

4-1926

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## Recommended Citation

Reeves, Ollie C. (1926) "Conditional Sale Contracts in Indiana," *Indiana Law Journal*: Vol. 1: Iss. 4, Article 2.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol1/iss4/2>

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## CONDITIONAL SALE CONTRACTS IN INDIANA

OLLIE C. REEVES\*

However much lawyers may differ as to the expediency of the attempt to secure by codification uniformity in the various States of certain of our commercial laws, all will agree that the field of commercial law including sales of personal property is a proper field for the beginning of the experiment. The vast increase of commerce in every line, the development of transportation by every conceivable means has tended to obliterate state lines and boundaries. Property sold today in the city of New York can be delivered the same day in the city of Chicago, or a day or so later to a buyer in San Francisco. There has been a constant tendency as a result perhaps of the above conditions to protect the possession of property rather than the title. This it seems is to protect and encourage trade. During the latter half of the last century, the commercial world, probably in an unconscious effort to promote trade and at the same time protect the seller, began to do business under what was called the conditional sale contract. The object to be attained by such transactions was identical with that to be obtained by means of the chattel mortgage but at the same time saving the expense necessary and incidental to having the chattel mortgage recorded. It was stated by the proponents of the conditional sale plan that a buyer will purchase property under such a plan when he would not do so if he had to give a chattel mortgage on the property and thereby cause his name to appear in the records of the county as a mortgagor. Hence the very cause of the growth of this plan in the United States was based largely on the fact that such transactions need not be recorded in order to protect the conditional seller against third parties who purchase from the buyer even without notice of the existence of the conditional sale.<sup>1</sup>

A conditional sale under countless decisions in Indiana as well as elsewhere is any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of a part or all of the price, or upon the performance of any other condition or the happening of any contingency; or it is any contract for the bailment or leasing of goods by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract.

It is fundamental, in the technical conditional sale, that the goods are delivered to the buyer. He is to have the possession and use of the goods while paying for them by performing some other act than payment, or awaiting the happening of some event. If the buyer does not receive possession and use of the goods, the transaction has no deceptive features for the public, and there is no need for special rules for the

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\*See biographical note p. 202.

<sup>1</sup> *Dunbar v. Rawles* (1867) 28 Ind. 225.

case. It is the element of possession without title but with all the appearances of title which gives rise to the need for special rules, and for this reason at least 34 states have enacted legislation requiring the recording or filing of conditional sale contracts, and many of these have enacted what is called the Uniform Conditional Sales Act. It is of course well established that such contracts need not be recorded in Indiana although it is submitted that there is a pressing need for such legislation.

The retention of title by the seller, notwithstanding possession, use and appearance of ownership by the buyer, is the characteristic feature of the conditional sale. If the buyer is to have possession and property in the goods also, the transaction cannot be properly called a technical conditional sale, no matter what means of securing the payment of price the seller may adopt, or what acts the seller may expect the buyer to perform later. The passage of property in the goods to the buyer is always subject to a condition precedent.<sup>2</sup> A sale whereby title is to revert in the seller on the happening of a condition subsequent, might also logically be termed a conditional sale; but the term conditional sale has acquired a special significance and has come to mean a sale where the passage of title is subject to a condition precedent and not a condition subsequent. For example, it is common for a sale to be made where the seller reserves a right to buy back the goods on the payment of a certain sum or happening of some other event. This is equivalent to a chattel mortgage.

Before there can be a valid conditional sale contract, the one assuming to occupy the relation of seller must be such in fact, and the one assuming to occupy the relation of buyer must in fact acquire his title from the seller. Paper transfers of titles are of no consequence, where corresponding facts do not exist, nor will apparent momentary ownership, for the purpose of an instantaneous re-sale suffice. Hence, constructive sales and re-sales will be disregarded, if in fact only the relation of debtor and creditor exists.<sup>3</sup>

The theory of the Uniform Conditional Sales Act is that the mortgage and conditional sale should be treated alike in the law since they have identical objects and effects.

Frequently the transaction by which goods are delivered for use is called by the parties a "lease" and provides for the payment of "rent;" but the name by which the transaction is called is not of importance and the intent and purpose of the parties will control.

The buyer as long as he is not in default has a right to retain the possession of the goods and the right to acquire the property in the goods on the performance of the conditions of the contract. By this

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<sup>2</sup> *Schneider v. Daniel* (1921) 131 N. E. 816.

<sup>3</sup> *Southern Finance Co. v. Mercantile Discount Corp.*, 80 Ind. App. 436; 141 N. E. 250.

means the buyer who makes payments over a long period of time gets the use of the goods and is thereby aided in paying for the same.<sup>4</sup>

In the absence of a stipulation against such action, the interest of both the seller and buyer is assignable, and the assignee steps into the shoes of the assignor.<sup>5</sup>

The question often arises between the conditional buyer and a third party as to whether the buyer has an interest in the goods that is subject to execution. Without giving any very satisfactory reason, it has been held in Indiana that the buyer has no leviable or attachable interest.<sup>6</sup> This result would be easily understood if the creditor sought to make the whole interest in the goods liable for the conditional buyer's debt, but it is not plain what objection there can be to making the special property interest of the buyer, who is in possession, and has so far complied with his contract, liable for his debts. Of course, it may result in substituting another party in the place of the buyer to whom the seller would not have sold the goods, but the seller ought to be satisfied if he gets the price and if the creditor of the conditional buyer does not pay the balance due the seller, the latter ought to be allowed to retake the goods. However, this is not the law, as stated above, in Indiana. The seller may replevin the goods from a Sheriff who levies an execution thereon.<sup>7</sup> Of course, the purchaser on the execution sale is in the same position as the levying creditor.<sup>8</sup>

If the conditional seller wrongfully retakes the goods, or wrongfully retains the goods, and thus appropriates to his own use the buyer's special property interest, the buyer may replevin the goods from the seller who prematurely takes them and recover as damages the value of the goods.<sup>9</sup>

If a third person wrongfully injures the goods, while they are in the buyer's possession and he is not in default, his special property right entitles him to maintain an action against the negligent person.<sup>10</sup>

If, according to the terms of the contract, the time has arrived when the entire price or the entire balance of the price has become due, the conditional seller may recover it, whether the buyer has yet become the owner of the goods or not. The buyer has agreed to pay the price at a certain date, or on a certain event. That date has arrived, or that event has happened and the price should be recoverable. And even if the buyer did condition his promise to pay the price on delivery of the goods, or on passage to him of the title to the goods, if the

<sup>4</sup> *Tully v. Fairly* (1875) 51 Ind. 311.

<sup>5</sup> *Tully v. Fairly* (1875) 51 Ind. 311. *Dunbar v. Rawles* (1867) 28 Ind. 225.

<sup>6</sup> *Keck v. State* (1894) 12 Ind. App. 119.

<sup>7</sup> *Hanway v. Wallace* (1862) 18 Ind. 377.

<sup>8</sup> *Bradshaw v. Warner* (1876) 54 Ind. 58.

<sup>9</sup> *Isbell v. Brinkman* (1880) 70 Ind. 118.

<sup>10</sup> *Craig v. Lee* (1924) 142 N. E. 399.

conditional buyer refuses to take delivery and title, the seller may force title on the buyer and collect the price.<sup>11</sup>

In Indiana, where both the contract of conditional sale and the note given for the goods are assigned to a third party, the seller's title, reserved by way of security, is held to pass impliedly to the assignee.<sup>12</sup> But where the note only is indorsed in blank to a third party by the conditional seller such indorsement does not give the indorsee the right to retake the goods on default, since the title to the goods does not pass as an incident of the note. It is submitted that the decision in the latter case is not in harmony with the better reasoned cases, for the right of the seller to collect the price is the principal thing, the reservation of title being only of secondary importance and is for the purpose of enabling the seller to collect the price. When the seller negotiates the note for the price, the title reserved ought to pass as an incident with the note, without express mention of such intent. If the seller no longer owns the note, he no longer has the right to collect the price from the buyer, and the retention of the title by him is useless, whereas it is decidedly useful to the new holder of the note. This view prevails in the majority of the States.

The question often arises as to the priority of liens over the title of the conditional seller. The most frequent cases are those where work is done on automobiles by garage men at the request of the conditional buyer.

In *Atlas Securities Co. v. Grove*,<sup>13</sup> an Indiana case, it was held that the burden is on the mechanic who has done work on the automobile to allege and prove that the repairs were necessary and were made with the seller's consent in order to prove a lien prior to that of the seller.

In *Watts v. Sweeney*<sup>14</sup> a common carrier mortgaged a locomotive, which mortgage was to extend over a few years and the engine was to remain in the possession of the mortgagor. It was held that a mechanic rendering necessary repairs for its upkeep could obtain a lien prior to that of the mortgagee, the reason being that in such a case it will be presumed that the mortgagee has constituted the mortgagor in possession his agent to have the necessary repairs made.

The law as laid down in *Watts v. Sweeney* has not generally been extended beyond courts of admiralty and where public service companies use goods in their business over rather long periods of time. It has always been the law in admiralty that where the owner of a ship mortgages the same, a mechanic doing necessary repairs to the ship has a lien prior to that of the mortgagee. The reasons for this rule lie largely in the conditions which exist at sea and on the ground

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<sup>11</sup>*Kilmer v. Moneyweight Scale Co.* (1905) 36 Ind. App. 568. *Gaar v. Fleschman* (1906) 38 Ind. App. 490.

<sup>12</sup>*Heyns v. Meyer* (1910) 46 Ind. App. 45.

<sup>13</sup>137 N. E. 570 (1922).

<sup>14</sup>127 Ind. 116.

that such repairs protect the security of the mortgagee. The last case in Indiana involving the priority of claims of laborers or material men over the lien of the conditional seller is *Pierce v. Blair*. Here the court simply held that where the conditional seller of a coal mine sells the same on the condition that the buyer pay a large portion of the profits monthly, derived from the operation of the mine, over a period of years after deducting expenses of mining, and where the buyer is simply to have a salary during said operation, the miners working in said mine may have a lien for wages prior to the lien of the conditional seller. In other words, the case is brought within the rule of *Watts v. Sweeney* in which case the property mortgaged was also to be used in earning the money with which the mortgage debt was to be paid.

It seems to the writer that the rule as laid down in *Watts v. Sweeney* and *Pierce v. Blair* may in some instances be difficult of application and should not be extended beyond the field of public utilities, courts of admiralty and perhaps in cases of sales of coal mines.

The conditional sale of railway rolling stock is regulated in detail by a statute and will not be discussed in this article.<sup>16</sup>

The question often arises just what rights the parties have where property has been sold conditionally and for the purpose of re-sale. In Indiana in *Orner v. Sattley Manufacturing Co.*<sup>17</sup> it was held that a reservation of title in a conditional sale for re-sale is valid between the seller and buyer, and the seller may retake the property. But as against a sub-vendee in the usual course of business, such a reservation of title is fraudulent and void.<sup>18</sup>

If the sub-vendee buys in bulk, he is not a purchaser in the ordinary course of business, and where purchase in the ordinary course is a prerequisite to protection, the conditional seller may retake the goods from the purchaser in bulk.<sup>19</sup>

In *Andre v. Murray* it was also held that such goods could not be levied upon by execution and sold to satisfy the buyer's creditors other than the seller; nor could it be taken by the buyer's trustee in bankruptcy to the prejudice of the seller's claim.

Conditional sale contracts for every kind of chattels often forbid the removal of the goods from a certain place, or the alienation of the buyer's interest, or both. Sometimes the prohibition is absolute and sometimes the qualification is inserted that removal or alienation is to

<sup>15</sup> 148 N. E. 414 (1925).

<sup>16</sup> Burns' R. S. 1914, Sections 5526 to 5530 inclusive.

<sup>17</sup> 18 Ind. App. 122 (1897).

<sup>18</sup> *Winchester Wagon Works v. Carman* (1886) 109 Ind. 31.

<sup>19</sup> *Hench v. Eacock* (1898) 21 Ind. App. 444. *Lett v. Eastern Moline Plow Co.* (1910) 46 Ind. App. 56. *Andre v. Murray* (1913) 179 Ind. 576; 101 N. E. 81.

occur only with the seller's written consent.<sup>20</sup> These clauses have been sustained as a reasonable protection of the seller's interest.

Under the Indiana Acts of 1923<sup>21</sup> it is made a felony for the conditional buyer of chattels to sell them or remove them out of the State without the written consent of the seller first obtained.

A breach of the agreement not to remove or alienate without consent is *impliedly* a cause for retaking the goods.<sup>22</sup>

In many cases where the seller has not especially provided for a right to retake the goods, on default, the Courts have found an implication in the contract that such right was to exist. This is especially true in the case of failure to make payment;<sup>23</sup> also where there was a violation of a provision against use of the goods other than on certain premises;<sup>24</sup> also in the case of an attempted absolute sale by the buyer.<sup>25</sup>

But in Indiana, it is a condition precedent to retaking that the seller return to the buyer whatever part payments he has made less damages done to the goods and the value of the use of the same, unless there is a provision in the contract of sale providing for forfeiture of part payments.<sup>26</sup> This is upon the theory that the seller is retaking the goods for his own use and is rescinding the contract.

Where the seller retakes the goods it is upon the notion that there is a rescission of the contract.<sup>27</sup> This is not the theory which prevails in most other jurisdictions. Under the Uniform Conditional Sales Act, the retaking is for security of the seller and for the purpose of foreclosure.

In this state where the seller elects to retake the goods on default of the buyer, he cannot, after taking the goods, sue the buyer for the balance of the price, the reason being that retaking amounts to a rescission and that the consideration for the promise to pay the price has failed after the buyer has lost possession of the goods, and the seller cannot have the goods and the price also.<sup>28</sup>

It has been held that the mere bringing of suit for the price constitutes an election which prevents the seller from retaking the goods later; the theory being that the seller cannot have both the goods and the price and having brought suit for the price, he thereby indicates

<sup>20</sup> *Swain v. Schild* (1917) 66 Ind. App. 156; 117 N. E. 933.

<sup>21</sup> Chapter 126, at page 334.

<sup>22</sup> *Dunbar v. Rawles* (1867) 28 Ind. 225.

<sup>23</sup> *Hodson v. Warner* (1877) 60 Ind. 214.

<sup>24</sup> *Dunbar v. Rawles* (1867) 28 Ind. 225.

<sup>25</sup> *Shireman v. Jackson* (1860) 14 Ind. 459.

<sup>26</sup> *Quality Clothes Shop v. Keeney* (1914) 57 Ind. App. 500; 106 N. E. 541.

<sup>27</sup> *Green v. Sinker* (1893) 135 Ind. 434.

<sup>28</sup> *Green v. Sinker* (1893) 135 Ind. 434. *Turk v. Carnehan* (1900) 25 Ind. App. 125.

an election to abandon his right to the goods and passes title at once to the buyer.<sup>29</sup>

The seller often inserts in the conditional sales contract a clause to the effect that, if the buyer defaults in his payments and the seller exercises his right to retake, all part payments previously made shall be treated as forfeited, or as rental payments, or as payments for damage and depreciation, or as liquidated damages. These clauses have generally been enforced on the theory that the parties might make any contract they desired to make.<sup>30</sup>

A careful study of the law of conditional sales in Indiana, it seems to the writer reveals a vital necessity for the enactment of the Uniform Conditional Sales Act which has for its purpose the codification of the pre-existing law as it prevails in our most progressive states; and to give recognition to the fact that the results of a conditional sale should be the same as a chattel mortgage requiring recording, providing for the protection of the buyer's equity of redemption and making it impossible for him to barter away such equity to his disadvantage. At least there should be a statute requiring such transactions to be recorded and protecting the buyer's equity against conscienceless repossession on the part of the seller.

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<sup>29</sup> *Smith v. Barber* (1899) 153 Ind. 322.

<sup>30</sup> *Green v. Sinker* (1893) 135 Ind. 434.

# INDIANA LAW JOURNAL

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Published Monthly, October to June, inclusive, by the Indiana State Bar Association

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EXECUTIVE OFFICE, 217 STATE HOUSE, INDIANAPOLIS, INDIANA  
EDITORIAL OFFICE, BLOOMINGTON, INDIANA

SUBSCRIPTION PRICE \$3.00 A YEAR SINGLE COPIES 50 CENTS  
Canadian Subscription Price is \$3.50; Foreign, \$4.00

Subscription price to individuals, not members of the Indiana State Bar Association, \$3.00 a year; to those who are members of the association the price is \$1.50 and is included in their annual dues, \$5.00.

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