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*Oct. 14, 15.
*Nov. 29.

ROBERT BALL AND LAWRENCE SWITHEN WHIELDON (DEFENDANTS) ..... APPELLANTS;

AND

THE ROYAL BANK OF CANADA (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

*Banking—Purchase of company's assets—Bill of sale—Description of chattels—B.C. "Bills of Sale Act," R.S.B.C., 1911, c. 20—Registration—Recital in bill of sale—Consideration—Defeasance—Reference to unregistered note—Collateral security—Loan by bank—"Bank Act," 3 & 4 Geo. V., c. 9, s. 76.*

Under the British Columbia "Bills of Sale Act," R.S.B.C., 1911, ch. 20, any description by which the goods affected by a bill of sale can be identified is formally sufficient, as the Act does not require specific description of the chattels comprised therein.

A bill of sale given as security for the payment of a promissory note contained recitals shewing particulars of the note and that interest was payable on the amount thereof, but the rate of interest was not mentioned and the note was not annexed thereto nor registered with the bill of sale.

*Held, per* Davies, Idington, Duff and Brodeur JJ. that the recitals stated the consideration in a manner which substantially conformed to the requirements of section 19 of the "Bills of Sale Act," R.S.B.C., 1911, ch. 20, and the omission to annex the note to the instrument as registered was, in this regard, immaterial. *Credit Co.* v. *Pott* (6 Q.B.D. 295) followed.

*Per* Duff, Anglin and Brodeur JJ. (Idington J. contra.)—As the assurance was embodied in two documents, the bill of sale and the note, and one of these documents, the note, was not registered as required by section 19 of the B.C. "Bills of Sale Act," the absence of a complete statement of the terms of defeas-

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

ance in the bill of sale rendered it void as a security to the bank. *Cochrane* v. *Matthews* (10 Ch. D. 80*n*); *Ex parte Odell* (10 Ch. D. 84); *Counsell* v. *London and Westminster Loan and Discount Co.* (19 Q.B.D. 512); *Edwards* v. *Marcus* ((1894) 1 Q.B. 587), and *Ex parte Collins* (10 Ch. App. 367), referred to.

As part of the consideration of an agreement by which the bank acquired the office site and business of a trust company the bank became responsible for the claims of persons who had deposited money with the company and, to secure the bank in respect to this liability and form a fund to meet payments to depositors, the company gave the bank a promissory note for the amount of the deposits and assigned assets to the bank which included, amongst other securities, the bill of sale above mentioned.

*Held, per* Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ. (Idington J. contra), that the transaction was not a loan of money or an advance made by the bank in contravention of section 76, sub-sec. 2 (*c*), of the "Bank Act," 3 & 4 Geo. V., ch. 9, but a legitimate exercise of the powers conferred by the Act.

*Per* Duff J.—If the transaction were to be considered as a loan it would, nevertheless, be unobjectionable because it would be a loan upon the security of an "obligation" of a corporation within the meaning of clause (*c*) of the first sub-section of section 76 of the "Bank Act," and it is immaterial that the "obligation" was secured by a charge upon the property of the corporation.

The judgment appealed from (22 D.L.R. 647; 8 West. W.R. 734) was reversed, Fitzpatrick C.J. and Davies J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia(1) affirming the judgment of Murphy J., at the trial(2), by which the plaintiff's action was maintained with costs.

The material circumstances of the case are sufficiently stated in the head-note.

*J. W. deB. Farris* for the appellants.
*Geo. F. Henderson K.C.* for the respondent.

THE CHIEF JUSTICE (dissenting).—The claim in this case is under a bill of sale, a form of security

(1) 22 D.L.R. 647; 8 West. W.R. 734; *sub nom. Royal Bank of Canada* v. *Whieldon.*
(2) 20 B.C. Rep. 242.

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beset with difficulties and a fruitful source of litigation. In the case of *Thomas* v. *Kelly*(1) Lord Chancellor Halsbury said:—

> My Lords, I cannot say that any construction of this obscure statute (the "Bills of Sale Act") seems completely satisfactory or gives an adequate solution to all the difficulties suggested in the argument,

and Lord Macnaghten used even stronger language, saying the Act was beset with difficulties which could only be removed by legislation. The difficulties presented by the British Columbia statute are, I think, no less and, as it differs from the English Act, we have not so much assistance from decided cases.

The defendant, the present appellant, raised many points but, at the argument before this court, two were, I think, mainly relied on; the first being the alleged insufficiency of the description of the goods and chattels covered by the bill of sale and the second that the transaction by which the respondent acquired the chattel mortgage is void under the provision of the "Bank Act," ch. 29, R.S.C. 1906, sec. 76, sub-sec. 2, par. (*c*).

That the description is quite inadequate for a proper bill of sale must, I think, be conceded; neither the nominal enumeration of the three items in the schedule nor the general words afford any satisfactory means of identification of the goods and chattels intended to be covered by the bill. There is granted, first, the three enumerated items of which the identification is not sufficient; I refer to the similar cases of *Carpenter* v. *Deen*(2), and *Davies* v. *Jenkins*(3).

Secondly, the goods on the farm at the time of the

(1) 13 App. Cas. 506. (2) 23 Q.B.D. 566.
(3) (1900) 1 Q.B. 133.

making of the instrument; these are, of course, not identified so that it can be said that they are still on the land at the time when the mortgage is put in force.

And thirdly, after-acquired property which may be brought on the farm.

In truth a grant such as this is not so much a bill of sale as a floating charge, that is a charge on whatever happens to be on the farm at the time when it is called into operation.

Under the English "Bills of Sale Act" no such charge can be given, as section 5 of the Act of 1882 (45 and 46 Vict. ch. 43) makes void, except as against the grantor, a bill of sale of any personal chattels of which the grantor is not the true owner.

In the case before the House of Lords of *Tailby* v. *Official Receiver*(1), at page 540, Lord Fitzgerald said:—

> In a case recently before the House, Your Lordships considered that the policy of the "Bills of Sale Act" of 1882 was to prohibit, in cases coming within its provisions, bills of sale of property not in existence, but which might be acquired thereafter.

Even if permissible in British Columbia, it is only equitable title that the grantee can obtain in such after-acquired property.

In the case of *Jones* v. *Roberts*(2) (in 1890), Fry L.J. said that this question of specific description in bills of sale was perpetually re-appearing and was always embarrassing. The necessary description varied according to the circumstances of each case.

The question always was—Was the description one which could reasonably be required to assist in

(1) 13 App. Cas. 523. (2) 34 Sol. J. 254.

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identifying the particular property in question ? The description (in the particular case) was sufficient to diminish the difficulty of identifying the property in case an execution were put in.

Though, as will appear from the above remarks, I have some hesitation in holding that the description of the goods and chattels is sufficient, I do not on the whole think there is occasion for this court to avoid the bill of sale on the ground of its being insufficient.

Both the trial judge and the judges of the Court of Appeal of British Columbia have declared themselves satisfied of the identity of the goods and chattels covered by the bill of sale with those sold by the appellant and that being so, I think the judgment should not be disturbed.

I have not thought it necessary to examine into the validity of the registration of the sale. Under section 19 of the British Columbia "Bills of Sale Act," a bill of sale is not void for failure to comply with its requirements. It is only the registration that is void. The British Columbia Act is taken apparently from the Imperial Act of 1878 which did not require registration in all cases for the validity of a bill of sale; this is only provided by the amendment Act of 1882, sec. 8.

In the "Bills of Sale Act," R.S.B.C., 1897, sections 11 to 14 are under the caption "Effect of Registration," and section 15, "Result of non-Registration."

In the British Columbia Court of Appeal, McPhillips J.A. insists

> that the appellant Ball was in no way a purchaser for value or otherwise entitled to the goods and chattels sold by him * * * The appellant in making the sale of the goods was selling not his goods, but the goods of the defendant Whieldon.

If it is true that the grantor of the bill of sale remained the owner of the goods, there is an end of any question, because the bill of sale certainly could not be void as against the grantor.

If, however, this is not the effect of the deed of the 11th August, 1913, it is still necessary for the appellant to shew that he is one of the persons as against whom the British Columbia "Bills of Sale Act" provides that an unregistered bill shall be void.

Section 7 of the Act is set out at page 6 of the respondent's factum, but he does not hazard any suggestion as to which of the class of persons therein enumerated he belongs.

As regards paragraph (*a*) in this section it may be noted that the Imperial statute reads:—

> As against all trustees or assignees of the estate of the person whose chattels or any of them are comprised in such bill of sale *under the law relating to bankruptcy or liquidations, etc.*

The words italicized are omitted in the British Columbia statute.

Even without such assistance as the comparison gives for reading the British Columbia provision, it does not seem possible that the appellant can be within any of the classes enumerated.

As for paragraph (*d*) the appellant cannot be considered a purchaser. He was entitled to hold neither the goods nor the purchase money.

I am not disposed to attach much importance to the point of a suggested contravention of the "Bank Act." The transaction was one of legitimate banking business and the taking over of this security was a small incident such as in no way brings it within the purview of the provisions of section 76 of the "Bank Act."

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The opinion that the taking by the respondent of the mortgage security is an infringement of the prohibition contained in section 76 of the "Bank Act" appears to be based on the assumption that "the company did not sell its business to the bank." I venture to suggest that this is not borne out by the facts and the agreement of the 13th January, 1913. It is not, of course, the opinion of the judges of the Court of Appeal of British Columbia. The trial judge says "the agreement was for the purchase of a banking business"; and McPhillips J.A.:—

> The People's Trust Company had engaged in business—in some respects analogous to that engaged in by a bank subject to the "Bank Act," but not in contravention of it—and to acquire the business so carried on was, in my opinion, the doing of something by the Royal Bank appertaining to the business of banking.

Turning to the agreement of the 13th January, 1913, whatever its effect, it certainly purported to dispose of the business of the trust company because it recites (*inter alia*) that the company had been carrying on business as agents and trustees and as the receivers of moneys paid on deposit at South Hill and various other places in British Columbia and that the company was desirous of selling the said business at South Hill to the bank and had agreed with the bank, for the consideration thereafter appearing, to transfer to the bank the business together with the office, etc. And it was witnessed (*inter alia*), by paragraph 9, that the company should hand over to the bank all documents relating to all business carried on by the vendors at South Hill aforesaid except as there mentioned and, by paragraph 10, that the company should in no wise attempt to procure or induce any of the depositors to thereafter continue their business with the company or any of its other branches.

It would seem that one must naturally arrive at different conclusions concerning the effect of the agreement of 13th January, 1913, and its legality according as the transaction is considered as being only a sale of the property, and a separate arrangement for discounting the company's note, or as one transaction for transferring to the bank the whole business of the company of which these are two incidental terms specially provided for. In the former case it might be contended that there was an advance on security prohibited by the "Bank Act," but in the latter case the transaction is proper banking business, the loan is not made on the security of goods and the taking over of the security is merely incidental to the transaction, no evasion of the Act, and not to be considered as even technically within its prohibition.

I may add that I very much question whether the appellant was entitled to plead this as a defence to the action.

I am of opinion that the appeal should be dismissed with costs.

DAVIES J. (dissenting).—There were several substantial questions argued upon this appeal. First, it was contended that the bill of sale in question did not contain a true statement of the note or debt for the payment of which it was given as collateral security and that the note itself or, at any rate, a true copy of it should under the statute have been annexed to the bill of sale.

I agree with the Court of Appeal for British Columbia that the question is concluded by the case of *Credit Company* v. *Pott*(1), and that the recitals in

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the bill of sale in question in this appeal state with substantial accuracy, though perhaps not with strict or technical accuracy, the facts of the indebtedness due from the grantor to the grantee which the bill of sale was given to secure. It is true that neither the note nor a copy of it was attached to the bill of sale, but the recitals contain the date and the amount of the note, the time when it became payable and that it carried interest. No question was or could be raised as to the *bona fides* of the transaction and it seemed to me the objection was reduced to this that the omission to state, in the recital of the note in the bill of sale, the *rate* of interest it carried, although all other particulars were correctly recited, was fatal as not complying with the statute. But in my judgment, if the case of *Credit Company* v. *Pott*(1) is good law, and I must say it commends itself to me as such, the objection cannot prevail.

It is a question whether the recitals contain with substantial accuracy a true statement of the consideration for which it was given so as to satisfy the requirements of the "Bills of Sale Act" of British Columbia.

In that case of *Credit Company* v. *Pott*(1) the bill of sale recited that B. had agreed to lend A. £7,350, and the consideration for such bill of sale was stated to be £7,350 then paid by A. to B. It was held that although no such money was then actually paid by A. to B., it being a balance due on accounts stated between the parties, and by such bill of sale was to be paid by A. to B. with interest on demand in writing, nevertheless the bill of sale "truly set forth" the consideration for which it was given so as to satisfy the statute.

(1) 6 Q.B.D. 295.

Brett L.J. (afterwards Lord Esher), says, at page 299:—

> Now I am inclined to agree that such facts are not strictly accurately stated, but then it will suffice if they are accurately stated either as to their legal effect or as to their mercantile and business effect, although they may not be stated with strict accuracy.
>
> What took place was this:—An account was stated between the parties, and it was agreed that a certain sum should be taken as the amount due to the company, and that, in consideration of the debtor giving the security of a bill of sale, the sum so due, and which might have been demanded at once of the debtor, should be held over until it was demanded in writing. That arrangement was carried out by the bill of sale in question. Then what is the effect? Why the old debt which was payable at once was wiped out, and a new debt constituted which was payable only after a demand in writing. A new credit was thus given, and the effect is the same as if after taking the accounts, £7,350, the sum found to be due, had been put into the hands of the creditors, and then handed back by them to the debtor to be repaid by him on demand in writing. Therefore, both the legal effect and the mercantile and business effect of the transaction was as if there had been an actual advance in money of the £7,350, and consequently the consideration is, I think, truly described in this bill of sale, both according to its mercantile and business effect and its legal effect.

The next objection was that the transaction between the People's Trust Company and the bank, as evidenced by the agreement of January 13th, was, so far as this bill of sale was concerned, a violation of section 76 of the "Bank Act."

Scrutinizing the transaction between the People's Trust Company and the bank as a whole, I have had no difficulty in reaching the conclusion that it was one with respect to which, as said by Chief Justice Macdonald, neither party had any intention of evading the "Bank Act." I think that it was within the permissive sections of that Act and I do not think it can be held to be a transaction violating any of the prohibitory sections of that Act.

I cannot for a moment believe that, in taking the

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assignment of the People's Trust Company's assets and making the advance to that company it did on the security it took, the bank could be held to be "lending money upon the security of any goods, wares or merchandise" within the prohibition of sub-section (*c*), para. 2, of section 76.

The mere fact that for one of the many notes transferred to the bank as collateral security for its advances the trust company held a bill of sale as collateral which also passed to the bank does not create such a condition as is covered by this prohibitory section. We must ascertain and scrutinize with care the *real* transaction, and if and when one finds that to be within the bank's general powers he will be slow to hold that the inclusion and transfer as a part of the larger transaction of a trivial debt and its collateral security upon goods and chattels would necessarily make that security void in the hands of the bank. I venture to say that the existence of this bill of sale as collateral security to one of the many promissory notes transferred to the bank never entered into the calculations of any one and I cannot hold that in taking an assignment of it under the circumstances it did the bank was guilty of any violation of the section of the Act referred to prohibiting the "lending of money upon the security of goods, wares and merchandise."

Then as to the last point taken, namely, the identity of the goods sold, I think there was evidence justifying the inference of the trial judge as to such identity and that his conclusion and that of the Court of Appeal was correct.

The appeal should be dismissed with costs.

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IDINGTON J.—The respondent recovered judgment against appellant for the sum of $1,136.30, being the amount of a promissory note secured by a chattel mortgage upon certain goods and chattels of which appellant became possessed and disputed respondent's right to enforce the chattel mortgage against him.

Of the several objections taken by appellant arising out of the alleged invalidity of the chattel mortgage itself, I agree with the courts below that he must fail therein.

The consideration is truly set forth within the meaning of the "Bills of Sale Act" according to what was held by the Court of Appeal in England in the case of *The Credit Co.* v. *Pott*(1), when construing the English Act using substantially the same language.

The omission (if there was in fact such) to annex to the registered instrument a copy of the promissory note which was to be secured thereby seems of no consequence in face of the full description thereof in the document itself. The allusion therein to its being annexed, if in fact it never was annexed, may well be treated as surplusage, having under such circumstances no meaning.

If, in fact, there was a copy of the promissory note annexed to the instrument, it was quite competent for the appellant to have not only shewn that fact, but also to have made of it anything found arguable by shewing that it substantially varied from that described in the instrument.

In default of his having done so I think it must be presumed that the certified copy of the instrument

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contains all that was registered, and that treated in the way already suggested.

Rather changing, I suspect, the ground taken in the court below reliance is put by appellant upon the provisions in section 19 of the Act, providing

> if the bill of sale is made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, etc.,

then that is to be written out and registered under pain of nullity of the instrument.

It seems to me quite clear that this promissory note is within the plain ordinary sense of the words "contained in the body" of the instrument, and the defeasance clause therein expressly provides that it is upon payment

> of the aforesaid promissory note at maturity or any renewal thereof and all interest in respect thereof, etc.,

that these presents shall cease and be utterly void.

I fail to comprehend where any other defeasance or condition has been found. I cannot conjure it up, unless something more to rest upon than my imagination, which is too inactive to supply the obvious requirement of the section to give vitality to the objection.

This is not the case of a mortgage given for a debt and a promissory note given for same debt is outstanding but never referred to in the mortgage. Nor is it a case of two promissory notes for same thing or different things intended to be covered by the same mortgage.

The only formidable objection, as it appears to me, set up by appellant to the respondent's right of recovery is, that its title to the mortgage rests upon what is an infringement of the prohibition contained in section 76 of the "Bank Act," which reads:—

76. 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 immoveable property, or of any ship or other vessels, or upon the security of any goods, wares and merchandise.

It is to be observed that this is such an absolute prohibition as to render such a transaction as within its terms illegal. To apprehend correctly what was done a brief statement of the facts is necessary.

The People's Trust Company seems to have been engaged in a quasi-banking and insurance business, when the respondent, desirous of acquiring its place of business at South Hill, in South Vancouver, in which to establish a branch bank, made a bargain with it for the purchase of the building and its contents, excepting the safe and its contents, for the price of $12,500. That was a perfectly legitimate transaction and was, I assume, the chief motive leading up to what followed. But the chief motive does not cover all that was done.

The company had in course of its business obtained money from its customers, by way of deposits earning four per cent. per annum interest, to the total amount of $30,341.31 and acquired, presumably by using said moneys in way of so loaning, and obtained in course of doing so, promissory notes and bills of exchange and other securities for the re-payment thereof to the amount of $25,578.50.

The assignment upon which the respondent's right to maintain its action and uphold the judgment now in question must rest, recites said facts and further recites as follows:—

And whereas the company is desirous of selling the said business at South Hill to the bank and also of providing for the payment to

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the said depositors at the branch at South Hill aforesaid of the amounts due to them with interest, and for the transfer of the various securities held by the company as collateral security for the payments to the said depositors by the bank.

And whereas the company has agreed with the bank for the consideration hereinafter appearing to transfer to the bank the business carried on by the company at South Hill aforesaid, together with the office and office premises and the contents thereof, and also the moneys deposited by various depositors through the said branch of the said company at South Hill aforesaid, and the securities, bills of exchange, and promissory notes hereinafter mentioned.

And whereas the company has agreed to pay to the bank the difference between the amount of such deposit accounts and the total amount of such promissory notes and bills of exchange in cash upon the completion of this agreement.

Such is the scope and purpose of the agreement relied upon by which, in its operative part, the company agrees to transfer to respondent all the premises of the company as described, and all goods therein as described in a schedule, and the said deposit accounts (whatever that may mean) enumerated in a schedule.

It then proceeds as follows:—

The company shall forthwith upon the transfer of the said accounts pay to the bank a sufficient sum to pay in full the total amount of ($30,341.31) so deposited with the company by any depositor in accordance with the said schedule, *which said sum shall be realized by the discounting by the bank of the promissory note referred to in clause 5 hereof, and the deposit of the proceeds with the bank.*

5. The company shall execute and deliver to the bank its promissory note for the said sum of thirty thousand three hundred and forty-one and 31/100 ($30,341.31) dollars payable to the bank on demand, with interest at eight per cent. (8%) per annum as well after as before maturity, which said promissory note shall be indorsed by R. D. Edwards, E. H. Mansfield, W. A. Pound J. B. Springford, H S. Rashleigh, Musgrave Norris, A. A. Falk, Charles C. Kilpin, A. Smith and J. K. Burden, the directors of the company.

6. The company shall also forthwith upon the execution of the agreement transfer and deliver to the purchaser the various promissory notes and bills of exchange in the hands of the company made by the customers of the said company in accordance with the third schedule hereunto annexed, *together with all securities for the payment thereof, held by the company,* which said promissory notes,

bills of exchange, *and securities* shall be dealt with in the manner hereinafter appearing.

It further provides:—

11. The said sum of thirty thousand three hundred and forty-one and 31/100 ($30,341.31) dollars, to be paid to the bank as hereinbefore set forth, shall be deposited to the credit of the company with the said Royal Bank of Canada in a special account to be opened as the People's Trust Company account in trust for depositors of South Hill branch, the said sum being derived from the proceeds of the promissory note to be given by the company and indorsed by the directors of the company as hereinbefore set forth, and neither the said company nor the said directors shall be at liberty to withdraw any portion of the said sum until the whole of the said depositors have been paid in full and the liability of the said company and the said directors to the bank, and the said depositors is completely discharged, and thereafter such sum as remains to the credit of the said company shall be repaid by the bank to the company.

* * * * *

13. The bank shall pay upon the said promissory note for thirty thousand three hundred and forty-one and 31/100 ($30,341.31) dollars, hereinbefore mentioned, the amount which may be collected by the bank on account of the promissory notes and bills of exchange due to the company and by the securities collateral thereto transferred to the bank pursuant to clause 6 hereof.

There are provisions for working out the scheme thus provided for protecting the depositors and for the application of the payments received from said bills, promissory notes and other securities, upon said promissory note for $30,341.31 to be given by the company and indorsed by the directors and also for returning any of said bills, promissory notes or other securities within six months if the bank should so elect, but if it did not so elect within that time they shall, as to all not so returned, at expiration thereof be deemed to be and shall be taken over by the bank as and for its own use and benefit and the company shall thereupon become entitled to credit therefor.

There is then the following clause:—

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In consideration of the premises and upon the due transfer of the various property, real and personal, to be transferred by the company to the bank as hereinbefore set forth, the bank shall pay to the company the sum of twelve thousand five hundred ($12,500) dollars.

There follows a clause of indemnity of company and directors who, by the way, were not parties to anything except to the note.

The contention set up is that this was an agreement providing for the advance of money upon the "security of goods, wares and merchandise."

There can be no doubt surely that the promissory note of the company, indorsed by the directors, was in the very language of the instrument discounted to raise the desired and needed sum set apart to meet a class of the company's obligations.

There can surely be no doubt that, *pro tanto*, the amount of this chattel mortgage was a substantial part of the security upon which the advance was made. The company evidently was in deep water at the time. Its directors as indorsers had a right on the face of the agreement, and leaving aside for the moment all question as to the effect of section 76, to look to that as part of their protection. If not illegal the bank could not discard, if it would, save under the six months' option, that part of the transaction, and insist upon the sureties so indorsing paying up and being disentitled to assert the ordinary rights of a surety and receive a transfer of that given the bank in way of security.

In passing I may say that the security of this chattel mortgage was, in one sense, so clearly severable from the rest of the transaction that its relation thereto may, in some aspects of the matter, be arguable as not tainting the entire obligation; especially in view

of the provision that it was not scheduled or specifically named in the agreement and that the bank had a right for six months for any reason it saw fit, or without reason, to reject it.

Does that make any difference herein? It may well be that the bank could say it was through an oversight this was not rejected within the six months and that it never would have deliberately accepted a chattel mortgage "on goods, wares or merchandise" or mortgage on real estate as part of the security presented and in view at the time of agreeing to the advance upon which it made same.

Assuming that, which I think quite probable, I am not disposed to think in such a peculiar case the consequences of a violation of the Act must necessarily taint the whole transaction.

The rule is that any part of the consideration of a contract being illegal, renders the whole void.

Can it be said with this right of rejection of the evil part that it vitiated the whole?

However that may be it is the question of the title of respondent that we must pass upon herein. And when it asserts the title it sets up it can only rest it upon the security having been part of the original consideration which never can within the law form part of the security, given contemporaneously with the agreement to make the advance which is made to rest thereon.

It so happens that there is no other title possible here for the bank to rely upon. It got an assignment later, but that was too late as an assignment for creditors had intervened. Hence, it comes back to the question of its possibly forming part of the original consideration or nothing.

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It is only the comprehensive language of paragraph 6 of the agreement and others in accord therewith which carry an equitable assignment of the mortgage in question.

And if we give this a fair construction can we impute to the respondent the intention to bargain thereby for that which would by the taking thereof vitiate the whole ? I incline to think not.

If anything had transpired later between the parties, say at the end of six months, when the taking of the mortgage then might have been interpreted as taking an additional security for a past debt, that would have been quite legal. I can find nothing in the case to rest such a holding upon.

It is said the motive of the whole transaction was the purchase of the property and the business of the company, but it is distinctly a contract of a two-fold character. One relates to the purchase of the property and the other to the discounting of the company's note secured by the indorsement of the directors for a purpose entirely separate from the purchase.

If the company had chosen to go to another chartered bank and there discount the note indorsed by its directors, with the same collaterals including this chattel mortgage as security, and made same arrangement relative to the fund in every way, could there be any doubt of the invalidity of such a transfer of the chattel mortgage ?

It is not true that the company sold its business to the bank. It sold its business site and furniture for $12,500. It recites the absurdity of selling its indebtedness to the depositors, but can that be treated seriously ? I think not.

The cases cited and relied upon do not seem to me to have much bearing upon the point raised herein.

The case of *Bank of Toronto* v. *Perkins*(1) is distinctly against the respondent.

It has occurred to me possibly the indorsers as sureties might have an equity to have the mortgage applied, but that I imagine would be only by way of subrogation, and I fail to find any equity on the part of the respondent through them in face of the express terms of the contract, which I interpret as excluding any intention to cover this mortgage. Indeed, no such argument was put forward.

The suggestion that the transaction was in fact a purchase of the securities including this chattel mortgage, seems to me at variance with many provisions and stipulations in the agreement. If it had provided at the expiration of six months it might take over the securities and give up the company's note indorsed by the directors, such an argument might have been tenable and, at all events, what we should have expected to find if a sale and purchase of securities had been its purpose.

It might be arguable that the phrase "goods, wares and merchandise" does not cover farm stock. No such argument was hinted at, but I have considered such a possible argument and concluded that the word "goods" does cover farm stock though it certainly does not cover every kind of personal property.

Standard dictionaries such as "Murray," the "Century" and the "Imperial" have nothing to enlighten us in regard to the meaning of the word "goods." The various definitions given by Stroud certainly indicate

(1) 8 Can. S.C.R. 603.

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that it does not cover every kind of personal property, and as defined by Bouvier I find the following:—

> Goods, wares and merchandise. A phrase used in the "Statute of Frauds." Fixtures do not come within it: I. Cr. M. & R. 275. Growing crops of potatoes, corn, turnips and other annual crops, are within it; 8 D. & R 314; 10 B. & C. 446; 4 M. & W. 347; *contra*, 2 Taunt. 38. See Addison, Contr. 31; Blackb., pp. 4, 5; 2 Dana 206; 2 Rawle 161; 5 B. & C. 829; 10 Ad. & E. 753. As to when growing crops are part of the realty and when personal property, see 1 Washb. R.P. 3.

The rest of the definition in Bouvier evidently relates to the sense in which the word is used by local legislatures. I think we must take it that coupled with the other words as in the phrase quoted it cannot mean personal property in the wide sense of the term such as promissory notes, bills of exchange or the like securities. Experience teaches us that bankers who have never hesitated in advancing upon collaterals of the latter description would certainly hesitate to take a chattel mortgage upon goods such as those now claimed herein.

I regret to have to come to the conclusion I have, but the long-standing policy of the "Bank Act" is so distinctly against countenancing loans by a bank on real or personal (so far as defined by the term "goods, wares and merchandise") property, that I think it should be adhered to and the appeal allowed and the judgment below reversed with costs.

DUFF J.—(1) As to the chattel mortgage.

(*a*) The description and identification of the goods. The description is formally sufficient, the British Columbia "Bills of Sale Act" not requiring a specific description of the property comprised in the bill of sale; any description by which the goods can be

identified being admissible. Of the identification of the goods I think there was evidence.

(*b*) As to the statement of consideration. The point is covered by *Credit Co.* v. *Pott*(1).

(*c*) The objection from which at present I see no escape is based upon the fact (which I must, I am afraid, unavoidably find) that the "assurance" was embodied in two documents, one of which was not registered.

It is possible that the copy of the promissory note recited as being annexed and marked "B" was in fact annexed at the time of the execution; but, if so, the whole document was not registered because the registrar's certificate is conclusive that the document put in evidence is a true copy of the document registered. If there was no such copy then the "assurance" was embodied in the two documents executed, the bill of sale, so called, and the promissory note. Whether the "assurance" was embodied in these two documents or only in the document executed and registered is, of course, a question of fact; but I do not see how I can find otherwise than as above indicated. The purport and intent of the "assurance" is to charge the goods with the payment of the principal and interest of the promissory note. The extent of this charge could only be ascertained by an examination of the note; and the two documents being executed at the same time, I think, having regard to the circumstances, I must hold as a fact that the note was part of the "assurance." This is consonant with the general effect of the earlier decisions upon the Act of 1854. See the

(1) 6 Q.B.D. 295.

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judgment of Lindley J. in *Cochrane* v. *Matthews*(1), and the judgment of James L.J., *Ex parte Odell*(2), in the same volume, and the judgment of Lord Esher in *Counsell* v. *London and Westminster Loan and Discount Co.*(3), at page 515.

(2) As to the objection based upon the "Bank Act."

It was intended no doubt that in certain eventualities the bank should be entitled to assume the position and exercise the rights of a lender holding the promissory notes, etc., * * * of the trust company as collateral security for an advance. Assuming this to be so, I am inclined to think that the provisions enabling the bank to assume that position ought to be regarded as merely subsidiary to the main purpose of the contract which was a sale and purchase of assets and as such quite unobjectionable.

But taking the most extreme view as against the bank, the loan was a loan upon the security of an "obligation" of a corporation within the meaning of section 76, sub-section 1, para. (*c*) of the "Bank Act" and that being the case it is quite immaterial that this obligation was secured by a charge on the property of the corporation.

ANGLIN J.—Reluctantly, because a chattel mortgage taken with unquestionable good faith to secure an honest debt will be avoided on what may be regarded as a technical ground, I have reached the conclusion that the omission of the rate of interest from the recital in it of the promissory note of the mort-

(1) 10 Ch. D. 80*n*. (2) 10 Ch. D. 76, at p. 84.
(3) 19 Q.B.D. 512.

gagor thereby collaterally secured, which was not otherwise registered, is fatal to the validity of the mortgage under section 19 of the British Columbia "Bills of Sale Act." Without a statement of the rate of interest, the mortgage did not "contain" the entire terms of defeasance. These could only be learned by referring to the promissory note. No doubt upon registration of the mortgage everybody was put on inquiry as to the contents of the promissory note and, had that met the requirements of section 19, the mortgage might be upheld. *Winchell* v. *Coney*(1). But, in order to prevent fraud, the scheme of the statute is that the extent of the interest both of the creditor and of the debtor in the property should appear upon the registered document itself.

If the words in the mortgage recital, "at interest," conclusively imported the statutory rate of interest and if the mortgage would be defeasible on payment of the principal secured with interest at that rate, regardless of the rate stipulated in the promissory note, the latter might possibly be regarded as an additional security such as was held not to require registration in *Ex parte Collins*(2). But see *Edwards* v. *Marcus*(3), which seems to be, if anything, a stronger case than that now before us and much in point.

Here it is clear from the defeasance clause in the mortgage that it is redeemable only on payment of the promissory note according to its terms. It would, therefore, seem clear that the parties committed their contract to two instruments, that its whole tenor and effect could be ascertained only from both, and that,

(1) 34 Alb. L.J. 210.
(2) 10 Ch. App. 367.
(3) [1894] 1 Q.B. 587.

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unless the full terms of the note were inserted in the chattel mortgage, it was necessary that the note itself should be registered. It was only by payment of the note that the mortgage could be satisfied. I cannot distinguish this case in principle from *Counsell* v. *London and Westminster Loan and Discount Co.*(1), relied on by the respondent. See, too, *Re Odell*(2).

What I have written suffices for the disposition of the appeal, but, having regard to the great importance of the question raised on the "Bank Act," I think I should express the view which I entertain upon it.

The substance of the transaction between the People's Trust Company and the Royal Bank was as follows. Its purpose was the taking over by the latter of the business of the former at South Hill. This entailed the assumption by the bank of the liabilities of this branch of the trust company's business as well as the acquisition of its assets. As to the latter the bank was prepared to take and pay for only such of them as it should, upon investigation, find to be worth purchasing. This involved the allowance of a period of time within which the bank might elect to take or to reject any of the assets. On the other hand, in order that the good will of the business to be taken over should be preserved, it was necessary immediately to provide for the payment of the liabilities assumed, especially for the claims of depositors. These latter amounted to $30,341.31. The assets in outstanding book debts and securities to be taken over had a face value of $25,578.50 which, if all the securities should be accepted by the bank, would be the amount to be

(1) 19 Q.B.D. 512. (2) 10 Ch. D. 76.

paid in respect of them to the trust company. The company agreed immediately to transfer all the book debts and securities to the bank and to pay it a sum which, added to their face value, would make up $30,341.31, which amount the bank on its part agreed to put to the credit of a special account to meet the claims of the company's depositors. To further secure itself the bank took the company's note for the whole $30,341.31. The company and its directors further bound themselves to immediately replace with its cash equivalent at face value any security which the bank should reject during the period of six months allowed for election. Book debts and securities not so rejected were to be deemed, after the expiry of that time, the unconditional property of the bank, and the company was to be entitled to credit for the face value thereof.

This was, in my opinion, a legitimate banking transaction and, while the agreement no doubt refers to the advance of the $30,341.31 as made upon the company's promissory note and the transaction took that form, its substance was the setting aside by the bank of that sum as the contingent purchase price of the assets handed over to it.

As to $4,764.81 paid in cash by the company to the bank contemporaneously with the taking over of the assets, the note was the merest form. It represented neither a loan nor a liability of the makers. As to the balance of $25,578.50 the note in fact served as security to the bank for the re-payment to it of the face value of such assets (if any) as it should reject. The transaction, in my opinion, was not within the

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mischief aimed at by section 76(*c*) of the "Bank Act" and should not be held to contravene it.

BRODEUR J. concurred with Duff J.

*Appeal allowed with costs.*

Solicitors for appellants: *Affleck & McInnes.*

Solicitors for respondent: *Tupper, Kitto & Wightman.*