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time the title continues in the plaintiff, is a longer step than we are willing to take."

The court cites and quotes from *Garst v. Hall and Lyon Co.*, a Massachusetts case similar in facts,[38] "the plaintiff's right was founded on personal contract alone, and can be enforced only against the contracting party. To say that the contract is attached to the property and follows it through successive sales which severally pass the title, is a very different proposition."[39]

According to Professor Chafee[40] although numerous eminent authorities and courts have held that such restrictions on chattels are inconsistent with the right of free alienation, not one has promulgated a really convincing reason for holding them inconsistent. It is not the intention of the writer herein to express his opinion as to the propriety of the general rule and its exceptions but merely to state as a conclusion that whatever may be its merits, the general rule throughout the United States and England is that equitable servitudes do not attach to chattels as they do to land.

Herbert Horn

RIGHT TO RECLAIM DELIVERED GOODS IN A CASH SALE

The term "cash sale" as applied to a sale of specific goods has been used by the courts in two different senses. It is sometimes used to denote a sale where title is not to pass until the cash is paid and sometimes to denote a sale where title has passed but possession is not to be delivered until payment is made. When used in the latter sense, the title passes at once upon the completion of the contract by the force of it, so as to cast the risk upon the buyer and entitle the seller to the price. However, the buyer, though he has title, is not entitled to possession until he pays the

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[38] 61 N. E. 219, 179 Mass. 588, 55 L. R. A. 631 (1901).

[39] See 7 A. L. R. 443 and note.

[40] 41 H. L. R. 945, at p. 982.

price; for payment and delivery in such a case are presumed to be concurrent acts, and until payment is made the seller may retain the goods by virtue of his vendor's lien. But the seller retains the goods, and not the title. When the term "cash sale" is used in the former sense on the other hand, title will not pass until the price is paid or the condition waived; for until the payment or its tender, the seller retains not simply the possession, but the title also.[1] The term in its technical sense[2] and as consistently used by the courts of Pennsylvania[3] signifies a sale where the transfer of title is conditioned on payment and not a sale where the transfer of possession or delivery of the goods is conditioned on payment. An eminent writer on the subject[4] uses the term in a very narrow sense and states that a sale is to be regarded as a cash sale, if the parties when they make their bargain contemplate an exchange of the goods for the price *immediately* on making the bargain. It is fundamental that the reader understand that the term "cash sale" as hereinafter referred to in this article signifies its technical meaning which is in accordance with the construction placed on the term by the Pennsylvania courts.

One of the rules often invoked for ascertaining the intention of the parties as to the time at which title passes in a sale of specific goods is found in Rule 1 of Section 19 of the Uniform Sales Act.[5] It provides as follows: "Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed."

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[1]55 C. J. page 569; 11 C. J. page 24 (note) 57 (b).

[2]Vold on Sales, page 168.

[3]Philadelphia & Reading Ry. Co. v. Lehigh Navigation Co., 36 Pa. 204 at 210 (1860); Hand v. Matthews, 208 Pa. 149 (1904); Ewing v. Musser, 42 Pa. Super. Ct. 177 (1910); Robb v. Zern, 42 Pa. Super. Ct. 182 (1910); Brown v. Reber, 30 Pa. Super. Ct. 114 (1906) and Welsh v. Bell, 32 Pa. 12 (1858).

[4]Williston on Sales, Vol. II, page 549.

[5]Act of May 19, 1915, P.L. 543.

Apparently this section of the Act has effected a change in the pre-existing law in Pennsylvania. Prior to the enactment of the Sales Act in Pennsylvania the early case of *Welsh v. Bell*[6] and subsequent cases following that decision[7] held that in the absence of a special provision or understanding to the contrary, a cash sale is generally presumed to have been contemplated, so that if the contract is silent as to the time for payment a cash sale is implied. In other words the cases prior to the act decided that payment in cash was always an implied condition to the transfer of title when nothing was said concerning the time or manner of making payment. Since the adoption of the Sales Act in Pennsylvania the Supreme court of this state in the case of *Collins v. Oliver*[8] expressly followed Rule 1 of Section 19 of the act and stated the doctrine to be that "when the terms of sale are agreed upon and the bargain is struck and everything the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property, and the risk of accident to the goods, vests in the buyer." Again in the case of *Perkins v. Halpren*[9] the court stated the rule to be "that it is the contract to sell a chattel, and not payment or delivery, which passes the property." The effect of the Act and these decisions is to change the pre-existing presumption in favor of a cash sale when nothing is said concerning payment into the presumption in favor of an absolute sale with a lien in the seller. In arriving at this conclusion the writer has not overlooked the lower court decision in the case of *Wheeler v. Payne*[10] which, although decided since the Sales Act, reiterates the rule as it existed prior to the Act. In any event it is undoubtedly well settled both before and after

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[6]32 Pa. 12 (1858).

[7]Hand v. Matthews, 208 Pa. 149 (1904); Brown v. Reber, 30 Pa. Super. Ct. 114 (1906); Mervine v. Arndt, 33 Pa. Super. Ct. 333 (1907); Ewing v. Musser, 42 Pa. Super. Ct. 177 (1910); Robb v. Zern, 42 Pa. Super. Ct. 182 (1910).

[8]299 Pa. 372 at page 376 (1930).

[9]257Pa. 402 at page 408 (1917).

[10]1 D. & C. 155 (1921).

the Sales Act that if the parties expressly provide for a cash sale their manifest intention will be carried out by the courts.[11] It often becomes important to determine just what effect delivery of possession of the goods to the buyer has on the respective rights of the seller and buyer when a cash sale is contemplated.

A leading and often cited [12] Pennsylvania case on this subject is *Frech v. Lewis*.[13] In this case the contract was that the plaintiff should furnish the defendant with two carriages to be paid for on delivery. The carriages were delivered and the defendant promised either to see the plaintiff or send him a check but failed to do either. While the plaintiff was diligent and persistent in demanding payment, at no time did he demand a return of the carriages or in any way assert his right to property in them until after two months and a half had elapsed when he began an action to replevy the goods.

The lower court in which the case arose submitted it to the jury to determine whether the plaintiff by his conduct had waived his right to retake the carriages. The jury found that he had not, and gave the plaintiff a verdict for the carriages. On appeal to the Superior Court the judgment of the lower court was affirmed.[14] The Superior Court held that it could not be said as a matter of law that the plaintiff's conduct amounted to a waiver of his right, but that his delay was only evidence of a waiver, and not conclusive in view of the conduct of the defendant. On appeal to the Supreme Court the judgment of the Superior

[11]Blair v. Clark, 37 Pa. Super. Ct. 44 (1908); Woolsey v. Axton and Son, 192 Pa. 526 (1899); Frech v. Lewis, 218 Pa. 141 (1907), and Wheeler v. Payne, 1 D. & C. 155 (1921).

[12]McCabe v. Northampton Trust Co., 60 Pa. Super. Ct. 20 (1915); Sheritt and Stoer Co. v. Roberts Engineering Co., 73 Pa. Super. Ct. 151 (1919); Penn Lumber Co. v. Hanover Binding and Manufacturing Co., 96 Pa. Super. Ct. 20 (1929); First Nat. Bank of Litchfield v. Pipe and Contractors' Supply Co., 273 Fed. 107 (1921); Dietrick v. U. S. Shipping Board Emergency Fleet Co., 9 Fed. (2nd.) 742 (1925); People's State Bank of Michigan v. Brown, 103 Pac. 102 (1909); L. R. A. 1915 D 356; 23 L. R. A. (N.S.) 824.

[13]218 Pa. 141 (1907).

[14]Frech v. Lewis, 32 Pa. Super. Ct. 279 (1906).

Court was reversed. Justice Stewart in a lengthy opinion, in which he reviewed the Pennsylvania law, said concerning the holding of the Superior Court, "In this we cannot concur. Reliance upon a subsequent promise to pay that leads the seller to refrain from asserting his right to retake the property, is in itself a waiver of the right, and makes absolute a delivery which in the first instance was conditional."

The learned judge laid down the rule as follows: "The settled doctrine of our cases is to the effect, that where the contract of sale provides for payment of the purchase price on delivery of the articles sold, and the seller delivers the goods but the buyer fails to pay, the right of property does not pass to the buyer with the possession, but remains with the seller, who may at his option reclaim the goods. In some jurisdictions the right of property is held to pass with the delivery, unless at the time the right to retake is expressly declared by the seller. We have not gone so far. Our cases proceed on the theory that until payment has been made or waived, the contract remains executory, and that delivery in such case is not a completion of the contract, except as an intention to so regard it is expressly declared or can fairly be inferred from the circumstances attending. Possession, however, having passed, and the buyer by the act of the seller having been invested with the indicia of ownership, the policy of our law requires that this situation—the possession in one and the right of property in another—shall continue no longer than is necessary to enable the seller to recover the goods with which he has parted. The law gives the seller the right in such case to reclaim his goods, but he must do so promptly, otherwise he will be held to have waived his right, and can only thereafter look to the buyer for the price."

The court then considered the question when an inference of waiver will arise. It pointed out that except when delayed by trick or artifice, the assertion of the right to reclaim the property must follow immediately upon default. This the court said does not mean that the seller must at that instant begin legal proceedings to recover the

goods; but does mean that the seller when he discovers that his delivery is not followed by payment as he had the right to expect is at once put to his election whether he will waive the condition as to payment and allow the delivery to become absolute, or retake the property, and that he must not allow unnecessary delay in making his choice.

An eminent writer[15] on the subject has taken a different view of the matter. He states that the rule should be: "If after bargaining for a cash sale the seller subsequently voluntarily delivers to the buyer the goods with the intent that the buyer may immediately use them as his own and without insisting upon contemporaneous payment, this action is absolutely inconsistent with the original bargain. Such a delivery is not only evidence of the waiver of the condition of cash payment; it should be conclusive evidence."

The Supreme Court of Kansas pointed out the impracticability of such a doctrine in the case of *Peoples State Bank of Michigan Valley v. Brown*[16] where it is stated that "as a practical necessity to avoid the inconvenience of requiring the seller of an article to keep one hand upon it until with the other he grasps the currency tendered in payment, there must be some relaxation of this rule. Delivery and payment, as a practical matter, cannot be absolutely simultaneous. Some slight interval between the two acts is inevitable and the criterion upon which the courts have agreed with substantial unanimity is that such interval does not conclusively prove a total abandonment of title and the right of possession by the seller, unless under all the circumstances of the case it in fact shows that result to have been intended."

In conclusion it may be said that if the seller delivers possession of the subject matter at the time and place specified without any intention, express or implied, of waiving his right to payment in cash he may ordinarily, on the refusal of the buyer to make payment, retake possession for the reason that the delivery is conditional

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[15]Williston on Sales, Section 346.

[16]103 Pac. 102 (1909); 23 L. R. A. (N.S.) 824.

on the payment of the price by the buyer. It has been held that the seller may even justify the retaking of the goods by force.[17] However the seller must be careful not to waive his right to retake possession after delivery. Upon the buyer's default he must make his election, either to reclaim the goods or to look to the buyer for the price, and if he elects the former remedy he must act promptly in exercising it. In other words the seller cannot play fast and loose; he cannot accept the buyer's promise to pay at a future time and then later change his mind and attempt to retake the goods.

It is submitted at this point that a case like *Frech v. Lewis* arising now would not be construed as a cash sale in view of the adoption by the Supreme Court of Pennsylvania of Rule 1 of Section 19 of the Sales Act. In that case the contract of sale provided for payment of the purchase price on delivery of the articles sold and the court construed the transaction to be a cash sale in which payment is an implied condition to the transfer of title. Since the contract said nothing concerning the time at which title should pass the court applied the pre-existing presumption that transfer of title and payment were concurrent conditions. By virtue of the adoption of Rule 1 of Section 19 of the Sales Act in Pennsylvania such a case would be construed differently. Title to the goods would pass at once upon the completion of the contract though no money be paid nor goods delivered. It is submitted that the only instance in which the courts will construe a sale to be a cash sale under the existing law in Pennsylvania today is where the parties expressly stipulate in their bargain that payment in cash shall be a condition to the transfer of title.

But what is the seller's right of reclamation as against purchasers of or creditors levying on the goods sold for cash but delivered without payment? Considering first the respective rights of the original seller and a subsequent bona fide purchaser from the original buyer it may be

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[17]Leedom v. Phillips, 1 Yeates 527 (1795). See also 55 C. J. 567; Henderson v. Lauch, 21 Pa. 359 (1853); Refining and Storage Co. v. Miller, 7 Phila. 97 (1868); Windle v. Moore, 1 Chest. Co. 409 (1879),

said that there is much confusion among the courts of the different jurisdictions.[18] One line of authorities holds that, the buyer having no title, a subsequent purchaser from him can obtain no better title, and will not be protected in his purchase as against the true owner.[19] Another line of cases holds that, the seller having visited the buyer with the indicia of ownership, and thereby enabled him to dispose of the property to a third person, as between the two, the seller should suffer the loss occasioned by the fraud of the buyer.[20] A leading writer[21] takes the position that although the parties originally contemplated a cash sale, delivery and permission to the buyer to use and enjoy the goods as his own are inconsistent with the original bargain so that a conditional sale is substituted and the transaction should be dealt with according to the rules governing conditional sales which protect innocent purchasers and subsequent creditors of the original buyer in the absence of recordation.

The early Pennsylvania case of *Leedom v. Phillips*[22] held that the subsequent purchaser for value was protected. In that case the plaintiffs contracted to sell one Edwards sugar for cash. The sugar was delivered on the pavement in front of Edwards' store and was sold by Edwards to the defendant, who subsequently removed it to his store. Plaintiffs sought to replevy the sugar from the defendant. The court held, "that if one sells goods for cash and the buyer takes them away without payment of the money, the seller should immediately reclaim them by pursuing the party, and he may justify the retaking of

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[18]See 13 L. R. A. (N.S.) 697; 29 L. R. A. (N.S.) 709; 47 L. R. A. (N.S.) 173; 23 R. C. L. 1385, Sec. 208 and 209.

[19]Coggill v. Hartford & N. H. R. Co., 3 Gray (Mass.) 545; Hirschorn v. Canney, 98 Mass. 149; Hart v. Boston & M. R. Co., 72 N. H. 410; National Bank v. Chicago B. & N. R. Co., 44 Minn. 224; Harmon v. Goetter, 87 Ala. 325.

[20]Michigan C. R. Co. v. Phillips, 60 Ill. 190; Ohio & M. R. Co. v. Kerr, 49 Ill. 458; Lee v. Galbraith, 5 La. Ann 343 and Hammett v. Linneman, 48 N. Y. 399.

[21]Williston on Sales, Section 346.

[22]1 Yeates 527 (1795).

them by force****. If the sale of the sugar to the defendant was bona fide, it ought to prevail. The plaintiffs should suffer by their own remissness, and not an innocent purchaser." This doctrine was iterated in the case of *Werley v. Dunn*[23] which held that, "where on a sale of goods the price is to be paid partly by notes and partly in cash, and the seller delivers the goods, accepts a note and a check, and the check is not paid because there are no funds in bank, title to the goods does not pass. If in such a case the seller agrees to permit the purchaser to retain the goods upon the execution by the latter of a chattel lease, the purchaser cannot thereafter make a good title to the goods even to an innocent purchaser for value." It is submitted that this rule is in accordance with the adverse position the Supreme Court of Pennsylvania has often taken toward the separation of title and possession, and also in substantial conformity with its frequent holding that "where an owner of personal property has so acted with reference to his property as to invest another with such evidence of ownership, or apparent authority to deal with and dispose of it, as is calculated to mislead a good faith purchaser for value, an estoppel will arise against him."[24] Subsequent creditors, being in the same position as innocent purchasers for value, should equally be protected under the same rule.

As to prior creditors of the cash sale buyer it is quite uniformly held that since such creditors are not in the position of bona fide purchasers, if the debtor is the buyer in a contract for the sale of goods to be paid for in cash, and the goods are conditionally delivered to him, and are levied upon while in his hands and before payment, the right of the seller to reclamation is superior to the right of the buyer's creditor.[25] Although there appears to be no express

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[23]56 Pa. Super. Ct. 254 (1914).

[24]O'Connor v. Clark, 170 Pa. 318 (1895); Leitch v. Sanford Motor Truck Co., 279 Pa. 164 (1924); Commercial Motors Mortgage Co. v. Water, 280 Pa. 177 (1924); McLaughlin's Assigned Estate, 280 Pa. 597 (1924) and Truck Tractor and Forwarding Co. v. Baker, 281 Pa. 145 (1924).

[25]See 13 L. R. A. (N.S.) 697; 29 L. R. A. (N.S.) 709; 47 L. R. A. (N.S.) 173; 23 R. C. L., p. 1384, Section 207.

holding in Pennsylvania on this point, it is submitted that our courts will apply the general rule as to prior creditors in accordance with the view taken by the majority of states.

Edgar K. Markley.

IS PA. SWINGING TO THE FEDERAL RULE ON CORPORATE ULTRA VIRES CONTRACTS?

"Contracts ultra vires of the corporation making them are not merely voidable but wholly void and of no effect and no performance by either party can give the unlawful contract any validity." This startling statement was recently made by the Pennsylvania Superior Court, in a decision involving Pennsylvania law, and dealing with a Pennsylvania corporation.[1]

Bedell, the plaintiff, was an employee of the Oliver H. Bair Co. funeral directors, the defendants. While so employed, the plaintiff executed a "Benefit Bond" wherein it was agreed between the plaintiff and defendant that in consideration of the payment of forty-six cents ($.46) quarterly during the term of the plaintiff's life, the defendant Co. would "care for and inter the remains" of the plaintiff at a total cost of $75. Failure to pay for three months worked a forfeiture of the agreement. Plaintiff in pursuance thereof paid the quarterly sums for twenty-eight years, in the aggregate amount of $51.74. Being advised that the contract was illegal, the plaintiff demanded from the defendant the amount paid in and upon defendant's refusal to refund the amount, sued in assumpsit. The Superior Court, through Judge Cunningham, affirmed the opinion of Judge Finletter in the court below finding that the contract was one of insurance, was clearly ultra vires of the defendant corporation, was *therefore* utterly void and of no effect, and no action could be based upon it! However, as suit was brought in assumpsit the court allowed a quasi-contractual recovery by the plaintiff.

[1]Bedell v. Oliver H. Bair Co. Inc., 158 Atl. 651.