



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 28 | Number 1

Article 23

12-1-1949

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Recommended Citation

Willis C. Bumgarner, *Sales -- Technical Cash Transaction -- Vendor's Right to Recover Property from Bona Fide Purchaser*, 28 N.C. L. REV. 132 (1949).

Available at: <http://scholarship.law.unc.edu/nclr/vol28/iss1/23>

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The 1940 Act changed the JUDICIAL CODE to provide that district courts have original jurisdiction of all suits of a civil nature where the matter in controversy “. . . is between citizens of different states, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any state or territory. . . .”²¹ Objections have been advanced that the Act is ambiguous and subject to several interpretations.²² The 1948 revision²³ differs from the 1940 act on the question of federal diversity jurisdiction in two respects.²⁴ The words, “or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any state or territory,” are omitted. The word “states,” as used in the section, is defined to include “the territories and the District of Columbia.” The 1948 revision leaves unchanged the basis upon which the Supreme Court reached their decision in the principal case. The Court referred to the 1948 revision as, in substance, re-enacting the 1940 Act.²⁵

The result of the 1940 Act as revised and construed is that the citizens of the District of Columbia and the territories, on a showing of diversity of citizenship between the parties, may sue in the federal courts. Nevertheless, by means of a splitting of opinions,²⁶ the conception of the Judiciary Article as the exclusive source of federal judicial power and the limited construction of the term “states,” as used in that Article, considered individually, remain intact. While the basis is as yet unsanctioned by legal principal approved by a majority of the justices, the Court by the purely mechanical device of a split majority accomplished the result they desired without the delay of a constitutional amendment or the complications attendant upon the creation of separate special courts.

CLYDE T. ROLLINS.

Sales—Technical Cash Transaction—Vendor's Right to Recover Property from Bona Fide Purchaser

Unless a contrary intention appears, promises for an agreed exchange which may be simultaneously performed are concurrently conditional.¹ It follows that, in a contract for the sale of a chattel where

²¹ 54 STAT. 143 (1940). Italics supplied.

²² A literal reading of the 1940 Act would indicate that, contrary to U. S. CONST. AMEND. XI, citizens of the District, Hawaii, and Alaska were authorized to sue any state or territory in the district courts. The Act seemingly authorized suits between two citizens of one territory in the federal courts. See McGarry v. City of Bethlehem, 45 F. Supp. 385 (E. D. Pa. 1942).

²³ 28 U. S. C. §1332 (1948).

²⁴ The revision removes the objection relating to a possible violation to U. S. CONST. AMEND. XI. The revision precludes federal jurisdiction over suits between two citizens of one territory.

²⁵ National Mut. Ins. Co. v. Tidewater Transfer Co., 69 Sup. Ct. 1173, 1174 (1949).

²⁶ See note 10, *supra*.

¹ RESTATEMENT, CONTRACTS §267 (1931).

nothing is said about the time of payment, payment, tender, or waiver of the purchase price is a condition on the right to demand delivery of the chattel.² It is recognized that title to the property will pass, if the parties so intend, upon completion of the contract irrespective of the time of payment,³ and if so, then the vendor retains a possessory lien and delivery of the chattel in expectation of immediate payment is conditional on the payment being forthcoming.⁴ In some jurisdictions this is the result where no evidence appears of any intention to extend credit; that is to say, title passes but a possessory lien is retained.⁵ Elsewhere, in the absence of an intent to extend credit, the transaction is considered a "technical cash sale,"⁶ and neither title nor right to possession passes to the buyer. Delivery to the buyer in expectation of immediate payment extinguishes neither the seller's title nor his right to possession.⁷

Independently of the above, in the absence of a special agreement to the contrary,⁸ a check or draft given in payment of an obligation is conditional, not constituting payment unless it is itself paid upon due presentation.⁹ This rule applies to obligations arising out of the immediate transaction as well as to the payment of antecedent debts.¹⁰ If the check is not paid, the obligee may at his option recover on the instrument or on the original obligation.¹¹

Although basically distinct,¹² this rule of payment has been incor-

² UNIFORM SALES ACT §42; *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535 (1889); *Wright v. Frank A. Andrews Co.*, 212 Mass. 186, 98 N. E. 798 (1912); *Crumney v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113 (1893); *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586 (1905); *Grandy v. Small*, 48 N. C. 8 (1855); *VOLD, SALES* 418 (1931); 2 *WILLISTON, SALES* §448 (rev. ed. 1948).

³ UNIFORM SALES ACT §19, rule 1.

⁴ *Merrill Furniture Co. v. Hill*, 87 Me. 17, 32 Atl. 712 (1894).

⁵ *Warrick v. Liddon*, 230 Ala. 253, 160 So. 534 (1935).

⁶ *VOLD, SALES* 168 (1931).

⁷ *Davidson v. Furniture Co.*, 176 N. C. 569, 97 S. E. 480 (1918). It has been held, in either case, that the condition may be waived, the vendee's title becoming thereby absolute, by repeated efforts to obtain payment coupled with acquiescence in the vendee's continued possession. *Merrill Furniture Co. v. Hill*, 87 Me. 17, 32 Atl. 712 (1894); *Frech v. Lewis*, 218 Pa. 141, 67 Atl. 45 (1907).

⁸ An agreement to accept a check as unconditional payment is not implied from the surrender of a note marked "Paid." *Little v. Mangum*, 17 F. 2d 44 (4th Cir. 1927); *Philadelphia Life Ins. Co. v. Hayworth*, 296 Fed. 339 (4th Cir. 1924); *Hayworth v. Insurance Co.*, 190 N. C. 757, 130 S. E. 612 (1925); *cf. South v. Sisk*, 205 N. C. 655, 172 S. E. 193 (1933) (note marked "Paid" and mortgage "Cancelled"); *Capital Automobile Co. v. Ward*, 54 Ga. App. 873, 189 S. E. 713 (1936) (bill of sale marked "Paid by two checks" held evidence from which an innocent purchaser from the buyer might assume that checks had been accepted as absolute payment).

⁹ *Manufacturers Finance Co. v. Armstrong*, 78 F. 2d 289 (4th Cir. 1935); *Cleve v. Craven Chemical Co.*, 18 F. 2d 711 (4th Cir. 1927); *Lumber Co. v. Hayworth*, 205 N. C. 585, 172 S. E. 194 (1933).

¹⁰ *Standard Investment Co. v. Town of Snow Hill*, 78 F. 2d 33 (4th Cir. 1935).

¹¹ *Dewey v. Margolis*, 195 N. C. 307, 142 S. E. 22 (1928).

¹² "There is confusion of thought in supposing that the condition in conditional payment by means of negotiable paper has any reference to the ownership of

porated into "cash sale" transactions¹³ with the result that, in any event, whether intent for a cash sale is found expressed in the original agreement or is presumed from the absence of contrary provisions, and whether it is conceived that the vendor retains a lien on or the title to the property, it is held that delivery of the chattel in return for a check for the purchase price is conditional on the check being paid and that upon the dishonor of the instrument the vendor may regain possession of the property from the vendee or any other party with no greater equities.¹⁴

The controversial question arises whether the vendor in such a case may assert his right to the property as against a bona fide purchaser for value from the vendee without notice of the vendee's defect of title. By majority rule¹⁵ the original vendor prevails in the absence of some conduct amounting to estoppel.¹⁶ The minority hold that although, as between the original parties, delivery is conditional, the rule is inapplicable to subsequent purchasers for value in good faith.¹⁷

In a recent decision by the Georgia Court of Appeals,¹⁸ where a check was given for the purchase price of an automobile at an auction sale and upon due presentment was returned marked "insufficient funds," it was held that, although, as between the original parties, no title passes until the check given for the purchase price in a cash sale is paid, unconditional delivery of the chattel to the vendee vests him with "external indicia" of the right of disposal, and that a subsequent sale to an innocent purchaser either divests the vendor of his title¹⁹ or estops him

property given in exchange for the paper. The condition relates to the creditor's right to revert to the money claim for which the negotiable paper was given." 2 WILLISTON, SALES 344 (rev. ed. 1948).

¹³ "Without regard to the former presumption—that payment of the price is a condition precedent to the passing of title to the goods—in many jurisdictions it has been stated to be the rule at common law that a sale of goods is presumed to be a sale for cash unless the seller agreed to allow a period of credit, and the force of this presumption has been held to be unaffected by reason alone of the intermission between receiving and cashing a check for the goods." Collins, *Title to Goods Paid for with Worthless Check*, 15 So. CAL. L. REV. 340 at 343 (1942).

¹⁴ First National Bank v. Griffin, 31 Okla. 382, 120 Pac. 595 (1911) (bank receiving the property with full knowledge of the transaction, at the same time refusing to cash the vendee's check, held to have no greater equities); McIver v. Williamson-Halsell-Frasier Co., 19 Okla. 454, 92 Pac. 170 (1907) (attaching creditor of the vendee).

¹⁵ VOLD, SALES 174 (1931).

¹⁶ Barksdale v. Banks, 206 Ala. 569, 90 So. 913 (1921); Clark v. Hamilton Diamond Co., 209 Cal. 1, 284 Pac. 915 (1930); Johnson v. Iankovetz, 57 Ore. 24, 110 Pac. 398 (1910); Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S. W. 125 (1924).

¹⁷ Crescent Chevrolet Co. v. Lewis, 230 Iowa 1074, 300 N. W. 260 (1941); Parr v. Helfrich, 108 Neb. 801, 189 N. W. 281 (1922); Comer v. Cunningham, 77 N. Y. 391, 33 Am. Rep. 626 (1879).

¹⁸ Blount v. Bainbridge, 79 Ga. App. 99, 53 S. E. 2d 122 (1949).

¹⁹ GA. CODE §96-207 (1933). "Where an owner has given to another such evidence of the right of selling his goods as, according to the custom of the trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of his property, a sale to an innocent purchaser divests the true owner's title."

from asserting it.²⁰ The court based its decision on two statutes²¹ in the alternative.

Although North Carolina has recognized both the technical cash sale doctrine²² and the rule that a check is conditional payment until it is paid,²³ no local worthless check case has been found in which the vendor maintained an action against an innocent purchaser of the property. In *Parker v. Trust Company*,²⁴ however, where, under facts similar to those of the Georgia case,²⁵ an agent of the vendee had resold the chattel at a profit and remitted the proceeds to the administrator of the vendee who had meanwhile committed suicide, the court said that no title passed and that the vendor could either recover the specific property, if not estopped,²⁶ or ratify the subsequent resale and recover the proceeds thereof from the administrator who held them in trust for the vendor, such resale being a conversion of his property. Although the first of these alternatives is a dictum, under the circumstances of the case,²⁷ it is enough to indicate that the North Carolina court would not have reached the result of the Georgia decision. An endeavor will be made to determine the reason.

That ancient and embattled maxim of the common law, *caveat emptor*,²⁸ having experienced considerable insecurity in England,²⁹ seems to have taken refuge in a more hospitable America.³⁰ The con-

²⁰ GA. CODE §37-113 (1933). "When one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury shall bear the loss."

²¹ Notes 19 and 20, *supra*.

²² *Davidson v. Furniture Co.*, 176 N. C. 569, 97 S. E. 480 (1918); *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586 (1905).

²³ *E.g.*, *Lumber Co. v. Hayworth*, 205 N. C. 585, 172 S. E. 194 (1933).

²⁴ 229 N. C. 527, 50 S. E. 2d 304 (1948).

²⁵ *Blount v. Bainbridge*, 79 Ga. App. 99, 53 S. E. 2d 122 (1949).

²⁶ The vendor had assigned the certificate of title to the vendee. The action was for the proceeds of the resale which amounted to more than the original sale price.

²⁷ See note 26, *supra*.

²⁸ "Let the buyer beware." As between the immediate parties to a sale, this doctrine has been seriously encroached upon by the recognition of implied warranties of title, merchantability, and fitness for a particular purpose, but it remains a potent weapon in the hands of the legal owner of property to be used against a bona fide purchaser from one who has no title to convey.

²⁹ A most serious English exception to the general rule embodied in *caveat emptor* is market overt whereby a thief may convey a good title in a sale in an "open market." This product of the law merchant, resulting in the increased negotiability of goods, has been excused on the theory that the loser of goods is bound to look in the market place and find them. Pease, *The Change of the Property in Goods by Sale in Market Overt*, 8 COL. L. REV. 375 (1908). A similar civil law doctrine is expressed in words roughly translated as "possession equals title" wherein even a donee, accepting goods in good faith from one in possession, becomes the lawful owner. Franklin, *La Possession Vaut Titre*, 6 TULANE L. REV. 589 (1932).

³⁰ "But we are not aware that this Saxon institution of markets overt, which controls and interferes with the application of the common law, has ever been recognized in any of the United States, or received any judicial sanction." *Ventress v. Smith*, 10 Pet. 161, 176, 9 L. Ed. 382, 387 (1836).

flict which has inevitably necessitated the almost imperceptible recession of the doctrine has been attributed to the opposed considerations of the protection of the ownership of property and the encouragement of trade.³¹ The growth of transportation and commerce, which has permitted industrial specialization and increased the interdependence of people for necessities as well as luxuries, has adversely affected caveat emptor by demanding a measure of security for the bona fide purchaser of goods.³²

But if the increased negotiability of goods would encourage freedom of trade, it must be remembered that the transaction here under consideration involves commercial paper, the security of which is deemed essential to commerce as we know it.³³ Unlike a chattel, the value of a check is not embodied in the physical instrument but depends upon the protection the law gives it. A measure of this, at least, consists of the seller's recourse against the specific chattel in the event a check received therefor is not paid. If an increase in the negotiability of goods would adversely affect the security of this type of commercial paper,³⁴

³¹ "Security of property for the original owner has as a general rule been accounted of greater importance to the general welfare than the possible resulting freedom of commerce that might be achieved by protecting the transferee who acquires the goods from a transferor who cannot rightfully convey." VOLD, SALES 396 (1931). Speaking of the common law, as contrasted to the civil law: ". . . it is entirely conceivable that a legal system should choose to protect the security of acquisitions at the expense of the security of transactions. In an agricultural community where movable property is scarce, acquisition, not transaction, that is property rather than contract, looms." Franklin, *La Possession Vaut Titre*, 6 TULANE L. REV. 589, 601 (1932). Market overt applies only to centers of trade, principally in London. See Pease, *The Change of the Property in Goods by Sale in Market Overt*, 8 COL. L. REV. 375 (1908).

³² Apparent ownership and apparent authority, as devices for protecting an innocent purchaser, go beyond ordinary rules of estoppel. VOLD, SALES 401 (1931). "In part, at least, they exemplify concessions to felt needs for more largely sustaining security of transactions for the advantage of trade and commerce, haltingly and gropingly made at the expense of security of property to the original owner. To some degree at least they thus represent a fresh example of gropingly replacing *caveat emptor* by *caveat dominus*." *Id.* at 402.

³³ It has been estimated that ninety per cent of all business transactions in this country are settled by check. As reported by the Federal Reserve Bulletin for August, 1949, the total amount of money in circulation, including coin and paper money of all denominations, reached a peak in November, 1948, of \$28,331,000,000. The total bank debits to customers' deposits, exclusive of interbank deposits, during the year of 1948 is reported as \$1,249,630,000,000.

³⁴ "We feel safe in saying that, as a matter of custom and convenience, most of the cash transactions of the country are paid with checks. A farmer brings in his cotton, tobacco, or wheat to town for sale and sells same, and, as a general rule, is paid by check, although all of such sales are treated as cash transactions. If, in such a case, the purchasers can immediately resell to an innocent party and convey good title, it would follow that vendors would refuse to accept checks and would require the actual money, which would result in great inconvenience and risk to merchants engaged in buying such produce, since it would require them to keep on hand large sums of actual cash. This would result in revolutionizing the custom of merchants in such matters." *Young v. Harris-Cortner Co.*, 152 Tenn. 15, 268 S. W. 125 at 127, 54 A. L. R. 516, 526 (1924). For criticism of this reasoning see Notes, 28 KY. L. JOURNAL 322 (1940); 13 MO. L. REV. 211 (1948).

the weight of such a consideration, when cast upon the scales in a worthless check case, would line up with caveat emptor, both being opposed to the negotiability of goods, and operate to deprive the innocent purchaser of the goods. The result is an anomalous situation wherein the security of acquisitions, rather than security of transactions, lends its support to the free movement of trade.

WILLIS C. BUMGARNER.

Torts—Federal Tort Claims Act—Servicemens' Suits

In 1946 Congress enacted the Federal Tort Claims Act.¹ This legislation is a sweeping waiver of governmental immunity from suits sounding in tort.² The Act makes the United States liable on "claims for injury or loss of property or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable. . . ."³ The Government is not to be liable in twelve enumerated instances. Among these specific "exceptions" is a provision that the Act is to have no application to "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."⁴ The Act makes no mention of veterans' or servicemens' claims except for the indirect reference implicit in the language of this exception.

What is the status then of the serviceman-claimant under the Act? The Supreme Court was faced with this question in *Brooks v. U. S.*⁵ Two soldiers, Welker and Arthur Brooks, were riding in an automobile when they were hit at a highway intersection by an Army truck. At the time of the accident the men were on leave and about their own private affairs. It was held that the fact that plaintiffs were servicemen would not preclude the maintenance of a suit under the Tort Claims Act.⁶ "The statute's terms are clear," wrote Mr. Justice Murphy.

¹ 28 U. S. C. §§1291, 1346, 1402, 1504, 2110, 2401, 2411, 2412, 2671-2680 (1948).

² This legislation seems to have been passed with two main purposes in mind: (1) to relieve an over-burdened Congress from the necessity of considering hundreds of private bills yearly (the only remedy available to the private citizen before passage of the Act), and (2) to remove the previous barrier to suit against the Government in tort, a reform which had been sought by statesmen and jurists for more than a century. See generally, Baer, *Suing Uncle Sam in Tort*, 26 N. C. L. REV. 119 (1948); Gellhorn and Schenck, *Tort Actions Against the Federal Government*, 47 COL. L. REV. 722 (1947); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L. J. 1 (1946); Note, 20 MISS. L. J. 354 (1949).

³ 28 U. S. C. §1346(b) (1948).

⁴ 28 U. S. C. §2680 (1948). The exceptions fall loosely into two categories: (1) claims which relate to certain governmental activities which should be free from the threat of damage suit, or (2) claims for which adequate remedies are already available. SEN. REP. No. 1400, 79th Cong., 2d Sess. 33 (1946).

⁵ 69 S. Ct. 918 (1949).

⁶ *Accord*, *Alansky v. Northwest Airlines*, 77 F. Supp. 556 (D. Mont. 1948) (death of officer in the military forces killed in plane crash while being trans-