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Conditional Sales: Date of Compulsory Resale When Goods Replevied

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U.S.[12] the defendants were convicted for conspiracy to kidnap and hold for ransom. The kidnappers brought their victim to the house of the defendants and at gunpoint forced the defendants to permit them to use it as a hideout from the police for themselves and their victim. The court found that the kidnappers were not present all the time, and that there would have been an opportunity to call the police. Therefore since the threat was not immediate during the commission of some of the overt acts, the defense of duress would not lie. The courts are extremely strict in their requirement of immediacy in the threat before the defense will be available.[13]

The rule may seem harsh. The distinction between an immediate threat and a mediate one appears, at first, to be an unduly academic rule by which to judge the actions of a prisoner suffering from physical exhaustion and mental anguish. He may be validly aware that his life is in jeopardy even though the threat may not have been direct or immediate but delivered by innuendo or by the obvious attitude of the captors coupled with the knowledge of the fate of other prisoners. But the rule is nevertheless sound. If any resistance of our troops is to be attained when they are captured and taken as prisoners of war it must be required that resistance be up to the very face of death. If anything less were required the necessity of resisting would be eliminated altogether. If the defense of duress could be based on the threat of mediate death, as defense contended, the mere fact of being taken prisoner would in most cases satisfy that standard. As said by one court:

> "We think that the citizen owing allegiance to the United States must manifest a determination to resist commands and orders until such time as he is faced with the alternative of immediate injury or death. Were any other rule to be applied, traitors in the enemy country would by that fact alone be shielded from any requirement of resistance. The person claiming the defense of coercion and duress must be the person whose resistance has brought him to the last ditch."[14]

It seems sound to retain the strict rule in determining guilt, and to consider all lesser circumstances in determining an appropriate sentence.

DAVID A. SCHUENKE

Conditional Sales: Date of Compulsory Resale When Goods Replevied.—Plaintiff sold two pieces of farm machinery to the defendants, the agreement being in the form of a conditional sales contract. The vendees refused to make any payments on the $1,000.00 unpaid

[12] 76 F.2d 490 (10th Cir. 1935).
[13] See R.I. Recreation Center Inc. v. Aetna Casualty and Surety Co., 177 F.2d 603 (1st Cir. 1949).
[14] 192 F.2d 338, at 359 (9th Cir. 1951).

balance. Unable to secure possession of the equipment through consent of the buyers, plaintiff instituted a replevin action on the 31st day of March, 1953. On April 15th following, the vendees voluntarily returned one piece, a harvester, however it was not until the 18th of May, 1953, that the sheriff seized the other unit, a tractor, pursuant to the writ and gave possession therof to the plaintiff. The trial awarded the defendants damages on their counterclaims and the plaintiff appealed. *Held*: Judgment reversed for the plaintiff. When a conditional vendor resorts to legal process to retake goods from the possession of a buyer in default and such action is contested, the thirty day statutory period for compulsory resale does not commence to run until the final adjudication in the replevin action. *Kahl v. Winfrey*, 81 Ariz. 199, 303 P.2d 526 (1956).

The trial court's decision reflected almost complete adoption of the buyers' counterclaim allegations which consisted of modification, recission, and severability of the contract as well as a claim for statutory damages for failure to resell. For the lower court to adopt the modification theory set forth by the buyers is not of itself unrealistic, however, to award damages for wrongful retaking and failure to resell the harvester within thirty days after April 15th, 1953, is entirely inconsistent with any form of modification wherein the allegation is that the harvester was returned in cancellation of the unpaid contract price. This question was dispensed with at the appellate level with the statement that the buyers had failed in their burden of proof on the matter. The Arizona Supreme Court's further holding of non-severability on the basis of the facts presented resulted in classifying both units of equipfent as one chattel sold under one contract, and therefore making both subject to the single writ. The voluntary return of the harvester is immaterial and without impact where the buyers actively resisted return of the tractor.

The instant case therefore presents the question of when must the conditional vendor resell as per the Uniform Conditional Sales Act once he has resorted to legal process to secure the return of the goods and such action is contested by the buyer in default who has paid at least fifty percent of the sale price. In resolving this issue, the Arizona appellate court, deciding the question for the first time, followed the decisions of the State of Tennessee, specifically adopting the holding enunciated in *Leiberman v. Puckett*.[1] Although Tennessee has not enacted the Uniform Conditional Sales Act, their conditional sale statute is similar in rights and duties of the buyers and sellers respectively.[2]

Decisions from New York both prior and subsequent to the enact-

[1] 94 Tenn. 273, 29 S.W. 6 (1895).
[2] TENN. CODE ANN. §47-1302 (1955).

ment of the Uniform Conditional Sales Act there in 1922 were discussed but none were relied on directly by the Arizona appellate court. Prior to 1933, the New York decisions[3] on this issue were in accord with the holding adopted in the instant case. It was not until eleven years after the adoption of the Uniform Conditional Sales Act in New York that the New York Court overruled their previous position by holding in *Montgomery Acceptance Corp. v. Coon*[4] that the date of retaking was the date the sheriff delivered the property to the vendor. The *Coon* decision met with apparent disfavor as evidenced by the legislative amendment[5] of the following year. Effective May 19, 1934, this statement was added to Sec. 796 of the New York Uniform Conditional Sales Act.

> "Provided, however, that when the seller retakes possession of the goods by legal process, and an answer is interposed the seller may hold such retaken goods for a period not to exceed thirty days after the entry of a judgment by a court of competent jurisdiction entitling the seller to possession of such goods before holding such resale."

Memoranda[7] presented to the Governor of New York and against passage of the bill fairly outline the advantages and objections to the proposed amendment. In the report submitted to the governor by the sponsor of the bill,[8] conversion was suggested as a probable consequence should the seller resell in conformity with the law of the *Coon* case, when the replevin action subsequently determines that the seller was not entitled to the goods. On the other hand, also following the decision of the *Coon* case, the seller cannot await determination of the replevin action without subjecting himself to statutory liability for failure to resell within the prescribed time. Both the Association of the Bar of the City of New York and the New York County Lawyers' Association favored passage of the amendment.[9]

The only objections urging the governor's veto were contained in a brief prepared for a business organization.[10] It was suggested by the

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[3] Siegel v. Frank E. Hatch & Co., 61 Misc. 332, 113 N.Y. Supp. 818 (1908); Spitaleri v. Brown, 163 App. Div. 644, 148 N.Y. Supp. 1005 (1914).
[4] 263 N.Y. 561, 189 N.E. 697 (1933).
[5] N. Y. Sess. Laws ch 728 (1934).
[6] N.Y. Personal Property Law, §79, Part 2 (1956).
[7] Photostatic copies of the reports contained in the bill jacket were received from the New York State Law Library.
[8] Assemblyman Harold B. Ehrlich's letter to Governor Herbert H. Lehman, dated May 12, 1934.
[9] The Committee on State Legislation of the Association of the Bar of the City of New York issued a Bulletin No. 258 in 1934 approving the proposed bill. The New York County Lawyers' Association approval was contained in a report sent to Governor Herbert H. Lehman on May 11th, 1934, by Irving J. Joseph, Chairman of the Committee on Legislation and Law Reform.
[10] H. G. Bragg, general manager of the Automobile Merchants' Association of New York, Inc., under letter dated May 10th, 1934, enclosed a brief outlining the points requiring its veto.

opponents that: "Revision should be effected only after deliberate consideration of the many technicalities involved . . . ." The main objection dealt with the ambiguity in construction as precipitating needless litigation. Specifically, the objecting association felt that the legislature had intended to give the conditional vendor an option to either consider the date of retaking as being the date of delivery of the goods by the sheriff or the date of final entry of a judgment. It was suggested however, that this intent might not be carried out, the reason being that the court might place a construction on the amendment which would limit the resale period to the thirty days following entry of a judgment. The fears epressed in the merchants' association report were recently allayed with the case of *Genauer v. Bac Corp.*,[11] where the New York Court held that the resale could be conducted during pendency of the replevin action as well as not later than thirty days after the entry of a judgment therein.

Of the nine Uniform Conditional Sales Act States,[12] Indiana alone has followed New York in this respect. The Indiana statute[13] contains the New York amendment verbatim with the exception of the phrase, "and an answer is interposed." No cases have been decided construing the provision.

In view of the fact that Pennsylvania[14] and Massachusetts[15] have enacted the Uniform Commercial Code, it might be well to consider those provisions of the 1957 draft which involve the issue of resale after retaking by legal process. With the exception of consumer goods, the Uniform Commercial Code does not provide for any definite time limit in which the seller must dispose of the retaken goods.[16] In the case of consumer goods,[17] however, the seller must dispose of them within ninety days after possession is taken. The statute[18] dealing with compulsory disposition of consumer goods makes no reference as to what shall constitute the date of possession when legal process is necessary to retake them. It is likely therefore, that the issue presented

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[11] 276 App. Div. 589, 96 N.Y.S.2d 394 (1950).

[12] Arizona, Delaware, Indiana, New Hampshire, New Jersey, New York, South Dakota, West Virginia, and Wisconsin. See 2 U.L.A., UNIFORM CONDITIONAL SALES ACT.

[13] BURNS' IND. ANN. STATS. §58-517 (1951).

[14] The UNIFORM COMMERCIAL CODE took effect July 1st, 1954, in Pennsylvania.

[15] Massachusetts passed the UNIFORM COMMERCIAL CODE on October 1st, 1957.

[16] Sec. 9-504 of the UNIFORM COMMERCIAL CODE which concerns the seller's right to dispose of the goods after default, simply provides that the method, manner, time, place, and terms of the disposition must be "commercially reasonable." No resale period is stipulated for it is the intent and purpose of the section to foster private sales through regular commercial channels.

[17] Under §9-505(1) of the UNIFORM COMMERCIAL CODE, disposition of consumer goods after default of the buyer, must be made within ninety days, "If the debtor has paid sixty per cent of the cash price in the case of a purchase money security interest in consumer goods or sixty per cent of the loan in the case of another security interest in consumer goods, ..."

[18] UNIFORM COMMERCIAL CODE §9-505.

by the instant case will arise under the Uniform Commercial Code in the area of retaken consumer goods. Sec. 19 of the Uniform Conditional Sales Act provides for resale within thirty days, "After the seller has retaken possession." Sec. 9-505(1) of the Uniform Commercial Code provides for liability for failure to dispose of the goods within ninety days, "After he takes possession." Unless the word possession in the latter phrase be interpreted to mean judicial as well as peaceful possession, it would appear that the Uniform Commercial Code has not completely eliminated the problem of resale after retaking by legal process.

Wisconsin has not passed on the precise issue presented by the instant case, however Wisconsin has adopted the language of the Model Uniform Conditional Sales Act Sec. 19.[19] In considering amendment of the Wisconsin Statute,[20] it is suggested that the Indiana version be adopted. By not requiring an answer to be interposed, it apparently eliminates a troublesome area present in the New York amendment. Under the New York version, it appears incumbent on the conditional vendor to proceed to conduct the resale as soon as the goods are delivered to him by the sheriff, for it is likely that unless he do so, he will fail to resell within the thirty day period should the vendee refuse to contest the action.[21] Construction of the Indiana provision, on the other hand, would quite probably allow the vendor thirty days after entry of judgment in which to conduct the resale, regardless of whether such judgment be obtained on the merits or by default.

ROBERT CHOINSKI

Pleading: Adding Parties by Intervention — Plaintiff, a New York corporation engaged in the business of buying dairy products for purposes of manufacture, brought an action against the attorney general and other state officers for a judgment that a Wisconsin Statute[1] be declared unconstitutional. The Pure Milk Products Cooperative petitioned for intervention on the ground that, by the terms of its marketing agreement with its producing members, it was their collective agent authorized to represent them in selling milk to pur-

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[19] "If the buyer does not redeem the goods within ten days after the seller has retaken possession, and the buyer has paid at least fifty per cent of the purchase price at the time of the retaking, the seller shall sell them at public auction in the state where they were at the time of the retaking, such sale to be held not more than thirty days after the retaking . . . ."

[20] WIS. STATS. §122.19 (1955).

[21] This same objecion was presented in the merchants association brief, see note 10 *supra*.

[1] WIS. STATS. §100.22 (1955): "One engaged in buying milk, cream, or butterfat for the purpose of manufacture, who pays a higher rate for such products in one section of the state than in another, shall be guilty of unfair discrimination, unless the price differential be commensurate with quantity, quality, or transportation charges."