropriate the funds of the company to pay for the shares in the company which four of them agreed to acquire for their own benefit from another of them: See *Lorang* v. *The King* (6). There was at the relevant time no provision in force in Western Australia corresponding with s. 45 of 19 & 20 Geo. V. c. 23.

(1) (1924) A.C. 625.
(2) (1931) 2 K.B. 188, at p. 191.
(3) (1932) 2 K.B. 423.
(4) (1855) 10 Moore 94, at p. 111 [14 E.R. 427, at p. 434].
(5) (1924) A.C. 625, at p. 640.
(6) (1931) 22 Cr. App. R. 167.

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WILLIAMS J. This is an appeal from a part of the judgment of the Supreme Court of Western Australia given in an action in which the West Australian Trustee Executor & Agency Co. Ltd., the executor of Hannah Alicia Connor deceased, as plaintiff sued M. P. Durack and E. J. Davidson, the executors of J. W. Durack deceased, and E. K. Durack the executrix of P. B. Durack deceased, and the company Connor Doherty & Durack Ltd. upon an indenture made on 27th July 1933 and upon a promissory note made by the defendant company on 11th August 1932 in favour of the plaintiff for the sum of £11,800 payable on 24th April 1933 indorsed by J. W. Durack and P. B. Durack and subsequently extended by the above indenture until 24th April 1938, and for outstanding interest.

The defendant company counterclaimed for the sum of £22,041 14s. 1d., being money paid for principal and interest to Mrs. Connor under the agreements hereinafter referred to made prior to the indenture of 27th July 1933 but forming part of the same transaction.

The learned trial Judge dismissed the action against the defendant company and the counterclaim by that company and against his judgment in these respects there is no appeal. But he gave judgment against the defendant executors and executrix *de bonis testatoris* for the principal sum of £11,800 and for interest, the total amount being £17,953 2s. 9d., and these defendants have appealed against this part of the judgment.

Before coming to the grounds argued on the appeal, it will be necessary briefly to state the essential facts.

In 1915 F. Connor, D. J. Doherty, M. P. Durack, J. W. Durack, and P. B. Durack were the directors of and substantially the beneficial holders of all the shares in the defendant company. On 21st April 1915, an indenture was entered into between these five persons and the defendant company for the purchase by Doherty and the three Duracks of Connor's 20,000 shares in the defendant company. The indenture provided that the consideration to be given by the purchasers to the vendor should be thirty-eight promissory notes each for £500 payable ten years after date, such promissory notes to be made by the defendant company in favour of the purchasers and by them restrictively indorsed to pay the vendor only without recourse against the purchasers as indorsers, the purchasers in no event to be personally liable to pay the £19,000 and interest or any part thereof. The vendor agreed to sign transfers in blank of the shares and scrip certificates therefor and transfers thereof and deposit these with the Bank of New South Wales at Perth, the scrip certificates and transfers to be delivered to the purchasers on the promissory notes being duly paid at maturity.

By an indenture made on 9th August 1916, which recited the circumstances under which Connor agreed to sell his shares to Doherty and the three Duracks, Connor assigned his rights under the indenture of 21st April 1915 and the promissory notes to his wife, Hannah Alicia Connor.

The defendant company was unable to meet the promissory notes when they fell due and the time for their payment had to be extended.

On 5th February 1924, it was agreed between Mrs. Connor and the defendant company that the defendant company would pay £7,000 to Mrs. Connor and that she would authorize the Bank of New South Wales to deliver up to the defendant company scrip for 7,000 shares. She also agreed to deliver up to the defendant company the thirty-eight promissory notes for £500 each already mentioned and the defendant company agreed to sign fresh promissory notes for £12,000 due 25th April 1931 in favour of D. J. Doherty and the three Duracks and to obtain their indorsements as soon as possible without recourse from them to pay Hannah Alicia Connor only. It was also agreed that the scrip certificates for the remaining 12,000 shares should be held in escrow with the Bank of New South Wales as against the promissory notes for £12,000 as on the same terms as in the original escrow. Pursuant to this indenture, the defendant company paid the sum of £7,000 to Mrs. Connor, and she caused the scrip for 7,000 of the shares to be delivered to the defendant company. These shares were then divided between the purchasers. The promissory notes provided for by the indenture were also made in favour of Mrs. Connor by the defendant company and indorsed in the manner thereby provided.

Mrs. Connor died on 29th July 1929 and the plaintiff is the executor of her estate.

On 11th August 1930, an indenture was made between the defendant company of the first part, the plaintiff of the second part, the Bank of New South Wales of the third part, and J. W. Durack and P. B. Durack of the fourth part, which provided, *inter alia*, for the payment by the defendant company to the plaintiff of £200 in respect of the principal sum of £12,000 and for the extension of the balance of £11,800 until 24th April 1933. Clause 3 provided that the plaintiff should, upon payment to it of the sum of £200 and delivery to it of one promissory note for £11,800 drawn by the defendant company in favour of the plaintiff payable on 24th April 1933 and duly indorsed by each of the parties of the fourth part, deliver to the defendant company the whole of the current promissory notes. Pursuant to this indenture, but for some unexplained reason nearly two years later, the defendant company on 11th August 1932 made a promissory

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note in favour of the plaintiff or order for £11,800 payable on 24th April 1933 and this promissory note was indorsed by J. W. Durack and P. B. Durack.

The defendant company was unable to pay the note at maturity, so that, by an indenture made on 27th July 1933 between the defendant company of the first part, the plaintiff of the second part and J. W. Durack and E. K. Durack executrix of the will of P. B. Durack (who had died in the meantime) of the third part, after reciting, *inter alia*, that the promissory note for £11,800 had been indorsed by J. W. Durack and P. B. Durack, that the defendant company or the indorsers had paid to the plaintiff the interest due under the promissory note up to 24th October 1932, that the promissory note had been duly presented for payment and dishonoured, and that the parties of the first and fourth parts (presumably the third part is meant), being unable to pay and discharge this promissory note, had requested the plaintiff to extend the time for payment and to reduce the rate of interest payable thereon, the indenture witnessed that the parties of the first and fourth (*sic*—third) parts covenanted and agreed to pay to the plaintiff the sum of £200 on the execution thereof, and the plaintiff agreed to reduce the rate of interest to 5 per cent per annum and to extend the due date of the promissory note until 24th April 1938. Clause 4 provided that, save and except as the same were thereby modified or altered, all the covenants and conditions contained in the agreement of 11th August 1930 should apply to this agreement as if the same were therein specifically set forth.

The substance of the transaction entered into in 1915 was, therefore, that it was agreed between the five directors of the defendant company that Doherty and the three Duracks should purchase the shares in the defendant company of Connor, the fifth director, and that the defendant company should finance the purchase of the shares on behalf of the purchasers and be solely liable to the vendor for the payment of the purchase money and interest. At the date of the indenture of 21st April 1915 and upon all subsequent relevant dates, the statute law relating to companies in Western Australia was the same as that contained in the English *Companies Acts* discussed by the House of Lords in *Trevor* v. *Whitworth* (1). In that case, the articles of association authorized the company to purchase its own shares, and it was held that under the *Companies Acts* a company has no power to purchase its own shares, so that a purchase of shares which the company had made was ultra vires, and the vendor was unable to claim the balance of the unpaid purchase money in the liquidation of

(1) (1887) 12 App. Cas. 409.

the company. The foundation of the decision was that the *Companies Acts* provide the only legal means (apart from forfeiture) of reducing the capital of the company, so that for a company to buy its own shares from its shareholders is to return the capital on those shares to those shareholders and thereby to reduce its paid-up and nominal capital in an unlawful manner.

In the present case, the defendant company was not purchasing its own shares. It was only financing their purchase by advancing money to some of its shareholders to enable them to purchase its shares, so that the transaction was not one which resulted in any reduction of the nominal or paid-up capital of the company. Further, the memorandum of association of the defendant company contains a clause authorizing the company to advance money without security, and to advance money to the four purchasers to enable them to buy the shares would create a debt from them to the company, and would not lead to any reduction of its capital. But the learned trial Judge held that it followed from the decision in *Trevor* v. *Whitworth* (1) that it is beyond the power of the company to lend money to its shareholders for this purpose, because so to do is to traffick in its shares, and that is a business which is contrary to the policy of the *Companies Acts* and therefore ultra vires the powers of a company limited by shares incorporated under these Acts and void.

The agreement was entered into at a time when there was no statutory provision in force in Western Australia corresponding with s. 45 of the English *Companies Act* 1929 which prohibits a company, under a penalty of £100, from lending money to a person to assist him to purchase shares in the company. It is true that, in *Lorang* v. *The King* (2), the Court of Criminal Appeal said that it was unable to see any difference between a company buying its own shares and the company making a loan authorized by its memorandum of association to a person to enable him to buy its shares, and that the latter was illegal independently of s. 45. It is difficult, however, to reconcile the case with the decision of the Court of Appeal in *In re V. G. M. Holdings Ltd.* (3), in which their Lordships appear to regard the section as making new law which is restricted in its scope to loans by a company for the purpose of acquiring its shares which are purchased in the strict sense of the term, and they held therefore that the section did not prohibit loans for the purpose of enabling persons to subscribe for shares in a company. They refer specifically to the practice of a company lending money to its shareholders to buy its shares as a practice which, after the last war, gave rise to great dissatisfaction and

(1) (1887) 12 App. Cas. 409.
(2) (1931) 22 Cr. App. R. 167.
(3) (1942) Ch. 235.

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scandals but do not even hint that it was illegal or ultra vires the powers of a company that had power to lend money. Further, apart from statute, a company can take a security over its shares for money lent to a shareholder. If it can do this, it is difficult to see why it cannot lend money to buy its shares, especially when its articles of association give it a lien over the shares when bought to secure the moneys owing. Such a lien is valid (*Allen* v. *Gold Reefs of West Africa* (1)).

If it is correct to hold that such loans were void independently of s. 45, which I take leave to doubt, it must be on the footing that, although not expressly or impliedly prohibited by the Act, they were opposed to its policy. But a provision in an agreement which is opposed to public policy is not illegal; it does not taint the whole agreement but is merely void (*Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.* (2); *Attorney-General (Cth.)* v. *Adelaide Steamship Co. Ltd.* (3)), and a provision in an agreement which is unenforceable only because opposed to the general policy of a statute is in no worse position (*In re Johns*; *Worrall* v. *Johns* (4); *Vita Food Products Inc.* v. *Unus Shipping Co.* (5)). On the other hand, an agreement prohibited by statute is inherently vicious and incapable of giving rise to legal rights: *Montreal Trust Co.* v. *Canadian National Railway Co.* (6); see the authorities usefully collected in *Marks* v. *Jolly* (7). But the plaintiff has not appealed against the judgment dismissing the action against the defendant company, so that I shall assume, for the purposes of the appeal, contrary to my own opinion, that the agreement by the defendant company to pay this purchase money and interest was void and unenforceable.

Further, although this point was not raised in the Court below, it is to be noted that the articles of association of the defendant company do not contain any provision authorizing a director to enter into a contract with the company so that, unless the contract was ratified by the company in general meeting, which does not appear to have been done, it would be a contract which offends against the equitable rule that, for the reasons given by Lord *Cranworth* in *Aberdeen Railway Co.* v. *Blaikie Bros.* (8), cited by Lord *Russell of Killowen* when delivering the judgment of the Privy Council in *E.B.M. Co. Ltd.* v. *Dominion Bank* (9), a director cannot make a contract with the

(1) (1900) 1 Ch. 656, at p. 658.
(2) (1892) A.C. 25, at pp. 39, 47, 51.
(3) (1913) A.C. 781, at p. 797.
(4) (1928) Ch. 737.
(5) (1939) A.C. 277, at p. 293.
(6) (1939) A.C. 613.
(7) (1938) 38 S.R. (N.S.W.) 351, at pp. 355-358; 55 W.N. 125, at pp. 127, 128.
(8) (1854) 1 Macq. 461, at pp. 471, 472.
(9) (1937) 3 All E.R 555, at pp. 568, 569.

company of which he is a director through the agency of the other directors, and it would therefore be a contract voidable at the mere option of and unenforceable against the defendant company.

But, in view of the limited nature of the appeal, it is unnecessary, in my opinion, to discuss the position that existed prior to the indenture of 11th August 1930, because that agreement introduced a number of material alterations into the original agreement. The promissory note provided for by that agreement was not a note to be made in favour of the purchasers by the defendant company and by them indorsed without recourse to the plaintiff, but was to be and was in fact made by the defendant company in favour of the plaintiff, and was to be and was in fact indorsed by J. W. Durack and P. B. Durack with the intention that they should become personally liable to the plaintiff for the payment of the balance of purchase money and interest. Their indorsements upon the promissory note appear above that by which the plaintiff indorsed the note without recourse to the credit of its account at the bank. But, where the intention is clear that an indorsement is placed upon a promissory note in order that the indorser shall be personally liable to the payee for the payment of the note by the maker, or in other words as a promise to the payee that the note will be met at maturity, this is immaterial, and the law would indeed be in a most unsatisfactory state if it were otherwise, so that the liability of an indorser under such circumstances would depend upon whether the payee was wise enough to place his own indorsement above or foolish enough to place it below that of the indorser. On this point, I desire to adopt the reasons given by *Wright* J. (as he then was) in *National Sales Corporation Ltd.* v. *Bernardi* (1) and *Goddard* J. (as he then was) in *McCall Bros. Ltd.* v. *Hargreaves* (2), which with respect appear to me to be unanswerable, simply adding that s. 25 of our *Bills of Exchange Act* corresponds to s. 20 of the Imperial Act. See also *Ferrier* v. *Stewart* (3), a decision which was clearly right but is capable of being supported, in my opinion, on broader grounds than those which appear in the judgments, and *Sydney and North Sydney Lime Burners Ltd.* v. *Phillips* (4).

Further, the plaintiff sued on two counts, (1) on the agreement contained in the indenture of 27th July 1933, and (2) on the promissory note of 11th August 1932. The learned trial Judge dismissed the action against the defendant company, but gave judgment against the appellants, and this judgment, which is not given on either count

(1) (1931) 2 K.B. 188.
(2) (1932) 2 K.B. 423.
(3) (1912) 15 C.L.R. 32.
(4) (1931) 31 S.R. (N.S.W.) 505; 48 W.N. 170.

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specifically, should stand if it can be supported on either count. As I have said, it clearly can, in my opinion, be supported on the second count, but I also consider that it can be supported on the first count. J. W. Durack and E. K. Durack would be estopped by the recitals to the indenture of 27th July 1933 from denying that the former personally and the latter as executrix of the estate of P. B. Durack to the extent of his assets had agreed to pay the balance of purchase money and interest. In the case of E. K. Durack, the indenture contains an express provision that nothing therein contained or implied shall in any wise render her personally liable for payment of principal or interest, but that such liability shall be limited to the estate of P. B. Durack coming into her hands at any time as executrix. The indenture also contains a provision that, if on 24th April in each year the trading account of the defendant company should not then have been reviewed by the Bank of New South Wales, then interest should not be payable until after such review by the bank, provided also that, if after such review the defendant company and the appellants were not able, out of any moneys made available to them by the bank for that purpose, to pay the whole or any part of such interest, then it should not be payable until 24th April 1938.

The minute book of the defendant company is in evidence, from which it appears that, at a meeting of the board of directors held on 27th July 1933, the indenture of 27th July 1933 was signed, sealed and delivered. On 7th March 1934, a document in the following terms was signed by the other two purchasers, M. P. Durack and D. J. Doherty: " re company's liability to the estate of H. A. Connor £11,800 and the indenture dated 27th July 1933—minute book 379—between Connor Doherty & Durack Ltd. and W. A. Trustee Executor & Agency Co. Ltd., re estate H. A. Connor, which was indorsed by J. W. Durack and E. K. Durack as executrix of the estate of P. B. Durack we, D. J. Doherty and M. P. Durack, hold ourselves equally responsible in this debt for any liability that may be incurred by J. W. Durack and E. K. Durack as executrix for the estate of P. B. Durack." A meeting of directors of the defendant company at which M. P. Durack, D. J. Doherty, J. W. Durack and E. K. Durack were present, was held on 7th March 1934, the minutes of which contain an entry relating to this document in the following terms: " The document attached to these minutes was signed by Mr. D. J. Doherty and Mr. M. P. Durack holding themselves equally liable with Mr. J. W. Durack and Mrs. E. K. Durack as executrix of the estate of P. B. Durack." This, and other evidence in the action, fully supports the finding of the learned trial Judge that " looking at all the facts and circumstances I have come to the conclusion that on the

promissory note of 1933 " (his Honour evidently means 1932), " J. W. Durack and P. B. Durack did intend to become liable as indorsers, and that the form of the promissory note was varied accordingly." The liability of the appellants to the plaintiff can therefore be supported under the agreement on the first count, or as indorsers of the promissory note on the second count.

Further, supposing that the nature of the liability of the appellants as indorsers is that of guarantors and that, contrary to the view expressed by *Goddard* J. in *McCall's Case* (1), there must be a sufficient memorandum in writing to satisfy the *Statute of Frauds* (which has not been pleaded), the indenture of 27th July 1933 is such a memorandum.

The grounds mainly argued on the appeal were that the indentures of 11th August 1930 and 27th July 1933 and all other agreements and documents, including the promissory note of 11th August 1932 made in pursuance thereof, were illegal and void, that any promise or covenant contained therein made by the appellants or their testators was made or given for an illegal consideration, that the promissory note was made and indorsed for and on account of an illegal consideration or alternatively without consideration, and that the plaintiff and all prior holders of the promissory notes had notice of such illegality or alternatively absence of consideration.

It is clear that Connor, Mrs. Connor, and the plaintiff had notice of the circumstances under which the various indentures were entered into and the various promissory notes were made, so that the appellants are entitled to succeed if they can establish that there was no consideration for their promises or that the consideration was illegal.

But the sale of the shares by Connor as vendor to Doherty and the three Duracks as purchasers was a perfectly valid transaction. There was nothing to prevent the purchasers completing the purchase by paying the purchase money, whereupon the vendor was bound to deliver the scrip and transfers to enable the purchasers to be registered as the holders of the shares. It cannot be contended, therefore, that there was no consideration for the promises by F. W. Durack and P. B. Durack to pay the balance of purchase money, so that it is unnecessary to discuss whether there were other and independent considerations for these promises. If, however, the indentures were entered into for an illegal purpose, then it would follow that a promise to pay or a guarantee of the payment of the money for such a purpose would also be illegal,

(1) (1932) 2 K.B. 423.

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and that these indentures and the promissory note of 11th August 1932 could not be enforced against the appellants by the plaintiff.

The appellants rely upon the statement of Lord *Watson* in *Trevor* v. *Whitworth* (1) that " directors and shareholders of a company limited by shares who desire to have the concern in the hands of themselves and their friends . . . ought to use their own money for that purpose and . . . not the trading capital of the company. In my opinion the application of the company's funds in furtherance of any such object is altogether illegitimate, because it is foreign to the proper business of the company and in violation of statute law " (2). But I doubt whether his Lordship intended to say more than that the transaction there in question was invalid. If he did, then his statement of the law has not found acceptance and is not in accord with the statements in the speeches of the other members of the House. Lord *Herschell* in the same case cited with approval a statement by *James* L.J. : " Either this is a purchase of shares in the sense of trafficking in shares, which is a purchase not authorised by the memorandum of association, or it is an extinguishment of shares and therefore a reduction of the capital of the company " (3). Lord *Macnaghten* said that " if a power to purchase its own shares were found in the memorandum of association of a limited company, it would necessarily be void " (4). Later he said : " Here the applicants are seeking to enforce against the company a contract which . . . was beyond the powers of the company " (5).

In *Kirby* v. *Wilkins* (6), *Romer* J. (as he then was) said : " If the company paid money for that transfer, then no doubt it would be trafficking in the shares of the company and that would be invalid."

This case is commented on in *In re Buckingham* ; *Oswell* v. *John Dobell Ltd.* (7). The same view that a similar transaction would be ultra vires the powers of a company and therefore void was taken by *Maugham* J. (as he then was) in *In re Walters' Deed of Guarantee*; *Walters'* " *Palm* " *Toffee Ltd.* v. *Walters* (8).

For a company in Western Australia to carry on a business of trafficking in its shares by financing their purchase by its shareholders was at most to carry on a business which could not lawfully be authorized by its memorandum of association because it was contrary to the policy of the Act and therefore ultra vires and void. It was certainly not illegal at any relevant time for a company there to advance money to a person to enable him to purchase its shares in the

(1) (1887) 12 App. Cas. 409.
(2) (1887) 12 App. Cas., at p. 430.
(3) (1887) 12 App. Cas., at pp. 418, 419.
(4) (1887) 12 App. Cas., at p. 436.
(5) (1887) 12 App. Cas., at p. 441.
(6) (1929) 2 Ch. 444, at p. 452.
(7) (1943) 170 L.T. 53.
(8) (1933) Ch. 321.

sense that such a loan was prohibited by statute and therefore tainted collateral transactions.

For these reasons, I am of opinion that the present case, viewed in the most favourable light for the appellants, cannot be distinguished from the decision of *Laurence* J. in *Garrard* v. *James* (1), which, if I may say so with respect, was rightly decided, and I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellants, *Dwyer, Durack & Dunphy*, Perth, by *Frank Brennan & Co.*

Solicitors for the respondent, *Unmack & Unmack*, Perth, by *Abbott, Beckett, Stillman & Gray.*

E. F. H.

(1) (1925) Ch. 616.