



1949

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Recommended Citation

Leahy, James E. (1949) "Sales - Uniform Conditional Sales Act - Need for Uniform Act in North Dakota," *North Dakota Law Review*. Vol. 25 : No. 4 , Article 3.

Available at: <https://commons.und.edu/ndlr/vol25/iss4/3>

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COMMENTS

SALES — UNIFORM CONDITIONAL SALES ACT — NEED FOR
UNIFORM ACT IN NORTH DAKOTA

BECAUSE of the continuing increase in installment buying the law of conditional sales is becoming more and more important. This fact was recognized by the Commissioners on Uniform State Laws as far back as 1919 when the Uniform Conditional Sales Act was first promulgated. Since 1919, twelve states have adopted the Uniform Act.¹ It is the purpose of this paper to analyze the cases construing the North Dakota statutes on conditional sales and compare them with the Uniform Act.

There are four main statutes governing conditional sales in North Dakota. Section 51-0121, N. D. Rev. Code (1943) authorizes the use of the conditional sale contract. The conditional sale contract to be good against subsequent creditors, purchasers and encumbrancers must be in writing and filed with the Register of Deeds, as set out in Section 51-0710. Under Section 28-2907 where an action has been started, the vendee may petition for a reasonable time to pay and this may be granted by the court. Section 28-2908 provides that if the vendee can show the court by affidavit, prior to the commencing of any action, that he has a legal counterclaim or is entitled to the provisions of Section 28-2907, or has a valid defense to the payment of the balance due, the court may enjoin repossession until the matter can be settled by the court. There are several other statutes which bear on this question but not directly relevant to the problem here.²

THE EFFECT OF NOT FILING A CONDITIONAL SALE CONTRACT

As early as 1902, our Supreme Court pointed out that omission to file the conditional sale contract, under Section 51-0710, does not render the contract absolutely void but void only as against those classes referred to in the statute, that is, sub-

¹ 2 UNIFORM LAWS ANNOTATED, Conditional Sales, Cum. Supp. (1949), 6.

² Sec. 35-0126 provides for a penalty for destroying, removing, concealing or selling property subject to a lien.

Sec. 51-0711 states that the vendor cannot repossess unless all taxes levied on the property have been paid.

Sec. 57-2218 is similar to Sec. 51-0711, providing for payment of taxes before repossession.

Sec. 49-0912 and 49-0913 provide for the term of a conditional sale of railroad equipment and for recording the same.

sequent creditors without notice, and purchasers and encumbrancers in good faith and for value. As to other classes not referred to, the omission to file is of no consequence.³ This principle was reaffirmed in *Rock Island Plow Co. v. Western Implement Co.*⁴ In this case the court allowed the plaintiff-vendor to recover the value of the property taken by the defendant from the conditional vendee. The conditional sale contract had not been filed until after the defendant took possession, but the court pointed out that the defendant had not brought himself under the statute as a "subsequent purchaser without notice, nor a purchaser or encumbrancer in good faith for value."

RIGHTS OF THE VENDOR

The laws of North Dakota favor the vendor. He may either repossess the property on default, or waive his right thereto and sue for the purchase price, but he cannot do both.⁵ The vendor need not account to the vendee for payments made by the vendee prior to default,⁶ and the contractual relations of the parties cease when the vendor repossesses.⁷ The vendor need not go through court proceedings to repossess. "Repossession is lawful if it is accomplished without breach of peace or unlawful trespass."⁸

RIGHTS OF THE VENDEE

It was recognized in *Tickfer v. Investment Corp.*⁹ that the North Dakota laws do not adequately protect the equities of the vendee. The court states, ". . . but the defects are such as to be remediable by legislative rather than judicial action." The court also refers to Chapter 222, Session Laws of 1933¹⁰ where the legislature had recently made provision for assistance to the vendee under similar circumstances. In construing Chapter 222 in a case between a vendee and a bona fide purchaser, the court states, "Chapter 222 did not prevent title to the truck from passing to the intervener (bona fide purchaser

³ *Thompson v. Armstrong*, 11 N. D. 198, 91 N.W. 39 (1902).

⁴ 21 N.D. 608, 132 N.W. 351, (1911).

⁵ *Dowagiac Mfg. Co. v. Mahon & Robinson*, 13 N.D. 516, 101 N.W. 903 (1904); *Poirier Mfg. Co. v. Kitts*, 18 N.D. 556, 120 N.W. 558 (1909); 16 N. D. BAR BRIEFS 173 (1940).

⁶ *Pfeiffer v. Norman*, 22 N.D. 168, 13 N.W. 97, 30 L.R.A. (N.S.) 891 (1911); *Dixon v. Central Motors*, 68 N.D. 264, 278 N.W. 648 (1938).

⁷ *Pfeiffer v. Norman*, *supra*, Note 6.

⁸ *McLean v. Underdal*, 73 N.D. 74, 11 N.W. 2d 102 (1948).

⁹ 63 N.D. 613, 249 N.W. 702 (1933).

¹⁰ N. D. Rev. Code. (1943) Sec. 28-2907, 28-2908.

from vendor who repossessed).¹¹ This chapter does not give to the vendee an absolute right of redemption. It affords him the right to apply to the court for an order that will prevent the vendor from taking possession of the property or selling it if the property is already in his possession. Whether this statute may be so construed as to impose upon the vendor the duty to give the vendee a reasonable time after seizure to apply for such an order before selling the property we need not determine. The statute clearly does not prevent title passing to a bona fide purchaser."¹² From this the question of whether or not the vendee has any action against the vendor for failure to hold the property until the vendee can apply to the court is still open. It would seem to follow that there not being any fiduciary relationship existing between vendor and vendee, the vendor is under no duty to the vendee to hold the property. The statute does, however, provide that where the vendor still has possession of the property after repossessing, the vendee may apply to the court to have the vendor restrained from selling or disposing of the property until their respective rights are settled. It is apparent that unless the vendor has a duty to hold the repossessed property, he can defeat the vendee's equity by disposing of the property prior to the vendee making application to the court for relief.

SIMILARITY BETWEEN CONDITIONAL SALE CONTRACTS AND CHATTEL MORTGAGES

Conditional sale contracts and chattel mortgages, in essence are both security devices. They do, of course, serve different purposes. For example, a chattel mortgage may be used to secure any type of an obligation, whereas a conditional sale can secure only the purchase price of the goods sold.¹³

In North Dakota, although we recognize that the conditional sale and the chattel mortgage are essentially security devices, we do consider them distinct and individual types of contracts. In *Tickfer v. Investment Corp.*, *supra*, the court states, "Inevitably any contract whereby money is made payable in the future to one party and its payment secured by a chattel to which the party paying will have clear title upon making payments takes on the aspect of a mortgage." The

¹¹ Material in parentheses supplied by the writer.

¹² *McLean v. Underdal*, *supra*, Note 8.

¹³ GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES, Rev. Ed. 1940, Sec. 513.

court then gives the following quotation from Williston:¹⁴ "Such a transaction is in its essence analogous to a transfer of title to the buyer, and a mortgage back by the buyer to the seller in order to secure the price." In this case however, the court decides that this contract is a conditional sale contract and distinct from a chattel mortgage.

Glenn, in his work on *Fraudulent Conveyances and Preferences*, *supra*, points out that recent legislation including the Uniform Conditional Sales Act has transformed the common law conditional sale into essentially a sale with a purchase money mortgage back.¹⁵

The filing of a chattel mortgage and a conditional sale contract in North Dakota is substantially the same. Both are filed in the office of the Register of Deeds and filing becomes notice of their existence to subsequent purchasers and encumbrancers.¹⁶ In filing a conditional sale contract, the Register of Deeds is directed to treat the purchaser as mortgagor and the vendor as mortgagee.¹⁷

Noting then, that the conditional sale and the chattel mortgage tend to serve the same purpose, that is, as a security device, it will be seen that the rights of the mortgagor-mortgagee are quite different from those of the conditional vendor-vendee.

The interest of the mortgagor, under a chattel mortgage, is protected in several ways. The mortgagee can realize on the mortgage only by foreclosure. In North Dakota, there are two methods of foreclosure of a chattel mortgage, one by court action,¹⁸ and the other by advertisement where the mortgage contains a power of sale.¹⁹ Under these methods the mortgaged property may be sold upon due notice. The mortgagee however must remit to the mortgagor any surplus over and above the cost of the foreclosure and the amount of the debt owing.²⁰ It is also believed that Sections 28-2907, 28-2908 give more protection to the mortgagor than to a conditional vendee. These sections give to the conditional vendee or the mortgagor the right to petition the court for relief from the

¹⁴ 2 WILLISTON, SALES, 2d Ed. 1924, Sec. 579.

¹⁵ GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES, Rev. Ed. 1940, Sec. 516.

¹⁶ N. D. Rev. Code (1943) Sec. 51-0710, 35-0407.

¹⁷ N. D. Rev. Code (1943) Sec. 51-0710.

¹⁸ N. D. Rev. Code (1943) Chap. 32-20.

¹⁹ N. D. Rev. Code (1943) Chap. 35-23.

²⁰ N. D. Rev. Code (1943) Sec. 35-2313.

hardship of default. However, as pointed out above, the vendor may repossess and resell the property before the vendee can get relief from the courts, in a conditional sale situation. In a mortgage situation, however, sale of the property must be made according to statute and there will be an interval of time from the seizure of the property until the sale, within which the mortgagor may apply to the courts for relief.²¹ It should be noted here also, that a chattel mortgagor has a right of redemption within 5 days after the foreclosure and sale by advertisement.²²

THE UNIFORM CONDITIONAL SALES ACT

We turn now to the provisions of the Uniform Conditional Sales Act, hereinafter referred to as the Act. We note first that the Act has some provisions which in effect are similar to the prevailing law in North Dakota. For example, in Section 2 of the Act the buyer is given possession of the property until default and the seller is responsible for breaches of warranty. This is true in North Dakota.²³ The rights of the vendor to be paid the price and the installments are set out in Section 3 of the Act and are similar to those given the vendor in North Dakota.

Filing of the conditional sale contract is provided for in Section 5 of the Act. Section 51-0710 of the N. D. Rev. Code (1943) provides for filing in North Dakota and states to whom the filing is notice.

Both the Act²⁴ and the North Dakota law allow the vendor to retake possession upon default by the vendee.²⁵

The other sections of the Act provide for remedies and procedures that we do not now have in North Dakota or if we do have them, they are not as all inclusive. Section 7 of the Act concerns itself with the attachment of fixtures to realty where the fixtures are sold under a conditional sale contract. The vendor can protect his reservation of property rights by filing a copy of the conditional sale contract with a description of the realty, in the same office where a deed to realty would be filed. No statute or case was found in North Dakota governing this situation. In the absence of a statute similar to the Act,

²¹ N. D. Rev. Code (1943) Sec. 35-2306; Also see Chap. 32-30.

²² N. D. Rev. Code (1943) Sec. 35-2317.

²³ N. D. Rev. Code (1943) Sec. 51-0121; *Sorg v. Bröst*, 29 N.D. 124, 150 N.W. 455 (1914).

²⁴ Sec. 16, Uniform Conditional Sales Act.

²⁵ *Dowagiac Mfg. Co. v. Mahon & Robinson*, *supra*, Note 5.

the general rule prevailing throughout the country seems to be that the reservation of property in the vendor is void against subsequent purchasers or encumbrancers of the realty even though the conditional sale contract is filed as provided by the regular conditional sale filing statute.²⁶ This section of the Act gives additional protection to the conditional vendor and at the same time protects purchasers of the land because a copy of the conditional sale contract will be recorded the same as any transaction affecting the realty.

No case or statute was found in North Dakota covering the situation set out in Section 9 of the Act. In this section, reservation of the property in the vendor is void where the goods are sold to the vendee for resale by the vendee. This is so even though the contract was filed, if the goods are sold by the vendee in the regular course of business. William Gehrke, in a recent issue of the *BAR BRIEFS*,²⁷ has examined the law governing floor plan chattel mortgages. Although he found no cases directly in point, from examination of the cases he reached the conclusion that in North Dakota, we would probably hold the chattel mortgage void as against a bona fide purchaser, where there is a chattel mortgage given to the mortgagee but the mortgagee allows the mortgagor possession and power of sale of the goods. North Dakota might also hold the same way in a conditional sale situation. Legislation such as contained in the Act on this point would definitely clarify this situation.

Section 35-0126 of the N. D. Rev. Code (1943) makes it a crime to "destroy, conceal, sell or in any manner dispose of property upon which there is a subsisting lien" such as a conditional sale contract. No provision is made for protection of the vendor other than the regular filing section. The Act,²⁸ in addition to making such transfer or sale a crime, gives the vendor the immediate right to retake the property and deal with it as if there had been a default by the vendee. As can be seen, these sections of the Act give additional protection to the vendor, not now provided for in North Dakota.

It is in Sections 17 through 26 of the Act that the rights of the vendee are set forth and protected to a greater degree

²⁶ 2 UNIFORM LAWS ANNOTATED, Conditional Sales, page 12; Anno. 141 A.L.R. 1283, 1289.

²⁷ 25 N. D. BAR BRIEFS 140 (1949).

²⁸ Sec. 13 and 15, Uniform Conditional Sales Act.

than is provided by the North Dakota laws. These sections provide that the vendor may give notice to repossess, and thereby give the vendee time to make good on the default. If the vendor does not wish to give notice, he must hold the property 10 days after retaking during which time the vendee may pay the default.²⁹ If the vendee does not redeem the goods in 10 days but has paid at least 50 per cent of the price, then the vendor *must* sell the goods at auction within 30 days. If the buyer has not paid 50 per cent the vendor is under no duty to sell the goods, unless the vendee demands a sale by written notice.³⁰ The proceeds of the sale shall go first to payment of the expenses of the sale, second to the payment of the expenses of retaking and keeping, and thirdly to satisfaction of the balance due on the debt. Any sum remaining shall be paid to the vendee. If there is a deficiency the vendor may recover that from the vendee.³¹ If there is no sale then the vendor may keep the goods and the vendee's obligation is discharged.³²

Section 24 of the Act does away with the election of remedies and the vendor may sue for the price, and later retake the goods, in case he cannot collect on his judgment.³³ The Act also provides that if the vendor does not comply with the Act, the vendee may sue for damages suffered by him.³⁴

Under Section 26 of the Act, no waiver of the provisions of the Act may be made in any conditional sale contract.

SUMMARY

From this brief review of the Act, we can see that far greater protection is given to the conditional vendee and conditional vendor under the Act than is now provided for under the laws of North Dakota.

As stated in the notes of the Commissioners on Uniform State Laws, "The theory . . . is that a conditional sale is practically equivalent to a chattel mortgage and the rights of the buyer and seller in the conditional sale ought to coincide with those of a chattel mortgagor and mortgagee as nearly as possible." We noted that a great deal of protection is accorded the chattel mortgagor in North Dakota. Our court

²⁹ Sec. 17 and 18, Uniform Conditional Sales Act.

³⁰ Sec. 19 and 20, Uniform Conditional Sales Act.

³¹ Sec. 21 and 22, Uniform Conditional Sales Act.

³² Sec. 23, Uniform Conditional Sales Act.

³³ Sec. 24, Uniform Conditional Sales Act; we now have the doctrine of election of remedies in North Dakota. See *Dowagiac Mfg. Co. v. Mahon & Robinson*, *supra*.

³⁴ Sec. 25, Uniform Conditional Sales Act.

has also noted that the remedies available to the conditional vendee are inadequate.²⁵ It would therefore seem advisable, in view of the fact that both the conditional sale and the chattel mortgage are essentially security devices, that the conditional vendee be accorded the same protection as a chattel mortgagor. This can be done by enactment of the Uniform Conditional Sales Act.

JAMES E. LEAHY
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²⁵ *Tickfer v. Investment Corp.*, *supra*, Note 9.