Hastings Law Journal

Volume 3 | Issue 2 Article 11

1-1952

Sales: Worthless Check Cash Sales

Richard Soulsby

not a volunteer.[8] The reason one co-tenant is allowed contribution when both are living is that both have an interest in the property, and both are primarily liable for the debt. When one co-tenant pays off the debt, he has protected the interest of his co-tenant as a necessary incident, and is subrogated to the rights of the creditor to the extent that he has paid more than his share of the debt.[9] After the death of one joint tenant, the survivor is not removing a lien on property in which he and the estate of the deceased joint tenant are jointly interested, but is removing a lien from his own property; property in which he alone is interested. It is unjust to require the estate of the deceased joint tenant to contribute toward paying off an encumbrance on the property of another.

There are apparently no cases exactly in point, but there are two analogous situations, each of which deny contribution or subrogation. The first is the case of a mortgagor who sells his equity of redemption to a grantee who either assumes,[10] or takes subject to the mortgage.[11] Here the original mortgagor then becomes a surety to pay off the debt only if the grantee is unable to do so,[12] or the value of the land is insufficient[13] to pay the debt. The grantee of the land is now the principal debtor, and the mortgagor is reduced to the position of surety; liable only if the principal debtor is unable to pay.[14] It is to be noted that here the one formerly the owner and primarily liable now has no interest in the property and is only secondarily liable. Should the grantee pay off the debt, naturally he would be denied contribution from his grantor.[15] The second is the case of a joint tenant co-mortgagor who sells his interest to his co-tenant. Here too the grantor is reduced from a principal debtor to a surety. The one formerly an owner and primarily liable now has no interest in the property and is only liable should the grantee be unable to pay. Contribution should also be denied here if the now owner of both interests should pay off the debt. This second case is analogous to the principal case. It should make no difference that the present sole owner acquired his co-tenant's interest by purchase, or by virtue of survivorship. In all of these cases a party formerly interested in the property now has no interest, and his liability is reduced from primary liability to secondary liability. It is manifest error to allow the principal debtor to recover contribution from the surety as was allowed in the principal case. *T. Marsh.*

SALES: WORTHLESS CHECK CASH SALES.—The Supreme Court of Arkansas held in the case of *Pingleton* v. *Shepherd*[1] that a fraudulent purchase of personal property is not void but only voidable, and that unless avoided by the seller, the fraudulent buyer can pass good title to a bona fide purchaser with no notice of the fraud.

One Wortham gave the plaintiffs a worthless check for the purchase price of an

---

[8]Parsons v. Urie, 104 Md. 238, 64 Atl. 927 (1906).

[9]Carpenter v. Koons, *supra* note 7.

[10]Howard v. Burns, 279 Ill. 256, 116 N.E. 703 (1917); Minnesota Trust Co. v. Peteler Car Co., 132 Minn. 277, 156 N.W. 255 (1916).

[11]Johnson v. Zink, 51 N.Y. 333 (1873); University State Bank v. Steeves, 85 Wash. 55, 147 Pac. 645 (1915).

[12]See note 10 *supra.*

[13]See note 11 *supra.*

[14]See note 10 *supra.*

[15]Dodds v. Spring, 174 Cal. 412, 162 Pac. 351 (1917); Drury v. Holden, 121 Ill. 130, 13 N.E. 547 (1887); Lydon v. Campbell, 204 Mass. 580, 91 N.E. 151 (1910).

[1]242 S.W.2d 971 (Ark., 1951).

automobile, falsely representing that the check was good, and before any action was taken by plaintiffs, the car had been sold to defendant, a bona fide purchaser. Appellants contend that since the fraudulent buyer, Wortham, obtained possession of the car by means of false representations, title remained in them and that none could therefore pass to defendant, and that the car could be replevied from defendant. The trial court held that since the car was obtained through the false representations that title obtained thereby was voidable, and that since plaintiffs had not avoided it, Wortham could pass good title to defendant, the bona fide purchaser for value without notice.

Section 24 of the Uniform Sales Act is cited as the controlling doctrine for the principle that such a fraudulent purchase is not void, but only voidable. However, there is a conflict in the courts as to whether such a worthless check cash sale as this is a void transaction, or only voidable at the election or action of the defrauded seller.[2] Some courts and statutes hold and provide that a defective or voidable title passes to the fraudulent buyer,[3] but it seems that a majority of the courts regard such payment by check, whether worthless or good, as being merely conditional, with title remaining in the seller until the check is cashed.[4]

Although delivery of the chattel and payment of the purchase money are not in fact simultaneous in cases where payment is by check, it can hardly be doubted that such a transaction is in substance a cash sale, and is so regarded by the parties to the sale.[5] That delivery of a check to the seller by the purchaser does not indicate an intention to extend credit to the buyer until the check is cashed is amply evidenced by the decisions of the courts.[6] In a cash sale the intentions of the parties determine the effect of transfer of possession on the title of the chattel, where a check has been given in payment, and the intention may be expressly declared or implied from the terms and nature of the sale.[7] In those cases where the court feels that the seller has passed a voidable or defeasible title to the fraudulent buyer, it seems as though the court is looking beyond the buyer and the actual intent of the seller to the position of the bona fide purchaser, and is attempting to protect the newly acquired "title" of the purchaser at the expense of the original seller who had a "misplaced confidence" in the fraudulent buyer, in whose hands mere possession was placed, if such were

---

[2](a) For those decisions holding fraudulent sales voidable, *see* Sullivan Co. v. Wells, 89 F.Supp. 317 (D. Neb., 1950); Keegan v. Kaufman Bros., 68 Cal.App.2d 197, 156 P.2d 261 (1945); (b) for those decisions holding fraudulent sales void, *see* Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S.W. 125 (1924); Morehouse v. Keyport Auto Sales Co., 118 N.J.Eq. 368, 179 Atl. 279 (1935); Clark v. Hamilton Diamond Co., 209 Cal. 1, 284 Pac. 915 (1930); *but cf.* J. L. McClure Motor Co. v. McClain, 34 Ala.App. 614, 42 So.2d 266 (1949).

[3]See note 2(a) *supra.*

[4]See note 2(b) *supra:* ". . . the American judicial materials have preponderantly held, that where in a cash sale transaction, no credit being contemplated, the goods are delivered on the giving of a check for the price and the check is not paid on due presentation, the property interest in the goods never passes to the buyer." Vold, *Worthless Check Cash Sales,* 1 HAST. L.J. 111, 113 (1950). Then, necessarily, title remains in the seller until the check is cashed, and it then passes to the buyer.

[5]Morehouse v. Keyport Auto Sales Co., 118 N.J.Eq. 368, 179 Atl. 279 (1935); People's State Bank v. Brown, 80 Kan. 520, 103 Pac. 102 (1909); Vold, *supra* note 4, at 116-117.

[6]Casey v. Gallagher, 326 Mass. 746, 96 N.E.2d 709 (1950); Clark v. Hamilton Diamond Co., 209 Cal. 1, 284 Pac. 915 (1930); People's State Bank v. Brown, *supra* note 5; Vold, *supra* note 4, at 117, note 16.

[7]South San Francisco Packing & Provision Co. v. Jacobsen, 183 Cal. 131, 190 Pac. 628 (1920); Nicewarner v. Alston, 228 S.W.2d 872 (Tex. Civ. App., 1950) (defendant gave a draft on a bank in payment, but the court grouped drafts and checks together as to the effect of the application of the law).

the seller's only "error."[8] It is said by Williston, in his work on Sales, that "if a seller should say, 'you must not deal with these goods, though I have put them in your hands, till I collect the check,' that would show an intent not to transfer the property to the buyer. . . ."[9] It may be inferred from that that Williston advocates an express declaration of reservation of title in the seller in a check cash sale, and that if such declaration is not present, the court should find the presumption that the seller intended title to pass, voidable until the check is cashed or until the buyer resells to a bona fide purchaser.

However, other cases have held that if the seller accepts a check as absolute payment and gives up possession thereon, title passes unconditionally, but if no intent is expressed, there is a presumption that the check represents only conditional payment and that title passes only on payment of the check.[10] It is submitted that the latter presumption is more founded in reason, for the seller realizes that he holds only an instrument which may or may not be transmuted into money, and a reasonable and prudent seller will not entrust the title to his chattels to a man with whom he is very often acquainted only in an impersonal commercial transaction.

It is generally held by the weight of authority that when the seller entrusts in the buyer the possession and sufficient indicia or evidence of title to clothe the buyer with an apparent authority to sell, the original seller will be estopped from asserting his title as against a bona fide purchaser from the original buyer, and this is so whether or not the check given in payment of the purchase price has been paid or has been dishonored on presentment.[11] The rationale behind this doctrine seems to be that the second buyer should not rely on the possession alone of the prospective seller, but that when the seller, the fraudulent buyer, has such indicia of title that the reasonable and prudent man would believe title was in his hands, such evidence is sufficient to protect the bona fide purchaser if he purchases from the fraudulent buyer,[12] who in truth might have obtained such indicia of title or apparent authority to sell directly from the original seller or through the sheer negligence of the original seller.[13] And yet it is submitted that it still is not correct to speak of a "voidable title" or "defective title" in the hands of the fraudulent buyer, and that the indicia of title was placed in the hands of the buyer to facilitate the physical elements of the sale by consolidating them into one operation, and that the seller would intend to treat the entire foregoing operation as a nullity if the check were not honored or paid. The complete title would still be in the original seller, subject to defeasance if the chattel were transferred to a bona fide purchaser for value without notice of the fraud.

---

[8]Keegan v. Kaufman Bros., 68 Cal.App.2d 197, 156 P.2d 261 (1945) (where the true owner is guilty of no more than misplaced confidence, such misplaced confidence is negligence within Calif. Civil Code, § 3543, which states, in effect, 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).

[9]2 WILLISTON, SALES, § 346a (3d ed., 1948).

[10]Towey v. Esser, 133 Cal.App. 669, 24 P.2d 853 (1933); National Bank of Commerce v. Chicago B. & N. R. Co., 44 Minn. 224, 46 N.W. 342 (1890).

[11]Sullivan Co. v. Wells, 89 F.Supp. 317 (D. Neb., 1950); J. L. McClure Motor Co. v. McClain, 34 Ala.App. 614, 42 So.2d 266 (1949) (certificate of title); Seward v. Evrard, 240 Mo.App. 893, 222 S.W.2d 509 (1949) (certificate of registration and license).

[12]Seward v. Evrard, *supra* note 11; E. I. DuPont de Nemours & Co. v. Laird, 24 Del.Ch. 152, 8 A.2d 162 (1939) (shares of stock indorsed in blank with power of attorney to transfer them on the books of the corporation); Dresher v. Roy Wilmouth Co., 118 Ind.App. 542, 82 N.E.2d 260 (1948) (possession plus lien-free, clear title).

[13]Where, as dictum, the court states that the seller's "misplaced confidence" in the trustworthiness of the buyer is negligence, *see* Keegan v. Kaufman Bros., 68 Cal.App.2d 197, 203, 156 P.2d 261, 267 (1945); that acceptance of a check is the usual custom and does not intimate negligence, *see* Cowan v. Thompson, 25 Tenn.App. 130, 152 S.W.2d 1036 (1941).

A rebuttal of this hypothesis has been put forth that if a buyer is not entitled to resell the goods or deal with them as his own until the check is paid, then even a person whose check was backed by sufficient funds would be a tortfeasor if he sold the goods before payment of the check, in that he would be dealing with goods of which he had not title in a manner adverse to the true owner's interests.[14] A sufficient answer to this contention may possibly be found in the holding of several courts that the payment of the check relates back to the time of delivery,[15] and that therefore the payment of the purchase is viewed as if the payment had been made in cash. It would seem to follow that the title of the chattel is looked upon as if it passed to the original buyer at the time of delivery of the check, but only if the check has been honored. It is further submitted that the original buyer is not a tortfeasor by virtue of his dealing with the chattels before the check has been cashed, but that the original seller has entrusted the buyer both possession and an authority to deal with the goods with subsequent buyers, but only to the extent of the validity of the check. If the goods are in the hands of a subsequent purchaser and the check is honored, payment and passage of title should relate back to the delivery of the check, and the subsequent purchaser has good title. Further, if the check were dishonored, and the seller has not presented sufficient indicia of title, the condition precedent to passage of title in a cash sale would not have been fulfilled, title would remain in the original seller, and he would be able to recover the chattel from the second purchaser on the basis of the many decisions that a subsequent purchaser is not entitled to rely solely on the possession of the chattel by his seller.[16]

As heretofore stated, when a check is given in payment of chattels, and possession alone is given to the buyer, title does not pass until the check is passed, and delivery of the check is regarded as conditional payment, with no intention of any extension of credit to the buyer.[17] And the majority of the courts should and do hold that title remains in the seller even as to a bona fide purchaser from the buyer, even though the subsequent buyer has no notice.[18]

But the trend of the law seems to be in the direction of increasing the negotiability of goods,[19] which would ultimately be to the detriment of the seller who accepted worthless checks for the purchase price in cash sale transactions, as the bona fide purchaser would obtain greater favor in the eyes of the court and the original seller would hold his title with a less firm grip when faced with a claim of a bona fide purchaser from a fraudulent buyer.

Richard Soulsby.

---

[14]2 WILLISTON, SALES, § 346a (3d ed., 1948).

[15]Drukker v. Howe & Haun Investment Co., 136 Cal.App. 437, 29 P.2d 289 (1934); Texas Mut. Life Ins. Assn. v. Tolbert, 134 Tex. 419, 136 S.W.2d 584 (1940); Hayes v. Federal Shipbuilding & Drydock Co., 5 N.J. Super. 212, 68 A.2d 766 (1949); Franciscan Hotel Co. v. Albuquerque Hotel Co., 37 N.M. 456, 24 P.2d 718 (1933).

[16]"Clothing another person with indicia of ownership does not mean simply giving him possession of a chattel." Sherer-Gilett Co. v. Long, 318 Ill. 432, 149 N.E. 225 (1925); *but cf.* Goddard Grocer Co. v. Freedman, 127 S.W.2d 759 (Mo., 1939) (court said that possession alone is strong indicium of title, and is regarded by the courts as prima facie evidence of title).

[17]See notes 4 and 6 *supra.*

[18]UNIFORM SALES ACT, § 23(1); Morehouse v. Keyport Auto Sales Co., 118 N.J.Eq. 368, 179 Atl. 279 (1935).

[19]UNIFORM REVISED SALES ACT, § 2-405(c), especially Comment 7.