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Validity of Conditional-Sale Contracts as Affected by Express or Implied Permission to Sell in the Ordinary Course of Business

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NOTES AND COMMENT

VALIDITY OF CONDITIONAL-SALE CONTRACTS AS AFFECTED BY EXPRESS OR IMPLIED PERMISSION TO PURCHASER TO SELL IN THE ORDINARY COURSE OF BUSINESS. Conditional sales have always been viewed with more or less disfavor by the courts, but now, in every state, with the exception of Louisiana,[1] such a reservation of title by vendor is valid as against the *bona fide* purchasers and creditors of the conditional vendee, if there has been sufficient compliance with the recording laws that may exist.[2] The question to be herein considered is whether that general rule is in any way modified

[1] *Barber Asphalt Pav. Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 So. 193 (1908).

[2] Ann. Cas. 1916 A. 1273; Rem. Comp. Stat. 3790, providing that conditional sales shall be absolute as to all *bona fide* purchasers and subsequent creditors, unless within ten days after the taking of possession by the vendee, a memorandum of such sale is filed.

where the goods are purchased for the purpose of resale. This is a problem of practical significance to the business world in that it involves the question whether one may safely purchase property from a dealer in such property without first making an investigation as to his title.

The weight of authority and better reasoning supports the view that this authority to the vendee to sell the property purchased by the conditional sale does not in any way affect the character of the contract, and, as between the original parties the contract is valid.[3] The following will be a discussion, first, as to the validity of this authority to resell with respect to purchasers from the conditional vendee, and second, as to its validity with respect to creditors.

PURCHASERS

The authority to resell is of several kinds. It may be *express* authority by the conditional seller of the property to the buyer;[4] it may be authority *implied* from facts and circumstances which give rise to the inference that actual authority was in fact given;[5] or, it may be apparent authority which like implied authority also arises from facts and circumstances,—this being the recognized objective test,[6] but under the subjective test the authority is on estoppel.[7] An examination of the cases will reveal that this distinction between implied and apparent authority has not been generally recognized. In many of the cases where an implied authority is stated to exist, the decision giving the subvendee priority is actually based upon an estoppel, thus indicating that what the court had in mind was not an implied authority, but an apparent authority [8]

It would seem to be perfectly obvious that one who buys from a conditional vendee, having authority conferred upon him, either express or implied to sell, obtains a good title, and this is the general rule.[9] Many of the cases insist upon the subvendee being a *bona*

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[3] *Re Pierce*, 97 C. A. A. 537, 157 Fed. 755 (1907) *Thompson v. Armstrong*, 11 N. D. 198, 91 N. W 39 (1902), failure to file a conditional sale contract did not operate as between the vendor and purchaser to transfer title to the latter.

[4] *Gen. Secur Co. v. Reo Motor Car Co.*, 91 Cal. App. 16, 266 Pac. 576 (1928) *Trousdale v. Winona Wagon Co.*, 25 Ida. 130, 137 Pac. 372 (1913).

[5] *Spooner v. Cummings*, 151 Mass. 313, 23 N. E. 839 (1890), allowed to prove a course of dealing, *Brett v. Forseen*, 17 Manitoba L. R. 241 (1907).

[6] *O'Loughlin v. E. M. Jennings Co.*, 107 Conn. 365, 140 Atl. 758 (1928) *Citizens Sav. & Invest. Co. v. Hunt's Garage*, 128 Miss. 535, 91 So. 133 (1922) *Clarke Bros. v. McNatt*, 132 Ga. 610, 64 S. E. 795, 26 L. R. A. (N. S.) 585 (1909).

[7] *Saltus v. Everett*, 20 Wendell 267, 32 Am. Dec. 541 (1838), (bill of sale).

[8] 47 A. L. R. 87.

[9] *Robinson's Appeal*, 63 Conn. 290, 28 Atl. 40 (1893) *Bass v. International Harvester Co.*, 169 Ala. 154, 53 So. 1014, 35 L. R. A. (N. S.) 374 (1910), (dealer) *South, Bend Iron Works v. Reedy*, 5 Pennewill 361, 60 Atl. 698 (1905), (dealer) *Peasley v. Noble*, 17 Ida. 686, 107 Pac. 402, 27 L. R. A. (N. S.) 216, 134 Am. St. Rep. 370 (1910), (dealer) *Spooner v. Cummings*, see note 5, *supra* (individual engaged in sale).

fide purchaser.[10] However, the sale having taken place within the actual authority conferred, it is not necessary that the subvendee be a *bona fide* purchaser for value any more than if he had purchased from the vendor.[11] Title passes on the general principles of agency, by such authority, the agent is empowered to convey the title of the principal. If there exists only apparent authority[12] or if the buyer were exceeding his express authority to resell,[13] then the subvendee should be *bona fide* of character. Some principle of estoppel must be present to give him priority over the vendor.

The adoption of the Uniform Conditional Sales Act has settled and unified the laws of many states. Section 9 of the Act[14] provides.

> "When goods are delivered under a conditional sale contract and the seller expressly or impliedly consents that the buyer may resell them prior to performance of the condition, the reservation of property shall be void against purchasers from the buyer for value in the ordinary course of business, and as to them the buyer shall be deemed the owner of the goods, even though the contract or a copy thereof shall be filed according to the provisions of this act."

A few of the courts have held that authority in the conditional vendee to resell is inconsistent with the essentials of a conditional sale contract, *i.e.*, the reservation-of-title clause, and that the effect is to make the sale an absolute one with title vesting absolutely in the buyer. In the case of *Ludden v. Hazen*[15] the New York court held.

> "This transaction cannot be upheld as a conditional sale. By the contract of sale and the delivery of the liquors to Hackett to make a part of his stock in trade and to be retailed to his customers, the property vested in him and became liable for his debts."

A number of the cases have held that such authority to resell was fraudulent as to the subsequent purchasers and creditors of the

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[10] *Spooner v. Cummings*, see note 5, *supra*, *Flint Wagon Works v. Maloney*, 3 Boyce 137, 81 Atl. 502 (1911) *South Bend Iron Works v. Reedy*, see note 9, *supra*.

[11] *Brett v. Forseen*, see note 5, *supra*, *Robinson's Appeal*, see note 9, *supra*.

[12] *Clarke Bros. v. McNatt*, see note 6, *supra*, *Citizens' Sav. & Invest. Co.*, see note 6, *supra*, *Miss. River Logging Co. v. Miller*, 109 Wis. 307, 85 N. W 193 (1901).

[13] *Peasley v. Noble*, see note 9, *supra*.

[14] See Uniform Laws Annotated, Vol. 2, page 15.

[15] 31 Barb. 650 (1860).

conditional vendee, thereby rendering the reservation of title void as to them.[16]

The theory of estoppel has been the basis of many of the decisions.[17] A recent Connecticut case[18] held that where an article is sold to a retail dealer for the apparent purpose of resale, a condition that the title shall remain in the seller until the price is paid is ineffectual as against a *bona fide* purchaser in the ordinary course of business. The conditional vendor is held to be estopped to deny the validity of a sale by one to whom he has given apparent power to sell. An Alabama court[19] stated the rule as follows

> "Where the owner by his act of consent, has given another such evidence of the right to sell or otherwise dispose of his goods, as according to the customs of the common understanding usually accompanied the authority of sale or disposition, * * * a sale by the person thus intrusted with possesion of the good and with the *indicia* of owner ship, or of authority to sell or otherwise dispose of them in violation of his duty to the owner, to an innocent purchaser for value, will prevail against the reserved title of the owner."

The fact that the conditional vendee is a dealer in goods of a class covered by the conditional sale raises certain implications or appearances of a power to resell that do not exist in other and usual conditional sales.[20] Authority to resell in such a case is usually held to be an apparent authority But, according to the Washington case of *Hardin v. State Bank of Seattle,*[21] the mere fact that an automobile was delivered to a mortgagor and placed in his show rooms was not sufficient upon which to base an estoppel as against the mortgagee when the automobile came into the hands of an innocent purchaser. The court in that case said

> "Where mortgagee's course of dealing is clearly shown to the effect that it never gave the mortgagor reason to believe that it had any authority to sell any car until after it had procured a release of the mortgage as to such car, these expressions fall far short of establishing an intent

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[16] *Winchester Wagon Works & Mfg. Co. v. Carman*, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382 (1887) *Re Garcewich*, 53 C. C. A. 510, 115 Fed. 87 (1902) *Flint Wagon Works v. Buttles*, 153 Fed. 932 (1907)

[17] *Flint Wagon Works Co. v. Maloney*, see note 10, *supra*, *Bent v. Jerkins*, 112 Ala. 485, 20 So. 655 (1895) *Citizens' Sav. & Inv. Co. v. Hunt's Garage*, see note 6, *supra*.

[18] *O'Loughlin v. E. M. Jennings Co.*, see note 6, *supra*.

[19] *Bent v. Jerkins*, see note 17, *supra*.

[20] *Brett v. Forseen*, see note 5, *supra*, *Gump Investment Co. v. Jackson*, 142 Va. 190, 128 S. E. 506, 47 A. L. R. 82 (1925).

[21] 119 Wash. 169, 207 Pac. 5 (1922).

to permit the mortgagor to sell without reference to the mortgage, or make appellant a party to the fraud upon the purchaser."

Gramm-Bernstein Motor Truck Co. v. Todd,[22] a Washington case decided three years later, may be distinguished from the Hardin case. The conditional vendor in the *Gramm* case knew of the dealer's custom of making sales as owners of the trucks and afterwards remitting the proceeds to secure a release of the conditional sales. Thus, the vendor was estopped by its conduct to claim that it was the owner of the truck and that the vendee had no authority to sell it and convey a good title.

The next question of interest is what is meant by permission to sell in the ordinary course of trade. Some decisions have held that one who buys the whole stock in bulk is not subject to the protection of purchasers from a retailer in the due and ordinary course of trade.[23] If the resale made by the buyer is of a totally different character from that which the seller authorized or is estopped to deny that he authorized, he is not estopped to assert his title.[24] A contrary view was expressed in the case of *Bass v. International Harvester Co.*[25] wherein the court said that the weight of authority did not confine the waiver or estoppel in favor of purchasers in retail or the ordinary course of trade but extended it to all innocent purchasers for value. Although the goods be sold to a retailer to dispose of it in the ordinary course of trade, an innocent purchaser would be protected, even though the conditional vendee exceeded his express authority in making the sale. If he sold only in the ordinary course, then any expression as to protection of innocent purchasers would be unnecessary for he would not exceed his authority

Should the constructive notice furnished by the recording of the conditional sale contract prevail as aganst a buyer from a retailer in the ordinary course of business? In a Georgia case, *Crenshaw v. Wilkes,*[26] the court held that since the authority to sell is regarded as invalidating the reserved title, the fact that the seller has complied with all statutory requirements as to filing or recording is immaterial. The Uniform Conditional Sales Act is in accord with this view and provides that "even though the contract or a copy thereof shall be filed according to the provisions of this act, the purchasers from the buyer for value in the ordinary course of business, shall be deemed the owner of the goods. The Washington

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[22] 121 Wash. 145, 209 Pac. 3 (1926).

[23] *Burbank v. Crooker,* 7 Gray 158, 66 Am. Dec. 470 (1858)

[24] *Peasley v. Noble,* see note 9, *supra.*

[25] See note 9, *supra, South Bend Iron v. Reedy,* see note 9, *supra, Columbus Buggy Co. v. Turley,* 73 Miss. 529, 19 So. 232, 32 L. R. A. 260, 55 Am. St. Rep 550 (1895) *Mishawaka Woolen Mfg. Co. v. Westveer,* 112 C. C. A. 109, 191 Fed. 465 (1911).

[26] 134 Ga. 684, 68 S. E. 498 (1910).

[27] See note 22, *supra.*

case of *Gramm-Bernstein Motor Truck Co. v. Todd*[27] appears also to be in accord with this view The court held that a manufacturer of trucks, which delivered possession of trucks to a dealer under conditional sales contracts, duly recorded, is estopped to assert its reserved title, as against a *bona fide* purchaser from the dealer, where it knew of the dealer's custom, for a period of years to make sales as owner of the trucks and afterwards remit the proceeds to secure a release of the conditional sales, since its conduct is inconsistent with the idea of retaining title by virtue of the contracts. "If one intends to claim title under a conditional sale contract his conduct must not be inconsistent with the terms of this instrument. It is contended by those who adopt this view that by this reservation of title and permission to resell, the vendor is doing two inconsistent things,[28] and that a purchaser for value in the regular course of business ought not to be required to examine the records to learn whether the retailer has title. To so require would greatly interfere with the exchange of property and would place cumbersome restraints upon business which modern courts are reluctant to do. The fact that the goods have been put in the retailer's stock with the consent of the wholsesaler should be some evidence that they are to be sold and that the retailer has the right to convey

The Maryland courts have refused to go that far. In a recent case[29] it was contended that regardless of the statute in force in the state relating to conditional sales agrements, it would be contrary to public policy to permit a manufacturer to retain a lien under such an agreement on a truck sold to a dealer who might resell it, because the existence of such a lien would be inconsistent with the dealer's right to resell and might result in loss to an innocent purchaser for value. The court said that the statute would have to be strictly construed and that if any injustice resulted in the case, the legislature alone would be the body to remedy it.

Creditors

The courts of the various states are not agreed as to whether a reservation of title under a conditional sale contract is valid as to creditors of the conditional sale vendee when the vendee is authorized to resell in the ordinary course of trade. Some jurisdictions, and notably the Federal courts,[30] hold that where the seller author-

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[28] *Boice v. Finance & G. Corp.*, 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654 (1920) *Hardin v. State Bank of Seattle*, see note 21, *supra.*

[29] *Finance & Guaranty Co. v. Defiance Motor Truck Co.*, 145 Md. 94, 125 Atl. 585 (1924).

[30] *Re Garcewich*, 53 C. C. A. 510, 115 Fed. 87 (1902) *Ludden v. Hazen*, 31 Barb. 650 (1860) *Re Penny*, 176 Fed. 141 (1909) *Re Agnew*, 178 Fed. 478 (1909) *Cowerta Fertilizer Co. v. Brown*, 89 C. C. A. 612, 163 Fed. 162 (1908) *Re Howland*, 109 Fed. 869 (1901).

izes the conditional vendee to resell in the ordinary course of business, he thereby clothes the vendee with *indicia* of ownership, the reservation of title in the vendor constitutes a fraud upon the creditors, and hence is void. So far as these cases disclose it is immaterial whether or not the creditor was a subsequent creditor and extended credit in reliance upon the fictitious credit in this manner secured by the purchaser.

However, the weight of authority as well as the trend of modern authority holds that the creditor of the conditional vendee succeeds merely to the rights of the original vendee and is therefore bound by the condition.[31] In the case of *Flint Wagon Works Co. v. Maloney*[32] the question of priority arose as between an execution creditor of the conditional vendee, and the conditional vendor. The court held that it was the duty of courts to construe contracts so as to carry out the intention of the parties and such should be ascertained from the agreement. The court said.

> "It is equally clear that while the vendee was permitted to sell the carriages in due course of business, and deliver the same to the purchasers free and discharged from the condition, the parties did not intend that a creditor of the vendee should levy upon the property and sell it for his debts. * * * The effort and intention of the parties was not to deprive creditors of the right to seize the *property of the vendee* for the payment of his debts, but to save the property from such seizure."

The court continues.

> "In order that the property might be liable for the debts of the vendee the title must have been in the vendee, which certainly could not be under the law as we understand it. But it is not necessary for the protection of an innocent purchaser that title to the property shall vest in the vendee, but that he will not assert his title against an innocent purchaser from such vendee, when he knew and had impliedly agreed, that the property might be sold by the vendee in the regular course of his business."

This latter excerpt seems to be a clear statement of what the law should logically be with reference to both creditors and purchasers.

In the same case the court in discussing the force of the objection as to giving false credit[33] to the vendee, said.

> "(it) has undoubtedly much force so that in many states the courts consider it as sufficient, but it applies

[31] *Bryant v. Swafford Bros. Dry Goods Co.*, 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. 161 (1909) *Flint Wagon Works v. Maloney*, see note 10, *supra.*
[32] See note 10, *supra.*
[33] *Newcomb v. Guthrie*, 145 Va. 627, 134 S. E. 585 (1926).

> with more or less strength, according to the circumstances, to all cases of conditional sales where the vendee is clothed with full possession and apparent ownership, but, as the court says in *Forbes v. Marsh, supra,* in this state, all cases of conditional sales made *bona fide* have been held good against attaching creditors, and in reply to the objection we are considering it warns persons against putting faith in appearance except where the case comes within the rule of the vendor retaining possession after the sale, and persons about to give faith on such appearances must make inquiry, and in this respect the language of our courts is similar to that of Campbell, J in giving the opinion in *Ketchum v. Brennan,* 35 Miss. 596 'A buyer must beware of purchasing from one who has not title, possession is not title.' "

According to *Schultz v. Wesco Oil Co.,*[34] a Washington case decided in 1928, a recorded conditional sale of goods to be placed in the stock of merchandise and sold in the course of trade, is void as to creditors in so far as it reserves the title in the vendor, where it contains no reservation of title to the proceeds of the goods sold and no agreement on the part of the vendee to account for the items sold or any proportion of the proceeds. This case was founded upon prior decisions[35] in this state laying down the same doctrine with reference to chattel mortgages. The leading case was *Miller v. Scarbrough,*[36] wherein it was held that a chattel mortgage upon a shifting stock of merchandise leaving the mortgagor to sell in the ordinary course of trade, to be valid as against subsequent creditors, should identify the mortgaged property and must provide for application of the proceeds from the sale of the mortgaged property on the mortgaged debt. The following is an excerpt from another Washington case[37] dealing with chattel mortgages

> "In short, the instrument was to be a floating mortgage, under the cover of which from time to time, new stock to an uncertain limit must be and beyond that limit might be introduced. It is to cover all of the mortgagor's stock, however large it may become. This feature of itself is enough to avoid the instrument, for it would serve the mortgagee, without any corresponding lawful advantage to him. But this instrument has another fatal infirmity If ny of he hypothecated goods are to be sold in trade or the rest of the property *pro tano* from the mortgage."

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[34] 149 Wash. 21, 170 Pac. 130 (1928).

[35] *Miller v. Scarbrough,* 108 Wash. 646, 185 Pac. 625 (1919) *Warner v. Hibler* 146 Wash. 65, 264 Pac. 423 (1928) *Byrd v. Forbes,* 3 W T. 318, 13 Pac. 715 (1918).

[36] See note 35, *supra.*

[37] *Byrd v. Forbes,* see note 35, *supra.*

Washington therefore adopts what seems to be a middle ground and will permit such a sale to be good against creditors sa far as the proceeds are applied to reduce the lien.

PHYLLIS CAVENDER.

CONSTITUTIONALITY OF A SEARCH AND SEIZURE, WITHOUT WARRANT, OF AN AUTOMOIBLE—REASONABLE CAUSE—ANONYMOUS TIPS. Since the case of *Carroll v. United States,*[1] it has become a generally recognized principle of law that an officer may make a search and seizure of an automobile without a warrant, provided that the officer has probable cause to make the search. The Fourth Amendment to the Constitution of the United States specifically is aimed to protect the people against "unreasonable searches and seizures."[2] The *Carroll* case is based on the theory that if the other has probable cause the search of an automobile is not an unreasonable search." The distinction drawn is that while the warrant can easily be issued to search a dwelling house,[3] yet because of the necessity of the situation when an officer has probable cause to believe that a moving object such as an automobile or motor boat contains contraband, it would be actually unreasonable to expect the officer to then get a search warrant, because in the meantime the moving object would likely be far beyond the reach of the officer. The *Carroll* case, *supra,* which was decided in 1925, has settled the law as far as the United States Supreme Court is concerned, and the principle has since been applied several times in other Federal cases.[4]

The constitutionality of a search and seizure of an automobile without a warrant has been upheld recently in the State of Washington in the case of *State v. Knudsen.*[5] In this case a Federal prohibition officer received a tip from an unknown person that the defendant was supplying intoxicating liquors in a certain locality The officer knew that the defendant had been previously convicted of the crime of possession, and acting upon the tip he had received, he and some other officers located the defendant's truck, followed it, noticed that it was loaded heavily, and saw it turn into

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[1] 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. Rep 280, 39 A.L.R. 790 (1924). Mr. Justice McReynolds and Mr. Justice Sutherland dissenting.

[2] Article IV of the Amendments to the United States Constitution.

[3] *Boyd v. United States,* 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524 (1886) *Weeks v. United States,* 232 U. S. 383, 58 L. ed. 652, L.R.A. 1915B 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C. 1177 (1914) *Agnello v. United States,* 269 U. S. 20, 70 L. ed. 145, 46 Sup. Ct. Rep. 4, 51 A. L. R. 409 (1925).

[4] *United States v. One Reo Truck,* 6 Fed. (2d) 412 (1925) *Lytle v. United States,* 5 Fed. (2d) 622 (1925), holding a search and seizure valid as long as the officers had probable cause; *Pinder v. United States,* 4 Fed. (2d) 390 (1925), where an inspector seized liquor in a parker car· *Lafazia v. United States,* 4 Fed. (2d) 817 (1925), where the officers in following a truck saw through its lattice sides that it contained cases of liquor.

[5] 54 Wash. Dec. 39, 280 Pac. 922 (1929).