Washington and Lee Law Review

Volume 17 | Issue 1 Article 20

Spring 3-1-1960

Assignments Of Security Interests In Dealers' Stocks Of Automobiles

should *not* be liable for defective food in sealed containers when the consumer has an effective remedy against the manufacturer. Finally, when the suit is against either the manufacturer or retailer, recovery should not be denied on the sole ground that the plaintiff lacks privity because he did not himself purchase the food.

HUGH V. WHITE, JR.

ASSIGNMENTS OF SECURITY INTERESTS IN DEALERS' STOCKS OF AUTOMOBILES

The validity of a security interest in a dealer's stock of automobiles against a bona fide purchaser in the normal course of trade is a troublesome question in the field of personal property security.[1] The principle laid down in the famous Virginia decision of *Boice v. Finance & Guaranty Corp.*,[2] which has been followed in many jurisdictions,[3] established that a duly recorded security interest in automobiles that a dealer offers for sale to his customers with the knowledge or consent of the securityholder is ineffective against one who purchases without actual notice in the ordinary course of business.[4]

---

[1]2 Jones, Chattel Mortgages and Conditional Sales § 379 (6th ed. 1933); 2 Williston, Sales § 329 (rev. ed. 1948).

[2]127 Va. 563, 102 S.E. 591 (1920).

[3]Twenty-one states (Alabama, Alaska, Arizona, Colorado, Florida, Idaho, Illinois, Kansas, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New York, Ohio, Oklahoma, Oregon, Tennessee, Texas, Virginia and West Virginia) in some form purport to follow the principles of the Boice case in declaring that a mortgagor's possession of mortgaged goods with the power to sell is conclusively fraudulent and void as to purchasers in the ordinary course of business. Twenty-two states (Arkansas, Georgia, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, Wisconsin and Wyoming) and the District of Columbia take the contrary view and declare the mortgagor's possession of mortgaged goods with a power of sale to be only prima facie evidence of fraud. 2 Jones, Chattel Mortgages and Conditional Sales § 415 (6th ed. 1933). A classification of the authorities in this respect is extremely difficult because of conflicting decisions within the jurisdictions and the enactment and revision of personal property security recording statutes and title certificate laws. See Annot., 136 A.L.R. 821 (1942) and 20 Notre Dame Law. 84 (1945).

[4]In the Boice case the finance company obtained a security interest in a licensed automobile dealer's stock of new cars by virtue of duly recorded chattel mortgages. The finance company knew that the dealer bought these cars for resale. A purchaser bought one of the mortgaged cars without actual knowledge of the recorded lien of the finance company. In holding in favor of the purchaser, Judge Burks made the following statement, often quoted as the Boice rule: "It is true that, as a rule, the seller of personal chattels cannot confer upon a purchaser any better title than he himself has; but if the owner stands by and permits a seller, who is a licensed dealer

Virginia, however, extended this principle in *Gump Inv. Co. v. Jackson*,[5] which held that a lienholder would lose his security interest on an automobile placed in a dealer's stock for sale to the public, even though done without the lienor's knowledge or consent. In a recent case, *McQuay v. Mount Vernon Bank & Trust Co.*,[6] the Virginia Supreme Court of Appeals has overruled the *Gump* case insofar as it extended the *Boice* rule and has thereby re-established the original *Boice* rule in Virginia.

In *McQuay* the defendant bank financed the purchase of a second-hand automobile by Racine, a used car dealer. The bank retained the title certificate which showed the lien, as security, allowing Racine to retain possession of the vehicle. Racine placed this car on his lot and sold it to the plaintiff, who had no actual knowledge of the bank's lien. When learning of this sale, the back seized the car and sold it to satisfy the lien, whereupon the plaintiff instituted his action for damages. The trial court, finding that the bank knew only that it was lending money on a car owned and used by Racine personally,[7] up-

---

in such goods, to hold himself out to the world as owner, to treat the goods as his own, place them with other similar goods of his own in a public showroom, and offer the same indiscriminately with his own to the public, he will be estopped by his conduct from asserting his ownership against a purchaser for value without notice of his title. The constructive notice furnished by a recorded mortgage or deed of trust in such cases is not sufficient. The act of knowingly permitting the goods to be so handled and used by the seller in the ordinary and usual conduct of his business is just as destructive of the rights of the creditor as if such permission had been expressly granted in the mortgage or deed of trust." Boice v. Finance & Guar. Corp. 127 Va. 563, 102 S.E. 591, 593 (1920). For a discussion of the Boice case see Annot., 10 A.L.R. 662 (1921) superseded by Annot., 136 A.L.R. 821, 831 (1942); 2 Rocky Mt. L. Rev. 261 (1930); 12 Va. L. Rev. 517 (1926).

For a discussion of security interests in a dealer's stock of merchandise see Estrich, Installment Sales 277-303 (1926); 2 Jones, Chattel Mortgages and Conditional Sales §§ 379-452 (6th ed. 1933); 14 C.J.S. Chattel Mortgages § 203 (1939); 18 Mich. L. Rev. 788 (1920); 41 Minn. L. Rev. 687 (1957); 23 Minn. L. Rev. 846 (1939); 15 Minn. L. Rev. 837 (1931); 20 Notre Dame Law. 84 (1945); 80 U. Pa. L. Rev. 755 (1932).

[5]142 Va. 190, 128 S.E. 506 (1925).

[6]200 Va. 776, 108 S.E.2d 251 (1959).

[7]In finding that the bank intended to finance Racine in his own personal capacity and not as a used car dealer, the lower court seemed to consider the following facts as controlling: on the bank's loan account and on the title certificate, Racine's address was carried as his residence, not his business address; Racine used the car in his personal business, parking it at his home at night and at his car lot during the day; and another finance company handled Racine's business financing. However, the automobile financed by the bank bore Racine's dealer's license plates, a fact of which the bank's branch manager was informed. Considering the purpose of dealer's license plates as set forth in the Virginia Code, it seems that such knowledge on the part of the bank's agent might have been sufficient to put the bank on notice that Racine intended to resell the car. The Code provision states: "[D]ealer's license plates may be used on motor vehicles ... owned by, or assigned to, duly

held the bank's lien and rendered judgment for the defendant.

The Virginia Supreme Court of Appeals affirmed. The court recognized and approved the principle laid down in the *Boice* case, but emphasized that in the present case, "the bank did not know, nor was it charged with notice that Racine would place the automobile on which it held a lien in his stock of cars for sale."[8] Therefore the *Boice* rule was held not to apply, and the bank's lien was allowed to prevail. In so holding the court stated that "insofar as the opinion in *Gump Investment Co. v. Jackson* ... extends the principle announced in [the *Boice* case] ... it is modified and overruled."[9]

To understand fully the extent to which *Gump* had altered the principle of *Boice,* it is necessary first to consider a case decided between these two cases. In *Rudolph v. Farmers' Supply Co.*[10] the plaintiff, a dealer in automobiles, sold a new car to a purchaser under a duly recorded conditional sales contract. The purchaser then sold the car to a dealer in second-hand automobiles, who in turn sold it from his lot to the defendant, a bona fide purchaser without actual notice of the plaintiff's recorded lien. The court upheld the plaintiff's lien on the ground that he had no knowledge of the fact that the car had been placed in the hands of the used car dealer. The rationale was that in the *Boice* case the lienholder was estopped to assert his security interest because he permitted the car on which he held a lien to become a part of the dealer's stock of automobiles, while in the *Rudolph* case the lienor sold the car to the initial purchaser for his own personal use and did not knowingly "stand by and permit" the used car dealer to place it on his lot for sale to the general public. Hence there was no basis for the application of the doctrine of estoppel. The court said:

> "The sole ground upon which the [plaintiff] ... could be deprived of its lien ... would be upon the theory that ... it is the duty of the vendor to keep track of the chattel, and, if it is sold to a dealer, and becomes part of a shifting stock, to take prompt and appropriate steps to preserve his lien, and prevent a sale to an innocent purchaser. There is nothing ... to indicate that the General Assembly, when it gave the lien ... intended to place upon the vendor the duty of following the subsequent course of the chattel sold by him, and, failing in this duty, incur the penalty of losing his lien in the event that in the ul-

---

licensed motor vehicle dealers of this State when operated on the highways of this State by such dealers or their authorized representative for demonstration or sale." Va. Code Ann. § 46.1-115(a) (Supp. 1958).

[8]200 Va. at 776, 783, 108 S.E.2d 251, 255 (1959).

[9]Ibid.

[10]131 Va. 305, 108 S.E. 638 (1921).

timate such chattel without his knowledge became a part of a shifting stock, and was sold to an innocent purchaser."[11]

Nevertheless, the subsequent *Gump* case placed just such a duty on the lienholder. In that case an automobile dealer made a pretended sale of a new car to a purchaser who left the car in the possession of the dealer. The purchaser signed notes and a conditional sales contract to secure the purchase. The notes and contract were subsequently assigned by the dealer to the plaintiff finance company. The plaintiff recorded the contract, but did not know that the car was still in the dealer's salesroom. It was subsequently sold to the defendant, who purchased without actual knowledge of the recorded lien. The court held that the defendant was entitled to the car free of the finance company's lien, distinguishing the *Rudolph* case on two grounds: first, that in *Rudolph* the initial purchaser took possession of the car, whereas in *Gump* the purchaser did not exercise his right to possession, and, secondly, that the car in *Rudolph* was a used car, this fact being sufficient to put the purchaser on notice as to possible recorded liens, while the automobile in the *Gump* case was new. Though recognizing that there was no ground for an estoppel as in the *Boice* decision, the court stated that "certain conclusions . . . inevitably arise from, and grow out of the *Boice* case, which . . . control the instant case."[12] The court then enunciated the principle that apparently extended the *Boice* rule:

> "[S]ome duty, at least, rests upon an individual, corporate or otherwise, who finances a retail dealer, to see to it that cars upon which he has a lien are not left under the domain and control of such dealer on his salesroom floor, to be offered to the public. The business of the Gump Investment Company was to finance retail automobile dealers, and it did finance them for a profit. It assumed some risk both as to the moral and financial standing of every dealer it financed. It took a risk as to the hazard for a profit."[13]

---

[11]Id. at 641.

[12]142 Va. at 195, 128 S.E. at 507.

[13]Ibid. Courts of three different jurisdictions have embodied this quotation in their opinions in cases similar to Gump. In Kearby v. Western States Sec. Co., 31 Ariz. 104, 250 Pac. 766, 769 (1926), the court commented on the quotation: "The . . . statement of the court in Gump . . . regarding a somewhat similar situation, applies very forcibly. . . ." However the basis of the decision in favor of the purchaser was that the finance company was estopped to assert its lien because it had actual knowledge of the dealer's retention of possession of the car after making a sale to one of his salesmen. In Sorensen v. Pagenkopf, 151 Kan. 913, 101 P.2d 928, 931 (1940), the court said: "The above language [Gump quotation] is persuasive here. It seems the better public policy to put the burden on the party who is in the business of financing automobiles for profit rather than on the member of the public

That the *Gump* case extended the principle laid down in the *Boice* case is quite clear. Under the *Boice* rule the lienor is estopped to assert his lien when he "stands by and permits" or "knowingly permits" automobiles on which he holds a security interest to be placed in a dealer's shifting stock of automobiles for sale to the public.[14] The *Gump* case places the burden on the lienholder to inquire and check to see that cars upon which he holds a security interest are not left in the dealer's possession to be offered for sale to the public.[15] There is no doubt that the Supreme Court of Appeals of Virginia was correct in overruling the *Gump* case if it did not want to extend the *Boice* rule.

The question arises as to the merit of the *Gump* rule in the modern world of automobile financing and purchasing. Facts similar to those in *Gump* have been presented to the courts in other jurisdictions quite frequently.[16] A dealer makes a pretended sale to his salesman or to another, who after signing a retention of title contract, leaves the car in the dealer's possession. The dealer then assigns the contract to the finance company. Thereafter the dealer sells the car to a second purchaser. The court must then decide who must bear the loss—the assignee of the security interest or the second bona fide purchaser.

The great majority of courts have arrived at the *Gump* result but for a variety of reasons.[17] The rights of the purchaser have been upheld on at least four different theories: (1) the assignee failed to record his retention of title contract in the manner required within the juris-

---

who does business with one he has a right to believe is a reputable firm." The court went on to state that the finance company lost its lien because it had failed to comply with the title certificate law of the State. In Iowa Guarantee Mortgage Corp. v. General Motors Acceptance Corp., 62 S.D. 18, 250 N.W. 669, 670 (1933), the court found the quotation inapplicable since the purchaser was not a bona fide purchaser for value.

[14]127 Va. at 570, 102 S.E. at 593. Accord, McQuay v. Mount Vernon Bank & Trust Co., 200 Va. 776, 780, 108 S.E.2d 251, 253 (1959); General Credit, Inc. v. Winchester, Inc., 196 Va. 711, 714, 85 S.E.2d 201, 202 (1955); O'Connor v. Smith, 188 Va. 214, 219, 49 S.E.2d 310, 312 (1948); Rudolph v. Farmers' Supply Co., 131 Va. 305, 108 S.E. 638 (1921); O'Neil v. Cheatwood 127 Va. 96, 102 S.E. 596 (1920).

[15]142 Va. at 195, 128 S.E. at 507. Accord, Estrich, Installment Sales § 239 (1926); 3 Jones, Chattel Mortgages and Conditional Sales § 1255 (6th ed. 1933); Vold, Sales 306 n.93, 308 n.2 (1931); 2 Williston, Sales §§ 316, 329 (rev. ed. 1948); 45 Va. L. Rev. 754, 755 (1959); 12 Va. L. Rev. 517 (1926).

[16]See Annot., 47 A.L.R. 85, 104 (1927) supplemented by Annot., 88 A.L.R. 109, 119 (1934); 19 Marq. L. Rev. 45 (1934); 87 U. Pa. L. Rev. 599 (1939).

[17]Of the twenty-one cases, from fifteen different jurisdictions, found with factual situations similar to Gump, seventeen have upheld the rights of the purchaser, whereas only four have found the lien of the assignee-lienor to be superior.

diction;[18] (2) the assignee neglected to comply with the title certificate law of the jurisdiction;[19] (3) the assignee had knowledge of the dealer's custom to retain possession of the cars and offer them for sale to the general public, and was thus estopped to assert his lien against a purchaser;[20] (4) the assignee failed to make an independent inquiry to ascertain whether the purchaser had actually taken possession of the car and had not left it with the dealer for a possible fraudulent sale to an innocent purchaser.[21] It is important to note that only cases

---

[18]In Halliwell v. Trans-States Fin. Corp., 98 N.J.L. 133, 118 Atl. 837 (Sup. Ct. 1922), the assignee recorded the conditional sale contract in the wrong county. Accord, Burnett County Abstract Co. v. Eau Clarie Citizens' Loan & Inv. Co., 216 Wis. 35, 255 N.W. 890 (1934), wherein the assignment was not filed by the assignee in the county in which the car was situated. In Northwestern Fin. Co. v. Russell, 161 Wash. 389, 297 Pac. 186 (1931), the conditional sales contract and the assignment thereof were filed by the assignee, but the bill of sale was not recorded as required by Washington law.

[19]In General Motors Acceptance Corp. v. Davis, 161 Kan. 220, 218 P.2d 181 (1950), the assignee neglected to have its lien stamped on the title certificate. Accord, Rauh v. Dumler, 170 Kan. 698, 228 P.2d 694 (1951), and Sorensen v. Pagenkopf, 151 Kan. 913, 101 P.2d 928 (1940) wherein no title certificate was issued. All three Kansas cases, supra, cite the Gump case as persuasive. In Sorensen v. Pagenkopf, supra at 933, the court stated: "We have concluded, therefore, that the title of the [purchaser] ... is superior to the rights of the [assignee] ... both on account of broad grounds of public policy and because the [assignee] ... failed to ... comply with the certificate of title law." The "broad grounds of public policy" which the court mentions are undoubtedly a reliance on the principle of the Gump case to put the burden on the assignee to scrutinize the transactions of the dealer to prevent him from defrauding an innocent purchaser. See quotation from Sorensen v. Pagenkopf, supra note 13. In La Porte Discount Corp. v. Bessinger, 91 Ind. App. 635, 171 N.E. 323 (1930), and Guaranty Discount Corp. v. Bowers, 94 Ind. App. 373, 158 N.E. 231 (1927) (both cases citing Gump as persuasive), the assignee lost his lien because of failure to comply with the title certificate law.

[20]Kearby v. Western States Sec. Co., 31 Ariz. 104, 250 Pac. 766 (1926) (citing Gump as persuasive). Accord, Smith v. Kirkpatrick Fin. Co., 181 Ark. 1031, 28 S.W.2d 1050 (1930); Buchanan v. Commercial Investment Trust, 177 Ark. 579, 7 S.W.2d 318 (1928); Rauh v. Dumler, 170 Kan. 698, 228 P.2d 694 (1951); L. A. W. Acceptance Corp. v. Chernick, 49 R.I. 434, 143 Atl. 783 (1928); State v. Casperson, 71 Utah 68, 262 Pac. 294 (1927). All these cases are based on the doctrine of estoppel. The assignee knew that the dealer retained possssion of the car after the first sale, and was estopped to assert its security interest against a subsequent purchaser from the dealer.

[21]In General Motors Acceptance Corp. v. Ferguson, 47 Ohio App. 251, 191 N.E. 834, 835-36 (1933), the court stated: "The [assignee] ... evidently never ascertained that the holder of the mortgage which they accepted by assignment of the mortgage had title. If they had so inquired they would have found he had no title, for no bill of sale was issued to him, and his possession was that of his employer [the dealer]. ... Certainly it is not imposing too great a burden to require a mortgagee to trace by inspection of a bill of sale title to the car mortgaged."

In General Credit Corp. v. Kapun, 237 App. Div. 694, 262 N.Y. Supp. 421, 423 (2d Dep't 1933), the court stated: "When [the assignee] ... received the conditional bill of sale and made no independent inquiry to ascertain whether an actual change of possession of the car had taken place, it [the assignee] took the risk that the in-

in this last category appear to be based on reasoning similar to that applied in the *Gump* case. Even these jurisdictions seem to have been reluctant to establish such a precedent and have weakened their decisions by setting forth strong secondary grounds upon which the decision might have been based.[22]

In the few cases in which the lien of the assignee has prevailed,[23] the states' recording statutes were given controlling emphasis. Subsequent purchasers are bound by the constructive notice given by exact compliance with the recording statutes.[24]

---

strument represented a genuine transaction. It must carry the burden of that risk if the rights of third parties become involved therein, by reason of a change of possession of the car not in fact transpiring." Accord, Tripp v. National Shawmut Bank, 263 Mass. 505, 161 N.E. 904 (1928) (leading case) and Commercial Credit Co. v. Culter, 176 Wash. 423, 29 P.2d 686, 688 (1934) (dissenting opinion).

[22]In both Tripp v. National Shawmut Bank, 263 Mass. 505, 161 N.E. 904 (1928), and General Credit Corp. v. Kapun, 237 App. Div. 694, 262 N.Y. Supp. 421 (2d Dep't 1933), the courts placed great emphasis on almost identical statutes enacted in both jurisdictions. The Massachusetts statute reads as follows: "If a person having sold goods continues in possession thereof... the delivery or transfer by such person, or by an agent acting for him, of the goods... under any sale... to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery... were expressly authorized by the owners of the goods to make the same." Mass. Ann. Laws, ch. 106 § 27 (1954). It is submitted that both courts might well have based their decisions on this statute alone. In addition, both assignees failed to record the conditional sales contract, and, although not specifically required to do so, the courts treated this as another strike against the assignees.

In General Motors Acceptance Corp. v. Ferguson, 47 Ohio App. 251, 191 N.E. 834 (1933), the dealer sold a new car to his salesman under a chattel mortgage that was assigned to the plaintiff and duly recorded. The salesman did not receive a bill of sale, and the car remained in the possession of the dealer unknown to the plaintiff. Later the dealer sold the car to a second purchaser under a chattel mortgage that was assigned to the defendant and was recorded. A bill of sale was delivered to the second purchaser. The court stated: "The result here is therefore a mortgage held by one claimant [plaintiff], executed by one who had no title [salesman], and a mortgage held by another claimant [defendant], executed by one [second purchaser] who had title." General Motors Acceptance Corp. v. Ferguson, supra at 836. Thus the failure of the plaintiff to have a bill of sale executed to the salesman seems to have been the decisive factor in this case.

[23]Commercial Credit Co. v. Hardin, 175 Ark. 811, 300 S.W. 434 (1927); W. A. Patterson Co. v. People's Loan & Sav. Co., 158 Ga. 503, 123 S.E. 704 (1924); Drew v. Feuer, 185 Minn. 133, 240 N.W. 114 (1931)(leading case); Commercial Credit Co. v. Cutler, 176 Wash. 423, 29 P.2d 686 (1934).

[24]In Drew v. Feuer, 185 Minn. 133, 240 N.W. 114 (1931), the court cited Gump as a case to the contrary and stated: "We cannot follow it [Gump] because we do not feel at liberty to create by construction an exception from our statute [conditional sale recording statute] which is plain language does not permit." Drew v. Feuer, supra at 115. Accord, Commercial Credit Co. v. Cutler, 176 Wash. 423, 29 P.2d 686 (1934). In Commercial Credit Co. v. Hardin, 175 Ark. 811, 300 S.W. 434 (1927), in a very confusing opinion, the court evidently decided in favor of the assignee's lien on the basis of its priority in time.

W. A. Patterson Co. v. People's Loan & Sav. Co., 158 Ga. 503, 123 S.E. 704 (1924),

The courts and legal writers who either accept[25] or reject[26] the *Gump* rule seem to do so without setting forth satisfactory reasons for their conclusion. The problem is to determine which of two in-

---

is a leading case that directly refutes the reasoning applied in Gump. Here the dealer sold a new car to a purchaser who signed a conditional sales contract but who allowed the dealer to retain possession of the car. The dealer then assigned the contract to the first assignee who recorded the contract without knowledge of the dealer's retained possession of the car. Subsequently the dealer mortgaged the car to the second assignee. The court treated the second assignee as a purchaser for value, thus making the factual situation here the same as in Gump. In holding in favor of the first assignee the court stated: "At the time the transferee [first assignee] took a transfer of the retention title note and the title to the property therein embraced, he was ignorant of the fact that the vendor [dealer] was then in possession of this property.... We do not think that the transferee of the note and title would be guilty of fraud by his mere failure to inquire and inform himself of the then or subsequent possession of this chattel. The [transferee]... would naturally and reasonably suppose that the vendee in the conditional contract of sale, which was duly executed and recorded, was in possession of the purchased property and would so remain. The due execution, attestation, and record of the contract of conditional sale presupposed, and was evidence of, both the sale and delivery of this property to purchaser. We do not think that the transferee of the note was so lacking in the exercise of ordinary care in failing to inform himself as to the possession of the property as would render his negligence in this matter a fraud against any one who would, after his purchase of the note, take a mortgage on the property or buy it from the original seller." W. A. Patterson Co. v. People's Loan & Sav. Co., supra at 706.

[25]The assignee finance company is in a better position to protect itself than a purchaser and should bear the risk of loss since that is part of its business. Accord, General Credit Corp. v. Kapun, 237 App. Div. 694, 262 N.Y. Supp. 421 (2d Dep't 1933); Tripp v. National Shawmut Bank, 263 Mass. 505, 161 N.E. 904 (1928); Gump Inv. Co. v. Jackson, 142 Va. 190, 128 S.E. 506 (1925).

The assignee finance company is better able to prevent an unscrupulous dealer from perpetrating a fraud on the unsuspecting public, who should be permitted to rely on the dealer's ostensible ownership of the car. Accord, Sorensen v. Pagenkopf, 151 Kan. 913, 101 P.2d 928 (1940); General Motors Acceptance Corp. v. Ferguson, 47 Ohio App. 251, 191 N.E. 834 (1933); Commercial Credit Co. v. Culter, 176 Wash. 423, 29 P.2d 686, 688 (1934) (dissenting opinion); 87 U. Pa. L. Rev. 599, 601 (1939).

See Estrich, Installment Sales § 239 (1926) and 3 Jones, Chattel Mortgages and Conditional Sales § 1255 (6th ed. 1933). Jones states the Gump rule as a broad general principle and cites Gump and three other cases in support thereof. 3 Jones, supra at 328 n.67. However, two of the cases so cited [Commercial Credit Co. v. Blair, 84 Mont. 314, 275 Pac. 748 (1929), and Harrison Auto Sec. Co., 70 Utah 11, 257 Pac. 677 (1927)] do not support what they are cited for, and the third case [Tripp v. National Shawmut Bank, 263 Mass. 505, 161 N.E. 904 (1928)] can be distinguished. See note 22 supra.

[26]To place such a burden on the assignee finance company is against public policy and was not intended by the legislature. It would create an exception to the recording acts. Accord, W. A. Patterson Co. v. People's Loan & Sav. Co., 158 Ga. 503, 123 S.E. 704 (1924); Drew v. Feuer, 185 Minn. 133, 240 N.W. 114 (1931); Iowa Guarantee Mortgage Corp. v. General Motors Acceptance Corp., 62 S.D. 18, 250 N.W. 669 (1933); Rudolph v. Farmers' Supply Co., 131 Va. 305, 108 S.E. 638 (1921); Vold, Sales 308 n.2 (1931); 19 Marq. L. Rev. 45, 46 (1934); 88 U. Pa. L. Rev. 367, 368 (1940).

nocent parties must suffer because of the fraud of a dealer in whom they both placed trust and confidence. Emphasis is given in weighing the equities to the following factors: who is in the better position to bear the inevitable loss;[27] who is better able to take additional precautions to protect himself;[28] what result will best foster the business of installment sales, considering both the interest of the conditional buyer who does not want to pay more than a reasonable interest rate and that of the finance company which may refuse to lend money on an inevitable loss.[29]

Substantial clarity might be achieved in this field of the law if the courts would look to the basic reasoning behind the *Gump* and the *Boice* principles. As a general rule of property one can pass no better title to goods than he himself has.[30] The doctrine of estoppel, upon which the *Boice* principle is based, creates a well recognized exception to this general rule.[31] The lienholder who takes a security interest upon automobiles which he knows to be included within a dealer's stock, thereby allows the dealer to appear as complete owner, and a purchaser relying on the dealer's ostensible ownership takes a title free of the securityholder's lien. Under the *Gump* factual situation the doctrine of estoppel has no application so that there can be no exception to the general rule on that basis.[32] The lienor finances an individual purchaser, not a dealer, and creates no ostensible ownership in a dealer. Therefore, unless an exception is created on some other ground, a purchaser from the dealer cannot be given a better title than

---

[27]Sorsensen v. Pagenkopf, 151 Kan. 913, 101 P.2d 928, 931 (1940); Gump Inv. Co. v. Jackson, 142 Va.190, 128 S.E. 506, 507 (1925).

[28]Guaranty Discount Corp. v. Bowers, 94 Ind. App. 373, 158 N.E. 231, 233 (1927); Tripp v. National Shawmut Bank, 263 Mass. 505, 161 N.E. 904, 907 (1928); General Credit Corp. v. Kapun, 237 App. Div. 694, 262 N.Y. Supp. 421, 424 (2d Dep't 1933); General Motors Acceptance Corp. v. Ferguson, 47 Ohio App. 251, 191 N.E. 834, 835-36 (1933).

[29]Sorensen v. Pagenkopf, 151 Kan. 913, 101 P.2d 928, 933 (1940); 18 Mich. L. Rev. 788, 789 (1920).

[30]2 Williston, Sales § 311 (rev. ed. 1948); 15 Minn. L. Rev. 837-38 (1931).

[31]Vold, Sales 400, 401 (1931); 2 Williston, Sales §§ 312, 316 (rev. ed. 1948).

[32]On the general rule the court in the Gump case stated: "Our attention was called to the general rule that a vendor can convey no greater right or title than he has. The general rule is conceded, but this court held in [Boice] . . . that it had no application to the facts of that case, and it has none here." 142 Va. at 196, 128 S.E. at 507-08. The reason the general rule had no application in Boice was because of the estoppel exception. In Gump the court expressly stated that the doctrine of estoppel did not apply. Thus it logically follows that the general rule should apply. The poor judicial reasoning in the Gump case may be summarized as follows: we accept the general rule; we find that the doctrine of estoppel does not apply in this case, but, we hold the general rule inapplicable in this case because Boice so held, even though the facts of the Boice case are not similar to the facts of this case, and even though the doctrine of estoppel applied in the Boice case.

the dealer could convey—*i.e.*, a title encumbered by the securityholder's lien.

The recording acts alter the general rule to some extent by requiring the lienor to take additional precautions to protect his lien. Once the lienor has complied with the requirements of these acts, the public is given constructive notice of the security interest. Here again, the *Boice* rule creates an exception and nullifies the effect of such constructive notice when the security interest is taken on a dealer's stock.[33] The basis for this exception is that by taking a security interest in a dealer's stock the lienor impliedly consents to sales in the ordinary course of business. The recording acts are therefore deemed inapplicable, as the lienor did not intend his security interest to be effective against such purchasers. Under the *Gump* principle, however, when the lienor finances an individual purchaser, no such consent to resale can be implied. Therefore the exception does not apply, and the lienor should be allowed the full benefit afforded by the recording statutes.

When the problem raised in *McQuay* is viewed in the light of existing business custom and practice, a more equitable result might be achieved by adopting an intermediate view. If the finance company knowingly finances a dealer, regardless of the capacity in which the dealer purports to purchase an automobile, the finance company should bear the risk of losing its lien because of a subsequent sale by the dealer to an innocent purchaser who has no actual knowledge of the lien. If such a rule were adopted, a contrary result would have been reached on the facts presented in *McQuay*, but the *Boice* rule would still be preserved and *Gump* overruled. However, if the finance company finances a person whom it had no reason to believe to be other than an individual purchaser, it would appear inequitable that it be forced to bear the risk that subsequently the encumbered automobile will be placed in a dealer's possession for resale. A ruling that it is not forced to bear such a risk would be in line with *Boice*, *Rudolph*, and the overwhelming weight of authority.[34]

NICHOLAS H. RODRIGUEZ

---

[33]127 Va. at 570, 102 S.E. at 593. The Boice rule also creates an exception to the Virginia title certificate statutes for the recordation of liens on automobiles, thus nullifying the constructive notice of such liens afforded to the public. This was first decided in General Credit, Inc. v. Winchester, Inc., 196 Va. 711, 85 S.E.2d 201 (1955), by a divided court and later followed in the principal case, McQuay v. Mount Vernon Bank & Trust Co., 200 Va. 776, 108 S.E.2d 251 (1959), and Welebir v. Gilbert, 209 Md. 181, 120 A.2d 575 (1956) (applying Virginia law). See 45 Va. L. Rev. 754 (1959) and 41 Va. L. Rev. 418 (1955).

[34]McComb v. Donald's Adm'r, 82 Va. 903, 907, 5 S.E. 558, 560 (1888); Vold, Sales 308 (1931); 2 Williston, Sales § 324 (rev. ed. 1948).