

Sales--Election of Remedies--Rights of Parties (Murry v. McDonald, 212 N.W. 711 (Iowa 1927))

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the suit of the purchaser, and, apparently, no authority to the contrary has been found by the learned author.

Once the fact of knowledge is established, it would seem unfair upon principle to deprive the original purchaser of his specific remedy merely because the title has passed from the party with whom he contracted; nor should a subsequent vendee be heard to disclaim knowledge gained by an attorney within the apparent scope of his authority while handling a matter entrusted to him.

HIGHWAY LAW; SECTION 282E AS AFFECTING COMMON LAW LIABILITY OF OWNER OF MOTOR VEHICLE—The action is to recover for death alleged to have been occasioned through the negligent operation of an automobile. The uncontradicted evidence necessitates the conclusion that the driver of the car was using it at the time of the accident for his own purposes exclusively, without the permission and against the commands of the defendant his employer. *Held*, The action would not lie inasmuch as the plaintiff gained nothing by Sec. 282e of the Highway Law (Cons. Law Chap. 25) providing that the owners of motor vehicles, operated upon public highways, shall be liable for death or injuries to person or property resulting from negligent operation by any person legally using same with the permission, express or implied, of the owner. Judgment affirmed. *Fluegel v. Coudert*, 244 N. Y. 392 (1927).

The Court held that the effect of the statute was to render obsolete the doctrine of such cases as *Van Blaricom v. Dodgson*, 220 N. Y., 111, 115 N. E. 443 (1917); *Potts v. Pardee*, 220 N. Y., 431, 436, 116 N. E. 78 (1917), and that liability no longer depended on use or operation by a servant in the "business" of a master, but upon its legal use or operation in the business "or otherwise" of the master with permission or consent. Thus the owner who loaned the car to a friend or an employee would be liable for the negligence of the operator though the loan was unrelated to employment and a mere friendly accommodation. The father would be liable for the negligence of the son to whom he had entrusted the use of the family automobile (*Van Blaricom v. Dodgson*, supra). The Court significantly stated, "We make no attempt at exhaustive enumeration. What has been said will suffice for illustration or example." It would thus appear that the Highway Law does not recognize such independent operation by a gratuitous bailee as will relieve the bailor from liability for the former's negligence, and the Court's opinion would seem to indicate that the section is still charged with such pregnant possibilities as will materially change the law of automobiles. 1 *St. John's L. Rev.*, 53, 54 (1926).

SALES—ELECTION OF REMEDIES—RIGHTS OF PARTIES—Defendant sold to one Edgar an automobile under a conditional bill of sale contract. Edgar paid \$50 in cash and gave a promissory note for the balance of purchase price. The conditional sale contract provides inter alia, that title should not pass until full price was paid, an acceleration clause for balance in case of default. In event of such default vendor may take immediate possession of property with privilege of resale, seller to have right to enforce any one or more

remedies hereunder mentioned either successively or concurrently. Some while later, Edgar turned over car to Defendant to store in Defendant's garage. Several payments were not paid and Defendant commenced an action against Edgar to recover judgment on the note and did recover judgment on same, which was duly recorded. On same day but after judgment had been entered, Edgar sold car to Plaintiff. Defendant refuses to give up car and is sued by Plaintiff for replevin, claiming when Defendant sued for judgment, his action showed intention to repudiate conditional sale contract and to treat property as if it has passed to purchaser (Edgar) absolutely and thereby terminated right to rely on security. *Held*, remedies of seller are not inconsistent and seller never recognized ownership in buyer where two or more concurrent remedies exist between which party may elect, and remedies are inconsistent, party, by indicating choice of some decisive act, with knowledge of facts is bound by election. When a conditional vendor sues for price and recovers a judgment, his right to security is not terminated unless same are inconsistent, and he is not deemed to have made an election. The remedies here are not inconsistent as by the contract the right and obligations of Defendant are concurrent and consistent. Judgment for Defendant affirmed. *Murry v. McDonald*, 212 N. W. 711 (Sup. Ct. Iowa 1927).

Doctrine of election of remedies applies only where inconsistent rights and remedies are involved. *Rotchford v. Cayuga County Cold Storage and Warehouse Co.*, 217 N. Y. 565, 112 N. W. 447, (1916), L. R. A. 1916E 615; *Reynolds v. Union Station Bk.*, 198 Mo. App. 323, 200 S. W. 711, (1918); *Pritchard v. Williams*, 175 N. C. 319, 95 S. E. 570, (1918); *Warriner v. Font*, 114 Miss. 174, 74 S. W. 822, (1917); *Wiedenbeck v. Anderson*, 168 Wis. 212, 169 N. W. 615, (1918); *Kilgore Lumber Co. v. Thomas*, 98 Ark. 219, 135 S. W. 859, (1911); *Williams v. Board of Comm. of Routt County*, 48 Colo. 541, 111 Pac. 71, (1910); *McKinnon v. Johnson*, 59 Fla. 332, 52 So. 288, (1910); *Surreny v. Glenville Supply Co.*, 13 Ga. App. 180, 78 S. E. 1013, (1913); *Merle & Henry Mfg. Co. v. Hick*, 178 Ill. App. 406; *Mayberry v. Sprague*, 207 Mass., 508, 93 N. E. 925, (1911). In conditional sales contracts the obligations of the parties are determined by language used and intention deduced from terms in contract. *Continental Guaranty Corp v. Peoples Bus Line*, 117 Atl. 275, Del. (1922); *Brewer v. Ford*, 54 Hun (N. Y.) 116, 7 N. Y. S. 244, (5th Dept. 1889). Every decision handed down must be carefully studied in light of facts and provisions of contract involved. *Green's Uni. Laws ann. Vol. 2*, pp. 36, 37. Whenever the contract by its stipulations makes remedies inconsistent or intention of the parties can be clearly seen, it will govern. *Avery v. Chapman*, 127 N. Y. S. 721, (1911); *Crompton v. Beach*, 62 Conn. 25, 25 A. 466, (1892), 18 L. R. A. 187; *C.f. In Frisch v. Wells*, 200 Mass. 429, 86 N. E. 755, (1909), 23 L. R. A. (N. S.) 144, there was not stipulations for retaking but simply that title not to pass until all payments were made. In the principal case, the contract gave to Defendant the right of remedies which were to sue for a judgment and retain property as security, which rights are not inconsistent with each other, as parties by their contract or agreement recognized such rights not to be inconsistent.