

Subject: Bank Loans * Voidable contracts? * Court Decisions

ULTRA VIRES CONTRACTS

1. "A contract is ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it. The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the **defendant to return**, or failing to do that, to **make compensation** for, **property** or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the **unlawful contract**." *Pullman v. Central Transp. Co.*, 139 U.S. 62, 11 S.Ct. 478, 35 L.Ed. 55
2. "When a contract is once declared ultra vires, the fact that it **is executed** does not validate it, nor can it be ratified, so as to make it the basis of suit or action, nor does the doctrine of estoppel apply." *F&PR v. Richmond*, 133 SE 898; 151 Va. 195.
3. "A national bank . . . cannot lend its credit to another by becoming surety, indorser or guarantor for him, such an act is ultra vires . . ." *Merchants Bank v. Baird*, 160 F 642.

LOAN OF CREDIT

4. "In the federal courts, it is well established that a national bank has not power to lend its credit to another by becoming surety, endorser, or guarantor for him." *Farmers and Miners Bank v. Bluefield Nat'l Bank*, 11 F.2d 83, 271 U.S. 669.
5. "A national bank has no power to lend its credit to any person or corporation." *Bowen v. Needles Nat. Bank*, 94 F. 925; 36 CCA 553, certiorari denied 120 S.Ct. 1024, 176 US 682, 44 L.Ed 637.
6. "Mr. Justice Marshall said: 'The doctrine of ultra vires is a most powerful weapon to keep private corporations within their legitimate spheres and to punish them for violations of their corporate charters, and it probably is not invoked too often . . .'" *Zinc Carbonate Co. v. First National Bank*, 103 Wis. 125, 79 NW 229, *American Express Co. v. Citizens State Bank*, 194 NW 430.
7. "A bank may not lend its credit to another, even though such a transaction turns out to have been of benefit to the bank, and in support of this a list of cases might be cited, which would look like a catalog of ships." *Norton Grocery Co. v. Peoples Nat. Bank*, 144 SE 505, 151 Va 195.
8. "It has been settled beyond controversy that a national bank, under federal law being limited in its powers and capacity, cannot lend its credit by guaranteeing the debts of another. All such contracts entered into by its officers are **ultra vires**. . ." *Howard & Foster Co. v. Citizens Nat'l Bank of Union*, 133 SC 202, 130 SE 759 (1926).

9. “. . . checks, drafts, money orders and bank notes are **not lawful money of the United States** .” *State v. Neilon*, 73 Pac. 324, 43 Ore. 168.

10. “Neither, as included in its powers, nor incidental to them, is it a part of a bank’s business to lend its credit. If a bank could lend its credit as well as its money, it might, if it received compensation and was careful to put its name only to solid paper, make a great deal more than any lawful interest on its money would amount to. If not careful, the power would be the mother of panics . . . Indeed, lending credit is the exact opposite of lending money which is the real business of a bank, for while the latter creates a liability in favor of the bank, the former gives rise to a liability of the bank to another.” 1 Morse, *Banks and Banking*, 5th Ed. Sec. 65; Magee, *Banks and Banking*, 3rd Ed. Sec. 248.” *American Express Co. v. Citizens State Bank*, 194 NW 429.

11. “It is not within those statutory powers for a national bank, even though solvent, to lend its credit to another in any of the various ways in which that might be done.” *Federal Intermediate Credit Bank v. L. Herrison*, 33 F.2d 841, 842 (1929).

12. “There is no doubt but what the law is that a national bank cannot lend its credit or become an accommodation endorser.” *National Bank of Commerce v. Atkinson*, 56 F. 471.

13. “A bank can lend its money, but not its credit.” *First Nat’l Bank of Tallapoosa v. Monroe*, 135 Ga 614, 69 F. 1124, 32 LRA (NS) 550.

14. “. . . the bank is allowed to lend money upon personal security, but it must be money that it loans, not its credit.” *Sellgman v. Charlottesville Nat. Bank*, 3 Hughes 647, Fed. Case No. 12, 642, 1039.

LOANS OF MONEY

15. “A loan may be defined as the delivery by one party to, and the receipt by another party of, a sum of money upon an agreement express or implied, to repay the sum with or without interest.” *Parsons v. Fox*, 179 Ga 605, 176 SE 644. Also see *Kirkland v. Bailey*, 155 SE 2d 701, and *United States v. Neifert White Co.*, 247 Fed.Supp. 878, 879.

“The word ‘money’ in its usual and ordinary acceptance means **gold, silver**, or paper money used as a circulating medium of exchange. . .” e.v. *Railey* 280 Ky 319, 133 SW2d 75.

PROMISE TO PAY NOT EQUIVALENT TO PAYMENT

16. “A **promise to pay cannot**, by argument, however ingenious, be made the equivalent of actual payment . . .” *Christensen v. Beebe*, 91 P 133, 32 Utah 406.

17. “A check is merely an order on a bank to pay money.” *Young v. Hembree*, 73 P2d 393.

HOLDER IN DUE COURSE

18. “A bank is not the holder in due course upon merely crediting the depositor’s

account.” *Bankers Trust v. Nagler*, 229 NYS2d 142, 143.

FRAUD AND MISREPRESENTATION

19. “Any false representation of material facts made with knowledge of falsity and **with intent that it shall be acted on by another in entering into contract, and which is so acted upon, constitutes ‘fraud,’ and entitles party deceived to a void contract or recover damages.**” *Barnsdall Refining Corp. v. Bimarn Wood Oil Co.*, 92 F.2d S17.

20. “Any conduct capable of being turned into a statement of fact is representation. There is no distinction between misrepresentations effected by words and misrepresentations effected by other acts.” *Leonard v. Springer*, 197 Ill 532, 64 NE 301.

21. “It is not necessary for rescission of a contract that the party making the misrepresentation should have known that it was false, but recovery is allowed even though misrepresentation is innocently made, because it would be **unjust to allow one who made false representations** even innocently to retain the fruits of a bargain induced by such representations.” *Whipp v. Iverson*, 43 Wis.2d 166.

CONSIDERATION

22. “If any **part of the consideration for a promise be illegal**, or if there are several considerations for an unseverable promise, one of which is illegal, the **promise**, whether written or **oral, is wholly void**, as it is impossible to say what part or which one of the considerations induced the promise.” *Menominee River Co. v. Augustus Spies L&C Co.*, 147 Wis 559, 572; 132 NW 1122.

23. “The **contract is void if it is only in part connected with the illegal transaction** and the promise single or entire.” *Guardian Agency v. Guardian Mut. Savings Bank*, 227 Wis. 550, 279 NW 83.

ADEQUATE ASSURANCE

24. Adequate Assurance of Due Performance at UCC § 2-609(4) and correlating state statutes states:

“After receipt of a **justified demand**, failure to provide within a reasonable time not exceeding 3 days such assurance of **due performance**, as is adequate under the circumstances of the particular case, is a repudiation of the contract.”