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Conditional Sales -- Right to Possession Before Default

Fred R. Edney

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NOTES AND COMMENTS

Conditional Sales—Right to Possession Before Default

B, the buyer of an automobile under a title-retained contract, was accosted on the streets of the City of High Point, North Carolina, by an agent of the defendant financing company, to which the vendor had assigned the contract. The agent told *B,* in the presence of third parties, that *B* was in default in the payments due by the terms of the contract, and that he, the agent, had instructions from the defendant to repossess the automobile. In spite of *B*'s remonstrances to the effect that he was not in default, the agent took the car. Defendant subsequently admitted that there was a mistake and that *B* was not in default. In an action for wrongful taking and conversion, brought by *B* against the defendant, special damages for the loss of the use of

the car and punitive damages because of the behavior of the agent in exposing *B* to embarrassment while repossessing the car were allowed by the Municipal Court of the City of High Point. The Superior Court reversed the decision of the Municipal Court. On appeal the Supreme Court of North Carolina reversed the Superior Court and affirmed the award of the Municipal Court.[1]

The opinion of the Supreme Court contains no mention at all of the right to possession, but there is no doubt that the question of possession was before the Court. It is elementary that in order for one to recover in an action of this sort he must have a present right to possession.[2] One of the parties, the plaintiff, put the question squarely before the Court. In his brief the plaintiff says: "However, the plaintiff's action is bottomed upon the proposition that the holder of the conditional sales contract in question did not have the right to repossess the automobile until default. It is a necessary implication from the conditional sales contract that the purchaser or the mortgagor should retain possession of the car until default should occur. It seems to be definitely settled that, where a chattel mortgage or conditional sales contract contains an express or implied stipulation that the mortgagor shall retain possession until default, the mortgagee or holder of the contract is liable in damages to the mortgagor if possession is taken before default."[3]

Thus it is plain that by holding the defendant liable in damages the Supreme Court has given silent assent to one of two propositions. The Court held either that (1) the conditional vendee is entitled to the possession of the car by virtue of the fact that he bought it under a conditional sales contract, or that (2) by necessary implication from the terms of this contract or the circumstances of the transaction the right of possession was vested in the vendee.

If the Court bottomed its opinion on the first proposition it is in accord with the almost universally accepted theory of conditional sales. However by doing so it has changed its own view on this subject.

The majority of American jurisdictions hold that one of the distinguishing features of a conditional sales contract is the vendee's right to possess the property until default.[4] Jones says: "The right

[1] Binder v. General Motors Acceptance Corp., 222 N. C. 512, 23 S. E. (2d) 894 (1943).

[2] Andrews v. Shaw, 15 N. C. 70 (1833); THROCKMORTON'S COOLEY ON TORTS (Student ed., 1930) 460; Note (1932) 18 CORNELL LAW QUARTERLY 71.

[3] Binder v. General Motors Acceptance Corp., 222 N. C. 512, 22 S. E. (2d) 894 (1943), Brief of the Plaintiff, p. 5.

[4] Commercial Credit Co. v. Ragland, 189 Ark. 349, 72 S. W. (2d) 226 (1934); General Motors Acceptance Corp. v. Sanders, 184 Ark. 957, 43 S. W. (2d) 1087 (1931); White v. Dotson, 41 Ga. App. 436, 153 S. E. 233 (1930); Lee v. Gorham, 165 Mass. 130, 42 N. E. 556 (1896); Houlihan v. Connecticut River R. Co., 164 Mass. 570, 42 N. E. 107 (1895); Friedman v. Phillips, 84 App. Div. 129, 82 N. Y.

of possession is exclusively in him [conditional vendee] as long as he is not in default in the performance of his contract. This must be so from the intrinsic nature of a conditional sale. Such a sale connotes somewhat of a dual ownership in which both the seller and the buyer own the property; a divided ownership in which one of the prime essentials of complete ownership—the title—is in the seller, and the other essential—possession and the privilege of use—is in the buyer, together with the added privilege of acquiring title upon paying the full purchase price."[5] Other authorities agree, Estrich saying: "Until default the buyer has the right to possession of property sold under conditional sale."[6] Indeed it has been said that "It is almost universally held that the transfer of possession and the right to possession are essential elements of a conditional sale."[7]

Pursuant to this rule, it has been held that neither the vendor[8] nor his creditors[9] can interfere with the right of the vendee to possession. The purchaser under a conditional sale contract is generally held to have an interest which he can transfer by sale or mortgage,[10] even though the seller has stipulated against such a resale.[11] A conditional vendee of either realty,[12] appurtenances,[13] or personal property,[14] has an insurable interest in the property. The respective rights of the parties have been characterized as follows: "The buyer has the beneficial ownership of the property and may mortgage, transfer, or insure his interest in the goods as well as maintain actions against wrongdoers. Further, the risk of loss falls on the buyer, and his interest in the goods is attachable. The seller, on the other hand, retains nothing but a naked legal title for the purposes of security."[15]

This doctrine of the buyer's right to possession of goods sold under a conditional sale is in accord with the principal purpose for which this type of transaction is used in the business world. In the great majority of instances the purchaser is primarily interested in gaining

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Supp. 96 (1903); Maran v. Abbott, 26 App. Div. 570, 50 N. Y. Supp. 337 (1898); Seely v. Peabody, 139 Wash. 382, 247 Pac. 471 (1926); Smith v. Ward, 63 Vt. 534, 22 Atl. 575 (1891).

[5] 3 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (6th ed. 1933) 339.

[6] ESTRICH, INSTALLMENT SALES (1926) 454.

[7] Note (1932) 11 N. C. L. REV. 321.

[8] Ivey v. Coston, 134 Ala. 259, 32 So. 664 (1902).

[9] Bickerstaff v. Daub, 19 Cal. 109 (1861).

[10] In re Bettman-Johnson Co., 250 Fed. 657 (C. C. A. 6th, 1918).

[11] Pelton Water Wheel Co. v. Oregon Iron and Steel Co., 87 Ore. 248, 170 Pac. 317 (1918).

[12] In re Bashart's Estate, 107 Misc. 697, 177 N. Y. Supp. 567 (1910).

[13] Sturgeon v. Hanover Fire Ins. Co., 112 Kan. 206, 210 Pac. 342 (1922).

[14] Dunne v. Phoenix Ins. Co., 113 Cal. App. 256, 298 Pac. 49 (1931); Bohn Manufacturing Co. v. Sawyer, 169 Mass. 477, 48 N. E. 620 (1897); Baker v. Northern Assurance Co., Limited of London, England, 214 Mich. 540, 183 N. W. 61 (1921).

[15] Note (1932) 17 MINN. L. REV. 66.

possession and use of the goods and in paying for them later. To the typical buyer of an automobile or a refrigerator under a conditional sales contract the important fact is that he can obtain the use of the goods at the present time without presently parting with the full purchase price. This is even more true in the case of the business man who is buying fixtures, goods, etc. under a conditional sales contract. Without the right of present possession the conditional sales device would be of little value to the ordinary buyer. In a like manner the average seller is concerned principally with the present transfer of possession and the later payment of the purchase price. To a certain extent the primary element of the transaction as far as he is concerned is the ability to "make a sale," *i.e.,* to convert the goods into accounts receivable, at the same time retaining security for the payment thereof. He knows that the lure of being able to attain present possession of goods without presently parting with the full purchase price for them has shown itself to be an excellent sales stimulant. To both parties the exact legal status of the title is a more or less secondary consideration.

Nevertheless, persuaded by legalistic logic, the North Carolina Supreme Court has since 1897 seen fit to hold that in a sale wherein the vendor retains title until the purchase price is paid the vendee receives no right of possession until he receives title. The logic of the Court stems from an erroneous construction of a recordation statute which was passed in 1883 as a result of a line of cases holding that a conditional sale was valid even though unrecorded.

In 1849, in the case of *Ballew v. Suddereth,*[16] the Supreme Court held that a conditional sale contract was good as against a subsequent bona fide purchaser, even though *at that time there was a statute requiring chattel mortgages to be registered* and the conditional sale had not been registered. This fact is significant in view of later holdings by the Supreme Court that a conditional sale is in effect a chattel mortgage. Conditional sales were not required to be registered in North Carolina until 1883. In that year the legislature passed a statute which read ". . . all conditional sales of personal property in which the title is retained by the bargainor, shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is now provided by the law relating to chattel mortgages. . . ."[17]

In one of the first cases to be decided under this statute the court seemed to be impressed by what it considered a similarity between conditional sales and chattel mortgages. In 1897, in the case of *Singer Manufacturing Co. v. Gray,* the Court said in dictum: "A conditional sale is a sale but upon condition, in which the purchaser sustains the

[16] 32 N. C. 176 (1849).
[17] N. C. PUB. LAWS 1883, c. 342; N. C. CODE ANN. (Michie, 1939) §3312.

relation of mortgagor and the seller that of mortgagee."[18] In 1917 the Court gave some hint of the reason behind the dicta in the *Singer* case. In a case holding that an unrecorded conditional sale was invalid as against the receiver of the bankrupt vendee's estate, the Court said: "By the express terms of the law [statute requiring registration of conditional sales], therefore, and under the various decisions construing the same, these conditional sales are to be regarded in this jurisdiction as chattel mortgages, and void as to creditors and purchasers except from registration."[19]

Thus the idea that "by the express terms" of the registration statute "conditional sales are to be regarded in this jurisdiction as chattel mortgages" is expressed. The statute plainly states that the *recording* of conditional sales is to have the same legal effect as the *recording* of chattel mortgages, whereas the Court interprets it as if it had stated that the conditional sales *themselves* are to have the same legal effect as chattel mortgages. Such a construction of this statute seems to border on the fantastic.[20*] Surprisingly enough, this view of the law has persisted in North Carolina, at least until the present case.[21] In a

[18] 121 N. C. 168, 170, 28 S. E. 257 (1897). *But see:* Frick v. Hilliard, 95 N. C. 117 (1886).

[19] Observer Co. v. Little, 175 N. C. 42, 43, 94 S. E. 526, 527 (1917).

[20*] Even though the statute will not support the construction which the North Carolina Court has placed on it, the ruling is not without its merits. In some instances it is wise to treat conditional sales and chattel mortgages as being the same thing, *e.g.* they should both be considered as security devices. By so doing a court can avoid the injustice described by Williston as follows: ". . . No satisfactory solution of the rights in such a transaction [conditional sale] can be found without observing that the essential character of the transaction is the same as that of an absolute sale with a mortgage back. A failure to observe and apply this analogy has led to injustice both against the seller and against the buyer. The seller is by a majority of courts denied the two remedies for which his contract provides; namely, the personal obligation of the debtor and the security of the goods, and compelled to choose between them, though both may be necessary for his protection. The buyer is also by the majority of courts denied the protection which courts of equity long ago gave to mortgagors. The opportunity and danger of a forfeiture are the same in the case of a conditional sale as in a mortgage; yet though it is abundantly established everywhere that whatever the terms of a mortgage the mortgagee is only entitled to obtain his debt and interest, and that terms of a bargain by which a forfeiture is contracted for will not be enforced, it seems to be generally supposed that in a conditional sale the terms of the bargain are to be enforced whatever they may be. The difference is doubtless partly due to the fact that courts of equity have established the fundamental principles of the law of mortgages, whereas the rights of parties in conditional sales have usually been determined at law. But in view of the general adoption of equitable principles by courts of law to-day, either under statutes or without their aid, there seems to be no reason why such principles should not be applied here whatever the form of the action." WILLISTON, SALES (1909) 964.

[21] John Hetherington & Sons v. Rudisill, 78 F. (2d) 713 (C. C. A. 4th, 1928); Grier v. Weldon, 205 N. C. 574, 172 S. E. 200 (1933); State v. Stinnett, 203 N. C. 829, 167 S. E. 63 (1932); Harris v. Seaboard Airline Railroad Co., 190 N. C. 480, 130 S. E. 319 (1925); Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526 (1917); Singer Manufacturing Co. v. Gray, 121 N. C. 168, 28 S. E. 257 (1897).

case as late as 1932 it was said: "Moreover, it has been definitely determined that a title retaining contract of the type disclosed by the present record is in effect a chattel mortgage. The law confers upon the mortgagee the right of possession which he may exercise before or after default, provided, of course the taking of the property does not involve a trespass as defined by the decisions."[22] The Court was speaking in that case of an ordinary title-retained conditional sales contract.

It is elementary that where the "title theory," *i.e.*, mortgagee gets legal title to the mortgaged property, of mortgages prevails the mortgagee is entitled to possession of the mortgaged property.[23] "As a general rule the right of possession follows the right of property; and therefore where there is no restraining stipulation, the mortgagee, having the right of property until defeated by performance of the condition, has as incident thereto the right of possession, and may therefore take the goods into his own custody, or maintain trespass or trover for them against anyone who takes or converts them to his own use."[24]

North Carolina is in accord with this view. The Supreme Court of North Carolina said in the case of *Hinson v. Smith:* "In some states a mortgage is held by statutory regulations or judicial construction to be simply a lien, leaving the legal estate in the mortgagor. In North Carolina and many other states the common law prevails and the mortgage deed passes the legal title at once, defeasible by the subsequent performance of its conditions, the title then draws the right of possession and the mortgagee may enter into possession of the property at once or at any time, unless restrained by express or necessary implication, which does not appear in the case before us."[25] This doctrine has been consistently followed in cases involving both chattel mortgages and conditional sales.[26] These holdings, however, have not been without some confusion, occasioned apparently by the Court's wish to do justice in a particular case, and at the same time to cling to the theory that a chattel mortgage and a conditional sale are the same.[27*]

[22] State v. Stinnett, 203 N. C. 829, 832, 167 S. E. 63, 64 (1932).
[23] 3 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (6th ed. 1933) 175.
[24] Coles v. Clark, 3 Cush. (57 Mass.) 399, 402 (1849).
[25] 118 N. C. 503, 505, 24 S. E. 541 (1896).
[26] Beeson Hardware Co. v. Malpass, 205 N. C. 605, 172 S. E. 215 (1933); State v. Stinnett, 203 N. C. 829, 167 S. E. 63 (1932); General Motors Acceptance Corp. v. Mayberry, 195 N. C 508, 142 S. E. 767 (1928) (This case involved trust receipts which the court called and treated as conditional sales); Harris v. Seaboard Airline Railroad, 190 N. C. 480, 130 S. E. 319 (1925); Satherwaite v. Ellis, 129 N. C. 67, 39 S. E. 726 (1901); Moore v. Hurtt, 124 N. C. 27, 32 S. E. 317 (1899); Hinson v. Smith, 118 N. C. 503, 24 S. E. 541 (1896); Coor v. Smith, 101 N. C. 261, 7 S. E. 669 (1888); Jackson v. Hall, 84 N. C. 490 (1881). In the case of Grier v. Weldon, 205 N. C. 574, 172 S. E. 200 (1933) this doctrine was followed but the court found an implied agreement between the parties that the vendee should have possession.
[27*] In the case of Grier v. Weldon, 205 N. C. 574, 172 S. E. 200 (1933) the Court said that a conditional sale was a chattel mortgage, and that there was

Thus, if the Court bottomed its opinion in the present case on the right of the conditional vendee to possession by virtue of having purchased the property under a conditional sales contract it has radically changed the North Carolina law of conditional sales. It is possible, however, that the Court followed the second theory pointed out above. In that event the opinion was bottomed on the proposition that there was an implied agreement that the vendee should have the possession of the automobile. The Court has stated that where there is a stipulation or a necessary implication in the mortgage that the mortgagor is to have possession the mortgagor has the right of possession until default.[28] It is usually held that the stipulation or implication must be found in the mortgage;[29] but North Carolina has at least one case which indicates that an implied agreement that the mortgagor is to have the right of possession might be raised by facts outside of the mortgage.[30] Of

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an implied agreement between the parties that the right to possession should be in the mortgagor. The Court points out no element of the transaction, nor does it mention any language in the contract, which might have given rise to the implication. Apparently the Court reached into thin air and found a convenient implication. It has been said of the Grier case that it is "an excellent example of confusion confounded. Had the court held the instrument to be a conditional sale, which it actually was, and followed the usual rule in conditional sales, the result it groped for would have followed as a matter of course." Note (1933) 12 N. C. L. REV. 254.

In Tufts v. Griffin, 107 N. C. 47, 12 S. E. 68 (1890) the Court was faced with the question of who should bear the risk of loss on property sold under a conditional sales contract. It was held that the vendee should bear the risk of loss, for, the Court said, he had promised upon good consideration to pay for the property. The consideration referred to by the Court was the receipt of certain rights. Among these rights, as enumerated by the Court, was the right of possession. When the vendee's right to possession was mentioned to support it the Court cited a case from Massachusetts, a jurisdiction which is in accord with the majority view that a conditional vendee has the right to possession before default. The Court in the Tufts case relied on the contract as giving this right to the vendee. However, in the contract as set out in the opinion, possession is mentioned but twice. The vendee acknowledges that he has received possession and agrees that in case of default vendor is to have the right to re-enter and posssess. There is no other mention of possession in the contract.

Possibly history has repeated itself, and in the present case the Court has again "groped" for a desired result. It is difficult to see why the Court considers it necessary to grope in order to find that a conditional vendee is entitled to possession. It certainly cannot be because they consider the present North Carolina rule desirable. In the great bulk of instances the people of the State pay no attention at all to the law that a conditional vendor has the right of possession. In the present case, for instance, the attempt to repossess was under the mistaken belief that the vendee was in default. If conditional vendors were, as a whole, to begin enforcing what the North Carolina Court has said is their legal right to possession, with the result that buyers on time lost their goods although not in default, this rule would last no longer than the next legislature. Is law sound when the best that can be said for it is that it survives because commonly no attention is paid to it?

[28] Grier v. Weldon, 205 N. C. 574, 172 S. E. 200 (1933); Hinson v. Smith, 118 N. C. 503, 24 S. E. 501 (1896).

[29] Wakeman v. Banks, 2 Conn. 445 (1818); Mason v. Sault, 93 Vt. 412, 108 Atl. 267 (1919); Note (1933) 12 N. C. L. REV. 254.

[30] Grier v. Weldon. 205 N. C. 574, 172 S. E. 200 (1933).

course, under the North Carolina rule that conditional sales are the same as chattel mortgages the law applicable to mortgages in this situation will apply alike to conditional sales.

In the instant case the Court points to no facts outside of the contract as raising an implied agreement that the vendee was to have possession. The North Carolina Court has refused to imply such an agreement from the mere fact that possession has been turned over to the mortgagor.[31] Therefore the conclusion is inescapable that if the Court assented to the proposition that the vendee had the right of possession through an implied agreement the agreement must have been found in the language of the contract itself.

The contract as set out in the record on appeal,[32] contains no express stipulation that the vendee should have the right of possession. The only language which could possibly be said to raise an implication of a right to possession in the vendee is the following:[33]

"5. Purchaser shall keep the said property free from all taxes, liens, and encumbrances; shall not use the same illegally, improperly or for hire; shall not remove the same from the state without the permission of the holder of this contract. . . .

"6. Time is of the essence of this contract, and if purchaser defaults in complying with the terms hereof, or the seller deems the property in danger of misuse or confiscation, seller or any sheriff or other officer of the law may take immediate possession of said property without demand (possession after default being unlawful). . . ."

If, in the Court's opinion, such language justifies a finding of an implied agreement that the vendee has the right of possession, the North Carolina rule that the conditional vendor is entitled to possession is considerably narrowed in its practical effect. The primary purpose of the language just quoted is to protect the vendor from misuse of the property. If such language raises an implication of a right to possession in the vendee the North Carolina law now seems to be that ordinarily in a conditional sale the conditional vendor has a right to the possession of the goods sold. This is a right which cannot be defeated by an actual surrender of possession to the vendee,[34] but if, on surrendering possession, the vendor uses language to protect himself from misuse he thereby impliedly agrees that the vendee is to have possession. Perhaps it might be argued that the result, *i.e.*, the practical narrowing of the doctrine that a conditional vendor has the right to possession of goods sold under a conditional sales contract (if the Court adopted the theory

[31] Hinson v. Smith, 118 N. C. 503, 24 S. E. 541 (1896).
[32] Binder v. General Motors Acceptance Corp., 222 N. C. 512, 23 S. E. (2d) 894 (1943), Record on Appeal, p. 29.
[33] Binder v. General Motors Acceptance Corp., 222 N. C. 512, 23 S. E. (2d) 894 (1943), Record on Appeal, p. 31.
[34] Hinson v. Smith, 118 N. C. 503, 24 S. E. 541 (1896).

of implied agreement) justifies the roundabout means taken to reach that end. It is at least questionable whether unnecessary complications and needless refinements in the law are justifiable.

Unfortunately the Court has failed to explain why they saw fit to award damages in the present case at all. There is no indication in the opinion, except for the fact that a conditional vendor was held liable in damages for taking the property sold under a conditional sale, as to whether or not the Court adopted either of the theories open to it. An excellent opportunity to clarify the North Carolina law of conditional sales has been lost. What would have been a valuable precedent is just another obscure opinion, deriving whatever value it may have from the fact that possibly it is a straw in the wind indicating that the Court is somewhat dissatisfied with the North Carolina law of conditional sales as it relates to the right to possession before default.

FRED R. EDNEY.

Conflict of Laws—Full Faith and Credit—Recognition of Foreign Divorce Decrees—Domicile

It is of interest to note that a North Carolina case[1] has recently furnished the occasion for a reversal by the United States Supreme Court[2] of its decision in *Haddock v. Haddock*.[3] The North Carolina case involved the prosecution for bigamous cohabitation of two citizens of this state who had remarried after having obtained divorces in Nevada upon compliance with the six weeks residence requirement of that state. In neither divorce action was the defendant personally served in Nevada nor did the defendant enter an appearance. *Haddock v. Haddock* involved a divorce granted by a state which was the domicile of one spouse but not the last matrimonial domicile of the parties. It was held that in the absence of personal service or appearance by the defendant in the action, such divorces, valid in the state where granted, need not be given full faith and credit by other states although such states might recognize them as a matter of comity. In accordance with this rule, North Carolina refused to recognize the divorces in the instant case.

In *Bell v. Bell*[4] it was decided that a state where neither party was domiciled could not grant a divorce even though both parties personally appeared. The North Carolina court suggested as another possible ground for its decision that if it were found that the plantiffs had

[1] State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769 (1942). Commented on in Note (1942) 20 N. C. L. REV. 294.

[2] Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. ed. (Adv. Ops.) 189 (1942).

[3] 201 U. S. 562, 26 S. Ct. 525, 10 L. ed. 867 (1906).

[4] 181 U. S. 175, 21 S. Ct. 551, 45 L. ed. 804 (1901).