

“It appears upon the face of the instrument that the defendant’s obligation to the Williams Mower and Reaper Company, the assignor of the plaintiff, was upon the sole condition and consideration that the reaper therein mentioned as belonging to the company, the possession of which was conditionally delivered to him, should, by a proper transfer of title from the company, become his absolute property, whenever and as soon as the said obligation was fulfilled in accordance with the terms of the contract. It is also expressly provided that the title and ownership of the reaper should remain in the company until full payment of the so-called note and interest; and that the delivery of the property at the time was subject to this condition, and to the right of the company to retake possession at any time it might deem itself insecure. Defendant’s promise, therefore, was not an absolute and unconditional one to be kept in any event; for it depended upon the contingency of an observance by the company of the sole condition on which it rested, that an absolute transfer of the property with good title would be made whenever the promise was performed. The promise of payment and the implied obligation to transfer the title were mutual; and, as each was the sole consideration for the other, and both were to be performed at the same time, they were concurrent conditions of the same agreement, in the nature of mutual conditions precedent, so that inability or refusal to perform one would excuse performance as to the other: Benjamin on Sale, pp. 451, 580. If, prior to any default on the part of the defendant, the company had retaken possession of the property and disposed of it, so that, upon the maturity of the defendant’s obligation, an observance of the condition on its part had become impossible, there can be no doubt that, under such circumstances, no action could have been maintained against him upon his promise. An obligation of this character is altogether too uncertain to serve the purpose of commercial paper as the representative of money in business transactions. It carries into the hands of every holder notice of the existence of a condition that may result in defeating any recovery upon it, and, therefore, cannot have afforded to it the privileges attaching to that kind of paper.”

This judgment is quoted and approved of by Hagarty, C.J.O., in *Sawyer v. Pringle*, 18 A.R. at p. 224, and by Maclennan, J.A., in *Dominion Bank v. Wiggins*, 21 A.R. at p. 278, and appears to me to be conclusive in the defendant’s favour.

The action will be dismissed with costs.