Who Lends—”Bailor” Who Borrows—”Bailee”

Who has the value? Who gives value? Who is the originator of value (the thing) loaned?

“Things are not always as they appear.” You decide.

BAILEE defined: contracts. One to whom goods are bailed. 2. His duties are to act in good faith he is bound to use extraordinary diligence in those contracts or bailments, where he alone receives the benefit, as in loans; he must observe ordinary diligence of those bailments, which are beneficial to both parties, as hiring; and he will be responsible for gross negligence in those bailments which are only for the benefit of the bailor, is deposit and mandate. Story's Bailm. Sec. 17, 18, 19. He is bound to return the property as soon as the purpose for which it was bailed shall have been accomplished. 3. He has generally a right to retain and use the thing bailed, according to the contract, until the object of the bailment shall have been accomplished. 4. A bailee with a mere naked authority, having a right to remuneration for his trouble, but coupled with no other interest, may support trespass for any injury, amounting to a trespass, done while he was in the actual possession of the thing. 4 Bouv. Inst. n. 3608.

LENDER defined: contracts. He from whom a thing is borrowed. 2. The contract of loan confers rights, and imposes duties on the lender. 1. The lender has the right to revoke the loan at his mere pleasure; 9 Cowen, R. 687; 8 Johns. Rep. 432; 1 T. R. 480; 2 Campb. Rep. 464; and is deemed the owner or proprietor of the thing during the period of the loan; so that an action for a trespass or conversion will lie in favor of the lender against a stranger, who has obtained a wrongful possession, or has made a wrongful conversion of the thing loaned; as mere gratuitous permission to a third person to use a chattel does not, in contemplation of the common law, take it out of the possession of the owner. 11 Johns. Rep. 285; 7 Cowen, Rep. 753; 9 Cowen, Rep. 687; 2 Saund. Rep. 47 b; 8 Johns. Rep. 432; 13 Johns. Rep. 141, 661; Bac. Abr. Trespass, c 2; Id. Trover, C 2. And in this the Civil agrees with the common law. Dig. 13, 6, 6, 8; Pothier, Pret, Usage, ch. 1, Sec. 1, art. 2, n. 4; art. 3, n. 9; Ayliffe's Pand. B. 4, t. 16, p. 517; Domat, B. 1, t. 5, Sec. 1, n. 4; and so does the Scotch law. Ersk. Pr. Laws of Scotl. B. 3, t. 1 Sec. 8. 3.-2. In the civil law, the first obligation on the part of the lender, is to suffer the borrower to use and enjoy the thing loaned during the time of the loan, according to the original intention. Such is not the doctrine of the common law. 9 Cowen, Rep. 687. The lender is obliged by the civil law to reimburse the borrower...
the extraordinary expenses to which he has been put for the preservation of the thing lent. And in such a case, the borrower would have a lien on the thing, and may detain it, until these extraordinary expenses are paid, and the lender cannot, even by an abandonment of the thing to the borrower, excuse himself from repayment, nor is he excused by the subsequent loss of the thing by accident, nor by a restitution of it by the borrower, without insisting upon repayment. Pothier, Pret ... Usage, ch. 3, n. 82, 83; Dig. 13, 6, 18, 4; Ersk. Pr. Laws ... of Scotl. B. 3, t. 1, Sec. 9. What would be decided at common law does not seem very clear. Story on Bailm. Sec. 274. Another case of implied obligation on the part of the lender by the civil law is, that he is bound to give notice to the borrower of the defects of the thing loaned; and if he does not and conceals them, and any injury occurs to the borrower thereby, the lender is responsible. Dig. 13, 6, 98, 3; Poth. Pret ... Usage, n. 84; Domat, Liv. 1, t. 5, s. 3, n. 3. In the civil law there is also an implied obligation on the part of the lender where the thing has been lost by the borrower, and after he has paid the lender the value of it, the thing has been restored to the lender; in such case the lender must return to the borrower either the price or thing. Dig. 13, 6, 17, 5; Poth. Id. n. 85. "The common law seems to recognize the same principles, though," says Judge Story, Bailm. Sec. 276, "it would not perhaps be easy to cite a case on a gratuitous loan directly on the point." See Borrower; Comodate; Story, Bailm. ch. 4; Domat. Liv. 2, tit. 5; 1 Bouv. Inst. n. 1078, et seq. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

QUID PRO QUO defined: This phrase signifies verbatim, what for what. It is applied to the consideration of a contract. See Co. Litt. 47, b; 7 Mann. & Gr. 998. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

BORROWER defined: contracts. He to whom a thing is lent at his request. 2. The contract of loan confers rights, and imposes duties on the borrower' 1. In general, he has the right to use the thing borrowed, during the time and for the purpose intended between the parties; the right of using the thing bailed, is strictly confined to the use, expressed or implied, in the particular transaction, and by any excess, the borrower will make himself responsible. Jones' Bailment, 58 6 Mass. R. 104; Cro. Jac. 244; 2 Ld. Raym. 909; Ayl. Pand. B. 4, t. 16, p. 517; Domat, B. 1, t. 5, Sec. 2, n. 10, 11, 12; Dio. 13, 6, 18 Poth. Pret a Usage, c. 2, Sec. 1, n. 22; 2 Bulst. 306; Ersk. Pr. Laws of ScotI. B. 3, t. 1, Sec. 9; 1 Const. Rep. So. Car. 121 Bracton, Lib. 3, c. 2, Sec. 1, p. 99. The loan is considered strictly personal, unless, from other circumstances, a different intention may be presumed. 1 Mod. Rep. 210; S. C. 3 Salk. 271. 3. - 2. The borrower is bound to take extraordinary care of the thing borrowed; to use it according to the intention of the lender, to restore it in proper time; to restore it in a proper condition. Of these, in their order. 4. - 1. The loan being gratuitous, the borrower is bound to extraordinary diligence, and is responsible for slight neglect in relation to the thing loaned. 2 Ld. Raym. 909, 916 Jones on Bailm. 65; 1 Dane's Abr. c. 17, art. 12; Dig. 44, 73 1, 4; Poth. Pret. a Usage, c. 2, Sec. 2, art. 21, n. 48 5. - 2. The use is to be according to the condition of the loan; if there is an excess in
the nature, time, manner, or quantity of the use, beyond what may be inferred to be within the intention of the parties, the borrower will be responsible, not only for any damages occasioned by the excess, but even for losses by accidents, which could not be foreseen or guarded against. 2 Ld. Raym. 909; Jones on Bailm. 68, 69. 6. - 3. The borrower is bound to make a return of the thing loaned, at the time, in the place, and in the manner contemplated by the contract. Domat, Liv. 1, t. 5, Sec. 1, n. 11; Dig. 13, 6, 5, 17. If the borrower does not return the thing at the proper time, he is deemed to be in default, and is generally responsible for all injuries, even for accidents. Jones on Bailm. 70; Pothier, Pret a Usage , ch. 2, Sec. 3, art. 2, n. 60; Civil Code Of Louis. art. 2870; Code Civil, art. 1881; Ersk. Inst. B. 3, t. 1, Sec. 22 Ersk. Pr. Laws of Scotl. B. 3, t. 1, Sec. 9. 7. - 4. As to the condition in which the thing is to be restored. The borrower not being liable for any loss or deterioration of the thing, unless caused by his own neglect of duty, it follows, that it is sufficient if he returns it in the proper manner, and at the proper time, however much it may be deteriorated from accidental or other causes, not connected with any such neglect. Story on Bailm. eh. 4, Sec. 268. See, generally, Story on Bailm. oh. 4; Poth. Pret A Usage; 2 Kent, Com. 446-449; Vin. Abr. Bailment, B 6; Bac. Abr. Bailment; Civil Code of Louis. art. 2869-2876; 1 Bouv. Inst. n. 1078-1090. Vide Lender. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

GRATUITOUS CONTRACT defined: civ. law. One, the object of which is for the benefit of the person with whom it is made, without any profit, received or promised, as a consideration for it as, for example, a gift. 1 Bouv. Inst. n. 709. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

To convey a title the seller must himself have a title to the property, which is the subject of the transfer. But to this general rule there are exceptions. 1. The lawful coin of the United States will pass the property along with the possession. 2. A negotiable instrument endorsed in blank is transferable by any person holding it, so as by its delivery to give a good title "to any person honestly acquiring it." 3 B. & C. 47; 3 Burr. 1516; 5 T. R. 683; 7 Bing. 284; 7 Taunt. 265, 278; 13 East, 509; Bouv. Inst. Index, h.t. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

INSTRUMENT defined: A formal or legal document in writing, such as a contract, deed, will, bond, or lease. A writing that satisfies the requisites of negotiability prescribed by U.C.C. Art. 3. A negotiable instrument (defined in U.C.C. § 3--104), or a security (defined in U.C.C. § 8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment. U.C.C. § 9-105(1). Anything reduced to writing, a document of a formal or solemn character, a writing given as a means of affording evidence. A document or writing which gives formal expression to a legal act or agreement,
for the purpose of creating, securing, modifying, or terminating a right. A writing executed and delivered as the evidence of an act or agreement. Moore v. Diamond Dry Goods Co., 47 Ariz. 128, 54 P.2d 553, 554. Anything which may be presented as evidence to the senses of the adjudicating tribunal. Black's Law Dictionary Sixth Edition (page 801)

PUBLIC ACTS Defined: are those which have a public authority, and which have been made before public officers, are authorized by a public seal, have been made public by the authority of a magistrate, or which have been extracted and been properly authenticated from public records. Black’s Law Dictionary Sixth Edition (page 26)

BANK defined: com. law. 1. A place for the deposit of money. 2. An institution, generally incorporated, authorized to receive deposits of money, to lend money, and to issue promissory notes, usually known by the name of bank notes. 3. Banks are said to be of three kinds, viz: of deposit, of discount, and of circulation; they generally perform all these operations. Vide Metc. & Perk. Dig. Banks and Banking. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

BANKBOOK defined: commerce. A book which persons dealing with a bank keep, in which the officers of the bank enter the amount of money deposited by them, and all notes or bills deposited by them, or discounted for their use. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

BANK NOTE defined: contracts. A bank note resembles a common promissory note, (q.v.) issued by a bank or corporation authorized to act as a bank. It is in fact a promissory note, but such notes are not, for many purposes, to be considered as mere securities for money; but are treated as money, in the ordinary course and transactions of business, by the general consent of mankind and, on payment of them, when a receipt is required, the receipts are always given as for money, not as for securities or notes. 1 Burr. R. 457; 12 John. R. 200; 1 John. Ch. R. 231; 9 John. R. 120; 19 John. 144; 1 Sch. & Lef. 318, 319; 11 Ves. 662; 1 Roper, Leg. 3; 1 Ham. R. 189, 524; 15 Pick. 177; 5 G. & John. 58; 3 Hawks, 328; 5 J. J. Marsh. 643. 2. Bank notes are assignable by delivery. Rep. Temp. Hard. 53 9 East, R. 48; 4 East, R. 510 Doug. 236. The holder of a bank note is prima facie entitled to prompt payment of it, and cannot be affected by the fraud of any former holder in obtaining it, unless evidence be given to bring it home to his privity. 1 Burr. 452; 4 Rawle, 185 13 East, R. 135 Dane's Ab. Index, h. t.; Pow. on Mortg. Index, h. t. U. S. Dig. h. t. Vide Bouv. Inst. Index, h. t. Note; Promissory note; @Reissuable note. 3. They cannot be taken in execution. Cunning. on Bills, 537; Hardw. Cases, 53; 1 Arch. Pr. 268 1 Wils. Rep. 9 Cro. Eliz. 746, pl. 25 A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than holder in due course, the delivery, in order to be
effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and, in such case, the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed until the contrary is proved.”

Nemo praesumitur donare: No one is presumed to give. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

Nemo potest sibi devere: No one can owe to himself. See Confusion of Rights. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est: It is very natural that an obligation should not be dissolved but by the same principles which were observed in contracting it. Dig. 50, 17, 35. See 1 Co. 100; 2 Co. Inst. 359. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

Executio est finis et fructus legis: An execution is the end and the first fruit of the law. Co. Litt. 259. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

Nemo potest contra recordum verificare per patriam. No one can verify by the country against a record. The issue upon a record cannot be tried by a jury. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

Nemo potest esse tenes et dominus. No man can be at the same time tenant and landlord of the same tenement. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

Ejus est periculum cujus est dominium aut commodum. He who has the risk has the dominion or advantage. A Law Dictionary Adapted To The Constitution And Laws Of The United States Of America And Of The Several States Of The American Union by: John Bouvier Revised Sixth Edition, 1856

Banking Corporations Cannot Lend Credit.” (Amarillo vs. Slaton Independent School District, Tex Civ App 1933, 58 SW 2d 870)

“Learning is finding out what you already know. Doing is demonstrating that you know it. Teaching is reminding others that they know just as well as you. We are all learners, doers, teachers.”
"Nowhere is the express authority granted to the corporation to lend its credit." (Gardilner Trust vs. Augusta Trust, 134 Me 191; 291 US 245)

"A national bank has no authority to lend its credit." (Johnston vs. Charlottesville National Bank, C.C. Va. 1879, Fed Cas. 7425)

"A contract made by a corporation beyond the scope of corporate powers is unlawful and void." (McCormick vs. Market National Bank, 165 U.S. 538)

(Note: Black’s Law Dictionary: ultra vires – Latin for "beyond powers." It refers to conduct by a corporation or its officers that exceeds the powers granted by law.)

Despite the above court cases, Ralph Gelder, Superintendent, Department of Banks and Banking, State of Maine, said on Feb. 20, 1974, "A commercial bank is able to make a loan by simply creating a new demand deposit (so called checkbook money) through bookkeeping entry." This is in total contradiction to what the courts have said. Yet, that is exactly how the banks create the money to loan to its customers or to buy government bonds.

"Act is ultra vires when corporation is without authority to perform it under any circumstance or for any purpose. By doctrine of ultra vires a contract made by a corporation beyond the scope of its corporate powers is unlawful." (Community Fed S&L vs. Fields, 128 F 2nd 705)

"A holder who does not give value cannot qualify as a holder in due course." (Uniform Commercial Code §3-303.1)

In securities law, the most important requirement is full disclosure. Investors have to be given the full scoop. You cannot hold anything back. Everything—lawsuits, criminal records, market share, debt—has to be disclosed. This same type of disclosure is required in the Truth in Lending Act as well. With that said, why is it that no one has ever heard of this legal argument? Well, probably because they have not been told. But don’t you think that it is important and relevant to tell potential loan customers, as well as bank shareholders, that according to the US Code and numerous judicial decisions, it is questionable whether a national bank is actually authorized to lend credit, become a guarantor, or become surety? They should at least say something to their customers and shareholders along the lines of this:

"Disclaimer: We the bank, are lending credit, guaranteeing debts and becoming surety, through our lending business, for profit. The Comptroller of Currency approves. Congress has been silent in recent years. However, both federal and state courts in the past have repeatedly told us that the National Bank Act does not provide for this activity. Therefore, at any point in the future, the bank could be subject to either federal or state cease and desist orders. In that event the bank will require immediate and full payments and will cancel your credit or loan. Further, the bank may be exposed to civil lawsuits from all its former loan Clients and shareholders."

Here are other things to consider:
• If a party breaches its authority, by entering into an agreement that
it knows it is not allowed by law to execute, is it moral to allow that party to enforce the agreement?
• Is it moral to force a person to pay on a loan, when that person did not know that the bank did not have the legal authority to issue credit or to become surety?
• Is it moral for a bank to place a negative mark on your credit report, when they did not have the authority to enter into the agreement in the first place, and that any deficit in payment has been insured by a third party insurance company and can be written off as a claim?

In addition to these three points, consider also that moral arguments (arguments based in equity), verses legal arguments (arguments based in law), are only upheld if the party seeking to enforce the agreement comes to the court with “clean hands.” This concept is known as the clean hands doctrine. What this doctrine means is that if a bank desires to enforce an agreement based on equity (morality), then they must have acted equitable (moral). In the case of credit, if the banks know that the law prevents them from loaning credit (there is over a hundred years of case law on this point) and they do it anyway, then they simply do not have clean hands, and cannot argue their case in equity. Therefore they must argue in law.

MEANWHILE, THE LAW PREVENTS THEM FROM LOANING Credit. There are penalties and forfeitures attached to what the bank did. In this case there are. In fact there are penalties attached to national banks going beyond their express powers in that they are exposing depositor’s money to loss in contradiction to the bank’s primary duty. Therefore, the issue that can be raise is the argument of ultra virus and not only is the contract void, but even if the borrower did receive a benefit, the borrower was not unjustly enriched. If the contract is void then both parties walk away as if there never was a contract. The judge is then asked to declare a zero balance and deem it as paid as agreed. Since the borrower provided the value for the source of funds, the borrower is also entitled to a judgment in the amount of the highest credit limit issued or loan amount. Also, since the banks acts demonstrates that the bank took unfair advantage of the borrower, this results in the bank needing to be penalized. Typically, the borrower is entitled to ask for a financial award against the bank in the amount of the debt forgiven. Since fraud is committed, the borrower is entitled to all sums paid on the contract including interest, plus treble (triple) damages, attorney fees expended and court and other costs in addition. The borrower can also demands a zero balance on this debt, and a voidance of the loan agreement, and a financial judgment in favor of the borrower due to the bad behaviour of the lender.

ADDITIONAL BORROWERS RELIEF
In Federal District Court, the borrower may have additional claims for relief under “Civil RICO” Federal Racketeering laws. (18 U.S.C. 1964) As the lender may have established a “pattern of racketeering activity” by using the U.S. Mail more than twice to collect an unlawful debt and the lender may be in violation of 18 U.S.C. 1341, 1343, 1961 and 1962. The borrower may have other claims for relief. If he can prove there was or is a conspiracy to deprive him of property without due process of law. Under 42 U.S.C. 1983 (Constitutional Injury), 1985 (Conspiracy) and 1986 (“knowledge” and “Neglect to Prevent” a U.S. Constitutional Wrong). Under 18 U.S.C.A. 241 (Conspiracy) violators, “shall be fined
In a Debtor’s RICO action against its creditor, alleging that the creditor had collected an unlawful debt, an interest rate (where all loan charges were added together) that exceeded, in the language of the RICO Statute, “twice the enforceable rate.” The Court found no reason to impose a requirement that the Plaintiff show the Defendant had been convicted of collecting an unlawful debt, running a “loan sharking” operation. The debt included the fact that exaction of a usurious interest rate rendered the debt unlawful and that is all that is necessary to support the Civil RICO action. Durante Bros. And Sons, Inc. v. Flushing Nat’l Bank, 755 F2d 239, Cert. Denied, 473 US 906 (1985). The Supreme Court found that the Plaintiff in a civil RICO action, need establish only a criminal “violation” and not a criminal conviction.