Conditional Sales Contract-Vendor's Election of Remedies Where Breach Occurs

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RECENT CASE NOTES

AUTOMOBILES—GRATUITOUS BAILEE—IMPUTED NEGLIGENCE—The defendant was operating his automobile at an unlawful rate of speed and attempted to make a left turn in violation of the traffic code, thereby colliding with plaintiff's automobile which was being operated by plaintiff's wife. Plaintiff brings this action to recover for the damages to his automobile. The defendant sets up the contributory negligence of the plaintiff's wife by way of defense. Held: Such contributory negligence will not be imputed to the plaintiff so as to bar his recovery. Lee v. Layton, Appellate Court of Indiana, August 1, 1924, 167 N. E. 540.

The weight of authority and modern tendency is that the contributory negligence of a bailee is not imputable to the bailor, where the subject of the bailment is damaged by a third person. Lloyd v. Northern Pacific R. Co., 107 Wash. 57; Sea Ins. Co. v. Vicksburg, S. & P. R. Co., 159 Fed. 676; New York, L. I. & W. R. Co. v. New Jersey Electric R. Co., 60 N. J. L. 338. The early cases, however, held that the bailee's negligence was imputable to the bailor; and that the bailor could only recover, where on the same facts the bailee might recover. Illinois Central R. Co. v. Sims, 77 Miss. 325; Texas and P. R. Co. v. Tankersly, 63 Tex. 57. Weltz v. Indianapolis and V. R. Co., 105 Ind. 55, is often cited in support of this minority view, 17 L. R. A. (N. S.) 926; 6 A. L. R. 316; 45 C. J. 1027; but the Appellate Court, in their opinion in the principal case, attempt to distinguish it from the principal case.

The marriage station in itself raises no presumption of agency, Debenham v. Mellon, L. R. 6 A. C. 24; and in the absence of such a relation in fact, the doctrine of imputable negligence is inapplicable; that is, negligence will not be imputed by reason of the marriage relation. The Louisville, N. A. & C. R. Co. v. Creek, 130 Ind. 139.

Under the facts of the present case the husband would clearly be liable for damages caused by the wife in a jurisdiction which adopts the family automobile doctrine. Plasch v. Fass, 144 Minn. 48; Birch v. Abercrombie, 74 Wash. 486. Therefore it would seem that the majority rule as to imputable negligence should be inapplicable in a jurisdiction which recognizes the family automobile doctrine, because to hold the husband liable for damages caused by the bailee and not make him subject to the defense of the bailee's conduct, would be inconsistent. However, Indiana has repudiated the family automobile doctrine. Smith v. Weaver, 73 Ind. App. 350; McGran v. Cromwell, 86 Ind. App. 107. Therefore the present decision appears to be both correct and consistent.

J. A. B.

CONDITIONAL SALES CONTRACT—VENDOR'S ELECTION OF REMEDIES WHERE BREACH OCCURS—On October 18, 1926, defendant Crute purchased of Prince Motor Co., a certain motor truck, title to remain in vendor until the consideration was paid. The conditional sales contract was evidenced by two promissory notes, one for $250 due 5 months after date, the other for $682.50 payable in monthly installments of $45. Each note was executed by Crute as principal, payable to Prince Motor Co., and each contained a description of the truck and a provision that it was given "as a part of contract for the automobile" which was "to remain the property of the Prince Motor Co. until all notes given" shall have been paid in full; that

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on default of payment of said notes at maturity, or any of said payments, all of them were to become due, the rights of the vendee under the contract were to be forfeited, and the vendor could resume possession of said automobile without liability to refund any money previously paid on account of the contract. The notes were assigned to plaintiff for valuable consideration, and later, defendant having defaulted as to monthly payments, plaintiff repossessed the truck and commenced this action to enforce the collection of the $250 note. Trial resulted in a finding and judgment for plaintiff, and defendants appeal. Held: Judgment reversed. Crute et al. v. La Porte Discount Corporation (No. 13507), App. Ct. Ind., August 1, 1929, 167 N. E. 542.

A vendor of property conditionally sold, reserving title to himself until the purchase price is paid, may in case of default by the vendee either sue to recover the specific property, or affirm the sale and sue for the price; but he cannot do both, as the remedies are inconsistent. Quality Clothes Shop v. Keene, 57 Ind. App. 500, 106 N. E. 41; Reeves v. Miller, 91 N. E. 812; Randall v. Chaney, 84 Ind. App. 280, 151 N. E. 105; Peoples State Bank of Indianapolis v. Hall, 83 Ind. App. 385, 148 N. E. 486; Turk v. Carahana et al., 25 Ind. App. 125, 57 N. E. 729; Green v. Slaker, Davis & Co., 135 Ind. 434, 35 N. E. 262; and having disaffirmed and taken possession of the property, the consideration for the note is destroyed and his right to recover on the note is lost, with one exception noted below.* Randall v. Chaney, supra. The courts are in conflict as to what constitutes an election between the two remedies, some holding that it is not the judgment which may be obtained, but the commencement of a suit to enforce a co-existing, inconsistent remedy in a court having jurisdiction which constitutes the decisive act and makes the election binding; Eilers Music House v. Douglas, 90 Wash. 583, 156 P. 937, L. R. A. 1916F 613; Frisch v. Wells, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (NS) 144; Orcutt v. Rickenbrodt, 59 N. Y. S. 1008; (but see Ratchford v. Cayuga County Cold Storage & Warehouse Co., 217 N. Y. 565, 112 N. E. 447); Truax v. Parvis, 7 Houst. (Del.), 32 Atl. 227; Merchants and P. Bank v. Thomas, 69 Tex. 237, 6 S. W. 565; Boas v. Knewing (Cal.), 165 P. 690, L. R. A. 1917F, 462; Osborne & Co. v. Walther, 12 Okla. 20, 69 P. 953; while other courts hold that where the seller brings suit and obtains judgment he has not lost the right to retake the property where the judgment remains unpaid; Thomason v. Lewis, 103 Ala. 426, 15 So. 830; Vaughn v. Hopson, 10 Bush 337; McPherson v. Acme Lumber Co., 70 Miss. 849, 12 So. 857; Campbell Printing Press and Mfg. Co. v. Rockaway Pub. Co., 56 N. J. L. 676, 29 Atl. 681; Root v. Lord, 23 Vt. 568; Moon v. Wright, 12 Ga. App. 659, 78 S. E. 141; or where the suit is discontinued before judgment. Matthews v. Lucia, 55 Vt. 308. The authority seems about equally divided, and there is apparently no case directly in point in Indiana. In some jurisdictions, on default of the buyer, part payments are regarded as forfeited, and it is not therefore necessary to return the payments received or notes given for the price as a condition precedent to a recovery of the goods. Fields v. Williams, 91 Ala. 502, 8 So. 808; Hughes v. Keely, 40 Conn. 148; Latham v. Sumner, 89 Ill. 233, 31 Am. Rep. 79; Fleck v. Warner, 25 Kans. 492; White v. Oakes, 88 Me. 367, 34 Atl. 175; Lorain Steel Co. v. Norfolk etc. Ry. Co., 187 Mass. 500, 73 N. E. 646; Tufts v. D'Arcambal, 35 Mich. 185, 48 N. W. 497; Duke v. Shackel-
In other jurisdictions, however, the rule has been adopted that a return of the payments made or notes given is a condition precedent to a recovery of the property. *American Soda Fountain Co. v. Dean Drug Co.*, 136 Iowa 312, 111 N. W. 534; *Ketchum v. Brennan*, 53 Miss. 596; *Shafer v. Rossell*, 28 Utah 444, 79 P. 559; *Segrist v. Crabtree*, 131 U. S. 287. Of course, the right to retain the amounts paid may depend upon express stipulation; *Singer Mfg. Co. v. Treadway*, 4 Ill. App. 57; and on the other hand the contract may preclude a forfeiture of payment by stipulating that the vendor may recover the property and reasonable charges. *Fairbanks v. Malloy*, 16 Ill. App. 277. So too, it has been held that the seller may retain such amount as will compensate him for any deterioration of the goods in the hands of the buyer. *Commercial Pub. Co. v. Campbell Printing Press*, etc. Co., 111 Ga. 388, 36 S. E. 756. The settled rule in Indiana is, that in the absence of a forfeiture clause either express or implied, by virtue of which all prior payments are to be retained by the vendor as liquidated damages, upon retaking the property, he must account to the vendee for the payments made to him. *Quality Clothes Shop v. Keeney*, supra. Where a note is not included within the conditional terms of a contract of sale, but is given as the equivalent of cash for a preliminary payment, its consideration does not fail by reason of the recapture of the property by the vendor upon the vendee's default, and the vendor may still enforce it. *Norman v. Meehor*, 91 Wash. 534, 188 Pac. 78, Ann. Cas. 1917D, 462; *Randall v. Chaney*, supra. Here, however, the conditional provisions of the sale contract were inserted in the note, and no mistake is alleged or reformation sought. The note in suit being part of the original conditional agreement, and the consideration having failed therefor, the general rule prevails, and it follows that the vendor cannot recover on the note. K. J. M.

**Criminal Law—Search and Seizure—Consent—** Officers sent to search D.'s home for intoxicating liquor read search warrant to D.'s wife, who said "COME RIGHT IN. You are welcome to search here. You will not find anything." Search warrant invalid. HELD: Such language did not constitute an invitation to search, nor a waiver of D.'s constitutional right against unlawful search and seizure. *State v. Connor*, 167 N. E. 545. Case is in accord with *Meno v. State*, 197 Ind. 16, in holding that one acquiescing to search under a warrant is merely yielding to legal coercion, resistance to which is an offense against the state, and does not thereby consent to the search. Accord: *State v. Owens*, 259 S. W. 100 (Ky.); *State v. Lock*, 259 S. W. 116 (Mo.); *Hampden v. State*, 252 S. W. 1007 (Tenn).

Failure to object to officers' search held not consent in *U. S. v. Olmstead*, 7 Fed. (2nd) 760, and yielding to a show of force is not consent, *Amos v. U. S.*, 255 U. S. 313; but see *Gallendon v. U. S.*, 5 Fed. (2nd) 673, assent under a threat to procure a search warrant held good consent. Owner of property, in reply to a show of a search warrant said "All right. Go ahead. You won't find anything." Held to constitute waiver as a matter of law. *State v. Uttila*, 71 Mont. 351. Accord, *Gray v. Commonwealth*, 749 S. W. 769; *Smith v. McDufllee*, 72 Ore. 236; *State v. Luna*, 266 S. W. 755 (Mo.). Perhaps the best rule is, where there is a conflict of facts as to alleged waiver, to submit the question to the jury under proper instructions. *People v. Forman*, 188 N. W. 375 (Mich.).