THE DIVIDED PROPERTY INTERESTS IN
CONDITIONAL SALES

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A conditional sale, as the term is used in current installment sales of chattels, usually appears in the form of a contract to sell when the buyer completes payment of all installments of the purchase price, the buyer getting the possession and the use of the goods in the meantime, and the seller having the power under the contract to retake the goods in the event of the buyer’s default. Is the legal effect of such a transaction merely that of a contract to sell, with the property interest in the goods to pass in the future when the stipulated conditions of payment or other performance have been complied with; or is the transaction, on the contrary, a present transfer of the property interest subject to encumbrance in favor of the seller, as a practical form of security for payment of the purchase price?

If the transaction is examined in the light of the ordinary tests for determining the intention of the parties, it is clear that all the elements of a present sale are present. The goods are specific. The parties have agreed to all the terms of the bargain. Even delivery has been made. Nothing remains to be done by the seller, and the buyer need only make payment as provided in the contract. The parties to the bargain thus have clearly supplied all the ordinary indications that they intend to transfer the ownership in the property at once.

What, then, do the parties mean by the express term in the agreement that the title is not to be transferred until the installments have all been paid in full? Where the parties have by the other terms of their bargain and by their conduct thereunder manifested the intention that the property was to pass at once, and have also in express terms said that it was not to pass until payment of the last installment, what actually is the intention?
While it is often difficult for the parties to express their intentions in sufficiently precise and articulate terms to indicate without question their exact legal effects, it is clear in the ordinary case that the parties intended that there should be divided property interests in the goods, the buyer to have the incidents of ownership but the seller to have security in the goods for the price. Expressed loosely and familiarly, a conditional seller might say that the goods belong technically to him but practically to the buyer. Viewed from a slightly different angle, the conditional seller is likely to say that he has an interest in the goods to the extent of the outstanding balance of the price, admitting that the buyer also has an interest in the goods to the extent of the excess over the outstanding balance. Buyers, similarly, in such cases speak of the goods as their own and treat them as their own, recognizing meanwhile that the seller also has an interest in the goods, but usually they are unable to express in precise terms the exact extent of that interest. This feature is especially accentuated in the case of automobiles bought on installments, where title is reserved in the sellers until paid and yet it is understood and expected by all parties to the bargain that the buyers shall be regularly registered in the public records under the motor vehicle laws as the owners of the automobiles. Reference to "the buyer's equity in the goods" is a form of expression often used informally to indicate the realities of the transaction which has been couched in the technical language of a conditional sale contract reserving title in the seller until paid in full. Viewed merely as a business proposition, it is very clear that the ordinary conditional sale contract, by which an enormous volume of current installment sales is handled, is

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1 It must be admitted that the difficulty is not all traceable to unfamiliarity with the precise application of legal terms. Part of the difficulty is also traceable to the desire on the part of the sellers, carried into elaborately drawn contracts through the services of attorneys secured for the purpose, to express the contract in fictitious forms in order to evade certain legal restrictions or to express the contract in such ambiguous form as to permit the seller to claim either as seller or as owner depending on which may in the particular events turn out to be more to his advantage. See Heryford v. Davis, 102 U. S. 235, 244 (1880); National Cash Register Co. v. Paul, 213 Mich. 609, 616, 182 N. W. 44, 46 (1921); Wood v. Cox, 92 N. J. Eq. 307, 309, 113 Atl. 501, 502 (1921).
intended to result in divided property interests, the general interest of ownership and beneficial use passing to the buyer on delivery, subject to a security interest, under whatever name expressed, reserved in the seller, as security for the purchase price. While there are still various conflicting theories prevalent in different jurisdictions as to the nature of conditional sales, and there is still much confusion in the language employed in the cases in describing the relations between parties to conditional sales, direct recognition of the fact that conditional sales involve divided property interests in the goods is now very frequently found in the opin-

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2 Many of the earlier cases seem to have regarded the contract language reserving title in the seller until payment as conclusive that the transaction was merely a contract to sell. See cases referred to in Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51 (1886). Naturally, this language, emphasizing merely that clause in the contract, is often repeated even in recent cases. Babbutt & Cowden Live Stock Co. v. Hooker, 28 Ariz. 263, 236 Pac. 722 (1925); Holmes v. Schnedler, 176 Minn. 483, 223 N. W. 908 (1929).

Under the rule in force in Colorado a reservation of title in the seller under a conditional sale contract amounts to a secret lien which is valid between the parties but which is void as against parties without notice. Turnbull v. Cole, infra note 77.

A somewhat similar view prevailed in Illinois for many years. Gilbert v. National Cash Register Co., 176 Ill. 288, 52 N. E. 22 (1898). In 1915 the rule was changed to accord with the weight of authority through the operation of sections 20 and 23 of the Uniform Sales Act. Graver Bartlett Nash Co. v. Krans, 239 Ill. App. 522 (1925). For some critical comments by Professor George G. Bogert on this change of front in Illinois, see infra note 78.

In Kentucky the conditional sale contract is given the same legal effect as a sale with a chattel mortgage back. Montenegro-Riehm Music Co. v. Beuris, 160 Ky. 557, 169 S. W. 986 (1914).

Under the Louisiana rule it is held that the sale is absolute, the reservation of property in the seller being regarded as void for repugnancy. Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 153, 46 So. 193 (1908).

In Michigan an unsatisfactory distinction is maintained between an absolute reservation of title till payment, which is called a conditional sale, and a contract whereby the seller purports to reserve the title by way of security merely, which is said to amount to a chattel mortgage. Atkinson v. Japink, 186 Mich. 335, 152 N. W. 1079 (1915).

Under the language commonly used in Pennsylvania before that state adopted the Uniform Conditional Sales Act there was a great similarity between bailment contracts and conditional sale contracts elsewhere. Schmidt v. Brady, 284 Pa. 41, 130 Atl. 259 (1925); see Mueller, Conditional Sales in Pennsylvania Since the Sales Act (1924) U. of Pa. L. Rev. 123.

In the state of Washington it is declared, contra to the weight of authority, that the conditional buyer acquires no property interest, legal or equitable, until payment. Holt Mfg. Co. v. Jaussaud, infra note 28. Despite such language it is recognized in Washington that the conditional buyer enjoys many of the incidents of ownership in the goods.
ions of courts. Various statutes now also directly or indirectly show recognition of this fact.

The legal nature of the conditional sale transaction may be briefly summarized in the statement that it is a present transfer of the beneficial ownership in the goods to the buyer, with an accompanying reservation of the legal title in the seller as security for the purchase price. Under a conditional sale, therefore, each party has certain property interests in the goods, less than complete and absolute ownership. Expressed in precise Hohfeldian terms, each has less than complete ownership, but each has with

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*a* Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50 (1915) (the buyer's right to perform the conditions and acquire the ownership is a property right); Murray v. McDonald, 203 Iowa 418, 212 N. W. 711 (1927) (a species of double ownership in buyer and seller, the ownership of each subject to the interest of the other); Worcester Morris Plan Co. v. Mader, 236 Mass. 435, 128 N. E. 777 (1920) (conditional buyer has a special property in the goods); Welch v. Harnett, 127 Misc. 221, 215 N. Y. Supp. 540 (1926) (conditional buyer is equitable owner, and is for all practical purposes the owner). That conditional buyer has an equity, see Brown v. Woody, 98 W. Va. 512, 127 S. E. 325 (1925); Underwood v. Raleigh Transportation, etc. Co., 102 W. Va. 305, 135 S. E. 4 (1926). Referring to the seller's interest as a lien, see Van Derveer & Son Co. v. Canzona, 206 App. Div. 130, 200 N. Y. Supp. 563 (1923); Biederman v. Edson & Co., 128 Misc. 455, 219 N. Y. Supp. 115 (1926); Hawley v. Levy, 99 W. Va. 335, 128 S. E. 735 (1925); Mlodzik v. Ackerman Oil Co., 191 Wis. 233, 212 N. W. 790 (1926).

4 Local statutes affecting conditional sales are set out in 2 U. L. A. Some of these bear out the statement in the text, but no attempt can here be made to analyze those statutes. The Uniform Sales Act, it may be noted, is so drawn as to recognize this distinction, §22 (a) providing that where the property is reserved by the seller merely to secure performance by the buyer the goods are at the buyer's risk from the time of delivery.

The Uniform Conditional Sales Act, in §§2 and 3, goes a great deal farther in recognizing the fact of divided property interests in conditional sales, adopting a form of statement under which the rights of the buyer and the rights of the seller are segregated and separately dealt with. The Uniform Conditional Sales Act, unfortunately, has as yet been adopted only in a few jurisdictions: Alaska, Arizona, Delaware, New Jersey, New York, Pennsylvania, South Dakota, West Virginia and Wisconsin.

Proceedings under various statutes to forfeit automobiles used in illegal transportation of liquor have incidentally brought out very sharply that both buyers and sellers under conditional sales have property interests in the goods forfeited. U. S. v. One Ford Coupe, 272 U. S. 321, 47 Sup. Ct. 154 (1926); White Auto Co. v. Collins, 136 Ark. 81, 206 S. W. 748 (1918) (provision that interest of seller be forfeited regardless of his innocence); People v. One Buick Coupe, 71 Cal. App. 691, 236 Pac. 198 (1925) (protecting innocent seller's interest). As to the effect of the National Prohibition Act, 41 Stat. 305 (1919), 27 U. S. C. §26 (1926), see Commercial Credit Co. v. U. S., 276 U. S. 226, 48 Sup. Ct. 20 (1928).

5. "... the incidents of beneficial ownership are with the conditional buyer, and the seller's reserved title is for security merely." Bogert, Commentaries on Conditional Sales (1924) §29, 2A U. L. A. §29.

*a* Williston, Sales (2d ed. 1924) §330.
relation to these goods certain rights, powers, privileges, and
immunities. The exact scope of these rights, powers, privileges
and immunities can vary greatly among individual cases, as they
are determined largely by the provisions of the particular contract
and the extent of the buyer's performance thereunder, but are
also affected by certain rules of law and especially by the provisions
of local recording acts.

The Conditional Buyer's Interest in the Goods

That the buyer in a conditional sale has a property interest
in the goods, as distinguished from having only a contract claim
against the seller, is manifested in various ways. The buyer has,
in the first place, the right to possession and beneficial use of the
goods. The buyer in possession, if the goods are wrongfully
taken or injured by strangers, has the ordinary possessory remedies
to recover the possession or to obtain compensation for injury to
the goods. Without default by the buyer in the payment of
installments, the goods cannot rightfully be taken from the buyer,
even by the conditional seller, who in express terms has reserved
title in himself. In case of default, the common law cases usually
permit the seller to retake the goods, sometimes with qualifications

7 Hohfeld, Fundamental Legal Conceptions (1923) 53, 54.
8 The conditional buyer in possession when the goods are injured through
negligent acts of third parties may recover damages from the wrongdoer.
Smith v. Louisville & N. R. R., 208 Ala. 440, 94 So. 489 (1922); Brown v.
New Haven Taxicab Co., 92 Conn. 252, 102 Atl. 573 (1917); Downey v.
Bay State St. Ry., 225 Mass. 281, 114 N. E. 207 (1916); Carter v. Black
& White Cab Co., 162 Misc. 680, 169 N. Y. Supp. 441 (1918). The condi-
tional buyer has a cause of action for conversion against third parties
who wrongfully take the goods from his possession. Harrington v. King,
121 Mass. 269 (1876); Angell v. Lewistown State Bank, 72 Mont. 345, 232
Pac. 90 (1925). Action by the conditional seller against a third party wrong-
doer for injury to the goods is barred by the conditional buyer's previous
settlement out of court with the wrongdoer where nothing is shown to im-
peach the settlement. Ellis Motor Co. v. Hancock, 38 Ga. App. 788, 145 S. E.
518 (1928); Smith v. Gufford, 36 Fla. 481, 18 So. 717 (1895). On the con-
tditional buyer's recovery of damages from the wrongdoer, he must account
to the conditional seller to the extent of the conditional seller's interest. Lacey
v. Great Northern Ry. Co., 70 Mont. 346, 225 Pac. 808 (1924); Harris v.
9 Carvell v. Weaver, 54 Cal. App. 734, 202 Pac. 897 (1921); Besche v.
Brady, 139 Md. 582, 116 Atl. 63 (1921); Commercial Credit Corp. v. Miron, 108
Conn. 524, 143 Atl. 849 (1928) (replevin); Madison River Live Stock Co. v.
Ogier, 30 Mont. 244, 102 Pac. 395 (1909) (replevin); cf. National Cash Register
that are somewhat obscure.\textsuperscript{10} It is clearly recognized in the Uniform Conditional Sales Act that, apart from a proper retaking by the seller for the buyer's default, which is in effect only foreclosure, the buyer's possession cannot rightfully be interfered with.\textsuperscript{11} The conditional buyer of an automobile, in order to have the benefit of its use on the public highways during the period while installments of the price are still outstanding, is recognized as entitled to have it registered in his name as "owner" under motor vehicle laws requiring the car to be registered in the owner's name.\textsuperscript{12}

The conditional buyer also has the power to become the absolute owner irrespective of any subsequent assent on the part of the seller by paying the price or otherwise performing the conditions of the contract. On the buyer's performance according to the terms of the contract he is recognized as absolute owner.\textsuperscript{13} The same consequence is held to follow a proper tender even after default if before actual retaking by the seller, even though the seller should decline to accept it.\textsuperscript{14} Whether this is described by saying that title then passes automatically to the buyer,\textsuperscript{15} or whether it is said that the seller's security interest is then extinguished, thereby leaving the buyer's ownership in the goods unencumbered, it is plain that the conditional buyer, even before complete performance, enjoys a power to make himself complete owner which is independent of the conditional seller's subsequent assent.

\textsuperscript{10} See \textit{infra} p. 724; \textit{Bogert, op. cit. supra} note 5, § 19, and authorities cited.
\textsuperscript{13} Staunton v. Smith, 6 Pen. 193, 65 Atl. 593 (Del. 1906); Tufts v. Griffin, 107 N. C. 47 (1890).
\textsuperscript{14} Wilkinson v. Fisherman's & Canner's Supply Co., 57 Cal. App. 165, 206 Pac. 761 (1922); White Co. v. Union Transfer Co., 270 Pa. 514, 113 Atl. 432 (1921); Duplex Printing Press Co. v. Public Opinion Publishing Co., 41 S. D. 523, 171 N. W. 606 (1919). In Tweedie v. Clark, 114 App. Div. 296, 90 N. Y. Supp. 856 (1906) the same result was reached under the local statute, even after the seller had resumed possession of the horse sold, the buyer's tender having been made before the necessary foreclosure sale.
\textsuperscript{15} White Co. v. Union Transfer Co., \textit{supra} note 14; Kiefer-Haessler Hardware Co. v. Paulus, 149 Wis. 453, 135 N. W. 832 (1912).
The conditional buyer may also before performance transfer or encumber his interest, even though there are special restrictions in the contract to the contrary, his transferees thereby becoming entitled to keep the goods by making or tendering full performance to the conditional seller. Where there are in the contract no special restrictions upon transfers by the conditional buyer, his transferees succeed a fortiori to his rights and powers with reference to the property, subject, apart from recording acts, to their performing the obligations to which the original conditional buyer himself was bound. The conditional buyer's interest in the goods may not only be transferred in his lifetime, but may pass in succession or, it would seem, be disposed of by will. It is well recognized that the conditional buyer has an insurable interest in the property. It is also well established by a large array of well reasoned cases, codified now in the Uniform Conditional Sales Act, despite some conflict on the point as a common law matter, that warranties are imposed in favor of the buyer in conditional sales on the same basis as in sales which are in the first instance absolute. The chance of gain through increase in the value of the goods is with the buyer.

26 Oppenheimer v. Telhiard, 123 Miss. 111, 85 So. 134 (1920); Tweedie v. Clark, supra note 14.
30 Uniform Conditional Sales Act, § 2.
31 See Bogert, op. cit. supra note 5, § 31; Estrich, INSTALLMENT SALES (1926) §§ 264-268.
32 In Frank v. Batten, 49 Hun 91, 1 N. Y. Supp. 705 (1888) there was a conditional sale of lumber to be manufactured into finishing woodwork. In such cases the seller gets the accession with the original chattel, though somewhat changed in form, on retaking for the buyer's default, but the seller's interest can be discharged, as in other cases, by the buyer's paying or tendering the balance due.
If the chattels conditionally bought are living animals their natural increase during the period of the contract belongs to the buyer on the same conditions as the original animals. The buyer also has an equity of redemption after default. Taking all these various features together, it is very clear that the conditional buyer enjoys most of the beneficial incidents of ownership in the goods.

Not only does the buyer have most of the beneficial incidents of ownership in goods bought under conditional sale contracts, but he also has the ordinary burdens of ownership. Thus, the conditional buyer is almost everywhere held to bear the risk of loss. Whether the goods are lost through their destruction by accidental fire, or through theft, deterioration, or death, the buyer’s liability to the conditional seller for the entire purchase price remains unaffected. In this respect, the results conform exactly to the principle that the loss follows the beneficial ownership. Even though it be freely recognized that there is an alternative ground on which the cases often place the formal explanation of the buyer’s bearing the risk of loss, in that by the terms of the contract he has promised absolutely to pay the purchase price,
the substantial result remains that the burden of the risk of loss falls on the buyer. The conditional buyer, who enjoys most of the beneficial incidents of ownership, thus also carries the risk of loss, which is the most conspicuous burden of ownership. Other incidental burdens of ownership also fall upon the buyer. Thus, the buyer's interest in the goods may be reached by his creditors. Taxes on the goods under ordinary statutes requiring assessment to the owner are assessed properly to the buyer. In the case of conditional sales of automobiles, the buyer, as the party who is to have the possession and use of the car, is also usually the party who must comply with the requirements of registration and pay the fees therefor under the motor vehicle laws.

Since the conditional buyer, therefore, not only enjoys most of the usual beneficial incidents of ownership but also carries the usual burdens incident to ownership of the goods, he is properly described as the beneficial owner whose interest in the goods is qualified only by the conditional seller's security interest. This qualification of the conditional buyer's interest in the goods may in the individual case be of greater or less importance, depending on the extent of the conditional seller's interest. The extent of this interest, in turn, depends largely on the terms of the contract and the amount of the balance outstanding, but is also affected by local rules of law and local recording acts.

THE CONDITIONAL SELLER'S INTEREST IN THE GOODS

That the conditional seller's interest in the goods is limited to an interest held as security for the purchase price is readily apparent when the term "security" is used in a broad inclusive sense, whether the transaction be viewed informally as a business proposition or whether it be viewed legally with reference to the terms of the contract, the conduct of the parties, and the circumstances of the case.

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35 State v. White Furniture Co., 206 Ala. 575, 90 So. 896 (1921).

36 See Welch v. Hartnett, supra note 3.
Viewed informally in its practical business aspects it is plain that the conditional sale transaction is resorted to by the parties as a device for financing the purchase of goods on credit by a buyer generally without adequate means for full payment on delivery. The parties manifestly intend that the buyer shall get control of the goods at once, that he shall in due time pay the agreed purchase price, and that the seller shall not interfere with the buyer's control of the goods except in case of his default under the contract. At the same time it is very clear that the conditional seller under ordinary circumstances does not want the goods back but wants the purchase price paid, that the intention of the parties is that the price shall be paid, and that the conditional buyer is bound to pay that price and has no option of discharging the contract by a return of the goods. Using the term "security" in a broad sense, the conditional seller's interest in the goods is merely security for the purchase price in a transaction in which the seller for the time being is carrying unusually heavy risks in extending credit to the buyer.

That the conditional seller holds only a limited interest in the goods for the purpose of security for the purchase price is also readily apparent when the transaction is examined in its legal aspects. Despite very sweeping language employed in certain clauses of conditional sale contracts purporting in terms to reserve in the seller the entire property interest in the goods, the results attained in the decided cases show that the seller's interest is much more limited.

Before default by the conditional buyer, the conditional seller's interest in the goods, however described, obviously does not exclude the buyer's interest, which, as indicated above, extends to most of the ordinary incidents of ownership. Even before the buyer's default, however, the conditional seller has some of the beneficial incidents of ownership in the goods. Thus, the conditional seller has an insurable interest in the goods to the extent of his security.37 The conditional seller may recover damages from wrongdoers at least up to the extent of his interest when

37 Commercial Credit Co. v. Eisenhour, 28 Ariz. 112, 236 Pac. 126 (1925); Aetna Ins. Co. v. Heidelberg, 112 Miss. 46, 72 So. 852 (1916).
they convert or do damage to the goods.\textsuperscript{38} Before the buyer’s default the conditional seller also has some—though not all—of the ordinary burdens of ownership. Thus, his interest in the goods may be reached by his creditors.\textsuperscript{39} His interest may also be taxed as a secured credit,\textsuperscript{40} although the full value of the goods cannot be assessed to him as owner.\textsuperscript{41} He is not, however, subject as owner to the risk of destruction or loss of the goods.\textsuperscript{42}

The limited character of the conditional seller’s interest in the goods is apparent with reference to its assignment. The conditional seller has the power to transfer his interest in the goods by making an assignment of his claim for the purchase price.\textsuperscript{43} As in more familiar instances of secured claims, the debt of the conditional buyer is here the principal thing, the seller’s interest in the goods being its security. By the assignment the assignee succeeds to the position of the assignor, the original conditional seller.\textsuperscript{44} The assignment by the conditional seller is subject to equities available between the original parties to the bargain. Thus, where there is fraud on the seller’s part in the original bargain the seller’s assignee takes the security subject to the conditional buyer’s power to set up the original seller’s fraud.\textsuperscript{45} If there be no notice to the conditional buyer of the fact of assignment, subsequent payment to the assignor, the original conditional


\textsuperscript{39} Escobar v. Rogers, 182 Cal. 603, 189 Pac. 268 (1920); McMillan v. Larned, 41 Mich. 521, 2 N. W. 662 (1879).

\textsuperscript{40} Stillman v. Lynch, 56 Utah 540, 192 Pac. 272 (1920).

\textsuperscript{41} State v. White Furniture Co., \textit{supra} note 35.

\textsuperscript{42} \textsc{Uniform Conditional Sales Act}, \textsection 27; \textsc{Uniform Sales Act}, \textsection 22 (a). As to the conflict under the common law, see \textsc{Williston, Sales} (2d ed. 1924) \textsection 304.

\textsuperscript{43} Western States Securities Co. v. Mosher, 28 Ariz. 420, 237 Pac. 192 (1925); General Motors Acceptance Corp. v. Smith, 101 N. J. L. 154, 127 Atl. 179 (1925). The assignment of the secured debt may be made in automobile cases without complying with the formalities required for proper transfer of the automobiles under the ordinary provisions of motor vehicle laws. General Motors Acceptance Corp. v. Smith, \textit{supra}.

\textsuperscript{44} Western States Securities Co. v. Mosher; General Motors Acceptance Corporation v. Smith, both \textit{supra} note 43. That the conditional seller’s transferring the note for the price does not prejudice holder’s rights under contract of conditional sale, see McMullen Machinery Co. v. Grand Rapids Trust Co., 239 Mich. 295, 214 N. W. 110 (1927). \textit{Contra:} Winton Motor Carriage Co. v. Broadway Auto Co., 65 Wash. 650, 118 Pac. 817 (1911); \textit{cf.} State Bank v. Johnson, 104 Wash. 550, 177 Pac. 340 (1918).

\textsuperscript{45} Auto Brokerage Co. v. Ullrich, 102 N. J. L. 341, 134 Atl. 885 (1926).
seller, will discharge the debt and extinguish thereby the conditional vendor's interest. Similarly, subsequent modifications of the contract by the original parties, if entered into by the buyer without notice of the prior assignment, are binding upon the assignee. Before default, therefore, it is apparent that the conditional seller's interest in the goods is a limited interest. This interest can be described, using the term broadly, as an interest held as security for the purchase price.

After the conditional buyer's default, the conditional seller's powers are greatly enlarged in that he can now retake the goods from the buyer. Carefully drawn conditional sales contracts usually provide in express terms that in the event of the buyer's default the seller may retake the goods, but the same result is reached even without such clause, by interpretation of the general clause reserving the property in the seller until the buyer has performed all his obligations under the contract. The conditional seller, on the default, may exercise his power to retake the goods by the mere act of resuming possession, if he can do so without otherwise committing a trespass or provoking a breach of the peace. If private retaking is resisted or is for any other reason considered inconvenient, the conditional seller may have resort to legal process. Thus, he may recover possession of the goods in an action of replevin. If the buyer retakes the goods from a seller who has rightfully repossessed them, his act constitutes a conversion for which the seller may recover in

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a tort action. If the seller unjustifiably retakes the goods from the buyer, on the other hand, he is himself liable for conversion.

**Legal Effects of the Exercise of the Seller's Remedies**

What are the legal effects of the seller's retaking the goods when the conditional buyer defaults? This question has many complex applications, on the numerous details of which there is a great deal of very sharp conflict of authority. Much of this conflict is traceable fundamentally to divergent analyses by different courts of the nature of conditional sales. Only a few of the principal applications can be here mentioned.

Many courts have in effect taken the position that the seller's retaking is a rescission of the contract for the buyer's default. This position would seem to be unsound, for if retaking were held to constitute rescission for default, the result would follow that the seller would be bound to restore the payments made by the buyer on account in order to put both parties back in their original positions. The retaking may be held, on the contrary, to be the exercise of one of the powers conferred on the seller by the contract, and therefore not a rescission of the contract for the buyer's default, but the enforcement of the term of the contract providing for the event of default. The retaking thus being under the terms of the contract, many courts have held that under those terms the buyer is not entitled to the return of any payments made on account. To avoid the extreme hardship and apparent

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64 Reinkey v. Findley Elec. Co., 147 Minn. 161, 180 N. W. 236 (1920); Richardson v. Great Western Motors, 109 Wash. 324, 187 Pac. 333 (1920).
65 Star Drilling Machine Co. v. Richards, 272 Pa. 383, 116 Atl. 309 (1922); see Bogert, *op. cit. supra* note 5, at 170, and cases there cited. Statutes dealing with the matter are also occasionally drawn on the theory that retaking constitutes rescission. Urquhart v. Sears, Roebuck & Co., 227 Mo. App. 627, 227 S. W. 881 (1921).
injustice of a forfeiture of the conditional buyer’s interest where he has paid all but the last installment or two, even though the terms of the contract so provide, some courts now require, either under the authority of special statutes enacted for the purpose or under some application of the common law analogy of chattel mortgages, that the conditional buyer shall have some opportunity to redeem the goods after the retaking,\textsuperscript{59} and that if they are not redeemed the seller shall resell them and apply their proceeds to the balance due and account to the buyer for any excess that may be available.\textsuperscript{60}

When the buyer’s payments on account have not been sufficient to equal the depreciation in the value of the goods, there is a somewhat similar conflict of opinion among the courts over the question whether the seller after retaking is entitled to recover any deficiency from the buyer. Many courts, conceiving that retaking the goods either constitutes rescission of the contract or gives rise to failure of consideration under the contract, have held that after a retaking the seller can no longer sue the buyer on the contract. Accordingly, a retaking of the goods is held to be inconsistent with an action for a deficiency.\textsuperscript{61} Such reasoning is founded on the misconception that the conditional sale transaction constitutes only an executory contract, overlooking the fact that the beneficial interest in the goods passes to the buyer at the outset and that the seller’s power of retaking for default is therefore only a summary form of foreclosure of his security interest. Other courts, better guided through some application of the common law analogy of chattel mortgages, or because of the fortunate assistance of local statutory enactments pointing in that direction, or specific provisions in recent contracts to that effect, or a combination of these considerations, have held that after retaking the goods and applying the proceeds to the balance due the con-


\textsuperscript{60} Bogert, \textit{op. cit. supra} note 5, at 159 et seq. This position is codified in the \textit{Uniform Conditional Sales Act}, §§ 19, 21, when the buyer has paid at least fifty per cent. of the contract price.

\textsuperscript{61} Aultman & Co. v. Olson, 43 Minn. 409, 45 N. W. 852 (1890); Star Drilling Machine Co. v. Richards, \textit{supra} note 55.
ditional seller is still entitled to enforce the contract against the buyer for the payment of any deficiency. Both in the matter of accounting for excess and in the matter of recovery for deficiency the Uniform Conditional Sales Act follows largely the analogy of chattel mortgages.

If the conditional seller sues for the purchase price, instead of retaking the goods on the buyer's default, there is a similar conflict of authority regarding the effect of such action on the right to retake. Many courts have held that an action for the price is inconsistent with subsequent retaking of the goods, the result being that by suing for the price the conditional seller is held to waive the power to retake the goods. The reasoning on which this conclusion is based is difficult to follow and seems utterly unsound. It seems to be assumed in such cases, contrary to the realities, that the conditional sale transaction is merely an executory contract, and to that is then apparently added the further assumption that by bringing his action for the price the conditional seller waives his reserved title, thereby making the buyer the owner, as it is said that on no other basis can he be entitled to recover the entire purchase price. Other courts, better appreciating the realities in the conditional sale transaction as constituting a transfer to the buyer of the beneficial interest in the goods with large powers reserved to the seller for the purpose of securing the purchase price, have held that there is no inconsistency between an action for the price and subsequent resort to the security in the form of retaking the goods where payment of the price has not been forthcoming through the action. This position, following

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65 Murray v. McDonald, 203 Iowa 418, 212 N. W. 77 (1927); Ratchford v. Cayuga County, etc., Co., 217 N. Y. 565, 112 N. E. 447 (1916). However, it is usually regarded as a conclusive election of remedies by the seller if he effectively asserts a lien on the goods or levies on them an attachment or
in substance the analogy of chattel mortgages, is also adopted in the Uniform Conditional Sales Act.\footnote{Uniform Conditional Sales Act, § 24.}

**Relations With Third Parties**

The foregoing analysis of the interests in the goods held by the conditional buyer and the conditional seller respectively broadly indicates that which each may transfer to other parties by voluntary sale and that which may be taken from each by his creditors. According to the general common law rules of property one may ordinarily transfer that which he has but no more, and one's creditors may ordinarily take by appropriate legal process that which their debtor has but no more. These elementary rules are as applicable to the divided property interests involved in conditional sales as they are to the more familiar undivided property interest of complete and absolute ownership of goods. Here, as in other cases, the application of these rules may be modified in certain respects because of statutory changes, because of circumstances of estoppel or of authorization, or because of certain special rules of policy.

Applying the familiar rule that one cannot convey more than he has, it is held by the overwhelming weight of authority, in cases in which recording acts do not apply, that a transfer by the conditional buyer to a third party, even though it be to a party who is a purchaser for value without notice, does not cut off the original conditional seller's interest.\footnote{Harkness v. Russell, supra note 2; Williston, Sales (2d ed. 1924) § 324.} The few jurisdictions that have held to the contrary are themselves not in accord as to the reasons for their conclusions. Similarly, a transfer by the conditional seller while the buyer is in possession without default operates at most as a transfer merely of the seller's claim for the purchase money with his reserved security interest in the goods.\footnote{See supra notes 43-47.}

\footnote{Beirce v. Hutchins, 205 U. S. 340, 27 Sup. Ct. 524 (1907); New England Road Machinery Co. v. Vanderhooft, 19 F. (2d) 331 (C. C. A. 1st, 1927). It is submitted that since in conditional sales the seller and the buyer have divided property interests in the same goods, no taking of the buyer's interest under attachment or levy need be regarded necessarily as a waiver of the seller's security interest.}
PROPERTY INTERESTS IN CONDITIONAL SALES

Subsequent mortgagees or other encumbrancers for value from the conditional buyer stand in this respect like purchasers, succeeding to the limited interest of their respective transferors.69 Attaching or execution creditors, similarly, apart from powers derived from recording acts, can rightfully seize only the interest of their debtor in the goods. Accordingly, the conditional buyer's creditors acquire by a levy on the goods no greater interest than he had.70 Similarly, where creditors of the conditional seller by appropriate process reach his interest they are subject to the buyer's interest71 under the contract and cannot justify a seizure of possession of the goods from the buyer without his default.72 On the same basis, an assignee in insolvency or a receiver of an insolvent conditional buyer, acting for the benefit of the creditors, takes the goods subject to the conditional seller's interest.73 The same is usually true of the conditional buyer's trustee in bankruptcy74 unless his position in the case in hand is affected by recording acts.75

FILING OR RECORDING ACTS

The effect of filing or recording statutes in the case of conditional sales is largely analogous to the effect of recording statutes in the more familiar case of chattel mortgages. Statutes providing for the recording of chattel mortgages quite generally embrace two vital features. In the first place, provision is made for recording such mortgages in some ascertained public office

71 Escobar v. Rogers, supra note 39.
72 Bickerstaff v. Doub, 19 Cal. 109 (1861).
75 See infra note 82.
where those who have occasion to do so may examine them and thus get notice of the facts. In the second place, provision is made that unless the mortgage is properly recorded it shall be void as against certain classes of parties having dealings with the mortgagor without notice thereof. Thus, it is most frequently enacted that, unless recorded, the chattel mortgage shall be void as against innocent purchasers of the goods from the mortgagor. Similar provision making the unrecorded chattel mortgage void as against certain types of creditors, such as judgment or attaching creditors, is also very common. The effect of these provisions is so far to change the common law rule of *caveat emptor* as to confer on the chattel mortgagor a power to cut off the interest of the chattel mortgagee under an unrecorded mortgage, a power which can be exercised by making a sale of the mortgaged goods to an innocent purchaser. A somewhat similar power is conferred on the mortgagor's creditors, usually exercisable by securing a lien on the goods. Recording acts thus give parties dealing with the mortgagor in possession a large measure of protection against secret liens in the form of unrecorded prior chattel mortgages. At the same time recording acts guard the important field of mortgage credit from serious interference through providing the mortgagee with an opportunity to record his mortgage in the designated public office where it will be open to inspection by all interested parties, the recording serving to affect outside parties with constructive notice.

In conditional sale transactions, the problem of hardship on parties dealing with the conditional buyer in possession, because of the secret reserved interest of the conditional seller, is very similar to that which is so familiar in connection with chattel mortgages. As has been previously noted, parties dealing with the conditional buyer, whether as purchasers of the goods or as creditors advancing accommodation on the credit of those goods, can under the ordinary common law rules succeed only to the limited interest of the conditional buyer. To avoid the resulting hardship on parties dealing with the conditional buyer without knowledge of the conditional seller's reserved security interest, the bold construction has sometimes been put on conditional sale transactions that they are chattel mortgages in substance and that
in consequence the chattel mortgage statutes apply to them. In certain states, on the other hand, it has been held that conditional sales, involving secret liens in favor of the conditional seller, are constructively fraudulent and void as against parties without notice. Obviously this view greatly impairs the range of conditional sale credit that can be practicably extended to purchasers in those states. In a large majority of states at the present time the problem of the secret lien in favor of the conditional seller is met by statutes somewhat analogous to chattel mortgage recording acts requiring the filing or recording of conditional sale contracts. Since the conditional sale recording acts that are now in force in the various states vary greatly in detail, the local statutes must be carefully examined in dealing with actual cases. Most of these statutes in effect give the conditional buyer the power to cut off the conditional seller's interest under an unrecorded conditional sale by making in turn a sale to an innocent purchaser. To a greater or less extent they also give creditors of the conditional buyer the power to secure priority over the conditional seller by making a levy on the goods or acquiring a judgment lien before notice of the unrecorded conditional sale. Under the operation of the amendment of 1910 to the National Bankruptcy Act, the conditional buyer's trustee in bankruptcy acquires the status of a lien creditor under the conditional sale recording acts to the exclusion of the conditional seller whose contract is not recorded. An ordinary equity receiver of an insolvent conditional buyer, not being in position to invoke the

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76 Hudson Co. v. Apartment Investment Corp., 244 Mich. 529, 221 N. W. 630 (1928).
77 Turnbull v. Cole, 70 Colo. 364, 201 Pac. 887 (1921).
78 See note (1926) 20 Ill. L. Rev. 708, by Professor Bogert.
79 Williston, Sales (2d ed. 1924) § 327.
81 On the other hand, a conditional seller who has assigned his interest cannot make an effective sale of the property when repossessed which will cut off the original assignee's interest. State Bank of Black Diamond v. Johnson, 104 Wash. 550, 177 Pac. 340 (1918).
82 Cashman v. Lewis, 26 Ariz. 95, 222 Pac. 411 (1924); Brown v. Christian, 97 N. J. L. 56, 117 Atl. 294 (1922).
bankruptcy statute in his favor, stands merely as successor to the conditional buyer and is therefore subject to the conditional seller's interest even though the conditional sale contract is not recorded. General creditors of the conditional buyer ordinarily do not under conditional sale recording acts get priority over the conditional seller whose contract is not recorded.

Though the conditional sale contract is not filed promptly at the time of the transaction, the conditional seller can protect his interest by filing his contract as required at any time before innocent purchasers or lien creditors have intervened. Purchasers from the conditional buyer with notice of the facts cannot under the usual conditional sale recording acts obtain priority over the conditional seller even though his contract is not recorded. The same is true of attaching or execution creditors with notice, and the same has been held for the conditional buyer's trustee in bankruptcy where there was from the outset notice of the conditional sale.

CONDITIONAL SALES FOR RESALE—APPARENT AUTHORITY

Conditional sale transactions are often resorted to not only for financing sales to ultimate users who have not sufficient means to pay on delivery but also for financing sales to retailers who similarly are without sufficient means to pay the wholesaler or manufacturer on delivery. As in other cases of conditional sales the terms of such contracts are binding upon the parties themselves. It is clear in such cases, however, that when the retailer makes a sale to an innocent purchaser in the ordinary course of

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84 Bogert, op. cit. supra note 5, § 59.
86 See cases cited in Estrich, op. cit. supra note 24, § 199, n. 10, and in Bogert, op. cit. supra note 5, at 80.
89 Bogert, op. cit. supra note 5, § 79.
business the entire property interest in the goods passes to such purchaser free and clear of the original conditional seller's security interest. Such cases fall within the range either of apparent or actual authority, and the conditional seller is therefore bound on the ordinary rules of agency. It is to be noticed, further, that conditional sale recording acts ordinarily do not affect the question, as between the original conditional seller and innocent purchasers from the retailer in the ordinary course of business, the retailer's actual or apparent authority to resell being decisive to protect the purchaser in such cases against the original conditional seller even though the conditional sale contract be recorded. Where the resale by the retailer is not in the ordinary course of business, however, the original conditional seller's interest remains unaffected and can be enforced against the purchaser even though he had no notice, the appearance of authority to sell in the ordinary course of business not justifying reliance thereon when sales are made out of the usual course.

Where contests arise between the original conditional seller and creditors of the retailer, the conditional seller usually prevails unless the creditors are within the protection accorded by recording acts, the creditors otherwise succeeding merely to the rights of their debtor. The actual or apparent authority to resell does not apply to justify an otherwise improper taking of the original conditional seller's interest by the retailer's creditors. There are, to be sure, some cases that have held the other way on the broad ground that by allowing the retailer to place the goods in his stock for sale the original conditional seller has helped to create an appearance of ownership in the retailer conducive to

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93 Thorne v. Webster, 193 Wis. 97, 213 N. W. 646 (1927).

his obtaining a false credit. Such cases seem very questionable. However convincing such reasoning may be on these facts to justify protection of a purchaser from the retailer by the application of the doctrine of ostensible or apparent authority to sell, it seems much less convincing to justify protection to the retailer’s creditors, aside from recording acts, by the application of a corresponding doctrine of ostensible ownership as a basis for credit. It is so well known in the business world that goods are often delivered to retailers for sale by them as factors or commission merchants, or on other special arrangements without the retailer's becoming a purchaser on his own account, that his possession of goods even with apparent authority to sell hardly seems without more a sufficient appearance of ownership to justify reliance on such ownership as a satisfactory basis for extension of credit.

Troublesome questions regarding the proper application of the doctrine of ostensible or apparent authority may arise in connection with conditional sale transactions apart from the cases of conditional sales to retailers for resale. It is clear by the overwhelming weight of authority that mere delivery of possession by the conditional seller to the conditional buyer does not, apart from the operation of recording statutes, confer upon the conditional buyer apparent authority to dispose of the conditional seller’s interest. Therefore, conditional buyer's delivery of the goods to a dealer in second-hand goods of that kind, the conditional seller having no knowledge of the facts, confers no apparent authority on such dealer to cut off the conditional seller's interest by making a resale to a purchaser. To the same effect it has been held, where the conditional seller has assigned his interest, that a subsequent repossession by the original conditional seller without the assignee's knowledge or consent confers no apparent authority on him to cut off the assignee's interest by making a resale. On the other hand, where such assignee au-

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thorizes or permits repossession by the original conditional seller, a finding of apparent authority to resell is upheld, thereby protecting the subsequent innocent purchaser, even though the resale was in violation of certain restrictions prescribed by the original seller's assignee holding the security interest. At least one case has applied the doctrine of apparent authority to protect innocent purchasers from the buyer where the conditional seller had permitted the conditional buyer to remain in possession long after default. It has also been intimated that apparent authority might, perhaps, be made out on showing that the conditional seller attached to the chattels name plates bearing the buyer's name. In the field of conditional sales, as in other applications of the doctrine, the limits of apparent authority do not readily lend themselves to precise definition in legal terms but rather depend largely on how the facts in cases that arise are understood and interpreted in everyday affairs by those who are familiar with their practical details.

92 Anchor Concrete Machinery Co. v. Pennsylvania Brick & Tile Co., supra note 80.
93 See note (1927) 47 A. L. R. 85.