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in the principal case to enjoin the Commission's order.<sup>26</sup> This means that the Government is without remedy in its present action whereas the railroads in a Commission ruling adverse to their interests would have been able to have brought the case before the district court for review of the Commission ruling.<sup>27</sup>

"The Government is always at liberty . . . to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights."<sup>28</sup> And yet the decision in the principal case provides a judicial cloak behind which private interests may seek immunity from judicial review sought by the Government of decisions favorable to those private interests.

ROBERT D. LARSEN.

### Automobiles—Repurchase Option Contracts—Enforceability Thereof

To combat the practice of quick resale to a "used car" lot, where today's demand permits new motor vehicles to be sold far above their original price, many dealers have employed a repurchase option contract. These provide that, if during the life of the agreement (usually six months) the purchaser wishes to sell the car, he will give the first refusal to the dealer for a fixed or determinable price. In addition, some contracts stipulate that for failure to perform, a certain sum shall be paid as liquidated damages.

In any suit to enforce such a contract the defense that the law does not favor restrictions deterring the sale of chattels must be met. But in light of the present situation in the automobile market, there should be a strong public policy in favor of these contracts as a device for cutting the price of "used cars" by accelerating delivery to legitimate purchasers.

Another problem present in all these contracts is that of consideration. The contract states that it is a part of the consideration for the sale of the car, and this interpretation has been upheld.<sup>1</sup> A close analogy to the contracts in questions may be found in similar transactions relating to corporate stock. In such a situation the Massachusetts court<sup>2</sup> said that the consideration was the purchase price plus the agreement to offer the

<sup>26</sup> *Lambert Co. v. Baltimore & O. R. R.*, 258 U. S. 377 (1922); *North Dakota v. Chicago & N. W. Ry.*, 257 U. S. 485, 490 (1922) ("Complete justice requires that the railroads not be subjected to the risk of two irreconcilable commands—that of the I. C. C. enforced by a decree on the one side and that of this court on the other.").

<sup>27</sup> *Cf. United States v. Griffin*, 303 U. S. 226 (1938).

<sup>28</sup> *United States v. Lee*, 106 U. S. 196, 222 (1882).

<sup>1</sup> *Schuler v. Dearing Chevrolet Co.*, 76 Ga. App. 570, 46 S. E. 2d 611 (1948).

<sup>2</sup> *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432 (1894).

stock to the company if a sale were contemplated. In this respect a seller's agreement to repurchase is the same as his option to repurchase insofar as the duty upon the buyer is concerned, for in either case he is bound to offer before selling elsewhere; therefore the rulings of such cases are authority here. These cases uniformly say that such agreements are valid terms of the sale, supported by its consideration, and that the claim of lack of mutuality of obligation is not a defense.<sup>3</sup>

For the equitable enforcement of these contracts there are three theories: specific performance, rescission for fraud, and equitable servitude. To succeed on the first theory the dealer must overcome the barrier that specific performance is not usually granted in personal property contracts unless the remedy at law is inadequate.<sup>4</sup> To show inadequacy he can plead injury to his good will and reputation in that if his cars are seen on "used car" lots, people will say that he is not careful to whom he sells, which in turn may lead to repercussions from national headquarters. A resale may result in damage actually impossible to ascertain, for dealers usually have repair and servicing shops from which a large part of their income is derived, and they have reason to expect that most cars kept in the hands of the purchaser will be returned to them for some later work. Furthermore, under a policy directed toward eliminating such resales, damages would not be as efficient a remedy.

A second theory that the dealer might pursue is rescission of the sale for fraudulent intent not to abide by this repurchase contract when the sale was made. Unless there were witnesses to testify as to the purchaser's intention, the proof of it would have to be circumstantial, in which case it would be strongest when the resale was made within a few days.

A third equitable theory would be that of a servitude. But since it is seldom recognized for personal property<sup>5</sup> and its use here would add nothing that could not be accomplished by specific performance, it is not recommended. Furthermore, the purpose of this doctrine seems to be to force holders of the chattel who were not in privity with the original contract to comply with the servitude, while in the situation in question the objective of the dealer is to keep the chattel from being transferred from the first purchaser; therefore it appears that this is not the type of problem for which the equitable servitude theory was intended.

<sup>3</sup> 46 AM. JUR., Sales §509; see Note, 60 A. L. R. 215, 232 (1929).

<sup>4</sup> As to the adequacy of damages in suits on dealer's contracts to sell new cars see Note, 62 HARV. L. REV. 149 (1949), and Simpson, *Equity* in 1947 ANN. SUR. AM. LAW 811 (1948).

<sup>5</sup> Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1928); Baer, *Performer's Right to Enjoin Unlicensed Broadcasts of Recorded Renditions*, 19 N. C. L. REV. 202, 205 (1941).

Present in the enforcement by any one of these theories is the problem of giving notice of the contract to any third party who might buy the car. Since in the majority of cases the car will already have been resold when the dealer learns of it, notice is necessary to prevent a bona fide purchaser from cutting off the equitable remedies. This could usually be accomplished by writing on the title that such a contract had been made relating to this automobile. Even though there may be no place reserved on the title for this entry, there seems to be no legal objection to putting such a notation on the certificate. If in seeking one of these remedies adequate notice has not been provided for third party purchasers, the dealer, under the theory that the purchaser was threatening to sell, would have to take steps to restrain a resale before it was made.<sup>6</sup> To avoid the question of notice the dealer could retain the title for six months, but for reasons of salesmanship and future good will it does not appear feasible.

In regard to the effectiveness in North Carolina of notice of this contract being placed on the certificate of title, the rules laid down in *Carolina Discount Corp. v. Landis Motor Co.*,<sup>7</sup> that the sale of an automobile without the transfer of title is valid and that the protection for mortgagees is in recordation, are broad enough to cover the issue here.<sup>8</sup> Although the certificate ordinarily would pass on sale, it does not have to, hence notice on it would not be a complete safeguard; but it seems that if the contract were put on record as a lien the requisite notice would have been given.

In lieu of or after failure of other remedies directed toward the return of the chattel itself, the dealer can seek the legal remedy of damages for the breach of the contract between the parties. In proving his damages the dealer's ethical problem may appear delicate for he must show the price that he could have realized had he resold it as a "used car" or had he, instead of the defendant, sold the car to a "used car" dealer. Legally, however, there is no restriction on the price at which a "used car" may be sold. Furthermore, if such profits were to be made, the contract stipulated who was to receive them and should be binding on the parties. If his contract is one of those which contains a provision for liquidated damages, the dealer need only plead the contract as it stands, leaving the burden of proof on the defendant to show that

<sup>6</sup> The defendant could be subjected to contempt proceedings if he did not obey the restraining order.

<sup>7</sup> 190 N. C. 157, 129 S. E. 414 (1925).

<sup>8</sup> The court held that the statutes governing transfer and registration of titles for automobiles [N. C. GEN. STAT. §§20-50, 72, 74 (1943)] did not replace the recordation law for mortgages, liens, and encumbrances. They distinguished the North Carolina statutes from those of other states which read that the sale without transfer of title is invalid or void.

the damages are such as to be a penalty.<sup>9</sup> Even though under such a contract the dealer is not required to prove his actual damage,<sup>10</sup> it would be safer to do so and to show that it was difficult to estimate the amount accurately when the contract was drawn.

In the two cases now reported involving the enforcement of these contracts, it has not been necessary for the courts to pass directly on the main issues. In *Larson Buick Co. v. Mosca*<sup>11</sup> the facts disclosed obvious fraud and the resale had been enjoined before an innocent purchaser intervened. In *Schuler v. Dearing Chevrolet Co.*<sup>12</sup> the purchaser's demurrer was sustained because the company's pleadings did not show that it had been damaged. However, from an over-all survey it appears that the first problem is whether such contracts will be recognized at all by the courts, to which it is submitted that in light of the present situation in the automobile business they are highly desirable. The second problem, notice to the third party who buys from the original purchaser, can be met by a notation on the title where it must be transferred as part of a sale or by recordation of the contract in states like North Carolina which do not make this requirement.

The solution most advantageous to the dealer would be a repurchase contract which had its liquidated damages secured by a non-negotiable note and a recorded chattel mortgage. Since this note and mortgage would take effect only in event of a breach, they cannot be attacked as a promise to pay more than the regular purchase price for the car. Such a contract would deter reselling for it is not likely that a "used car" dealer would want a vehicle with a mortgage against it which must be paid to perfect the title. It would also give the notice necessary for the use of an equitable remedy and protect against a breach by an insolvent person. The majority of states recognize comity for recordation, therefore a chattel mortgage properly recorded would be constructive notice to a purchaser outside the state.<sup>13</sup>

MARSHALL T. SPEARS, JR.

### Constitutional Law—Declaratory Judgment—Remedy in Federal Constitutional Cases

The basic accomplishment of proceeding by declaratory judgment is "that it enables the point in dispute to be raised at the inception of the controversy, before damage has been done by acting upon one's own

<sup>9</sup> *McCORMICK, DAMAGES* §157 (1935); *Pace v. Zellmer*, 194 Iowa 516, 186 N. W. 420 (1922).

<sup>10</sup> If the court took judicial notice of the prevailing situation with regard to "used cars," the opposition's claim of penalty would be met; if not, the better procedure would be to show the situation to rebut the claim.

<sup>11</sup> 79 N. Y. S. 2d 654 (Sup. Ct. 1948).

<sup>12</sup> 76 Ga. App. 570, 46 S. E. 2d 611 (1948).

<sup>13</sup> 10 AM. JUR., *Chattel Mortgages* §21; see Note, 57 A. L. R. 702, 711 (1928).