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the accumulating trust fund is not definitely known and determined during the taxation period. The probable beneficiaries could not be definitely ascertained before the contingency, i.e., their survival until they reached twenty-five years of age, actually took place.

We therefore have to deal exclusively with the 1920 amendment (ch. 49, sec. 4) which covers the present case, and, in my view, is a complete taxing provision devised to tax in the hands of a trustee resident in Canada income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests, without, for obvious reasons, distinguishing between residents and non-residents. I feel bound by our decision in the *Royal Trust* case (1) and would allow the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *W. S. Fisher.*
Solicitor for the respondent: *James Y. Murdoch.*

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*May 11.
*June 30.

IN THE MATTER OF THE ESTATE OF SMITH AND HOGAN, LIMITED, AUTHORIZED ASSIGNOR.

INDUSTRIAL ACCEPTANCE CORPORATION, LIMITED, AND CANADIAN ACCEPTANCE CORPORATION, LIMITED..... } APPELLANTS;

AND

THE CANADA PERMANENT TRUST COMPANY, AUTHORIZED TRUSTEE.... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Conditional sales—Bankruptcy—Validity of conditional sales agreements as against trustee in bankruptcy—Title and possession of the goods at times of agreements—Nature of transactions—Whether compliance required with Bills of Sale Act, R.S.N.B., 1927, c. 151.

Appellants claimed, under certain conditional sales agreements, to be secured creditors of the estate in bankruptcy of certain motor car dealers. Registrations were made under the *Conditional Sales Act,*

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Maclean (*ad hoc*) JJ.

(1) Minister of National Revenue v. Royal Trust Co., [1931] Can. S.C.R. 485.

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R.S.N.B., 1927, c. 152, but not under the *Bills of Sale Act,* R.S.N.B., 1927, c. 151. The dealers would order the cars from the manufacturers, who would send the invoice to the dealers, and would send the bill of lading, with sight draft on the dealers attached, to a bank. The dealers would then go to one of the appellants with the invoice, a conditional sale agreement covering the cars would be made, and appellant would give the dealers a cheque payable to the dealers for 85% or 90% (and in one case payable to the bank for the whole) of the amount of the draft. The dealers took the cheque to the bank and it was applied towards payment of the draft, the dealers supplying the balance. The dealers then obtained the bills of lading and took possession of the cars. The Supreme Court of New Brunswick, Appeal Division (4 M.P.R. 39), affirming judgment of Barry, C.J. K.B., (*ibid*), held that the conditional sales agreements were ineffective as against the dealers' trustee in bankruptcy, as appellants, not having been owners of the cars, could not retain ownership or property therein under the agreements.

Held (reversing said judgments below, Lamont and Cannon JJ. dissenting): The conditional sales agreements were valid and effective. These agreements, coupled with the cheques and the evidence of what was done, showed that, on each occasion, an agreement was arrived at between the dealers and appellant by which the dealers, in consideration of the cheque, transferred to appellant their right to acquire from the manufacturer ownership and possession of the cars mentioned in the conditional sale agreement, in consideration of this agreement for sale of the cars to them. When the dealers used appellant's cheque towards payment of the sight draft, they were paying the draft to procure title and possession for appellant, in pursuance of their agreement. When the dealers got the bill of lading on payment of the draft and took possession, they were not taking possession to themselves by virtue of their original right, but by virtue of and in pursuance of the terms of the conditional sale agreement. Sec. 6 of the *Bills of Sale Act* did not apply to avoid title to the cars passing to appellant. That section has reference to a sale of goods and chattels which the seller owns, but the dealers were not selling or transferring to appellant goods and chattels which they owned, but only their right to acquire ownership and possession of the chattels on performance of a condition, namely, payment of the draft. It was a contract carried into effect and completed at the moment by payment of the price. Such a completed contract, not coming within the *Bills of Sale Act,* does not require to be in writing. Ownership of the cars passed to appellant and never became vested in the dealers. (*Commercial Finance Corp. Ltd.* v. *Capital Discount Corp. Ltd.,* [1931] O.R. 22, and *Re Grand River Motors Ltd.,* [1932] O.R. 101, distinguished). Appellant was in position, as such owner, to make the conditional sale agreement by virtue of which it retained the ownership until paid.

Per Lamont J. (dissenting): Upon the evidence, there was not, nor did the transactions justify an inference of, any agreement or arrangement by which the dealers sold or agreed to sell to appellant the cars which appellant purported to sell back to them under the conditional sale agreement. The intention of the parties was a question of fact on which there are the concurrent findings of the courts below. Even assuming there was an implied sale by the dealers to appellant prior to execution of the conditional sale agreement, it was invalid,

as against the trustee in bankruptcy, for want of compliance with s. 6 of the *Bills of Sale Act*. Nor, upon the evidence, could it be said that the dealers assigned to appellant their right to acquire from the manufacturers the ownership and possession of the cars. Upon the facts of the case, on payment of the draft the property must be deemed to have passed to the dealers. The transactions were simply a method of loans to the dealers upon the security of the conditional sales agreements, and these agreements, being simply conveyances intended by the parties to operate as mortgages of goods and chattels, and not being in the form or evidenced in the manner required by s. 2 of the *Bills of Sale Act*, were void as against the trustee in bankruptcy.

Per Cannon J. (dissenting): The evidence did not justify an inference of any agreement or arrangement by which appellant acquired any title to the cars prior to the conditional sale agreement. The transactions were really loans on the security of the conditional sales agreements, and such security was invalid, as against the trustee in bankruptcy, for non-compliance with the *Bills of Sale Act*.

APPEAL (by special leave granted by a judge of this Court) from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1), dismissing the present appellants' appeal from the judgment of Barry, C.J.K.B. (sitting in Bankruptcy) (2), dismissing their appeal from the decision of the Trustee of the Estate in Bankruptcy of Smith & Hogan, Ltd., disallowing the claims of the appellants as secured creditors under certain conditional sales agreements.

The material facts of the case and questions in issue are sufficiently stated in the judgments now reported. The appeal to this Court was allowed with costs, Lamont and Cannon JJ. dissenting.

L. A. Forsyth, K.C., and *G. F. Osler* for the appellants.

C. F. Inches, K.C., for the respondent.

The judgment of the majority of the Court (Rinfret, Smith and Maclean (*ad hoc*) JJ.) was delivered by

SMITH, J.—This is an appeal from a judgment of the Supreme Court of New Brunswick, Appeal Division, sitting in Bankruptcy (1), upholding the decision of the trial judge (2).

The bankrupt, Smith & Hogan, Limited, were dealers in automobiles in the city of Saint John, N.B., and made an

(1) (1931) 4 M.P.R. 39; 12 C.B.R. 468; [1931] 4 D.L.R. 348.
(2) (1930) 4 M.P.R. 39; 12 C.B.R. 93; [1931] 2 D.L.R. 663.

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authorized assignment on the 30th of July, 1930; and the respondent company was duly elected trustee of the estate in bankruptcy.

The appellant, with head office in Toronto, Ont., and a branch office in the city of Saint John, N.B., filed a proof of claim in the estate for sums of money owing under a number of conditional sales agreements of certain automobiles that were in possession of the bankrupt and passed into the possession of the trustee. In each case the appellants valued the security, which was the car, at the full amount of the claim under the agreement against the car.

It is admitted that these conditional sales agreements of the various cars in question were duly filed in compliance with the *Conditional Sales Act,* R.S.N.B., 1927, ch. 152, but they have been held to be ineffective as against the trustee, on the ground that the appellants were never owners of the goods, and therefore could not retain an ownership or property in the goods that they never possessed.

In my view the decision must turn upon this question of whether or not the appellants acquired ownership and property in the goods by virtue of what took place between the bankrupt and the appellant at the time of making the various conditional sales agreements. The statement of facts admitted and the evidence and documents show that Smith & Hogan, Limited, ordered the cars from the factory where they are made or assembled, and that the invoice for the said cars came to Smith & Hogan, Limited. The factory sent the bills of lading to the Bank of Nova Scotia at Saint John with sight draft on Smith & Hogan, Limited, attached for the invoice price. Smith & Hogan, Limited, would then go to the appellants with the invoice, when a conditional sale agreement covering the cars mentioned in the invoice would be made out, and a cheque for the whole or eighty-five or ninety per cent. of the draft would be given to Smith & Hogan, Limited, with which to take up the sight draft. In one case the appellants made their cheque for the whole amount of the sight draft, and payable to the order of the Bank of Nova Scotia, which held the draft and bills of lading; but in other cases the cheques were for eighty-five or ninety per cent. only of the sight draft, and in some cases the cheques were made payable to the order of Smith & Hogan, Limited. In all cases the

appellants' cheques were taken by the firm of Smith & Hogan, Limited, to the bank, and applied in payment or part payment, as the case might be, of the sight draft, Smith & Hogan, Limited, supplying the balance over and above the appellants' cheque, required to pay the draft in full. Smith & Hogan, Limited, then obtained from the bank the bill of lading, upon which they took possession of the cars.

The contention is that, when Smith & Hogan, Limited, thus procured possession of the cars by payment of the sight draft, the title in the automobiles passed to that company; and, if that be the correct view of the results, the decision appealed from would appear to be right.

In support of this contention the respondent refers to a number of English cases decided under the provisions of the English statutes of 1854 and 1878. The former is 17-18 Vic., ch. 36, *An Act for preventing Frauds upon Creditors by secret Bills of Sale of personal Chattels.* The statute of 1878 is 41-42 Vic., ch. 31, which consolidates and amends the law relating to bills of sale of personal chattels. Section 3 reads as follows:

> 3. This Act shall apply to every bill of sale executed on or after the first day of January one thousand eight hundred and seventy-nine (whether the same be absolute, or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale.

Section 4 has the following:

> The expression "Bill of Sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, * * *

By an amending Act of 1882, ch. 43, sec. 9, it was provided that

> A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed.

The cases numbered 1 to 24 cited and digested in the respondent's factum all turn upon the question whether or not the documents under which the goods were sought to be held were bills of sale within the provisions of these

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Acts. The object of both Acts is declared to be for preventing frauds upon creditors by secret bills of sale of personal chattels, and there is no provision for the registration of conditional sales or hire and purchase agreements unless they come within the definition of bills of sale set out in the Acts.

The definition quoted above of the Act of 1878 is much more comprehensive than the original definition in sec. 7 of the Act of 1854.

The gist of the various English decisions cited by the respondent is that the real nature of the transactions between the parties must be enquired into, regardless of the form; and if it is found that the document is in fact one made for a loan on the security of the chattels, it is a bill of sale within the meaning of these Acts, and requires to be registered. In most of the cases the transaction commenced with the ownership of the property vested in the party who became the purchaser under the hire and purchase agreement, followed by a sale or pretended sale of the chattels to the vendor in the hire and purchase agreement, and then by the execution of that agreement. The decisions in such cases hinged upon the questions of fact as to whether or not the sale to the ultimate vendor was a real sale or whether the whole transaction was a loan of money on security of the chattels.

In *Redhead* v. *Westwood* (1), R. applied to W. for a loan of £100, which was refused. Then R. sold the furniture in his house to W. for £100, who handed him a cheque for the money, but no receipt was given. Shortly afterwards, by an agreement in writing, W. agreed to let the furniture to R. on the hire and purchase plan. Held, that the agreement was a valid agreement for hire and not a bill of sale, and the transaction was unaffected by the *Bills of Sale Act*.

In *In re Watson, Ex Parte Official Receiver in Bankruptcy* (2), an execution was put into the bankrupt's house. L. agreed to lend her £150. L. made an inventory and an agreement whereby he agreed to sell the bankrupt the goods on the hire and purchase plan, and she was told she was selling the property to L., but it would be hers again on the repayments of the hire being properly kept up; and she handed L. a chair, informing him that she had sold him the

(1) (1888) 59 L.T. (N.S.) 293. (2) (1890) 25 Q.B.D. 27 (C.A.).

furniture. She then signed the hiring agreement. Held, that the true nature, not the form of the transaction, must be regarded, and that the supposed hiring and purchase agreement was a bill of sale.

In *Beckett* v. *Tower Assets Co.* (1), plaintiff applied to defendants for a loan of £30 on a bill of sale. Defendants made an inventory, but recommended a friendly distress. Defendants bought at the distress sale, obtainging a receipt, and then sold back to plaintiff's wife on the hire and purchase plan. Cave J. held that it was not necessary to register either the receipt or the hiring and purchase agreement. The case went to appeal (2). At p. 648, Bowen, L.J., says:

> We ought to find on the facts that there was an understanding between the plaintiff and the defendants that, although the property passed, the defendants should hold it in trust for the plaintiff, except so far as the rights of the parties should afterwards be defined by some document of hiring and repurchase, or other document of that sort, to be afterwards executed.

He goes on to say:

> If the beneficial property in the goods was only to become theirs when some further assurance was executed, then the hiring and repurchase agreement which was executed is such a document as is avoided by the Act if not registered. Again, if it operated only as a licence to seize goods which remained in equity the property of the plaintiff, so far as the beneficial interest was concerned, then also it is avoided by the Act. So that in either view it is a document which is a bill of sale; it is a necessary part of the transaction in order to give the defendants a title to the goods, for without it they were only trustees for the plaintiff. I am glad to think we are only differing upon a question of fact from the learned judge in the Court below.

These cases are sufficient to show that the English cases cited by respondent turn on the special provisions of the English Acts.

The present appeal must be decided, not upon the provisions of these English statutes, but according to the common law and statutes of New Brunswick relating to the matters in question. In New Brunswick there are two Acts which have relation to the transfer of chattels where possession does not accompany the transfer or go with the ownership. These are the *Bills of Sale Act,* R.S.N.B., 1927, ch. 151; and the *Conditional Sales Act,* R.S.N.B., 1927, ch. 152; and it is by virtue of the provisions of the former Act that the respondent claims title; and the question, as

(1) [1891] 1 Q.B. 1. (2) [1891] 1 Q.B. 638.

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I have already stated, is whether, upon payment of the drafts alluded to, the title and ownership of the chattels passed to Smith & Hogan, Limited, or to the appellant.

When Smith & Hogan, Limited, obtained the cheques and gave the various conditional sales agreements, they were not the owners of the cars, as ownership remained with the manufacturers who shipped them until payment of the sight drafts. All that Smith & Hogan, Limited, had was a right to acquire ownership and possession by payment of the draft.

What, then, were the terms of the entire agreement entered into between Smith & Hogan, Limited, and the appellant on each occasion?

It is not necessary, in order to constitute an agreement between parties, that it shall be stated in precise language. The terms may be arrived at from various documents, the acts of the parties and the circumstances. Here we have Smith & Hogan, Limited, going to appellant at various times with an invoice of cars shipped to them of which they can only acquire ownership and possession by payment of a sight draft for the amount of the invoice. They ask appellant to supply the whole or ninety per cent. or eighty-five per cent. of the amount required, and the conditional sales agreement is executed by both parties, and a cheque for the required amount is given Smith & Hogan, Limited, to apply on the draft. This conditional sales agreement by its terms shows that both parties intended that the cheque was given on the condition that title was to pass to appellants, and it could only be so passed by use, on appellant's behalf, of Smith & Hogan's right to acquire ownership and possession. Smith & Hogan, Limited, in the agreement contract to buy from appellants, and expressly agree that title is not to pass to them till payment by them to appellant of the purchase price, that is, the amount advanced. Therefore, when Smith & Hogan, Limited, used appellant's cheque towards payment of the sight draft, they were paying the draft to procure title and possession for appellant, in pursuance of their agreement, and not to acquire title and possession in themselves in breach of their agreement. When they got the bill of lading on payment of the draft and took possession, they were not taking possession to themselves by virtue of their

original right, but by virtue of and in pursuance of the terms of the conditional sales agreement.

I am of opinion, therefore, that the conditional sales agreements, coupled with the cheques and the evidence of what was done, show that an agreement was arrived at between Smith & Hogan, Limited, and the appellant by which Smith & Hogan, Limited, in consideration of the cheques, transferred to the appellant their right to acquire ownership and possession of the cars mentioned in the various conditional sales agreements, in consideration of these agreements for sale of the cars to them.

It is argued that title to the cars could not pass to the appellant by such an agreement because it would have to be in writing and filed, as provided by the *Bills of Sale Act,* R.S.N.B., 1927, ch. 151.

Section 6 of that Act provides that

> Every sale of goods and chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, etc.

This section has reference to a sale of goods and chattels that the seller owns, but here Smith & Hogan Limited were not selling or transferring to the appellant goods and chattels that they owned, but only their right to acquire ownership and possession of certain chattels on performance of a condition, namely, payment of the draft. It was not an executory contract to sell this right, but a contract carried into effect and completed at the moment by payment of the price. Such a completed contract, not coming within the *Bills of Sale Act,* does not require to be in writing. Only the part of the agreement relating to the conditional sale was required to be in writing and filed, by virtue of the *Conditional Sales Act,* and that part is in writing and duly filed.

The argument that the real nature of the transaction was a loan of money on the security of the goods, and that therefore the security must be taken by way of chattel mortgage executed and filed in compliance with the provisions of the Act, has, in my opinion, no force. This argument is based on the decisions already referred to under the particular provisions of the English Acts. Here the Act only purports to deal with mortgages not accompanied by an immediate change of possession of the chattels mort-

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gaged, and there is no provision that loans on chattels must be by mortgage filed pursuant to the Act.

So far as the *Bills of Sale Act* is concerned, loans may be secured on chattels otherwise than by chattel mortgage in any way permitted by the common law and statute law. An ordinary way of holding chattels as security at common law is to acquire ownership of the chattels and then to sell them to a purchaser, retaining ownership until the price is paid, but, by virtue of the *Conditional Sales Act*, such a sale must be in writing and filed pursuant to the terms of the Act.

The respondent cited *Commercial Finance Corporation Ltd.* v. *Capital Discount Corporation Ltd.* (1), and *Re Grand River Motors Ltd.* (2); and argued that these were directly in point. An examination shows that they are not at all in point.

The first of these is a decision by the Ontario Appellate Division.

One Lind purchased a car from Leggett Motors Ltd., for $1,349, of which he paid $232, the balance being paid by moneys from the plaintiff. The reasons state that this was apparently an outright sale and transfer of property. The distinction, therefore, between that case and this is that there the transactions by which Lind became purchaser under a conditional sales agreement started with Lind as owner and in possession, and the gist of the decision is that he could not as against creditors and subsequent purchasers transfer that ownership to plaintiff while retaining possession except by a document registered in compliance with the *Bills of Sale Act*.

Re Grand River Motors Ltd. (2) is a decision following the other under the same circumstances.

In my opinion, ownership of the automobiles here in question passed to the appellant, and never became vested in Smith & Hogan Limited. The appellant therefore was in a position as such owner to make the conditional sales agreements in question by virtue of which they retain the ownership till paid. The respondent has therefore a right to acquire ownership and retain possession only on payment to appellant of the balances owing as claimed.

(1) [1931] O.R. 22; [1931] 1 D.L.R. 1007.

(2) [1932] O.R. 101; [1932] 1 D.L.R. 565.

The appeal should be allowed, the judgments below set aside, and judgment should be entered for the appellant as indicated, with costs throughout.

LAMONT J. (dissenting).—I agree with the conclusions reached by my brother Cannon. The question submitted for our determination is: Are the appellants entitled to exercise against the trustee in bankruptcy, or the creditors of Smith and Hogan, Ltd., any rights with respect to certain automobiles by virtue of conditional sales agreements in which the appellants respectively appear as conditional vendors and Smith and Hogan, Ltd., as purchasers?

Each of the appellants filed with the trustee in bankruptcy claims in which they set out that, by reason of being the holders of the conditional sales agreements, they were secured creditors and entitled to maintain their securities as against the general creditors of Smith and Hogan, Ltd. (hereinafter called the "Dealers"). The trustee refused to recognize the appellants' claim to rank as secured creditors. The appellants appealed to a judge in bankruptcy and submitted an agreed statement of facts in each case. As the same point of law was involved in both appeals, and as the facts were similar, the appeals were consolidated and were determined on the statements of facts submitted, supplemented by *viva voce* evidence.

As pointed out by my brother Cannon J., apart from whatever understanding may be implied from the execution of the conditional sales agreements, the evidence shews that there was no agreement or arrangement whatever, either verbal or written, between the Dealers and either of the appellants, to the effect that the Dealers had, at any time, sold or agreed to sell to the appellants the automobiles which the appellants respectively purported to sell back to them under the conditional sales agreements. The material before us does, however, shew the true nature of the transactions which took place between these parties. Mr. Hogan says: "When we first started in the car business we applied to them for credit." The Dealers had to furnish a statement of assets and liabilities. Then the Acceptance Corporations made their investigations with the result that the Dealers obtained from the appellant, The Industrial Acceptance Corporation, a line of credit of

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$12,000, and from the appellant, The Canadian Acceptance Corporation, a line of credit of $20,000. Mr. Casey, the manager of the appellant, The I.A.C., Ltd., gave the following testimony:—

Q. Are you authorized by your head office to give these firms like Smith and Hogan, Limited, a certain amount of credit?—A. After the recommendation has been approved by the head office.

Q. How do you mean?—A. A financial statement is received from the dealer and investigations are made and recommendations are made to head office and if they are approved it is O.K. to give them credit.

Q. And you are allowed to advance them up to a certain sum, is that right?—A. Yes.

Q. I mean a general advance. What is the largest sum that you are entitled to finance Smith and Hogan?—A. I am not sure what the established line of credit is right now, but they had twelve thousand dollars outstanding credit at the time of the assignment.

And Mr. Ogilvie, manager of the appellant, The C.A.C., Ltd., testified as follows:

Q. And what is your limit as to the amount of credit that you could give Smith and Hogan, Limited?—A. They were authorized by our Credit Department at Toronto at the first of 1930—fifteen thousand dollars on Hupmobiles and five thousand dollars on De Sotos. This line of credit was reduced to eight thousand dollars on June first.

Q. How much would you advance each time, the whole amount of the invoice value or only part?—A. Eighty-five or ninety per cent. Usually eighty-five per cent.

Having arranged for credit with which to finance their purchases, the Dealers would from time to time order from the manufacturer a car load of automobiles, and ask him to ship them with sight draft attached to the bill of lading. The manufacturer shipped the automobiles to the Dealers and sent them an invoice thereof and, at the same time, sent the bill of lading with draft for the invoice price attached, to the Bank of Nova Scotia. On receipt of the invoice the Dealers took it to one of the appellants and received, from that corporation, a cheque for 85% or 90% of the invoice price; either then or at a later date they signed a conditional sales agreement which stated that they had agreed to purchase from the Acceptance Corporation the automobiles specified therein, and had also agreed that the property therein should not pass to the Dealers until they had paid an acceptance which was given for the amount advanced. The Dealers took the appellant's cheque and deposited it to their own account in the bank with such additional funds of their own as were necessary to meet the sight draft. They then accepted the draft from the manufacturer, received the bill of lading, took delivery

of the cars and placed them on the floor of their warehouse for sale by retail. Within the time specified in the statute the appellants registered the conditional sales agreement. Only on one occasion was a cheque given to the Dealers for the full amount of the invoice price and, on that occasion alone (April 22, 1930), was the cheque made payable to the Bank of Nova Scotia; in all other cases it was made payable to the Dealers.

On the above state of facts, as to which there is no dispute, can it be said that the conditional sales agreements represented genuine bargains and sales between the appellants and the Dealers, or were the transactions simply a method adopted by the appellants of financing the Dealers and taking security for the moneys advanced?

The argument of the appellants in the Bankruptcy Court, as appears from a report of it in the appeal book, was stated by their counsel in these words:—

> It is to be implied from the conduct and dealing of the parties and from the circumstances of the entire transaction, that there was a sale by Smith and Hogan, Ltd., of their beneficial interest in the cars to the acceptance corporations, before the bill of lading was taken up at the bank and before the conditional sales agreements were executed.

There are two answers to this argument, the first is: that the managers of the appellant corporations admit that in not one of the transactions was anything said by the Dealers from which an intention could be inferred to sell the automobiles to the appellant applied to for financial assistance. It is only from the fact that the conditional sales agreements were executed that it can be argued that such an intention must have existed. The execution of the conditional sales agreements, however, is, in my opinion, just as consistent with an intention to take security on the automobiles for advances made, but with a misconception of the legal effect which would follow the taking of security in that form, as it is with an intention on the part of the appellants to purchase the automobiles. It is wholly a question of the intention of the parties, and that is a question of fact on which we have the concurrent finding of two courts.

The second answer is: that, assuming there was an implied sale of the automobiles by the Dealers to the appellants prior to the execution of the conditional sales agreements, it cannot assist the appellants, for section 6

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of the *Bills of Sale Act* (R.S.N.B., 1927, ch. 151), reads as follows:—

6. (1) Every sale of goods and chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Chapter, and shall be accompanied by an affidavit * * * that the sale is *bona fide* and for good consideration * * *.

(2) The conveyance and affidavit shall be filed as hereinafter provided within thirty days from the execution thereof, otherwise the sale shall be absolutely void as against * * * the assignee of the grantor under any law relating to insolvency * * * or an assignee for the general benefit of the creditors of the maker * * *.

In this case there was no immediate delivery of the automobiles by the Dealers to the appellants, followed by actual and continued change of possession. The sale, therefore, to be valid required to be evidenced by a conveyance duly filed. As this was not done, the implied sale cannot, in my opinion, be considered a valid one as against the trustee in bankruptcy.

On the argument before us, counsel for the appellants altered his ground and submitted that, antecedent to the conditional sales agreements, the title to the said automobiles was not in the Dealers, but was either in the appellants respectively or in some third person, and that, by their transactions with the appellants, the Dealers were not selling or transferring automobiles which they owned, but only assigning their right to acquire the ownership and possession of the automobiles they were entitled to receive from the manufacturer upon payment of the sight draft.

That the title could not have been in the appellants is obvious. Up to the moment the sight draft was paid the title was in the manufacturer. The shipping of the automobiles with the draft attached to the bills of lading indicates an intention on the part of the manufacturer of retaining the property in the automobiles and their possession until payment of the draft. Until the draft was paid no property passed. Upon payment, the property passed, and the question is, to whom? In my opinion, on the facts of this case, it could pass only to the Dealers. The manufacturer's contractual obligation was to pass it to them. In the transaction he knew no one else. No agreement between the Dealers and the appellants could have the effect of making the appellants direct purchasers from the manu-

facturer or of altering his obligation without his consent. That consent was not obtained. The manufacturer, by shipping the automobiles and sending to the bank the bill of lading with draft attached, was not offering to sell to anyone who might come forward and pay the draft. None of the bills of lading were put in and there is no evidence of their contents, but, in his evidence, Hogan swears: "The cars would be shipped direct to us." It was suggested on the argument that the bills of lading might have been made out to the manufacturer's order and endorsed by him in blank and this would entitle anyone paying the draft, with the Dealer's consent, to obtain the property in the cars. There is not the slightest evidence that any bill of lading was made out to the order of the manufacturer and, in view of Hogan's evidence, I think we must conclude that it was made out to the Dealers. The appellants did not take an assignment of the bills of lading, but, even if they had, the assignment would not have afforded them any protection unless there had been a *bona fide* sale to them of the automobiles, or a *bona fide* assignment of the Dealers' contract. The evidence, in my opinion, establishes that no such *bona fide* sale or assignment took place.

On examination before the Registrar, Hogan said:—

> I took the invoice down to the Industrial Acceptance Corporation's office, the invoice I received from the factory, and asked them to wholesale this automobile for a period of three or four months, and Mr. Casey made out a cheque for me for fourteen hundred and seventy-six dollars and seven cents.
>
> * * * * *
>
> Q. It was understood that this cheque was to be used to pay for this car?—A. Not necessarily that cheque. They advanced us so much money on the car to help us unload it.
>
> Q. It was understood this cheque was given in consideration of this transaction?—A. Yes.
>
> Q. And for the purpose of paying off the factory draft?—A. To help pay off the factory draft.

And further on:—

> Q. You know the cheque was given to pay off the draft on those specific cars?—A. The cheque was given as a loan towards those automobiles.

It is clear from this evidence that Hogan's conception of the transaction was the obtaining of an advance on the automobiles out of the arranged credits to help them to pay the manufacturer's draft. The appellants' respective managers do not say they had any idea of buying the automobiles outright or of taking an assignment of the Dealers'

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contract. Would it, therefore, be reasonable to infer from the execution of the conditional sales agreements alone that the Dealers were absolutely assigning all their interest in their contract with the manufacturer in consideration of the cheques received, and paying the appellants either 10% or 15% of the invoice price to take the contract off their hands? In my opinion it would not. Yet that is what we must infer if we accept the argument of the appellants.

In view of the fact that none of the parties to the conditional sales agreements ever suggested at any of their interviews that the Dealers were selling to the appellants the automobiles, or their right to acquire them from the manufacturer, and in view of the arrangements made for a line of credit and the giving of that credit by means of cheques, I can arrive at no other conclusion than that these transactions were merely loans to the Dealers upon the security of the conditional sales agreements. These agreements, being simply conveyances intended by the parties to operate as mortgages of goods and chattels and not being in the form or evidenced in the manner required by section 2 of the *Bills of Sale Act*, are void as against the trustee in bankruptcy.

The appeal, in my opinion, should be dismissed with costs.

CANNON J. (dissenting).—This case should be decided, as all other cases, on the material before the court, and not on what the appellants might or should have done, or what they now wish they had done to protect their money. What have the parties done to help us to ascertain the ownership of the automobiles at the time of the signature of the conditional sale agreements by the appellants and Smith & Hogan, Ltd., now insolvent?

We have:

(1) In the statement of facts admitted by the parties the following:

> After the transactions took place * * * Smith and Hogan, Ltd., took up the bill of lading, secured delivery of the cars from the Railway and placed them on their floor for sale at retail.

(2) Moreover, Mr. Anglin, before the trial judge, put the case for the appellant in the following way:

> The question is whether we are secured because we sold under this conditional sales agreement. To be secured and (to have) sold under that conditional sales agreement *we have to have title to the cars first.*

The cars come forward from the factory and we admit to Smith and Hogan that they own them. They come in with the invoice to our office and ask to have the transaction financed. We say that would be all right if they sell us their interest in the cars while they are still in the hands of the railway and we sell the cars back to them reserving the title for security. We feel that in equity we are entitled to that security and that your Lordship after hearing the evidence will be *able to imply although specific language apparently was never used by the dealer with the manager of the acceptance corporation to the effect that the dealer was selling first to the acceptance corporation.* Yet our contention is that the dealer in buying them back and executing that document admitted they are buying them back from one who is holding the security title, and it surely *could be implied in law that they first sold their* interest in the cars to the acceptance corporation. So that the acceptance corporation could be in a position to sell back, reserving the security title.

(3) Casey, the manager of the Industrial Acceptance Corporation, admits that he cannot remember or prove any specific conversation with Hogan as to whether the latter was selling his interest in the cars to the appellants and the latter were buying it before they sold it back to him. Ogilvie's evidence, as manager of the Canadian Acceptance Corporation, the other appellant, does not prove any such agreement.

(4) Hogan himself explains the situation as follows:

A. When we wanted a car load of automobiles we would send a wire from our company to the manufacturer and ask him to ship us so many cars, sight draft, bill of lading attached. The cars would be shipped direct to us. The Hupp Motor Car Corporation in March shipped to Smith & Hogan, Limited. The bill of lading and the draft would come in to the bank of Nova Scotia and they would call us up and let us know it was there. And the invoice or bill for the cars would come through the mail to us from the automobile manufacturers. I would take the invoice down to the finance company's office and they would advance me eighty-five or ninety per cent. of the value of the invoice and they would make me out a cheque payable to Smith & Hogan, Limited, for that amount. I would take—

Q. Did you sign any document?—A. Yes, I would have to sign a sales agreement.

Q. Do you recognize that as an agreement?—A. Yes, I would sign a document and take the cheque and it would be deposited in our bank account. I would either deposit it or somebody from our company would do so. Then one of our company would have to accept the sight draft at the bank which would be charged to our account, and he would get the bill of lading, so we could unload the cars.

Q. (By the Court). Then you would have the cars discharged from any lien of the manufacturers, and the finance company would have paid ninety per cent. of it you paid the other ten per cent. yourselves?—A. Yes, the finance company would advance us a cheque for ninety per cent. and I would put it in the bank and accept their draft which would be ten per cent. larger than the cheque.

Q. Then you signed this agreement between yourselves and the finance corporation whereby you acknowledged them to be the owners of the

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property, and you agreed to pay for it at a certain time and the property remained in them?—A. I was asked a question in the Bankruptcy Court, who I considered had the title to the automobiles and I answered that I considered we had the title to the cars, but we admitted we owed the finance company the ninety per cent.

Mr. Anglin: What Mr. Hogan said in answer to the question, on the examination, he said that he considered he owned the cars, on the examination.

Court: When you sold those cars around to Mr. Jones or Mr. Smith, did the finance corporation release their lien upon the cars?—A. Upon payment of the amount outstanding against them, the ninety per cent.

Q. Did you ever suggest to Mr. Casey or Mr. Ogilvie or either member of their firm, that you use this particular document rather than any other document?—A. No.

Q. Or a chattel mortgage?—A. No.

Q. Did they ever suggest it to you?—A. No.

And also:

Q. What was your idea of what you were giving them?—A. What we were giving the finance company?

Q. Yes?—A. When I took the invoice down we would pay some money down on the car that they were advancing us a portion of the invoice price. We had to sign some kind of a time contract and also sign a note to the finance company to come due either two, three, four or five months.

Q. What was your idea as to what you were giving them by signing this contract when you also signed a note?—A. I could not tell you. I didn't know whether I was giving them a lien or a chattel mortgage or what I was giving them. I never read it through to see what I was giving them.

Q. Do you know the difference between a lien and a chattel mortgage?—A. No, I never read one of those contracts to see what I was giving them.

Q. But you feel you were giving them some kind of security on the cars?—A. I knew the practice with our cars, when either Ogilvy or Casey would come around and check our cars at the last of the month, we had to pay them for the cars that we had sold that were on our financed cars, once they asked us to pay out.

Q. Did you know or feel that they had any rights in these cars under that contract?—A. I knew that they advanced us so much money on the car.

Q. Who did you consider owned the car?—A. *I considered we owned the car.*

Q. Did you consider they had any rights in the car?—A. They had a certain interest in the car.

Q. How would you define their interest?—A. I would pay them back what they advanced us when they car-checked us.

Q. You would pay them what they advanced you people, but what interest would they have in the car, suppose you had not paid?—A. If I did not pay it to them at the time, it would still be owing to them.

Q. Suppose you never paid it, what interest would they have in the car?—A. *If the car was sold I don't think they would have any interest in it.*

Q. If the car was not sold?—A. That money would still be owing to them.

Q. If you did not pay it when the note came due, what would their rights, if any, be in the car?—A. Their interest in the car would be what they advanced us on it.

Facing this evidence, it is impossible for me to reach the conclusion that the learned trial judge and the four members of the Court of Appeal for New Brunswick certainly erred in refusing to infer from these facts the implied tacit contract which Mr. Anglin very fairly stated was necessary to establish a preference in favour of the appellants. I believe, like the trial judge and the Appeal Court, that the record and the admissions of the parties clearly establish that the real transaction in this case was a loan to the dealer. It is remarkable that there is no evidence at all whereby the court could come to any other finding. Not one of the appellants' witnesses even suggested that the dealer sold them the cars. Their counsel argues that before the appellants conditionally sold the cars to the dealer, they must have first obtained title to the cars in some manner which is left a matter of conjecture. The trial judge has found as a fact that the transaction was really a loan on the security of the conditional sale which was invalid because, as a matter of fact, the appellants were never owners of the cars.

This decision has been affirmed in the Court of Appeal and we are practically in the same situation as the House of Lords in *Maas* v. *Pepper* (1); and, using the words of Lord Halsbury, at page 104, I would say that the trial judge came to the right conclusion on a question of fact. It also seems to me that the whole evidence points in the one direction. I do not think that the sale was a reality; these were loans on the security of chattels, without due compliance with the requirements of the law of New Brunswick for the protection of creditors; the bankrupts may have acquired more credit than they ought, when the appellants left in their open and public possession as owners to retail to the public the cars which they now claim as their own. This alleged secret and tacit separation of the legal and beneficial property leaving the alleged assignor with the possession of the property allegedly conveyed as re-

(1) [1905] A.C. 102.

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puted owner, would leave the appellants liable to the casualties of Smith & Hogan's trade, and therefore, in equity, after the latter's failure, they are only entitled to come in *pari passu* with the rest of the creditors.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellants: *W. Arthur I. Anglin.*

Solicitor for the respondent: *Cyrus F. Inches.*