THE CANADIAN BANK OF COMMERCE (PLAINTIFF) ..... APPELLANT;

AND

THE YORKSHIRE & CANADIAN TRUST LIMITED, AS ADMINISTRATOR OF THE ESTATE OF NELLIE GRACE SILK, DECEASED (DEFENDANT) ..... RESPONDENT.

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* May 4, 5
* Dec. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Banks and banking—Choses in action—Vendors and purchasers—Assignment to bank of moneys payable under agreement of sale of land, as security for all existing and future indebtedness of the vendor to bank—Validity of assignment—Bank Act (Dom., 1934, c. 24), ss. 75 (2) (c), 79 (1) (b)—Inseverability of purchaser's obligation to pay (under agreement of sale) from vendor's obligation to convey—Rights of third persons having equities against assignor (vendor) in respect of the land.

One S., registered as owner of certain land in Vancouver, B.C., entered into an agreement for sale thereof, and subsequently, being indebted to the appellant bank in the sum of $500, executed and delivered to it, "as security for all existing and future indebtedness and liability" of S. to the bank, an assignment of "all moneys now or hereafter payable" to S. under said agreement for sale. The purchaser was notified thereof. The assignment was not registered. Subsequently the bank made further loans to S. Certain next of kin of S.'s wife, deceased, had claimed that said land had been purchased with her moneys and that the land and proceeds of sale thereof were held by S. in trust for her estate, and they sued and obtained judgment against S. in favour of their claim. Respondent company was appointed administrator of her estate (in place and stead of S.)

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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and title to said land was registered in its name. It notified the bank (which had received no prior actual notice) of its claim that the moneys due under said agreement for sale were the property of said estate; and its claim, and the opposing claim of the bank under said assignment, came (by action and special case) before the court. The Court of Appeal for British Columbia (52 B.C.R. 438) held (reversing judgment of Fisher J., 52 B.C.R. 16) that the assignment to the bank was in contravention of the *Bank Act* (Dom., 1934, c. 24), s. 75 (2) (*c*) (prohibiting a bank, except as authorized by the Act, from lending upon the security of lands), unless it could be said to come within s. 79 (1) (*b*) (empowering a bank to take, by way of additional security for debts contracted to it in the course of its business, the rights of vendors under agreements for the sale of property); that it did not come within s. 79 (1) (*b*) except with respect to the indebtedness of $500 for which it was taken as additional security, but of which sum the bank had later received payment; that a bank cannot take such an assignment as security for an anticipated future indebtedness; and in respect to which it purported to be security for any future indebtedness the assignment was invalid. The bank appealed.

Held: The bank had no right, under the assignment, to any moneys now in question payable under the agreement of sale.

Per The Chief Justice: The assignment could not take effect in virtue of said s. 79 (1) (*b*). That enactment is a special provision dealing with a particular case and declares the law with regard to that case.

Per Crocket and Kerwin JJ.: The assignment was invalid under said s. 75 (2) (*c*); the obligation of the purchaser to pay the purchase price under the agreement of sale being inseparable from the vendor's obligation to convey the land.

Per Davis J.: The instrument taken by the bank was an invalid assignment; the legal *chose in action* which the bank sought to obtain (merely the debt of the purchaser) could not in point of law be separated from the assignor's obligation to convey upon payment of the debt. (As to a vendor's interest, reference made to *Simpson* v. *Smyth*, 2 U.C. Jur. 162, at 193, and *Parke* v. *Riley*, 3 U.C. E. & A. Rep. 215, at 231-2).

Per Hudson J.: Under said ss. 75 (2) (*c*) and 79 (1) (*b*), the assignment was invalid in respect of all advances subsequent to its making. Further, in so far as the purchaser's covenant for payment in the agreement of sale could be assignable at all, the assignee would take subject to all existing equities (authorities referred to, including *Cockell* v. *Taylor*, 15 Beav. 103, at 118, *In re Morgan*, 18 Ch. D. 93, at 103); the assignor was a trustee in respect of the land and of any proceeds of sale thereof, and the bank took subject to this trust, and there was nothing operating against respondent in the nature of an estoppel nor any rights acquired by the bank through a priority of registration; in this view the assignment was never a good assignment as against respondent's equitable right to the proceeds.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1) reversing the judgment of Fisher J. (2) answering in favour of the plain-

(1) 52 B.C.R. 438; [1938] 1 W.W.R. 530; [1938] 2 D.L.R. 285.
(2) 52 B.C.R. 16; [1937] 2 W.W.R. 474.

tiff two questions (hereinafter set out) arising out of a special case stated, in the action, for the opinion of the court.

On March 8, 1928, one Nellie Grace Silk purchased, with funds forming part of her separate estate, certain land (in question) in the city of Vancouver, British Columbia, for $19,000. The said land was registered in the land registry office at Vancouver in the names of said Nellie Grace Silk and her husband, George Baillie Silk, as joint tenants.

On October 20, 1928, said Nellie Grace Silk died, and on December 11, 1928, letters of administration to her estate were granted to said George Baillie Silk.

On March 22, 1929, Silk caused an application to be made in the land registry office to register the title to said land in himself as surviving joint tenant, and title was so registered.

[Paragraph 5 of special case, referred to in question 2 *infra*]: On June 14, 1929, Silk entered into an agreement for sale of said land to Nanson, Rothwell & Co. Ltd. [hereinafter called the purchaser] for $30,000; and $7,665 became due and payable on July 1, 1936, together with one year's interest amounting to $229.75 under the terms of said agreement, as amended by an agreement dated April 28, 1933.

On June 26, 1929, Silk was notified by two of the next of kin of said Nellie Grace Silk, deceased, that they claimed that said land had been purchased with her funds and that the land and proceeds of sale thereof were the property of her estate, and were held by him in trust for said estate.

[Paragraph 7 of special case, referred to in question 1 *infra*]: On July 23, 1929, Silk, being indebted to the plaintiff bank, and in anticipation of future loans, executed and delivered to it an assignment of the moneys owing under said agreement for sale, which assignment read as follows:

As security for all existing and future indebtedness and liability of the undersigned to The Canadian Bank of Commerce, all moneys now or hereafter payable to the undersigned under a certain Agreement for Sale, *re* Lot 18, Block 31, District Lot 541, Group 1, N.W.D., dated the 14th June, 1929, made between George Baillie Silk and Nanson, Rothwell & Co. Ltd. are hereby assigned to the said Bank, and the Bank is authorized to collect and give receipts therefor. Should any of the said moneys be received by or for the undersigned the same shall be received as trustee for the Bank and shall be paid over to or accounted for by the

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undersigned to the Bank. Dated at Vancouver, B.C., this 23rd day of July, 1929.

On July 24, 1929, notice of said assignment was given to the purchaser by the plaintiff.

The plaintiff made no search at the land registry office to ascertain whether Silk was registered therein as owner of said property, and did not attempt to register its assignment of the moneys owing under said agreement for sale.

At the time of execution of said assignment, Silk was indebted to plaintiff in the sum of $500. Plaintiff made further loans to Silk after that date, and at the date of the commencement of this action the total amount of indebtedness of Silk to plaintiff was (including certain liabilities as endorser) $6,758.90.

On September 18, 1929, the purchaser paid to plaintiff $5,000, $3,500 of which was applied against the loans made by plaintiff to Silk and the balance, $1,500, was deposited in Silk's current account with plaintiff. On June 23, 1930, the purchaser paid to plaintiff $4,338.92, $4,000 of which was applied against the loans made by plaintiff to Silk and the balance, $338.92, was deposited in Silk's current account with plaintiff.

On August 22, 1929, an action was commenced by the said two of the next of kin of said Nellie Grace Silk, deceased, against Silk in the Supreme Court of British Columbia and on the same date a *lis pendens* in said action was filed in the land registry office on behalf of said two next of kin. On May 20, 1930, the latter obtained a judgment against Silk by which (*inter alia*) it was ordered and adjudged that said property was purchased with the moneys of said deceased and was the property of her estate and was held by Silk in trust for her estate.

On June 27, 1930, defendant (the present respondent) was appointed administrator of the estate of said deceased in the place and stead of Silk, and on October 21, 1930, the title to said property was registered in the name of defendant as administrator.

On December 1, 1930, plaintiff received actual notice of defendant's claim that the moneys due under said agreement for sale were the property of said deceased's estate, and on April 8, 1931, defendant received notice that said money was claimed by plaintiff under the said assignment, and it was agreed between the parties hereto that since

the said dates their respective claims should be allowed to stand without prejudice to the rights of either party.

[Paragraph 17 of special case, referred to in question 2 *infra*]: On June 19, 1935, defendant received the sum of $574.87 from the purchaser, being 2½ years' interest owing on said agreement for sale, which said money was paid to defendant without prejudice to plaintiff's position, and was to be held by defendant until the legal ownership of the said money had been determined.

The questions for the opinion of the court were:

1. Is the assignment referred to in paragraph 7 hereof a good and valid assignment as against the defendant, as personal representative of the estate of Nellie Grace Silk, deceased, and/or its predecessor in office?

2. Should the sums of $7,665 and $229.95 referred to in paragraph 5 hereof and the sum of $574.87 referred to in paragraph 17 hereof be paid to the plaintiff, or should the sums of $7,665 and $229.95 referred to in paragraph 5 be paid to the defendant?

Fisher J. (1) answered the first question "yes" and, in answer to the second question, held that the sums therein mentioned should be paid to the plaintiff. His judgment was set aside by the Court of Appeal (McPhillips J.A. dissenting) (2), which held that the assignment in question was valid in respect of the sum of $500 advanced by plaintiff to Silk prior to the date of said assignment (but payment whereof was received by plaintiff in September, 1929), but that in respect of subsequent advances by plaintiff to Silk it was invalid; and that the sums of $7,665 and $229.95 mentioned in question 2 should be paid to defendant. Its judgment was based upon the ground that unless the assignment in question can be said to come within s. 79 (1) (*b*) of the *Bank Act* (Dom., 1934, c. 24) it is in contravention of s. 75 (2) (*c*) of that Act; that it does not come within s. 79 (1) (*b*) except with respect to the indebtedness of $500 for which debt the assignment was made and taken as additional security; that the bank may take an assignment of the rights of a vendor under an agreement for sale of property as additional security for debts contracted to the bank in the course of its business, but that the bank cannot take such an assignment as security for an anticipated future indebtedness.

(1) 52 B.C.R. 16; [1937] 2 W.W.R. 474.

(2) 52 B.C.R. 438; [1938] 1 W.W.R. 530; [1938] 2 D.L.R. 285.

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Said sections of the *Bank Act* read as follows:

Sec. 75 (2) (*c*):

2. Except as authorized by this Act, the bank shall not either directly or indirectly,

* * *

(*c*) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements, or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise.

Sec. 79 (1) (*b*):

79. The bank may take, hold and dispose of, by way of additional security for debts or liabilities contracted to the bank in the course of its business,

* * *

(*b*) the rights of vendors or purchasers under agreements for the sale or purchase of real and personal, immovable and movable property.

The plaintiff appealed to this Court.

Gordon R. Munnoch K.C. for the appellant.

J. V. Clyne and *John W. H. Rowley* for the respondent.

THE CHIEF JUSTICE.—I concur with the view of Mr. Justice Sloan (1) that the assignment here in question cannot take effect in virtue of section 79 (1) (*b*) of the *Bank Act*.

That enactment, in my opinion, is a special provision dealing with a particular case and declares the law with regard to that case.

The appeal should be dismissed with costs.

CROCKET, J.—I agree that the assignment which the appellant took from Silk as the vendor of the land in question was invalid under subs. 2 (*c*) of s. 75 of the *Bank Act*, the obligation of the purchaser to pay the purchase price under the agreement of sale being contingent upon and inseparable from the vendor's obligation to convey the land.

The appeal should be dismissed with costs.

DAVIS, J.—The facts are fully set out in the special case settled by the parties.

On or about March 8th, 1928, real property in the city of Vancouver known as the Howe street property was

(1) In the Court of Appeal: 52 B.C.R. 438; [1938] 1 W.W.R. 530; [1938] 2 D.L.R. 285.

purchased with the moneys of Nellie Grace Silk and conveyed to her and her husband, George Baillie Silk, as joint tenants. On October 20th, 1928, Nellie Grace Silk died and letters of administration were granted to her husband, George Baillie Silk, on December 11th, 1928. On March 22nd, 1929, the said George Baillie Silk caused the title to the said property to be registered in his name as surviving joint tenant. On June 14th, 1929, the said George Baillie Silk entered into an agreement for sale of the said property to Nanson, Rothwell & Company, Limited. On June 26th, 1929, the said George Baillie Silk was notified by two of the next of kin of his deceased wife that they claimed that the said property was held by him in trust for the heirs at law of Nellie Grace Silk, deceased, but no notice of this contention was then given to the appellant bank.

On July 23rd, 1929, the said George Baillie Silk, being indebted to the appellant bank in the sum of $500, executed and delivered an assignment to it of all moneys then or thereafter payable to him under the said agreement for sale, which assignment is as follows:

> As security for all existing and future indebtedness and liability of the undersigned to The Canadian Bank of Commerce, all moneys now or hereafter payable to the undersigned under a certain Agreement for Sale, *re* Lot 18, Block 31, District Lot 541, Group 1, N.W.D., dated the 14th June day of . . . . 1929, made between George Baillie Silk and Nanson, Rothwell & Co. Ltd. are hereby assigned to the said Bank, and the Bank is authorized to collect and give receipts therefor. Should any of the said moneys be received by or for the undersigned the same shall be received as trustee for the Bank and shall be paid over to or accounted for by the undersigned to the Bank.
>
> Dated at Vancouver, this 23rd day of July, 1929.
>
> "G. B. Silk."

Notice in writing of the said assignment was duly given to Nanson, Rothwell & Company Limited. Subsequently, the appellant bank made substantial advances to the said George Baillie Silk relying upon the said assignment as security therefor and also relied upon the said assignment for moneys advanced to three other persons respectively upon their promissory notes endorsed by the said Silk. When this action was commenced, the total liability of the said Silk to the appellant bank in respect of direct loans and in respect of his said endorsements aggregated $6,758.90.

By a judgment delivered on May 20th, 1930, in an action commenced by two of the heirs at law of Nellie

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Grace Silk, deceased, against the said George Baillie Silk for a declaration, *inter alia,* that the Howe street property formed part of the estate of the said deceased and did not belong to the said George Baillie Silk by survivorship, it was determined that the Howe street property was held by the said George Baillie Silk in trust for the estate of Nellie Grace Silk, deceased. The parties hereto admit the validity of that judgment and further admit the findings of fact contained in the reasons for the judgment.

On June 27th, 1930, the respondent was appointed Administrator of the estate of the said Nellie Grace Silk, deceased, in the place and stead of the said George Baillie Silk, and on October 21st, 1930, the title to the Howe street property was registered in the name of the respondent as Administrator.

On December 1st, 1930, the appellant bank was notified by the respondent that the moneys due under the said agreement for sale were claimed by it as Administrator of the estate of Nellie Grace Silk, deceased. The appellant bank had no prior notice of any claim adverse to its rights under the aforesaid assignment given to it by the said George Baillie Silk.

On July 1st, 1936, the sum of $7,665 became due and payable under the said agreement for sale by Nanson, Rothwell & Company Limited, together with interest amounting to $229.95. On June 19th, 1935, the respondent had received the sum of $574.87 from the said Nanson, Rothwell & Company Limited, which said money was paid to the respondent without prejudice to the appellant's rights, and pending the determination of this action.

The contest in this action between the appellant bank and the respondent trust company arises from their respective claims to the balance owing under the agreement for sale by Nanson, Rothwell & Company, Limited. The bank claims the fund by reason of the assignment; the trust company as Administrator resists this contention and raises two objections to the bank's claim. The first objection is that the assignment to the bank was not an absolute but an equitable assignment by way of charge only and is therefore postponed to the prior equity represented by the trust company as Administrator of the estate of Nellie Grace Silk. The second objection is that the assignment is contrary to *The Bank Act* and in consequence void.

The learned trial judge found in favour of the Bank (1). Upon appeal, the Court of Appeal for British Columbia (2) reversed that judgment, except as to the $500 advanced by the bank to George Baillie Silk on the 15th day of July, 1929, and ordered that the sums of $7,665 and $229.95 referred to in the special case should be paid to the trust company. The bank now appeals to this Court.

Much of the argument before us was directed to the question whether or not the assignment to the bank was an absolute assignment or an equitable assignment by way of charge only. The learned trial judge considered that question and discussed it at length in his reasons for judgment, coming to the conclusion that the instrument did not purport to be by way of charge only and was an absolute assignment of the debt. The Court of Appeal found it unnecessary to consider that question because that Court came to the conclusion, in its view of the relevant sections of *The Bank Act,* that a bank may take an assignment of the rights of a vendor under an agreement for sale of property as additional security for debts contracted to the bank in the course of its business but that a bank cannot take such an assignment as security for an anticipated future indebtedness. Upon that ground the Court of Appeal held that the assignment to the bank was valid in so far as it was taken as additional security for payment of the debt contracted at the time (i.e., the $500) but invalid in so far as it purported to be security for any future indebtedness. The bank having received payment of the $500 debt, it was held to have no claim now under the assignment upon any of the moneys still owing by Nanson, Rothwell & Company Limited under the agreement for sale.

Section 75 (2) (*c*) of *The Bank Act* (ch. 24 of the Statutes of Canada, 1934) prohibits the bank, except as authorized by the Act, from either directly or indirectly lending money or making advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property. By section 79 (1) (*b*) the bank may, however, take, hold, and dispose of by way of additional security for debts or liabilities contracted to the

(1) 52 B.C.R. 16; [1937] 2 W.W.R. 474.
(2) 52 B.C.R. 438; [1938] 1 W.W.R. 530; [1938] 2 D.L.R. 285.

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bank in the course of its business, the rights of vendors or purchasers under agreements for the sale or purchase of real and personal, immovable and movable property.

The only indebtedness of Silk to the bank at the date of the delivery of the assignment in question was the sum of $500. The assignment is now sought to be enforced by the bank in respect of subsequent advances.

Counsel for the bank argues that if it is to be implied that an assignment by a vendor of a debt for unpaid purchase money necessarily carries with it the vendor's interest in the lands, that intention is negatived in this case because of the statutory incapacity of the bank, by virtue of sec. 75 (2) (*c*), to lend money or make advances upon the security of land. Further, that by virtue of sec. 79 (1) (*b*), a bank may only take the rights of a vendor in an agreement for the sale of land by way of additional security for debts or liabilities contracted to the bank in the course of its business. Therefore, the submission on behalf of the bank is that the assignment in question is not affected by the provisions of either sec. 75 or sec. 79 of *The Bank Act* because the assignment was an assignment of moneys only—separated from any right enforceable against any interest in the land—and that it was competent to the bank to take and hold the said assignment as security for the debts and liabilities of Silk to the bank whether incurred before or after the assignment was taken.

In my opinion, the appeal can be disposed of upon one point. The obligation of a vendor upon payment is to convey the property to the purchaser; and the debt of a purchaser under an agreement for the sale of land cannot be separated from the equitable obligation of the vendor to convey upon payment. The bank did not put itself in the position of being able to convey upon payment of the debt; it did not acquire from its customer, the vendor, the title to the property which he was bound in equity to convey to his purchaser upon payment of the purchase money. The effect of the separation was to place the debt in the hands of the bank while the title to the property remained in the hands of the assignor. The legal *chose in action* which the bank sought to obtain by assignment could not in point of law be separated from the assignor's obligation to convey upon payment of the debt. A vendor does not in substance remain the owner of the land but

only in form as a means of compelling payment of the debt secured upon it, which is the owner's only valuable interest in the land, to adopt and adapt the language of the Chief Justice of Upper Canada, Sir John Beverley Robinson, in *Simpson* v. *Smyth* (1), dealing with the rights of a mortgagee, which language was relied upon by Vice-Chancellor Mowat in his valuable judgment (though dissenting) in *Parke* v. *Riley* (2), where that great judge said:

> Every word of this (that is, the language of Chief Justice Robinson) is as applicable to the case of a vendor who has not conveyed, as to a mortgagee. Like a mortgagee, he has a right to retain the legal estate so long only as the debt for the land remains unpaid. His real interest in it is the debt due—nothing more; and the effect of the sale, if permitted, would not be to pass to the purchaser the right of suing at law for the debt, any more than in case of a formal mortgage. In a word, in whatever sense the language of the learned judge is correct in reference to the case to which he was alluding, it is equally correct as to the case here.

The instrument upon which the bank rests its claim is, in my opinion, an invalid assignment and for this reason the appeal must be dismissed with costs. There having been no cross appeal, that part of the order of the Court appealed from which declared that the assignment was valid in so far as the sum of $500 advanced by the bank to Silk on July 15th, 1929, was secured, cannot in this appeal be set aside but no harm will be done because the $500 was repaid as early as September, 1929.

KERWIN, J.—Although the argument before us covered a wide field, in my opinion the appellant must fail because what it did was in violation of subsection 2, clause (*c*) of section 75 of *The Bank Act*. By this enactment a bank shall not either directly or indirectly lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property.

After having made a loan of five hundred dollars to one Silk (which loan was later paid off and no question arises as to it), the appellant took from him a document reading as follows:

> As security for all existing and future indebtedness and liability of the undersigned to The Canadian Bank of Commerce, all moneys now or hereafter payable to the undersigned under a certain Agreement for Sale, *re* Lot 18, Block 31, District Lot 541, Group 1, N.W.D., dated the 14th

(1) (1846) 2 U.C. Jur. 162 at 193.

(2) (1866) 3 U.C. E. & A. Rep. 215, at 231-232.

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June, 1929, made between George Baillie Silk and Nanson, Rothwell & Co. Ltd. are hereby assigned to the said Bank, and the Bank is authorized to collect and give receipts therefor. Should any of the said moneys be received by or for the undersigned the same shall be received as trustee for the Bank and shall be paid over to or accounted for by the undersigned to the Bank.

Dated at Vancouver, B.C., this 23rd day of July, 1929.

The only argument addressed to us on the point was that this document was a mere assignment of the moneys due under the agreement for sale of the lands mentioned and was not an assignment of all the rights of Silk as vendor under that agreement. It was urged that the vendor's right under the purchaser's covenant in the agreement, to receive the purchase moneys, was severable from the duty which the vendor was under to give title to the purchaser upon payment of the full consideration, but in my view that contention is not sound. The purchaser's covenant to pay cannot be divorced from his right to secure, and the vendor's duty to convey, the lands upon payment of the purchase price. The agreement bound the vendor to convey upon payment of the purchase price, and in accepting the assignment of the moneys due under the covenant for payment in the agreement the Bank certainly indirectly, if not directly, lent money, after the taking of the assignment, upon the security of lands.

I would dismiss the appeal with costs.

HUDSON, J.—This is an appeal from a judgment of the Court of Appeal of British Columbia (1), which allowed an appeal by the respondents from a judgment of Mr. Justice Fisher (2). The controversy is in respect of the moneys payable by a purchaser under an agreement to purchase lands in the City of Vancouver. The appellant bank claims under an assignment from a man named Silk, in the following terms:

AS SECURITY for all existing and future indebtedness and liability of the undersigned to THE CANADIAN BANK OF COMMERCE, all moneys now or hereafter payable to the undersigned, under a certain Agreement for Sale, *re* Lot 18, Block 31, District Lot 541, Group 1, N.W.D., dated the 14th June day of . . . . 1929, made between George Baillie Silk and Nanson, Rothwell & Co. Ltd. are hereby assigned to the said Bank, and the Bank is authorized to collect and give receipts therefor. Should any of the said moneys be received by or for the

(1) 52 B.C.R. 438; [1938] 1 W.W.R. 530; [1938] 2 D.L.R. 285.
(2) 52 B.C.R. 16; [1937] 2 W.W.R. 474.

undersigned the same shall be received as trustee for the Bank and shall be paid over to or accounted for by the undersigned to the Bank.

DATED at Vancouver, this 23rd day of July, 1929.

"G. B. Silk."

At the time when this assignment was given to the Bank, there was also given them by Silk a duplicate original of the agreement for sale. Silk was the registered owner of the land in question at the time he made the agreement of sale and remained so until after the assignment to the Bank. Silk was indebted to the Bank in the sum of $500 when he made the assignment; this amount was afterwards repaid but subsequent advances were made to him by the Bank, so that in the autumn of 1929 and at the time of the commencement of this action the amount of his indebtedness to the Bank was $5,477.67, in addition to certain liabilities as endorser in respect of loans to others aggregating $1,281.23.

The defendant is the administrator of the estate of Nellie Grace Silk, wife of the above mentioned Silk, who died in October, 1928. On the 26th of June, 1929, two of the next-of-kin of Mrs. Silk notified Silk that they claimed the property in question had been purchased with funds of the late Mrs. Silk and that the proceeds were the property of her estate. On the 22nd of August, 1929, they commenced an action against Silk to enforce this claim and they filed a *lis pendens* in the proper registry office. Subsequently, on the 20th of May, 1930, they obtained a judgment against Silk, declaring that the properties covered by this agreement of sale and other property

were purchased with the moneys of the above named Nellie Grace Silk, deceased, and are the property of her estate and in so far as any portions thereof are held in the name of the Defendant, they are so held by him in trust for the said estate together with any other properties or investments which were purchased by him with the moneys received by him from the said Nellie Grace Silk and which are held by him or by any one on his behalf.

Then, on the 27th of June, 1930, the defendant company was appointed administrator and became the registered owner of the property in question.

Although, as above mentioned, a *lis pendens* had been filed as early as August, 1929, the appellant Bank did not have actual notice of the claim set up by the next-of-kin, now represented by the respondent, until the 1st Decem-

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ber, 1930, before which date they had made the advances above referred to.

In this action, the appellant Bank asks for a declaration of ownership of the moneys owing by the purchasers under the agreement of sale, and for a declaration that the assignment to them is a good and valid assignment and for payment of a sum of $574.87.

A special case setting out the facts was submitted and two questions left for the opinion of the Court:

1. Is the assignment referred to in paragraph 7 hereof a good and valid assignment as against the Defendant, as personal representative of the Estate of Nellie Grace Silk, deceased and/or its predecessor in office?

2. Should the sums of $7,665 and $229.95 referred to in paragraph 5 hereof and the sum of $574.87 referred to in paragraph 17 hereof be paid to the Plaintiff, or should the sums of $7,665 and $229.95 referred to in paragraph 5 be paid to the Defendant?

The learned trial judge answered the first question in the affirmative and the second question, that the sums should be paid to the plaintiff. The Court of Appeal took another view and held that the assignment to the appellant was invalid under the provisions of the *Bank Act,* except as to the sum of $500 advanced prior to the assignment and subsequently repaid.

The assignment purports to assign all moneys now or hereafter payable to Silk under the agreement of sale mentioned, but the agreement of sale does more than create an obligation on the part of the purchasers. There is a corresponding obligation on the part of the vendor to give title at the time when the purchase money is paid, and the purchaser would be under no obligation to pay his purchase money until the vendor was in a position to give him title. In this instance the obligation was constant because under the terms of the agreement of sale the purchaser had the privilege of paying off the balance of the purchase price at any time. The Bank is here met with the formidable difficulty that the respondent now holds the legal title to the estate.

The reciprocal obligations of vendors and purchasers in this respect are succinctly stated in Dart on Vendors and Purchasers, 8th Edition, at page 265:

> From the time the owner of an estate enters into a binding agreement for its sale, he holds the same in trust for the purchaser, subject to payment of the purchase-money: but the relationship thus created does not entail all the obligations of an ordinary trusteeship. The vendor is not a mere dormant trustee; he is a trustee having a personal and

substantial interest in the property, a right to protect, and an active right to assert that interest, if anything is done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsists, but subject to the paramount right of the vendor to protect his own interest as vendor of the property. When the title has been accepted and the purchase-money paid, this paramount right of the vendor ceases, and the trusteeship subsists without qualification; but, as from the date of the contract, the relationship is throughout that of trustee and *cestui que trust.*

This statement of Dart is supported in numerous decisions of the highest authority.

In *Rose* v. *Watson* (1), Lord Westbury says:

> When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate.

Shaw v. *Foster* (2) and *Peck* v. *Sun Life Assurance Company* (3).

In *Royal Trust Company* v. *Kennedy* (4), it was stated by Mr. Justice Newcombe as follows:

> The chief end of the agreement between the parties, and the reason for which it was called into being, was the sale and purchase of the lands described; and, while the purchaser had covenanted to pay the purchase money with interest as provided, the vendor had, in like manner agreed, on payment of the purchase money, to convey and assure the premises to the purchaser by good and sufficient deed in fee simple. The terms are therefore dependent.

For this reason the obligation of the purchaser cannot be treated in any sense as negotiable and the Bank could not get any better title than Silk himself had unless by way of estoppel or because of the registry laws. There was no registration of the Bank's assignment and, indeed if there had been, their position would have been even more vulnerable because of section 75 of the *Bank Act.* In the Court of Appeal Mr. Justice Sloan, speaking on behalf of the majority of the Court, disposed of the matter there on the basis that the instrument in question was invalid under the provisions of sections 75 and 79 of the *Bank Act,* in respect of all advances subsequent to the making of the assignment, and that the Bank had no right to take such

(1) (1864) 10 H.L. Cas. 672, at 678.
(2) (1872) L.R. 5 H.L. 321.
(3) (1905) 11 B.C.R. 215.
(4) [1930] S.C.R. 602, at 609.

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assignment as security for an anticipated future indebtedness.

I agree with Mr. Justice Sloan in his interpretation of the provisions of the *Bank Act* in so far as they apply to this case, but I also think that there is a more fundamental difficulty in the way of the Bank's success. As has already been stated, the purchaser's covenant for payment in an agreement for sale such as this is not a negotiable security. It is a *chose in action* and, in so far as it is assignable at all, the assignee takes subject to all existing equities. The assignor had no right to assign something that he did not own.

The law in support of this position is clearly stated in numerous cases.

In *Cockell* v. *Taylor* (1), Sir John Romilly said:

> The rule relative to the equities which attach on a *chose in action* has been discussed and established in many cases. It has not been disputed, nor can it be doubted, that the purchaser of a *chose in action* does not stand in the situation of a purchaser of real estate for valuable consideration without notice of any prior title, but that the purchaser of a *chose in action* takes the thing bought subject to all the prior claims upon it. If, therefore, the share of the Plaintiff Collett in the fund in Court had been charged with a sum to another person unknown to Taylor, Taylor would have taken this interest in the fund subject to that charge.

In re Morgan (2). Where a lease was surrendered by an executor and a new lease, including additional property, was taken by him in his own name and at an increased rent and was deposited by him as security for money advanced to him, it was held that the *cestuis que trust* had priority over the equity mortgage. Jessel, M.R., said at p. 103:

> This being the position of the matter, he was a trustee of the new lease. In 1879 he borrowed in his own name, for his own use in carrying on the business, a sum of money from the Appellant, and he deposited the lease with him. It is true that the Appellant had no notice that Pillgrem was not the lawful owner of the property comprised in the lease. If he had inquired into the landlord's title he would have got no notice. He was therefore a purchaser without notice, who did not get the legal title, therefore he must take the lease subject to prior equities, that is, to the trust on which it was held.

In White and Tudor's L.C. 9th Edition, Vol. I, page 138:

> Where though the assignor purports to assign a right, no right is in fact vested in him at the date of the alleged assignment, manifestly the assignee can obtain no title though he gives value and has no notice of the invalidity of the right assigned. Thus if a satisfied bond or a bond void at law or in equity be assigned, the assignee can neither enforce

(1) (1852) 15 Beavan 103, at 118. (2) (1881) 18 Ch. Div. 93.

the bond nor rely upon it as a defence. Further if the transaction out of which the right assigned arises is liable to be set aside as against the assignor by reason of fraud, misrepresentation, or other ground of relief, the assignee acquires only a defeasible title and the relief which could be obtained against the assignor can be obtained against the assignee.

and at page 139:

Where a *cestui que trust* is indebted to the estate by reason of his having profited by a breach of trust, an assignee for value of his beneficial interest will take it, subject to the equity of making good the breach of trust by which the assignor has profited (*Priddy* v. *Rose*) (1).

See also *Montreal Trust Company* v. *Richardson* (2).

In the present case the assignor Silk was a trustee for his wife in respect of the land and in respect of any proceeds that might be derived from the sale thereof. He had no right to alienate these moneys to others. The Bank took subject to this trust and there is nothing operating against the respondent in the nature of an estoppel nor any rights acquired by the Bank through a priority of registration. If this view is correct, the assignment was never a good and valid assignment as against the respondent's equitable right to the proceeds and the declaration as contained in the judgment of the Court of Appeal to that effect should be struck out. This, however, does not affect the practical result and, therefore, I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Davis & Co.*

Solicitors for the respondent: *Macrae, Duncan & Clyne.*