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Right of Creditors to Attach Personalty in the Hands of a Vendor Who Retains Possession After Sale

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RIGHT OF CREDITORS TO ATTACH PERSONALTY IN
THE HANDS OF A VENDOR WHO RETAINS
POSSESSION AFTER SALE

Section 26 of the Uniform Sales Act provides

"Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact, or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void."¹

This section of the Uniform Sales Act does not strive for uniformity, but intentionally leaves the question as to whether the retention was or was not fraudulent to the courts and legislatures of each state. Since the enactment of the Sales Act there has been a diversity of opinion as to presumptions of fraud in cases in which section 26 is applicable. In the majority of the jurisdictions, either by common law,² or by statute,³ the retention of possession by the vendor gives rise to rebuttable presumption of fraud in the first transaction, placing on the first purchaser the burden of going forward with the evidence to show good faith and the payment of an adequate consideration.⁴ Contrasted with this is the minority rule, in which, either by common law⁵ or statute,⁶ the presumption of fraud is conclusive, thus rendering the first sale void.

Prior to 1892 the *general* rule in Kentucky was that of the minority of the jurisdictions. Reported cases for the century preceding the above date hold that the sale was fraudulent *per se* as to creditors of a vendor who retained possession of the goods.⁷ Exceptions were made to this general common law rule

¹ Where there is retention by seller and a subsequent sale to a b. f. p. without notice Section 25 of the Uniform Sales Act clearly provides that the interest of the first purchaser is cut off. Carroll's Kentucky Statutes (1936) Section 2651-b-25.

² *Holley v Haile Motor Co.*, 188 N. Y. App. 798, 177 N. Y. Supp. 429, 437 (1919)

³ Mason's Minnesota Statutes (1937) Section 8467.

⁴ Tex. L. R. 269 (1925), 24 Am. Jurisprudence 202 (1939), WIGMORE, EVIDENCE, (3d. ed. 1939) Section 2489.

⁵ *Coburn v. Pickering*, 3 N. H. 415, 14 Am. Dec. 375 (1826).

⁶ Colorado Statutes Anno. (1935), Vol. 3, Chap. 71, Section 14.

⁷ *Morton v Ragan & Dickey*, 68 Ky (5 Bush) 334 (1869), *Robbins v. Oldham*, 62 Ky (1 Duvall) 28 (1863); *Brummel v. Stockton*, 33 Ky. (3 Dana) 135 (1835), *Bradley v. Buford*, 2 Ky. (1 Sneed) 13 (1801).

by the Kentucky Court when the goods were subject to, or exempt from an execution sale;⁸ and in other situations where the nature of the goods themselves rendered it impractical to effect an immediate actual delivery.⁹ As to these exceptions, the court dispensed with the actual transfer under the general rule and found a constructive transfer of possession which the court deemed sufficient to protect the first purchaser against creditors of the vendor. In 1892 the Kentucky legislature enacted a statute, Section 1908,¹⁰ providing:

"Every voluntary alienation of or charge upon personal property, unless the actual possession, in good faith, accompanies same, shall be voided, as to a purchaser without notice, or any creditor, prior to the lodging for record of such transfer or charge in the office of the county court for the county where the alienor or person creating the charge resides."

The first question in interpreting this section is: What change of possession is sufficient to remove the sale from the effect of the statute? The Kentucky Court has answered this by stating that this statute is an expression of the common law rule in Kentucky prior to its enactment.¹¹ Such an interpretation necessarily brought in the common law exceptions. Since the enactment of the statute there have been exceptions allowed which were similar to those allowed prior to 1892. In *Kenton v. Ratcliffe*¹² the Kentucky court held that the statute (expressing the general common law rule) was not applicable to growing crops, or to property not in a condition to be removed without injury. In the case of *Thierman v. Laupheimer*¹³ decided the following year, the transfer of warehouse receipts (actual delivery of goods lacking) was a sufficient delivery to remove the transaction from the effect of the statute. Thus it might be inferred that all exceptions allowed under the common law will be allowed under the statute, and creditors will be deprived of the remedy which Section 1908 seemingly provides. Thus, while the Kentucky court usually follows the minority rule, it

⁸ *Greathouse v. Brown*, 21 Ky. (5 Monroe) 280 (1827), *Anthony v. Wade*, 64 Ky. (1 Bush) 110 (1866).

⁹ See annotations following Section 1908, *Carroll's Kentucky Statutes* (1936).

¹⁰ *Ibid.*

¹¹ *General Motors Acceptance Corporation v. Wigger*, 249 Ky. 722, 61 S. W. (2d) 620, 622 (1933).

¹² 105 Ky. 376, 49 S. W. 14 (1899).

¹³ 21 Ky. Law Rep. 1631, 55 S. W. 925 (1900)

has avoided the harsh effects of this minority rule where a constructive delivery of possession to the vendee can be found. Although it would seem that the present Kentucky rule is a clear case of judicial legislation, the legislature probably would have excluded those cases, which the courts have allowed as exceptions, from the effect of the statute if such cases had been foreseen.

The second question arising in an interpretation of Section 1908 of the Kentucky Statutes is as to the effect of recording of a bill of sale of chattels. The state of Washington has a statute, the provisions of which are practically identical to Section 1908.¹⁴ In interpreting this section the Washington court said that a recorded bill of sale operated as constructive notice to creditors and no transfer of possession was necessary in order to protect the first purchaser.¹⁵ It is well established that unless adequate provision is made by statute for recording an instrument, the recording of it will not operate to the detriment of the creditors of the vendor.¹⁶ There is express authority in the Washington statutes¹⁷ for recording a bill of sale of personalty, but none has been found in the Kentucky Statutes. However, the language of Section 1908 implies that such instruments are authorized to be recorded in Kentucky. Any attempt to foresee the construction which will be placed on that portion of the statute which deals with recording would be a mere guess, but during the fifty years that the statute has been in effect there has been no case in which the court has held "that recording of a bill of sale would dispense with the necessity of a change of possession"¹⁸

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¹⁴ Rev. Stat. of Washington (1932) Section 5827.

¹⁵ Flynn v Garford Motor Truck Co., 149 Wash. 267, 270 Pac. 806, 808 (1928).

¹⁶ *Ibid.*; also see Spalding v. Paine, 81 Ky. 416, 5 Ky. L. Rep. 391 (1883)

¹⁷ Rev. Stat. of Washington (1932) Section 10601; for an interpretation of the statute see Flynn v. Garford Truck Co., *op. cit. supra* n. 15.

¹⁸ WILLISTON, SALES (2d ed. 1924) Section 370.