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Conditional Sales, Election of Remedies

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grantee appears to the transaction, it shall be sufficient to convey the estate, although the deed remains in the hands of the grantor. Stevens v. Hatch, 6 Minn. 64 (1861). A completed delivery is not affected by the fact that the grantee hands the deed back to the grantor, for record, safe keeping, or for any other purpose. 8 R. C. L. 987, § 54. A delivery of a deed in escrow cannot be made to the grantee and that if such delivery is in fact made, it becomes, in law, an absolute delivery. Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330, (1851).

If the grantor makes a manual delivery to the grantee of a deed absolute in form, intending to part with all authority and dominion over the instrument, he makes an absolute delivery and title passes immediately in accordance with the terms of the deed notwithstanding any intention or understanding that its operation be delayed until the happening of a contingency. An exception is, of course, made by statute with regard to deeds which are in fact mortgages. N. D. Comp. Laws Ann. (1913) § 6729. In the Keefe v. Fitzgerald case the instrument was intentionally delivered to the grantee. It was absolute on its face and therefore immediately conveyed absolute title.

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CONDITIONAL SALES, ELECTION OF REMEDIES

Plaintiff's assignor sold an automobile to one Emanuelson. After the down payment there was left $650 payable in monthly installments for which the buyer gave his promissory notes, which were assigned together with the contract to plaintiff. Emanuelson defaulted on several installments. Plaintiff commenced an action on the notes and twice garnished Emanuelson's wages. Emanuelson sold the car to defendant, and three days later went into voluntary bankruptcy. Plaintiff dismissed its action for the overdue installments, released the garnishments, and brought suit in replevin. On an appeal from the trial court the Supreme Court held, "The seller's suit for the price under a conditional sale contract is not inconsistent with his reserved title and right to repossess under the buyer's default. Hence, it is not such an election of remedies as to bar a subsequent exercise of the right of repossession." The Supreme Court stated, "The Contract is, not that the seller shall keep the title until he sues for the price or gets a judgment, but that it shall remain in him until he gets his money. Is it not then to defeat rather than effectuate plainly expressed contractual intention to decide that the seller's suit for the price or a piece of it transfers title to the buyer?" Midland Loan Finance Co. v. Osterberg et al, 201 Minn. 210, 275 N. W. 681 (1937).

There is a split of authority on the question of whether or not the election of one of the remedies, a suit for the purchase price, or retaking of the property, bars the other under a con-

ditional sale contract. ". . . therefore, the ultimate question is, are the remedies concurrent, or alternative and inconsistent? The courts which have proceeded upon the theory that they were inconsistent have assumed that they were without demonstrating how they were so." Note (1921) 12 A.L.R. 503.

Prior to the time of the principal case it was the settled law in the State of Minnesota that where the vendee under a conditional sale contract failed to comply with the condition as to payment, the vendor could retake the property or could treat the sale as absolute and bring an action for the purchase price, but the assertion by him of either right waived the other. Keystone Mfg. Co. v. Casselius et al, 74 Minn. 115, 76 N. W. 1028 (1898); Alden v. W. J. Dyer & Bros., 92 Minn. 134, 99 N. W. 784 (1904). After the exercise of his right under the conditional sale to sue for the price, making the sale absolute, the conditional sale is brought to an end, and the seller can no longer proceed to collect the debt and not recognize the buyer as the owner. Holmes v. Schneller, 176 Minn. 483, 223 N. W. 908 (1929).

North Dakota is in accord with this view by holding that under a conditional sale contract the seller may elect whether he will proceed in an action for the value or for the recovery of the property, but he cannot do both. The election of one remedy waives the other. Poirier Mfg. Co. v. Kitts, 18 N. D. 556, 120 N. W. 558 (1909). See Pfeiffer v. Norman, 22 N. D. 168, 175; 133 N. W. 97, 100 (1911); See also Dixon v. Central Motors Co., 68 N. D. 264, 269; 278 N. W. 648, 651 (1938).

Other cases reaching the same result have held as follows: New England Road Machinery Co. v. Vanderhoof, C. C. A. 1st., 19F. (2d) 331 (1927), that a suit for the purchase price is an election to treat the transaction as a sale, is a settled rule; Bailey v. Hervey, 135 Mass. 172 (1883), the vendor cannot treat the transaction as a valid sale and an invalid one at the same time; Shepard v. Mills, 173 Ill. 233, 50 N. E. 709 (1898), a provision reserving title is waived through the bringing of an action in a form which treats the contract as fully performed and the title as having passed; Francis v. Bohart, 76, Ore. 3, 143 Pac. 920, 147 Pac. 755 (1915), an action for the purchase price must proceed upon the theory that title has been waived by the seller and vested in the buyer. "How can the seller say the buyer was indebted to him for the price of the goods, without at the same time, admitting his title to the goods? For one cannot owe or be indebted to another for the price of goods of which, admittedly he never gets title." Purtle v. Heney, 33 N. B. 607, (1898) (Annotation 12 A. L. R. 504).

On the other hand, authority is given that an election of one of the remedies does not waive the other. If the title is retained as security only, a suit on the notes does not waive the right to reclaim possession before satisfaction of the purchase price. Holcomb & H. Mfg. Co. v. Cataldo, 199 Mich. 265, 165 N. W. 941 (1917). The contract reserves title in the seller until the settlement is fully satisfied. Therefore, by taking an unsatisfactory

judgment, the right to reclaim the property is not defeated. Canadian Typograph Co. v. Macguran, 119 Mich. 533, 78 N. W. 542 (1899).

So we have on one side the view that as the remedies of the seller to retake possession or sue for the purchase price are inconsistent, one bars the other; on the other side, we have the view that the contract provides that the seller shall have both remedies until he receives his money. However, without deciding which is the most logical, or which is the weight of authority, it would seem that the principal case has reached the result which is the most just to the seller under a conditional sale contract.

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OUR SUPREME COURT HOLDS

In J. K. Murray, Petr. and Applt., vs. Fred Mutschelknaus, et al., Defts. and Applts.,and State of North Dakota doing business as Bank of North Dakota, Intrs. and Applts.

That an assessment becomes final within the contemplation of section 2, chapter 225, S. L. N. D. 1939 when the state board of equalization causes an abstract of its proceedings to be certified to the county auditor pursuant to the provisions of section 2142, C. L. 1913.

That the period for instituting proceedings under chapter 225, S. L. 1939, is limited to one year from the date of certification by the state board of equalization to the county auditor.

That it is presumed that the legislature intends a statute to operate prospectively only unless it clearly manifests a contrary intention.

That where a statute is susceptible of two constructions by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided it is the duty of courts to adopt the latter construction.

That Chapter 225, S. L. 1939 is construed to operate prospectively and to apply only to tax assessments made subsequent to the effective date of the act.

Appeal from the District Court of Hettinger County, Hon. R. G. McFarland, Special Judge. AFFIRMED IN PART, REVERSED IN PART.

Opinion of the Court by Morris, J.

In The State of North Dakota ex rel Alvin C. Strutz, Attorney General, Petr., vs. A. J. Huber, Auditor of Grant County, Respt.

That the duties of the county auditor in calculating the rate per cent of tax levies and in spreading and extending the tax charges on the tax lists against real property subject to taxation pursuant to the provisions of the Initiated Measure, adopted June 29, 1932 (S. L. 1933, p. 493) section 2143 C. L. 1913 and chapter 241, S. L. 1929, are ministerial and their performance may be compelled by mandamus.

That Chapter 225, S. L. 1939 entitled "An act declaring all tax charges based on original final values of property assessed by local assessors, in excess of amount that would have been charged had said original final value been limited to the full and true value in money, null and void providing remedy to the taxpayer; and repealing all laws or parts of laws in conflict therewith," is considered and construed, and it is held, for reasons stated in the opinion, that said chapter 225 does not modify or repeal the provisions of