



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

---

Volume 11 | Number 3

Article 9

---

4-1-1933

## Conditional Sales -- Vendor's Right to Possession Before Default

William Medford

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

### Recommended Citation

William Medford, *Conditional Sales -- Vendor's Right to Possession Before Default*, 11 N.C. L. REV. 321 (1933).

Available at: <http://scholarship.law.unc.edu/nclr/vol11/iss3/9>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

### Conditional Sales—Vendor's Right to Possession Before Default.

A recent North Carolina case<sup>1</sup> involved the retaking of an automobile by the vendor under a conditional sales contract. Brogden, J., speaking for the court, says that a conditional sale is in effect a chattel mortgage; and that "the law confers upon the mortgagee the right of possession which he may exercise before or after default. . . ."<sup>1a</sup> The clear import of this statement is that the vendor in a conditional sales contract has the right to possession before default, as in the case of a chattel mortgage.

A conditional sale and a purchase-money chattel mortgage are used for practically the same purposes. Even the forms are hard to distinguish. These facts alone would cause confusion in placing the various transactions in one or the other of the two categories. Moreover, when this field of the law was developing, most states required chattel mortgages to be registered but had no such provision concerning conditional sales.<sup>2</sup> This added to the confusion since the courts, in order to protect innocent third parties who had relied upon the appearance created by possession, resorted to strained construction to bring the transaction within the class requiring registration.<sup>3</sup>

North Carolina had its share of this confusion and conflict<sup>4</sup> until endorsement been lacking or expressly restricted to a guarantee of "genuineness" of prior endorsements.

Furthermore, while it is recognized that this is not a sale, a pertinent analogy can be drawn in the field of sales. *Hawkins v. Pemberton*, 51 N. Y. 198 (1872) (vendor will not be permitted to say that he does not intend what his warranty explicitly declares); *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493 (1893) (purchaser may examine article himself and at the same time take warranty from vendor); *Tennessee Roofing Co. v. Ely*, 159 Tenn. 628, 21 S. W. (2d) 398 (1929) (as to latent defects the buyer may take and enforce an express warranty notwithstanding the fact that he has personally examined the goods); see also 1 WILLISTON, SALES, (2d ed. 1924) §208.

The double security of warranties and personal inspection may be desirable for several reasons. *Oak Lawn Sugar Co. v. Sparks Bros. Mule Co.*, 159 Mo. App. 496, 141 S. W. 698 (1911) (purchaser realizes his liability to mistaken judgment); *Brown v. Matthews*, 14 Ala. App. 428, 70 So. 287 (1915) (existence of some special knowledge on the part of vendor).

<sup>1</sup> *State v. Stinnett*, 203 N. C. 829, 167 S. E. 63 (1933).

<sup>1a</sup> 203 N. C. at 832, 167 S. E. at 64.

<sup>2</sup> *Young v. Phillips*, 202 Mich. 480, 168 N. W. 549 (1918); *Ballew v. Smith*, 32 N. C. 176 (1849).

<sup>3</sup> *Tague v. Guaranty State Bank of Drumright*, 82 Okla. 197, 202 Pac. 510 (1921).

<sup>4</sup> *Ashe, J.*, says in *Frank v. Hillard*, 95 N. C. 117, 119 (1886): "We have had a good many cases before this court like that presented by the record in this case, and there has been some conflict in these decisions which we find it difficult to reconcile."

the passage of a statute in 1883 requiring conditional sales to be registered in the same manner and with the same effect as chattel mortgages.<sup>5</sup> That is, in order for a vendor who had retained title by way of security to assert this title against innocent purchasers, the title-retention contract would have to be registered. But the legislature declared no intention of abolishing the distinction between conditional sales and chattel mortgages.<sup>6</sup>

However, the language in the instant case is applied to facts that involve neither a question of registration nor a policy of protecting innocent third parties. The controversy here is between the original parties to the transaction. Neither this statute nor decisions under this statute would apply. Therefore, the question of the right of possession under a conditional sale contract before default would depend upon the normal construction given such contracts.

It is almost universally held that the transfer of possession and the right to possession before default are essential elements of a conditional sale.<sup>7</sup> The very purpose of this kind of transaction is to give the purchaser the use of the property while it is being paid for. The Uniform Conditional Sales Act provides that "the buyer shall have the right when not in default to retain possession of the

<sup>5</sup> N. C. CODE ANN. (Michie, 1931) §3312.

<sup>6</sup> *Brem v. Lockhart*, 93 N. C. 191 (1885), seems to be the first case involving this statute. There is no intimation in that case that the distinction between conditional sales and chattel mortgages had been abolished. In *Tufts v. Griffin*, 107 N. C. 47, 12 S. E. 68, 10 L. R. A. 526 (1890), the court decides that as between the parties a given transaction amounts to a conditional sale and does not mention a chattel mortgage.

However, in more recent cases the court has intimated that the two transactions were the same. *Whitlock v. Auburn Lumber Co.*, 145 N. C. 120, 58 S. E. 909 (1907); *Standard Dry Kiln Co. v. Ellington*, 172 N. C. 481, 90 S. E. 564 (1916). In *Harris v. S. A. L. Ry. Co.*, 190 N. C. 480, 130 S. E. 319, 49 A. L. R. 1452 (1925), the court says that to all intents and purposes, the title retaining contract is a chattel mortgage. But the case only decided that one who negligently injured a chattel held under a registered conditional sale contract could settle either with the vendee in default or the vendor and that a settlement with one precluded recovery by the other.

<sup>7</sup> *First National Bank v. Marlow*, 71 Mont. 461, 230 Pac. 374 (1924); *Phelen v. Stock Yards Bank*, 134 Okla. 13, 276 Pac. 175 (1928); *Kingland Plow Co. v. Joyce*, 194 Mo. App. 367, 184 S. W. 490 (1916); *Firestone Tire and Rubber Co. v. Anderson*, 190 Iowa 439, 180 N. W. 273 (1920); *Defiance Machine Wks. v. Gill*, 170 Wis. 477, 175 N. W. 940 (1920); *Young v. Phillips*, 203 Mich. 566, 169 N. W. 822 (1918).

See also (1929) 13 MINN. L. REV. 247, which says that a vendee under a conditional sales contract has two rights, that of possession, and that of acquiring title.

See *contra*: *General Motors Acceptance Corp. v. Goldboges*, 260 Ill. App. 474, 481 (1931).

goods. . . ."<sup>8</sup> The North Carolina Supreme Court, in *Tufts v. Griffin*,<sup>9</sup> which was decided seven years after the passage of the conditional sales recordation statute, states that the vendee has a right to the "actual legal and rightful possession" with a right to the title upon payment of purchase price; and further, that the "vendor could not interfere with possession 'until a failure to perform condition.'"

Therefore, it appears that the court in taking one type of transaction and placing it in the category of another transaction, then giving it all the attributes of this other transaction—a dangerous procedure at best—has adopted a theory which cannot be supported by direct authority in our own or in other jurisdictions.

WILLIAM MEDFORD.

### Constitutional Law—Protection of Rights Acquired in Reliance on Overruled Decision.

A significant factor in the change and growth of Anglo-American law is the overruling of prior judicial decisions. The overruling process, though unquestionably salutary in the course of time, engenders immediate difficulties. One of these difficulties—the adjustment of acts done and rights vested in reliance on the decision overruled—faced the United States Supreme Court in the case of *Great Northern Ry. Co. v. Sunburst Oil Co.*<sup>1</sup>

The Supreme Court of Montana, in *Doney v. Northern Pacific Ry. Co.*,<sup>2</sup> had indicated a certain procedure to be followed by shippers in suits against carriers to recover overcharges for freight. Plaintiff in the *Great Northern* case, in bringing suit against defendant carrier, had followed the procedure indicated in the *Doney* case. On the appeal of the *Great Northern* case to the Montana Supreme Court, that tribunal held that the rulings of the *Doney* case were erroneous, and would not be followed in the future, but that nevertheless they

<sup>8</sup> UNIFORM CONDITIONAL SALES ACT §2. See (1922) 2 ORE. L. REV. 1 for discussion of the scope of the purpose of this act.

<sup>9</sup> *Supra* note 4. See also *Whitlock v. Lumber Co.*, *supra* note 6, at 126, 58 S. E. at 911, where the court quotes with approval from 3 CENT. L. J. 413 as follows: "There is no doubt but that title and the right of property by the terms of the note remained in the seller while possession and right to possession were in defendant (buyer)." This was in the absence of a specific provision in the contract as to which party was to have possession.

<sup>1</sup> *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 53 Sup. Ct. 145, 77 L. ed. (Advance Opinions) 173 (1932).

<sup>2</sup> *Doney v. Northern Pacific Ry. Co.*, 60 Mont. 209, 199 Pac. 432 (1921).