

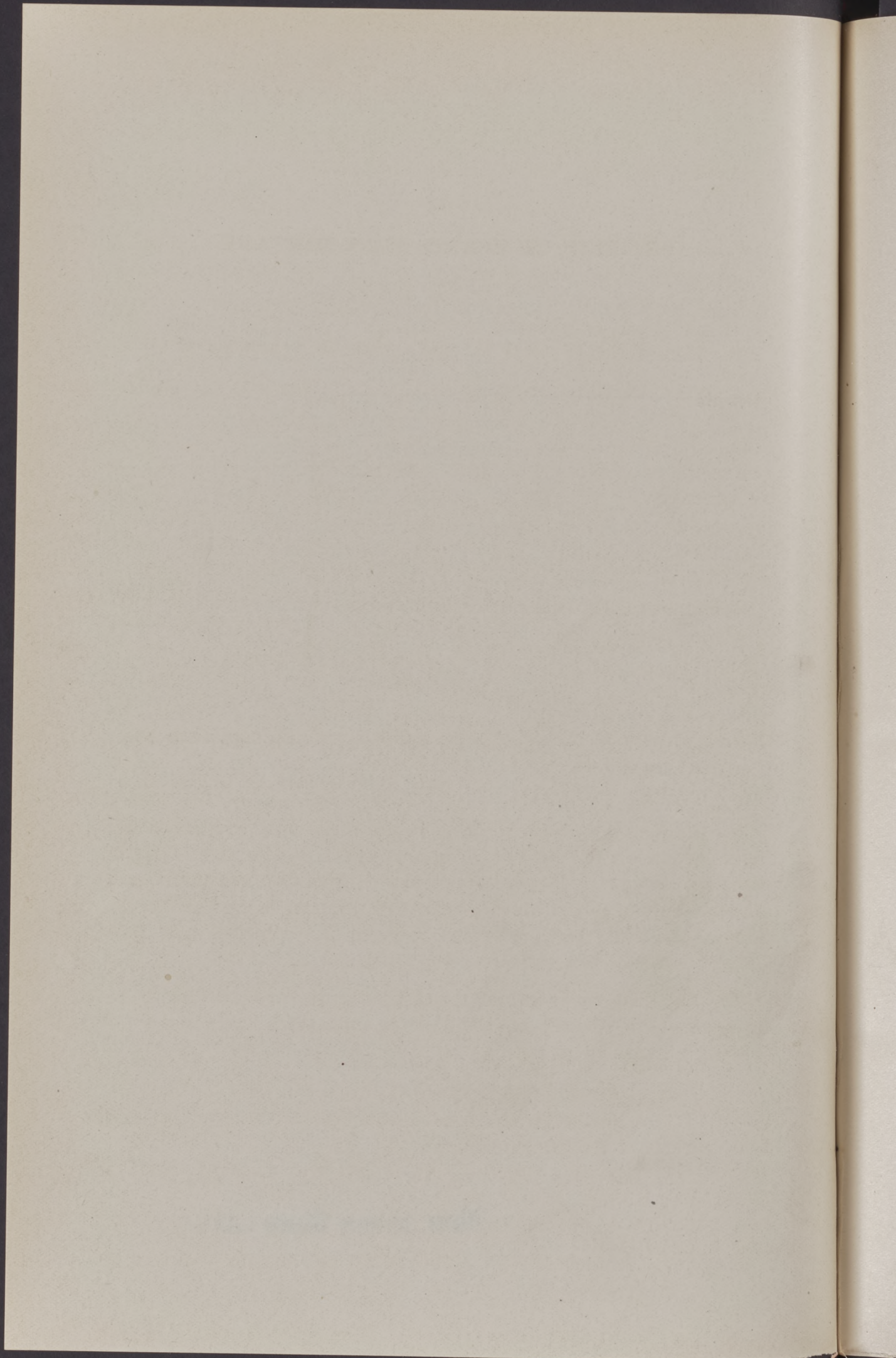
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PETITION OF MORRIS PLAN COMPANY.

Filed May 21, 1919.

In Chancery of New Jersey

Between

THE DAVID STRAUS COMPANY, a corporation,

Complainant,

and

COMMERCIAL DELIVERY COMPANY, a corporation,

Defendant.

10

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To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

Complaining shows unto your Honor, your orators, The Morris Plan Company of New York, a corporation duly organized and existing under the laws of the State of New York, and H. G. Farnam, Frank H. Tomlinson, Frank A. Sawicki, William Geair, Joseph Flynn, Albert Wilde, Napoleon Gagnor, R. C. Von Bayer, Marius Hvarre, Jack Schwartz, George H. Cromwell and Benjamin Gottlieb, respectfully allege and say:

30

First. That the receiver heretofore appointed in the above-mentioned case be directed to deliver unto your orators the following automobile trucks:

1. United Tractor and Trailor, 6 ton, No. T 59.
1. United Tractor and Trailor, 6 ton, tractor No. 163, trailor No. 380.
5. Maccars, 1½ ton, No. 7035, 779, 776, 735, 736, respectively.
2. Maccars, 3½ ton, No. 4072 and 4132, respectively.
2. Autocars, 1½ ton, No. 16,321 and 14,210, respectively.
1. Graham Ford Truck, No. 2,554,932.

40

Petition of Morris Plan Company.

Seven of the above-mentioned cars are now in the hands of the receiver, and the remaining cars are at different places in the City of New York and in the State of New Jersey. All of said cars were used in delivering freight for the Commercial Delivery Company.

10 *Second.* In support of said prayer your orators allege that they were employed by the Commercial Delivery Company for the delivery of freight and that each of them purchased and severally own the trucks hereinabove mentioned, having purchased the same from the Commercial Delivery Company, and having paid the substantial part of the purchase price in each case, and having given a note secured by a lease upon the trucks which were discounted by The Morris Plan Company of New York. The lease in each instance was assigned as security for the payment of the respective notes. That all of said leases are duly recorded.

20 *Third.* Your orators allege and say that the Commercial Delivery Company has no interest in the ownership of said cars and that to further detain them from the lawful owners causes them considerable financial loss, as it deprives them of their means of livelihood or of a gross rental of twenty to thirty dollars a day for each car.

30 *Fourth.* Your orators further allege and say that they are ready, willing and able to give such reasonable bond as to the Court may seem just in the premises to hold the receiver and the Court harmless against any loss to the estate, or to have the said trucks forthcoming to answer any future order of this honorable Court.

BENJAMIN GOTTLIEB,
WM. GEAIR,
JOSEPH FLYNN,
GEO. H. CROMWELL,
FRANK A. SAMICKI,
ALBERT WILDE,
NAPOLEON GAYNOR,
MARIUS P. HVARRE.

Petition of Morris Plan Company.

Severally subscribed and sworn to before me
this 20th day of May, 1919.

J. SCOTT,

Commissioner of Deeds, City of New York.

Residing in Bronx County.

New York Co. Clerk's No. 571, Reg. No. 191.

Commission expires Sept. 18, 1919.

10

STATE OF NEW YORK, }
CITY OF NEW YORK. } ss.:

HOWARD B. JACKSON, Assistant Secretary of The Morris Plan Company of New York, being duly sworn, according to law, on his oath deposes and says: that he is the Assistant Secretary of The Morris Plan Company of New York, petitioner; that he has read the petition and knows the contents thereof, and that the same is true to his own knowledge.

20

That each of the individual petitioners therein mentioned purchased an automobile truck, more fully described in the conditional bills of sale or leases, and that each paid a substantial amount on the purchase price and offered their notes, together with leases or conditional bills of sale, duly assigned unto The Morris Plan Company of New York, to The Morris Plan Company of New York for discount.

That the said The Morris Plan Company of New York discounted said notes and paid the proceeds thereof unto the seller, the Commercial Delivery Company, whereupon the legal title to all of the trucks mentioned in the petition became vested in The Morris Plan Company of New York, with the equitable title in each of the individual purchasers. That all of such leases or bills of sale are duly recorded and that none of the notes have been paid nor the leases and conditional bills of sale otherwise satisfied.

30

That he is ready at all times to present to the Court the details of each of these transactions, and to show unto the Court or unto its receiver the status of each of the accounts.

40

That for the receiver to longer detain said motor vehicles will occasion a loss to the beneficial owners and to The Morris Plan Company of New York, a gross rental of approximately twenty dollars (\$20) per day each.

Petition of Morris Plan Company.

10 That he respectfully prays that these cars be delivered to the individual petitioner to The Morris Plan Company of New York and that the said The Morris Plan Company of New York is anxious, willing and able to give a bond to hold the receiver and estate harmless against any loss occasioned to the estate by the delivery of said trucks, as aforesaid, or to have them forthcoming to answer any further or future order of this honorable Court.

The reason why this verification is made by your deponent instead of your petitioner, The Morris Plan Company of New York, is that your petitioner is a corporation, and that your deponent is the Assistant Secretary of the said corporation.

HOWARD B. JACKSON.

Sworn to before me this
20th day of May, 1919.

20

J. SCOTT,

Commissioner of Deeds, City of New York.

Residing in Bronx County.

New York Co. Clerk's No. 391, Reg. No. 191.

Commission expires Sept. 18, 1919.

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Petition of Jacob L. Newman, Receiver.

PETITION OF JACOB L. NEWMAN, RECEIVER.

Filed May 31, 1919.

To His Honor Edwin Robert Walker, Chancellor of the State of New Jersey:

The petition of Jacob L. Newman respectfully shows and alleges: 10

1. That a bill of complaint was filed herein on May 14, 1919, and on the same day your petitioner was appointed receiver, and as such receiver has duly qualified and taken possession and control of the assets of the above-named defendant company.

2. That among the assets of the defendant company your petitioner took possession of certain trucks hereinafter set forth.

3. The said trucks are being claimed by The Morris Plan Company, a corporation, on the ground that they hold the legal title thereto. 20

4. The Commercial Delivery Company herein was also engaged in the general trucking business, and in connection with the conduct of its business maintained, operated and controlled a considerable number of automobiles. That the defendant company entered into a so-called service contract agreement with the drivers hereinafter mentioned, under the terms of which the defendant company agreed to employ the said parties hereinafter referred to as drivers, in accordance with said terms set forth in the said agreements. 30

5. The defendant company purchased the trucks hereinafter referred to for and on account of itself and thereafter entered into a certain lease agreement with the said drivers, whereby it agreed to lease the said trucks to the respective drivers for the amounts and rentals herein set forth:

1. Marius P. Hvarre, 39 Rutland ave., Arlington, N. J.
 1½ ton Autocar, Motor No. 16321, Model 21 F J.
 Purchase price \$2,582.80.
 Payment by note and cash \$670.80.
 12 months' note of \$1,412.00. 40
 Agreement dated December 26, 1918,
 Assigned December 26, 1918.
 Recorded in Union County, January 3, 1919,
 Book 404 of Chattel Mortgages, page 38.

Petition of Jacob L. Newman, Receiver.

2. George H. Cromwell, 71 So. Union st., Elizabeth, N. J.
 1½ ton Autocar, Motor No. 14210, Model 21 F.
 Purchase price \$2390.
 Payment by note and cash \$478.
 12 months' note of \$1,912.
 10 Agreement dated January 3, 1919,
 Assigned January 3, 1919.
 Recorded in Union County, March 11, 1919,
 Book 103 of Chattel Mortgages, page 312.
3. Benjamin Gottlieb, 71 So. Union st., Elizabeth, N. J.
 Graham-Ford, Model T.
 Purchase price \$1,537.
 Payment by note and cash \$307.40.
 12 months' note \$1,229.60.
 20 Agreement dated January 6, 1919,
 Assigned January 6, 1919.
 Recorded in Union County, March 11, 1919,
 Book 103 of Chattel Mortgages, page 318.
4. William Geair, Milltown, N. J.
 Maccar, Motor No. 779, Model L.
 Purchase price \$3,702.50.
 Payment by note and cash \$1,035.01.
 12 months' note \$2,962.
 Agreement dated October 23, 1918,
 30 Assigned October 23, 1918.
 Recorded November 23, 1918, Middlesex County,
 Book 65 of Chattel Mortgages, page 643.
5. Joseph Flynn, Brooklyn, N. Y.
 Maccar, Motor No. 778, Model L.
 Purchase price \$3,702.50.
 Payment by note and cash \$1,035.01.
 12 months' note \$2,962.
 Agreement dated October 19, 1918,
 Assigned October 19, 1918.
 40 Recorded Union County, November 23, 1918,
 Book 102 Chattel Mortgages, page 4.
6. Napoleon Gagnon, Newark, N. J.
 1½ ton Maccar, No. 736, Model L.
 Purchase price \$3,702.50.

Petition of Jacob L. Newman, Receiver.

Payment by note and cash \$1,035.01.
 12 months' note \$2,962.
 Agreement dated November 23, 1918.
 Assigned November 25, 1918.
 Recorded Essex County, December 7, 1918,
 Book 381 Chattel Mortgages, page 532.

10

7. Frank Sawicki, 71 So. Union st., Elizabeth, N. J.
 1½ ton Maccar, No. 739.
 Purchase price \$3,522.78.
 Payment by note and cash \$1,030.78.
 12 months' note \$2,492.
 Agreement dated September 29, 1918,
 Assigned September 29, 1918.
 Recorded Union County, October 3, 1918,
 Book 101 Chattel Mortgages, page 335.

6. The cash purported to have been paid as aforesaid was not in fact really paid by the drivers in all instances, but notes were given to the defendant company and which said notes are now in the possession of your petitioner as receiver.

20

7. The defendant company in order to carry out its service contract and lease agreement hereinbefore referred to, had the transaction financed by The Morris Plan Company, a corporation, and the said company agreed to finance the entire transaction, and the defendant company and said drivers signed said notes as co-makers for the balance of the payments hereinbefore referred to and which said notes were delivered to The Morris Plan Company, a corporation. The leases hereinbefore referred to were drawn and an agreement prepared by The Morris Plan Company, and were signed by the drivers in favor of the defendant company, and the defendant company assigned its interest in the said installment payments to the said Morris Plan Company.

30

8. That after the said finance transaction was consummated the aforementioned drivers continued in the employ of the defendant company and the defendant company supplied the said truck drivers with gasoline, oil, accessories, etc., and the said drivers are indebted to the defendant company for the said supplies, accessories, etc., in an amount of at least \$3,200.00. Then defendant company also paid for and on behalf of the drivers, several of the installment notes to The Morris Plan Company, the

40

Petition of Jacob L. Newman, Receiver.

exact amount of which is unknown to your petitioner at this time.

10 9. Your petitioner shows that all of the aforementioned trucks are in his possession and believes that the aforementioned trucks should be sold by him as receiver, free and clear of the alleged claim of the Morris Plan Company, a corporation, for the following reasons:

(1) That the defendant company is the only legal owner of the trucks; that the defendant company did not assign to the Morris Plan Company the title to the trucks; but merely assigned to the Morris Plan the installment payments.

(2) That your petitioner is entitled to hold the trucks until the lien claim aforesaid is fully paid.

20 (3) That unless a sale is had forthwith the said trucks will deteriorate in value.

(4) That the charges against said trucks are continually accruing.

WHEREFORE your petitioner prays that an order may be made permitting him to sell said property free and clear of the alleged lien claim of the Morris Plan Company.

JACOB L. NEWMAN,
Petitioner.

30 STATE OF NEW JERSEY, } ss.:
COUNTY OF ESSEX, }

JACOB L. NEWMAN, being duly sworn according to law, on his oath deposes and says:

That he is the receiver herein; that he signed and executed the foregoing petition; that the statements of fact therein contained are true, except those matters therein alleged to be on information and belief, and as to those matters your petitioner believes same to be true.

40 JACOB L. NEWMAN.

Subscribed and sworn to before me this 30th
day of May, A. D., 1919

LIONEL P. KRISTELLER,
Master in Chancery of N. J.

Benjamin J. MacDonald, direct.

IN CHANCERY OF NEW JERSEY

May 31, 1919.

Between

THE DAVID STRAUS COMPANY, a corporation,

Complainant,

and

COMMERCIAL DELIVERY COMPANY, a corporation,

Defendant.

*On Claim of
Certain Drivers
and The Morris
Plan Company.*

10

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Transcript of shorthand notes of testimony taken in the above entitled matter on May 31, 1919, at the Chancery Chambers, Prudential Building, Newark, New Jersey, before the Honorable Merritt Lane, Vice-Chancellor.

APPEARANCES:

Mr. Theodore J. Harrington, and with him Mr. Harold H. Kissam (of the New York Bar) for drivers and Morris Plan Co.

Mr. George Furst (of Furst & Furst) for receiver.

30

BENJAMIN J. MACDONALD, sworn.

Direct examination by Mr. Furst.

Q Mr. MacDonald, where do you reside? A Temporarily, Elizabeth; Newburgh, New York, is my home.

Q And were you connected with the Commercial Delivery Company, the defendant in this case? A I was.

Q And in what capacity were you connected with the company? A Manager.

40

Q Did you have charge of the books of the company? A Yes, to some extent; we had some one to look after them.

Q Are you familiar with the accounts of these so-called driver purchasers? A Yes, sir.

Benjamin J. MacDonald, direct.

Q Have you the accounts with you, Mr. MacDonald? A I have just an abstract of the accounts up to April 1st.

Q Have you the account there of Joseph Flynn? A Yes.

Q Does that account show any indebtedness from that driver purchaser to the company? A Yes, there are notes receivable due from Mr. Flynn for \$835.01; there are debits extending over
10 November, December, January, February and March, and credits for the same period amounting to \$870.75; the debits amount to \$1,126.53.

Q And you say that account goes up to what time? A Up to April 1st.

Q And you haven't posted your record since April 1st? A They are ready now, but they haven't been entered.

Q Are there any other charges that you know of since April 1st? A Yes, sir; there are debits which would exceed the credit
20 for that period for a month and a half.

Q Now, Mr. MacDonald, you mentioned something about notes receivable. What does that refer to? A The notes receivable is the balance of the purchased price of the truck.

Q Are you familiar personally with that transaction so far as service contract and sale is concerned? A Nothing particularly, only the record; we have all the service contracts.

Q I show you a paper which purports to be a service contract; is that a copy of the agreement that was signed by this truck purchaser and the other truck purchasers? A Yes; we
30 have all the records of those at the office.

Same offered in evidence and marked Exhibit C. 1.

Q Now, at the time the service contract was signed, Mr. MacDonald, did your company also have the truck drivers sign a so-called lease agreement and is that a copy of the agreement signed, so far as you know? A As far as I know.

Q And then after you had the truck driver sign a lease of this character, what did you do with the lease? A The lease was given to the Morris Plan Company.
40

Agreement offered in evidence and marked Exhibit C. 2.

Q Now, at the time this lease marked C-2 was signed and delivered to the Morris Plan Company, did you sign notes? A The Commercial Delivery Company was co-maker on the note.

Benjamin J. MacDonald, direct.

Q I show you a note and ask you whether this is a copy of the note signed by your company as co-maker? A Yes.

Note offered in evidence and marked Exhibit C-3.

Q Do you know whether or not your company signed any other papers for the Morris Plan Company besides signing the note and lease, so far as you know? A I didn't have anything to do with them; I don't know. 10

Q Now, Mr. MacDonald, were any of these notes paid by these truck drivers or any installment? A You mean the notes to Morris Plan or notes to Commercial?

Q First, take the Morris Plan? A Yes, payments made by Commercial Delivery Company to Morris Plan on these notes?

Q For the benefit of the truck drivers? A Yes.

Q And your records show what payments were made? A Yes. 20

Q Now, were the notes that were given by the truck drivers direct to your company paid? A No.

Q They were not paid? A No.

Q And you still hold these notes? A Yes.

Q And are in possession of the receiver? A Yes.

Q Can you tell us the total amount due for supplies, such as gas, oil and accessories, about the total amount? A For each one? 30

Q Altogether. A Something over three thousand as I figure it, between three and four thousand, the total would be figuring up to the time the owner drivers finished.

Q What drivers do you refer to?

The Court. Their names are set out in the petition?

Mr. Furst. Yes.

Q Now, Mr. MacDonald, which of these trucks are now in possession of the receiver at the Elizabeth plant? A They are all in possession of the receiver with the exception of the truck of Albert Wilde; and three trucks are in New York.

Q Do you know the names of those truck drivers? A They are not truck owners, driven by some one, H. G. Farnam, F. H. Tomlinson and R. C. Von Bayer. 40

Q In New York? A I believe so.

Q And one Mr. Wilde has in Paterson, New Jersey? A I believe so.

Benjamin J. MacDonald, cross.

Cross-examination by Mr. Kissam.

Q Is this a copy of the application (showing paper to witness) used by your company for personal service contract? A Yes, to the best of my knowledge, I believe so; I didn't attend to this matter, but that is a copy.

10

Application for lease and purchase offered in evidence and marked D-1.

Q Will you explain more fully these debit and credit items that you have spoken of? A The debit items in the first place are for promissory notes given by the owner drivers to Commercial Delivery Company. The debits in the other case are for moneys advanced, gasoline, oil and repairs, and the credits are for the amount of money made on the route taken by the owner driver for each specific day, totalled in one month.

20

Q (By Mr. Furst) Under the service contract what was the arrangement your company had with the truck drivers? A They were to receive a certain percentage and the office was to receive a certain percentage.

Q (By Mr. Furst) What was the agreement as to control and possession of the car? A The cars were to remain in possession of the company for a period of two years.

Q (By the Court) Were these instruments all executed simultaneously? A No, sir.

30

Mr. Kissam. Different dates.

Q (By the Court) In any one case, all executed simultaneously? Was the application for the lease and purchase and the assignment to Morris Plan in each case executed at the same time and as part of the one transaction? A I don't know positively.

Mr. Kissam. They are substantially the same time; they are considered one transaction.

The Witness. The dates would show.

40

Mr. Kissam. The dates would vary by one day but they are supposed to be one transaction.

Q How do you account for the fact that under paragraph 6 of your contract, personal service contract, which reads: "It is understood that the party of the first part will, in addition to the other services to be performed by it, furnish at least a

Benjamin J. MacDonald, cross.

sufficient amount of work for the truck herein mentioned to meet all fixed charges arising from the operation of said truck"—now, under that clause, how do you account for the fact that your debit exceeds the credit when notes have not been paid? A Well, they are only given credit for the amount of work they do; they are actually given a certain percentage for the work that truck does, for a certain period, and they are debited with any advances, gasoline and oil furnished, repairs made, and the promissory note is also a debit for the balance of the purchase price. 10

Q The payments on the note is a fixed charge which should advance to the credit of each party? A Providing that the truck earns that.

Q You guarantee that it will earn that charge. You guarantee in that paragraph: "It is understood that the party of the first part will, in addition to the other services to be performed by it, furnish at least a sufficient amount of work for the truck herein mentioned to meet all fixed charges arising from the operation of said truck." 20

Mr. Furst. I object to that.

A Well, the fixed charges would be certain notes but they could only be credited for a certain amount of work they must do; we only gave them credit for the work they did.

Q Did you supply a sufficient amount of work to meet all fixed charges as you contracted that you would do? A What do you mean by "fixed charges"? 30

Q The amounts due on the notes? A On the notes to Morris Plan. Any other notes?

Q No; Morris Plan notes. A Part of those notes were paid, but they were debited with them also.

Q (By the Court) Did you furnish them with sufficient work to meet these fixed charges? A No, the company didn't furnish sufficient work.

Q And you debited them with repairs and other items due. How do you account for that discrepancy, apparently? 40

The Court. There isn't any discrepancy.

Mr. Kissam. Apparently.

The Court. There isn't any "apparently."

Benjamin J. MacDonald, by the Court.

Examined by the Court.

Q Were personal notes given in each one of these instances, where it says assignments of the lease, that certain amount had been paid? Take the Flynn lease for instance, \$1,035.01. Was that paid in cash or by note? A Paid part cash; \$200 in cash
10 and a promissory note for \$835.01.

Q Payable when? A Payable to the best of my recollection six months, but it is due and unpaid.

Q In each instance are the notes overdue and unpaid? A In mostly all; I think in some of the cases the notes are not still due.

Q Not yet due? A Yes. One note is due July 6th; that will be soon due; I think the July 6th note is for \$132.08, given by Benjamin Gotteleb; a note for \$135.01, William Geair, is due on August 23rd.
20

Q What amount? A \$1,035; this man paid \$500 in cash; \$400 note which was due on April 23rd, and another note for \$135.01 which was due August 23rd, which will become due on August 23rd; then there is another note due of Marius P. Hvarre on June 21st, amounting to \$170.80; and another note of George H. Cromwell, \$206.22 on July 3rd; other than that notes are due and unpaid.

Q. In each one of these cases is a note due and unpaid? A No; in Benjamin Gotteleb case the note is still not due until July 6th; Marius P. Hvarre June 21st; George H. Cromwell July 3rd; these notes are not yet due.
30

Q Actually in arrears? A On those particular promissory notes but on the others they are due.

Q All in arrears on the Morris Plan note? A Then on the promissory note William Geair, note of \$400 due on April 23rd not paid.

Q You say, except the three which you have referred to, all of them have personal notes due and unpaid? A Yes.

Q Have all of them installments due the Morris Plan Company which are unpaid? A. Yes, all due; some of them have been paid, but some due and unpaid, some notes have been paid.
40

Q In each instance there is a Morris Plan note due and unpaid? A Yes, sir.

Q As well as personal note due and unpaid except in the three instances which you have referred to? A Yes, sir.

Benjamin J. MacDonald, by the Court.

Q Two instances. Who were they again? A Benjamin Gotteleb; George H. Cromwell, Marius P. Hvarre.

Mr. Furst. I reserve the right to produce the original records written up to date showing the entire indebtedness these men owe the company or Morris Plan Corporation.

10

Q What has been the practice? Have the trucks always remained in your control? A Yes, sir.

Q What was your practice with your drivers; what did you in fact do. A The trucks were kept at the warehouse with the exception of two, one in Paterson and one in New Brunswick, but they came back to the warehouse the next morning.

Q Then what did the drivers do; go out every day? A Yes, with goods.

Q The goods furnished by you? A Yes, sir.

20

Q Express business? A Yes.

Q And then the drivers made returns to you? A Yes, sir.

Q The returns were made by you through the drivers? A Through the drivers.

Q What did the drivers get out of it? A They got forty per cent. of the gross revenue of the truck.

Q Was that paid over to them in cash? A No; it was debited and credited; they were advanced five dollars a day and furnished their gasoline and oil and repairs made on their trucks, which was debited to them.

30

Q What do you mean? They were given cash? A Five dollars a day?

Q What were they to use that five dollars a day for? A For themselves.

Q That was wages? A Yes.

Q As matter of fact they didn't put any cash in at all, did they? A Owner drivers?

Q Yes. A They all paid some cash and a promissory note.

Q Where did they get the cash? A That was their own cash.

40

Q All of them put in cash, other than cash which was raised by the notes through the Morris Plan or the Commercial Delivery? A No, all they put in cash was cash they made in purchasing the truck; they advanced a certain amount of cash when they purchased the truck.

Benjamin J. MacDonald, by the Court.

Q Was that their own cash or cash raised on notes? A. Their own cash.

Q Did the Commercial Delivery receive from the Morris Plan a certain amount on these promissory notes? A Paid by the Commercial Delivery?

10 Q Yes. A. Yes.

Q How much? A Each one separately or the aggregate?

Q What was the arrangement? A That they were to be paid in monthly installments covering a period of twelve payments.

Q Didn't you give the Morris Plan a certain amount of cash? A Yes, sir.

Q On these notes? A On these notes.

Q How much, what percentage of the face of the notes? A We get the full amount that they have charged us with there, less their discount.

20 Q What was the amount of the discount?

Mr. Kissam.—Roughly it is six per cent. of their incidental charges which I haven't got; it is about, amounting to about eight per cent. of the face value of the note.

Q Suppose the note was \$1,000; how much would you get for the note? A We would get the full amount for the note.

Q (By Mr. Kissam) And then you returned the discount? A The discount was deducted from the face.

30 Q (By Mr. Kissam) You got the face amount of your note less six per cent. charge, plus some other percentage, small amount for investigation fee? A Yes.

Q Substantially the full amount of the note? A Substantially.

Q (By Mr. Furst) Mr. MacDonald, didn't they charge you some insurance rates? A That was covering the trucks for property and liability damage.

Q (By Mr. Furst) Let us take one instance, and let us see what they charged you for interest, search fees and attorney's fees, insurance charges? A I haven't it here with me.

40 Q You haven't your record? A We have each account separate.

Q You haven't that record? A No; I haven't it here with me.

Exhibit C. 1.

EXHIBIT C. 1.

SERVICE CONTRACT

THIS AGREEMENT, made and entered into by and between the Commercial Delivery Company, of Elizabeth, New Jersey, party of the first part, and Napoleon Gaynor, of Newark, N. J., party of the second part. 10

WITNESSETH:

WHEREAS, party of the second part is desirous of securing the services of the party of the first part as his managing business agent, and the party of the first part is willing to render certain services as such under the terms hereinafter set forth.

NOW THEREFORE, in consideration of the sum of One Dollar (\$1.00) lawful money of the United States from each to the other in hand duly paid, receipt of which is hereby duly acknowledged, the mutual covenants herein and other valuable consideration, it is understood and agreed as follows: 20

1. The party of the second part agrees to work one motor truck for a term of two years under the direction of the party of the first part on an average of at least ten (10) hours per working day in such a manner that the gross earnings of the truck will amount to at least the fixed monthly charges arising from the operating of said truck.

2. It is further agreed that the party of the second part shall not use or permit said motor truck to be used other than in or about such hauling as shall be assigned, directed or stipulated by the party of the first part in writing; and to abide by all its rules and regulations. 30

3. The entire gross monthly earnings of said truck is to be delivered to party of the first part, out of which the party of the first part is authorized to retain 20% for its services, and out of the remaining 80% is authorized to pay drivers wages (at the rate of \$5.00 per day of 10 hours), monthly bills for oil, gasoline, repairs, alterations, supplies, etc., and storage charges of \$15 per month. Any balance remaining shall be paid over or credited to the party of the second part. 40

4. It is agreed that the truck must at all times be stored in a garage to be furnished by the party of the first part.

Exhibit C. 2.

5. In case of sickness or disability of the party of the second part, the truck shall be driven by an employee of the party of the first part at the expense of the party of the second part during the continuance of sickness or disability of said party of the second part. Preference will be given to driver furnished or recommended by party of the second part during such period of sickness or disability.

6. It is understood that the party of the first part will, in addition to the other services to be performed by it, furnish at least a sufficient amount of work for the truck herein mentioned to meet all fixed charges arising from the operation of said truck.

IN WITNESS WHEREOF the party of the first part has caused these presents to be executed by its proper officers and its corporate seal to be affixed, the party of the second part has hereunto set his hand and seal this 1st day of March, 1919.

Approved

COMMERCIAL DELIVERY COMPANY

(Seal)

By CHARLES BAYER,
Treasurer

Witnesses:

NAPOLEON GAYNOR.

EXHIBIT C. 2.

LEASE AGREEMENT

THIS AGREEMENT, made this 26th day of Sept., 1918, between Commercial Delivery Co., Elizabeth, N. J., hereinafter collectively called the "Lessor," party of the first part, and Frank A. Sawick, 71 So. Union St., Eliz., N. J., party of the second part, hereinafter called the "Lessee."

WITNESSETH, that the Lessor has this day delivered in good condition, and hereby leases upon the terms and for the period hereinbelow specified, to the Lessee one motor vehicle, No. 739, Model 1½ ton of Maccar make, hereinafter called the "Car," of the agreed value of Thirty five hundred twenty two and

Exhibit C. 2.

78/100 Dollars, (\$3522.78), for the use of which during the period of this lease the Lessee has this day paid Ten hundred thirty and 78/100 Dollars, (\$1030.78) and has given his promissory note in the sum of Twenty four hundred Ninety two Dollars, (\$2492.00), payable to the order of The Morris Plan Company of New York and maturing 12 months from the date thereof. As security for the payment of said note, the Lessee hereby subscribes to an Instalment Investment Certificate of the said The Morris Plan Company of New York, in a sum equal to the amount of said note, and hereby agrees faithfully to perform all the terms of said Investment Certificate and to be bound by all the provisions thereof, as fully as if said Certificate were actually signed by him, the said Lessee, which Certificate is hereby hypothecated with the said The Morris Plan Company of New York as collateral security for said note.

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The period of this lease is from the date hereof until the date of maturity of said note, unless sooner terminated, subject to the provisions and terms hereof.

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The car is subject only to manufacturer's warranty if copy of such warranty is annexed hereto, and if not so annexed, Lessee leases Car as it stands, and no warranty, guaranty, or representation as to the Car or any of its equipment is otherwise made or given by the Lessor.

Upon default in the observance of any of the terms of said note, then the entire principal of said note shall become due and payable, at the option of the legal holder thereof, without notice or demand, such demand and notice being hereby expressly waived. The Lessee shall not sell, let, assign, encumber, use for hire or dispose of the car without the written consent of the Lessor, and the Lessee shall keep and maintain the Car in good order and repair. The Lessor shall, at the expense of the Lessee, provide insurance on said Car against damage by fire, theft, and transportation hazards. The Lessee shall keep the Car free of all liens, taxes, and charges, and shall at his expense and in his name cause the Car to be registered and licensed in compliance with law. Upon any default in payment, or breach of condition or covenant herein made, or contained in said note, by the Lessee, or if the Lessor shall deem the security for the payment of said note insufficient or unsafe, the Lessee shall, on demand by the Lessor, forthwith

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Exhibit C. 2.

deliver the Car to the Lessor, in as good condition as when
 received by the Lessee, ordinary wear and tear excepted, and
 should the Lessee fail or refuse, upon such demand, to deliver
 the Car as aforesaid to the Lessor, the Lessee agrees that the
 Lessor, his or its agents and servants, or any other person
 employed by him or it, shall have the right, without any fur-
 10 ther notice or demand, forthwith to take possession of the Car,
 wherever found, and for such purpose the Lessee hereby licenses
 and authorizes the Lessor, his or its agents and servants, or
 any other person employed by him or it, to enter any prem-
 ises of the Lessee, to take possession of the Car, and the Lessee
 hereby waives any right of action for trespass, or damages
 therefor, and disclaims any right of resistance of action, and
 Lessee waives all right of homestead or other exemption under
 the laws of the State of New Jersey against this obligation;
 20 if the Lessor shall so take possession of the Car by reason of
 any default or breach hereof, or with respect to said note
 by the Lessee, the Lessee agrees that all payments made by the
 Lessee with respect to said indebtedness represented by said
 note, shall belong to and be retained by the Lessor as liquidated
 damages for the non-fulfilment or breach of performance of
 this agreement, for loss in value with respect to the Car, and
 for the rental value thereof. The Lessor may, at his option,
 by collection, suit or otherwise, enforce payment of said note,
 but no suits or legal proceedings with respect thereto shall be
 deemed a waiver of the right of the Lessor to take possession
 30 on default or breach as aforesaid. Upon the Lessor so taking
 possession of the Car, the Lessor may sell the Car at public
 or private sale at any time thereafter, without any notice to
 the Lessee, and if upon such sale the proceeds thereof are
 insufficient to pay the sum remaining unpaid with respect to
 said note and the expense caused by such repossession, removal,
 reparation, storage, liens and sale, any deficiency shall be paid
 by the Lessee, otherwise any overplus in excess of the amount
 necessary to cover such items shall be paid to the Lessee.

The Lessee acknowledges receipt from the Lessor of a true
 40 copy of this agreement, together with notice that this agree-
 ment together with all the right, title, and interest of the Les-
 sor herein are hereupon assigned by the Lessor to The Morris
 Plan Company of New York.

Exhibit C. 2.

The Lessor agrees that at the termination of this lease, the Lessee, if he has complied with all the terms hereof and has paid in full the above described note, may become the purchaser of said above described Car, in which event the payments made in accordance with the terms of this lease, together with payment of said note by the Lessee, will be accepted as and for payment of the purchase price of said Car.

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IN WITNESS WHEREOF, Lessor and Lessee, parties hereto, have hereunto subscribed their signatures and set their seals, in duplicate, on the day and year first above written.

COMMERCIAL DELIVERY CO. (Seal)

By R. Clyde Boyes, *Treasurer* (Seal)

FRANK A. SAWISKI

Witnesses:

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Richard Doppler

Julius Doppler

Dealers and Purchasers' Signatures Must be Acknowledged
Here on Appropriate Form.

ASSIGNMENT

FOR VALUE RECEIVED, the undersigned hereby sells and assigns to The Morris Plan Company of New York, a New York Corporation, all right, title and interest in and to the foregoing agreement of lease dated the 26th day of Sept., 1918, between Frank A. Sawicki and the undersigned, and in and to the property the rights therein described, and hereby guarantees the full performance of said instrument and all its terms. The undersigned further agrees, in the event of any resale, release or repossession of said property, to pay to said The Morris Plan Company of New York or its assigns, any deficiency between the net proceeds of such resale and the amount necessary to pay the amount of the instalments remaining unpaid, and the reasonable expense of such resale and attorney's fees connected therewith. The undersigned hereby waives any and all notice or notices of non-payment, demand, presentment or protest which might otherwise be required with respect to

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Exhibit C. 2.

any endorsement or to this guaranty, or in connection therewith, and hereby agrees that any extension which may be granted with respect to said instrument or to any parts thereof, or to the instalments as they fall due, shall not in any manner release the undersigned from such obligation or this guaranty.

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COMMERCIAL DELIVERY CO. (Seal)

By R. CLYDE BAYES, *Treas.*

Witness: F. H. Tomlinson.

Form for Individual Acknowledgment

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

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Be it remembered that on this 26th day of Sept., one thousand nine hundred and eighteen, personally before me appeared the subscriber, a notary in and for the County aforesaid, whom I am satisfied is the Frank A. Sawicki named in the within instrument; and having first made known unto him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed

(L.S.)

JULIUS DOPPLER.

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Form for Individual Acknowledgment

(Stamp of Notary Public.)

STATE OF NEW }
COUNTY OF } ss.:

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Be it remembered that on this.....day of....., one thousand nine hundred and....., personally before me appeared the subscriber, a.....in and for the County aforesaid, whom I am satisfied is the..... named in the within instrument; and having first made known unto him the contents thereof, he acknowledged that he signed, sealed, and delivered the same, as his voluntary act and deed, for the uses and purposes therein expressed.

(L. S.)

.....

Exhibit C. 2.

Form of Acknowledgment for Partnership

STATE OF NEW
COUNTY OF

} ss.:

On this.....day of.....One Thousand
Nine Hundred and....., personally appeared before me the
subscriber, a.....in and for the County aforesaid,
....., a member of the firm of.....,
whom I am satisfied is the person who signed the within instru-
ment; and I having first made known to him the contents thereof,
he acknowledged that he signed, sealed, and delivered the same,
as the voluntary act and deed of the firm aforesaid;

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.....
Notary Public.

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Form of Corporate Acknowledgment

(Stamp of Notary Public.)

STATE OF NEW YORK,
COUNTY OF NEW YORK, }

ss.:

On this 26th day of Sept., One Thousand Nine Hundred and
eighteen before me, a notary, personally appeared R. C. Von
Bayer, President (or other officer as may be the case) whom
I am satisfied is the person who has signed the within instru-
ment; and I having first made known to him the contents thereof,
he did acknowledge that he signed, sealed, and delivered the
same, as such officer aforesaid, and that the within instrument
is the voluntary act and deed of such corporation, made by
virtue of authority from its Board of Directors (or Trustees,
as the case may be).

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JULIUS DOPPLER,
Notary Public.

(Stamp of Notary Public.)

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Exhibit C. 2.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

Form 2

No. 81638 Series B

10 I, WILLIAM F. SCHNEIDER, Clerk of the County of New York,
and also Clerk of the Supreme Court for the said County, the
same being a Court of Record, do hereby certify, That Julius
Doppler, whose name is subscribed to the deposition or cer-
tificate of the proof or acknowledgment of the annexed instru-
ment, and thereon written, was, at the time of taking such
deposition, or proof and acknowledgment, a Notary Public, act-
ing in and for the said County, duly commissioned and sworn,
and authorized by the laws of said State to take depositions and
also acknowledgments and proofs of Deeds, or conveyances for
20 land, tenements or hereditaments in said State of New York.
That there is on file in the Clerk's office of the County of New
York, a certified copy of his appointment and qualification as
Notary Public of the County of Queens, with his autograph signa-
ture. And further, that I am well acquainted with the hand-
writing of such Notary Public, and verily believe that the sig-
nature to said deposition, or certificate of proof or acknowledg-
ment is genuine.

30 IN TESTIMONY WHEREOF, I have hereunto set my hand and
affixed the seal of the said Court and County this 3rd day of
Oct., 1918.

WM. SCHNEIDER, *Clerk.*

Received Union County Register's Office Oct. 3, 11.13 A. M.,
1918, Elizabeth, N. J.

RECEIVED in the Register's Office of the County of Union, N. J.,
on the 3 day of October, A. D. 1918, at 11.13 o'clock, in the fore-
noon, and Recorded in Book 101 of Chattel Mtg for said County
on pages: 335 &c.

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EDWARD BAUER,
Register.

Exhibit C. 3.

EXHIBIT C. 3.

A-9889

The Morris Plan

Form Auto-5-18-IM Copyright, 1913

Industrial Finance Corporation All rights reserved

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NOTE

THE MORRIS PLAN COMPANY OF NEW YORK

No. 125-R

New York, N. Y., October 29, 1918.

Fifty-two weeks after date, for value received, we, the undersigned, jointly and severally promise to pay to the order of THE MORRIS PLAN COMPANY OF NEW YORK, at its office in the City of New York, the sum of Twenty Nine Hundred Sixty Two Dollars (\$2962.00), in gold coin of the United States, having deposited herewith as collateral security Instalment Investment Certificate of said Company, No. 125-R, and

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.....
And the makers further promise whenever required by the said Company to increase the amount of security of this obligation until satisfactory to the Company; and should this security be not increased when so required, or should default be made in the payment of any instalment due to the said Company on the Certificate herewith hypothecated, or in the event of the default in the observance of any other regulation of said Company, then this obligation, at the option of the Company, shall become due and payable, whether due according to its face or not. Waiver by the Company of any default shall not be waiver of any other or subsequent default.

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And for the purpose of enforcing the payment of this obligation, the said Company shall have full power and authority to sell, assign, collect, compromise, transfer and deliver the said collateral, whether original or additional, or so much thereof as may be requisite. Such sale may be made whenever the said Company may direct, and may be public or private, with or without advertisement, and with or without notice to or demand on the makers, or any of them, and said Company may become the purchaser of any or all said collateral at any such sale.

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Exhibit C. 3.

If, before the obligation is paid and the collateral herewith hypothecated is released, the makers, or any of them, shall become liable to the said Company on any other obligation, then the collateral herewith hypothecated, or the proceeds thereof to the extent that they are not required in paying this obligation, shall be held by the said Company as collateral security and applied by it upon the terms herein set forth on such other obligations of the makers as the company may elect.

If at the maturity of this note all instalment payments and charges, if any, for the period shall have been paid on the Instalment Investment Certificate hypothecated herewith, then the maker hereof who hypothecated the same may surrender to the Company the said Certificate and with the cash received therefrom discharge the obligation, provided notice of such intention be given to the Company within ten days before the maturity of this note.

It is understood and agreed, however, that the Company shall not be compelled to resort first to the collateral hypothecated for the security of this obligation, but may at its election require said obligation to be paid by any maker or makers hereon, and to this agreement said maker or makers hereby specifically give their assent, and upon the payment of this obligation by the said makers, or any of them, this note, together with the collateral aforesaid, shall be transferred without recourse against the Company to the maker or makers who pay this note.

And each of us, whether principal, surety, guarantor or other party hereto, hereby severally waives any or all benefit or relief from any exemption laws of any State now in force or hereafter to be passed as against this debt or any renewal thereof; and each further waives demand, protest and notice of demand, protest and non-payment.

Signatures:

William Gear

Commercial Delivery Co., by R. Von Bayer, Treas.

Addresses:

Riva Ave., Milton, N. J.

The Morris Plan Co. of New York is hereby authorized to pay the proceeds of this note to Commercial Delivery Co., Elizabeth, N. J., in part payment of my purchase from them of a 1½ ton Maccar truck, body, cab, ext. equip., etc.

Exhibit D. 1.

EXHIBIT D. 1.

FOR OWNER-DRIVER ONLY

APPLICATION FOR LEASE AND PURCHASE.

Date..... 10

To:

COMMERCIAL DELIVERY COMPANY,
ELIZABETH, N. J.

GENTLEMEN:

You are hereby requested to lease for my account one 1½ Ton Maccar Motor Truck, including the extra equipment listed below.

I have made partial payment of.....dollars (\$500) with this application.

I agree to pay.....dollars (\$500) within six months, no interest from the date hereof. 20

Total amount of cash to be paid.....dollars (\$1000.00

The balance of the purchase price, that is.....dollars (\$2700) payable in twelve equal monthly installments, for which I am to sign Lease and give notes, all falling due within one year from date.

Delivery to be made as soon as possible, conditional upon strikes, fires, floods, accidents or other causes beyond control.

Truck to become the property of the lessee when fully paid for in cash. 30

Capacity 1½ Ton. Style of Body Stake. Wheelbase 14 feet. To have the Newark Rout on some other to be agreed upon.

EXTRA EQUIPMENT.

Chassis Stake Body. Cab. Curtain, Painting and Lettering. Two signs. Radiator Guard. Hub-Odometer. War Tax (not to exceed \$100) Freight to New York. Insurance against Fire, Theft, Collission, property damage and liability, suit of clothes and overcoat, license plate and Tag (all complete and ready to run). 40

It is mutually understood and agreed, that this order, when accepted by an officer of the Company, constitutes the entire agreement between the parties, and that no party, except an officer of the Company, has or shall have the power to bind

Exhibit D. 1.

the Company by the making of any contract or by the acceptance of this order. All promises, verbal understandings, or agreements of any kind pertaining to this order not specified in writing herein, are hereby waived.

10 It is further understood and this agreement is made on the condition that in the event of my death at any time after my payments have been regularly made as above specified, either by me previous to death or by my heirs, executors or administrators, within thirty days after my death, the above described truck shall, in accordance with this agreement, be delivered, and any notes given by me be returned to my estate.

Cash, checks, or notes (or both) of an aggregate amount of \$500 has been given with this application.

Accepted:

20 COMMERCIAL DELIVERY CO., ELIZABETH, N. J.

By.....

.....
(Name in full of Lessee)

.....
(Street and Street No.)

.....
(City) (State)

30 If You Do Not Receive Acknowledgment of This Application in Ten Days Notify Commercial Delivery Company, Elizabeth, N. J.

Nov. 23rd, 1918

Received of Napoleon Gognan Five hundred & no/100 cash Five hundred. Note due 6 months, as an initial payment on an Application for lease and purchase of a 1½ ton Maccar Motor Truck, all to be returned if not approved under the terms of my application for same bearing even date herewith.

40 COMMERCIAL DELIVERY COMPANY

C. C. HOADLEY, *Agent.*

Conclusions of Vice-Chancellor.

CONCLUSIONS OF VICE-CHANCELLOR.

Filed June 4, 1919.

Mr. Theodore J. Harrington and with him Mr. Harold H. KISSAM (of the New York Bar) for drivers and Morris Plan Co.

Messrs. Furst & Furst (Mr. George Furst) for Receiver.

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LANE, V. C.

The controversy is with respect to certain automobile trucks. The legal title to the trucks was originally in the Commercial Delivery Company. That company entered into agreements called "leases" with individual truck drivers. The lessor referred to in the agreements is the Commercial Delivery Company and the lessees the truck drivers. I will take one of the agreements as a sample. It recites that the Commercial Delivery Company, lessor, has delivered a certain truck to the lessee at a certain valuation, for the use of which truck, during the period of the lease, the lessee is to pay a certain sum of money and has given a promissory note, payable to the order of the Morris Plan Company and maturing twelve months from date. The period of the lease is stated to be until date of maturity of the note. It is provided upon default of any of the terms of the note the entire principal sum should become due at the option of the legal holder. The lessee is forbidden to sell, let, assign, encumber, use for hire or dispose of the car without written consent of the lessor. Upon default in payment, or breach of condition, or if the lessor should deem the security for payment of the note insufficient or unsafe, the lessee agrees to deliver the car to the lessor in as good condition as received by the lessee. It is provided that if the lessor takes possession of the car by reason of any default, the lessee agrees that all payments made should be retained as liquidated damages and for rental value. It is provided upon the lessor taking possession of the car it may be sold at public or private sale at any time without notice to the lessee, and if, upon such sale, the proceeds thereof are insufficient to pay the sum remaining unpaid with respect to the note and the expenses, the deficiency shall be paid by the lessee. It is provided that the lessor agrees that at the termination of the lease the lessee, if he has complied with all the terms and has paid in full the note, may become the purchaser of the car, in which event the payments

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Conclusions of Vice-Chancellor.

made in accordance with the terms of the lease, together with the payment of the note by the lessee will be accepted as and for payment of the purchase price of the car. Upon the back of each one of these so-called leases there is a written assignment made by the Commercial Delivery Company selling and assigning to "the Morris Plan Company all right, title and interest in and to the foregoing agreement of lease, dated, etc., between, etc., and in and to the property and rights therein described." The assignment further provided that "the undersigned further agrees, in the event of any resale, release or repossession of said property, to pay to said The Morris Plan Company of New York, or its assigns, any deficiency between the net proceeds of such resale and the amount necessary to pay the amount of the instalments remaining unpaid, and the reasonable expense of such resale and attorney's fees connected therewith." Preceding the lease, application for lease and purchase was signed by each driver reciting substantially the terms of the lease. Coincident with the making of the lease a service contract was entered into, under the terms of which the Commercial Delivery Company contracted with the driver that he would work the motor truck for a term of two years under the direction of the Commercial Delivery Company, on an average of at least ten hours per working day in such a manner as that the gross earnings of the truck will amount to at least the fixed monthly charges arising from the operating of said truck; that he would not permit the truck to be used in any other manner than as directed by the Commercial Delivery Company; that the entire gross monthly earnings of the truck was to be delivered to the Commercial Delivery Company, out of which it was authorized to retain twenty per cent. for its services, and out of the remaining eighty per cent. authorized to pay drivers' wages at the rate of \$5.00 per day of 10 hours, monthly bills for oil, gasoline, repairs, etc., and storage charges of \$15.00 per month, and any balance to be credited to the driver; that the truck should at all times be stored in a garage to be furnished by the Commercial Delivery Company; that the Commercial Delivery Company would, in addition to the other services to be performed by it, furnish at least a sufficient amount of work for the truck to meet all its fixed charges arising from the operation of said truck. At the time the contracts of leases were entered into payments were made by the drivers

Conclusions of Vice-Chancellor.

to the Commercial Delivery Company of the amounts stipulated to be paid in cash and partly in notes to the Commercial Delivery Company. The difference between the amount of cash and notes paid or made directly by the drivers to the Commercial Delivery Company and the purchase price of the car was made up by moneys received by the Commercial Delivery Company from the Morris Plan Company, for which moneys the Morris Plan Company took a note made jointly by the driver and the Commercial Delivery Company and the assignment of the so-called lease hereinbefore referred to. When the receiver of the Commercial Delivery Company went into possession of its assets he found these trucks. Default had been made in the payment by the drivers of the monthly instalments provided for by the contract of lease, which monthly instalments went to the Morris Plan Company, it having advanced the money to the Commercial Delivery Company.

The present application is on behalf of the truck drivers and the Morris Plan Company to compel the receiver to release possession of the cars either to the truck drivers or the Morris Plan Company. The proof is that the Commercial Delivery Company did not furnish sufficient work to the drivers to meet the fixed charges. The receiver insists that he has the right to possession of the trucks and to dispose of them because of garage liens and also because the legal title remains in the Commercial Delivery Company. The only creditors whose rights are to be considered are the creditors of the Commercial Delivery Company. The intent of the contract between the Commercial Delivery Company and the truck driver was to retain title in the Commercial Delivery Company. Whether the intent of the assignment from the Commercial Delivery Company to the Morris Plan Company was to transfer the legal title to Morris Plan Company may be a subject of controversy. The instrument assigns all right, title and interest in and to the agreement of lease, and this, of course, would carry with it the right to receive payments from the lessee, the truck driver. It then proceeds "and in and to the property rights therein described." It may be that from this language there may be spelled out an intent to transfer the legal title to the truck. The Commercial Delivery Company then agrees in case of a resale, etc., to pay any deficiency between the net proceeds of the resale and the amount necessary to pay the amount of the

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Conclusions of Vice-Chancellor.

instalments remaining unpaid and the reasonable expense of such resale and attorney's fees connected therewith. There is nothing said with respect to what happens to any surplus. Assuming that the intent was to transfer the legal title to the Morris Plan Company the question arises as to whether that transfer of the legal title is valid as against creditors of the Commercial Delivery Company, and that depends upon whether it was an absolute transfer of the legal title or transfer as security. In determining this question, it must be kept in mind that the Commercial Delivery Company was a joint maker upon the note of the truck driver. It was a debtor of the Morris Plan Company. In the instrument of assignment it guaranteed the payment of the note and made itself responsible in case of a resale for any deficiency. It was contemplated by the instrument of assignment that the rights of the parties should be settled by a resale. While the instrument is not in form a chattel mortgage, it is in substance. It is defective as a pledge. There was no delivery of the trucks. The physical possession of the trucks has always been in the Commercial Delivery Company. While the right of possession apparently went to the drivers, yet by virtue of the service contract executed simultaneously with the lease, the actual possession went to the drivers only during the day time when in use by them, practically as drivers for the Commercial Delivery Company.

Assuming that the possession went to the drivers, it seems to me that so far as the Morris Plan Company is concerned, the possession of the drivers must be considered the possession of the Commercial Delivery Company. The real purpose of the transfer of the interests under this lease and of the property, if such was intended to be its effect, was to secure payment of the debt due to the Morris Plan Company from the Commercial Delivery Company and the truck drivers. There was no change of possession of the title so that it seems to me that the transaction being in the nature of a chattel mortgage, it is void as against creditors of the Commercial Delivery Company. The result is that as against the receiver representing creditors, the Morris Plan Company is not entitled to the possession of these cars. Nor are the truck drivers. No argument has been made that because of the breach on the part of the Commercial Delivery Company of its contract to furnish sufficient work for the cars to meet fixed charges that the truck drivers are entitled

Conclusions of Vice-Chancellor.

to take the cars without payment of the purchase price. The Commercial Delivery Company being insolvent, in the hands of a receiver, there can be no specific performance. The relative rights of the driver and the Commercial Delivery Company can only be worked out by a sale of the cars. It may be that out of the proceeds of such sale the drivers will be entitled to such damages as they may show accrued to them by reason of the failure of the Commercial Delivery Company to fulfil its contract. In this connection it must also be kept in mind that most, if not all, of the truck drivers are in default upon their personal notes to the Commercial Delivery Company and by no stretch of the imagination can it be contended that the Commercial Delivery Company agreed that sufficient work should be given to the trucks to meet these, and, indeed, it may be claimed that under Clause 6 of the Service Contract it was not contemplated that the instalments due upon the notes of the Morris Plan Company should be considered as included within the term "all fixed charges arising from the operation of said truck." In any event, it seems to me that the drivers are not entitled to the immediate possession of the trucks, and that the trucks must be sold.

An order, therefore, will be advised adjudging that the receiver is entitled to the possession of these trucks and is entitled to sell them free, clear and discharged of any lien or claim of title of the Morris Plan Company or of the truck drivers, and further that the instrument securing the Morris Plan Company upon its notes is void as against the creditors of the Commercial Delivery Company. What the rights of the truck drivers may be, if any, in the proceeds of sale, I do not determine. It may be claimed that if they have suffered any loss or damage by breach of contract they are but general creditors. If after the sale of the trucks, or before, counsel desire to re-argue the question as to whether the Morris Plan Company is entitled to a prior lien upon the proceeds of sale, they may do so upon notice.

Order.

ORDER.

Filed June 12, 1919.

IN CHANCERY OF NEW JERSEY.

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Between

DAVID STRAUS COMPANY,

Complainant,

and

COMMERCIAL DELIVERY COMPANY,
poration,

Defendant.

On Bill.

*On Application of
Receiver to sell
free of liens.*

*On Application of
Morris Plan. Co.
and others to turn
over assets.*

Order.

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This matter coming on to be heard in the presence of George Furst, of counsel with receiver, and Theodore J. Harrington and Harold H. Kissam, of counsel with Morris Plan Company and certain individuals, purchasers or lessees of cars of defendant company, upon the petition of the receiver to sell certain automobile trucks free of any claim, lien or right of the Morris Plan Company and said individual purchasers or lessees, and upon the petition of said Morris Plan Company and said individual purchasers or lessees for directions to the receiver to turn over said trucks to one of them and for a determination of their rights, and the rights of the receiver, and testimony having been taken, and the pleadings, testimony and arguments of counsel having been considered, and it appearing to the court that the Commercial Delivery Company retained legal title to said cars as to the purchasers or lessees and that said purchasers or lessees have defaulted upon their contracts of purchase or lease, and are not entitled to the possession of said cars, and that if the instrument of assignment from the Commercial Delivery Company to the Morris Plan Company can be construed to carry the legal title the transaction so far as the cars are concerned is that of chattel mortgage and as such is void as against the receiver for lack of record, there being no change in possession.

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It is on this fifth day of June, 1919, ordered, adjudged and decreed that the individual purchasers or lessees are not en-

Order to Stay.

titled to the possession of the automobile trucks mentioned in the pleadings the rights of such purchasers or lessees, if any, in the proceeds of such cars is reserved for further order.

It is further ordered, adjudged and decreed that the claim of the Morris Plan Company upon said cars is that of a chattel mortgagee and as such is void as against the receiver for lack of record, there being no change in possession.

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It is further ordered, adjudged and decreed that the property is perishable and liable to deteriorate in value pending litigation as to the respective rights of the parties, and said receiver is directed and authorized to sell said cars free, clear and discharged of any claim of lien or title of said Morris Plan Company and said individual purchasers or lessees.

E. R. WALKER, C.

Respectfully advised.

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MERRITT LANE, V. C.

ORDER TO STAY.

Filed June 26, 1919.

This matter being opened to the Court by Riker and Riker, solicitors for the Morris Plan Company, Benjamin Gottlieb, William Gear, Joseph Flynn, George H. Cromwell, Frank A. Sawicke, Albert Wilde, Napoleon Gagnor and Marius P. Hvarre, appellants, from the order made in this cause and filed with the clerk of this Court on the 12th day of June, 1919;

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It is on this twenty-fifth day of June, 1919, ordered that pending said appeal proceedings under said order be stayed;

It is further ordered that the receiver of the Commercial Delivery Company turn over to the Morris Plan Company the eight automobile trucks in his possession referred to in the petition filed in this cause on or about May 26, 1919, by the Morris Plan Company, Benjamin Gottlieb, William Gear, Joseph Flynn, George H. Cromwell, Frank A. Sawicki, Albert Wilde, Napoleon Gagnor and Marius P. Hvarre, upon the delivery of a bond executed by said Morris Plan Company, with a sufficient security in double the amount of the value of said automobile trucks, as appraised by appraisers, one of them appointed by

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Order to Stay.

the receiver and the other by the Morris Plan Company, conditioned that the Morris Plan Company, in case said order appealed from be affirmed, pay over to said receiver the value of the trucks at the present time, as appraised in the manner above set forth, and with the further condition that if said order be affirmed the receiver may proceed in this court for the collection of said present value, as appraised, together with costs, if any, suit for collection be necessary.

And it is further ordered that before said trucks be delivered by receiver to said Morris Plan Company, said Morris Plan Company shall file with this court a designation of Riker and Riker, as solicitors, to receive process for suit on said bond, if suit be necessary.

It is further ordered that copies of this order, which need not be certified, may be served upon the receiver and his counsel within two days of the date hereof.

E. R. WALKER, C.

Respectfully advised,

JOHN E. FOSTER, V. C.

We hereby consent to the signing and entry of the above order.

FURST & FURST,
Solicitors of Receiver.

A true copy.

JESSE R. SALMON,
Clerk.

Copy of endorsement:

Copy of the within order received this 25th day of June, 1919.

FURST & FURST,
Solicitors of Receiver.

Copy of the within order received this 25th day of June, 1919.

JACOB L. NEWMAN,
Receiver.

Order Amending Recital.

ORDER AMENDING RECITAL.

Filed July 3, 1919.

This matter being opened to the Court by Riker and Riker, solicitors for the Morris Plan Company and others, and it appearing that Commercial Delivery Company was present, through its officers and agents, in this court and made no objection to the entry of the order made in this cause on the 25th day of June, 1919, wherein, among other things, it was ordered that the receiver of the Commercial Delivery Company turn over to the Morris Plan Company the eight automobile trucks, upon certain conditions as expressed in said order;

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It is on this first day of July, 1919, Ordered that the recital of said order made on the 25th day of June, 1919, be amended to read as follows:

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“This matter being opened to the Court by Riker and Riker, solicitors for the Morris Plan Company, Benjamin Gottlieb, William Gear, Joseph Flynn, George H. Cromwell, Frank A. Sawicki, Albert Wilde, Napoleon Gagnor and Morris P. Hvarre, appellants from the order made in this cause and filed with the Clerk of this Court on the 12th day of June, 1919, it appearing that the Commercial Delivery Company, through its officers and agents, was present and made no opposition to the entry of an order which would require the delivery of the eight automobile trucks in the possession of the receiver of the Commercial Delivery Company to the Morris Plan Company upon certain conditions.”

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E. R. WALKER, C.

Respectfully advised.

JOHN E. FOSTER, V. C.

We hereby consent to the making and entry of the above order.

FURST & FURST,
Solicitors of Receiver.

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A true copy.

JESSE R. SALMON,
Clerk.

Notice of Appeal.

NOTICE OF APPEAL.

Filed June 19, 1919.

10 The Morris Plan Company of New York, H. G. Farnam, Frank H. Tomlinson, Frank A. Sawicki, William Geair, Joseph Flynn, Albert Wilde, Napoleon Gagnor, R. C. Van Bayer, Marius Hvarre, Jack Schwartz, George H. Cromwell and Benjamin Gottlieb hereby appeal from an order made in this court, on application of receiver to sell free of liens and on application of Morris Plan Company and others to turn over assets, and from the whole and every part of said order, which was filed in the office of the Clerk of Chancery on the 12th day of June, 1919, to the Court of Errors and Appeals in the last resort in all causes.

20 Dated June 18, 1919.

RIKER & RIKER,
Solicitors for and of Counsel with Appellants.

HAROLD H. KISSAM,
Of Counsel with Appellants.

I conceive there is good cause for appeal in the above-stated cause.

30 ANDREW VAN BLARCOM,
Of Counsel with Appellants.

Service of the within notice of appeal acknowledged this 18th day of June, 1919.

FURST & FURST,
Solicitors of Receiver, Jacob L. Newman.

Petition of Appeal.

PETITION OF APPEAL.

Filed July 5, 1919.

New Jersey Court of Errors and Appeals

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Between

DAVID STRAUS COMPANY,

Complainant,

and

COMMERCIAL DELIVERY COMPANY,

Defendant.

On Appeal.

On Bill.

*On Application of
Receiver to Sell
Free of Liens.*

*On Application of
Morris Plan
Company and
Others to Turn
Over Assets.*

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*Petition of
Appeal.*

To the Honorable Court of Errors and Appeals in the Last Resort in All Causes:

The petition of The Morris Plan Company, a New York corporation, Benjamin Gottlieb, William Geair, Joseph Flynn, George H. Cromwell, Frank A. Sawicki, Albert Wilde, Napoleon Gagnor and Marius P. Hvarre, the appellants in the above-stated cause, respectfully shows that your petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the 12th day of June, 1919, in a cause wherein the David Straus Company, a corporation, was complainant, and the Commercial Delivery Company, a corporation, was defendant, in this respect, to wit: that the said order adjudges as follows:

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“It is on this fifth day of June, 1919, ordered, adjudged and decreed that the individual purchasers or lessees are not entitled to the possession of the automobile trucks mentioned in the pleadings, the rights of such purchasers

Petition of Appeal.

or lessees, if any, in the proceeds of such cars is reserved for further order.

It is further ordered, adjudged and decreed that the claim of the Morris Plan Company upon said cars is that of a chattel mortgagee and as such is void as against the Receiver, for lack of record, there being no change in possession."

Your petitioners appeal from that part of the order of the Chancellor which orders as aforesaid, upon the ground that the same was erroneous for that the individual purchasers or lessees are entitled to the possession of the automobile trucks, and the claim of the Morris Plan Company upon said cars is not that of a chattel mortgage and is not void as against the receiver for lack of record, and the claim of the said Morris Plan Company upon said trucks is superior to the claim of the receiver.

Your petitioners, therefore, pray that the said order of the said Chancellor may be in whole and every part aforesaid reversed, set aside and for nothing holden, and that your petitioners may have such further and other relief in the premises as to this honorable Court shall seem meet.

RIKER & RIKER,
Solicitors and of Counsel with Appellants.

HAROLD H. KISSAM,
R. RANDOLPH HICKS,
Of Counsel with Appellants.

Service of the within petition of appeal is hereby acknowledged this 2nd day of July, 1919.

JACOB L. NEWMAN,
Receiver.

FURST & FURST,
Solicitors of Receiver.

Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

Filed September 24, 1919.

The answer of Jacob L. Newman, receiver of the Commercial Delivery Company, a corporation, the above-named defendant, and respondent to the petition of appeal of The Morris Plan Company, a corporation, appellant. 10

The receiver of the above-named defendant company and respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that an order was on the 5th day of June, 1919, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this receiver of the defendant company and respondent prays to refer thereto when the same shall be produced. And this receiver of the defendant company and respondent is advised and believes that the said order is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to the receiver of the defendant company and respondent. 20

FURST & FURST,
Solicitors for Jacob L. Newman, Receiver of the Defendant Company and Respondent.

GEORGE FURST,
Of Counsel with the Receiver. 30

Filed September 24, 1919.

Endorsed:

We hereby consent to the filing of the within answer as of time.

RIKER & RIKER,
Solicitors of Morris Plan Company, et al.

Stipulation.

STIPULATION.

10 IT IS HEREBY STIPULATED, this 16th day of October, 1919, by and between Riker & Riker, Esquires, solicitors for and of counsel with Morris Plan Company, a New York corporation, Benjamin Gottlieb, William Geair, Joseph Flynn, George H. Cromwell, Frank A. Sawicki, Albert Wilde, Napoleon Gagnor and Marius P. Hvarre, and Furst & Furst, Esquires, solicitors for and of counsel with Jacob L. Newman, receiver of the Commercial Delivery Company, that the above constitutes the entire state of the case on appeal from an order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 12th day of June, 1919.

20 IT IS FURTHER STIPULATED AND AGREED by and between the respective counsel that the service contract designated as Exhibit C. 1, lease agreement designated as Exhibit C. 2, the note designated Exhibit C. 3 and the application for loan and purchase designated D. 1 in the within state of the case be regarded as typical of the eight transactions involved in this appeal and that the above-named papers for each transaction need not be included in the state of the case, and that where copies of said papers were designated as exhibits the said copies be taken for and instead of the originals.

30 RIKER & RIKER,
*Solicitors for and of Counsel with Morris Plan Company,
Benjamin Gottlieb, William Geair, Joseph Flynn,
George H. Cromwell, Frank A. Sawicki, Albert
Wilde, Napoleon Gagnor and Marius P. Hvarre.*

FURST & FURST,
*Solicitors for and of Counsel with Jacob L. Newman,
Receiver of Commercial Delivery Company.*

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IN CHANCERY OF NEW JERSEY

*Between*THE DAVID STRAUS COMPANY,
a corporation,*Complainant,**and*COMMERCIAL DELIVERY COMPANY,
a corporation,*Defendant.**On Bill.**Order.*

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This matter being opened to the Court by Furst & Furst, solicitors for the complainant, upon the return of an order to show cause directed to the defendant company why a receiver should not be appointed and why an injunction should not issue pursuant to the prayer of the bill of complaint filed herein, and it appearing that the said order to show cause was returnable May 20, 1919, and was continued from time to time, and it further appearing that Jacob L. Newman was appointed temporary receiver and his appointment was continued from time to time and that he was directed to prepare a report showing the financial condition of the defendant company, and after reading and filing his report and it appearing from said report that the said defendant company is insolvent and that the business of the defendant company has been and is being conducted at a great loss and greatly prejudicial to the interest of the stockholders and creditors so that its business can not be conducted with safety to the public and advantage to the stockholders, and upon the written consent of Benjamin J. MacDonald, the manager and director of the defendant company, it is on this 8th day of July, 1919,

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ORDERED, ADJUDGED AND DECREED that the business of the Commercial Delivery Company has been conducted at a great loss and prejudicial to the interest of its stockholders and creditors, so that its business can not be conducted with safety to the public and advantage to the stockholders; and it is further

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ORDERED: That the said Commercial Delivery Company be and it is hereby declared insolvent and that an injunction issue against the defendant corporation according to the prayer of the bill of complaint, and that the said Commercial Delivery Company, its officers, servants and agents absolutely desist and refrain, and they are hereby enjoined and restrained from exercising any of its privileges or franchises and from collecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements, or effects, except to a receiver appointed by this Court; and it is further

ORDERED: That Jacob L. Newman, Esq., be and he is hereby appointed receiver for the creditors and stockholders of the said defendant corporation, with all powers incident thereto, and that he do and perform all the duties imposed upon him and required by law and especially by an Act entitled "An Act concerning corporations (Revision of 1896)" and the acts supplementary thereto and amendatory thereof; and it is further

ORDERED: That the said receiver, before he shall enter upon his duties as such receiver, shall take the oath prescribed by law, and give a bond to the Chancellor of the State of New Jersey in the sum of ten thousand dollars, conditioned for the faithful performance of his duties to be approved as to form and security thereof by any one of the special masters of this Court; and it is further

ORDERED: That the creditors and stockholders of the defendant company show cause on the 15th day of July, 1919, at ten o'clock in the forenoon, or as soon thereafter as the matter can be heard, at the Chancery Chambers, in the City of Newark, why the said receiver should not be continued; and it is further

ORDERED: That the said receiver shall within three days from the date hereof, mail to each of the creditors and stockholders of said corporation, at his last known post-office address, a true copy of this order, which need not be certified.

EDWIN ROBERT WALKER,
Chancellor.

Respectfully advised.

JOHN FOSTER, V. C.

I hereby consent to the entry of the foregoing order.

BENJAMIN J. MACDONALD.

New Jersey Court of Errors and Appeals

Between

DAVID STRAUS COMPANY,

Complainant,

and

COMMERCIAL DELIVERY COMPANY,

Defendant.

On Appeal.

On Bill.

*On Application
of Receiver to
Sell Free of
Liens.*

*On Application of
Morris Plan
Company and
Others to Turn
Over Assets.*

BRIEF FOR APPELLANTS MORRIS PLAN COMPANY AND OTHERS.

This is a controversy between the receiver of the Commercial Delivery Company, on one side, and the Morris Plan Company of New York, H. G. Farnam, Frank H. Tomlinson, Frank A. Sawicki, William Gear, Joseph Flynn, Albert Wilde, Napoleon Gagnor, R. C. Von Bayer, Marius Hvarre, Jack Schwartz, George H. Cromwell and Benjamin Gottlieb, on the other side.

The evidence discloses that the Commercial Delivery Company is a corporation engaged in the business of procuring truck business for drivers of motor trucks and of selling to such drivers motor trucks and supplies necessary for the operation thereof. (See Service Contract, Case, p. 17; Lease Agreement, Case, pp. 18, 19, 20 and 21.)

In a suit instituted by the David Straus Company against the Commercial Delivery Company the assets of the Commercial Delivery Company were placed in the hands of Jacob L. Newman, as receiver. (See Petition of Jacob L. Newman, Case, p. 5.)

When the receiver took charge of the assets of the Commercial Delivery Company, he took possession of seven (7) motor trucks. These seven motor trucks are the subjects of the controversy and were the property respectfully of Marius Hvarre, George H. Cromwell, Benjamin Gottlieb, William Gear, Joseph Flynn, Napoleon Gagnor and Frank A. Sawicki, each of whom

had purchased a motor truck under an agreement, a copy of which appears on page 18 of the case as Exhibit C and is entitled Lease Agreement. (By agreement of counsel (C., p. 42) only one of said agreements was filed in evidence, as the agreements were identical in each case, the lease agreement which appears as Exhibit 2, as well as the other exhibits, were regarded as typical of the agreement in each instance.)

The purchasers of the motor trucks, as enumerated above, will, for convenience sake, be termed in this brief "Driver."

An examination of this agreement shows that the motor truck was "delivered in good condition" to the "Driver" by the Commercial Delivery Company, upon the payment to said Commercial Delivery Company by said "Driver" of cash approximately equal to one-third of the total value of the motor truck and the execution by said "Driver" of a note representing the balance of the purchase price, which note was payable twelve months after its date. *None of these notes were due.*

As security for the payment of the note the "Driver" subscribed to an Instalment Investment Certificate of the Morris Plan Company of New York in a sum equal to the amount of the note and hypothecated this certificate as security for the note. In addition to the security of the Morris Plan Investment Certificate above mentioned, the lease agreement under review retains a lien upon the truck. It is in form called a lease. The Commercial Delivery Company is called lessor, while the "Driver" is called lessee. The term of the so-called lease is designated at the time intervening between its execution and the date of maturity of the note.

This lease agreement provides that upon default in the observance of any of the terms of the note, representing deferred purchase price of trucks, then the entire principal of said note shall become due and payable, *at the option of the legal holder thereof* (the Morris Plan Company of New York).

The agreement further provides that the "driver" shall not assign or encumber the car without the written consent of the Commercial Delivery Company, and that the "driver" shall keep and maintain the car in good order and repair. That the "Driver" shall keep the car insured and shall pay all taxes and charges thereon.

It is further provided that upon any breach by the "Driver" of any of his numerous duties the Commercial Delivery Com-

pany may demand and the "Driver" shall deliver to it the motor truck.

The contract further provides (C., p. 20, l. 40) that the interest of the Commercial Delivery Company, as defined in said agreement, was assigned to the Morris Plan Company of New York, and that the lessee ("Driver") upon complying with his duties and paying the note, shall become the unconditional owner of the truck (C., p. 21, 1st, 1-10).

As has been pointed out, the purchase price of the car was paid part in cash and part by the execution of a note. This note was payable to the Morris Plan Company of New York. In order to understand the transaction, it is necessary to briefly analyze the note which is found on page 25, as Exhibit C. It is in form similar to the ordinary collateral note with Instalment Investment Certificate of the Morris Plan Company assigned as collateral. The note provides, that in the event of the failure on the part of the "Driver" to make payment of any instalment due on the Certificate of Investment hypothecated along with the goods, then the note, at the *option* of the Morris Plan Company of New York, shall become due and payable.

The note further provides, that upon its maturity if all instalment payments have been made upon the *Investment Certificate*, then the Investment Certificate may be surrendered to the Morris Plan Company and with the cash received therefrom the "Driver" may discharge the note. This note is signed by the Commercial Delivery Company and the "Driver."

We have already seen that all of the right, title and interest of the Commercial Delivery Company, as set out in the lease agreement, Exhibit 2, was in the body of said instrument assigned to the Morris Plan Company of New York. The exact language of this assignment is as follows:

"The lessee acknowledges receipt from the lessor of a true copy of this agreement, together with notice that this agreement together with all the right, title and interest of the lessor herein are hereupon assigned by the lessor to The Morris Plan Company of New York."

In addition to the assignment above set out, at the foot of said lease agreement, another assignment is executed (C., p. 21, l. 20, etc.). Under this last-mentioned assignment it is provided that the Commercial Delivery Company sells and assigns to the Morris Plan Company of New York all its rights, title and

interest in and to the lease agreement and in and to the *property rights* therein secured.

The above transaction is somewhat complicated, but by a careful inspection of the pages in the case the undisputable facts are easily deducible. In effect, an arrangement was effected by which the "Driver" purchased from the Commercial Delivery Company a motor truck at a fixed price and by which the Commercial Delivery Company retained a lien on the motor truck for the benefit of and which it assigned to the Morris Plan Company for the unpaid purchase money. This unpaid money was represented by a note payable to the Morris Plan Company. In order to retain this lien, the Commercial Delivery Company called the instrument under review a lease. Whether it is a lease, a conditional sales agreement, a chattel mortgage or merely a bill of sale, for the purpose of the present inquiry, it is immaterial, because in either event the receiver is not entitled to the motor trucks. This instrument contemplates a delivery of the motor truck to the "Driver," and an agreement on the part of the "Driver" to pay a fixed sum for said motor truck, said fixed sum being represented by part in cash and part by note. The Commercial Delivery Company received the full value of the motor trucks, part from the "Driver" and the balance from the Morris Plan Company of New York. It had no further interest in the transaction save that it guaranteed the payment of the note.

Under two separate instruments it transferred all of its right, title and interest in the motor trucks to the Morris Plan Company, it having previously or at about the same time transferred the actual possession of the motor truck to the "Driver." The only contingency under which the Commercial Delivery Company could ever be further interested in the motor truck was the contingency of its having to make good its guaranty. There is not claim that it ever has made good its guaranty or that it ever will be able to make it good. It therefore stands in a Court of Equity as having had its assets augmented to the full value of the motor trucks.

The decision, of which complaint is made, gives to the Commercial Delivery Company unencumbered title to the motor trucks and allows it to retain the full value of the motor trucks already paid it by the "Driver" and the Morris Plan Company, a curiously inequitable result.

An examination of Exhibit 1, termed "Service Contract" discloses that the "Driver" employed the Commercial Delivery Company as its managing business agent and agreed that such "Driver" would work the motor truck on his own account for two years upon the terms set out in said agreement, and that he would store the motor truck during the term of the service contract in a garage to be furnished by the Commercial Delivery Company. The Commercial Delivery Company agreed that it would furnish to the "Driver" a sufficient amount of work for the truck to meet all fixed charges arising from its purchase and operation. The proceeds of the operation of the truck were to be turned over to the Commercial Delivery Company. It was to have 20 per cent. thereof for its services and the remaining 80 per cent. was to be paid over in certain designated parts to the "Driver" or his creditors.

An examination of the testimony of Benjamin J. MacDonald (C., p. 13, l. 35, etc.), shows that the Commercial Delivery Company did not live up to its agreement to furnish to the drivers sufficient work to meet the "fixed charges" on the motor trucks. Said testimony further shows that the notes to the Morris Plan Company were part of the "fixed charges." Since the Commercial Delivery Company in its said service contract agreed, for valid consideration, to furnish sufficient work to meet the fixed charges on the motor trucks, the failure on the part of the "Driver" to meet his obligation to the Morris Plan Company was and could be due only to the failure of the Commercial Delivery Company to live up to its contract with him. *The Commercial Delivery Company, therefore, was never in a position in which it could claim any right of repossession to the motor trucks, an important fact in considering the rights of the parties.*

The Court is asked to bear in mind that the "Driver" employs the Commercial Delivery Company as his managing business agent and pays to said company 20 per cent. of his gross earnings, and further agrees that he will store the car in a garage to be furnished by the Commercial Delivery Company and pay to the Commercial Delivery Company a storage charge of \$15 per month.

In order to uphold the decision of the Court of Chancery, it is necessary to come to the conclusion from an inspection of this contract that under it the possession of the car was not in the "Driver" but in the Commercial Delivery Company. Such a conclusion is impossible, when it is remembered that the lease agreement contemplates an actual delivery to the "Driver" and

requires a continuous employment of the motor truck by him, and provides for repossession only in event of default. The testimony of MacDonald shows that each of the motor drivers did actually operate the motor truck pursuant to the terms of the agreements filed in evidence, and only defaulted by reason of failure of Commercial Delivery Company to live up to its duties as laid down in said service contract. (See C., pp. 11 and 12.)

I.

Vice-Chancellor's conclusions contradictory and unsupported by evidence.

An examination of the Order in Chancery (C., p. 34) distinctly sets out the facts on which the Vice-Chancellor reached his conclusions. It uses this language:

"And it appearing to the Court that the Commercial Delivery Company retained legal title to said cars as to the purchasers or lessees, and that said purchasers or lessees have defaulted upon their contracts of purchase or lease, and are not entitled to the possession of said cars, and that if the instrument of assignment from the Commercial Delivery Company to the Morris Plan Company can be construed to carry the legal title, the transaction so far as the cars are concerned is that of chattel mortgage and as such is void as against the receiver for lack of record, there being no change in possession."

In the conclusions of the Vice-Chancellor, his views are elaborated in the following language (C., p. 32):

"In determining this question, it must be kept in mind that the Commercial Delivery Company was a joint maker upon the note of the truck driver. It was a debtor of the Morris Plan Company. In the instrument of assignment it guaranteed the payment of the note and made itself responsible in case of a resale for any deficiency. It was contemplated by the instrument of assignment that the rights of the parties should be settled by a resale. While the instrument is not in form a chattel mortgage, it is in substance. It is defective as a pledge. There was no delivery of the trucks. The physical possession of the trucks has always been in the Commercial Delivery Company. While the right of possession apparently went to the drivers, yet by virtue of the service contract executed simultaneously with the lease, the actual possession went to the drivers only during the daytime when in use by them, practically as drivers for the Commercial Delivery Company.

“Assuming that the possession went to the drivers, it seems to me that so far as the Morris Plan Company is concerned, the possession of the drivers must be considered the possession of the Commercial Delivery Company. The real purpose of the transfer of the interests under this lease and of the property, if such was intended to be its effect, was to secure payment of the debt due to the Morris Plan Company from the Commercial Delivery Company and the truck drivers. There was no change of possession of the title so that it seems to me that the transaction being in the nature of a chattel mortgage, it is void as against creditors of the Commercial Delivery Company. The result is that as against the receiver representing creditors, the Morris Plan Company is not entitled to the possession of these cars. Nor are the truck drivers.”

The conclusions set out in the order are manifestly in conflict with the conclusions set out in the opinion of the Vice-Chancellor. It will be observed that in the order it is stated that the Commercial Delivery Company retained legal title to the cars as to the drivers, and that the “Driver” defaulted in his contract, and by reason of such default, was not entitled to possession, while in the opinion, the Vice-Chancellor states:

“Assuming that the possession went to the drivers, it seems to me that so far as the Morris Plan Company is concerned, the possession of the drivers must be considered the possession of the Commercial Delivery Company.”

In one case it is, therefore, stated that the Commercial Delivery Company was entitled to the possession of the cars by reason of default in the payment. In the other it is stated that the Commercial Delivery Company was in possession, because the possession of the “Driver” was the possession of the Commercial Delivery Company. The inconsistency in these two positions, while illustrating the uncertainty in the mind of the Vice-Chancellor as to the reasons for his conclusions, are immaterial to the controversy at bar, because in either event the Vice-Chancellor is mistaken.

It is true that the lessee had defaulted in the payments called for in the lease agreement, but this default is not shown to have been due to any violation of duty on the part of the “Driver” or lessee, but on the contrary, is shown to be due to the failure of the Commercial Delivery Company to live up to its agreement to furnish sufficient work to supply the fixed charges which included the payments to the Morris Plan Company, as shown

above. If, therefore, the failure of the "Driver" to make the payments required is due to the failure of the Commercial Delivery Company to supply the work which it promised, it follows that the Commercial Delivery Company is not in a position to complain of the non-payment of the fixed charges by the "Driver," and not being able to so complain, is not entitled to repossess the motor trucks under the terms of the agreement. That the failure to meet the fixed charges was due to the Commercial Delivery Company is uncontradictedly shown by the testimony of J. MacDonald, the manager of the Commercial Delivery Company.

Page 13, l. 35, etc., the following question was asked by the Court:

"Q Did you supply a sufficient amount of work to meet all fixed charges?"

A No, the company didn't furnish sufficient work."

Service contract, Case, p. 18, is as follows:

"It is understood that the party of the first part will, in addition to the other services to be performed by it, furnish at least a sufficient amount of work for the truck herein mentioned to meet all fixed charges arising from the operation of said truck."

The statement, therefore, in the order is not sustained by any testimony and on the contrary is in the teeth of the undisputed facts.

II.

Default of "Driver" could only be taken advantage of by Morris Plan Company.

Even if we admit, however, that the drivers were in default and that this default was not due to the Commercial Delivery Company but was due to their own fault, the conclusion of the Vice-Chancellor is erroneous.

An examination of Exhibit C, pages 19 and 20, shows that while the right of possession upon default is retained by the lessor, all of his right, title and interest in the instrument are assigned to the Morris Plan Company of New York. If the lessor has assigned all his interest under the instrument to the Morris Plan Company of New York, it is manifest that he also assigns the right to repossess the car to the Morris Plan Company of New York. The repossession of the cars by the Com-

mercial Delivery Company was not on demand of the Morris Plan Company of New York but on the contrary was against its request and contrary to its wishes.

III.

Possession of "Driver" not possession of Commercial Delivery Company.

The opinion states that the possession of the drivers must be considered the possession of the Commercial Delivery Company. The theory of this conclusion is not given and is left to surmise.

The service contract, the lease agreement, the note and the testimony of MacDonald all show that the possession of the "Driver" is adverse to the possession of the Commercial Delivery Company. The Commercial Delivery Company agreed to and did deliver this possession to the "Driver." The relationship shown by this uncontradicted testimony is that after the execution of the various contracts the relationship between the Commercial Delivery Company and the "Driver" was one of agency on the part of the Commercial Delivery Company to obtain work for the "Driver" and to house the motor truck for the "Driver" as a bailee for hire at the rate of \$15 per month. *The conclusion is irresistible, therefore, that in no event could the possession of the "Driver" be considered the possession of the Commercial Delivery Company.*

It is submitted that so far as possession of the trucks is concerned, the arrangement contemplated by the instruments and followed out is the same as if the truck drivers received physical possession of the trucks and stored them with a garage owner other than the Commercial Delivery Company.

The rule is that there must be no *formal* handing over of possession and a *formal* storage. *Shields v. Lozear*, 34 N. J. L. 496. It is to this effect that Mr. Justice Depue, speaking for this Court, says on page 501:

"Having been admitted into possession under the lease, a formal entry under the mortgage was not necessary to vest in him the possession under it."

IV.

Recordation of instrument described by Vice-Chancellor immaterial.

Both in the opinion of the Vice-Chancellor, quoted above and in the order of the Court, the rights of the Morris Plan Company are denied, because the "instrument of assignment from the Commercial Delivery Company to the Morris Plan Company" is a chattel mortgage, and as such is void against the receiver for lack of record.

Whether the instrument of assignment which is found on page 21 of the case is or is not properly recorded is immaterial.

Section 4, volume 1, page 463 of the Compiled Statutes of New Jersey, provides that chattel mortgages, unless recorded, and where possession remains in the mortgagor, are "void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagors in good faith."

The recordation, therefore, of such an instrument does not affect its validity as between the original parties. It only affects the rights of creditors, vendees and mortgagees. There are no creditors making any claims, no subsequent vendees and no subsequent mortgages. The only controversy is between the "Drivers" and the receiver of the Commercial Delivery Company.

In the case of *Kane v. Loder*, 56 Equity 268., 38 Atlantic, page 966, it is expressly decided that in such a controversy the receiver has no other or greater rights than the company which he represents. In that case the Capital Dry Goods Company executed sundry chattel mortgages. Subsequently, it sold the property mortgaged to the Trenton Dry Goods Company, which assumed the payment of the chattel mortgages. The Trenton Dry Goods Company became insolvent and its assets went into the hands of a receiver. The holder of the chattel mortgage attempted to enforce it. The defence was made by the receiver that it was not properly recorded, and the Court said:

"The defendant sets up among other things that the affidavit to the chattel mortgage is defective, but as against the receiver, who was the only party defendant, the mortgage is good without registry or affidavit. The mortgage as against the mortgagor was entirely efficacious as an encumbrance and the receiver took his title to the property subject to all the equities to which it was subject in the hands of the debtor. This rule was asserted in respect to an assignment for the benefit of creditors in *Shaw v.*

Glen, 37 N. J. Eq. 32. A receiver in this respect stands on the same footing as an assignee for the benefit of creditors."

We are aware that in the case of *Receiver of Graham Button Company v. Charles Spielman*, 50 Eq., p. 120, the Court allowed a receiver to test the validity of a chattel mortgage. But in that case the Court held first that in order for a receiver to contest such a mortgage (a) the creditor whom he represents must have his debt fastened on the mortgaged property; (b) that by an adjudication in insolvency and appointment of a receiver, the debts of the creditors at large of an insolvent corporation were fastened upon the property in the hands of a receiver, and (c) by reason of the fact that the debts are so fastened upon the property, the receiver can test the validity of the chattel mortgage. In the case at bar, there had been no adjudication of insolvency. The receiver was merely a temporary receiver. Therefore, the doctrine laid down in *Kane v. Loder*, *supra*, applies to the Straus case.

V.

The assignment referred to by Vice-Chancellor but a link in title of Morris Plan Company.

The instrument of assignment under discussion is not the sole instrument under which the Morris Plan Company claims title, though the Vice-Chancellor treats it as the entire claim of the Morris Plan Company.

We have seen that in the body of the lease agreement all of the rights of the Commercial Delivery Company therein are assigned to the Morris Plan Company. Upon the execution, therefore, of the original instrument, the Commercial Delivery Company divested itself of every interest in the transaction.

It having no interest in the transaction, and having no interest of any character in the motor trucks, its receiver could stand in no better position.

VI.

Instrument under review a conditional sales agreement and properly recorded.

The instrument called the lease agreement is not a chattel mortgage. It in no way measures up to the definition of a chattel mortgage. On the contrary, it does come within the definition of a conditional sale, Section 1, page 4647, of Compiled Statutes of 1910, provides that contracts of sale may be either absolute or conditional. An examination of the lease agreement heretofore referred to, and which appears as Exhibit C, page 18, discloses that it is a sale on condition. It provides for the delivery of the motor truck and has a clause at its end which reads as follows:

“The lessor (meaning the Commercial Delivery Company) agrees that at the termination of this lease, the lessee (meaning the “Driver”), if he has complied with all the terms hereof and has paid in full the above described note, may become the purchaser of said above described car, in which event the payments made in accordance with the terms of this lease, together with payment of said note by the lessee, will be accepted as and for payment of the purchase price of said car.”

In the case of *Lauter Co. v. Isenreath and others*, 77 N. J. L., page 323, 72 Atlantic, page 56, the Court held that a substantially similar instrument was a conditional sales agreement. In that case the Court held such an instrument as the one under review a conditional sales agreement. It used the following language:

“It is insisted that the contract between the Lauter Company and Isenreath was not one for the conditional sale of the piano. In support of this insistence, the case of *Singer Mfg. Co. v. Wolff Company*, 70 N. J. L. 127, 56 Atl. 147, is cited; but in this case there was a hiring of a sewing machine at a fixed rent, with no clause that upon payment of the value of the machine, title should pass to the bailee, nor that a bill of sale should be made to him. In the present case, as has been stated, there is a provision that, upon the payment of monthly rentals for a period named, the Lauter Company will sell the piano to Isenreath and give a receipted bill for same. There is nothing in the point that the certificate was merely an agreement to sell in the future, if a certain condition is performed by the vendee, and that it is not an agreement for a present sale, title not to pass until the price is paid. the agreement is that a receipted bill shall be given upon

full payment by the vendee, meaning that title shall pass upon the performance of that condition, and this constituted a conditional sale."

In the case of *Singer Mfg. Co. v. Wolff Company*, referred to above, 70 N. J. E. 127, 56 Atl. 147, the instrument did not provide for a purchase, but, on the contrary, it provided that the lessee, at the end of the lease, return it to the lessor, and the Court said:

"That she pays in rent for a year the full value of the machine does not at all prove that at the end of the year she is entitled to the machine, for she has expressly agreed to return it at the expiration of the time for which she rented it. Cases cited in which it appears that upon the payment of the full value of the goods the title is to be vested in the vendee, although the instruments are called leases, and payments of instalments called payments of rent are not applicable to this case."

It is, therefore, plain that under the adjudicated cases of this State, the lease agreement is a conditional sales agreement.

While said agreement is not properly recorded as a chattel mortgage in that it is not accompanied by the affidavit required for a chattel mortgage, it is properly recorded as a conditional sales agreement. (See Registry Certificate of Edward Bauer, Record, page 24.)

VII.

Even if we disregard the lease agreement and rest the decision on the assignment alone, the Vice-Chancellor is in error in holding that the assignment of the lease was a chattel mortgage.

He says (C., p. 32, ll. 4-20):

"Assuming that the intent was to transfer the legal title to the Morris Plan Company, the question arises as to whether that transfer of the legal title is valid as against creditors of the Commercial Delivery Company, and that depends upon whether it was an absolute transfer of the legal title or transfer as security. In determining this question, it must be kept in mind that the Commercial Delivery Company was a joint maker upon the note of the truck driver. It was a debtor of the Morris Plan Company. In the instrument of assignment it guaranteed the payment of the note and made itself responsible in case of a resale for any deficiency. It was contemplated by the instrument of assignment that the rights of the parties should be settled by a resale. While the instrument is not in form a chattel mortgage, it is in substance."

Attention is again called to what the Vice-Chancellor said regarding the assignment, in speaking of the event of resale, release or possession of said property, that is:

“There is nothing said with respect to what happens to any surplus.”

In *Wilmerding, Hoguet & Co. v. Mitchell*, 42 N. J. L. 476, on page 479, Justice Van Syckel says (italics ours):

“Whenever a transaction of this character resolves itself into a security for a debt, it is a mortgage. 2 Story’s Eq. Jur. Sec. 1018, 1019. *The right of redemption must exist, to constitute a mortgage*, so that the debtor shall be entitled to a release of his property, on the payment of the debt. The form of the conveyance is not a controlling circumstance, where the right to redemption is established. In this agreement, the right to redeem upon payment of a sum due to the plaintiff is absent.”

In *Hastings v. Fithian*, 71 N. J. L. 311, Mr. Justice Dixon, speaking for this court, says (pp. 312, 313) (italics ours):

“The transaction, therefore, presented all the elements that have ever been deemed necessary to constitute a mortgage—an indebtedness, a transfer of property by the debtor to the creditor to ensure the payment of the debt and a *right in the debtor to have all that remains after the debt is paid*. These circumstances inevitably create a right to redeem by payment of the debt. *Sheilds v. Lozear*, 5 Vr. 496; *Crane v. DeCamp*, 6 C. E. Gr. 414; *Pace v. Bartles*, 2 Dick. Ch. Rep. 170. In *Wilmerding v. Mitchell*, 13 Vroom 476, the instrument, claimed to be merely a mortgage, *gave the creditors other rights than that of making their debt out of the property, and for that reason was held not to be a mortgage. But no such condition exists here.*”

It will be noted that the assignment of the lease (1) purports, on its face to be absolute; (2) does not give a right to the Commercial Delivery Company in case of a resale to have all that remains after the debt is paid; (3) gives the Morris Plan Company a right other than that of making its debt out of the property; that is, the right to look to the Commercial Delivery Company, in the event of a resale, for the deficiency between the net proceeds of the resale and the amount necessary to pay the amount of the instalments remaining unpaid, etc.; (4) does not give the right of redemption to the Commercial Delivery Company.

A most rigid examination of the assignment will fail to disclose a contemplation by the parties that the rights of the parties should be settled by a resale.

It is respectfully contended that said assignment does not come within the definition of a chattel mortgage, as defined by our courts, consequently need not be recorded to entitle the Morris Plan Company to possession of the trucks in question as against the Receiver of the Commercial Delivery Company.

VIII.

Recordation of either chattel mortgage or condition sales agreement only necessary as to creditors of debtor not necessary to protect debtor against claims of creditor.

The recordation, however, of the instrument under review, is immaterial, whether the said instrument be recorded as a chattel mortgage or as a conditional sales agreement. Chattel mortgages, unless recorded, are void as to creditors of the mortgagor, and conditional sales agreements, where there is a transmutation of possession, are void as to creditors of the vendee. If the instrument under review is a chattel mortgage, the "Driver" is the mortgagor, and if it is a conditional sales agreement, he is the vendee. No creditor of his is claiming this property. As far as the records show, and as far as we know, he has no creditors and the judgment under review confuses the rights of the creditors of the vendee or mortgagor with the rights of the creditors of the vendor or mortgagee.

The opinion and order under review instead of being based on the rights of the parties, as shown under the lease agreement, entirely disregards this instrument. No allusion is made to it, and no construction attempted. The Court confines its decision to a discussion of the assignment of this agreement and lease, and treats the matter in litigation as being confined to the rights which grow out of this assignment rather than to the rights which grow out of the lease agreement.

Respectfully submitted,

RIKER & RIKER,

*Solicitors for and of Counsel with Appellants
Morris Plan Company and Others.*

R. RANDOLPH HICKS,

HAROLD H. KISSAM,

Of Counsel.

New Jersey Court of Errors and Appeals

Between

DAVID STRAUS COMPANY,

Complainant,

and

COMMERCIAL DELIVERY Co.,

Defendant.

On Appeal.

BRIEF FOR RESPONDENT, JACOB L. NEWMAN, RECEIVER OF COMMERCIAL DELIVERY COMPANY.

The Facts.

The controversy is with respect to certain automobile trucks, and is between Jacob L. Newman, receiver of the Commercial Delivery Company, an insolvent corporation; and the Morris Plan Company of New York, a financing corporation; George Cromwell, Albert Wilde, Napoleon Gagnon, Joseph Flynn, Frank A. Sawieki, William Gear, Marius P. Hvarre, and Benjamin Gottlieb, all known as truck drivers.

The Commercial Delivery Company was a corporation engaged in the delivery of packages for New York department stores to purchasers residing in the State of New Jersey, and the company maintained its principal place of business at 71 South Union street, Elizabeth, N. J., and used automobile trucks in connection with the conduct of its business. The company entered into a so-called service contract agreement with the truck drivers hereinbefore mentioned, under the terms of which the defendant company agreed to employ the said truck drivers in accordance with the terms set forth in said service contract.

The David Straus Company, the complainant, a creditor of the Commercial Delivery Company, filed a bill of complaint in the Court of Chancery on May 14, 1919, and on the said day Mr. Jacob L. Newman was appointed receiver, and his appointment was continued from time to time and on the 8th day of July, 1919, a decree was entered in said cause adjudicating the defendant company insolvent and appointing Mr. Jacob L. Newman, permanent receiver.

When the receiver was originally appointed he took possession of seven motor trucks, which are the trucks in dispute. The insolvent corporation purchased the said trucks referred to for and on account of itself, and thereafter entered into a certain agreement with the said truck drivers. The agreement and assignment were executed on the 26th day of September, 1918, and recorded in the Register's Office of Union County on October 3, 1918.

The lessor referred to in the agreements is the Commercial Delivery Company, and the lessee is the truck driver. The lease provides that the lessor deliver a certain truck to the lessee at a certain valuation and that upon the delivery of the truck the lessor pay a certain amount of cash and that for the use of the truck during the period of the lease, the lessor agrees to pay a certain sum of money, and give a certain promissory installment note, payable to the order of the Morris Plan Company, a financing corporation, and maturing in twelve months from the date. The period of the lease to be until the date of the maturity of the note. It further provides that upon default in any of the terms of the note, the entire principal sum should become due at the option of the legal holder.

It further provides that the lessee is forbidden to sell, let, assign, encumber, use for hire or dispose of the car without the written consent of the lessor; that should default be made in any one of the payments or in the terms of said agreement, or if the lessor should at any time deem the security for payment of said note insufficient, the lessee agrees to deliver the car to the lessor in as good condition as received by the lessee; and further, that in the event the lessor takes possession of the car by reason of such default, the lessee agrees that all payments made should be retained as liquidated damages and for rental value; and that the lessor may at any time, without notice to the lessee, sell such car at public or private sale, and should the proceeds derived from said sale be insufficient to pay the sum remaining unpaid with respect to the note and expenses, the deficiency shall be paid by the lessee.

And it further provides that the lessee, at the termination of said lease, provided he has complied with all the terms and conditions of said lease and paid the note and all expenses in full, may become the purchaser of the car, in which event, the payments made in accordance with the terms of the lease, together with the payment of the note by the lessee will be accepted as and for payment of the purchase price of the car.

The service contract hereinbefore referred to, was executed at the same time as the making of the lease, under the terms of which the Commercial Delivery Company contracted with the driver, that the driver would operate the motor truck for a term of two years, under the direction and supervision of the Commercial Delivery Company, on an average of at least ten hours each working day, and so as to have the gross earnings of the truck amount to at least the fixed monthly charges for the operation of said truck.

The said driver agrees not to permit the truck to be used in any other manner than as directed by the Commercial Delivery Company; that the entire gross monthly earnings of the truck be delivered to the Commercial Delivery Company, out of which it was authorized to retain twenty per cent. for its services, and out of the remaining eighty per cent. authorized to pay drivers' wages at the rate of \$5.00 per day of 10 hours, monthly bills for oil, gasoline, repairs, etc., and storage charges of \$15.00 per month, and any balance to be credited to the driver; that the truck should at all times be stored in a garage to be furnished by the Commercial Delivery Company; that the Commercial Delivery Company would, in addition to the other services to be performed by it, furnish at least a sufficient amount of work for the truck to meet all its fixed charges arising from the operation of said truck.

At the time the contract of leases were executed, payments were made by the drivers to the Commercial Delivery Company for the amounts stipulated to be paid in cash and partly in notes to the Commercial Delivery Company. The difference between the amount of cash and notes paid or made directly by the drivers to the Commercial Delivery Company and the purchase price of the car was made up by moneys received by the Commercial Delivery Company from the Morris Plan Company, for which moneys the Morris Plan Company took a note made jointly by the driver and the Commercial Delivery Company and the assignment of the so-called lease hereinbefore referred to.

The defendant company, in order to carry out its said service contract and lease agreement, had the transaction financed by the Morris Plan Company, a financing corporation, and the said company agreed to finance the entire transaction, and the lease agreement and the notes were delivered to the said financing corporation, at which time the Morris Plan Company gave to the Commercial Delivery Company a check for the amount of the notes, deducting therefrom the interest, service and insurance charges.

It should also be noted that the cash purported to have been paid by the truck drivers to the Commercial Delivery Company was in fact not really paid by the lessees in all instances, but notes were given to the defendant company and which said notes were not paid and were past due at the time of the appointment of the receiver and which said notes remain in the possession of the receiver unpaid.

At the time of the receivership, default had been made in the payment by the drivers in the monthly installments provided for in the contract of lease and also default in the payments of the notes made directly to the Commercial Delivery Company, which were not transferred to the Morris Plan Company, the financing corporation.

In addition thereto the Commercial Delivery Company furnished the lessees with supplies such as gasoline and oils and made repairs upon the truck and at the time of the receivership, the truck drivers were indebted to the company in an amount of three thousand dollars for such supplies and repairs.

It should also be noted that the defendant company paid for and on behalf of the drivers, several of the installment notes to the Morris Plan Company.

After the appointment of the receiver, an application was made on behalf of the truck drivers and the Morris Plan Company to compel the receiver to release possession of the cars either to the truck drivers or the Morris Plan Company. The receiver refused to deliver possession of the trucks upon the ground that he had a right to the possession and to dispose of them at a sale because the legal title to the trucks remained at all times in the Commercial Delivery Company and because of the garage lien in favor of the company for supplies and repairs.

After a hearing the Court of Chancery entered the order, adjudging that the instrument in question was in effect a chattel mortgage and was void as against the receiver, and that the receiver was entitled to the possession and had a right to sell the trucks free and clear of any claim of the Morris Plan Company.

Thereafter pending the appeal from the Court's decision, the Morris Plan Company executed a bond in favor of the receiver for the value of the trucks, so that the receiver would be in a position to release the trucks to the Morris Plan Company or the truck drivers and that the bond would remain in place of the value of the trucks.

It should also be noted that thereafter all of the trucks were surrendered by the receiver and they are now in the possession of the truck drivers. In addition thereto the Morris Plan Company filed a claim with the receiver for the amount due on the said installment notes, and has an arrangement to collect the notes from the truck drivers.

THE LAW.

Point I.

The Vice-Chancellor's conclusion that the assignment was a chattel mortgage and is void against the Receiver, is supported by the evidence.

It should be borne in mind that there are two separate and distinct transactions. First—The lease agreement made by and between the insolvent company and the truck drivers whereby the rights of the lessor and the lessee were fixed. Second—The assignment made and executed by the Commercial Delivery Company in favor of the Morris Plan Company, the financing corporation, whereby the rights of the insolvent company and the financing corporation were fixed.

By the lease agreement, the legal title at all times remained in the Commercial Delivery Company until the conditions in the lease were fully complied with by the truck drivers. By virtue of the service contract made by and between the company and the truck drivers, the drivers agreed to work the trucks under the direction of the company and agreed not to use or permit the truck to be used for any other purpose except as that directed by the company, and to abide by all the rules and regulations of the company, and Paragraph 4 of the said service contract specifically provides as follows: "It is agreed that the truck must at all times be stored in a garage to be furnished by the party of the first part," to wit, the Commercial Delivery Company.

The trucks pursuant to the said agreement, were at all times kept in the said garage maintained by the Commercial Delivery Company in Elizabeth, and were under the control and supervision of the company.

It would therefore clearly appear that the company, in addition to retaining the actual legal title, had the physical possession of the trucks at all times with the sole exception that the drivers

had possession during the day time, when they were in use for the express purpose of delivering packages, and were acting merely as the drivers for the company.

The possession of the drivers during the said time must and can only be considered the possession of the Commercial Delivery Company.

The assignment signed by the Commercial Delivery Company provided that the company agreed to pay to the Morris Plan Company the amount due on the note and further agreed that in the event of a resale to pay any deficiency between the net proceeds of resale and the amount necessary to pay the amount of installments unpaid, the expenses of resale and attorneys' fees connected therewith. It is true that nothing was said with respect to what happens to any surplus, but it certainly was contemplated by all of the parties that in case of any surplus the amount should go to the Commercial Delivery Company.

The assignment was executed for the purpose of securing the Morris Plan Company and was a transfer purely as security for the debt represented by the transaction, and presented all the elements that constitute a chattel mortgage.

There was an indebtedness which is noted by the fact that the Commercial Delivery Company was a co-maker upon the note and was primarily liable to the financing corporation; there was an assignment by the debtor to the creditor to secure the payment of the debt, as is evidenced by the assignment in question, and certainly there was a right remaining in the Commercial Delivery Company to have the surplus. It would be inequitable to reach any other conclusion so as to permit the financing corporation to obtain a greater amount than was due on the note. There is no question but that the company at all times, in order to be released, could have paid the Morris Plan Company the amount of the debt, thereby reserving the right to redeem. The rights of the respective parties had to be determined by a resale of the trucks, and the instrument, therefore, presents all the elements that constitute a chattel mortgage.

It should be noted at this time that the assignment was dated September 26, 1918, and was recorded in the Register's Office of Union County on October 3, 1918.

The transaction, therefore, being one of a chattel mortgage, was void against the receiver, because there was no affidavit annexed to the assignment setting forth the true consideration of said mortgage and as nearly as possible the amount due or

to grow due thereon, and was not recorded immediately as required by an Act entitled "An Act concerning mortgages on chattels (Revision of 1902)," C. S. Vol. 1, Sec. 4, pages 463, etc.

Point II.

The default of the driver could be taken advantage of by the Commercial Delivery Company.

The truck drivers in connection with the transaction signed two notes—one note was given to the Commercial Delivery Company, which it retained, and the other note was the installment note signed both by the company and the truck drivers.

For the purpose of this point it should be assumed that the truck drivers were in default; then the question remains as to whether or not the Commercial Delivery Company had a right to take advantage of the default.

By the terms of the lease, the Commercial Delivery Company had the legal title and had a right to retake possession in case of default. Moreover, the company at all times was in physical and actual possession of the trucks, and at no times did the drivers have possession, except as hereinbefore noted. It certainly can not be said that the rights of the drivers are enlarged by the assignment. Their rights are not enlarged by the assignment for two reasons:

(1) Because the assignment constitutes in reality either a pledge or a chattel mortgage. It is conceded that it is void as a pledge because there was no change of possession by the Commercial Delivery Company in favor of the Morris Plan Company, and the possession remained in the Commercial Delivery Company.

(2) Because of the fact that the assignment constitutes a chattel mortgage and is void for the reason noted against the receiver. Neither the truck drivers nor the Morris Plan Company can justify any right under a void instrument.

Although the Commercial Delivery Company may be accountable to the Morris Plan Company under the terms of the assignment, the truck drivers can acquire no greater or better right than fixed in the lease. The lease terms fixed their rights and they are bound by them. Therefore, the Commercial Delivery Company would have a right to retain possession of the trucks.

Point III.

The possession of the drivers was possession of the Commercial Delivery Company.

The Commercial Delivery Company was engaged in the delivery of packages from New York department stores to resident buyers of New Jersey, and it was necessary in connection with the conduct of its business to use automobile trucks to make deliveries. It purchased a certain number of automobile trucks and, as an inducement to truck drivers, it entered into the service contract and the lease agreement.

We have already shown that by the terms of the service contract the truck drivers agreed to work the truck under the sole direction of the company, and were not to use or permit the truck to be used for any other purpose except as that indicated by the company and to abide by all its rules and regulations, and agreed to store the car in a garage to be furnished by the Commercial Delivery Company.

In fact the trucks were kept in the garage owned and controlled by the company, and the truck drivers continued in the employ of the company. The company furnished the supplies, such as gasoline, oil, etc., and made all necessary repairs.

The actual possession at all times remained in the company, except during the day-time, when the trucks were used by the drivers for the purpose of delivering packages.

Because of this arrangement, the creditors had a right to believe that the company owned the trucks and to extend credit upon this representation.

Point IV.

The Receiver is a proper party to contest the validity of a chattel mortgage, and if a chattel mortgage is not executed in accordance with the Chattel Mortgage Act it is void.

The assignment was dated September 26, 1918, and was recorded on October 3, 1918. There was no affidavit annexed to it setting forth the true consideration and the amount due or to grow due thereon, signed by the mortgagee, as required by an Act entitled "An Act concerning mortgages on chattels (Revision of 1902)," C. S. Vol. 1, Section 4, page 463, etc.

The Act further provides that if there is no affidavit and if there is no immediate recording, it is void against the creditors and mortgagor and against subsequent creditors and mortgagors in good faith.

The case of *Kane v. Loder*, 56 Equity 268, has no application to the case at bar. The case, however, of the *Receiver of Graham Button Company v. Charles Speilman*, 50 Eq., p. 120, applies to the case at bar. The Court held that in order for a receiver to contest the validity of a mortgage, the creditors whom he represents must have their debt fastened on the mortgaged property; that by an adjudication in insolvency and the appointment of a receiver, the debts of the creditors at large of an insolvent corporation were fastened upon the property in the hands of a receiver and by reason of the fact that the debts are so fastened upon the property, the receiver can test the validity of the chattel mortgage.

It is true, as stated, that the receiver at the time of the disposition of the subject matter was merely a temporary receiver, but on the 8th day of July, 1919, a decree was entered adjudicating the company insolvent and making the receivership permanent, and the rights of the receiver revert to the date of the filing of the bill, as provided in a supplement to an Act entitled "An Act concerning corporations" (Revision of 1896), Pamphlet Laws of 1919, page 455, Section 4: "The title and right of any receiver appointed under the provisions of the Act to which this Act is a supplement, shall be held for the purpose of void leases, and possession to revert back to the time of the filing of the bill and petition."

The bill in this case was filed May 14, 1919, and the law just cited was approved April 15, 1919. Surely the doctrine laid down in the case of *Kane v. Loder* does not apply to the case at bar. The receiver's rights go back to the time of the filing of the bill, and, there being an adjudication in insolvency, the debts of the creditors are fastened upon the property, and for this reason the receiver has the right to test the validity of the chattel mortgage.

Point V.

The Commercial Delivery Company has an interest in the motor trucks.

The insolvent corporation was primarily liable upon the note and in case of a resale was liable for a deficiency. It surely can not be said that the company no longer had an interest in the transaction when the assignment was executed.

Point VI.

It is immaterial whether or not the agreement made and executed by and between the Commercial Delivery Company and the truck drivers is a lease or a conditional bill of sale.

It is conceded that the agreement made by and between the Commercial Delivery Company and the truck drivers is that of a conditional bill of sale. The company retained the legal title and was in possession and agreed that in case of payment of the rental that the truck drivers could obtain title to the property.

This agreement, however, is one in which the rights of the truck drivers and the insolvent company was fixed and is separate and distinct from the transaction represented by the assignment made by the company in favor of the Morris Plan Company. By the conditional bill of sale, the rights of the truck drivers were fixed. It is not argued that the said agreement constitutes a chattel mortgage. It is contended by the receiver that the assignment which represents another transaction constitutes a chattel mortgage.

The validity of the lease agreement or the conditional bill of sale, of course, could be questioned by the creditors of the truck drivers, but as between the immediate parties, the instrument was valid.

The driver is not the mortgagor. The Commercial Delivery Company became the mortgagor on the assignment transaction, and the Morris Plan Company the mortgagee.

The truck drivers were in default and the Commercial Delivery Company had a right to have exclusive possession of the trucks.

It should be noted that the notes which were given by the truck drivers to the Commercial Delivery Company were not met and were past due, and that all of the installment notes were not paid by the truck drivers. In fact, in some instances the moneys were advanced by the Commercial Delivery Company on account of its liability on the notes. By these defaults the company had a right to obtain exclusive possession.

Section six of the service contract has the following provision: "It is understood that the party of the first part (Commercial Delivery Company) will, in addition to the other services to be performed by it, furnish at least a sufficient amount of work for the truck herein mentioned to meet all fixed charges arising from the operation of said truck."

It certainly can not be contended that fixed charges included the payment of the notes. Fixed charges were such as supplies, gasoline and oils and repairs, and that the default, therefore, can not be said to have been caused by the Commercial Delivery Company not furnishing a sufficient amount of work to meet the payment of the notes. All the company was required to do was to furnish a sufficient amount of work to meet fixed charges only.

Moreover the service contract was a separate and collateral contract. Even if it can be considered that the fixed charges in Clause 6 of the first contract includes an agreement to furnish sufficient work to meet the payment of the notes, it is purely a collateral agreement for the breach of which the driver would have a right to sue the company and recover the amount of damages. It clearly appears, however, that the term "fixed charges" can not contemplate the payment of the installment notes. Because the truck drivers failed to pay the notes they were guilty of a breach, giving the company the right to retain exclusive possession of the trucks, which it did.

Summary.

It therefore clearly appears from an examination of the documents that the lease agreement and the assignment represent two distinct transactions. It is immaterial whether or not the agreement made by and between the company and the truck drivers is a conditional bill of sale or a lease. The important instrument is the assignment. The assignment was made and executed to secure an indebtedness and was a transfer by way of security. It is void as a pledge because there was no change of possession and only can be considered, therefore, as a chattel mortgage.

It has all the elements of a chattel mortgage and, because there is no affidavit setting forth the true consideration and the amount due or to grow due thereon, signed by the mortgagee, and because it was not recorded immediately in accordance with the statute in such case made and provided, it is void as against the receiver, and being a void instrument the Morris Plan Company or the truck drivers can claim no rights thereunder.

If the truck drivers could get the trucks without paying the purchase price and forcing the Commercial Delivery Company to institute suit at law for the purchase price, it would deprive the company of its security which it had by virtue of the lease

and the actual retention of possession. This would be inequitable and would be unfair. It would give the Morris Plan Company certain rights which it could not acquire under the assignment, which was void, as already indicated.

The company retained possession of the trucks, and on the strength of it obtained credit, and if the truck drivers would be permitted to get the trucks, it would operate as a fraud on the chattel mortgage act. The drivers would have possession of the trucks without paying therefor, and the Morris Plan Company would have a right to sue the company and therefore deprive it of its security, and it would lose its right of having the cars sold and the rights of the respective parties adjudicated.

Finally it should be noted that the Morris Plan Company has filed with the receiver a claim for the entire indebtedness and that the truck drivers are now in possession under an agreement to pay the amount of the notes.

It is respectfully submitted that the opinion and the order under review are proper and should be affirmed.

Respectfully submitted,

FURST & FURST,

Solicitors for Jacob L. Newman,

Receiver of the Commercial Delivery Company.

GEORGE FURST,
Of Counsel.

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