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## Notes

### REMEDIES OF THE SELLER IN A CONDITIONAL SALE OF CHATTELS

Almost all modern installment payment plans depend on the use of either the conditional sale or an absolute sale with an immediate giving back of a chattel mortgage.<sup>1</sup> "The retention of title by the seller, notwithstanding possession, use, and apparent ownership by the buyer, is the characteristic feature of a conditional sale . . . The passage of property in the goods to the buyer is always subject to the performance of some condition precedent."<sup>2</sup> The chattel mortgage proceeds upon an entirely different theory, although it may lead to much the same results through the incorporation of special clauses. In the latter form title passes absolutely to the buyer at once and the seller is given back a mere lien on the goods.<sup>3</sup> Despite the view of some recent writers<sup>4</sup> that the conditional sale is essentially a chattel mortgage, it is still in the absence of special statutes vitally important

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<sup>1</sup> For a laudatory account of installment selling, cf. Seligman, *THE ECONOMICS OF INSTALLMENT SELLING* (1927).

<sup>2</sup> Bogert, *COMMENTARIES ON CONDITIONAL SALES* (1924) 5. The Uniform Conditional Sales Act says, "In this Act 'Conditional Sale' means (1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of a part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equal to the value of the goods and by which it is agreed the bailee or lessee is bound to become or has the option of becoming the owner of such goods upon full compliance with the terms of the contract." Uniform Conditional Sales Act, sec. 1. The Uniform Act has been adopted in eight jurisdictions. Alaska Laws 1919 c. 13; Ariz. Laws 1919 c. 40; Del. Laws 1919 c. 192; N. J. Laws 1919 c. 210; N. Y. Laws 1922 c. 642; Pa. Laws 1925 no. 325; S. D. Laws 1919 c. 137; W. Va. Laws 1925 c. 64; Wis. Laws 1919 c. 672.

<sup>3</sup> 5 R. C. L. 383-384.

<sup>4</sup> 1 Williston, *ON SALES* (2nd ed. 1924) 771; Vold, *ON SALES* (1931) 289-295.

to distinguish between the two in considering what the remedies of the parties are and ought to be.<sup>5</sup> Unfortunately it is not always easy to determine whether a given contract is actually a conditional sale or something else. Clever lawyers frequently attempt to disguise a conditional sale in some other garb, often that of a lease so as to obtain greater rights for their clients, who are really vendors.<sup>6</sup> As was pointed out by the Missouri Court of Appeals in a recent case, the nature of the contract is not determined by "its technical form, but from the intention of the parties as gathered from the four corners of the contract . . . . A test usually applied in determining whether a particular instrument is a lease or a conditional sales contract is whether or not such instrument requires or permits the transferee to return the property in lieu of paying the purchase price. If the return of the property is either required or permitted such an instrument will be held to be a lease. On the other hand, if the transferee is obligated to pay the purchase price, even though such price is denominated rental or hire, the contract will be held one of sale."<sup>7</sup>

In so far as the conditional vendor's rights are based on his title to the goods sold, it would seem just and reasonable at first glance that they be the same whether asserted against the vendee or someone claiming under the latter. This was the original view, but experience showed that secret conditional sales contracts would sometimes suddenly come to light and deprive an innocent purchaser of goods for which he had paid full value.<sup>8</sup> To remedy this evil almost all the states have passed statutes requiring conditional sales contracts to be recorded under penalty of making them void as against certain classes of persons other than the original vendee.<sup>9</sup> The Missouri Statute dates back to 1877, providing that the condition precedent in the contract "shall be void as to all subsequent purchasers in good faith, and

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<sup>5</sup> Not only because of the important theoretical difference, which would cause a different theoretical approach to the cases even if the results would finally grant the parties the same rights, but also because of certain practical differences that cannot be overcome no matter in what form a chattel mortgage is written, *e. g.*, a trustee in bankruptcy has a right to the goods as against a chattel mortgagee but has no right to them as against a conditional vendor after a default. In *re Seward Dredging Co.* (C. C. A. 2, 1917) 242 F. 225, *certiorari* denied (1917) 245 U. S. 651.

<sup>6</sup> *Cf.* notes (1922) 17 A. L. R. 147, (1926) 43 A. L. R. 1252.

<sup>7</sup> *Kolb v. Golden Rule Baking Co.* (1928) 222 Mo. App. 1068, 9 S. W. (2d) 840.

<sup>8</sup> *Wurmser v. Stivey* (1893) 52 Mo. App. 424.

<sup>9</sup> Uniform Conditional Sales Act, sec. 5 and *cf.* collection of statutes from all states which have not adopted the Uniform Act in an appendix to the Act as printed in volume 2 of the Uniform Laws Annotated series.

creditors unless such condition shall be evidenced by writing executed, acknowledged and recorded as provided in the case of mortgages of personal property.”<sup>10</sup> The Statute relating to the recording of chattel mortgages requires them to be recorded in the office of the recorder of deeds of the county wherein the property was at the time of making the mortgage.<sup>11</sup> The Statute requires that the purchaser buy in good faith, i. e., without notice, to be able to avail himself of its protective mantle,<sup>12</sup> but it is not as clear as it might be whether or not the same condition applies to a creditor who has seized the property by attachment or levied upon it. The Missouri Supreme Court first took the view that the two classes were to be treated alike,<sup>13</sup> but this case was expressly overruled in 1892 and it has become settled that a creditor is protected even though at the time he made the attachment or levy he knew all the facts of the conditional sales transaction.<sup>14</sup> This decision is probably sounder as a matter of grammatical interpretation, but it would seem to give the creditor an unfair advantage, particularly if he made the loan after the conditional sales contract was made. To be safe the vendor should always record all such contracts at once, paying the small fees involved as a matter of insurance. As a realistic criticism of the policy of the Statute it may be suggested that the average purchaser or creditor would never bother to go to the office of the recorder of deeds and search the voluminous archives to discover if there was such a contract. The Statute was enacted when the installment buying scheme was largely applied to the sales of machinery and the like, rather than to articles for use by individuals, and was probably a real protection under those conditions, for a capitalist buying a plant should and normally does make a thorough investigation.

The simplest thing for the seller to do on default in the pay-

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<sup>10</sup> Mo. Laws 1877 p. 320, now R. S. Mo. (1929) sec. 3125. There is also a special law as to conditional sales of railroad equipment. R. S. Mo. (1929) secs. 4906-4909.

<sup>11</sup> R. S. Mo. (1929) sec. 3097.

<sup>12</sup> American Clay Machinery Co. v. Sedalia Brick and Tile Co. (1913) 174 Mo. App. 485, 160 S. W. 902. Where the goods have been sold to a dealer who resells them to a purchaser in ordinary course, section 9 of the Uniform Act would protect the latter even though the contract was recorded. There is hopeless conflict on this point in the decisions of other states and it has not yet been decided in Missouri. The courts which protect such a buyer do so upon the theory of estoppel or of implied agency in the dealer to resell and vest the original vendor's title in the new buyer. Cf. note (1927) 47 A. L. R. 85. It would probably be best to cover this point by a statute similar to section 9.

<sup>13</sup> Coover v. Johnson (1885) 86 Mo. 533.

<sup>14</sup> Collins v. Wilhoit (1892) 108 Mo. 451, 18 S. W. 839.

ments is to retake possession of the goods to which he still has title. By the great weight of authority at common law the seller could do this regardless of how much the vendee had paid before the default and without any liability to repay such sums.<sup>15</sup> This was the settled law in Missouri prior to 1877,<sup>16</sup> although the unjust gains that a seller may make by such a forfeiture are all too apparent in those cases where little remains to be paid. Some courts have seized the bull by the horns and have declared boldly that they will not enforce such a right, and require the seller to repay all but a reasonable compensation for the use of the goods;<sup>17</sup> but even these courts will not adhere to their view if there is an express provision for forfeiture in the contract,<sup>18</sup> a provision to which a buyer might readily be forced to agree as he does not normally seriously contemplate his inability to pay. The Missouri Statute of 1877 is far more solicitous of the rights of such buyers. It provides:

Whenever such property is so sold or leased, rented, hired or delivered, it shall be unlawful for the vendor, leasor, renter, hirer, or deliverer, or his or their agent or servant, to take possession of the said property without tendering or refunding to the purchaser, lessee, renter, or hirer thereof or any party receiving the same, the sum or sums of money so paid, after deducting therefrom a reasonable compensation for the use of such property, which shall in no case exceed twenty-five per cent of the amount so paid, anything in the contract to the contrary notwithstanding, and whether such condition be expressed in such contract or not, unless such property has been broken or actually damaged, and then a reasonable compensation for such breakage or damage shall be allowed.<sup>19</sup>

This Statute has been held to apply to all conditional sales and to be absolutely mandatory if the seller retakes the property

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<sup>15</sup> *Harris v. Moreland Truck Co.* (C. C. A. 9, 1922) 279 F. 543, writ of error dismissed (1922) 260 U. S. 702; *Seanor v. McLaughlin* (1895) 165 Pa. 150, 30 Atl. 717.

<sup>16</sup> *Kingsland-Ferguson Mfg. Co. v. Culp* (1885) 85 Mo. 548.

<sup>17</sup> *Heine Piano Co. v. Crepin* (1904) 142 Cal. 609, 76 Pac. 493; *Bent v. Jones* (1912) 172 Ill. App. 62. Other courts have given the vendee a right of redemption for a certain period after the retaking. *Ames Iron Works v. Rea* (1892) 56 Ark. 450, 19 S. W. 1063. The latter scheme is followed by statutes in numerous states. Uniform Conditional Sales Acts, secs. 17 and 18; Ala. Civ. Code (1923) secs. 7400 and 7401; Mass. Gen. Laws (1921) c. 255 secs. 11-13; Neb. Comp. Stat. (1922) sec. 437 (if one-third of the price has been paid).

<sup>18</sup> *Liver v. Mills* (1909) 155 Cal. 459, 101 Pac. 299.

<sup>19</sup> Mo. Laws 1877 p. 320, now R. S. Mo. (1929) sec. 3126.

either by replevin or otherwise.<sup>20</sup> In replevin the plaintiff must plead and prove compliance with the Statute or there must be judgment for the defendant.<sup>21</sup> If the seller does not comply with the Statute, but nevertheless succeeds in retaking the goods, the buyer may maintain a separate suit to recover seventy-five per cent of all payments made.<sup>22</sup> The Missouri Courts have construed the Statute with narrow technicality so that it does not necessitate any tender where the suit is against anyone other than the original buyer, interpreting the phrase "or any person receiving the same" to mean any person receiving the same from the seller and hence as adding very little to the preceding words, under none of which such a third party to the original contract could fall.<sup>23</sup> It has also been restricted so as to apply only to cases where the payments have been made in money, as distinguished from notes or services rendered.<sup>24</sup> This

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<sup>20</sup> *Gentry v. Templeton* (1891) 47 Mo. App. 55.

<sup>21</sup> *Burt v. Mears* (1890) 41 Mo. App. 231. However, the judgment should be in the alternative so that the seller may return the goods or tender the defendant the proper amount, to be assessed by the jury in the replevin action. *Burt v. Mears*, above. This is the general rule in Missouri where the defendant has only a special property in the goods, while the general property is in the plaintiff. *Dilworth v. McKelvy* (1860) 30 Mo. 149.

<sup>22</sup> *McArthur v. St. Louis Piano Co.* (1900) 85 Mo. App. 525; *Urquhart v. Sears, Roebuck and Co.* (1921) 207 Mo. App. 627, 227 S. W. 881. This assumes that the reasonable compensation for the use of the goods will be found by the jury to be the full 25% allowed by the Statute, and that there has been no actual damage for which reasonable compensation is also allowed. The compensation for the use of the goods must include both interest upon the capital involved and the loss of value caused by the obsolescence of the goods, as no separate allowance is made for these. This right may be waived at the time of retaking, but cannot be waived in the original contract. *Laclede Power Co. v. Assigned Estate of Ennis Stationery Co.* (1899) 79 Mo. App. 302.

<sup>23</sup> *Barnes v. Rawlins* (1894) 74 Mo. App. 531; *Toledo Computing Scale v. Aubuchon* (1915) 187 Mo. App. 687, 173 S. W. 85. Ohio is the only State that has a statute similar to the Missouri one. This act applies to all conditional sales except certain sales of machinery. It makes repayment necessary only if 25% of the purchase price has been paid, and allows a deduction of 50% as compensation for the use of the goods. As far as the parties to whom the repayment is to be made, it is identical with the wording of the Missouri Statute except that the last phrase is "receiving it from the vendor." Yet under this wording, the Ohio Courts have taken the more liberal view that such a third party is within the spirit of the Statute and is entitled to its protection. *Page's Ohio Gen. Code* (1926) sec. 8570; *Albright v. Meredith* (1898) 58 Ohio 194, 50 N. E. 719; *National Cash Register Co. v. Cervone* (1907) 76 Ohio 12, 80 N. E. 1033.

<sup>24</sup> *Columbus Buggy Co. v. Hord* (1896) 65 Mo. App. 41. Here the acceptances had not been negotiated and were overdue; it was admitted that if the plaintiff sued subsequently on the acceptances, the defendant would have a set-off equivalent to the value of the goods when they were taken.

is doubtless correct from the specific reference to the "sum or sums of money so paid," but is an oversight in drafting which might lead to harmful results in a few cases. The Statute applies to all attempts to retake goods in Missouri no matter where the original contract was made, it being considered an expression of a profound public policy of the forum and hence controlling the local Courts in their treatment of such contracts.<sup>25</sup>

The fact that after the retaking the vendor resells the article, but is unable to realize the amount still due on it does not entitle him to maintain an action against the buyer for the deficiency. The retaking is treated by the Missouri courts as a complete rescission of the contract as far as this part of it is concerned.<sup>26</sup> Although such a case has not apparently been decided by any Missouri appellate court, the weight of authority throughout the country favors the upholding of an express provision in the original contract authorizing such a resale and suit for the deficiency.<sup>27</sup> Some courts have reached this result with marked reluctance, the Supreme Court of Oregon saying, "However, we may deplore the folly of the defendant in entering into such a contract, or the unbounded avarice of a plaintiff who would enforce it to such an extent, we cannot see our way clear to relieve the defendant from the burden of his deliberately assumed obligation."<sup>28</sup> It is obvious that such a provision makes the instrument far more similar to a chattel mortgage with a special grant of a power to take and sell than to a true conditional sale.

In probably the vast majority of instances the seller retakes without resorting to any legal process. It is universally recognized that he may do so when he can regain possession without entering on the buyer's land or using force.<sup>29</sup> If the contract does not grant a right of entry, the seller is certainly liable for damages for the trespass to the land<sup>30</sup> (usually merely nominal) and one Michigan case goes so far as to declare him liable in

<sup>25</sup> *American Hoist and Derrick Co. v. Trustee and Registrar Corp. of Mo.* (Mo. App. 1930) 27 S. W. (2d) 437. A similar decision was reached in a case involving the Ohio Statute. *Wurzell v. Delph* (1912) 33 Ohio Cir. Ct. Rep. 219.

<sup>26</sup> *Laclede Power Co. v. Assigned Estate of Ennis Stationery Co.* (1899) 79 Mo. App. 302. This is the general rule in the absence of statutes. *White v. Solomon* (1895) 164 Mass. 516, 42 N. E. 104; *Cooper v. Payne* (1907) 190 N. Y. 512, 83 N. E. 1124. Some states have compulsory resale statutes, *cf.* 47 below.

<sup>27</sup> *Harkness v. Russell and Co.* (1886) 118 U. S. 663; *Bedard v. Ransom* (1922) 241 Mass. 74, 134 N. E. 392.

<sup>28</sup> *International Harvester Co. v. Baur* (1917) 82 Ore. 686, 160 Pac. 856.

<sup>29</sup> *Vorenberg v. American House Hotel Co.* (1923) 246 Mass. 108, 140 N. E. 297. *Cf.* note (1928) 55 A. L. R. 184.

<sup>30</sup> *Van Wren v. Flynn* (1882) 34 La. Ann. 1158.

replevin or conversion for the chattel itself.<sup>31</sup> If the contract grants a right of entry, some cases treat this as an irrevocable license which will authorize the seller to break into a house if necessary.<sup>32</sup> This doctrine seems very dangerous in that such breaking and entering would certainly encourage breaches of the peace if the buyer happened to be at home.<sup>33</sup> This latter view is supported by the rule in a majority of the states that the seller cannot use force as against any person in retaking the goods or he is liable for damages for assault and battery.<sup>34</sup> It would seem that the rule should be established that the buyer can retake without incurring the expense and bother of legal process, but only where he can do so without the use of force against either persons or property. A right of entry to retake in this manner might well be implied from the existence of the mere right to retake. Of course, the provisions of the Missouri Statute must be obeyed whether or not replevin is used.

As against the buyer the seller has also an action for the purchase price agreed upon in the contract between them.<sup>35</sup> Although such an action may culminate in the seizure of the goods themselves under a writ of execution and their sale by the sheriff, it is well settled in Missouri that this is not a technical retaking by the seller to which alone the Statute applies.<sup>36</sup> In such a suit the seller may take advantage of the exception to the general exemptions statutes created by Section 1171 of the Revised Statutes of 1929:<sup>37</sup>

Personal property shall in all cases be subject to execution on a judgment against the purchaser for the purchase price thereof and shall in no case be exempt from such judgment and execution, except in the hands of an innocent purchaser for value, without notice of the existence of such prior claim for the purchase money.

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<sup>31</sup> *Dominick v. Rea* (1924) 226 Mich. 594, 198 N. W. 184.

<sup>32</sup> *Lambert v. Robinson* (1894) 162 Mass. 34, 37 N. E. 753; *Walsh v. Taylor* (1874) 39 Md. 592; *Walker Furniture Co. v. Dyson* (1908) 32 App. D. C. 90.

<sup>33</sup> *Stewart v. North Co.* (1916) 65 Pa. Super. Ct. 195.

<sup>34</sup> *Biggs v. Seufferlein* (1914) 154 Iowa 241, 145 N. W. 547; *Singer Sewing Machine Co. v. Phipps* (1911) 49 Ind. App. 116, 94 N. E. 794. Some courts allow the seller to use reasonable force to overcome force. *Lambert v. Robinson* and *Walker Furniture Co. v. Dyson*, above.

<sup>35</sup> *Vette v. J. S. Merrel Drug Co.* (1909) 137 Mo. App. 229, 117 S. W. 666; *Conn. v. Orr* (1910) 150 Mo. App. 705, 131 S. W. 765. It is also allowed by the Uniform Conditional Sales Act, sec. 3.

<sup>36</sup> *De Loach Mill Mfg. Co. v. Latham* (1903) 99 Mo. App. 231, 72 S. W. 1080; *American Law Book Co. v. Brewer* (1919) 202 Mo. App. 15, 213 S. W. 881.

<sup>37</sup> *Straus v. Sole Leather Pad Co.* (1890) 102 Mo. 261, 14 S. W. 940.

Since this is solely a contractual right, it is obviously not available against third parties unless such a third party has assumed, in his contract with the original buyer, the latter's liability towards the seller.<sup>38</sup> If such an assumption were made, the seller could certainly avail himself of it in Missouri by the same reasoning which allows a mortgagee to have recourse to such an assumption as between the mortgagor and a third party.<sup>39</sup> Of course, any person holding under the original vendee is under a practical obligation to be sure that the purchase price is paid, for otherwise he might lose the goods through the seller's exercise of his right of recaption. The seller would probably use this form of remedy only where the goods have declined so greatly in value since the original sale that after making the repayment to the buyer the vendor would not be able to obtain enough for them to protect himself from loss on the transaction. This result is readily possible in very many instances for the Statute does not allow any deduction for obsolescence,<sup>40</sup> perhaps the most important factor in the sharp decline in value for resale of many types of goods, such as automobiles, radios, and the like.

Another possible remedy is a suit for conversion of the goods. Since this is based upon title, it is available against either the buyer or a third party.<sup>41</sup> Because the measure of damages is only the amount still unpaid to the seller,<sup>42</sup> there is no practical advantage in using it rather than a suit on the contract for the unpaid balance when brought against the original buyer. Indeed, its use would have a disadvantage in that the execution to recover any judgment obtained would be subject to the general exemption statutes, without the benefit of the exception as to goods purchased in an action for the purchase price. As against a person claiming under the vendee it affords normally the only way to obtain a money judgment, since such a person is not liable on the contract. Of course the judgment is limited to the value of the goods at the time of the alleged conversion,<sup>43</sup> but this may easily be more than the seller could realize by retaking them and selling them, as such a resale would surely involve some expense to the latter. It has frequently been said that there must be a demand and a refusal to deliver before such an action can be

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<sup>38</sup> *Breakstone v. Buffalo Foundry Co.* (1915) 167 App. Div. 62, 152 N. Y. S. 394; *Wright Motor Co. v. Shaw* (1926) 171 Ark. 935, 287 S. W. 177.

<sup>39</sup> *Fitzgerald v. Barker* (1879) 70 Mo. 685.

<sup>40</sup> *Cf.* n. 22 above.

<sup>41</sup> *Eisenberg v. Nelson* (Mo. App. 1922) 247 S. W. 242. *Cf.* note (1931) 73 A. L. R. 799.

<sup>42</sup> *Eisenberg v. Nelson*, above.

<sup>43</sup> *Davis v. Bliss* (1907) 187 N. Y. 77, 79 N. E. 851.



maintained.<sup>44</sup> This general rule is unquestionably too broad. There must always be some evidence of a conversion, and such a refusal is sometimes the only possible evidence, but its place may be taken by any other act which positively asserts ownership in the goods, such as a sale of them.<sup>45</sup>

Recent Missouri cases have tended to establish a fourth possible remedy, a suit to foreclose an equitable lien on the goods. Such a suit proceeds on the theory that the buyer has title to the goods subject to a lien to the seller for the unpaid installments.<sup>46</sup> This is directly contrary to the theory on which the seller's rights to retake and sue for conversion are based. At first glance it seems anomalous to think of title to goods shifting at the mere whim of one party, regardless of the stipulations of the contract.

The view that foreclosure of an equitable lien was a proper remedy for a conditional vendor was imported into Missouri jurisprudence from other states. In many of these it was a logical deduction from special statutes which required the seller after retaking to resell and turn over to the buyer any surplus after paying the costs of the sale and the balance due on the contract.<sup>47</sup> In some of these states the buyer was liable for any deficiency.<sup>48</sup> Under such statutes there could be but little objection to the fairness of the dealing being supervised by a court of equity. The Virginia Statute specifically provides for such foreclosure.<sup>49</sup> However there are at least four jurisdictions that have allowed such proceedings in the absence of special

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<sup>44</sup> *Sanders v. Keber and Muller* (1876) 28 Ohio 630. Cf. note (1931) 73 A. L. R. 799.

<sup>45</sup> *Eisenberg v. Nelson*, above; *Lorain Steel Co. v. Norfolk and Boston Street Ry. Co.* (1907) 187 Mass. 500, 73 N. E. 646.

<sup>46</sup> *Wayne Tank and Pump Co. v. Quick Service Laundry Co.* (Mo. App. 1926) 285 S. W. 705, rehearing on another point (Mo. App. 1930) 29 S. W. (2d) 161.

<sup>47</sup> The Uniform Conditional Sales Act provides for a mandatory public sale if the buyer has paid more than 50% (sec. 19), and allows either party to demand one if less has been paid (sec. 20). The surplus realized over the costs of the sale and the balance due on the contract goes to the buyer, while if there is a deficiency, the buyer is still liable to a suit on the contract for this (sec. 22). Massachusetts makes such a resale compulsory if the buyer has paid 75%. Mass. Gen. Laws (1921) c. 255 sec. 11. North Carolina and Tennessee statutes do so in all instances. N. C. Code (1927) sec. 2587; Tenn. Ann. Code (Shannon, 1917), secs. 3670a7-3670a11.

<sup>48</sup> In North Carolina, Tennessee and states which have adopted the Uniform Conditional Sales Act.

<sup>49</sup> Va. Code Ann. (1924) sec. 5190. Texas and Utah have provided by statute that all contracts reserving title shall be treated as chattel mortgages. Tex. Rev. Civ. Stat. (1920) sec. 5654; Utah Laws (1917) sec. 478.

statutes of any kind.<sup>50</sup> These courts were largely actuated by the belief that such a proceeding was better for the vendee than if the vendor had chosen to exercise his harsh common law rights to retake the article, forfeiting any payments already made.<sup>51</sup> Once the courts admitted the possibility of a foreclosure suit, it was but a step to allow a deficiency judgment for this was a normal concomitant of suits to foreclose liens.<sup>52</sup>

Although there were scattered dicta in some early Missouri cases which called the seller's right over the goods a lien,<sup>53</sup> the first case to permit a suit in equity to foreclose such a lien was decided by the Kansas City Court of Appeals in 1913. This case was one between the vendor and a mortgagee of the buyer and the right to sue in equity was put upon the ground that this was better for the defendant than if the seller had merely retaken the goods (the Statute as to repayment of course does not apply as the defendant is not a party to the original contract).<sup>54</sup> Two years later the Springfield Court of Appeals refused to decide in a suit to foreclose a lien whether the instrument in question was a conditional sales contract or a chattel mortgage, holding it made no difference which it was as the defendant, a third party, had no right to the goods as against the plaintiff in either case.<sup>55</sup> In the case of *Wayne Tank and Pump Co. v. Quick Service Laundry Co.*,<sup>56</sup> the Kansas City Court of Appeals again allowed a suit to foreclose a lien, expressly holding such a proceeding justified both at Common Law and under the Missouri Statute, although pointing out that on the facts of the particular case the Missouri Statute would not apply. The same Court, in the next year, allowed such a suit between the original parties, incidentally remarking that the adequacy of the remedy at law would not bar equity,<sup>57</sup> a most unusual statement in a modern case, for theoretically the basis for equitable

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<sup>50</sup> *Gigray v. Mumper* (1909) 141 Iowa 396, 118 N. W. 393; *McDaniel v. Chiaramonte* (1912) 61 Ore. 403, 122 Pac. 33; *Southern Ice Co. v. Alley* (1912) 127 Tenn. 173, 154 S. W. 536 (prior to the Tennessee statute mentioned above); *Ballinger v. West Publishing Co.* (1915) 44 App. D. C. 49, *certiorari* denied (1915) 239 U. S. 649.

<sup>51</sup> *McDaniel v. Chiaramonte*, above.

<sup>52</sup> *Ballinger v. West Publishing Co.* above; *Southern Ice Co. v. Alley*, above; *Sheridan First National Bank v. Yokum* (1920) 96 Ore. 438, 189 Pac. 220.

<sup>53</sup> *Kingsland v. Drum* (1883) 80 Mo. 646; *Farmer v. Moore* (1898) 73 Mo. App. 527.

<sup>54</sup> *Wolf. Co. v. Hermann Savings Bank* (1913) 168 Mo. App. 549, 153 S. W. 1094.

<sup>55</sup> *Musselman v. City of Joplin* (Mo. App. 1915) 180 S. W. 1058.

<sup>56</sup> (Mo. App. 1926) 285 S. W. 750.

<sup>57</sup> *Kolb v. Golden Rule Baking Co.*, above.

action is the inadequacy of the remedy at law. In the most recent case the St. Louis Court of Appeals held that the right to foreclose a lien was "well settled" in Missouri practice, although the case was reversed upon another point.<sup>58</sup> In the earlier cases there had been no prayer for deficiency judgment, but in this case such a judgment was asked, if necessary. This point was passed over in silence by the Court. Obviously where the defendant is not bound in contract to pay the balance due such a prayer would be improper, but where he is bound to pay, such a prayer seems justified under the general practice in the foreclosure of liens, if the lien theory is to be adopted at all. Similar results have been reached by the Federal Circuit Courts of Appeal and the Ohio Supreme Court in construing the Ohio Statute.<sup>59</sup>

It may well be asked why an honest defendant should care whether the seller chooses to sue to foreclose a lien or to sue for the balance due and levy on the particular goods, or if it is not possible to pray for a deficiency judgment because a third party is being sued, whether the seller takes the goods by way of a foreclosure sale or by a writ of replevin before there has been any trial at all. It must be confessed that if the defendant is a third party any objection to foreclosure would be purely technical, for the third party is really benefited by the seller's choice as he is enabled to use the goods longer. The former case presents more difficulties. If the seller retook the goods directly, he would have to pay back at least 75% of the payments made and could not recover any deficiency between their resale price (plus the compensation deducted for the use of the goods while the buyer had them) and the original contract price. Of course, if the seller sued on the contract, he could always levy on the goods and have them sold, but this is likely to be a far slower process than the suit to foreclose a lien, for the jury trial dockets seem always to be more crowded than the equity dockets. It can be urged with justice that the buyer has no vested right in the Law's delay, and that this is an argument of practicality rather than of justice. Nevertheless, it remains true that the buyer may be only temporarily embarrassed, or may be able to obtain the money to pay for the goods by the use of them during this period of delay. Perhaps a far more potent argument against allowing suit in a court of equity is the power of such a court to appoint a receiver ancillary to a proceeding before it. If a receiver is appointed, the buyer may lose the goods just as soon as

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<sup>58</sup> *General Excavator Co. v. Emory* (Mo. App. 1931) 40 S. W. (2d) 490.

<sup>59</sup> *Parker Appliance Co. v. Co-operative Machinery Co.* (1924) 111 Ohio 255, 142 N. E. 891; *Re National Cash Register Co.* (C. C. A. 6, 1909) 179 F. 579; *Burroughs Adding Machine Co. v. Dial* (C. C. A. 6, 1918) 257 F. 574.

he would if the seller had retaken them, and yet the buyer receives no return of his payments. The traditional requirement for appointing a receiver has been well laid down by Professor Pomeroy: "The plaintiff must show, first that he has a clear right to the property itself or that he has some lien on it . . . and secondly that the possession of the property by the defendant was obtained by fraud or that the property itself or the income from it is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant. The element of danger is an important consideration; a remote or past danger will not suffice as a grounds for the relief, but there must be a well grounded apprehension of immediate injury. Nor will the court act upon a possible danger only; the danger must be great and imminent, demanding immediate relief."<sup>60</sup> Unfortunately the judges of the Missouri circuit courts<sup>61</sup> seem at times to forget these sound principles and the even sounder caution which Pomeroy adds, "The appointment of a receiver is one of the most responsible duties which a court of equity is called upon to perform; and while resting within the sound judicial discretion of the court, the power is, or should be, exercised with great caution and circumspection."<sup>62</sup>

In some instances it may be contended that although the seller originally had all the rights outlined above, he cannot now prosecute the one he desires because of his past actions. Missouri agrees with the majority rule that the mere taking of notes for installments at the time of making the contract does not bar a subsequent retaking under a condition reserving title until payment is made in cash.<sup>63</sup> Some states hold that the various rights of the seller are not inconsistent and that he can pursue them all (with the possible exception of claiming a lien)<sup>64</sup> until he secures a satisfied judgment,<sup>65</sup> but Missouri and

<sup>60</sup> 1 Pomeroy, *EQUITABLE REMEDIES* (1905) sec. 64.

<sup>61</sup> *Cf.* *General Excavator Co. v. Emory*, above.

<sup>62</sup> 1 Pomeroy *op. cit.* sec. 67. "By the settled practice of the court, in ordinary suits, a receiver cannot be appointed *ex parte*, before the defendant has had an opportunity to be heard in relation to his rights except in those cases where he is out of the jurisdiction of the court, or where, for some other reason, it becomes absolutely necessary for the court to interfere, before there is time to give notice to the opposite party, to prevent the destruction or loss of the property." *Verplanck v. Mercantile Insurance Co. of N. Y.* (N. Y. 1831) 2 Paige 438.

<sup>63</sup> *Columbus Buggy Co. v. Hord*, above; *Kingsland-Ferguson Mfg. Co. v. Culp* (1885) 85 Mo. 548; *Segrist v. Crabtree* (1889) 131 U. S. 287.

<sup>64</sup> *Kirk v. Crystal* (1908) 193 N. Y. 622, 86 N. E. 1124; *contra*, *Bierce v. Hutchins* (1907) 205 U. S. 340.

<sup>65</sup> *White v. Solomon and Bierce v. Hutchins* above. *Cf.* notes (1921) 12 A. L. R. 503 and (1928) 56 A. L. R. 238.

many other states maintain that the remedies are based on radically inconsistent theories of law and of the relation of the facts and that hence the seller must elect which right he will exercise.<sup>66</sup> Unfortunately there is hopeless conflict as to what is a binding election.<sup>67</sup> Missouri seems to have adopted the more liberal, and probably better, rule that the mere bringing of an action on which the seller was forced to take a nonsuit is not an election.<sup>68</sup> It is possible that even where there is not a binding election the seller may be estopped from asserting some of his rights.

Although the present Missouri law on the remedies of the conditional vendor seems to be largely satisfactory, certain statutory changes would be wise. The Statute as to retaking should be amended so as to apply to retakings from a person claiming under the vendee as well as from the vendee and so as to allow a reasonable deduction for obsolescence of the goods as well as for their actual depreciation. The seller should probably be allowed to continue to sue in equity to foreclose a lien, but the greatest care should be used in the appointment of receivers, and they should not be appointed merely because the property is subject to greater depreciation and obsolescence while being used than if it were stored. If this were done, the Missouri law would be far superior to the more cumbersome system set up by the Uniform Conditional Sales Act with its periods of redemption and forced resales.

GEORGE W. SIMPKINS, '33.

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### POLITICAL DISCRIMINATION BY PARTY CONTROL OVER PRIMARY ELECTIONS—*Nixon v. Condon*

The Fifteenth Amendment provides:

The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

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<sup>66</sup> *Twentieth Century Machinery Co. v. Excelsior Springs Bottling Co.* (Mo. App. 1914) 171 S. W. 940. Good case comment in (1915) 7 Mo. L. BULL. 44.

<sup>67</sup> Cf. A. L. R. notes cited in n. 65.

<sup>68</sup> *Twentieth Century Machinery Co. v. Excelsior Springs Bottling Co.*, above. Sec. 24 of the Uniform Conditional Sales Act provides: "Neither the bringing of an action by the seller for the recovery of the whole or any part of the purchase price, nor the recovery of a judgment in such action, nor the collection of a portion of the price shall be deemed inconsistent with a later retaking of the goods . . . But such right of retaking shall not be exercised after he has collected the entire price, or after he has claimed a lien on the good, or attached them, or levied upon them as the goods of the buyer."