THE PENNSYLVANIA BAILMENT LEASE

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In 1819 "a liberal, perhaps an enlarged construction" was given to the statute of 13 Elizabeth by Justice Gibson in the case of *Clow v. Woods,*[1] which was to have a far reaching effect in the law of sales. The statute in question rendered void all conveyances made with intent to defraud creditors. One Hancock mortgaged certain personal property, but retained possession. While no actual intent to defraud was shown on his part, the court held that the separation of the possession from the ownership was to be considered fraudulent *per se* as to creditors and purchasers without notice, and that therefore the conveyance was void under the statute.

Five years later in *Babb v. Clemson* [2] this rule was extended to the case of an ordinary sale, and seven years later in *Martin v. Mathiot,*[3] to a contract in which the agreement provided that possession was to be in the vendee, but title to remain in the vendor until the whole purchase money was paid—in other words, a conditional sale.

It was thus established that in cases where, by the terms of the contract, a change of title is to take place, the separation of the possession from the ownership is a fraud *per se* as to creditors.[4] The consequences of this rule can easily be seen. Not only were a number of innocent transactions liable to be rendered of no effect, but an enormous practical deterrent was placed on one of the most convenient methods for making a sale, *i. e.,* whereby a purchaser could obtain the use of goods while paying for them in one or more future instalments, and the vendor on his part

[1] 5 S. & R. 275 (Pa. 1819).

[2] 10 S. & R. 419 (Pa. 1824).

[3] 14 S. & R. 214 (Pa. 1826).

[4] This rule, of course, has a reasonable limitation. "The purchaser of goods must, for the protection of the public, take such possession as is usual and reasonable in view of all the circumstances of his purchase", Stevens v. Gifford, 137 Pa. 219, 20 Atl. 542 (1890). It is therefore relaxed in the case of bulky goods, goods not in the possession of the vendor at the time of sale, etc.

could, until full payment, retain the legal title with its attendant privileges. If the buyer's creditors might seize, or third parties buy, the goods with impunity, naturally the seller would be loath to enter into such a transaction. This situation made the time ripe for some plan to render possible a credit sale with adequate protection to the seller.

The rule of *Clow v. Woods* was never, of course, extended to the ordinary bailment for use, where the article is rented for a term and then returned, although in such a case the property right is equally separated from the possession. The reason given was that a bailment was a time-worn, legitimate transaction in which the bailor had always been protected, while the conditional sale presumably was a more recent legal situation as to which there were no binding precedents. In the present day, however, when newlyweds spend as they earn, and the apartment is furnished from victrola to vacuum cleaner on the easy-payment plan, the conditional sale seems no more strange or illegitimate than the bailment—in fact, it is in some form or other a necessity.

The solution was found in the creation of what is now termed the "bailment lease". This needs no particular description. It is the familiar contract used in the sale of motor cars and other commonly used articles. It is described in *Myers v. Harvey*[5] as "a bailment, with a super-added agreement to vest the title in the bailee when he should pay a sum certain . . . Such a transaction includes two distinct, but consistent contracts—the one taking effect, if at all, when the other is spent. The contract of bailment preserves the ownership of the bailor during the particular relation created by it, and the contract of sale which supersedes it, transfers the title as soon as it is called into action, by payment of the price." Where a contract has been construed to be a bailmeant lease, it has always been held to give protection to the bailor against creditors or bona fide purchasers of the bailee. Because of the obvious analogy to a conditional sale, and because, as we have seen, the latter affords no protection against the equities of third parties claiming under the buyer, one is naturally led to

[5] 2 P. & W. 478 (Pa. 1831).

inquire as to the real distinction between these two sorts of contracts.

This distinction is discussed at length in *Ott v. Sweatman*,[6] and is summarized as follows:

> "There are many cases in Pennsylvania in which has been considered the liability of goods to levy and sale by the sheriff, where the claimant has parted with their possession under a contract with the execution defendant, by which the latter has or may become the owner, the contract preventing or attempting to prevent the title passing with the possession. A careful examination of these cases will show that they may be reduced to two classes, one in which the goods have been bailed to the defendant, with the right in him to purchase them during the continuance of the bailment or at its termination, and the other, in which the goods have been delivered to the defendant, under a contract of sale, and the seller has sought to retain a lien on them for the price. In the former, the goods are not subject to the levy during the existence of the contract of bailment, nor until the title has actually vested in the bailee; in the latter they are subject to the levy so soon as they reach the possession of the purchaser, though no part of the price has been paid. The reason for the distinction is that, in a bailment, by the change of possession, no title to the goods passes, and the necessities of life require that bailments should be allowed and enforced; but where the possession of goods changes, under a contract which is essentially one of sale, the title does pass, though conditionally, and, as to an execution creditor of the buyer, will be held to have passed absolutely, and the seller will not be allowed to enforce the condition, as a lien for the price, because a secret lien on personal property is against public policy. The courts in determining whether or not the contract was one of bailment, or one of sale with an attempt to retain a lien for the price, have not considered what name the parties have given to the contract, but what was its essential character."

This statement gives a satisfactory thesis, if logically carried out. The question is, not what term the parties call the contract, but is it essentially a bailment, or essentially a conditional sale?

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[6] 166 Pa. 217, 220-1, 31 Atl. 102, 103 (1895).

Such terms as "lease", "rent", "bailor", "bailee", and so on should thus be of no primary importance if they conceal the real nature of the transaction; so, also, should any expressions which negative the passage of title until payment of the full sum specified.

With this in mind, our next inquiry is, "What are the essentials of a bailment on the one hand, and a conditional sale on the other?" They may be stated as follows: (1) In a bailment, the article is given to the bailee to be used by him for a certain term and then to be returned to the bailor, who retains title throughout. Payments are made for the *use* of the article. (2) In a conditional sale, the article is given to the conditional vendee with the intention that the article is to belong to the vendee and payments are made for the *article itself*. Title is temporarily reserved in the vendor simply to secure the unpaid balance of the purchase price.

In other words, in the first situation the goods are evidently to be returned to the owner; in the second, the owner is making one form of sale. Of course, a contract of bailment may also have joined with it an option to purchase, or indeed any other contract; the two, however, are distinct, and the legal incidents of the latter do not affect the former. There are, it is needless to add, other forms of bailment, but they do not enter into the problem here discussed, with the exception of the bailment for sale, which will be considered later.

The question, then, in each case should be, "Are the payments in fact intended as consideration for the use of the article, or are they intended as consideration for the article itself?" The *form* given the contract by the parties to the transaction is not of primary importance. As Professor Williston points out:

> "Sellers desirous of making conditional sales of their goods, but who do not wish openly to make a bargain in that form, for one reason or another, have frequently resorted to the device of making contracts in the form of leases, either with options to the buyer to purchase for a small consideration at the end of the term, provided the so-called rent has been duly paid, or with stipulations that if the rent throughout the term is paid, title shall thereupon vest in the lessee. It is obvious that such transactions are leases only in name.

> The so-called rent must necessarily be regarded as payment of the price in instalments, since the due payment of the agreed amount results, by the terms of the bargain, in the transfer of title to the lessee. This has been clearly recognized and many of the statutes relating to conditional sales in express terms include leases within their scope. Apart from statutes, the courts have disregarded the form of the transaction and held that where payment of so-called rent nearly or quite pays the price of the goods, the bargain is a conditional sale and subject to the rules governing that kind of transaction." [7]

It is obvious that in a state where possible penalties are attached to a conditional sale, sellers who seek the same result would attempt to make just such contracts as are described by Professor Williston. It is equally obvious that the courts of Pennsylvania, despite their inclination against the conditional sale, have allowed such contracts to have a valid and separate existence, and have based such distinctions as they have made, not on the essentials, but on matters of no ultimate significance. An examination of some Pennsylvania cases will illustrate this fully.

Three early decisions mark the genesis of the bailment lease. In *Myers v. Harvey* [8] property was leased with a provision for sale, the actual details of which are not stated in the report. While this case has often been cited as supporting the validity of the bailment lease, its only real significance is the fact that it is one of the first Pennsylvania cases to recognize the bailment lease. In *Clark v. Jack* [9] a contract was made which stipulated for a sale on a future day, but with immediate delivery. In substance, it was a loan subject to be turned into a sale in two years, upon the payment of a judgment bond; the goods were levied upon by the defendant, a judgment creditor of the bailee, and in an action of trespass, the plaintiff, bailor, was allowed to recover. The contract was construed as establishing a bailment lease. In *Chamberlain v. Smith* [10] a yoke of cattle was delivered "to keep and use in a farmer-like manner for one year" with the privilege of keep-

[7] WILLISTON, SALES (2d ed. 1924) § 336.
[8] *Supra* note 5.
[9] 7 Watts 375 (Pa. 1838).
[10] 44 Pa. 431 (1863).

ing the cattle at the end of the year upon the payment of $40, otherwise to be returned. It was held that this was a valid bailment, and that the owner should replevy the cattle from the purchaser of the bailee. It was pointed out in this case that there was no contract of sale, but merely an offer to sell at a future time, and that the transfer of possession was not in pursuance of the sale, and hence not fraudulent. In this way the case was distinguished from *Martin v. Mathiot.*[11]

These three cases have time and time again been cited to support the bailment lease. As far as can be determined from their facts, they are consistent with the theory advanced as, in each case, the consideration for the sale may well have been a substantial consideration distinct from the provisions for payment of rent. However, in *Rowe v. Sharp*[12] no such distinction can be found. In this case two billiard tables were let by *S* to *G* for nine months, a sum to be paid for their use on certain dates. At the end of the term, *G* was to re-deliver the tables and *S* was given the privilege of re-capturing upon default. It was finally provided that if all the covenants were fulfilled, *S* was to give *G* a bill of sale at the end of the term for the amount of the payments. *G* subsequently sold the tables to *R*, before his covenants to *S* were fulfilled. In an action of replevin it was held that *S* could recover the tables from R. The agreement was held a valid bailment, with an agreement for future sale. It can be seen that the decision marks a departure from any theory distinguishing bailment from conditional sale, since the payments for "rental" corresponded exactly to payments on instalment for the price of the goods in the case of a conditional sale. The same result was reached in *Enlow v. Klein,*[13] which involved an agreement to "furnish" horses, for which $2.00 per week was to be paid in 200 payments. When the last payment was made, the owner of the horses agreed to relinquish his rights to the "bailee". This decision was predicated solely on the ground that the agreement did not create a present property interest in the bailee.

[11] *Supra* note 3.
[12] 51 Pa. 26 (1865).
[13] 79 Pa. 488 (1875).

In *Christie's Appeal* [14] a similar contract is also distinguished from *Martin v. Mathiot* on the ground that the latter decision involved a sale of chattels real. No attempt, however, has been made to urge this distinction in subsequent cases.

In *Stadtfeld v. Huntsman* [15] a contract under which furniture was to be purchased on instalments of $5 a week, the goods to remain the property of the seller subject to removal by the seller on default, was held to be a conditional sale and consequently a subsequent purchaser from the vendee was allowed to keep the furniture in an action of replevin by the vendor. This case was cited as controlling in *Brunswick-Balke Co. v. Hoover,*[16] in which an agreement was entered into whereby the plaintiff agreed to furnish four billiard tables to *R,* to be paid for in instalments, payments to be secured by a lease, and title to remain in the original owner until final settlement. Judgment creditors of *R* subsequently sold the tables and were held not to be responsible in an action of trespass by plaintiff. *Rowe v. Sharp* was distinguished, not on any substantial ground, but because in the earlier case there was no agreement for security, and an express stipulation for the return of the property.

In *Dando v. Foulds* [17] the following rule was definitely laid down:

> ". . . to bring within the statute of Elizabeth, the contract must vest presently a title of some kind in the buyer, and the mere right to acquire the title at some future time . . . will not have that effect. In other words, the title to the goods must pass to the vendee at the time he receives the possession, otherwise there is no sale, but only a bailment."

This was reaffirmed in *Edwards' Appeal,*[18] where it was pointed out that if the transferee is to hold the goods for a definite period, to become the owner at the end of that period or to pay for their use, the transacion amounts to a bailment.

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[14] 85 Pa. 463 (1877).
[15] 92 Pa. 53 (1879).
[16] 95 Pa. 508 (1880).
[17] 105 Pa. 74 (1884).
[18] 105 Pa. 103 (1884). See also Ditman v. Cottrell, 125 Pa. 606, 17 Atl. 504 (1889).

Farquhar v. McAlevy[19] involved a "hire" of certain machinery, for which $750 was to be paid at the end of six months and an additional $750 at the end of twelve months, with interest at six per cent. Title was to remain in the original owner, with the privilege to the transferee to purchase for one dollar. In a feigned issue to try title, between the original owner and a subsequent purchaser at a sheriff's sale, the transaction was held to be a conditional sale, but again the ground of the decision was that there was no express stipulation for the return of the property at the end of the term.

Similarly in *Ott v. Sweatman*[20] a contract identical in its terms with that in *Rowe v. Sharp* was held a conditional sale, and this despite an express stipulation that it was to be treated as a lease.

In *Goss Printing Co. v. Jordan*[21] a printing press was sold on approval. While the purchaser had possession for thirty days' trial, the parties changed the contract of sale to one of bailment with an alternative conversion into a sale on compliance with certain conditions. Shortly thereafter a judgment creditor of the purchaser had the sheriff levy on the property. It was held that the contract was a bailment lease, and that the parties could properly change from a sale to a bailment while the contract was still executory. By way of *dictum,* however, the court said that if delivery is made under the contract of sale, and the second contract is in fact an afterthought merely to secure the price, then the whole transaction will be treated as one of conditional sale.

In *Lippincott v. Scott*[22] it was held that the delivery of notes to cover the various instalments did not prevent the transaction

[19] 142 Pa. 233, 21 Atl. 811 (1891).

[20] *Supra* note 6.

[21] 171 Pa. 474, 32 Atl. 1031 (1895). See also Federal Sales Co. v. Kiefer, 273 Pa. 42, 116 Atl. 545 (1922); Schmidt v. Bader, *infra* note 27; Byers Machine Co. v. Risher, 41 Pa. Super. 469 (1910); Michael v. Stuber, 73 Pa. Super. 390 (1920). The bailment lease was considered a dodge in Morgan-Gardner Electric Co. v. Brown, 193 Pa. 351, 44 Atl. 459 (1899).

[22] 198 Pa. 283, 47 Atl. 1115 (1901). See also Link Machinery Co. v. Continental Trust Co., *infra* note 26; Lippincott v. Holden, 11 Pa. Super. 15 (1899); Byers Machine Co. v. Risher, *supra* note 21; Wilson v. Weaver, 66 Pa. Super. 599 (1917). And it is immaterial that installments bear interest: See case cited, and Euwer v. Greer, 29 Pa. Super. 262 (1905).

from being a bailment lease; and in *Stiles v. Seaton*[23] the rule of *Goss Printing Co. v. Jordan* was reaffirmed, and it was further laid down that a contract, otherwise a bailment, is not vitiated by the fact that it contains no stipulation for the return of the property, except on default,[24] and no stipulation for a definite term. This has been affirmed in numerous cases. It was, however, departed from in *Kelly Springfield Road Roller Co. v. Spyker,*[25] which involved a "lease" of a roller for the full sum of $2,000, payable in $250 instalments every other month. Here the court definitely stated that the contract was meant to be a conditional sale, that the use of particular words was immaterial, and that the two types of contracts could not be distinguished if "sale" were substituted for "lease". Subsequently, however, a bailment lease was sustained in *Link Machinery Co. v. Continental Trust Co.*[26] upon a contract indistinguishable from that in the *Spyker* case except in unimportant details.

The most recent Supreme Court case of any significance is that of *Schmidt v. Bader.*[27] This involved a contract drawn as a lease, with a definite rental payable every two months, the right in the transferor to retake on default, and a right in the transferee to obtain a bill of sale at the end of the contract period upon the payment of $5.00. In an action of replevin by the transferor against a purchaser at a bankrupt sale the contract was held to be one of bailment, upon the express authority of *Rowe v. Sharp.*

No attempt has been made to discuss all the cases which have taken up the construction of such contracts. Reference has been made only to those which have been thought to be most significant and have raised new points of distinction. Others will be found cited in the footnotes.

The following conclusions can be drawn from the cases referred to, with more or less certainty, although exceptions will

[23] 200 Pa. 114, 49 Atl. 774 (1901).
[24] Federal Sales Co. v. Kiefer, *supra* note 21; Jones v. Wauds, 1 Pa. Super. 269 (1896); Harris v. Shaw, 17 Pa. Super. 1 (1901); Porter v. Duncan, 23 Pa. Super. 58 (1903); Miller v. Douglas, 32 Pa. Super. 158 (1906); Reading Automobile Co. v. De Haven, 53 Pa. Super. 344 (1913).
[25] 215 Pa. 332, 64 Atl. 546 (1906).
[26] 227 Pa. 37, 75 Atl. 985 (1910).
[27] 284 Pa. 41, 130 Atl. 259 (1925).

always be found. A contract will be construed as a bailment lease notwithstanding the fact that (1) no fixed term of bailment is set, (2) no express provision is made for the return of the goods at the end of the term, (3) the contract was originally drawn as a conditional sale but changed while still executory, (4) notes are given for the various instalments, or (5) the instalments themselves bear interest.

No contract which purports to be a bailment lease has been held a conditional sale where the "bailee" is merely given an option to buy at the end of the term, even though this option is for a nominal sum. The following quotation from *Stern & Co. v. Paul* [28] is therefore undoubtedly a conservative statement of the law on this subject:

> ". . . generally, where a person receives possession of a chattel under an agreement which contains apt words of lease, fixes a definite term and a certain rental, and includes an undertaking to return the same property at the termination of the lease, the mere fact that the bailee has an option to purchase the property during or at the expiration of the period of the lease does not transform the transaction into a conditional sale." [29]

Where the option provision is omitted and title automatically vests in the bailee upon the payment of a stipulated rental, the cases are in confusion and cannot be logically resolved. In by far the greater number, however, where words denoting a bailment lease are used, the contract has been held to be such. So in *Schmidt v. Bader,* we find the court relying upon the old case of *Rowe v. Sharp,* thus showing that the doctrine of the former decision has not been discarded. Such a construction has commonly been given, unless the price was to be paid in one lump sum or the original contract was by its terms a conditional sale. In the latter case, where the property has actually been delivered under the first contract, the courts appear to have taken the ground that an obvious attempt was being made to avoid the restrictions placed on such a method of passing title. It must be admitted, however,

[28] 96 Pa. Super. 112 (1929); (1929) 3 TEMPLE L. Q. 451.

[29] *Supra* note 28, at 116.

that in some cases the omission of terms usual to a bailment has been held to create a sale, while in others again the omission of such terms has been ignored upon similar facts.

These petty distinctions and refinements hardly merit serious study. As a practical matter, almost everyone nowadays can draw a bailment lease which will be upheld, and litigation as to the nature of the contract has become increasingly rare. The essential point to grasp is that in practically none of the cases has the only significant distinction been made. *If the owner of the goods is willing to surrender title for the sum of the rental payments, the transaction is a sale, and nothing more remains to be said.* Once this factor is granted, the problem is solved, and the various technical features invariably brought to the fore by the courts become immaterial. It is farcical in such a case to talk about the "intention" of the parties as construed from their acts and writings. The terms of the bargain speak eloquently and definitively on this point. No owner will pass title to his goods unless he gets what he considers to be their value to him, and when he agrees to pass title on getting a certain value, he is making a sale no matter what the transaction is called.

This point of distinction applies in every case where no additional payment beyond the stipulated rental is required or where such payment is purely nominal. This, of course, does not mean that the additional payment must in every case reflect the full value of the goods. It is perfectly conceivable for the owner to feel that the profit from a long-term lease may justify him as a business matter in taking less than the market value for the goods from one who consents to enter into such a contract. On the other hand, it is obvious that where the bailee is given an option to buy the goods at the end of the term for the large sum of one dollar, as is the case in the usual contract, the goods are not rented but sold. It requires no legal learning to realize the truth of this assertion.

The *form* of passing title means nothing. We may say in the one case that there is a present contract of sale, but that the seller retains title as security for the payment of the price, or, as Professor Williston has expressed it, a sale with a mortgage

back to the seller. On the other hand, we may say that the sale does not come into existence until all the payments have been made. In either case the result is the same. The parties have intended to make a sale. Possession has passed to the buyer, but title has remained in the seller. Therefore, in all logic, the ban of *Clow v. Woods* and *Martin v. Mathiot* applies.[30]

The Measure of Damages Applicable to a Bailment Lease

The difficulties of making a bailment out of what is essentially a sale become apparent when it is important to determine what measure of damages the bailor may invoke upon a diversion or destruction of the chattel. In *Edwards' Appeal*[31] it was said by way of *dictum:*

> "If during the period of the bailment the bailee pays part of the price fixed, a creditor may levy upon and sell the bailee's interest, but no right of the bailor will thereby be extinguished."

In *Collins v. Bellefonte Central Railway Co.*[32] the question arose as between the bailor and a purchaser at a judicial sale. A railroad company had been given possession of certain rolling stock upon a bailment lease. The cars were later sold out on a prior mortgage, which purported to cover all such goods of the railroad. In an action by the bailor against the purchaser at the mortgage sale, it was held that the former had a right to recover, but that whatever equities the bailee had by virtue of the lease passed to the defendant. Hence the measure of the plaintiff's damages was taken to be the value of the property as stipulated in the bailment contract, mitigated by the amount already paid by the bailee.

Both these cases recognize an interest in the bailee under a bailment lease which is greater than that of the usual lessee. In both cases, however, the creditor or purchaser succeeded to the bailee's interest, whatever that interest may have been. The prob-

[30] The inconsistencies of the bailment lease are discussed in *In re* Morris, 156 Fed. 597, 598 (D. C. Pa. 1907); 6 C. J. (1916) 1089.

[31] *Supra* note 18.

[32] 171 Pa. 243, 33 Atl. 331 (1895).

lem is squarely presented in *General Motors Acceptance Corporation v. B. & O. Railroad Co.*[33] In this case an automobile was transferred on a bailment lease with a total rental of $887. At the time the unpaid rentals aggregated $560.09, the automobile was totally destroyed as the result of the negligent operation of one of the trains of the defendant company at a grade crossing. Actions were brought against the Railroad both by bailor and bailee. The latter's right to recover was denied because of his contributory negligence. It was properly held, however, that his negligence could not be imputed to the bailor, and a judgment was entered by the trial court for the latter in the sum of $725, the market value of the car at the time of the accident.

Upon appeal to the Superior Court, the judgment was reversed upon the measure of damages. As the contract was one of bailment lease, the Superior Court held that the damages could not be limited to the sum of the unpaid instalments. It was pointed out that a contract for the term of the lease was only a bailment, with the mere right to acquire title at some future time; that the Railroad Company was a tortfeasor and could not succeed to any of the bailee's rights under the lease; and to allow the bailor to recover only the unpaid instalments was to violate the theory of the lease and to treat the transaction as one of conditional sale. On the other hand, it was held that the measure of damages accepted by the court below could not be sustained, and that the option in the bailee to purchase the car for one dollar at the expiration of the term necessarily affected the value of the bailor's interest in the car. It was therefore decided that the bailor was entitled to recover the "actual value of its ownership in the property", which was dependent to a large extent upon the length of time the lease had been running and whether the bailee had paid the specified rentals, and that the value of the property right was therefore a question of fact for the jury under the circumstances indicated.

This decision obviously leaves the measure of damages in a very unsatisfactory state. The reason for the court's decision

[33] 97 Pa. Super. 93 (1929).

is apparent. It was unwilling to lay down a rule under which, in some cases, the bailor might receive almost double the actual value of the property. Such a situation would arise where the chattel was destroyed just before the final payment on the lease. On the other hand, the court could not award merely the unpaid instalments, since such a theory would in effect admit that the contract was not a lease, but a sale. Just how a jury can determine the "actual value" of the ownership is problematical. The practical answer undoubtedly is that the jury will award an amount equal to the unpaid instalments, which indeed is the justice of the case. However, the rule itself is unsatisfactory. It is because of the illogicalities which are inherent in the bailment lease that such a result is brought about.

Bailments for Sale

The appellate courts have recently refused to sanction the bailment lease in the case of contracts whereunder the transferee receives the article, not for his own personal use, but for ultimate sale to another on his own account, or, as they are termed in the decisions, "bailments for sale".

No problem arises in the case of the true bailment for sale, under which the bailee is in fact the agent of the bailor in the sale, and is actually selling for the latter's account, not his own. Such are obviously legitimate transactions. Thus in *McCullough v. Porter* [34] it was held that an agreement to furnish goods to an insolvent at invoice prices, he returning the invoice price to the consignors after sale and retaining all realized above that sum for the support of himself and family, was a bailment, and that the goods were not subject to claims of his creditors. A similar contract was sustained as a bailment lease in *Becker v. Smith*,[35] whereby the transferee was to receive certain personal property to sell on commission, to deposit the proceeds with a banker, and to become the owner of any property remaining after the named

[34] 4 W. & S. 177 (Pa. 1842).
[35] 59 Pa. 469 (1868).

sum had been realized. In both cases the sales were made primarily in the bailor's interest.[36]

On the other hand, the same view was taken in *Brown Bros. v. Billington*.[37] In this case a dealer desired to purchase bicycles abroad on credit. He applied to the plaintiff for letters of credit, which were sent to the London office of the plaintiffs, accompanied by a draft and invoices. The London office accepted the papers, and the goods were shipped to the plaintiffs as their property and transferred to the dealer upon his signing a "trust receipt". This receipt specified that the dealer had received the property, held the goods in trust for the plaintiffs with liberty to sell the same for their account, and agreed to hand over the proceeds to them to be applied against the acceptances under the letter of credit. It was held that the transaction constituted a bailment, that title was in the plaintiffs, and that consequently a judgment creditor of the dealer could not levy on the bicycles.

The more recent cases, however, seem impossible to reconcile on principle with *Brown Bros. v. Billington*. The problem has come up chiefly with reference to credit arrangements in connection with the sale of automobiles. In *Root v. Republic Acceptance Corp.*[38] the owner of an automobile, to secure a loan, executed a bill of sale and storage receipt to the one making the loan, who later executed a bailment lease back to the original owner, there being no change in possession. It was held that the general creditors of the "bailor" were not cut off by the bailment lease. In *Republic Acceptance Corp. v. Smith* [39] the same result was reached on behalf of the landlord. In *Sterling Commercial Co. v. Smith* [40] the defendant was a dealer in automobiles. He required additional cash to pay a sight draft on a carload of trucks, and borrowed the necessary amount from the plaintiff. Defendant executed to plaintiff a bill of sale for one of the trucks contained in the shipment, and

[36] See also Middleton v. Stone, 111 Pa. 589, 4 Atl. 523 (1886), where the problem is analyzed; 6 C. J. (1916) 1091.

[37] 163 Pa. 76, 29 Atl. 904 (1894).

[38] 279 Pa. 55, 123 Atl. 650 (1924).

[39] 88 Pa. Super. 349 (1926).

[40] 291 Pa. 236, 139 Atl. 847 (1927). See also Wendel v. Smith, 291 Pa. 247, 139 Atl. 873 (1927).

at the same time received back a bailment lease on the same car. Defendant also gave to the plaintiff a storage receipt in which he agreed to keep the truck in his showroom and return it to the plaintiff on demand. Subsequently the dealer went bankrupt and the trustee in bankruptcy was held to have the superior right to the car.

It is true that in the above cases the title to the goods was in the dealer before he executed the sale or trust receipt, and therefore the decisions turned mainly on the lack of change of possession. It was pointed out in the *Sterling* case that as the sale itself was void, the subsequent bailment lease would also be of no effect. However, the cases distinctly show that it is the determination of the court to "look through the screen of paper titles to ascertain what was the real situation", and that where the real purpose of the transactions between the parties was to secure payment of loans from plaintiff to defendant, the bailment lease would not be upheld.

In *Hoeveler-Stutz Co. v. Cleveland Motor Sales* [41] the issue was directly presented. Here the automobile had been delivered by a distributor to the defendant, a dealer, upon a bailment lease. Later the dealer sold the car to a third party. It was held, in an action of replevin by the distributor, that the purchaser from the dealer could retain the car. The court said in this connection:

> "A distributor cannot deliver automobiles, or any other kind of property, to a dealer for the purpose of having the latter sell them, and at the same time tie up the title, as respects a purchaser from the dealer, by executing a bailment for their use. He cannot use this form of security for a transaction which contemplates a sale by the so called bailee, and make the purchaser an unwitting guarantor of the credit of his dealer. This contract which constitutes a valid form of security for the delivery of motor cars or other personal property to the using public cannot be extended to protect a manufacturer or distributor who furnishes them to a dealer to sell, at least, as against purchasers from the latter. There are other forms of security which may be resorted to

[41] 92 Pa. Super. 425 (1928).

in such cases; but a bailment for use is inconsistent with a delivery for sale, as respects purchasers from the dealer."

This case distinguishes *Leitch v. Sanford Motor Truck Co.*,[42] in which a truck was similarly given by a motor company to a dealer on a bailment lease and exhibited by the dealer in his showroom. The dealer transferred the truck as collateral security for a debt to a bank which had no knowledge of the bailment, and it was held that the Motor Company could recover. The court in the *Hoeveler-Stutz Co.* case pointed out that while the transferee in the *Leitch* case was a dealer in trucks, there was nothing in that fact necessarily inconsistent with a delivery for use, that the truck may have been intended for demonstration, and that in any case it did not affirmatively appear that the purpose of delivering the car to the dealer was that he should sell it. While the distinction seems unsatisfactory, it is believed that in view of the later cases it will be followed, and that the *Leitch* case will be dismissed as unimportant on its facts.

The most recent decision is that of *Commonwealth v. Williams*,[43] involving a prosecution for larceny of an automobile by a bailee. The defendant, who received certain cars from the Chevrolet Motor Company, had executed simultaneously a trust receipt and promissory note to the General Motors Acceptance Corporation, a credit concern. The dealer then applied the money he received from the sale of these cars to his own use. The court held that the transaction was not a bailment, but a conditional sale, and reversed the conviction. It was pointed out in the opinion that the cars were shipped directly from the Motor Company, and that the Acceptance Corporation never had possession, that the cars were placed in the possession of the defendant for sale, and that they were regarded as collateral on the loan from the finance company for the repayment of which the defendant had given his promissory note. Such a relation was held inconsistent with the legal conception of a bailment.

The only conclusion to be drawn from these later cases is that a "bailment lease" will be considered in reality a conditional

[42] 279 Pa. 160, 123 Atl. 658 (1924).
[43] 93 Pa. Super. 92 (1928).

sale where it is given by a dealer either to a distributor to secure the payment of the price, or to a finance company to secure a loan, and whether it is executed before or after the dealer receives actual possssion of the goods. This result is consistent with the decision of *Clow v. Woods.* Whether the document given to the creditor is called a storage receipt, a trust receipt, a bailment lease, or some other name, is immaterial. What the creditor is doing in each case is retaining or obtaining title as security for the payment of the price of the goods, while the debtor at the same time has them in his possession. They would seem in effect to overrule the decision in *Brown Bros. v. Billington,* although this has not been done in so many words. The transaction set forth in *Commonwealth v. Williams* cannot be distinguished factually from that of *Brown Bros. v. Billington.* It will be noted that both in the *Hoeveler-Stutz Co.* case and in the *Williams* case, the dealer had not received possession before the lease or trust receipt was executed. The basis of the decision in *Brown Bros. v. Billington* cannot be taken with too much seriousness. The dealer there obviously was not selling the goods for Brown Bros.; the latter were engaged in the banking business, not the bicycle business. The real object of the transaction was to provide a credit arrangement whereby the dealer could engage in the business of selling bicycles. If the sale of automobiles to a dealer cannot be protected by a bailment lease, then logically no sound reason can be found for protecting a similar sale by saying in the contract that the goods and the proceeds therefrom are held in trust for the creditor. In both situations creditors of, and purchasers from, the dealer have equal equities.

The only query is why the courts have not gone further. If the delivery of cars to a dealer under a bailment lease is unfair to his creditors, it is equally unfair to the creditors of one who buys for his own use. The sole answer that can be given is that bailment leases to the ultimate purchaser have become sanctioned by time, whereas similar leases to a dealer are of comparatively recent origin. This, however, still does not explain the "trust receipt", which, as has been pointed out, cannot logically be distinguished.

The Recordation of the Bailment Lease

In this state (Pennsylvania) it is not necessary to record the bailment lease to protect the title of the bailor. The Uniform Conditional Sales Act provides for the recording of such contracts as come under its terms; and in its original form, as adopted by most states, covers not only the ordinary conditional sale but "any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay in compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of such goods upon full compliance with the terms of the contract." This provision, however, was omitted from the act as adopted in this state.[44] Furthermore, in the Commissioners' draft, the word "buyer" is defined as one who "buys or hires", whereas in the Pennsylvania Act the words "or hires" are omitted, as are the words "or leases". All doubt as to the intention of the Legislature was removed by the recent case of *Stern & Co. v. Paul.*[45] It was there pointed out that the legislative history of the Conditional Sales Act, as disclosed by the journals of the House and Senate, showed that as passed by the Senate it corresponded exactly with the draft of the Uniform Conditional Sales Act, but was subsequently so amended as to omit all references to contracts for the bailment or leasing of goods. This significant omission was consequently held to withdraw bailment leases from the operation of the statute.

The present status of such contracts is, therefore, a rather ironical one. In the great majority of states the conditional sale was originally held to afford full protection to the vendor. In this state, however, the rights of the latter were treated as inferior to those of purchasers from or creditors of the vendee. Since then it has come to be recognized that some sort of protection was justly due innocent third parties, and the Uniform Con-

[44] Conditional Sales Act of May 12, 1925, P. L. 603, PA. STAT. (Supp. 1928) § 19727a *et seq.*

[45] *Supra* note 28. The need for such a provision was pointed out in Mueller, *Conditional Sales in Pennsylvania Since the Adoption of the Sales Act* (1923) 72 U. OF PA. L. REV. 123.

ditional Sales Act, adopted generally both by other jurisdictions and by this state, requires that such transactions be recorded if the seller desires protection. The bailment lease, however, which is simply the conditional sale masquerading under another name, has continued without restriction, and Pennsylvania, which frowned upon the conditional sale when other states approved it, exempts the bailment lease from the operation of the Conditional Sales Act, although otherwise it has been brought within the provisions of that statute.[46]

[46] In connection with the general subject, attention is called to Thompson, *Election of Remedies in Bailment Lease Contracts* (1928) 3 TEMPLE L. Q. 274.

As might be expected, in view of the accepted construction, *a fortiori* credit sales are construed as bailments under the Capital Stock Tax Act of July 15, 1919, P. L. 948, PA. STAT. (West, 1920) §§ 20363-4; Commonwealth v. National Cash Register Co., 271 Pa. 406, 117 Atl. 439 (1921); Commonwealth v. Motors Mortgage Corp., 297 Pa. 468, 147 Atl. 98 (1929). But as the corporations concerned would have insisted on protection from third parties under the terms of the "leases," it is only fair to take them at their own word, and treat the goods as their own for purposes of taxation.

The current distinctions between lease and sale may be found in a recent publication, SCOTT, LAW OF BAILMENTS (1931). No attempt is made at any fundamental analysis.