

March 1945

Discussion of Recent Decisions

P. Moran

W. A. McClintock Jr.

H. H. Flentye

T. F. Bayer

Edith H. Vaughan

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

P. Moran, W. A. McClintock Jr., H. H. Flentye, T. F. Bayer & Edith H. Vaughan, *Discussion of Recent Decisions*, 23 Chi.-Kent L. Rev. 185 (1945).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol23/iss2/6>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

CHICAGO-KENT LAW REVIEW

PUBLISHED DECEMBER, MARCH, JUNE AND SEPTEMBER BY THE STUDENTS OF
CHICAGO-KENT COLLEGE OF LAW, 10 N. FRANKLIN ST., CHICAGO, ILLINOIS
Subscription price, \$2.00 per year Single copies, 75c Foreign subscription, \$2.50

EDITORIAL BOARD

Editor-in-Chief

T. F. BAYER

Associate Editor

J. J. LIMPERIS

STAFF

L. J. BELLSON

J. B. WYATT

Case Editors

R. BURDETT

M. C. MAITLAND

P. MORAN

S. L. EHRlich

RUTH MARKMAN

EDITH H. VAUGHAN

H. H. FLENTYE

W. A. McCLINTOCK, JR.

F. WEINSTEIN

BOARD OF MANAGERS

WM. F. ZACHARIAS, *Chairman and Faculty Adviser*

KATHERINE D. AGAR HUMPHREY M. BARBOUR DONALD CAMPBELL JAMES R. HEMINGWAY

The College assumes no responsibility for any statement
appearing in the columns of the REVIEW.

VOLUME 23

MARCH, 1945

NUMBER 2

DISCUSSION OF RECENT DECISIONS

CORPORATIONS — CORPORATE POWERS AND LIABILITIES — WHETHER “NO-ACTION” CLAUSE IN CORPORATE BOND PREVENTS SUIT AT LAW AFTER MATURITY BY HOLDER UNABLE TO SECURE SUFFICIENT PERCENTAGE OF HOLDERS TO JOIN IN DEMAND ON TRUSTEE—In *Gordon v. Conlon Corporation*,¹ the holder of two corporate bonds, part of a large issue, sued at law in his own name to recover the amount due thereon at maturity. Judgment in his favor was granted over objection that all right of action upon such bonds, whether by reason of default prior to maturity or for any other reason, was vested in the trustee named in the trust agreement securing such issue unless upon failure of the trustee to act after demand made by a specified percentage of the holders of such bonds. It appeared that the greater proportion of such holders had consented to an extension of the maturity date, and it was impossible by reason thereof for the plaintiff to procure enough other uncommitted holders to join in a sufficient demand. On appeal, such judgment was reversed when the Appellate Court for the First Dis-

¹ 323 Ill. App. 380, 55 N. E. (2d) 821 (1944).

strict found that the limitation of the trust agreement, suitably incorporated in the bonds themselves, prevented any action whatever except in the name of the trustee.

One earlier Illinois case might seem to oppose the holding in the instant case, for the reported headnote to the abstract opinion therein suggests that limitations of the type in question do not apply to suits at law after maturity.² Examination of the record therein, however, discloses that the precise question here involved was given little attention and the case was settled on other points. The instant case, therefore, marks the first time the issue has been squarely decided in this state.

In the absence of suitable limitation in the bond, it is fundamental law that the holder of a bond secured by a mortgage or a trust indenture has, after maturity, the right to sue at law to recover the amount promised independently of any restriction contained in the mortgage or trust indenture with reference to its foreclosure, for he is the holder of two separate and distinct rights.³ His right to enforce the bond independently of the mortgage may, however, be limited by suitable provisions particularly if such provisions be reasonable ones.⁴ But such restrictions are generally subject to strict construction for they derogate against the common-law rights of creditors⁵ and will not be enforced unless there is not only reference to the same but also suitable limitation on the face of the bond itself showing that the rights of the holder are qualified rather than absolute.⁶ Tested in that light, the qualification on the face of the bonds involved in the instant case was clearly sufficient to warn the holder that he possessed no unqualified promise.

The principal ground relied on, however, was that the acts of the corporate debtor and of the trustee, acting in conjunction with the greater percentage of the bondholders, in extending the maturity date of all bonds owned by such persons had rendered it impossible for the plaintiff to comply with such restrictions, hence he was entitled to be relieved therefrom. Inability to obtain joint action from a sufficient percentage of other holders has been held no excuse for not complying with the requirement of such restrictive clauses in cases involving almost identical facts to the instant case⁷ and it has even been held that such restriction cannot be avoided by showing that the greater percentage of holders were acting collusively to defeat the rights of the

² *Kaletka v. Archer Coal & Material Co.*, 287 Ill. App. 631, 5 N. E. (2d) 879 (1936).

³ *Rohrer v. Deatherage*, 336 Ill. 450, 168 N. E. 266 (1929); *Rogers v. Meyers*, 68 Ill. 92 (1873).

⁴ See annotation in 108 A. L. R. 88, particularly p. 90, and cases there cited.

⁵ *Boley v. Lake Street Elev. R. Co.*, 64 Ill. App. 305 (1896).

⁶ *Oswianza v. Wengler & Mandell*, 358 Ill. 302, 193 N. E. 123 (1934), affirming 273 Ill. App. 239 (1934).

⁷ See, for example, *Crothwaite v. Moline Plow Co.*, 298 F. 466 (1924).

minority.⁸ It has also been held that, for purpose of computation, the required percentage must be calculated on the total amount of outstanding bonds and not just a percentage of those which have not been extended or committed to a reorganization.⁹ So essential would seem compliance with such restrictions that in *Central States Life Insurance Company v. Kopljar Company*¹⁰ recovery was denied, in the absence of demand on the trustee, even though the holder was said to possess "almost all the bonds."¹¹

More equitable would seem the holdings in other cases which have permitted suit, even though plaintiff lacked sufficient holdings to warrant demand on the trustee, when it appeared that the majority holder was an operating company which deliberately withheld the payment of interest at a time when, by reason of its large holdings, it could postpone action as long as it pleased¹² or where the balance of the issue was in the hands of one holder who had refused to give consent.¹³ Courts have even gone so far as to construe such restrictions narrowly so as not to defeat a suit at law after maturity at the instance of a minority holder,¹⁴ such restraint being limited to apply only to equitable actions designed to reach the security pledged for the collective benefit of all holders.¹⁵

While there may be valid reason for clauses of this type where joint action is desirable, as in case of an election to declare the entire issue due and to foreclose in case of an interim default, there seems a certain injustice in denying to the creditor, no matter how small, his right to any action after maturity particularly where he cannot, by reason of means beyond his control, muster sufficient strength to compel action in his behalf. Under the rule of the instant case, such denial might even result in loss of the total claim by lapse of time for unless he joins in the extension and obtains the benefits thereof his claim might eventually be outlawed although, through no fault of his own, he cannot prosecute suit. It would seem more just to permit recovery or else to require, in the interest of reasonableness, that clauses of this nature should provide that upon approval of a sufficient percentage of holders all bonds of the same issue should be extended so as to mature at the same time.

P. MORAN

⁸ *Florida Nat. Bank v. Jefferson Standard L. Ins. Co.*, 123 Fla. 525, 167 So. 378 (1936), rehearing denied 125 Fla. 386, 169 So. 729 (1936).

⁹ *Varner v. Atlanta Laundries*, 182 Ga. 148, 184 S. E. 877 (1936).

¹⁰ 80 F. (2d) 754 (1936).

¹¹ In *Southern National Bank v. Germania Mfg. Co.*, 176 N. C. 318, 97 S. E. 1 (1918), however, action was not denied when it appeared that plaintiff held the entire issue.

¹² *Linder v. Hartwell R. Co.*, 73 F. 320 (1896).

¹³ *Weir v. Bauer*, 75 Utah 498, 286 P. 936 (1930).

¹⁴ *Bullowa v. Thermoid Co.*, 114 N. J. L. 205, 176 A. 596 (1935).

¹⁵ *Hoyt v. E. I. DuPont DeNemours Powder Co.*, 88 N. J. Eq. 196, 102 A. 666 (1917).

CORPORATIONS—PUBLIC REGULATION AND SUPERVISION—WHETHER OR NOT PUBLIC OFFERING OF UNQUALIFIED STOCK BY OWNER THEREOF THROUGH LICENSED BROKERS OPERATING ON A COMMISSION BASIS CONSTITUTES A VIOLATION OF SECURITIES LAW SO AS TO ENTITLE PURCHASER TO RECOVER PURCHASE PRICE—In *Scully v. DeMet*,¹ the Appellate Court for the First District was asked to interpret and apply Section 5 of the so-called "Blue Sky Law"² which deals with the exemption which may be granted to the sale of securities not registered under the Securities Law. The facts therein disclosed that at the time of incorporation in Delaware of the company concerned the defendants received some twenty thousand shares in a voting trust covering the common stock thereof for their minority interest in the enterprise so incorporated. These shares were held by the defendants as their individual property until 1936 when a block of fifteen thousand of such voting trust shares was sold to the public through a firm of licensed brokers. Plaintiffs, who had held preferred shares of the corporation, were induced by the salesmen of such brokerage firm to sell the preferred stock and to buy shares in the voting trust so offered and they acquired an aggregate of two hundred and forty of the shares so sold. Upon learning that the stock was not qualified under the Securities Act, the plaintiffs tendered return of the stock so purchased and sued for the return of the purchase price. Judgment for the plaintiff in the trial court upon summary proceedings was affirmed when the Appellate Court held that the sales were not exempt as claimed by the defendants.

The prime defense to the action was that the sale fell within an exemption which declares that any security sold "by or on behalf of a vendor who is not an issuer, or underwriter or promoter of the issuer, or a dealer or broker; and who, being a bona fide owner of such security, disposes of his own property for his own account"³ shall be treated as a sale of class "B" securities and, as a consequence, the right of rescission granted by the statute⁴ was unavailable. It was also argued that, inasmuch as the securities were sold through a broker "on behalf of a vendor" in the aforementioned category, the fact that

¹ 323 Ill. App. 74, 55 N. E. (2d) 101 (1944). It is understood that leave to appeal was sought and denied. Thereafter, a petition was presented by a number of attorneys customarily representing security dealers for leave to appear as *amici curiae*. They sought to have the Illinois Supreme Court reconsider its action and grant leave to appeal. Such request has apparently been denied. The reported decision of the Appellate Court states that judgments totalling in excess of the jurisdictional amount were granted the several plaintiffs, but it does not reveal if any single plaintiff recovered more than \$1500.00. If not, there is doubt that the Illinois Supreme Court would have jurisdiction to review in the absence of a certificate of importance: Ill. Rev. Stat. 1943, Ch. 110, § 199(2). See also *Antosz v. Goss Motors, Inc.*, 378 Ill. 608, 39 N. E. (2d) 322 (1942), and *Martin v. Martin's Estate*, 377 Ill. 392, 36 N. E. (2d) 742 (1941), both noted in 20 CHICAGO-KENT LAW REVIEW 174.

² Ill. Rev. Stat. 1943, Ch. 121½, § 100.

³ *Ibid.*, § 100(1).

⁴ *Ibid.*, § 132.

intermediaries were used in the transaction was of no legal significance.

Little was said in the opinion on the last point, for the court decided the case on the major issue, but there is occasion to doubt that the sale was "on behalf of the vendor" as the defendants gave the brokerage firm unrestricted power to sell to whom it pleased at any price it pleased so long as the defendants received a net sum fixed by them. Any amount realized over that figure was to be retained by the brokerage firm as a commission. It would appear from the facts of the case, however, that the sales made did net the brokers an unusual profit⁵ so as to give the impression that the brokers were more than just intermediaries in the transaction. While the statute fixes no limit to the broker's compensation⁶ and there is nothing in the general law which prevents an agent from being compensated on the basis of whatever he may procure over a given figure,⁷ the policy behind the Securities Act would seem to dictate that the intermediary conducting a sale "on behalf of" a vendor should be limited to reasonable compensation so as not to be tempted, by his own cupidity, to take advantage of unwary purchasers.

Of principal significance, though, is the holding on the major issue, i.e. whether or not the sales came within the statutory exemption. No precedent exists on this point for the instant case represents the first time the question has been posed since the statute was amended in 1933. Prior to that time only an isolated transaction could be classed as exempt⁸ and the law then clearly did not contemplate an indiscriminate public offering of securities.⁹ That limitation was not carried over into the present statute so it would seem, on the surface, from the fact of such deletion, that the legislature intended that a vendor selling on his own account should be free to dispose of his holdings in a block or peddle the same to many purchasers if he so saw fit. It might be, if the vendor's holding was extensive, that sale thereof could only be accomplished in the last mentioned way so that change in the statute could be said to reflect legislative recognition of that possibility. When it is also noticed that the phrase "on behalf

⁵ The shares appear to have cost plaintiffs \$7.00 each, while the defendants received \$4.375 thereof. Maximum commissions for odd-lot sales of stocks registered on the New York Stock Exchange selling below \$10.00 per share would be approximately twelve cents per share as contrasted with the \$2.625 per share received as "commission" by the brokers in the instant case.

⁶ Ill. Rev. Stat. 1943, Ch. 121½, § 118e(p), indicates that taking a "grossly unfair advantage" of a customer is ground for revoking the dealer's license.

⁷ *Hutton v. Renner*, 74 Ill. App. 124 (1897); *Apple-Cole Co. v. Maibohm*, 295 Ill. App. 613, 15 N. E. (2d) 61 (1938).

⁸ *Laws 1921*, p. 360. The 1919 statute had contained the limitation that such sales were exempt only "when not made in the course of continued and repeated transactions of a similar nature." See *Laws 1919*, p. 355.

⁹ *Hudson v. Silver*, 273 Ill. App. 40 (1933); *People v. Weese*, 225 Mich. 480, 196 N. W. 516 (1923).

of" a vendor was likewise inserted into the original act,¹⁰ further strength is given to the defendants' argument that the legislature not only realized the necessity of giving the vendor the right to make many piecemeal sales of his holdings, if necessary, but also considered that it might, because of the multiplicity thereof, be practical to use the services of a skilled organization such as is possessed by the average licensed brokerage firm.

Plausible as such argument might seem, the Appellate Court went deeper into the problem of ascertaining the legislative intent than can be done just by drawing inferences from changes in language or grammatical context. It observed that the prime purpose of the whole statutory scheme was to shield the public at large, particularly those members thereof apt to invest in stocks, from the dishonesty or irresponsibility of persons engaged in the business of disposing of securities of uncertain value.¹¹ Individual buyers who lacked the means of investigation, it found, were to be protected by the statute from the usual consequences of the doctrine of *caveat emptor*.¹² When such fundamental purposes were borne in mind, it was seen that offerings such as were made in the instant case would be the very sort of thing most apt to mislead members of the investing public. Such persons would be the ones most likely to draw assurance, from the fact of a public offering through a licensed broker, that the securities purchased were suitable for investment. It was also deemed unlikely that any significance would be given to the statement, if made, that the broker was making the offering on behalf of a vendor of unregistered securities. For these reasons, the court concluded that the transaction was contrary to the spirit of the whole act in question as well as not permitted by the letter of the specific provision relied on by the defendants.

There is some doubt as to the correctness of the court's conclusion that the transaction violated the letter of the law, for, as has been pointed out, the sales measured up to the apparent standard laid down in that (1) they were made on behalf of a vendor who was not an issuer, and (2) were superficially, at least, made for his own account. If the court were limited to applying the law as it is written, the action taken would then be clearly improper and should call for reversal. But ambiguity and doubt may exist not alone over the letter but also as to the spirit of a statute. In such a case it is as much the

¹⁰ The present phraseology first appeared in the 1931 revision: Laws 1931, p. 820. Prior thereto the law had permitted sales by the owner's representative: Laws 1921, p. 360.

¹¹ *Stewart v. Brady*, 300 Ill. 425, 133 N. E. 310 (1921); *Brannan, Beckham & Co. v. Ramsaur*, 41 Ga. App. 166, 152 S. E. 282 (1930); *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N. W. 937 (1920).

¹² *Douthit v. Swiney*, 310 Ill. 180, 141 N. E. 535 (1923).

duty of the court to resolve the ambiguity or doubt¹³ as it would be to construe a conflict in language.¹⁴ No better solution for a difficulty of that nature can be had than to ascertain the fundamental legislative purpose and seek to effectuate it. There being a conflict between the letter and the spirit of the exemption here involved, the court acted properly in endeavoring to resolve the same and it would seem to have correctly interpreted the legislative objective.

It might be urged that the Securities Law, being opposed to common law principles, should be strictly construed. Such at least has been the intimation in cases dealing with penalty provisions of other statutes.¹⁵ But if the fundamental purpose of the Securities Law is to protect the investing public rather than to facilitate the disposition of securities owned, so narrow an attitude could well be dispensed with.¹⁶

W. A. McCLINTOCK, JR.

LANDLORD AND TENANT—TERMINATION OF AN ESTATE FOR YEARS—LIABILITY OF TENANT AFTER TENANCY HAS BEEN TERMINATED BY LEGAL PROCEEDINGS FOR RENT ALREADY ACCRUED—An unusual point of law was presented to the Appellate Court for the First District in the recent case of *Metropolitan Trust Company v. Fishman*¹ where it appeared that the defendant had entered into a lease with a receiver of an apartment hotel building but subsequently defaulted in the payment of rent and taxes. The plaintiff, a successor-receiver, upon such default, petitioned the court for a writ of assistance which was granted. The order, however, not only directed plaintiff to resume possession but also directed that "the lease . . . be . . . cancelled."² Thereafter, within ten years from the date of such order, the present action was brought to recover the amount of unpaid rent and taxes due under the lease and accrued prior to its termination. Defense to such suit was based on the contention that the cancellation of the lease made it null and void *ab initio* extinguishing all liability thereunder, or if not, that as the action was commenced more than five years

¹³ It is a fundamental principle of statutory construction that courts are governed by the legislative intention rather than by the exact words used: *Burke v. Industrial Commission*, 368 Ill. 554, 15 N. E. (2d) 305, 119, A. L. R. 1152 (1938); *Smith v. Logan County*, 284 Ill. 163, 119 N. E. 932 (1918); *Hoyne v. Danisch*, 264 Ill. 467, 106 N. E. 341 (1914). When so construing, words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency with such intention: *People v. Wallace*, 291 Ill. 465, 126 N. E. 175 (1920); *Furlong v. South Park Commissioners*, 320 Ill. 507, 151 N. E. 510 (1926).

¹⁴ *Baker & Conrad v. Chicago Heights Const. Co.*, 364 Ill. 386, 4 N. E. (2d) 953 (1936).

¹⁵ See, for example, *C., R. I. & P. Ry. Co. v. People*, 217 Ill. 164, 75 N. E. 368 (1905).

¹⁶ *Sutherland, Statutes and Statutory Construction* (Callaghan & Co., Chicago, 1943), 3rd Ed., Vol. 3, p. 391.

¹ 323 Ill. App. 413, 55 N. E. (2d) 837 (1944). Leave to appeal has been denied.

² 323 Ill. App. 413 at 414, 55 N. E. (2d) 837.

after the date of the order, the action was barred.³ Judgment for plaintiff in the trial court was affirmed when the Appellate Court held that the word "cancelled" as used in the order was used inadvertently; that the effect of such cancellation was merely to terminate the relationship of landlord and tenant but not the express agreement to pay rent and taxes which had accrued; and that defendant's liability was not barred.

Definitions of the word "cancel," found in other contract cases, suggest a purpose to annul and destroy, and necessarily imply a waiver of all rights thereunder.⁴ For that reason, after a contract is discharged either by rescission or by substitution of a new contract, no action can be maintained upon the original contract but any benefits accruing to either party by a part performance, unless expressly released, must be recovered in an action on *quantum meruit* or *quantum valebant*.⁵ That word also possesses the meaning to make void or invalid.⁶ When one party rescinds or repudiates a contract, he merely gives notice to the other party that he does not propose to be bound thereby. If a court of equity, however, grants rescission or cancellation it destroys the contract and renders it as though it had never existed.⁷ On the surface, therefore, it would appear that the defendant's contention was sound and plaintiff's right to recover could rest only upon an implied agreement for use and occupation. But a closer examination of such cases reveals that they are not in point with the instant problem either because the cancellation was mutually agreed upon or because it was ordered by a court upon proper complaint setting forth fraud or other equitable ground for nullification.

Inadvertent action by the court in the original proceeding herein, when it declared the lease "cancelled," ought not serve to destroy the plaintiff's right to rent accrued for any of several reasons. In the first place, that court had no right, under the facts, to cancel the lease for plaintiff had not requested such action and the exercise of any such power would not only amount to a taking of property without

³ Ill. Rev. Stat. 1943, Ch. 83, § 16. The theory underlying that part of the defense was that, as the suit was one for use and occupation upon an implied agreement, substituted for the cancelled express agreement, the five-year rather than the ten-year statute applied.

⁴ Whedon v. Lancaster County, 80 Neb. 682, 114 N. W. 1102 (1908); Capital City Mutual Fire Ins. Co. v. Detwiler, 23 Ill. App. 656 (1887).

⁵ Lipschutz v. Weatherly & Twiddy, 140 N. C. 365, 53 S. E. 132 (1906), citing Drefus v. Columbian Exposition Salvage Co., 194 Pa. 475, 45 A. 370, 75 Am. St. Rep. 704 (1900).

⁶ Clegg v. Schvaneveldt, 79 Utah 195, 8 P. (2d) 620 (1932).

⁷ United Wool Dyeing & Finishing Co. v. Werner & Co., 102 N. J. Eq. 322, 140 A. 465 (1928).

due process of law,⁸ but would make the order void at least to the extent that it was without foundation under the issues raised.⁹

Even though a valid termination of the lease had occurred through proper legal proceedings, such termination could have only prospective effect. That, at least, is the tenor of analogous cases where leases have been terminated as the result of legal action. Thus the majority view, in condemnation proceedings, is that a taking of the whole of the demised premises under the power of eminent domain terminates the lease and relieves the tenant of liability to pay rent accruing after the event but not before.¹⁰ Eviction by title paramount will discharge the lessee from the obligation to pay rent which may fall due, by the terms of the lease, after eviction.¹¹ In foreclosure suits, a lease made subsequent to the mortgage may be terminated provided the lessee is made a party to the suit.¹² If so, the lessee is discharged from liability for future rent due thereunder¹³ but would not be absolved from accumulated past due rent. It should follow, therefore, that the termination of the defendant's right to further possession of the demised premises involved in the instant case should have no bearing on his liability for rent accrued. It is true that one authority purports to lay down the rule that "after the cancellation of a lease in legal proceedings, liability for rent thereunder is extinguished,"¹⁴ but such statement is misleading and an examination of the cases cited in support thereof discloses that the only question involved therein was a right to rent which had accrued after the order of termination.¹⁵

When it is remembered that every lease possesses a double aspect,

⁸ U. S. Const., Fifth Amend.

⁹ See, for example, *Holmstedt v. Holmstedt*, 383 Ill. 290, 49 N. E. (2d) 25 (1943), and *Kaifer v. Kaifer*, 286 Ill. App. 433, 3 N. E. (2d) 886 (1936), noted in 15 CHICAGO-KENT REVIEW 72.

¹⁰ *Stubbings v. Village of Evanston*, 136 Ill. 37, 26 N. E. 577, 29 Am. St. Rep. 300, 11 L. R. A. 839 (1891). That result may be achieved by statute in some jurisdictions: *Hinrichs v. New Orleans*, 50 La. Ann. 1214, 24 So. 224 (1898); *Spence v. Charrot*, 137 App. Div. 882, 121 N. Y. S. 519 (1910).

¹¹ *Corrigan v. City of Chicago*, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212 (1893).

¹² *Richardson v. Hadsall*, 106 Ill. 476 (1883); *Brush v. Fowler*, 36 Ill. 53, 85 Am. Dec. 382 (1864); *Reichert v. Bankson*, 199 Ill. App. 95 (1916); *Gale v. Carter*, 154 Ill. App. 478 (1910); *Runner v. White*, 60 Ill. App. 247 (1895).

¹³ *Jetzinger v. Consumers Sanitary, etc., Stores*, 268 Ill. App. 482 (1932); *Bartlett v. Hitchcock*, 10 Ill. App. 87 (1882); *Reed v. Bartlett*, 9 Ill. App. 267 (1881). See also *Stein v. Midway Chevrolet Co.*, 315 Ill. App. 105, 42 N. E. (2d) 125 (1942).

¹⁴ 36 C. J., Landlord and Tenant, § 1143, p. 336.

¹⁵ In *Sigur v. Lloyd*, 1 La. Ann. 421 (1846), for example, it was held that where the lessor sought judgment for rent due and to become due and for a dissolution of the lease, and defendant acquiesced in the prayer for dissolution, the lessee could not be ordered to pay rent falling due after the dissolution. In *Ernst v. Zeltner Brewing Co.*, 117 N. Y. S. 922 (1909), lessee, who had been made a party to a foreclosure proceeding which had terminated the lease, was held not liable on the lease itself even though he had continued in possession.

being both a conveyance and a contract,¹⁶ a ready explanation may be found for the view that a lease may cease being operative as to the right of future possession yet remain effective as to past obligations for rent. The grant may expire or be nullified, but the contract can survive. Moreover, as a lease is usually a divisible contract, calling for performance and payment in successive divisions, receipt of a part performance should create an obligation to pay for that benefit in spite of a subsequent breach.¹⁷ As there was no evidence in the instant case of an intention to release the tenant from the consequence of his default except for the unfortunate word "cancelled," nor proof of consideration furnished to support the idea of an accord and satisfaction, the result achieved in the instant case seems to be eminently just as well as legally sound.

H. H. FLENTYE

SALES — CONDITIONAL SALES — WHETHER OR NOT TRANSACTION IN FORM OF CONDITIONAL SALE BUT IN FACT ONE OF LENDING AND BORROWING IS EFFECTIVE AGAINST RIGHTS OF SUBSEQUENT JUDGMENT CREDITOR OF PURPORTED CONDITIONAL VENDEE—In *Raymond v. Horan, Bailiff of Municipal Court of Chicago*,¹ an action to determine plaintiff's right to certain personal property, it was necessary to ascertain what legal effect was to be given to a contract which in form and by the intention of the parties thereto was a conditional sales contract. The facts were these: One Coburn, desirous of engaging in business, found a likely location in which were installed suitable fixtures and equipment owned by a finance company. Coburn borrowed funds from plaintiff and with this money purchased the fixtures and equipment. On the same day he executed and delivered to plaintiff a bill of sale covering the property and as part of the same transaction plaintiff purportedly sold the goods back to Coburn under a conditional sales contract providing for semi-annual payments. The testimony showed that the absolute sale to plaintiff and his re-sale to Coburn under the conditional sales contract had only one purpose, to-wit: that of securing plaintiff's loan. Subsequently, one of the defendants sold supplies to Coburn and, upon his failure to pay, procured judgment. Execution and levy on the fixtures and equipment involved was made by the other defendant. Plaintiff thereupon challenged the right of the judgment creditor, claiming title under the conditional sales contract. The trial court decided in favor of plaintiff, but on appeal the judgment was reversed, the court finding that the purported sale and conditional resale were but subterfuges and that, in legal effect, the transaction

¹⁶ *University Club v. Deakin*, 265 Ill. 257, 106 N. E. 790 (1914).

¹⁷ See Williston, *Contracts*, Rev. Ed., Vol. III, § 861.

¹ Sub nom. *Appeal of Continental Distributing Co.*, 323 Ill. App. 120, 55 N. E. (2d) 99 (1944).

amounted to an unrecorded chattel mortgage which could not be set up against the rights of the judgment creditor.²

The determination of whether a particular transaction shall have the legal effect of a conditional sales contract or of a chattel mortgage is a matter which has caused the courts considerable difficulty. This, no doubt, is due to the fact that both are in important aspects governed by the same principles and the relationship of the parties in each case bears a striking similarity.³ There are differences, however, the most important of which is that under a conditional sales contract the vendor remains owner, subject, to the vendee's right to acquire title by fulfilling the specified conditions, while in the case of an absolute sale with a mortgage back the vendee acquires title subject to a lien brought into existence by the mortgage.⁴

A sales transaction wherein by the contract of the parties, the seller then being the unquestioned owner of the chattels involved, it is expressly provided that the title to the property shall remain in the vendor until the purchase money is fully paid and by which there is no reservation of a lien will be, without question, denominated a conditional sale and not a mortgage.⁵ It will also not be disputed that a transaction wherein the owner of chattels, wishing to borrow money, effects a loan and pledges the title to the property as security for the borrowed money is properly classified as a chattel mortgage.⁶ But between these two extreme types of transactions there exist numerous business dealings which can be classified as one or the other only after considerable study and then sometimes with grave doubt as to whether the proper classification has been made. It will also be found that what may be deemed a conditional sale when only the rights of the vendor and vendee are being adjudicated by the courts may, chameleon-like, change its nature and legal effect to a chattel mortgage when the rights of a third party are involved.⁷

² While the Illinois law makes no provision for recording conditional sales contracts, chattel mortgages, to be binding on third parties, must be recorded: Ill. Rev. Stat. 1943, Ch. 95, § 4.

³ General Motors Acceptance Corp. v. Baker, 291 N. Y. S. 1015 (1936).

⁴ Stroup v. Meyers, 106 Ind. App. 538, 21 N. E. (2d) 75 (1939); Mondie v. General Motors Acceptance Corp., 178 Okl. 584, 63 P. (2d) 708, (1937).

⁵ Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N. E. 225 (1925); Conner v. Borland-Grannis Co., 294 Ill. 58, 128 N. E. 317 (1920); Leopold v. Universal Credit Co., 290 Ill. App. 305, 8 N. E. (2d) 727 (1937); Sears, Roebuck & Co. v. Piasa Bldg. & Loan Ass'n. 276 Ill. App. 389 (1934); Horvitz v. Leibowitz, 274 Ill. App. 196 (1934).

⁶ Conard v. The Atlantic Insurance Company of New York, 26 U. S. (1 Pet.) 386, 7 L. Ed. 189 (1828); Southern Surety Co. v. People's State Bank of Astoria, 332 Ill. 362, 163 N. E. 659 (1928); Ehrlich v. Chapple, 311 Ill. 467, 143 N. E. 61, 32 A. L. R. 989 (1924); Citizens State Bank of Manteno v. Senesac, 267 Ill. App. 288 (1932).

⁷ Pietrantonio v. Scalo, 120 Conn. 524, 181 A. 628 (1935).

Where the nature of the transaction is doubtful, courts have sought to classify it principally on the basis of the intention of the parties as disclosed by the entire contract,⁸ though minor elements such as the adequacy of the consideration have thrown what otherwise might have been termed a conditional sale into the category of a chattel mortgage.⁹ In that regard it may be noted that contracts in which the vendor has sought a purposeful ambiguity, with a view to a construction as a conditional sale or a chattel mortgage as may best fit the vendor's situation when litigation does arise, will in general be construed and the doubt resolved against the vendor.¹⁰ It has even been said that the conditional sales contract is not favored in the law and consequently where the legal nature of the transaction is at all questionable, it is likely to be construed as a chattel mortgage.¹¹ When, however, from a consideration of the entire contract, it clearly appears that it was the intention of the parties that the transaction was in its nature a conditional sale, that construction may be placed upon it by the courts.¹²

If this rule of intention had been adopted by the court in the instant case, the contract between plaintiff and his vendee would have been upheld as a valid conditional sale for it was clearly the intention of the parties that it was to be so regarded. But the court, favoring the view of the Washington case of *Hughbanks, Inc. v. Gourley*,¹³ expressly repudiated the rule of intention for it said, using the words of that case, that the problem is "not one of determining whether the parties intended to mould their transaction into the form of a conditional sale rather than that of a chattel mortgage, but of deciding whether in a pure financing arrangement the conditional sale can ever be adopted as a means of securing a loan. And the answer is that the contract of conditional sale may be used only by an actual vendor in the economic sense, and not by one who in a particular transaction occupies the status of a financier or lender of money, even though the latter may go through the form of taking title and possession of the chattel which he purports to sell."¹⁴

⁸ *Keystone Finance Corp. v. Krueger*, 17 F. (2d) 904 (1927); *Southern Surety Co. v. People's State Bank of Astoria*, 332 Ill. 362, 163 N. E. 659 (1928); *J. H. Gerlach Co. v. Noyes*, 251 Mass. 558, 147 N. E. 24, 45 A. L. R. 961 (1925).

⁹ *Guilford-Chester Water Co. v. Town of Guilford*, 107 Conn. 519, 141 A. 880 (1928); *Cary & Co. v. Hyer*, 91 Fla. 322, 107 So. 684 (1926).

¹⁰ *Mills Novelty Co. v. Morett*, 266 Mich. 451, 254 N. W. 163 (1934).

¹¹ *Weaver v. Lapsley*, 42 Ala. 601, 94 Am. Dec. 671 (1868); *Schneider v. Daniel*, 191 Ind. 59, 131 N. E. 816, 17 A. L. R. 1410 (1921); *Low v. Colby*, 137 Wash. 476, 243 P. 18 (1926); *Hughbanks, Inc. v. Gourley*, 12 Wash. (2d) 44, 120 P. (2d) 523, 138 A. L. R. 658 (1941).

¹² *Bailey v. Baker Ice Mach. Co.*, 239 U. S. 268, 36 S. Ct. 50, 60 L. Ed. 275 (1915).

¹³ 12 Wash. (2d) 44, 120 P. (2d) 523, 138 A. L. R. 658 (1941).

¹⁴ 323 Ill. App. 120 at 123, 55 N. E. (2d) 99 at 100, quoting from *Hughbanks v. Gourley*, 12 Wash. (2d) 44, 120 P. (2d) 523 at 526, 138 A. L. R. 658 at 662.

Although the court did not cite that case, there is some precedent for such view in the prior Illinois case of *First State Bank v. Harter*.¹⁵ There the alleged conditional vendor never had title and consequently could reserve none as security, hence its rights under a purported conditional sales contract were subordinated to those of a judgment creditor of the supposed conditional vendee. In the instant case the alleged vendor held title for but a fleeting moment. Even so, the court disregarded that fact on the ground that reality, not the form of the instrument, should govern in determining whether the contract was a conditional sales contract or a chattel mortgage.¹⁶

Illinois and Washington are not alone in holding that the conditional sales contract, with its harsh remedial incidents, must be restricted in its use to bona fide sales transactions between vendor and vendee and should not be extended to transactions where the true relationship between the parties is that of creditor and debtor, for at least six other jurisdictions have adopted the same view.¹⁷ In the light of such holdings, it would seem that one planning to advance money so as to enable another to purchase some wanted chattel but anxious to obtain the security of a conditional sales contract must first, as a middleman, purchase that chattel himself, taking all the risks of ownership, and then convey it to his "borrower" with an appropriate reservation of title. Only if he has acquired a full legal and equitable title thereto can he be treated as a vendor entitled to the benefits accruing to an unpaid seller upon a resale.¹⁸

T. F. BAYER

WILLS — RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES — WHETHER ELECTION TO RENOUNCE PROVISIONS OF WILL OF DECEASED HUSBAND MAY BE MADE BY CONSULAR OFFICER ON BEHALF OF NONRESIDENT ALIEN WIDOW IN ABSENCE OF EXPRESS POWER OF ATTORNEY FROM

¹⁵ 301 Ill. App. 234, 22 N. E. (2d) 393 (1939). The court therein stated that the Uniform Sales Act, Ill. Rev. Stat. 1943, Ch. 121½, § 1, particularly with reference to conditional sales contracts, "clearly indicates that it is intended to operate as between the seller and buyer of goods. . . . It is not within the intent or contemplation of the act that such contracts shall supplant or assume the legal identity of chattel mortgages. They are separate and distinct instruments and governed by separate and distinct acts." 301 Ill. App. 234 at 236, 22 N. E. (2d) 393 at 394.

¹⁶ *Gray v. Brasee*, 14 N. Y. S. (2d) 687 (1939).

¹⁷ *In re James, Inc.*, 30 F. (2d) 555 (1929); *Pietrantonio v. Scalo*, 120 Conn. 524, 181 A. 628 (1935); *Schneider v. Daniel*, 191 Ind. 59, 131 N. E. 816, 17 A. L. R. 1410 (1921); *Southern Finance Co. v. Mercantile Discount Corp.*, 80 Ind. App. 436, 141 N. E. 250 (1923); *Acme Feeds, Inc. v. Berg*, 231 Iowa 1271, 4 N. W. (2d) 430 (1942); *Payne v. Parker*, 95 Miss. 375, 48 So. 835 (1909); *First Nat'l Bank v. Marlowe*, 71 Mont. 461, 230 P. 374 (1924).

¹⁸ A close analogy can be found in the case of purchase money mortgages of real estate where the benefit of that type of security can inure only to the grantor and cannot aid the lender who advances funds to be used to purchase land: *Hickson Lumber Co. v. Gay Lumber Co.*, 150 N. C. 282, 63 S. E. 1045, 21 L. R. A. (N.S.) 843 (1909).

HER AUTHORIZING SUCH ACTION—An important question affecting the rights of nationals in occupied countries was presented in the recent New York case of *In re Zalewski's Estate*¹ wherein the deceased testator gave to his widow,² resident and national of Poland, a nominal legacy although he left a large estate. After his will had been admitted to probate, the Consul General of the Republic of Poland served an instrument on the administrator with the will annexed stating that he, acting on behalf of the widow under power given him by the treaty between his country and the United States,³ was exercising the personal right of election given by the statute⁴ to take her share of the estate as in case of intestacy rather than to accept the provision of the will. The administrator with the will annexed refused to recognize such election and his act was upheld by the Surrogate's Court.⁵ That decision was affirmed in the Appellate Division of the New York Supreme Court.⁶ Upon appeal granted by permission, the New York Court of Appeals reversed such decision when it held that the written notice of such election could be made by the Consul General as the widow's attorney in fact, even though he lacked express authority from her, as the agency granted by the treaty was not to be construed to defeat its purpose and the right to "appear" and to "represent" assigned thereby permitted the official to perform useful duties and was not limited to the mere collection of property devised or bequeathed.⁷

The significance of the instant case lies in the fact that it appears to be the first of its kind wherein a consular officer of a foreign nation

¹ 292 N. Y. 332, 55 N. E. (2d) 184 (1944). Lehman, C. J., wrote a dissenting opinion in which Rippey, J., and Lewis J., concurred.

² The testator left his widow in Poland some forty years ago. Whether she was in fact alive was impossible to determine, but the court relied on the presumption of a continuance of a condition demonstrated to have been in existence at a previous time: *Whiting v. Nicholl*, 46 Ill. 230 (1867). But see *Keystone Steel & Wire Co. v. Industrial Commission*, 289 Ill. 587, 124 N. E. 542 (1919), to the effect that such presumption may not hold true as to persons living in war zones.

³ Section 24 of the Treaty of 1931 states: "A consular officer . . . shall . . . have the right to appear personally or by delegate in all matters concerning the administration and distribution of the estate of a deceased person under the jurisdiction of the local authorities for all such heirs or legatees in said estate, either minors or adults, as may be non-residents and nationals of the country represented by the said consular officer with the same effect as if he held their power of attorney to represent them unless such heirs or legatees themselves have appeared either in person or by duly authorized representative." See Marcellus Donald A. R. von Redlich, *The Law of Nations* (World League for Permanent Peace, 1937), 2d Ed., p. 603.

⁴ Cahill's Cons. Laws N. Y. 1930, Ch. 13, § 18.

⁵ 30 N. Y. S. (2d) 658, 177 Misc. 384 (1941).

⁶ 38 N. Y. S. (2d) 37, 265 App. Div. 878 (1942).

⁷ Payment to nationals of occupied countries has been temporarily suspended, under 12 U. S. C. A. § 95a, by Executive Orders 8389, 8785, and 8832. See also general order of the Probate Court of Cook County, Illinois, under date of August 6, 1941.

has been found to have the right to make an election to take against the will of the testator without any express direction whatsoever from the widow of the latter. That the right of election is personal to the widow seems to be well established, at least to the extent that it does not survive her death so cannot thereafter be exercised by her heirs,⁸ her legal representatives,⁹ or her creditors,¹⁰ unless so authorized by statutory provision.¹¹ Courts have even held that, where the surviving spouse is insane or incompetent, her committee or conservator cannot make the election for her,¹² unless expressly authorized by proper court order.¹³ Such decisions would seem to limit the right of election to the surviving spouse only as "a personal right . . . inherent in the particular individual to whom it is given, as distinguished from a right which might be exercised by any other person whomsoever."¹⁴

Of course, the right is not so personal that the surviving spouse must execute the essential papers personally as she may act through a resident attorney in fact. Thus, a widow residing abroad once executed a power of attorney giving her agent general powers to act for her in connection with the estate of her deceased husband, and it was held that the agent could elect to take against the will although no specific authorization to make such election was designated.¹⁵ Such right may be delegated to a third person who may act independently at his discretion,¹⁶ even though the election is to be manifested by a writing "signed by her."¹⁷ Had the consul in the instant case pos-

⁸ *Sippel v. Wolff*, 333 Ill. 284, 164 N. E. 678 (1928); *Welch v. Anderson*, 28 Mo. 293 (1859); *Matter of Muhlman*, 251 N. Y. S. 147, 140 Misc. 535 (1931); *Crozier's Appeal*, 90 Pa. 384, 35 Am. Rep. 666 (1879).

⁹ *Donald v. Portis*, 42 Ala. 29 (1868); *Matter of Ackler*, 6 N. Y. S. (2d) 128, 168 Misc. 623 (1938); *Matter of Brill*, 22 N. Y. S. (2d) 966, 175 Misc. 236 (1940); *Matter of Youngs*, 25 N. Y. S. (2d) 811, 175 Misc. 716 (1940).

¹⁰ *Eltzroth v. Binford*, 71 Ind. 455 (1880).

¹¹ See, for example, *Hamilton Nat. Bank v. Haynes*, 180 Tenn. 247, 174 S. W. (2d) 39 (1943).

¹² *Heavenridge v. Nelson*, 56 Ind. 90 (1877); *Pinkerton v. Sargent*, 102 Mass. 568 (1869).

¹³ *Davis v. Mather*, 309 Ill. 284, 141, N. E. 209 (1923); *Andrews v. Bassett*, 92 Mich. 449, 52 N. W. 743, 17 L. R. A. 296 (1892); *Hardy v. Richards*, 98 Miss. 625, 54 So. 76, 35 L. R. A. (N.S.) 1210 (1911); *Van Steenwyck v. Washburn*, 59 Wis. 483, 17 N. W. 289, 48 Am. Rep. 532 (1883). In *Matter of Donnelly*, 14 N. Y. S. (2d) 700, 172 Misc. 107 (1939), it was held that a special guardian appointed to protect the rights of absent heirs could not elect to take against the will to the extent of having a portion of the testator's estate impounded, because the right was purely personal to the wards and, being adults, they were in no sense wards of the court.

¹⁴ *Matter of Muhlman*, 251 N. Y. S. 147 at 149, 140 Misc. 535 (1931).

¹⁵ *In re Celenza's Estate*, 308 Pa. St. 186, 162 A. 456, 85 A. L. R. 851 (1932). See also *In re Minnich's Estate*, 288 Pa. 354, 136 A. 236 (1927).

¹⁶ *Page*, *The Law of Wills* (W. H. Anderson Co., Cincinnati, 1941), 3d Ed., Vol. 4, § 1361, p. 32. See also note in 85 A. L. R. 859.

¹⁷ *In re Celenza's Estate*, 308 Pa. St. 186, 162 A. 456, 85 A. L. R. 851 (1932). Ill. Rev. Stat. 1943, Ch. 3, § 169, provides for a written instrument "signed by the surviving spouse."

essed such a power of attorney there would be no problem. But if it could be said that he possessed such power by virtue of his office, then his action on behalf of his national should be upheld.

In that regard, it was decided as early as 1821 that a consul had the right to "assert or defend the rights of property of the individuals of his nation,"¹⁸ even in the absence of express treaty provision. Such power has been held, in some instances, to extend to maintaining affirmatively the rights of his countrymen as by collecting a distributive share due from an estate,¹⁹ though in others he has been limited to maintaining action but not personally collecting the proceeds thereof.²⁰ Absent special authority by treaty or executed power of attorney, it has been held that he could collect workmen's compensation for the benefit of the alien widow and child since the consul has been said to be the "standing, fully authorized, and qualified personal and immediate representative, for all purposes, of a citizen of his country . . . having any interest to be cared for within the consular district."²¹ The breadth of such decisions would seem to suggest that the consul enjoys powers not necessarily confined to the treaty or any written instrument of appointment but which emanate from the very position itself.

Aside from general powers, the consul in the instant case relied upon a provision of the treaty that stipulated that the sphere of his authority to act for his nationals should be "as if he held their power of attorney."²² Had he actually possessed personal authorization, which he probably would have in normal times, there would be no doubt of his right to make the election. It would not seem as though a different result should be achieved merely because the authority was conferred by a treaty promulgated by the sovereign on behalf of its nationals, for such treaty would be binding on the latter as well as on the citizens of this country.²³ Although the scope of the implied power of attorney is not expressed in the treaty, it would seem to intend a general one as no limitation is found thereon. While powers of attorney are subject to strict construction, the same include not only expressly specified powers but also such other powers as are essential in effectuating the expressed ones.²⁴ When it is remembered that the rule of strict construction should not be applied with such rigor as to "destroy the very purpose of the power or to preclude the ascertainment in a proper way of what the language was meant to

¹⁸ *The Bello Corrunes*, 6 Wheat. (U.S.) 152 at 162, 5 L. Ed. 229 at 233 (1821).

¹⁹ *In re Tartaglio's Estate*, 33 N. Y. S. 1121, 12 Misc. 245 (1895).

²⁰ *Lachowicz v. Lechowicz*, 181 Md. 478, 30 A. (2d) 793 (1943).

²¹ *Vujic v. Youngstown Sheet & Tube Co.*, 220 F. 390 at 392 (1914).

²² See text of treaty in note 3, ante.

²³ U. S. Const., Art. VI.

²⁴ 2 Am. Jur., Agency, § 31.

accomplish,"²⁵ it would seem that the treaty language here concerned is broad enough to warrant the making of an election of the type here involved. If it were not, the rights of the absent spouse might well be lost by default through no fault of her own.²⁶

EDITH H. VAUGHAN

²⁵ 2 C. J. S. Agency, § 98c(3), p. 1223-4.

²⁶ Cahill's Cons. Laws N. Y. 1930, Ch. 13, § 18(7), permits the Surrogate to enlarge the time for making the election, provided application is made before its expiration, for a period of not exceeding six months upon any one application. The provision in Ill. Rev. Stat. 1943, Ch. 3, § 169, is limited to cases where litigation is pending that affects the share of the surviving spouse in the estate.