IN THE MATTER OF GRAND RIVER MOTORS LTD. (DEBTOR)
EX PARTE—COMMERCIAL FINANCE CORPORATION LTD.

1933

*June 12, 13.
*June 28.

COMMERCIAL FINANCE CORPORATION LTD (DEFENDANT)..... APPELLANT;

AND

N. L. MARTIN (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
(SITTING IN BANKRUPTCY)

Conditional sale—Bill of sale—Validity as against trustee in bankruptcy—Trust—Estoppel.

Respondent, as trustee in bankruptcy of an automobile dealer in Ontario, disputed the right claimed by appellant, as vendor to the dealer under conditional sale agreements, in certain automobiles, in stock on the

* PRESENT:—Rinfret, Lamont, Smith, Cannon and Hughes JJ.

(1) (1911) 28 R.P.C. 157, at 163.

1933

In re GRAND RIVER MOTORS LTD.

COMMERCIAL FINANCE CORP. LTD. *v.* MARTIN.

dealer's premises at the time of the assignment in bankruptcy. Two of the automobiles, Viking cars, had been ordered by the dealer from the maker, and shipped to the dealer by freight, the bills of lading being sent to a bank with draft for price attached, so that the dealer could get possession by payment of the draft. The dealer, having ascertained the serial numbers of the cars, executed an "indenture," in reality a bill of sale, purporting to sell, assign, transfer, and set over the cars to appellant in consideration of the price represented by the drafts. The bill of sale was not registered. The appellant and the dealer then executed a conditional sale agreement (which was registered) by which appellant agreed to sell the cars to the dealer for the amounts represented by the drafts, the property in the cars to remain in appellant until the price was paid. Appellant then gave cheques to the dealer with which the dealer paid the drafts and got possession of the cars. In the case of the other cars, the dealer, when ordering one, sent its driver to the maker's factory with the dealer's blank cheque, which was filled in for the price and handed to the maker, the driver then taking possession of the car and driving it to the dealer's place of business, where it went into stock. The dealer then executed an "indenture," or bill of sale (not registered), of the car to appellant, which then executed a conditional sale (registered) of it to the dealer for the original price, or 90% of it, and gave its cheque to the dealer for that sum, thus enabling the dealer to meet its cheque to the maker of the car.

Held (affirming judgment of the Court of Appeal, Ont., [1932] O.R. 712), that, as against respondent, the bills of sale and conditional sale agreements were invalid.

As to the Viking cars—*Per* Rinfret, Smith and Hughes JJ.: The attempted transfer of ownership from the dealer to appellant, by means of the "indenture" or bill of sale and payment by appellant of the drafts, came within s. 14 of the *Bills of Sale and Chattel Mortgage Act*, R.S.O. 1927, c. 164 (s. 14 extending the Act to a sale of goods which may not be the property of or in the possession, custody or control of the bargainer or any person on his behalf at the time of the making of the sale), and, in the absence of registration, was void as against respondent. The presence of s. 14 in the Ontario Act distinguishes this case from *In re Estate of Smith & Hogan Ltd.*, [1932] Can. S.C.R. 661, which would have applied had s. 8 of the Act stood alone, as s. 8 (like s. 6 of the New Brunswick Act dealt with in the *Smith & Hogan* case) does not apply to a transfer of a mere right to acquire ownership of chattels (Ontario cases cited), and, at the time of execution of the "indenture," ownership was still in the shipper, and all the dealer had was a right to acquire ownership by payment of the draft, and this right or interest in the property was all that passed by virtue of the "indenture." *Per* Lamont J. (concurring that the bills of sale were invalid, but on different grounds): The documents and course of dealing clearly established an intention of the dealer and appellant that the dealer should acquire title to the cars from the shipper and then, having the property in them, should sell them to appellant, and appellant, should in turn sell them back to the dealer under a conditional sale agreement. The bill of sale was, for convenience, drawn up and executed preparatory to completion of the transaction, but was not to operate as a bill of sale until the dealer had the cars upon its premises. The order of

the steps toward completion was immaterial, the documents were effective from the moment the parties intended they should become operative. The *Smith & Hogan* case (*supra*) did not apply because, in the present case, a court could not, without doing violence to the language used in the bill of sale, find as a fact that the intention was that appellant, in consideration of the cheques which it advanced, was to have only an equitable right to acquire the ownership and possession of the cars, and not the absolute property in them.

As to the other cars—The ownership and property therein vested in the dealer upon delivery to it, and the "indenture" or bill of sale by it to appellant, without change of possession or registration, came within s. 8 of the Act and was void as against respondent.

Ownership never having passed to appellant as against respondent, appellant was not, as against respondent, in a position to make a conditional sale of the cars to the dealer, retaining the ownership.

Appellant's contention that, in view of the general course of dealings between the dealer and appellant in connection with the financing of the purchase of the cars, a trust was created, by which the dealer held the cars in trust for appellant, and unaffected by said Act, was rejected.

It was held further, that the giving up by respondent to appellant of possession of the cars had not, under the circumstances in question, raised an estoppel against respondent.

APPEAL (by leave of a judge of the Supreme Court of Canada) from the judgment of the Court of Appeal for Ontario (1) dismissing an appeal by the present appellant from the judgment of Sedgewick J. (2), sitting as a Judge in Bankruptcy upon the trial of an issue between the parties, whereby it was declared that certain alleged bills of sale (not registered) and conditional sale agreements (registered) were invalid as against the present respondent (trustee in bankruptcy of Grand River Motors Ltd.), and whereby it was ordered that the present respondent should recover from the present appellant the sum of $9,487.12, the value of certain automobiles mentioned in the said alleged bills of sale and conditional sale agreements, and which had been delivered by the present respondent to the present appellant.

The material facts of the case are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The appeal was dismissed with costs.

J. C. McRuer K.C. and *F. A. Brewin* for the appellant.

J. M. Bullen and *L. Davis* for the respondent.

(1) [1932] O.R. 712; 14 C.B.R. 165; [1932] 4 D.L.R. 657.
(2) [1932] O.R. 101; 13 C.B.R. 107; [1932] 1 D.L.R. 565.

1933

In re GRAND RIVER MOTORS LTD. — COMMERCIAL FINANCE CORP. LTD. *v.* MARTIN.

The judgment of Rinfret, Smith and Hughes JJ. was delivered by

SMITH, J.—Grand River Motors Limited, the debtor, carried on business in Galt and Hamilton as automobile dealers, and, in the course of their business, ordered and received the following automobiles, of the values set out:

La Salle coupé, Serial No. 413537....	$2,789 50
Viking sedan, Serial No. V.D.S. 979...	1,900 00
Oldsmobile coupé, Serial No. 27311...	780 43
Viking sedan, Serial No. V.B. 353....	1,800 00
Oldsmobile coupé, Serial No. 27529...	708 27
Oldsmobile coach, Serial No. 27588...	793 92
Oldsmobile coach, Serial No. 27456...	715 00
	$9,487 12

These automobiles were in stock in the debtor's premises at the time of the assignment.

The two Viking automobiles were ordered from the makers in the United States, and were shipped to the debtor by freight, and the bill of lading was sent to a bank with a draft for the price attached, so that the debtor was able to get possession by payment of the draft. The debtor ascertained from the bill of lading at the bank the serial numbers of the cars, and then went to the appellant company, and executed an "indenture" in form Exhibit 2 (*b*), in reality a bill of sale, purporting to sell, assign, transfer and set over to the appellant company these automobiles described by their serial numbers, in consideration of the price represented by the drafts. These bills of sale were not filed, as provided by the *Bills of Sale and Chattel Mortgage Act.*

The appellant and the debtor then executed a conditional sale agreement, by which the appellant agreed to sell the automobiles to the debtor for the amounts represented by the drafts, this purchase price to be paid by the debtor to the appellant at stated times, the property in the automobiles to remain in the appellant until the price should be paid.

On completion of these documents, cheques for the amount of the drafts payable to the bank were given the debtor, with which the debtor paid the drafts and got possession of the bills of lading, and the cars.

These facts place the transaction in connection with the two Viking cars practically on all fours with the facts in *In Re Estate of Smith & Hogan Ltd.* (1). The statutes having a bearing in that case were, the *Bills of Sale Act,* R.S.N.B. 1927, ch. 151, and the *Conditional Sales Act,* R.S.N.B. 1927, ch. 152. The gist of the decision in that case was that the vendor in the conditional sale agreement had acquired the legal title and ownership of the cars at the time the conditional sale agreement was made, and that this legal ownership had never passed to or become vested in the dealer, who was the purchaser under the conditional sale agreement. In both cases the cars were ordered by the dealer, were shipped to the dealer, and bills of lading sent with sight draft attached. The legal ownership, therefore, was retained by the shipper, and the dealer's only right at that stage was a right to obtain legal ownership by payment of the draft.

In the *Smith & Hogan* case (1) it was held that, by virtue of the various documents and the payment of the draft, the legal title and ownership, on payment of the draft, passed to the vendor in the conditional sale agreement, and not to the dealer, who was the vendee in that agreement.

Here, also, the dealer—that is, the debtor—obtained no legal title or ownership to the cars by virtue of the shipment and the sending of the bills of lading with sight draft attached; the title, at that stage, being still in the shipper. The "indentures" or bills of sale from the debtor to the appellant did not pass the legal title to the appellant, because the title or ownership still remained in the shipper, and could not be transferred to the appellant until the drafts were paid. Ownership, however, would, as between the two parties, pass to the appellant on payment of the draft, which would give the appellant complete title and ownership of the cars, unless the *Bills of Sale and Chattel Mortgage Act* of Ontario, R.S.O. 1927, ch. 164, makes a transfer of legal ownership by that method void as against the creditors.

In the *Smith & Hogan* case (1) it was held that the *Bills of Sale Act* of New Brunswick, sec. 6, has to do with a transfer or sale of chattels where the transferor or seller has

(1) [1932] Can. S.C.R. 661.

1933

In re GRAND RIVER MOTORS LTD.

COMMERCIAL FINANCE CORP. LTD. *v.* MARTIN.

Smith J.

the ownership of the chattels at the time of transfer or sale, and does not apply to a transfer of a mere right to acquire ownership of chattels.

This principle seems to have been well established by Ontario decisions under sec. 8 of the Ontario statute.

In *Burton* v. *Bellhouse* (1), it was held that a verbal agreement to buy from a manufacturer two half-finished locomotives, to be finished, passed the property, and that the Chattel Mortgage Act did not apply.

In *Coyne* v. *Lee* (2), it was held that a chattel mortgage of goods to be acquired by the mortgagor was good as against creditors, on the ground that the mortgagee acquired an equitable title, which became a legal title as soon as the goods were acquired.

In *Horsfall* v. *Boisseau* (3), Hagarty, C.J.O., says:

> Before the passing of the Act of 1892, there does not appear to have been any statutable provision respecting future goods brought into a stock in trade on which a chattel mortgage was given.

In *Banks* v. *Robinson* (4), Boyd, C., says:

> My opinion is, that the Bills of Sale and Chattel Mortgages Act, R.S.O., ch. 125, 1887, was not intended to cover agreements creating equitable interests in non-existing and future-acquired property. The Act relates to existing chattels capable of manual delivery and susceptible of full and certain description for the purpose of identification, at the date of the instrument.

Many other cases to the same effect might be cited. Here the goods were in existence, and fully identified, but, as already stated, the debtor had not the property in them, and they were not capable of delivery by the debtor at the date of the instrument; and a mere equitable title was transferred at that stage, capable of being converted into a full legal title by acceptance and payment of the draft.

R.S.O. 1927, ch. 164, sec. 8, is the same as sec. 6 of the New Brunswick statute and, if it stood alone, I am unable to see any distinction between the *Smith & Hogan* case (5) and this one, as far as these Viking cars are concerned. The "indenture", or bill of sale, in this case could not transfer the property and ownership in the cars to the appellant, because the debtor did not have such property and ownership, and surely could not transfer a property that it did not own, but which was still owned by the shipper. All that

(1) (1860) 20 U.C.Q.B. 60.
(2) (1887) 14 Ont. A.R. 503.
(3) (1894) 21 Ont. A.R. 663 at 665.
(4) (1888) 15 O.R. 618, at 622.
(5) [1932] Can. S.C.R. 661.

the debtor had when this "indenture" was executed was a right to acquire the ownership by payment of the draft, and this right or interest in the property was all that passed by virtue of the "indenture".

Section 8 referred to, like sec. 6 of the New Brunswick Act, deals only with a sale of chattels, which means a transfer of the ownership. On this principle it was held in the Ontario courts that the provisions of section 8 did not apply to property to be acquired by the vendor in future, or not capable of immediate delivery. The scope of sec. 8 in the original Act was enlarged, in 1892, by 55 Vict., ch. 26, sec. 1, which is now sec. 14, and reads as follows:

> This Act shall extend to a mortgage or sale of goods and chattels which may not be the property of or in the possession, custody or control of the mortgagor or bargainor or any person on his behalf at the time of the making of the mortgage or sale, and notwithstanding that such goods or chattels may be intended to be delivered at some future time, or that the same may not at the time of the making of the mortgage or sale be actually procured or provided or fit or ready for delivery, or that some act may be required for the making or completing of such goods and chattels or rendering the same fit for delivery.

This section seems to cover precisely the attempted transfer of the ownership in these Viking cars by means of the "indenture," or bill of sale, and payment of the drafts by the appellant. It was a sale, or attempted sale, of goods and chattels which were not the property of or in the possession, custody or control of the bargainor, or any person on his behalf, at the time of the making of the sale, which comes within the precise words of this section of the statute. That transfer, not having been filed or registered pursuant to the Act, becomes, by virtue of the Act, void as against creditors of the transferor. The language of the section is, no doubt, open to criticism, because it is difficult to understand how one is able to sell goods and chattels that are not his property, though there can be no doubt of his ability to transfer an interest which he may have in goods and chattels that he does not own. This section, however, in terms extends to any instrument that purports to sell goods of which the vendor is not the owner, and therefore extends to any interest in chattels transferred by such instrument.

Mr. McRuer realized that this section in the Ontario statute distinguishes the present case from the case of *Smith* and *Hogan Ltd* (1), and sought, in a very able argu-

(1) [1932] Can. S.C.R. 661.

1933

In re GRAND RIVER MOTORS LTD. — COMMERCIAL FINANCE CORP. LTD. *v.* MARTIN. — Smith J.

ment, to overcome this difficulty upon the theory that a trust was created by which the debtor held these cars in trust for the appellant, to which the *Bills of Sale and Chattel Mortgage Act* does not apply. Before dealing with this contention, I shall refer to the remaining cars in dispute, which were dealt with in an entirely different manner.

These were all purchased from the General Motors of Canada, Limited. When the debtor was ordering one of these cars, it would send its driver to the factory of the General Motors with a blank cheque of the debtor, which would be filled in for the price of the car to be taken over, and would be handed to the General Motors Limited. The driver would then take possession of the car, and drive it to the place of business of the debtor, where it would be taken into stock. The debtor would then execute an "indenture," or bill of sale of the car to the appellant, who would then execute a conditional sale of it to the debtor for the original price, or ninety per cent of it, and the debtor would receive appellant's cheque, payable to the debtor, for the purchase price stated in the conditional sale agreement. The debtor would then deposit this cheque to its credit in the bank, which would provide the funds required to meet the cheque given to the General Motors, if no funds, or no sufficient funds, were otherwise on hand to meet such cheque.

It seems to me impossible to argue that the ownership and property in these cars, purchased from the General Motors Limited, did not vest in the debtor upon delivery. The "indenture" or bill of sale of these cars to the appellant, without change of possession, and without registration, is a document coming precisely within the provisions of section 8 of the Act, and void as against creditors of the debtor. As against creditors, therefore, the appellant acquired no title or ownership by virtue of the bills of sale, and therefore, as against creditors, was not in a position to make a conditional sale of the cars to the debtor, retaining the ownership, because, as against the creditors, that ownership never passed to the appellant.

This difficulty, again, is sought to be avoided upon the theory of a trust having been created by the act and intention of the parties. It is argued that, in view of the general course of dealings between the debtor and the appel-

lant in connection with the financing of the purchase of these cars by the debtor, it should be held that such a trust was created. As between themselves, there was no occasion for the creation of any trust, because, as against the debtor, the appellant obtained complete title and ownership to these automobiles, and the conditional sale agreement was perfectly valid. In order to hold that the debtor was a trustee for the appellant, it must be determined that the legal title and ownership was vested in the debtor and the beneficial interest in the appellant. The very reverse was, however, the real situation, the appellant's difficulty being that its legal ownership, by virtue of the Act, was void as against creditors.

The argument of the appellant must be that the provision of the Act that makes the appellant's title void has, at the same time, the effect of vesting or retaining the legal ownership in the debtor as trustee, with a valid equitable ownership in the appellant. To hold that a trust in favour of the appellant was thus created, unaffected by the provisions of the statute, would virtually render the statute of no effect. This argument seems to be untenable.

It was also contended that the respondent was estopped by his own conduct from recovering the amount claimed. The appellant demanded from him, and obtained, possession of the cars, which the appellant sold; and it is argued that this giving up of possession by the trustee amounts either to an actual abandonment of the property by the trustee or is in the nature of an estoppel against the trustee. The learned trial judge holds that the trustee did not agree with the appellant that the appellant was entitled to possession of the cars by virtue of its securities, but intimated, in giving up possession, that the question of appellant's title was not admitted, and was being investigated by its solicitors. He further points out that the trustee cannot, without the authority of the inspectors, give up any right which the trustee has in respect of the debtor's property, and that therefore no act of the trustee, unauthorized by the inspectors, can raise an estoppel against the trustee.

I agree with the finding of the trial judge that there was no estoppel under the circumstances.

The appeal must be dismissed with costs.

1933

In re GRAND RIVER MOTORS LTD.

COMMERCIAL FINANCE CORP. LTD. *v.* MARTIN.

LAMONT, J.—In this case I concur in the conclusion reached by my brother Smith. In so far as the automobiles purchased from the General Motors are concerned, I concur for the reason stated in my brother's judgment. In so far as the two Viking cars are concerned, I concur for the reason that the evidence, in my opinion, clearly establishes an intention on the part of both the dealer (The Grand River Motors, Limited) and the Commercial Finance Corporation that the dealer should acquire title to the cars from the shipper and then, having the property in them, should sell them to the Corporation. The Corporation, it was understood, would in turn sell them back to the dealer under a conditional sales agreement. That such was the mutual intention is made clear by a perusal of the documents and an examination of the course of dealing between the parties.

When the cars arrived from the shipper, and the dealer was notified that the bill of lading with a draft attached for the price was at the bank, the dealer inspected the cars and ascertained the descriptive number and model of each. These numbers it took to the Corporation, got the Corporation's cheque for the price and gave the Corporation a bill of sale of the cars, which were still in the possession of the railway company, and which were to be delivered to the dealer on payment of the draft. The cheque of the Corporation paid the draft; the cars were handed over to the dealer, and were placed in the dealer's warehouse. That the dealer was to acquire the property in the cars before selling them is shewn by the bill of sale (designated an "Indenture"), given by the dealer and accepted by the Corporation. In that document the dealer is described as "vendor" and the Corporation as "purchaser." The document contains the following:—

> WITNESSETH that, in consideration of the said total selling price of lawful money of Canada paid by the PURCHASER to the VENDOR (the receipt thereof is by him acknowledged) the VENDOR hath sold, assigned, transferred and set over and doth hereby sell, assign, transfer and set over unto the PURCHASER, its successors and assigns, the motor vehicles of the respective numbers, makes and models and for the respective prices shewn on the margin hereof, which said motor vehicles are contained in, upon or about the premises of the VENDOR, situate and being at No. 70 John Street North, in the City of Hamilton, and County of Wentworth, Ontario.
>
> * * *

THE VENDOR hereby represents and warrants to the PURCHASER that the said motor vehicles are brand new, and COVENANTS that he, the VENDOR, is rightfully and absolutely possessed of and entitled to the said motor vehicles and rightfully entitled to sell the same to the PURCHASER, and that the latter has, by virtue hereof, become the rightful owner thereof by a good and sufficient title free and clear of all liens, charges and encumbrances whatsoever

By this document the parties in the clearest and most explicit language have declared:

1. That the dealer was selling to the Corporation the cars described in the document.

2. That the dealer was rightfully and absolutely possessed of the cars.

3. That it was entitled to sell them to the Corporation, and

4. That the Corporation, by virtue of this bill of sale, had become the rightful owner of the cars.

I do not think language more definite or explicit could be used to convey the idea that the dealer was selling to the Corporation and the Corporation was purchasing cars of which the dealer was the owner and of which it had absolute property.

It was, however, argued that at the moment the bill of sale was signed the dealer did not have title to the cars, that the title was then in the shipper and, therefore, the dealer could not pass to the Corporation property in the cars which he did not possess. The answer to this argument, in my opinion, is that the bill of sale was executed at that particular time for the convenience of the dealer in the ordinary course of business and to avoid the necessity of returning to execute it after he had paid the shipper's draft. It was, however, not intended to operate as a bill of sale until the dealer had the cars upon its premises, where he could not have them until after the draft was paid. This is shewn by the language used in the first of the above quoted paragraphs in which it is declared that the cars being sold

are contained in, upon or about the premises of the Vendor, situate and being at No. 70 John Street North, in the City of Hamilton,

and also by the declaration that the dealer was selling its own cars. What took place in this case was just an ordinary, everyday transaction in which the conveyance was drawn up and executed preparatory to the completion of the transaction. I cannot think that the legal effect of

1933

In re GRAND RIVER MOTORS LTD. v. COMMERCIAL FINANCE CORP. LTD. v. MARTIN.

Lamont J.

such a transaction can be made to depend upon whether the dealer executes the bill of sale before he pays the shipper's draft and receives the bill of lading, or afterwards. The order in which the various steps toward completion are taken is immaterial, the documents are effective from the moment the parties intended they should become operative.

The appellant strongly relied upon the judgment of this court in *In re Estate of Smith and Hogan, Limited* (1). In my opinion that case has no application to the one before us. In the *Smith* and *Hogan* case (1), which in some respects resembles the present one, there was no bill of sale from the dealer to the financial company which was supplying the dealer with money to carry on its business. There was, in that case, nothing to indicate the real nature of the transaction except the cheques representing the moneys advanced, the conditional sales agreement from the financial company to the dealer, and the course of business between the parties. There was no evidence, verbal or written, that the dealer had ever agreed to sell to the financial company, or that the company had agreed to purchase the automobiles described in the conditional sales agreement. The intention of the parties, therefore, had to be inferred from the conditional sales agreement and the course of dealing between the parties. This court, by a majority, drew the inference (p. 668),

> 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.

and (p. 669)

> that an agreement was arrived at * * * by which Smith & Hogan, Limited, in consideration of the cheques, transferred to the appellant their right to acquire ownership and possession of the cars.

The ratio of that decision, therefore, was that both parties understood and intended that what the company was to obtain for its cheque was a transfer of the dealer's right to acquire ownership and possession of the cars, and not the cars themselves. In other words, the company was to receive what, in effect, would be an assignment of the dealer's rights under its contract to purchase.

As I have said, that case, in my opinion, can have no application here, for, in the case before us, it seems to me

(1) [1932] Can. S.C.R. 661.

impossible for a court, without doing violence to the language used in the bill of sale, to find as a fact that the intention of the parties was that the Commercial Finance Corporation, in consideration of the cheques which it advanced, was to have only an equitable right to acquire the ownership and possession of the cars, and not the property in the cars themselves. The question involved, in my opinion, is one of fact.

1933

In re GRAND RIVER MOTORS LTD.

COMMERCIAL FINANCE CORP. LTD. *v.* MARTIN.

Lamont J.

CANNON J., without delivering written reasons, held that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Briggs, Frost & Birks.*

Solicitors for the respondent: *McMaster, Montgomery, Fleury & Company.*

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Hughes JJ.