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TOWARDS NEGOTIABILITY OF GOODS

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It has been uniformly held as a rule supported by imposing precedent in the common-law field of Sales of Goods that a buyer acquires no other or greater title than the seller had, that, aside from statutes, possession alone does not give the possessor the right or power to dispose of the goods to a third party to the prejudice of the title of the true owner.[1]

But by all courts an exception is admitted to the above rule to the effect that the owner of the goods may clothe the possessor with apparent authority to sell or apparent ownership, whereby third parties found to be bona fide purchasers for value without notice from the possessor will prevail over the original owner in any action wherein such owner seeks to assert his title to the goods.[2] The equitable maxim, "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer," is sometimes used to reach the same results.[3] This maxim, however, has often been criticized as vague and impossible of precise application, serving, perhaps, as a good restatement of what has been decided but as no accurate basis for the decision. In all cases, however, that have been correctly decided by application of the above mentioned exceptions to the primary rule of property mentioned above, something more than possession is necessary in the intermediate party, as a bill of sale signed by the original owner placed in the hands of the possessor or words or acts of the owner which would reasonably lead the third party to believe that the possessor is either an authorized agent to sell or the holder of the legal title, before the third party is allowed to prevail over the real owner.[4]

From a search of the primary authorities it appears, however, that another exception has been made to the rule of property law that a buyer acquires no other

1 - Henderson Baker Lmbr. Co. v. Headley, 247 Ala. 681, 26 So. 2d 81; Metropolitan Finance Corp. of America v. Morf, 42 Cal. App. 2d 756, 109 P. 2d 969; Church v. Mellville, 17 Or. 413, 21 P. 387; Moore v. Long, 33 So. 2d 6, 1947.

2 - Kearby v. Western States Securities Co. 31 Ariz. 104, 250 P. 766; Uniform Sales Act, Section 23.

3 - Cal. Div. Code 3542; Conklin v. Benson, 159 Cal. 785, 116 P. 34.

4 - Pickering v. Busk, 15 East 38, 1812; Nixon v. Brown, 57 N.H. 34, 1876; Pool v. George, 209 S.W. 2d 209; see Vold, Cases on Sales, 1949 Ed. Pg. 466 nt. 14.

or greater title than the seller had. The Courts have not put this exception, as yet, in the form of a rule, nor have they in fact openly admitted that they were treading in waters beyond apparent authority or ownership,[5] yet from an analysis of the facts of recent decisions of some courts, it appears that the possessor of goods with no indicia of ownership nor apparent authority to sell who received the goods in pursuance of a contract to sell has been given the power to invest title of his transferror in a bona fide purchaser for value without notice of the rights of the original party.[6]

Perhaps the most common and clearest illustration of an owner being deprived of his goods is the situation where he delivers to B who is in the business of selling that and similar merchandise. A sale by B in this case not in accordance with authority given or even where no authority to sell is given would place the title in the bona fide purchaser for value without notice. The rule is well stated by Justice Field in an obiter: "The delivery of goods to a merchant engaged in the sale of articles of a similar kind, is such evidence of bestowal of the right to dispose of the same as to protect the purchaser from the possessor."[7] There is no question that under such facts there is something more than possession in the intermediate party that precludes the original owner from the recovery of his goods or their value.

A closer case, however, is presented when the intermediate party acts both in the capacity of seller of his own goods and as bailee of goods for others. These cases usually do not involve delivery of possession in pursuance of a contract to sell, but do indicate the extent of the rules of apparent authority or apparent ownership. In Kastner v. Andrews,[8] where the farmer's grain was bailed to the elevator operator, who was also in the business of selling his own grain, a purchaser from the elevator operator with no actual

5 - See as an illustration of this point Blount v. Bainbridge, 79 Ga. App. 99, 53 S.E. 2d 122, Apr. 1949.

6 - Close on the facts as to whether there was more than possession, see Jesse Meadows v. Hampton Live Stock Comm. Co., 55 Cal. App. 2d 634, 131 P. 591, 1942. Here the original seller refused to give a bill of sale as required by the Ag. Code, wishing to reserve title until he received cash. The bona fide purchaser from the possessor prevailed.

7 - Wright v. Soloman, 19 Cal. 64.

8 - Kastner v. Andrews, 49 N.D. 1059, 194 N.W. 824, 1923.

knowledge of the specific transaction of bailment was held liable in conversion to the bailor. It was held that the purchaser could not rely upon apparent ownership created by the act of the farmer, since as a grain dealer he knew the manner in which the Elevator Co. did business generally. A reverse holding was made in Kearby v. Western States Securities Co.,[9] where it was contended that even if there were no authority to sell, the Security Co. that allowed the automobile dealer to display the car for sale purposes was bound by a sale thereof to a good faith purchaser for value without notice. Such cases may be distinguished, it seems, on the score of knowledge, that which will serve as apparent ownership for one being insufficient for another. better informed.

And if a bill of sale signed by the owner accompanies the possession, although title was withheld, the bona fide purchaser from the possessor prevails.[10]

Whether apparent ownership or authority to sell exists, for practical purposes the same question whether estoppel is present, may get still closer. In Keegan v. Kaufman Bros. et. al.[11] lambs were bought from the possessor for cash in good faith and without notice that title was in other than the possessor. The original vendor here reserved title until cash was received from a check given by the possessor. The cash was not received, nor was receipt of the same waived. The original vendor stood by as the sheep were loaded, the court by that fact estopping him from asserting his title, insisting that an "indicia of ownership" was created by the seller standing by.

It seems the court might have been on sounder footing if "indicia of ownership" were based on the fact that sheep were delivered to one in the business of selling sheep. But to that reasoning the same rebuttal might have been used as was used in Kastner v. Andrews, supra.[12]

To ascribe apparent authority or ownership to a

9 - Cited in Note 2.
10 - Dudley v. Lovins, 220 S.W. 2d 978.
11 - 68 Cal. App. 2d 197, 156 P. 2d 261, 1945. See also Meadows case cited in Note 6.
12 - Citation, Note 8. The Court said: "The purchaser likewise knows the character of the business transacted by the warehouseman (intermediate party) and knows that in the ordinary conduct of such business he will both purchase . . . This carries notice that his right to sell is limited . . . Hence no reason is apparent for making an exception to the rule of "caveat emptor". "

transaction the original seller by word or act must mislead the third party to his prejudice. There is no positive duty upon the original party.[13] The bona fide purchaser here was not made to believe that the possessor was owner by any act, admission or conduct of the original owner; he depended upon his own knowledge of the facts. It is said to be well settled that "standing by" creates a good basis for estoppel,[14] yet the cases examined do not reanalyze the situation with reference to the theory of estoppel, but merely cite precedent and authority for support.

Aside from apparent ownership would the California case referred to in some detail above have been decided the same? Perhaps an answer may be got from decisions in other jurisdictions to follow.[15]

A recent case that bombards the facts with various legal theories in an attempt to protect the bona fide purchaser from a possessor who received the goods by virtue of a contract to sell is Sullivan Co. v. Larson, a Nebraska decision.[16] The original seller sought to replevy 28 head of cattle. Plaintiff sold them to B, who gave a bad check; no title was to pass until cash was received. Defendant bought the cattle at auction conducted on behalf of B, and judgment went for the defendant. The court, relying upon possession alone as indication of ownership, allowed the bona fide purchaser to prevail.

The court cites Parr v. Helfrich,[17] really no authority for the present decision, for there a certified check was involved, the original transaction held to be one where the title of the goods was meant to pass for the certified check, it being considered the equivalent of cash. The Uniform Sales Act, Section 23, was cited, the court opining that plaintiff had allowed the

13 - Estoppel by silence, Black's Law Dict, wherein it is defined as: "A kind of equitable estoppel arising where a person under a duty to another to speak refrains from so doing, and thereby leads the latter to believe in the existence of a state of facts, in reliance on which he acts to his prejudice;" Farmers' State Bank of Jefferson v. Jordan, 61 Okl. 15, 160 P. 53, 54.
14 - Vold, Cases on Sales, 1949, Pg. 55, Note 63.
15 - Compare Keegan et al. v. Lenzie, 171 Or. 194, 135 P. 2d 717, for stricter view. But see Mogul Transportation Co. v. Larison, 181 P. 2d 139, 1947, decided after the Keegan case. A cash sale was intended, and the court in a dictum stated: "Title to property does not pass until payment, and, if the buyer has taken possession without paying the price, the seller, unless he has waived concurrent payment, may reclaim the property if, in the interim, rights of innocent third persons have not intervened."
16 - 149 Neb. 97, 30 N.W. 460, 1948.
17 - 108 Neb. 801, 189 N.W. 281, 1922.

possessor to hold himself out as owner, thereby being precluded from asserting his title. But the possessor in fact had no more than possession of the cattle, the bill of lading, which was not negotiable, of course, in his possession reciting the plaintiff both as consignor and consignee. It may be, though unexpressed, that in view of the facts that the possessor had trucked the cattle some distance, sold them through another at a bona fide auction, that the wiser course was to leave the transaction closed to prevent the inconvenience, even disruption of the flow of commerce.

As to the court's suggestion that voidable title passed, it need only be pointed out that the first parties contemplated a cash transaction, of which there was no waiver.

A recent Georgia decision states the new rule in this fashion: "Where one, under a contract of sale (to sell?) gives to another unrestricted and unqualified possession of personal property to deal with and use as his own a bona fide purchaser for value from such person in possession divests such owner of his title . ."[18] The court then lessened the force of its assertion by indicating that additionally some elements of estoppel must intervene. Yet why indeed should estoppel intervene? Particularly why should estoppel as apparent authority or apparent ownership, or either apparent authority or apparent ownership as doctrines differing slightly from estoppel, be summoned to protect the bona fide purchaser when it or they do not logically fit the facts? A further rule is needed to give expression to a good body of decisions and surely to the needs of stable commerce in the particular and fluid commerce in the aggregate. Let the duty of vigilance be cast upon the original party when pursuant to a contract to sell he delivers possession. As to the bona fide purchaser let the transaction be the same as a completed sale.[19]

The suggestion of the Ward case (supra) was followed in Blount v. Bainbridge, 20 where a directed verdict of the lower court in favor of the plaintiff was reversed. In the lower court directed verdict went for the plaintiff on the grounds that "one cannot be a

18 - Capital Automobile Co. v. Ward, 54 Ga. App. 873, 189 S.E. 713, 1936.
19 - See 25 Col. L.R. 129 where it is suggested that the seller beware.

bona fide purchaser (sic) . . . where he takes the property without any indicia of ownership." Here the intermediate party gave a worthless check for the car, subsequently placed it up for sale in a garage unknown to the seller, who was not aware that the car was being taken for resale. In reversing the court feels somewhat insecure, it appears, with estoppel so grasps the "catch-all" maxim, "that where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." But the obvious result of the decision is to allow the possessor to divest the original owner of his title, since the original owner put the possession of the goods in the intermediate party in pursuance of a contract to sell.

The question to be answered, it then appears, is whether the doctrines of apparent authority or ownership should be applied within their logical limits or whether the progress of the law is in search of a new rule? The latter would seem true, surely desirable. Let the seller beware when he contracts to sell and delivers possession in pursuance thereof. The original seller means to divest himself of his title upon condition after delivery of possession, so it is no real injustice to him if the law ignores the condition insofar as a bona fide purchaser for value without notice is concerned. Commercial transactions would be stabilized within this situation, and consonant with the economic theory that was responsible for the negotiability of bills and notes, later other documents, such stability brings about increased commerce and thus greater wealth generally.[21]

20 - 79 Ga. App. 99, 53 S.E. 2d 122, 1949.

21 - See Uniform Revised Sales Act, Sec. 2-401 (1) 1949 draft, in accord generally.