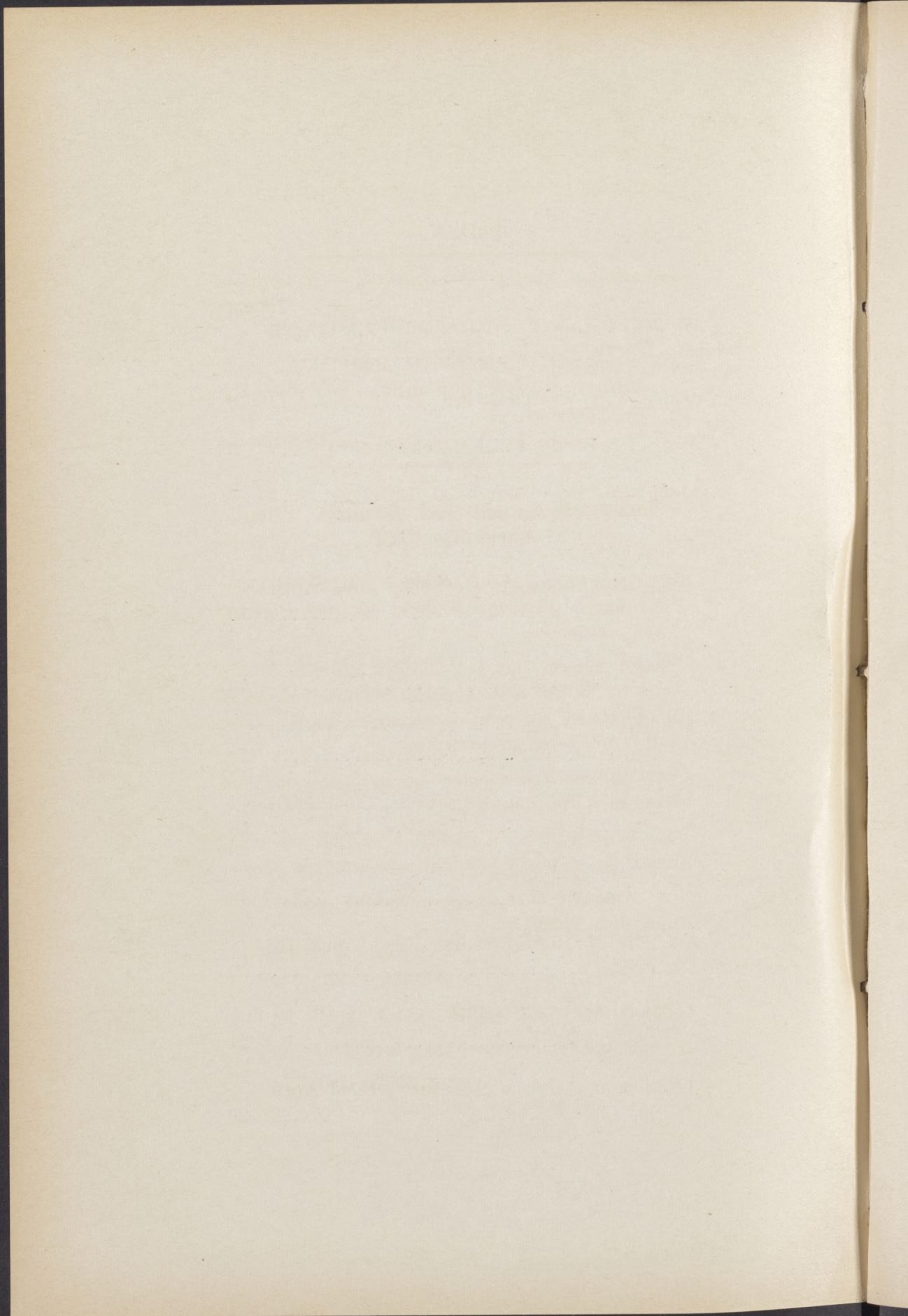


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PASSAIC COUNTY CIRCUIT COURT.

Action at Law.

COMMERCIAL CREDIT CORPORATION, a corporation,
Plaintiff,

—vs.—

MINNIE SMITH, CLARK SMITH, JOHN A. McCRANE 10
MOTORS, INC., a corporation, and WILLIAM
N. NUSSMAN,
Defendants.

**Notice of Appeal and Grounds, Filed
April 13, 1929.**

*To Peter Cohn, Esq., attorney for Defendants,
John A. McCrane Motors, Inc. and William
N. Nussman.* 20

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in the above stated cause on the following grounds:

1. Circuit Court erred in striking out complaint filed by plaintiff.
2. Circuit Court erred in striking out complaint on ex parte affidavits in replevin action. 30
3. Circuit Court erred in making order dated April 10th, 1929.

GREEN & GREEN,
Attorneys for Plaintiff.

Dated, April 12th, 1929.

Copy acknowledged on April 13/29.

PETER COHN, 40
Attorney for John A. McCrane
Motors, Inc., a corporation and
William Nussman.

Order, Filed April 11, 1929.**PASSAIC COUNTY CIRCUIT COURT.**

COMMERCIAL CREDIT CORPORATION, a corporation,
Plaintiff,

10

—vs.—

MINNIE SMITH, CLARK SMITH, JOHN A. McCRANE
MOTORS, INC., a corporation, and WILLIAM
NUSSMAN,

Defendants.

20 Due notice having been given to the above
named plaintiff that application would be made
before me on Wednesday, April 10th, 1929, at 4
o'clock in the afternoon, or as soon thereafter
as counsel can be heard, for an order striking
out the complaint filed in this cause on the
grounds that the matters contained therein are
sham and untrue, and filed for the purpose of
harassing the defendants John A. McCrane
Motors, Inc., a corporation and William Nuss-
man; and, the same coming on for argument in
30 the presence of Samuel Green of Green and
Green, attorneys for the plaintiff, and Peter Cohn,
attorney for the defendants, John A. McCrane
Motors, Inc., a corporation and William Nuss-
man, and it appearing to the Court from the
affidavits filed in this cause that the matters con-
tained in the complaint filed herein are sham
and untrue and filed for the purpose of harassing
the defendants John A. McCrane Motors, Inc., a
corporation and William Nussman;

40

Order.

And, it further appearing that said plaintiff is the assignee of a certain conditional sales contract entered into between said defendants Minnie Smith and Clark Smith and the Erie Motor Car Co. of Paterson, N. J., on the 14th of August, 1928, covering one Willys-Knight coupe 56, serial number 46758, motor number 44637, and that said conditional sales agreement was not filed in the office of the Register of Deeds of Passaic County as provided for by the Conditional Sales Act, Chapter 210, Public Laws 1919; 10

And, it further appearing that the said John A. McCrane Motors, Inc., a corporation is a judgment-creditor of the said defendants Minnie Smith and Clark Smith, and that on March 13th, 1929, the said Willys-Knight automobile was duly levied upon, seized and taken into possession by the defendant William Nussman, Constable of the County of Passaic, by virtue of an alias execution bearing date March 13th, 1929, issuing out of the Paterson District Court on a certain judgment recovered by the said John A. McCrane Motors, Inc., a corporation against the said defendants Minnie Smith and Clark Smith for the sum of Four Hundred and Forty-eight Dollars and Ninety-seven Cents (\$448.97), besides costs of Twenty-six Dollars and Forty-five Cents (\$26.45); 20 30

And, it appearing that the said John A. McCrane Motors, Inc., acquired a lien on said automobile before the conditional sales contract or a copy thereof was filed in the office of the Register of Deeds of Passaic County, without notice of the fact that a conditional sales agreement was entered into between the said defend- 40

Order.

ants and the said Erie Motor Car Co., covering said automobile;

10 And, it appearing that the allegations in the said complaint are sham and untrue, and filed for the purpose of harassing the said defendants John A. McCrane Motors, Inc., a corporation and William Nussman,

20 It is thereupon on this 10th day of April, Nineteen Hundred and Twenty-nine, on motion of Peter Cohn, attorney for the said John A. McCrane Motors, Inc., a corporation and William Nussman, ORDERED that said complaint be and is hereby struck out, with costs to be taxed, and the said Commercial Credit Corporation be and is hereby directed forthwith upon the service of a copy of this order, which may be certified to as correct by the said Peter Cohn, to deliver unto the said William Nussman, Constable, the Willys-Knight coupe 56, serial number 46758, motor number 44637.

NEWTON H. PORTER,
Judge.

Filed April 10, 1929.

30 NEWTON H. PORTER,
Judge.

Writ of Replevin, Filed March 30, 1929.

THE STATE OF NEW JERSEY, to the
SHERIFF OF PASSAIC COUNTY, GREETING:

(L. S.) We command you, that if Commercial
Credit Corporation, a corporation shall
make you secure, you cause to be 10
taken and delivered to it, following goods and
chattels, to wit: One (1) Willys-Knight Coupe,
56, Serial No. 46758, Motor No. 44637 and equip-
ment, which Minnie Smith, Clark Smith, John
A. McCrane Motors Inc., a corporation and Wil-
liam Nussman, took and unjustly detain as
is said; and that you summon the said Minnie
Smith, Clark Smith, John A. McCrane Motors,
Inc., a corporation and William Nussman, to answer 20
the annexed complaint of Commercial Credit
Corporation, a corporation, in an action at law
in the Passaic County Circuit Court. And that
you notify them that unless they file answer to
said complaint with the Clerk of the Circuit
Court, at Paterson, within 20 days after service
of this writ and the annexed complaint, the plain-
tiff may proceed in the suit and judgment may
be entered against them.

WITNESS, NEWTON H. PORTER, ESQ., Judge of
the said Circuit Court, at Paterson, this 20th
day of March, 1929. 30

LLOYD B. MARSH,
Clerk.

GREEN & GREEN,
Attorneys.

Writ of Replevin.

10 Duly served the within writ and complaint on Minnie Smith personally March 21, 1929 at 474 E. 18th St., Paterson, N. J. Duly served the within summons and complaint on Clark Smith, March 21, 1929, by leaving the same with his wife at his usual place of abode 474 E. 18th St., Paterson, N. J. Duly served the within writ and complaint on John A. McCrane Motors, Inc., March 21, 1929, by leaving the same with Leo McCrane, Sec'y. of the above Co. at 103 Fair St., Paterson, N. J. Duly served the within writ and complaint on William Nussman, personally March 21, 1929, at 103 Fair St., Paterson.

20 THOMAS CARLESS,
Sheriff.

FREDERICK H. NAEF,
Spec. Deputy.

30

40

Complaint, Filed March 30, 1929.

PASSAIC COUNTY CIRCUIT COURT.

Action at Law.

(Replevin.)

COMMERCIAL CREDIT CORPORATION, a corporation,
Plaintiff,

10

—vs.—

MINNIE SMITH, CLARK SMITH, JOHN A. MCCRANE
MOTORS, INC., a corporation, and WILLIAM
N. NUSSMAN,

Defendants.

Plaintiff, a corporation of the State of New
York having its business office in the City of
New York, and State of New York, says that:

20

FIRST COUNT.

1. On March 14, 1929, plaintiff was, and ever
since has been, the owner, and entitled to the
immediate possession of the following goods and
chattels, to wit:

30

One (1) Willys-Knight Coupe, 56, Serial
#46758, Motor #44637, and equipment.

2. On or about said date, at Paterson, Passaic
County, N. J., defendant wrongfully took posses-
sion of said goods and chattels from plaintiff,
wrongfully refused to deliver same to plaintiff
and wrongfully detained and still wrongfully
detain the same.

40

Complaint.

SECOND COUNT.

1. Plaintiff repeats paragraph 1 of the First Count.

10 2. Before serving writ in this action, at Paterson, New Jersey, plaintiff served a written demand upon defendants for possession of said goods and chattels, but defendants wrongfully refused to deliver same to plaintiff, and wrongfully detained and still wrongfully detain the same.

20 Plaintiff demands immediate possession of said goods and chattels, in the condition they were in on March 14th, 1928, (reasonable wear and tear excepted), or in case they cannot or are not returned to plaintiff and in such condition, the sum of \$600 for their value.

30 Plaintiff also demands as special damages the sum of \$100 for attorneys' fees and disbursements in bringing this action, cost of replevin bond, and interest on the value of said goods and chattels from the time of their wrongful detention, for the wrongful detention thereof by defendant from plaintiff.

GREEN & GREEN,
Attorneys for Plaintiff.

Notice, Filed April 11, 1929.

PASSAIC COUNTY CIRCUIT COURT.

COMMERCIAL CREDIT CORPORATION, a corporation,
Plaintiff,

—vs.—

10

MINNIE SMITH, CLARK SMITH, JOHN A. MCCRANE
MOTORS, INC., a corporation, and WILLIAM
NUSSMAN,

Defendants.

*To Commercial Credit Corporation, a corporation,
or, Green and Green, its attorneys:*

PLEASE TAKE NOTICE, that leave having been
first had and obtained, I shall apply to his Honor
Newton H. Porter, one of the Judges of the
Passaic County Circuit Court, at the Court Rooms
of the said Passaic County Circuit Court, lo-
cated in the Court House, Paterson, New Jersey,
on Wednesday, the 10th day of April, 1929, at
4 o'clock in the afternoon, or as soon thereafter
as counsel can be heard, for an Order striking
out the Complaint filed in this cause on the
grounds that the matters contained therein are
sham and untrue, and filed for the purpose of
harassing the defendants John A. McCrane Mo-
tors, Inc., a corporation, and William Nussman;

And, I will read in support of my motion, the
Affidavits of which the annexed is a true copy.

Yours respectfully,

PETER COHN,
Attorney for Defendants John A. McCrane
Motors, Inc., and William Nussman. 40

Affidavit, Filed April 11, 1929.

PASSAIC COUNTY CIRCUIT COURT.

COMMERCIAL CREDIT CORPORATION, a corporation,
Plaintiff,

10

—vs.—

MINNIE SMITH, CLARK SMITH, JOHN A. McCRANE
MOTORS, INC., a corporation, and WILLIAM
NUSSMAN,

Defendants.

State of New Jersey,
20 County of Passaic—ss.:

JOHN A. McCRANE, being duly sworn accord-
ing to law, upon his oath deposes and says:

That I am the President of the John A. Mc-
Crane Motors, Inc., a corporation, and have been
duly authorized by it to make the within Affidavit.

30 That the said John A. McCrane Motors, Inc., is
a judgment-creditor of the defendants Minnie
Smith and Clark Smith, against whom it secured
a judgment in the Paterson District Court on
the 13th of February, 1929, for the sum of Four
Hundred and Forty-eight Dollars and Ninety-
seven Cents (\$448.97), besides costs of Twenty-
six Dollars and Forty-five Cents (\$26.45).

That deponent caused an execution to be is-
sued on said judgment under date of February
13th, 1929, which said execution was thereafter
returned unsatisfied.

40 That on the 13th of March, 1929, deponent
caused to be issued an alias execution on said

Affidavit of John A. McCrane.

judgment directed to William Nussman, a duly authorized constable of the County of Passaic, who, in pursuance to said execution, did levy upon, seize and take into his possession a Willys-Knight coupe, belonging to the defendant Minnie Smith, and more fully described in the complaint filed in this cause, and thereafter, the said William Nussman did cause notices of the said sale to be duly posted, as provided for by law, scheduling said sale for the 21st of March, 1929, at 10 o'clock in the forenoon, at the Fair Street Garage, 103 Fair Street, Paterson, New Jersey. 10

That after the said William Nussman as constable seized and took into his possession the Willys-Knight coupe, deponent caused a search to be made of the records of the Register of Deeds' office for the purpose of ascertaining whether the said automobile was encumbered by a Conditional Bill of Sale, Chattel Mortgage or other means of encumbrances, and ascertained as a result of said search that there were no Conditional Bills of Sale, Chattel Mortgages or other liens encumbering the same. 20

That deponent does not know and did not know at the time of the issuance of said alias execution, that said automobile was encumbered by a Chattel Mortgage, Conditional Bill of Sale or other means of encumbrance, but has since been advised by his Attorney that the plaintiff in this case claims to hold a Conditional Bill of Sale which it did not file. 30

Deponent therefore prays that an Order may be entered striking out the complaint filed in this cause, for the reason that the facts contained therein are untrue, are sham and filed for the purpose of delaying and hindering deponent's 40

Affidavit of William Nussman.

firm in the collection of its judgment, and for the purpose of hindering the processes of our Courts, and causing an unwarranted delay.

JOHN A. McCRANE.

10 Sworn and subscribed to before me
this 4th day of April, A. D. 1929.

R. BERKOWITZ,
A Notary Public of New Jersey.

Affidavit, Filed April 11, 1929.

20 PASSAIC COUNTY CIRCUIT COURT.

COMMERCIAL CREDIT CORPORATION, a corporation,
Plaintiff,

—vs.—

MINNIE SMITH, CLARK SMITH, JOHN A. McCRANE
MOTORS, INC., a corporation, and WILLIAM
NUSSMAN,

30 Defendants.

State of New Jersey,
County of Passaic—ss.:

WILLIAM NUSSMAN being duly sworn according to law, upon his oath deposes and says:

40 That I am a constable of the County of Passaic,
and the person to whom the execution on the

Affidavit of William Nussman.

judgment obtained by the John A. McCrane Motors, Inc., against Minnie Smith and Clark Smith, obtained in the Paterson District Court on the 13th of February, 1929, for the sum of Four Hundred and Forty-eight Dollars and Ninety-seven Cents (\$448.97), besides costs of Twenty-six Dollars and Forty-five Cents (\$26.45), was directed. 10

I have read the Affidavit of John A. McCrane, attached hereto, and the facts stated therein are true, and recites the actual situation.

By virtue of said execution, I thereupon called at the home of the said defendants Minnie Smith and Clark Smith and levied upon, seized and took into my possession the Willys-Knight coupe, which is the subject matter of the replevin suit now pending in this matter. I was not advised of the fact nor did I know that the same was subject to any encumbrances, Chattel Mortgages or Conditional Bills of Sale, and accordingly, did post notices of the execution sale as I was directed by said writ of execution, and scheduled said sale to be held on the 21st day of March, 1929, at the time and place mentioned in the Affidavit of Mr. John A. McCrane. 20

That at about 9:50 of the morning of that date, I was advised that a writ of replevin was issued in this case by the Commercial Credit Corporation, claiming that it held a Conditional Sales Agreement which it did not record. 30

I know that after I had levied upon and seized said automobile, I advised Mr. Peter Cohn of that fact, who in my presence instructed one of his assistants to make a search of the records of the Register of Deeds of the County of Passaic, for the purpose of ascertaining whether or not 40

Affidavit of L. J. Weckselman.

any encumbrances appeared of record, and was thereafter advised that none so appeared.

10 It is my opinion that the complaint filed in this cause by the said plaintiff is sham and untrue, and is merely for the purpose of hindering and delaying plaintiff in the collection of its judgment.

WILLIAM NUSSMAN.

Sworn and subscribed to before me
this 4th day of April, A. D. 1929.

R. BERKOWITZ,
A Notary Public of New Jersey.

Affidavit, Filed April 11, 1929.

20

PASSAIC COUNTY CIRCUIT COURT.

COMMERCIAL CREDIT CORPORATION, a corporation,
Plaintiff,

—vs.—

MINNIE SMITH, CLARK SMITH, JOHN A. McCRANE
MOTORS, INC., a corporation, and WILLIAM
NUSSMAN,

30

Defendants.

State of New Jersey,
County of Passaic—ss.:

L. JEROME WECKSELMAN being duly sworn according to law, upon his oath deposes and says:

40 That I am an attorney-at-law practicing in the City of Paterson, and am associated with Peter Cohn.

Affidavit of L. J. Weckselman.

At his request, I searched the records of the Register of Deeds of Passaic County, after the Willys-Knight coupe, more fully described in the complaint, was levied upon and seized by Mr. Nussman. My search of the records of the Register of Deeds disclosed there were no Chat- 10
 tel Mortgages, Conditional Bills of Sale or encumbrances affecting said automobile. That later, I ascertained that the plaintiff in this case, the Commercial Credit Corporation, held a Conditional Bill of Sale which it had neglected to file, a representative of the Commercial Credit Corporation having spoken to me over the telephone and having advised me of the fact that he thought the same was filed, and if it was not filed it was an oversight. 20

L. JEROME WECKSELMAN.

Sworn and subscribed to before me
 this 4th day of April, A. D. 1929.

R. BERKOWITZ,
 A Notary Public of New Jersey.

30

40

Affidavit of William H. Queriple.

installments of \$54.00 each secured by a conditional sales contract, a true copy of which conditional sales contract is annexed hereto and made a part hereof, covering said motor vehicle. Said conditional sales agreement, inter alia, provided that title to said motor vehicle shall remain in seller until all amounts due thereunder are fully paid in cash. 10

3. On August 14th, 1928, said Erie Motor Car Co. assigned all its right, title and interest in and to said conditional sales agreement and motor vehicle secured thereby to plaintiff.

4. By virtue of said conditional sales agreement, plaintiff is the owner of said motor vehicle.

5. On March 14, 1929, an installment in the sum of \$54.00 fell due, but was not paid. 20

6. As a result the entire balance due on said conditional sales agreement of \$324.00 became immediately due and payable and plaintiff became entitled to immediate possession of said motor vehicle.

7. Plaintiff commenced above entitled replevin action to recover possession of said motor vehicle. 30

WM. H. QUERIPLE.

Sworn and subscribed to before me
this 10th day of April, 1929.

H. RUSSELL VAN CLEVE,
A Notary Public of N. J.
(L. S.)

Filed April 10, 1929,

NEWTON H. PORTER,
Judge. 40

CONDITIONAL SALES CONTRACT AN-
NEXED TO AFFIDAVIT.

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PURCHASER'S STATEMENT
(Please answer all questions and fill in all blanks)

City.....State.....Date.....192.....

To the "Seller" named in the contract on reverse side hereof.

For the purpose of securing credit from you in the purchase of the Motor Vehicle mentioned in the contract on the reverse side hereof, and in order that you may sell to or discount with Commercial Credit Corporation the note mentioned therein, undersigned makes the following representations:

Residence Address.....No. and Street.....City.....County.....State.....How long there?.....Years

Previous Address.....No. and Street.....City.....State.....How long there?.....Years

Employed by.....Position?.....How long?.....

If in business for self, in what business engaged?.....How long?.....

Business Address.....No. and Street.....City.....County.....State.....

Previous Employer.....Address.....How long?.....

Married?.....Age?.....Number of dependents?.....Color?.....Monthly Income? \$.....

Fraternal Orders and Unions of which you are a member.....

Carry savings account Number.....with.....Bank.....Branch

Carry checking account with.....Bank.....Branch

Carry Life Insurance with.....Company of.....

Previous Car Purchased From.....Address.....

Notes Carried By.....Address.....

Business References.....Address.....No. and Street.....City

.....Address.....No. and Street.....City

Name of nearest Relative.....Address.....No. and Street.....City

except Wife or Husband.....Address.....No. and Street.....City


Description and location of Real Estate or Personal Property owned by and in name of undersigned.

Description	Location	Cash Value	Owing on Same
.....	\$.....	\$.....

Remarks.....

Undersigned will pay said note irrespective of any imperfections in the Motor Vehicle or any breach of alleged representations. You and/or Commercial Credit Corporation are authorized to correct patent errors in said contract and other papers executed by undersigned in connection therewith.

P.....Minnie Smith.....
(Purchaser Sign Here)

IMPORTANT 

.....Clark Smith.....
(Please insert mailing address)

DEALER'S REPRESENTATIONS AND ASSIGNMENT

Answer Yes or No

1. Have you any reasons to believe Purchaser violates any laws concerning liquor or narcotics?.....
2. Was this Purchaser, to your knowledge, ever rejected by any other Finance Company, Bank or Banker?.....

FOR VALUE RECEIVED, Undersigned does hereby sell, assign and transfer to Commercial Credit Corporation, his, its or their right, title and interest in and to the contract on the reverse side hereof and the Car referred to therein, with power to take legal proceedings in the name of the Undersigned or itself in respect thereto. Undersigned warrants that the down payment made by the Purchaser as stated in the contract was in cash and not its equivalent, unless otherwise mentioned in the contract, and that no part thereof was loaned directly or indirectly by Undersigned to the Purchaser; that Undersigned had a title free and clear of all encumbrances at the time of the execution of this contract by the Purchaser; that the Purchaser is 21 years of age or older; that the answers by Undersigned to questions above are true and complete. Undersigned makes said warranties for the purpose of inducing Commercial Credit Corporation to purchase the said contract and the note referred to therein; and if any such warranties should be untrue, Undersigned shall buy from Commercial Credit Corporation upon demand said note and contract, and will pay therefor not less than the amount owing thereon plus any and all costs and expenses paid or incurred by Commercial Credit Corporation in respect thereto, and said remedy shall be cumulative and not exclusive, and shall not affect any other right or remedy that Commercial Credit Corporation might have at law or in equity against Undersigned.

Commercial Credit Corporation is hereby authorized to correct patent errors in said contract and other papers executed, endorsed or assigned by Undersigned in connection therewith.

Witness the signature and seal of the Undersigned at.....Paterson, N. J......
(Place)

.....August 14....., 192 8..... D.....Erie Motor Car Co......(Seal)
(Date) (Dealer Sign Here)

By.....J. Opru, Pres......
(Owner, Officer or Firm Member)



CONDITIONAL SALES CONTRACT

Paterson, N. J. August 14, 1928

Minnie Smith (Print Purchaser's Name) Paterson, N. J. (City)

Erie Motor Car Co. (Dealer's name) Paterson, N. J. (City)

Paterson, N. J. hereinafter called Purchaser. (State)

Paterson, N. J. hereinafter called Seller. (State)

Purchaser hereby acknowledges delivery and acceptance of the following described Motor Vehicle together with equipment (herein called "Car") in its present condition, after thorough examination, which Purchaser buys and Seller sells for the time price and on the following terms and conditions:

Table with columns: MAKE, Type of Body, Model, Year of Manufacture, Manufacturer's Serial Number, Motor Number, Will Car be used for (Pleasure, Business, Taxicab or Hire). Row: Willys-Knight, Coupe, 56, 46758, 44637, Bus & Pleas.

Car will be kept at (Number and Street) (City) (State)

Table with columns: CASH PRICE, TIME PRICE. Rows include List Price, Freight and Tax, Extra Equipment, Total Cash Price, Cash on or before delivery, Allowance on Trade In, Total Down Payment.

Title to said Car shall remain in Seller until all amounts due hereunder are fully paid in cash, and if stated above that Purchaser resides in the State of New Jersey, it is hereby agreed that immediately upon completion of payments Seller will deliver to Purchaser a regular bill of sale in conformity with Chapter 168, P. L. 1919, New Jersey Statutes as amended...

Said Car shall not be used for taxicab purposes or for hire unless otherwise mentioned herein. Purchaser shall not remove or attempt to remove said Car from the county and state given above as Purchaser's address without the written consent of the Seller.

If Purchaser should fail to pay said note or any instalment thereon, or breach this contract, or if any insurance company should cancel or give notice of intention to cancel as against Purchaser any policy against the hazards of fire and theft to said Car, or if any execution, attachment or other writ should be levied on any of Purchaser's property...

Any action to enforce payment of said note shall not waive or affect any of Seller's rights hereunder. Any indulgencies granted Purchaser shall not be considered a waiver of any rights of Seller. Time is the essence of this agreement.

This agreement constitutes the entire contract and no waivers or modification shall be valid unless written upon or attached to this contract, and said Car is accepted without any express or implied warranties unless written hereon at the date of purchase.

This agreement shall apply to, inure to the benefit of, and bind the heirs, executors, administrators, successors and assigns of the Purchaser and Seller.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals to this contract.

WITNESSES:

D. Vineis

Wm. Backus

D. Erie Motor Car Co. (Seal) (Dealer sign here)

By J. Opru Pres. (Owner, Officer or Firm Member)

P. Minnie Smith (Seal) (Purchaser sign here)

Clark Smith (Seal)

IMPORTANT

Purchaser Read Before Signing

Purchaser sign here if Motor Vehicle is actually in your possession, but do not sign here unless you have actually received Motor Vehicle, since by doing so you might place yourself in the position of being a party to a fraud.

Affidavit, Filed April 10, 1929.

PASSAIC COUNTY CIRCUIT COURT.

Action at Law.

COMMERCIAL CREDIT CORPORATION, a corporation, 10
Plaintiff,

—vs.—

MINNIE SMITH, CLARK SMITH, JOHN A. McCRANE
MOTORS, INC., a corporation, and WILLIAM
NUSSMAN,
Defendants.

State of New Jersey, 20
County of Essex—ss.:

MINNIE SMITH, of full age, being duly sworn according to law, on her oath deposes and says, that:

1. She is one of the defendants in the above entitled cause.
2. On February 19th, 1929, your deponent was 30
examined in supplementary proceedings at the law office of Ward & McGinnis, Paterson, N. J., at which time she informed attorney for defendant, John A. McCrane Motors, Inc., that the motor vehicle more particularly described in complaint filed herein was covered by a conditional sales contract held by Commercial Credit Corporation, which conditional sales contract was unsatisfied.
3. Deponent further states that on March 13th, 40

Affidavit of Minnie Smith.

1929, she informed the defendant, William Nussman, at the time said defendant, William Nussman, attempted to seize motor vehicle, that the said motor vehicle was covered by an unsatisfied conditional sales contract held by Commercial Credit Corporation.

10

4. Deponent further states that on March 14th, 1929, she informed the defendant, William Nussman, at the time said defendant, William Nussman, seized motor vehicle that the said motor vehicle was covered by an unsatisfied conditional sales contract held by Commercial Credit Corporation.

MINNIE SMITH,

20

Sworn and subscribed to before me
this 5th day of April, 1929.

DOROTHY F. WALTER,
Notary Public of New Jersey.
My Commission expires Nov. 3, 1932.

Filed April 10, 1929.

30

NEWTON H. PORTER,
Judge.

40

Affidavit, Filed April 10, 1929.

PASSAIC COUNTY CIRCUIT COURT.

Action at Law.

COMMERCIAL CREDIT CORPORATION, a corporation, 10
Plaintiff,

—vs.—

MINNIE SMITH, CLARK SMITH, JOHN A. McCRANE
MOTORS, INC., a corporation, and WILLIAM
NUSSMAN,
Defendants.

State of New Jersey, 20
County of Essex—ss.:

CLARK SMITH, of full age, being duly sworn according to law, on his oath deposes and says, that:

1. He is one of the defendants in the above entitled cause.

2. On February 19th, 1929, your deponent was examined in supplementary proceedings at the law office of Ward & McGinnis, Paterson, N. J., at which time he informed attorney for defendant, John A. McCrane Motors, Inc., that the motor vehicle more particularly described in complaint filed herein was covered by a conditional sales contract held by Commercial Credit Corporation, Park Avenue and Straight Street, Paterson, N. J., which conditional sales contract was unsatisfied. 30

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Affidavit of Clark Smith.

3. Deponent requested said defendant, William Nussman, to appear with him at the office of Commercial Credit Corporation, Park Avenue and Straight Street, Paterson, on March 14th, 1929, to discuss the matter with one of the representatives of said Commercial Credit Corporation. Deponent appeared at the office of Commercial Credit Corporation on March 14th, 1929, but the defendant, William Nussman, failed to appear at that time.

4. Deponent further states that on March 13th, he informed the defendant, William Nussman, at the time said defendant, William Nussman attempted to seize motor vehicle, that the said motor vehicle was covered by an unsatisfied conditional sales contract held by Commercial Credit Corporation.

5. Deponent further states that on March 14th, 1929, he informed the defendant, William Nussman, at the time said defendant, William Nussman, seized motor vehicle that the said motor vehicle was covered by an unsatisfied conditional sales contract held by Commercial Credit Corporation.

CLARK SMITH.

Sworn and subscribed to before me
this 6th day of April, 1929.

DOROTHY F. WALTER,
Notary Public of New Jersey.
My Commission expires Nov. 3, 1932.

Filed April 10, 1929.

40 NEWTON H. PORTER,
Judge.

Affidavit, Filed April 10, 1929.

PASSAIC COUNTY CIRCUIT COURT.

Action at Law.

COMMERCIAL CREDIT CORPORATION, a corporation, 10
Plaintiff,

—vs.—

MINNIE SMITH, CLARK SMITH, JOHN A. MCCRANE
MOTORS, INC., a corporation, and WILLIAM
NUSSMAN,
Defendants.

State of New Jersey, 20
County of Passaic—ss.:

HARRISON DOUGHERTY, of full age, being duly sworn according to law, on his oath deposes and says, that:

1. He is employed by Commercial Credit Corporation, a corporation of the State of New York, at their branch office, at Paterson, N. J.

2. On March 13th, 1929, one, William Nussman, called deponent on the telephone and informed him that he was a Constable of Passaic County; that he was at the home of Minnie Smith and Clark Smith, for the purpose of levying upon a certain Willys-Knight automobile then in the possession of said Minnie Smith and Clark Smith; said William Nussman stated that he was informed by Mr. and Mrs. Smith that said motor

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Affidavit of Harrison Dougherty.

vehicle was covered by a conditional sales contract held by Commercial Credit Corporation and that he was calling deponent to verify this information.

HARRISON DOUGHERTY.

10 Sworn and subscribed to before me
this 9th day of April, 1929.

FRANK D. SAVASTANO,
Notary Public of New Jersey.
(L. S.)

Filed April 10, 1929.
NEWTON H. PORTER,
20 Judge.

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114 MAY. 1. 1929

New Jersey Court of Errors and Appeals.
On Appeal from Passaic County Circuit Court.

Action at Law.

COMMERCIAL CREDIT CORPORATION, a corporation,
Plaintiff-Appellant,

—vs.—

MINNIE SMITH, CLARK SMITH, JOHN A. Mc-
CRANE MOTORS, INC., a corporation and WIL-
LIAM N. NUSSMAN,
Defendants-Respondents.

BRIEF OF PLAINTIFF-APPELLANT.

Statement.

This is an appeal by the plaintiff, Commercial Credit Corporation, from the judgment of the Passaic County Circuit Court, based upon the Court's striking out complaint filed by plaintiff as sham and untrue and filed for the purpose of harassing the defendants, John A. McCrane Motors, Inc., and William N. Nussman.

Facts.

The facts appear in affidavits filed by the plaintiff, in opposition to the motion to strike out its complaint (Case, pp. 16-24), and in affidavits used by the defendants, John A. McCrane Motors,

Inc., and William N. Nussman, in support of their motion (Case, pp. 10-15), and may be briefly summarized as follows:

Defendants, Minnie Smith and Clark Smith did not appear in, and are not contesting, the action.

On August 14th, 1928, the defendants, Minnie Smith and Clark Smith (hereinafter referred to as "Purchasers"), agreed to buy a Willys-Knight coupe from Erie Motor Car Co. (hereinafter referred to as "Dealer"), for \$1,207.43, and executed a conditional sale contract to said Dealer, reserving title to motor vehicle in said Dealer, and wherein Purchasers agreed to pay \$507.43 in cash on or before delivery, and balance of \$700 in 15 equal monthly installments of \$54 each. On the same day, said Dealer sold and assigned the contract to Commercial Credit Corporation (hereinafter referred to as "Plaintiff"), and duly executed assignment thereof (Case, p. 18).

The Purchasers paid the first few installments, but defaulted on installment due March 14th, 1928. As a result, the entire unpaid balance on said contract became due and payable, and Plaintiff became entitled to immediate possession of motor vehicle (Case, p. 17). (*Commercial Credit Corporation v. Coover*, 101 N. J. L. 530; *General Motors Acceptance Corporation v. Smith*, 101 N. J. L. 154.)

On or about February 13th, 1929, defendant, John A. McCrane Motors, Inc., recovered a judgment in the Paterson District Court against Purchasers, in the sum of \$448.97, plus costs of \$26.45. On the same day, said defendant caused an execution to be issued out of said District Court, which execution was subsequently returned unsatisfied (Case, p. 10, ll. 35-40).

On or about February 19th, 1929, Purchasers were examined in supplementary proceedings at the office of Ward & McGinnis, Paterson, N. J., during which proceedings Purchasers informed attorney for defendant, John A. McCrane Motors, Inc., that motor vehicle described in complaint filed herein was covered by an unsatisfied conditional sale contract held by Plaintiff (Case, p. 19, ll. 30-40; p. 21, ll. 29-40).

Subsequently, defendant, John A. McCrane Motors, Inc., had an alias execution issued out of the District Court to the defendant, William N. Nussman, a Constable of Passaic County, for the purpose of levying upon motor vehicle referred to in complaint. On March 13th, 1929, said Constable called at the home of Purchasers for the purpose of levying upon motor vehicle. At that time, and before any levy was made, he was then and there informed by Purchasers that motor vehicle was covered by an unsatisfied conditional sale contract held by Commercial Credit Corporation (Case, p. 20, ll. 1-10; p. 22, ll. 15-20).

Clark Smith, one of the Purchasers, requested Constable to appear with him at the office of Commercial Credit Corporation, in Paterson, on March 14th, 1929, to discuss the matter with a representative of Plaintiff, and at that time Purchaser appeared, but Constable failed to appear. On March 13th, 1929, Constable phoned the office of Commercial Credit Corporation in Paterson, and spoke to Harrison Dougherty, the representative in charge, who informed him that the motor vehicle was covered by an unsatisfied conditional sale contract (Case, pp. 23-24).

Actual levy upon motor vehicle was not made by Constable until March 14th, 1929, the day after Constable personally received actual notice

from Purchasers that motor vehicle was covered by unsatisfied conditional sale contract.

Defendant Nussman contends that he levied upon motor vehicle without notice of conditional sale contract being filed. After present action was commenced (March 20th, 1929), defendants caused a search to be made of the records of Passaic County, but were unable to find a contract filed covering motor vehicle. As a result, defendants contend that complaint filed is untrue, sham and filed for the purpose of delaying and harassing defendant, John A. McCrane Motors, Inc., from collecting its judgment against the Purchasers.

The facts as to notice are sharply in dispute.

In this state of affairs, the Circuit Court struck out Plaintiff's complaint on the ground that it was sham, untrue and filed for the purpose of harassing defendants, John A. McCrane Motors, Inc., and William N. Nussman.

Grounds of Appeal.

1. Circuit Court erred in striking out complaint filed by Plaintiff.
2. Circuit Court erred in striking out complaint on *ex parte* affidavits in replevin action.
3. Circuit Court erred in making order dated April 10th, 1929.

*Law.***POINT ONE.**

Plaintiff was the owner of the automobile by virtue of the assignment of the conditional sale contract, and entitled to immediate possession by virtue of default of Purchasers.

Plaintiff was the owner of said automobile by virtue of Dealer's assignment of contract (Case, pp. 17-18), by which it appears that the automobile dealer, Erie Motor Car Co., which originally executed the contract with Purchasers, sold, assigned and transferred to Plaintiff its right, title and interest in and to the contract and the motor vehicle referred to therein.

Commercial Credit Corporation v. Coover, 101 N. J. L. 530; *General Motors Acceptance Corporation v. Smith*, 101 N. J. L. 154; *Endler v. Commercial Credit Corporation*, 7 N. J. A. R. 315.

Purchasers were only entitled to possession of said motor vehicle upon compliance with the terms and conditions of said conditional sale contract, and upon a breach thereof, Plaintiff had the right to take possession of the same, both under the conditional sale contract and the Uniform Conditional Sales Act, P. L. 1919, page 466, Section 16.

POINT TWO.

There was no proof before the Circuit Court upon which order to strike out plaintiff's complaint was made, and order was therefore not justified.

Affidavit of John A. McCrane, President of John A. McCrane Motors, Inc. (Case, p. 11, ll. 3-37), is improper, and is filled throughout with hearsay and conclusions.

The affidavit of William Nussman, in part, reads as follows (Case, p. 13, ll. 12-16) :

"I have read the affidavit of John A. McCrane attached hereto, and the facts stated therein are true, and recites the actual situation."

This defendant characterizes the testimony of John A. McCrane, an officer of the other defendant. This practice has been repeatedly condemned by Chancellor Walker.

The remainder of his affidavit (Case, p. 13), consists solely of hearsay evidence and conclusions.

The affidavit of L. Jerome Weckselman, an attorney in the office of attorney for defendant (Case, p. 15, ll. 7-12), in part, reads as follows:

"* * * My search of the records of the Register of Deeds disclosed there were no chattel mortgages, conditional bills of sale, or encumbrances affecting said automobile. * * *"

It is of interest to note that the trial Court found from the evidence submitted to him, and based his order of April 10th, 1929, on the fact that Plaintiff failed to file its contract mainly from the above. This testimony is a pure unfounded conclusion. Same fails to show against whom said deponent searched in the indices of the Register of Deeds to ascertain conclusions set forth in his affidavit.

In the case of *Hand v. Nolan*, 1 N. J. Misc. Rep. 428, Mr. Justice Katzenbach, speaking for the Supreme Court in an application to set aside an order to hold to bail, stated as follows:

“* * * The rule is, that there must be an order to hold to bail by a Judge or Commissioner, but only upon proof by affidavit disclosing a cause of action and some special cause for ordering bail. *Benson v. Bennett*, 25 N. J. L. 166. * * * The present case is one where the proof should establish a special cause for holding the defendant to bail. Special reasons ordinarily cited are non-residence of the defendant, or facts and circumstances from which it may be inferred that the defendant may not be in the jurisdiction to answer to a judgment when rendered. *Hufty v. Wilson*, 78 N. J. L. 241. It was also held in this case ‘that the amendment of the statute (1903) in regard to the issuing of this writ in tort actions by using in such amendment the very language used in the statute long on our books concerning its issue in contract actions, will be construed in the same way that the provisions of the statute have been construed which relate to actions on contract.’ The reasons stated should amount to proof and should not be the conclusions of the affiant. *Proof, it has been held, when used*

in a legislative enactment, means competent and legal evidence, testimony that conforms to the fundamental rules of proof, one of which excludes hearsay evidence, however trustworthy the informant or, however implicit may be the deponent's belief in the truth of what he has heard. Inglis v. Schreiner, 58 Ind. 102; Hufty v. Wilson, supra." (Italics ours.)

The Supreme Court, in *Truax ads. Pennsylvania R. R. Co.*, in 56 N. J. L. 278, says:

"We think the adjudication in this case is without legal support. An adjudication that a debtor has fraudulently contracted the debt *must rest upon proof, by competent and legal evidence, of the facts from which fraud in contracting the debt may reasonably be inferred. Bowne ads. Titus, 1 Vroom 340. Statements made in an affidavit, to which the affiant could not lawfully testify in open court, are not competent proof in these ex parte proceedings for the purpose of holding a defendant to bail. * * ** If these statements were legal evidence, they would warrant the adjudication of the commissioner, but they are not; *they are merely the witness' inferences from the legal evidence, which should itself have been produced before the commissioner.*" (Italics ours.)

Chief Justice Gummere, speaking for the Supreme Court, in *Githens v. Mount*, 64 Id. 166, at page 168, says:

"* * * This petition was verified by the oath of one of the plaintiffs, but the verification of the facts upon which the petitioner sought to obtain the restraining

provision of the order *was merely upon the information and belief*. Such a verification was not a compliance with the requirements of the act, and did not justify the restraining clause contained in the order now before us. *The act requires proof of the facts upon which the application for the injunction is based, and 'proof', when used in a legislative enactment means legal evidence upon which judicial action may be rested.* *Truax v. Pennsylvania Railroad Co.*, 27 Vroom 277; *Inglis v. Schreiner*, 29 Id. 120; *Barr v. Voorhees*, 10 Dick. Ch. Rep. 561.

Obviously the petition of the defendant verified in manner mentioned does not supply this statutory requirement. As evidence the affidavit is the veriest hearsay. So much of the order, therefore, as restrains the defendant from collecting his distributive share of the residue of his father's estate must be set aside." (Italics ours.)

Mr. Justice Kalisch, speaking for the Supreme Court, in *Jaudel v. Schoetzke*, 95 Id. 171, at page 177, says:

"An examination of the affidavit upon which the legality of the order awarding the writ of attachment must rest discloses that the requisite proof to establish the material averments of that deposition was not only not produced before the Supreme Court Commissioner who granted the order, but also, that the averments set forth in the affidavit fail to establish that the affiant has a legal cause of action against the defendant.

It is too well settled in this state so as to warrant any debate on the subject that where a legislative act requires proof to be made of the existence of certain facts, for example, as the statute does in the present

instance, it means competent evidence—such testimony as would be admissible in the trial of the case in a court of justice. ‘Proof’, as was well said by Mr. Justice Garrison, in Inglis v. Schreiner, 58 N. J. L. 120, speaking for the Supreme Court (at page 122), ‘when used in a legislative enactment, means competent and legal evidence, or, in other words, testimony that conforms to the fundamental rules of proof, one of which excludes hearsay evidence, however trustworthy the informant or however implicit may be the deponent’s belief in the truth of what he has heard.’ This clear and concise statement of the law was adopted by Mr. Justice Voorhees in Hufty v. Wilson, 78 Id. 241. To the same effect is Hanford v. Duchastel, supra (at p. 208).” (Italics ours.)

As there was no legal proof before the trial Court, order cannot be justified, and judgment should therefore be reversed on this ground alone.

POINT THREE.

Complaint filed by plaintiff was not sham, and proof submitted by defendants, even if evidential, was insufficient upon which court could make order striking out complaint as sham.

Chancellor Walker, sitting as Ordinary *In re Bream*, 93 N. J. Eq., page 593, at pages 595, bottom, and 596, top, with reference to sham and frivolous pleadings, quoting from 31 Cyc. 613, states as follows:

“While the court sometimes used the

terms 'frivolous and sham' as meaning the same thing, and a motion to strike is often based on the ground that a plea is both frivolous and sham, there is nevertheless a clear distinction between the two, in that *a sham plea is good on its face but false in fact*, while a frivolous plea is one which on its face sets up no defense, although it may be true. A frivolous pleading is always assumed to be true, *while a sham pleading must be proved to be false*; the character of the former is determined by mere inspection, *while that of the latter is usually determined by proof aliunde.*" (Italics ours.)

Plaintiff proved that it was the owner, and entitled to immediate possession of motor vehicle. *Commercial Credit Corporation v. Coover*, 101 N. J. L. 530; *General Motors Acceptance Corporation v. Smith*. 101 N. J. L. 154; *Endler v. Commercial Credit Corporation*, 7 N. J. A. R. 315.

Assuming for the purpose of argument that the defendants' affidavits were evidential, although we contend to the contrary, as set forth in Point Two, same show the following facts:

On March 13th, 1929, at the instance of defendant, John A. McCrane Motors, Inc., the constable levied upon and took into his possession the motor vehicle involved in this matter. Defendants further contend that they acquired a lien on said motor vehicle before the conditional sale contract or a copy thereof was filed in the office of the Register of Deeds of Passaic County, without notice of the fact that such conditional sale contract was entered into between the purchasers and the Erie Motor Car Co.

Plaintiff, in its affidavits, to controvert the above, shows that in hearing on supplementary proceedings held in the office of Ward & McGin-

nis, attorneys, that they informed attorney for the John A. McCrane Motors, Inc., that motor vehicle was covered by an unsatisfied conditional sale contract held by Commercial Credit Corporation. Purchasers also showed that on March 13th, 1929, before the constable made an actual levy upon the motor vehicle, that they informed the constable of said unsatisfied conditional sale contract held by Commercial Credit Corporation. The constable thereupon phoned the Paterson office of Commercial Credit Corporation (Case, p. 23), and spoke to Mr. Dougherty, the agent in charge thereof.

Thereafter, on March 14th, 1929, and not March 13th, the constable actually made a levy upon the motor vehicle, one day after having received actual notice from purchasers that said motor vehicle was covered by a conditional sale contract.

Notwithstanding the above evidence, which was sharply in conflict, the trial Court struck out complaint as being sham.

In *Coykendall v. Robinson*, 39 N. J. L. 98, this Court, speaking by Justice Van Sickle, at page 101, states as follows:

“When a defendant, on a rule to show cause why his plea be not stricken out, or, on application by him to set aside a judgment entered over his plea, shows, by his own affidavit, or by other testimony, that he has a defense, stating, specifically, the grounds of it, a question of fact is presented to be passed upon, and he cannot be deprived of the benefit of a trial in the ordinary mode. In that event, a case for striking out does not exist, and, if he is denied a trial by jury, he will be entitled to review the action of the Court by which his legal rights are impaired.”

POINT FOUR.

Defendant, John A. McCrane Motors, Inc., had actual notice that motor vehicle was covered by an unsatisfied conditional sale contract, and an issue of fact triable by a jury was presented.

Section 4 of the Uniform Conditional Sales Act, P. L. 1919 of N. J., page 462, reads as follows:

“Every provision in a conditional sale reserving property in the seller after possession of the goods is delivered to the buyer, shall be *valid as to all persons*, except as hereinafter provided.”

Section 5 of said Act reads as follows:

“Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of, the buyer, who, *without notice of such provision*, purchases the goods or acquires *by attachment or levy a lien upon them* before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within 10 days after the making of the conditional sale.”
(Italics ours.)

Judge Rellstab construed these sections in another aspect in re *B. & B. Motor Sales Corporation*, 277 Fed. Rep. 808.

In *Lyle Culbert &c. Equipment Co. v. J. F. Anderson Lumber Co.* (1923 S. Dak.), 193 N. W. 58, an officer making a levy under an execution

with specific directions by the execution creditor as to the goods to be seized, acts as the agent of the creditor, and knowledge on the officer's part that the goods are held by the debtor under a conditional sale contract is imputed to the creditor.

Proof from defendants' affidavits shows that such notice was had by the officer on March 13th, 1929, prior to the time levy was made by him, which levy was made on March 14th, 1929.

If a judgment creditor received notice just before he made a levy on property that there was a conditional sale contract against the same, even though the contract was not filed, there would be no question as to the validity of the contract against said judgment creditor, because Section 5 of the Conditional Sales Act, *supra*, distinctly states that the lien must be acquired *without notice*. After all, filing is only constructive notice, and where a person has actual notice the question of the constructive notice by filing becomes immaterial.

On the proposition of effect of actual notice, may we quote several excerpts from *Morey & Co. v. Schaad*, Court of Errors & Appeals, 98 N. J. L. 799, in opinion by Justice Minturn:

"In construing a statute of this remedial character, we are guided by the obvious fundamental rule furnished by the purpose of the Legislature, which was to give notice to a *bona fide* purchaser or creditor of the exact legal status and property rights of the parties to the contract, so as to enable such intending purchaser or creditor to guide himself accordingly. Pursuant to express language of the statute, this purpose may be accompanied either by the imparting of the actual notice to such parties or by the filing of the contract, etc. * * *

“ * * * It will be observed, therefore, that both the legislative provisions and the decisions construing it are based upon the theory that if *actual notice* is imparted to the subsequent attaching creditor of the contractual status existing between the vendor and vendee, such sale is not invalidated, and that *whether the notice be actually imparted within the ten days' period or thereafter constructively by filing the instrument, the legal effect is the same.*” (Italics ours.)

Vice-Chancellor Backes, in the recent case of *Goldstein v. Marlboro Construction Co.*, 145 Atl. 2, decided March 2nd, 1929, stated as follows:

“Our recording acts invalidate unrecorded, and, of course, improperly recorded mortgages, only as to subsequent judgment creditors *without actual notice* of the mortgage. 2 Comp. St. 1910, p. 1553, and 3 Comp. St. 1910, p. 3414; *Brenton v. Scull*, 55 N. J. Eq. 747; *Majewski v. Greenberg*, 136 A. 749.

Appellant therefore contends that defendants received actual notice of its conditional sale contract before a lien was acquired by it, and therefore filing was unnecessary, because at most, filing would only have given constructive notice, and as actual notice was already had by creditor, this was sufficient. Said contract of conditional sale was therefore valid against the creditor, and trial Court erred in striking out complaint as sham on this ground alone, notwithstanding the fact of the sharp issue of facts presenting a case triable by a jury.

CONCLUSION.

It is, therefore, respectfully submitted that the Circuit Court erred in striking out the complaint filed by plaintiff as sham and untrue, and that said judgment should be reversed, set aside, and for nothing holden, and a new trial granted to plaintiff, so that it may have an opportunity to present its case before a jury.

Respectfully submitted,

GREEN & GREEN,
Attorneys for Plaintiff-Appellant.

DAVID GREEN,
Counsellor at Law.

114 MAY. 1. 1929

New Jersey Court of Errors and Appeals

COMMERCIAL CREDIT CORPORATION, a corporation,
Plaintiff-Appellant,

vs.

MINNIE SMITH, CLARK SMITH,
JOHN A. McCRANE MOTORS,
INC., a corporation, and WIL-
LIAM N. NUSSMAN,
Defendants-Respondents.

On Appeal
from Passaic
County Circuit
Court.

BRIEF OF DEFENDANTS-RESPONDENTS.

Facts.

On February 13th, 1929, John A. McCrane Motors, Inc., a corporation of this State, secured a judgment for the sum of Four Hundred and Forty-eight Dollars, and Ninety-seven Cents (\$448.97) besides costs of Twenty-six Dollars and Forty-five Cents (\$26.45) against the defendants Minnie Smith and Clark Smith, in the Paterson District Court, (Case, page 10, ll. 27-35). An execution was issued on this judgment on February 13th, 1929, which was thereafter returned unsatisfied. On March 13th, 1929, an alias execution was issued thereon directed to the defendant William Nussman, a Constable of the County of Passaic, who, in pursuance to said execution, levied upon, seized and took into his possession a Willys-Knight coupe belonging to the defendant Minnie Smith, and thereafter caused notices of the sale to be duly posted, scheduling said sale for March 21st, 1929, at 10 o'clock in the forenoon, at the premises Fair

Street Garage, Number 103 Fair Street, Paterson, New Jersey, (Case, page 10, ll. 39-40; page 13, ll. 16-29; page 11, ll. 5 to 16). After said car was seized by the defendant Nussman as Constable, a search was made of the records of the Register of Deeds of the County of Passaic, disclosing that there were no Conditional Bills of Sale, Chattel Mortgages or other liens encumbering said automobile (Case, page 11, ll. 17-27; page 13, ll. 35-41; page 14, ll. 5-6; page 15, ll. 5-12).

At 9.50 o'clock on March 21st, 1929, or ten minutes before the sale was to be held, plaintiff filed a writ of replevin, whereby said car was taken by the Sheriff of Passaic County and placed in the possession of the plaintiff who claimed in its complaint that it was the owner and entitled to the immediate possession of the same, (Case, pages 7 and 8). Plaintiff thereupon, upon notice, duly moved before Newton H. Porter, Esquire, one of the Judges of the Passaic County Circuit Court for an Order striking out the complaint filed by plaintiff, on the grounds that the matters contained therein are sham and untrue, and filed for the purpose of harrassing the defendants John A. McCrane Motors, Inc., a corporation, and William Nussman (Case, page 9).

Plaintiff Commercial Credit Corporation, filed certain affidavits in opposition to said motion, (Case, pages 16 to 24), wherein no denial is made of the fact that plaintiff was a judgment creditor without notice of the existence of the Conditional Sales Agreement referred to in plaintiff's affidavits, (Case, pages 16 and 23), and further, that said Conditional Sales Agreement was not filed as provided for by Section 5 of the Uniform Conditional Sales Act, Public Laws of 1919, page 462, nor is any attempt made to show that plaintiff or any other person knew of the provision in the Condi-

tional Sales Agreement reserving the property in the seller. Plaintiff, however, attempts to justify its appeal by the affidavits of the defendant judgment-debtors Minnie Smith and Clark Smith to the effect that on February 19th, 1929, attorney for the John A. McCrane Motors, Inc., was informed of the fact that the said motor vehicle was covered by a Conditional Sales Contract held by the Commercial Credit Corporation, which Conditional Sales Contract was unsatisfied, (Case, page 19, ll. 30-38; page 21, ll. 29-39), and further, that they advised the defendant William Nussman of the fact whilst he was making a levy thereon and took the same into his possession by virtue of the aforesaid alias execution, (Case, page 20, ll. 4-18; page 22, ll. 16-30).

Upon the conclusion of the argument and the reading of the respective affidavits, Judge Porter struck out the complaint on the grounds that it was sham, untrue and filed for the purpose of harassing the defendants John A. McCrane Motors, Inc., judgment creditor, and William Nussman, Constable, by an Order dated April 10th, 1929, (Case, pages 2 to 4).

The issues presented for determination are:

(1) Is notice by judgment debtor to an officer making a levy under an execution, that the Chattel levied upon was "covered by an unsatisfied conditional sales contract," not filed as required by law, notice to the judgment creditor of the conditional vendee, within the meaning of Section 5 of the Uniform Conditional Sales Act.

(2) Is notice that an automobile is "covered by an unsatisfied conditional sales contract" acquired by judgment creditor's attorney, notice to the judgment creditor of the provisions therein re-

serving property in the seller, within the meaning of Section 5 of the Uniform Conditional Sales Act, when said contract was never filed by the conditional seller, and the judgment creditor never knew that the said automobile was encumbered by the unfiled conditional sales contract.

ARGUMENT.

POINT I.

Plaintiff was not entitled to the immediate possession of the automobile on March 14th, 1929, as defendant Minnie Smith, purchaser under the conditional sales contract, was not in default.

The complaint was based upon the fact that plaintiff on March 14th, 1929, was and ever since has been the owner and entitled to the immediate possession of the said automobile. To substantiate this allegation, plaintiff evidenced a Conditional Sales Agreement dated August 14th, 1928, upon which an installment of Fifty-four (\$54.00) Dollars became due on March 14th, 1929, (Case, page 16, ll. 34-40; page 17, ll. 5-12, 20-21). No allegation is made that any prior installments were unpaid, but the suit was instituted because the installment of March 14th, 1929, was not paid (Case, page 17). Plaintiff's affidavits concede that the automobile was seized by Constable Nussman on that day (Case, page 20, ll. 4-18; page 22, ll. 16-30), whilst defendants' affidavits and the return on the execution states the car was levied upon and seized on March 13th, 1929; but, assuming that said automobile was seized on March 14th, 1929, plaintiff was not entitled to the immediate possession there of on that date, but on the contrary, de-

defendants John A. McCrane Motors, Inc., judgment creditor, and William Nussman, Constable, had a special interest in said automobile by virtue of said execution and levy.

In *Brown vs. Christian*, 97 N. J. L., page 56, Mr. Justice Bergen, speaking for the Supreme Court, says on page 61:

"There is another point which is fatal to this inquisition, and that is that the claimant retook the goods during business hours of the last day which must elapse before a default was possible. The lessee had the entire 19th day of July, 1920, to make the payment, and the claimants had no right to assume a default and retake his goods as early as ten o'clock in the forenoon, because the defendant in attachment had the entire business day to make the payment, and it was his property when attached and not that of the lessor, there being then no legal default."

(Italics ours).

The head note of that case reads as follows:

"The right to retake goods conditionally sold upon default in payment of an installment does not exist until the last day the payment is required has elapsed, for the conditional buyer has all of that day to make the payment, and an earlier seizure does not deprive the buyer of his right to the property during the last day payment may be made."

Therefore, plaintiff was not, on March 14th, 1929, as it alleges in its complaint, the owner and entitled to the immediate possession of the said automobile.

POINT II.

There was proof before the Circuit Court to justify the making of the order striking out plaintiff's complaint.

Plaintiff contends that the affidavits filed in support of this motion are filed with hearsay and conclusions, and cites a number of authorities holding that affidavits supporting any motion or in attachment proceedings must contain competent, legal evidence, and not hearsay or conclusions. This undoubtedly is the law, but defendants contend that their affidavits are not subject to that criticism, even if it be conceded that the affidavits are inartistically drawn. The following facts undeniably appear:

(1) John A. McCrane Motors, Inc., is a judgment creditor of the defendants Minnie Smith and Clark Smith, against whom it secured a judgment in the Paterson District Court on February 13th, 1929, and upon which an execution was issued on February 13th, 1929, which was thereafter returned unsatisfied.

(2) That on March 13th, 1929, an alias execution was issued thereon directed to William Nussman, a duly authorized constable of the County of Passaic.

(3) That by virtue of said execution, the said Constable duly levied upon, seized and took into his possession, the Willys-Knight coupe described in plaintiff's complaint, belonging to the defendant Minnie Smith.

(4) That notices of the execution sale were

duly posted, scheduling the same for March 21st, 1929, at 10 o'clock in the forenoon, at the Fair Street Garage.

(5) That a search of the records of the Register of Deeds of the County of Passaic disclosed that no Conditional Bills of Sale, Chattel Mortgages or other liens encumbering the said automobile was filed.

(6) That the John A. McCrane Motors, Inc., the judgment creditor did not know that the said automobile was encumbered by Chattel Mortgage, Conditional Bill of Sale or other means of encumbrance.

(7) That on March 21st, 1929, at 9:50 o'clock in the morning, (which was ten minutes before the time scheduled for the holding of the execution sale), plaintiff filed a replevin suit in the Passaic County Circuit Court, and retook from the Constable, the automobile mentioned.

(8) That plaintiff communicated with Mr. Weckselman and advised him of the fact that it had neglected to file the Conditional Bill of Sale, (see Case, pages 10 to 15).

Under the foregoing, there can be no doubt but that there was legal proof adduced before the trial Court justifying the Order made.

POINT III.

That said conditional sales contract was void as to the defendant John A. McCrane Motors, Inc.

By Section 5 of the Uniform Conditional Sales Act, Public Laws 1919, page 462, it is to be noted that,

“Every provision in a conditional sale reserving property in the seller, shall be *void* as to any purchaser from, or creditor of the *buyer*, who without *notice of such provision*, purchases the goods or acquires by attachment or levy, a lien upon them before the contract or a copy thereof shall be filed.”
(Italics ours).

No attempt is made to show that the judgment creditor John A. McCrane Motors, Inc., its attorney or the constable, had knowledge of the provision in the Conditional Sales Agreement reserving the property in the plaintiff; all that is attempted to justify plaintiff's point 4, are the affidavits of Mr. and Mrs. Smith, wherein they state that they advised the attorney for the defendant John A. McCrane Motors, Inc., that the motor vehicle was covered by an unsatisfied Conditional Sales Contract held by plaintiff.

It is to be borne in mind that the Statute makes every provision in a conditional sale reserving property in the seller void as to any judgment creditor who without notice of such provision acquires a lien upon the same by virtue of a levy. As Justice Bergen said in the case of *Brown vs. Christian*, 97 N. J. L. page 56, the judgment creditor must have knowledge not only of the existence of

the Conditional Bill of Sale, but of its provisions. In other words, I might have knowledge of the fact that there is a Conditional Sales Agreement in existence, but unless I had knowledge of the fact that there is a provision therein reserving the property in the seller, I would still not be bound by it. It is otherwise if the Conditional Sales Agreement or copy thereof was filed, for then every subsequent creditor or purchaser from the buyer has constructive notice not only of the contract on file, but also of its provisions.

The remarks of Mr. Justice Bergen in the case of *Brown vs. Christian*, *supra*, on page 60, are enlightening on this phase of the controversy, and are as follows:

“And so when this attachment was levied it was void as to the attaching creditor unless he had notice, *not that there was a conditional bill of sale, but of its provisions*, and the mere fact that on the day the writ was issued the seller retook the goods was no notice that the sale was conditional, or of *its provisions* relating to retaking goods. If it were otherwise, then the very object of the act would be defeated, because very often credit is extended because the debtor has in his possession ample personal property to satisfy the credit if given, and to allow a party to withhold a bill of sale from record until the very day judgment is entered, or an attachment levied, and then seize or retake the goods, would destroy the very purpose of the act. We think that under this statute, although we do not have to go so far in this case, if a conditional bill of sale is not filed within ten days after it is made, it is absolutely void as to any attaching creditor, unless he has *notice of the bill of sale and of its provisions prior to the execution of the writ.*”

(Italics ours.)

Likewise see the case of *Morey & Co. vs. Schaad*, Court of Errors and Appeals decision, 98 N. J. L., page 799, where Mr. Justice Minturn, on page 801 says:

“In construing a statute of this remedial character, we are guided by the obvious fundamental rule furnished by the purpose of the legislature, which was to give notice to a bona fide purchaser or creditor of the exact legal status and such intending purchaser or creditor to guide himself accordingly. Pursuant to the express language of the statute, this purpose may be accomplished either by the imparting of *actual notice* to such parties, or by the filing of the contract itself within the ten days prescribed by the act. Such we conceive was the interpretation given to the act in the opinion referred to where Mr. Justice Bergen remarks:

‘It (the sale) is absolutely void as to any attaching creditor, unless he has notice of the bill of sale, *and of its provisions prior to the execution of the writ.*’ (Italics ours).

It is evident from the above quotation that the legislative intent was to protect bona fide purchasers and creditors of the conditional vendee by giving them notice as required by the Uniform Conditional Sales Act. It is pertinent that the Court in the above case specifically states that the notice required must be either *actual* or by the filing of the contract itself within ten days of the execution thereof. Assuming, but not admitting, that the officer levying the execution received notice, and that the attorney for the judgment creditor John A. McCrane Motors, Inc., received notice, it cannot be said that such amounted to *actual* notice, within the rule as stated by Mr. Justice

Minturn, at most, the notice was merely constructive. (*Italics ours*).

The following extract from the opinion of the Chief Justice in the case of Thayer Mer. Co., vs. First National Bank of Milltown, 98 N. J. L., page 29, on page 31, is pertinent:

“And the creditors described in section 5 are those who, *without notice of the provision in the contract reserving property in the seller until the whole purchase price is paid, ‘acquire by attachment or levy a lien upon the goods.’ The language of these provisions is free from ambiguity, and our examination of the other sections of the statute satisfies us that they do not in any way restrain or limit the natural force to be given to it.* In the present case there is nothing in the agreed state of facts tending to show that, *at the time the attachment was executed, the creditor bank had any knowledge or notice that the automobile had been purchased by the defendant in the attachment proceedings from the plaintiff under a conditional sale agreement which reserved the title to the automobile in the vendor until the purchase price had been fully paid. This being the case, such reservation of title could only be made effective as against the attaching creditor by complying with the statutory requirement and filing the conditional sale contract, or a copy thereof, in the office of the County Clerk of Middlesex County within ten days after December 28th, 1920; and this, as we have before stated, was not done.*”

(*Italics ours*).

In *Commercial Credit Co. vs. Vineis*, 120 Atl. Rep., page 417, Mr. Justice Minturn in speaking of this particular section of this Act, said:

“This statutory language inherited from

centuries of legal application has a fixed and determinate meaning peculiar to legal procedure, and obviously imports the precedent institution of a legal proceeding in a court of law or equity, as a basis for the existence of the writ and a levy thereunder.

25 Cyc. 206, and cases; 6 C. J. 42, and cases; 17 R. C. L. 102, and cases.

“A statute therefore containing such well defined legal terms with reference to the determination of legal rights *inter partes* must be strictly construed, and its plain legal meaning cannot be extended by implication.

Woolley vs. Geneva Co., 69 N. J. Law, 278, 35 Atl. 789”.

POINT IV.

Notice to the officer making the levy under the execution is not notice to the creditor, within the meaning of Section 5 of the Uniform Conditional Sales Act.

Plaintiff cites the case of Lyle Culbert &c. Equipment Co. vs. J. F. Anderson Lumber Co., (1923 S. Dak.) 193 N. W. 58. That case is not applicable to the case *sub judice* for the reason that its facts and circumstances are entirely dissimilar.

The great weight of authority is that the notice to the officer executing process is not notice to the creditor.

“In case of creditors, the notice must be brought home to the *creditor*, and *notice to the officer executing process is not sufficient*”.
(Italics ours).

35 Cyc, page 694.

The case of *Thomas vs. Richard*, 69 Wis., page 671, 35 N. W., 42, is almost identical with the case under examination, and holds that:

“Notice of a conditional sale if the contract is not filed as required by law, to be effectual as against attaching creditor, must be brought home to the creditor and not merely to the sheriff who made the levy”.

(Italics ours).

Likewise *Wilcox vs. Williamson* Law Book Company, 92 Iowa, page 215, 60 N. W., 618:

“That a statement by the purchaser plaintiff to the vendor’s attorneys that he had no notice of the contract of sale made at a time when no such statement was called for by any remarks of the attorneys, is not sufficient to authorize a finding that the purchaser had actual notice of the sale and its conditional character.

See also *Hogan vs. Detroit United R. Co.*, 140 Mich., 101, 103 N. W., 543.”

It is of interest to note that the Wisconsin Court which decided the case of *Thomas vs. Richard* *ubi supra*, also held that the finding of a copy of a conditional sales contract on the property at the time of levying an execution, did not amount to notice, for it was entirely too late.

In *Wilodzik vs. Ackerman Oil Co.*, 191 Wis., page 233, 212 N. W., 790, the Court said:

“The reason why the conditional sales act provides that an attachment or levy destroys the vendor’s lien, is no doubt to reward the diligent creditor.”

Defendants-appellee therefore contend that they did not receive either actual or constructive notice

of the conditional sales contract, or of its provisions, before they acquired a lien by levy, and hence the reservation of property in the seller in the conditional sales contract is void.

POINT V.

The complaint filed by plaintiff was sham, and the Court was justified in making the order complained of.

The automobile in question was seized by the defendant Nussman by virtue of the alias execution on March 13th, 1929. Plaintiff was not entitled to possession of this automobile until March 15th, 1929, under the authority of *Brown vs. Christian, supra*. No proof was submitted to the Court showing that the defendant John A. McCrane, the judgment creditor of the defendant Minnie Smith and Clark Smith, had notice of the existence of the Conditional Sales Agreement, and particularly, that it had notice of the provision therein set forth, wherein the property was reserved in the seller.

Plaintiff's affidavits attempt to show that the defendants' attorney was advised by Mr. and Mrs. Smith that the said automobile was covered by a Conditional Sales Contract, and that likewise the Constable was advised of that fact when making the levy and taking the car into his possession. No attempt is made to show that the judgment creditor John A. McCrane Motors, Inc., ever knew of the existence of the Conditional Sales Agreement, nor that the Constable or the Attorney of the defendants knew of the provision in the Conditional Sales Agreement reserving the property in the seller, consequently, there was no evidence

which could have been submitted to the jury showing that the judgment creditor had actual notice of the provision in the Conditional Sales Agreement reserving the property in the seller.

It is conceded that the sale was actually made on August 14th, 1928, and that neither the contract nor a copy thereof was filed within ten days thereafter, nor at any subsequent time.

It is submitted, that there being no proof before the Court showing that the judgment creditor had knowledge of the provision in the Conditional Sales Contract reserving the property in the plaintiff, that the same was void as to it, and hence the complaint having been proven to be sham, the court had authority to strike it out by virtue of that pertinent portion of Chapter 151 of the Laws of 1928, which reads as follows:

“Subject to rules, any frivolous or sham complaint, or any frivolous or sham counterclaim heretofore filed or which may hereafter be filed, or any portion or count of such counterclaim may be struck out; or if it appear probable that the complaint or counterclaim is frivolous or sham the plaintiff or counterclaimant may be allowed to proceed therewith on terms”.

CONCLUSION.

It is therefore submitted that the Circuit Court did not err in striking out the complaint filed by plaintiff, and that the said judgment should be affirmed.

Respectfully submitted,

PETER COHN,
Attorney for and of Counsel
with Defendants-Respondents.

