FILING UNDER THE CONDITIONAL SALES ACT: IS IT NOTICE TO SUBSEQUENT PURCHASERS?*

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I.

There is a widely—indeed, almost universally—held view among the profession that when a seller under a conditional sale agreement files it in accordance with the Conditional Sales Act, his rights respecting the goods sold under the agreement are protected even against a subsequent purchaser for value and without notice. At the risk of being accused of launching a heresy, it is submitted that this view does not accurately express the law in most of the common-law provinces and the territories. A strong argument can, it is believed, be made that where a buyer under a conditional sale agreement transfers the goods for value to a subsequent purchaser who receives them without notice of the agreement, the subsequent purchaser acquires a good title as against the conditional seller even if the agreement is duly registered.

II. *The Argument*

The key section of the Conditional Sales Act, as it appears in New Brunswick, is section 2, which reads as follows:

> Where possession of goods has been delivered to a buyer under a conditional sale, every provision contained therein whereby the property in the goods remains in the seller is, unless this Act is complied with, void as against a creditor and as against a subsequent purchaser or mortgagee claiming from or under the buyer in good faith for valuable consideration and without notice; and the buyer shall, notwithstanding such provision, be deemed as against such persons to be the owner of the goods.[1]

A similar section appears in all the common-law provinces and

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[1] R.S.N.B., 1952, c. 34, s. 2.

the territories,[2] except Manitoba where there is no general scheme of registering conditional sales.[3]

That section sets forth the effect of a conditional sale agreement if the Act is not complied with, either by registration or otherwise. Unless the Act is complied with, it provides, any condition reserving title in the seller is void—not against everyone, but void as against a creditor and as against a subsequent purchaser or mortgagee claiming from or under the conditional buyer in good faith, for valuable consideration and without notice. In so far as a subsequent purchaser without notice is concerned, it is the same as if the conditional sale had been absolute.

But nowhere in the Act will one find a provision setting forth the effect of ordinary[4] registration.[5] It may, of course, be argued that since the Act declares that conditions reserving title in unregistered agreements are void against subsequent purchasers for value and without notice, then by implication it provides that such conditions in registered agreements are valid against innocent purchasers. But reading into statutes provisions that are not there is at best dangerous, and this is particularly so where it would take away the rights of innocent persons as it would here. Further, it is suggested that implying such a condition would fly in the face of the whole purpose and object of the Act as it appears from its provisions. The purpose of the Act is to limit the rights of conditional sellers, not to add to them. Thus the section already cited makes conditions reserving title in the seller void unless the agreement is

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[2] Newfoundland, 1955, no. 62, s. 3 (apparently not proclaimed); Nova Scotia, R.S.N.S., 1954, c. 47, s. 2(1); Prince Edward Island, R.S.P.E.I., 1951, c. 28, s. 2(1); Ontario, R.S.O., 1950, c. 61, s. 2(1), (3); Saskatchewan, 1957, c. 97, s. 3(1); Alberta, R.S.A., 1955, c. 54, s. 3(1); British Columbia, R.S.B.C., 1948, c. 64, s. 3(1); Northwest Territories, R.O.N.W.T., 1956, c. 15, s. 3(1); Yukon, 1954 (3rd sess.), c. 9, s. 3(1).

[3] The Lien Notes Act, R.S.M., 1954, c. 144, s. 2, provides that certain requirements must be fulfilled as regards some conditional sales but it is not necessary to register them. The argument presented in this article is also inapplicable to Manitoba because of s. 28(3) of the Sale of Goods Act, R.S.M., 1954, c. 233.

[4] Some of the statutes have special provisions respecting goods affixed to realty and filing is made actual notice. See New Brunswick, *supra*, footnote 1, s. 16(7); Newfoundland, *supra*, footnote 2, s. 14(7); Saskatchewan, *supra*, footnote 2, s. 17(5) (as amended by 1958, c. 84, s. 5(3)); British Columbia, *supra*, footnote 2, s. 14(5). Making filing notice is, of course, perfectly proper here because the goods become in effect realty.

[5] Hereafter, reference will largely be made to registration as if it were the only means of complying with the Act. In most provinces this can also be done, in the case of manufacturers, by marking their names on the goods as provided in the Act. See New Brunswick, *Ibid.*, s. 4; Newfoundland, *ibid.*, s. 5; Ontario, *supra*, footnote 2, s. 2(5); Saskatchewan, *ibid.*, s. 5(7); Alberta, *supra*, footnote 2, s. 11(1). The same argument applies to this manner of complying with the Act as registration.

registered or the Act is otherwise complied with, and a later section seriously curtails the seller's right of sale on repossession.[6] It is submitted, therefore, that the legislature intended to make conditions reserving title void unless the agreement was registered, and not to interfere with them if registered, but rather to allow them whatever operation they had before. This, I suggest, is a fair inference to draw if one reads the Act without preconceived notions.

The idea is not a novel one; it is supported by an impressive array of authorities. Perhaps the best statement is that of Orde J. of the Supreme Court of Ontario in *Commercial Finance Corporation Limited* v. *Stratford*[7]. He says:

> The Act is designed for the protection of persons dealing with one to whom the possession but not the ownership of a chattel has been given, and requires the owner to comply with certain provisions of the Act if he desires to preserve his ownership. But, having complied with those provisions, he stands in no better or higher position than if the Act had not been passed.

That being so it is necessary to examine how the common law resolved the problem and to see what relevant legislation is in force besides the Conditional Sales Act.

The common-law position may be illustrated by *Forristal* v. *McDonald*[8] in the Supreme Court of Canada. There A, the plaintiff, consigned crude oil to B, a refiner, on the express agreement that no property in the oil should pass to B until he had made certain payments to A (an ordinary conditional sale). Before these payments were made, B sold the oil to C for value, C believing that B was the owner of the oil and was entitled to sell it. In an action brought by A, the conditional seller, against C, the subsequent purchaser, it was held that he could recover the price of the oil from C, though the latter was a purchaser in good faith, for value and without notice.

Strong J. in the course of his judgment cited the following

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[6] New Brunswick, *ibid.*, s. 14; Newfoundland, *ibid.*, s. 12; Nova Scotia, *supra*, footnote 2, s. 11; Prince Edward Island, *supra*, footnote 2, s. 10; Ontario, *ibid.*, s. 8; Saskatchewan, *ibid.*, s. 14; Alberta, *ibid.*, s. 19; British Columbia, *supra*, footnote 2, s. 12; Northwest Territories, *supra*, footnote 2, s. 11; Yukon, *supra*, footnote 2, s. 11. All the sections for that matter are aimed against the seller.

[7] (1920), 47 O.L.R. 392, at p. 396; see also *Canadian Westinghouse Co.* v. *Murray Shoe Co.* (1914), 31 O.L.R. 11, at p. 14; 20 D.L.R. 672, at p. 674; *The Commercial Credit Co. of Canada Ltd.* v. *Fulton Bros.* (1922), 55 N.S.R. 208, at pp. 240-243; 65 D.L.R. 699, at pp. 719-722, per Mellish J.; *Hannah* v. *Pearlman*, [1954] 1 D.L.R. 282, at p. 286; see also Falconbridge Handbook on the Law of Sale of Goods (1921), p. 60.

[8] (1882), 9 S.C.R. 12.

passage of Blackburn J. in *Cole and Another* v. *The North Western Bank*:[9]

> At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded as against those who were induced bona fide to act on the faith of that apparent authority, and the result as to them was the same as if he had really given it.

But B in this case did not, as Strong J. went on to point out, have authority from A to sell the goods; nor was he clothed with apparent authority to sell. He was not a factor or agent for sale for A, because he did not in fact carry on the business or calling of a factor. And A could not be estopped from pleading his title merely because he had entrusted B with the possession of his property.

If, then, there was no legislation other than the Conditional Sales Act, in filing a conditional sales agreement a seller's right would be protected even against a *bona fide* purchaser for value without notice—not by virtue of anything in the Act itself, but by virtue of the common law.

But there is other legislation.

The common-law position may have been satisfactory in rural England, but it was felt to be ill adapted to the needs of a commercial community and it was altered by the British Parliament in the Factors Act, 1877,[10] which was repealed and re-enacted in the Factors Act, 1889,[11] the relevant portion of which is section 9. That section reads as follows:

> Where a person, having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the document of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or document of title under any sale, pledge or other disposition thereof, *or under an agreement for sale, pledge or other disposition thereof*, to a person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile

[9] (1875), L.R. 10 C.P. 354, at pp. 362-363.
[10] 40 & 41 Vict., c. 39, s. 4. [11] 52 & 53 Vict., c. 45.

agent in possession of the goods or document of title with the consent of the owner.

An almost identical provision (except that it does not include the words in italics) was passed a few years later as section 25(2) of the Sale of Goods Act, 1893.[12] When the Sale of Goods Act, 1893 was passed, it had been planned to repeal section 9 of the Factors Act, 1889 but it having been observed that section 9 was somewhat broader, it was retained.[13] There existed, therefore, two sections on the English statute book of almost identical meaning, a point which it will be seen is of some importance.

Both these sections are reproduced in the legislation of New Brunswick, Saskatchewan, Alberta and the Territories.[14] In Newfoundland, Nova Scotia, Ontario, Manitoba and British Columbia the Sale of Goods section[15] appears but not that in the Factors Act. Prince Edward Island only has the section in the Factors Act.[16] It should be observed, however, that in Prince Edward Island, Manitoba and Alberta there are provisions stating that these sections do not apply to conditional sales respecting which the provisions of the Conditional Sales Act have been complied with.[17] It may be said in passing that it is not easy to understand what the section can apply to except such conditional sales because those that do not comply with the Act are declared to be void.[18] But in view of these sections the argument advanced in this article is not applicable to Prince Edward Island, Manitoba or Alberta and no further reference to the legislation of these provinces will, in general, be made.

Section 9 of the Factors Act and section 25(2) of the Sale of Goods Act provide in effect that if a person, B, who has bought or agreed to buy goods, obtains possession of them with the consent of the seller A, and then sells or otherwise disposes of them

[12] 56 & 57 Vict., c. 71.

[13] See Chalmer's Sale of Goods (12th ed. 1945), p. 192.

[14] New Brunswick, R.S.N.B., 1952, c. 79, s. 12, c. 199, s. 24(2); Saskatchewan, R.S.S., 1953, c. 351, s. 10, c. 353, s. 26(2); Alberta, R.S.A., 1955, c. 106, s. 10(1), c. 295, s. 27(2); Northwest Territories, R.O.N.W.T., 1956, c. 33, s. 10, c. 84, s. 25(2); Yukon, 1954 (3rd sess.), c. 25, s. 10, c 22, s. 25(2).

[15] Newfoundland, R.S.N., 1952, c. 222, s. 26(2); Nova Scotia, R.S.N.S., 1954, c. 256, s. 27(2); Ontario, R.S.O., 1950, c. 345, s. 25(2); Manitoba, R.S.M., 1954, c. 233, s. 28(2); British Columbia, R.S.B.C., 1948, c. 294, s. 32(2).

[16] R.S.P.E.I., 1951, c. 55, s. 10(1).

[17] *Ibid*, s. 10(2); Manitoba, *supra*, footnote 15, s. 28(3); Alberta, *supra*, footnote 14, c. 106, s. 10(2), c. 295, s. 27(3).

[18] See per Mellish J., in *Commercial Credit of Canada* v. *Fulton Bros.* *supra*, footnote 7, at p. 241; D.L.R., at p. 720; Gilbert D. Kennedy in correspondence in (1954), 32 Can. Bar Review, 1175, at p. 1180. Dr. Kennedy appears to share the view advanced in this article.

to a third person, C, who takes them in good faith, for value and without notice, the effect is the same as if B were a mercantile agent in possession of the goods or documents of title with the consent of the owner. Now a sale by a mercantile agent under these circumstances is as valid as if he were expressly authorized by the owner to make it.[19] This means, in short, that the common law position has been reversed. This may be exemplified by *Lee* v. *Butler*.[20] There A and B entered into a hire-purchase agreement under which A supplied furniture to B on May 5th, 1892. B agreed to pay A £1 on May 6th and £96, 4s., on August 1st. It was agreed that title to the furniture should remain in A until B had made the final payment. Before this payment was made, and in violation of a term providing that B would not remove the goods from her apartment, B sold and delivered the goods to C, who received them in good faith and without notice of A's interest in the goods. A's assignee subsequently sued C to recover the furniture, but the court held that by virtue of sections 2 and 9 of the Factors Act, C acquired a good title against A.

From this it can be seen that, were it not for the Conditional Sales Act, if a buyer in possession of goods under a conditional sale agreement sold and delivered them to a *bona fide* purchaser for value without notice, such purchaser would obtain a good title to the goods. And if Orde J. and the other authorities cited are correct in holding that a seller who registers a conditional sale agreement "stands in no better or higher position than if the Act had not been passed," the inevitable conclusion is, in the absence of other considerations, that if a buyer under a conditional sale sells the goods to a *bona fide* purchaser for value without notice, that purchaser acquires a good title against the conditional seller even though the agreement is duly registered.

But may it not be argued that filing a conditional sale amounts to constructive notice? This question may best be answered by

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[19] See New Brunswick, R.S.N.B., 1952, c. 78, s. 2; Nova Scotia R.S.N.S. 1954, c. 93, s. 2(1); Ontario, R.S.O., 1950, c. 125, s. 2(1); Saskatchewan, R.S.S., 1953, c. 351, s. 3(1); British Columbia, *supra*, footnote 15, s. 60(1); Northwest Territories, R.O.N.W.T., 1956, c. 33, s. 3(1); Yukon, 1954 (3rd. sess.), c. 25, s. 3(1). Newfoundland does not appear to have a similar provision but a factor at common law could sell under these circumstances; see *Pickering* v. *Busk and Another* (1812), 15 East 38, 104 E.R. 758; *Cole and Another* v. *The North Western Bank*, *supra*, footnote 9, sets forth the powers of factors at common law and their extension by the Factors Act.

[20] [1893] 2 Q.B. 318; see also *Cahn and Mayer* v. *Pockett's Bristol Channel Steam Packet Company Limited* [1899] 1 Q.B. 643 as regards the section in the Sale of Goods Act.

citing the classical statement of Lindley L.J., in *Manchester Trust* v. *Furness*.[21] He said:

> As regards the extension of the equitable doctrines of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is not time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country.

These words received the full approbation of Lopes and Rigby L.JJ. and have been frequently cited with approval in English and Canadian cases.[22]

Were there no further authority one could argue from principle that filing under the Conditional Sales Act is not notice for the purposes of the Factors Act or the Sale of Goods Act. But there is authority that confirms the view. A case directly in point is *Commercial Credit Co. of Canada* v. *Fulton Bros.*,[23] of which a simplified though not distorted, statement of the facts is as follows: A delivered a truck to B Co., which was engaged in selling cars and trucks, under the terms of a contract which provided that title was to remain in A. The latter assigned his rights to the plaintiff and the contract was filed pursuant to a provision in the Nova Scotia Bills of Sale Act providing for the filing of conditional sales. B never paid the price but sold the truck to the defendant, who paid valuable consideration and had no notice of the agreement. The plaintiff sued the defendant for conversion of the truck but a majority of the Supreme Court of Nova Scotia

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[21] [1895] 2 Q.B. 539, at p. 545.

[22] See, *inter alia*, *Green* v. *Downs Supply Company*, [1927] 2 K.B. 28, per Scrutton L.J., at pp. 35-36, and Lawrence L.J., at p. 37; *Vowles* v. *Island Finances Ltd.* (1940), 55 B.C.R. 362; [1940] 4 D.L.R. 357; see also *Joseph* v. *Lyons* (1884), L.R. 15 Q.B.D. 285, per Cotton L.J., at p. 286 and Lindley L.J., at p. 287; see also *Wynacht* v. *McGinty* (1912), 12 E.L.R. 116; (*sub nom Whynot* v. *McGinty*, 7 D.L.R. 618; *Nourse* v. *Canadian Canners Ltd.*, [1935] 2 D.L.R. 121.

[23] *Supra*, footnote 7; affirmed on other grounds [1923] A.C. 798, [1923] 3 D.L.R. 611. Numerous cases hold that filing is not notice for the purposes of related provisions: see, for example, *Commercial Securities (B.C.) Limited* v. *Johnston* (1931), 43 B.C.R. 381 (s. 60(1) B.C. Sale of Goods Act—purchase from factor without notice); *Vowles* v. *Island Finances Ltd.*, *supra*, footnote 22 (s. 32(1) B.C. Sale of Goods Act—purchase from conditional seller without notice).

decided in favour of the defendant. The decision was based on various grounds but one of the majority judges, Mellish J., clearly held that filing under the Act did not constitute notice within section 27(2) of the Nova Scotia Sale of Goods Act (which is identical to section 25(2) of the English Act). Having cited the section, he said, in part:

> Whatever view be taken of the other points raised on this appeal, I am of opinion that under the admitted facts, the defendants are absolutely protected by this provision. On two grounds it was suggested that this statute had no application. 1st: That the filed agreement (assuming it to have been filed in compliance with the Bills of Sale Act) was 'notice' to the purchaser and 2nd: That the section quoted had no application to an agreement covered by the Bills of Sale Act.
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> I am unable to agree with either of these contentions. If they are to prevail it is difficult I think to give but a very restricted meaning and purpose, if any, to the foregoing subsection. As already pointed out, sec. 8 of the Bills of Sale Act, 1918, ch. 11, provides that transactions such as those contemplated by this subsection shall be evidenced by instruments in writing which must be filed in accordance with the Act, otherwise they are void as against creditors, purchasers and mortgagees of the party in possession.
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> The foregoing subsection I think 'reinforces' this legislation, to use the language of a recent text writer (Falconbridge on the Sale of Goods, p. 57) and makes such transactions void as against innocent purchasers without notice even if evidenced in writing duly filed. This conclusion implies that filing does not afford the notice contemplated by the Act.[24]

Further support for the view may be found in several cases holding that filing a bill of sale under a Bills of Sale Act is not notice either in equity or for the purposes of a statute in the absence of express provision.[25] Of these, the facts of *Joseph* v. *Lyons*[26] may be given. Here a jeweller assigned his after-acquired stock-in-trade to the plaintiff by a bill of sale subject to a proviso for redemption. The bill of sale was duly filed under the English Bills of Sale Act. The jeweller then pledged the goods with the defendant without authority. Since the goods were future goods, the plaintiff had only an equitable interest in them and such an interest is liable to be displaced by the interest of a subsequent purchaser for value without notice (a situation similar to that under discussion). It was argued, however, that since the defendant might have searched the register of bills of sale, he had constructive

[24] (1922), 55 N.S.R. 208, at pp. 240-241; see also at pp. 242-244, 65 D.L.R. 699, at pp. 719-720, see also at pp. 721-2.

[25] *Joseph* v. *Lyons*, *supra*, footnote 22; *Wynacht* v. *McGinty*, *supra*, footnote 22; *Nourse* v. *Canadian Canners Ltd. supra*, footnote 22; *Mail Printing Co.* v. *Bloor Bldg. Ltd.*, [1934] O.W.N. 404 (not "notice" for purposes of Bulk Sales Act).

[26] *Ibid.*

notice of the plaintiff's interest. But the court held for the defendant. In the words of Cotton L.J.:

> . . . he was not bound to search the register of bills of sale . . . Of course, if he had been informed of the existence of the bill of sale, he would have been bound to search the register in order to inform himself of its contents; but I think that the doctrine as to constructive notice has gone too far, and I shall not extend it.[27]

It may be objected that if the view advanced in this article is correct, then the Conditional Act can have no purpose. This objection can best be answered by an examination of a branch of our legal history that at first sight may seem to have little connection with the problem, namely, that of bankruptcy and insolvency. Shortly after Confederation, the federal Parliament repealed various provincial laws relating to insolvency and passed legislation providing for a uniform system of insolvency laws throughout Canada. The federal legislation having met with severe criticism, both as regards its provisions and administration, was repealed in 1880, and from that time until 1919 there was no bankruptcy legislation in Canada.[28] But evidently legislation is required to regulate many of the matters normally dealt with in a bankruptcy Act. The provinces, therefore, did everything within their power to effect results similar to those obtainable by a comprehensive bankruptcy scheme. They could and did, for example, exercise jurisdiction over fraudulent and preferential assignments, but this did not avoid the difficulty that it is not always easy to discover that such assignments have been made. Legislation was therefore passed to give publicity to transactions that could be manipulated to defraud creditors and others relying on the possession of goods by a person. It was for this reason that bills of sale, conditional sales and bulk sales legislation was originally passed in Canada.[29] Thus Nova Scotia in 1882, Ontario in 1888, British Columbia in 1892, Prince Edward Island in 1896, the Northwest Territories (then comprising what is now Saskatchewan, Alberta, the Yukon and part of Manitoba) in 1897, and New Brunswick in 1899, passed legislation requiring that conditional sales be registered.[30]

The Acts were not designed, then, to compel buyers to search

[27] *Ibid*, at p. 286.
[28] See Lewis Duncan, The Law and Practice of Bankruptcy in Canada (1922), c. III.
[29] *Ibid*, pp. 20-1.
[30] Nova Scotia, 1882, c. 13; Ontario, 1888, c. 19; British Columbia, 1892, c. 21; Prince Edward Island, 1896, c. 6; Northwest Territories, 1897, no. 39; New Brunswick, 1899, c. 12.

the registry at their peril; they were aimed rather at preventing fraudulent and preferential agreements by making transactions that could be used for the purpose void unless made public. This is probably what Orde J. and other judges had in mind when they said that the rights of sellers were not increased by the Conditional Sales Act. It was true that when a conditional sale was registered the seller's rights prevailed over those of the buyer by virtue of the common law, but that rule was subsequently altered as we have seen, when section 9 of the Factors Act and section 25(2) of the Sale of Goods Act were reproduced in Canada. To argue otherwise one must assert that these sections were virtually meaningless from their inception.[31]

The Conditional Sales Acts still serve the purpose for which they were originally enacted. They continue to make unregistered agreements reserving title in a seller void against subsequent purchasers, mortgagees and certain creditors. It is true that the rights of the seller would not prevail against a subsequent buyer by virtue of the sections in the Factors and Sale of Goods Acts, but these sections, it should be observed, are not applicable to creditors so that filing does serve a most useful purpose. What is more it provides a seller with a public method of giving notice which will bind subsequent purchasers who find the agreement in the registry.

If this is the true view, however, it may be wondered why there is such a general impression that the rights of a seller under a registered conditional sale take priority over those of subsequent purchasers. There are several reasons. In the first place, lawyers in this country are accustomed to land registry systems that give priority to the person who first registers.[32] Again when most of the Conditional Sales Acts were originally passed in Canada there was no other legislation affecting the matter so the

[31] In most of the provinces the Conditional Sales Act preceded the enactment of sections similar to s. 9 of the English Factors Act and s. 25(2) of the English Sale of Goods Act. The years when the Conditional Sales Acts were passed appear in footnote 30. The sections either of the Factors Act or the Sale of Goods Act were originally passed as follows: Nova Scotia, 1895, c. 11, s. 9; Ontario, 1910, c. 66, s. 10(1). For its history see *infra*, footnote 34; British Columbia, R.S.B.C., 1897, c. 169, s. 37(2); Prince Edward Island, 1919, c. 11, s. 31(b); New Brunswick, 1919, c. 4, s. 25(2), c. 5, s. 9. Only in the Northwest Territories and in Newfoundland were these provisions passed before a Conditional Sales Act. The first Northwest Territories Act appears as no. 39 of 1897. The Newfoundland Conditional Sales Act was only passed in 1955 (no. 62 of that year) and the latest statutes state that it has not been proclaimed.

[32] In *Vowles* v. *Island Finances Ltd. supra*, footnote 22, the difference between land registry and registration of commercial documents is discussed.

common-law rule applied to registered agreements.[33] And when the relevant section in the Factors Act was passed in the largest jurisdiction, Ontario, in 1910, another section was added providing that it did not apply to agreements in respect of which the Conditional Sales Act had been complied with. This section still exists in Prince Edward Island, Manitoba and Alberta. It was not until 1920 that this important qualifying provision was deleted from the Ontario statutes.[34]

With this as a background, is it surprising that lawyers and judges continued to assume that a seller who filed under the Conditional Sales Act was fully protected? Cases and *dicta* based on this assumption are not wanting but these, it is submitted, should not be given too much weight because the point under consideration was not argued.

III. *Some Difficulties*

One provision of the Act, however, gives rise to considerable difficulty. In New Brunswick, it reads as follows:

> Where a seller of goods expressly or impliedly consents that the buyer may sell them in the ordinary course of business, and the buyer so sells the goods, the property in the goods passes to the purchaser from the buyer notwithstanding the other provisions of this Act.[35]

Identical sections may be found in Newfoundland, Nova Scotia, Saskatchewan, British Columbia and the Territories, and there is one of similar import in Ontario.[36] The section appears to assume that the rights of the seller under these circumstances would otherwise prevail over those of a subsequent purchaser, and from this it may be argued that the Act is intended to give the seller priority if he registers. But before this conclusion is accepted, certain points should be observed. In the first place, the section, like the other provisions of the Act, is clearly intended to benefit subsequent purchasers, not the sellers. Is it to be so con-

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[33] See *supra*, footnotes 30 and 31.

[34] The section first appeared in Ontario in the Factors Act, *supra*, footnote 31, s. 10(1) and it was made inapplicable to conditional sales by s. 10(2). In 1920, the Sale of Goods Act, c. 40, s. 26(2) replaced s. 10(1) which was repealed by s. 59, s. 59 also repealed s. 10(2) of the Factors Act and this subsection was not re-enacted. Mellish J., in *Commercial Credit Co. of Canada* v. *Fulton Bros.*, *supra*, footnote 7, at p. 243, D.L.R. at p. 722, distinguished Ontario authorities because of section 10(2) of the Factors Act which did not exist in Nova Scotia.

[35] *Supra*, footnote 1, s. 9.

[36] Newfoundland, *supra*, footnote 2, s. 8; Nova Scotia, *supra*, footnote 2, s. 5; Ontario, *supra*, footnote 2, s. 2(4); Saskatchewan, *supra*, footnote 2, s. 10; British Columbia, *supra*, footnote 2, s. 5; Northwest Territories, *supra*, footnote 2, s. 5; Yukon, *supra*, footnote 2, s. 5.

strued as to take away their rights? Again, the section is clearly of secondary importance in the general scheme of the Act. Can an inference properly be raised from it that would change the whole character of the Act? Or, to put it another way, if the section were repealed, would it alter the whole scope and purpose of the Act? It is significant to note also that a section of this kind first appeared in Ontario at a time when, by virtue of the common law, the rights of a seller under a registered conditional sale normally prevailed over those of a subsequent purchaser. And in several other jurisdictions—New Brunswick, Nova Scotia, Saskatchewan, British Columbia and the Territories—the section was introduced long after a registering system had been established.[37] Is it to be supposed that a fundamental change in the scheme of the Act was intended to be made by inference by the addition of this section? In enacting this section the legislatures acted to make certain that, in a transaction described in the section, the rights of a subsequent buyer would prevail, but, it is submitted, they could hardly have intended to take away his rights on other occasions. If they had, clearer words would, it is suggested, have been used.

There is a further, though less serious, difficulty in the provinces—Newfoundland, Nova Scotia, Ontario and British Columbia—where the section protecting subsequent purchasers appears in the Sale of Goods Act, but not in the Factors Act. That is because there appears in the Sale of Goods Act, but not in the Factors Act, a section reading as follows:

> The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.[38]

At first sight it may seem that this section provides that the provisions of the Sale of Goods Act do not apply to conditional sales. But this, it is submitted, would be a most startling conclusion, for it would mean that in many important matters the law of sale in absolute contracts would differ from that of con-

[37] The section was introduced in the relevant provinces as follows: New Brunswick, R.S.N.B., 1927, c. 152, s. 4; Nova Scotia, 1930, c. 6, s. 4; Ontario, 1892, c. 26, s. 5; Saskatchewan, 1957, c. 97, s. 10; British Columbia, 1922, c. 13, s. 4; Northwest Territories, 1948, c. 17, s. 4; Yukon, 1954 (3rd sess.), c. 9, s. 5. The Newfoundland Conditional Sales Act was passed in 1955 and the section appears in 1955, no. 62, s. 9. The years when the conditional sales provisions were originally passed in the other jurisdictions appear in footnote 30 *supra*.

[38] Newfoundland, *supra*, footnote 15, s. 59(3); Nova Scotia, *supra*, footnote 15, s. 59(3); Ontario, *supra*, footnote 15, s. 57(3); British Columbia, *supra*, footnote 15, s. 69(3).

ditional sales. For example, the well-known section that provides that sales of goods of over forty (or fifty) dollars are unenforceable unless they are reduced to writing or there is part performance or earnest would be inapplicable to conditional sales. A closer look at the provision indicates that what is referred to are not real sales, but mortgages, pledges, charges and other securities that may be contracts of sale in form, but not in fact. In contrast, a conditional sale is clearly a real sale, though subject to a condition that must be performed before the contract becomes absolute.[39] It should also be observed that *Commercial Credit* v. *Fulton*[40] was decided under the Sale of Goods Act, not the Factors Act.

IV. *A Loophole*

If the argument advanced above is correct, then a person who purchases without notice goods from a buyer under a conditional sale agreement gets a good title as against the conditional seller *even if the agreement is registered.* But there is, of course, a way in which the seller can protect himself, and it is in common use in England. Instead of a conditional sale agreement, a hire-purchase contract is entered into whereby A hires goods to B at a rental of so much a month. Under the terms of the contract B is obliged to rent the goods for a given number of months, but he is not obliged to buy them; instead he is given an option to buy at the termination of the rental at a price that he would be foolish not to pay. Since, however, he has not agreed to buy, section 9 of the Factors Act and section 25(2) of the Sale of Goods Act do not apply to it, for those sections apply only where a person has bought or agreed to buy goods. One of the leading cases is *Belsize Motor Supply Co.* v. *Cox.*[41] There A delivered a motor car to B under a hire-purchase agreement. The hire amounted to £374, payable by 24 monthly instalments. B was also given an option of buying the car within the 24 months by paying a further sum of £100. B, while he was in arrears for £58, pledged the car to C. Now if this had been an ordinary conditional sale contract, B's pledge would have been good against A because the pledge would have come within section 9 of the Factors Act and section

[39] The meaning of the section as given here is adopted by Benjamin on Sales (8th ed. 1950), pp. 5-6.

[40] *Supra*, footnote 7; see also, *Cahn* v. *Pockett's Bristol Channel Packet Co.*, *supra*, footnote 20.

[41] [1914] 1 K.B. 244; see also *Helby* v. *Mathews*, [1895] A.C. 471, but the contract in the latter case is not as attractive because the person to whom the goods were hired was at liberty to terminate the contract at any time.

25(2) of the Sale of Goods Act. But this was a hire-purchase agreement under which the hirer had not "agreed to buy" the goods and, therefore, the pledge was not valid against A. It should be observed, however, that in that case the sum mentioned in the option was a substantial portion of the value of the car. If the amount had been nominal, the court might well have held that the transaction was in substance a sale and not a hire.[42]

In common with conditional sale agreements, hire-purchase contracts must be registered; otherwise the conditions reserving title are void as against subsequent purchasers, mortgagees and creditors claiming under the person in possession of the goods.[43] Once registered, however, their effect is entirely different; the rights of the owner prevail over those of a subsequent purchaser, mortgagee or creditor.

V. *Should it be Notice?*

It may be urged that the Conditional Sales Act should be amended to make it clear that filing is notice. But it is submitted that we should pause long before taking that step unless, at least, certain other changes are made in the Act. For there is much to be said for the principle that when one of two innocent persons must suffer through the wrong of a third party, it is the person who has put the third party in a position where he can harm others who should bear the loss. Here it is the seller who has trusted the buyer and thereby made it possible for him to set himself up as the owner, and it was to make the seller bear the loss that section 9 of the Factors Act and section 25(2) of the Sale of Goods Act were passed.

Searching the registry may, it is true, give the subsequent purchaser notice—but not always. Except for the provinces and territories where there is a central registry,[44] it may well happen that a conditional sale agreement is filed in one registration district but the sale to the subsequent purchaser takes place in an-

[42] For a discussion of the problem, see Atiyah, Injustices and Anomalies in the Law of Hire-Purchase in (1958), 5 The Business Law Review, pp. 24-31.

[43] R.S.N.B., *supra*, footnote 1, s. 1(e) (ii); Newfoundland, *supra*, footnote 2, s. 2(f) (ii); Nova Scotia, *supra*, footnote 2, s. 1(b) (ii); Ontario, *supra*, footnote 2, s. 2(1), (2); Saskatchewan, *supra*, footnote 2, s. 2(6); British Columbia, *supra*, footnote 2, s. 2 "Conditional sale"; Northwest Territories, *supra*, footnote 2, s. 2(b); Yukon, *supra*, footnote 2, s. 2(b).

[44] Newfoundland, Saskatchewan and the two Territories. In addition some provinces have a central registry for motor vehicles: New Brunswick, Motor Vehicle Act, 1955, c. 13, ss. 35, 36 (not yet proclaimed); note that the sections make filing constructive notice; Conditional Sales Act of British Columbia, *supra*, footnote 2, s. 3(8).

other district. Again, a conditional seller is given a certain period under all the Acts to register his agreement, but a fraudulent buyer may sell the goods during that period before the agreement is filed.[45]

Another matter should be considered. The vast majority of conditional sellers (or their assignees) are organizations that provide for losses under these agreements, either in their prices, interest or other charges. Such losses are part and parcel of the ordinary business risks that in a competent concern are taken into account. So much is this so that many finance companies register only a fraction of the conditional sales agreements assigned to them. But the subsequent purchaser is not in this happy position. To him the loss will usually be a completely unexpected financial blow for which he has not provided.

It is therefore suggested that the attitude of the law (or rather what it has been argued is the law) serves the ends of justice better than a provision providing that filing constitutes notice under most of the Acts as they now stand. However, should it be thought that filing should constitute notice, it is strongly urged that it should be notice only within the district where an agreement is filed and then only when it is actually registered. This would probably require additional permissive provisions for filing in districts other than those where the transaction was made.

A central registry such as is provided in Newfoundland, Saskatchewan and the Territories and as regards motor vehicles in New Brunswick and British Columbia may provide the answer, especially for expensive goods, even though such registries are inconvenient to those living far from the registration centre.

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[45] New Brunswick, *supra*, footnote 1, s. 3(2), (30 days); Newfoundland, *supra*, footnote 2, s. 4(2), (30 days); Nova Scotia, *supra*, footnote 2, s. 2(2), (20 days); Prince Edward Island, *supra*, footnote 2, s. 2(2), (20 days); Ontario, *supra*, footnote 2, s. 2(1) (b), (10 days); Saskatchewan, *supra*, footnote 2, s. 5(2), (30 days); Alberta, *supra*, footnote 2, s. 4(1), (30 days); British Columbia, *ibid.*, s. 3(2), (10 days); Northwest Territories, *supra*, footnote 2, s. 3(2), (20 days); Yukon, *supra*, footnote 2, s. 3(2), (20 days); see *Klimove* v. *General Motors Acceptance Corp. and Dubuc* (1955), 14 W.W.R. (N.S.) 463; [1955] 2 D.L.R. 215.