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Conditional Sales -- Remedies of the Seller in Florida

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CONDITIONAL SALES — REMEDIES OF THE SELLER IN FLORIDA

INTRODUCTION

Installment buying has opened to millions of consumers the possibility of acquiring things which they have wanted and could not otherwise have acquired. In Florida, as well as the rest of the nation, installment selling is as much a part of the economic life as banking and farming. It has been deeply woven into our economic fabric by many years of increasingly widespread use.[1]

By far the majority of installment sales in the State of Florida involve transactions in which security is taken or title reserved by the seller for the payment of the purchase price.[2] This security is taken in one of several forms. Most popular is the conditional sales contract.[3]

A few states, mainly because of early judicial prejudice against the conditional sales contract, favor the use of the chattel mortgage to secure payment of deferred balances.[4] But the chattel mortgage does not give the seller as much flexibility for protecting his interest as does the conditional sale. Consequently, the amount of goods sold conditionally is reflected in the increased use of this form of installment buying.

This widely used financing method is crystallized in a structure built of legal rules and contractual provisions. It is a method of installment selling whereby the retail seller assumes the burden of carrying the credit of the buyer until the remainder of the purchase price is paid in periodic installments.[5] The credit arrangements embody an agreement which provides for retention of title in the seller as security until some condition, usually complete payment, is fulfilled.[6] The purchaser, after agreeing to the basic terms, signs an elaborate contract providing for conditions which restrict his beneficial use and privileges of resale. Occasionally it provides that even if the buyer is not in arrears but should impair his credit standing the seller would be able to declare the buyer in default. The conditional seller achieves his advantage, not from these elaborate provisions, but from the basic nature of the instrument.

In Florida, where the distinctions between a conditional sales contract

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1. Nugent and Henderson, *Installment Selling and the Consumer: A Brief for Regulation*, 173 ANNALS 93 (1934).

2. Donaldson, *An Analysis of Retail Installment Sales Legislation*, 19 ROCKY MT. L. REV. 135 (1947).

3. Dunham, *Inventory and Accounts Receivable Financing*, 62 HARV. L. REV. 588 (1949).

4. Turnbull v. Cole, 70 Colo. 364, 201 Pac. 887 (1921); Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 153, 46 So. 193 (1908).

5. Mizell Live Stock Co. v. J. J. McCaskill Co., 59 Fla. 322, 51 So. 547 (1910) (payment plus a mortgage on other property); Alden v. W. J. Dyer and Bro., 92 Minn. 134, 99 N.W. 784 (1904) (payment of purchase price plus agreement not to sell or remove property without seller's consent); Union Machine and Supply Co. v. Thompson, 98 Wash. 119, 167 Pac. 95 (1917) (payment of purchase price plus an old debt).

6. Edwards v. Baldwin Piano Co., 79 Fla. 143, 83 So. 915 (1920).

and a chattel mortgage are observed,[7] it becomes necessary to point out that the sale or credit with a chattel mortgage back to secure payment of the purchase price is a similar device widely used to accomplish a credit transaction. It should not be confused with a conditional sale as it gives the seller different rights and remedies in the event the buyer defaults. The typical characteristics of a conditional sale which differentiate it from a chattel mortgage are:

> (1) The conditional sale provides that the title of the goods is to remain in the seller[8] until the happening of a named condition when it is to vest in the buyer.[9] This results in a division of the attributes of ownership. The buyer receives immediate possession of the goods and the right to continue in possession until he defaults. The seller, by force of the title-retaining feature of the contract, has legal title to the goods[10] and the contractual right to recover the purchase price[11] or the goods.
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> (2) Possession is delivered to the buyer at once.
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> In the chattel mortgage, title passes immediately to the buyer subject to a lien. The agreement takes the form of a conveyance with a chattel mortgage back which can be satisfied by the payment of the purchase price.[12] Thus a chattel mortgage assumes title in the mortgagor, the mortgage creating a specific lien. It is not a conveyance of legal title nor of the right to possession.[13]

The distinction is important because: (a) The Florida recording acts require that a chattel mortgage be recorded, but no such requirement is imposed upon a conditional sales contract.[14] (b) The usury laws apply to interest on a loan[15] but not to carrying charges added to the price.[16] (c) Finally, there are remedies available to the seller.[17] It is these remedies which will be discussed.

Doctrine of Election

A choice of remedies is available to the credit seller under a conditional sales contract upon the buyer's default. The seller may, at his option,[18] bring an action to recover the purchase price, replevy the goods, resort to self-help,[19] or go into a court of equity to establish a lien on the property for the unpaid portion of the purchase price.[20] These remedies if properly

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7. Voges v. Ward, 98 Fla. 304, 123 So. 785 (1929).
8. Stokes v. Humphries, 69 Fla. 468, 68 So. 448 (1915).
9. Southern Hardware and Supply Co. v. Clark, 201 Fed. 1 (5th Cir. 1912).
10. The risk is on the purchaser for loss of goods. United States v. Greenwood Products Co., 87 F.Supp. 785 (N.D. Fla. 1950), *aff'd*, 188 F.2d 401 (5th Cir. 1951).
11. Phenix Ins. Co. v. Hilliard, 59 Fla. 590, 52 So. 799 (1910).
12. Walsh, A Treatise on Mortgages, 35 (1934).
13. See note 7 *supra*.
14. McKais v. Commercial Credit Corp., 126 F.2d 68 (5th Cir. 1942).
15. Fla. Stat. § 687.09 (1951).
16. Fla. Stat. § 687.02 (1951).
17. Pavlis v. Atlas-Imperial Diesel Engine Co., 126 Fla. 808, 172 So. 57 (1937).
18. Nelson v. Watson, 114 Fla. 806, 155 So. 101 (1933).
19. Commercial Credit Co. v. Neal, 91 Fla. 505, 107 So. 639 (1926).
20. Malone v. Meres, 91 Fla. 709, 109 So. 677 (1926).

understood and used, will provide the seller with a greater amount of protection than is available under any other type of modern credit arrangement. These advantages will be lost[21] if the seller does not make proper use of his remedies. This is true because, should the seller choose a remedy not adequately covering his particular situation, he will have made an election[22] which will operate as a waiver of other remedies. This election may benefit the defaulting buyer.

The election principle is followed in Florida.[23] The seller, where the rights of a bona-fide third party[24] have not intervened,[25] must elect[26] to pursue one of three inconsistent remedies. These remedies will be considered separately and in some detail below. From the outset the reader must be aware of the election-of-remedies hazard which attends the seller's initial choice of remedy. The seller has an optional legal remedy either to proceed in replevin, or, if the contract provides, to resort to self-help.[27] He may also look to the buyer's personal obligation and recover the purchase price. The seller cannot treat the remedies as cumulative. He must choose one or the other.[28] In Florida, as in most common law jurisdictions, when the seller has elected to sue for the recovery of the debt, he thereby affirms the sale. He waives his right to repossess the property, and title to the property vests absolutely in the buyer.[29] Similarly, should the seller elect to repossess, he has rescinded the contract[30] and given up his right to recover the purchase price.[31] These remedies are concurrent with those provided for in the contract which are not inconsistent with public policy.[32]

The typical conditional sales contract usually involves, comparatively speaking, little money. Because of this, few decisions concerning the nature of the conditional sales contract emanate from the Supreme Court of Florida. However, examination of conditional sales decisions in other common law states demonstrates some of the consequences of the election doctrine. In Arkansas, as in Florida, when the seller brings an action of

21. Weeke v. Reeve, 65 Fla. 374, 61 So. 749 (1913).

22. American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 So. 942 (1908).

23. Kauffman v. International Harvester Co., 153 Fla. 188, 14 So.2d 387 (1943); Commercial Credit Co. v. Miller, 111 Fla. 554, 149 So. 482 (1935); Robertson v. Northern Motor Security Co., 105 Fla. 644, 142 So. 226 (1932).

24. Commercial Credit Co. v. Parker, 101 Fla. 928, 132 So. 640 (1931); Kent v. Polk Grocery Co., 131 Fla. 139, 179 So. 136 (1938); Glass v. Continental Guaranty Corp., 81 Fla. 687, 88 So. 876 (1921); Onyx Soda Fountain Co. v. L'Engle, 53 Fla. 314, 43 So. 771 (1907).

25. Nash Miami Motors v. Bandel, 160 Fla. 925, 37 So.2d 366 (1948); Marriott v. Meadows, 138 Fla. 436, 189 So. 415 (1939).

26. The election must be made within a reasonable time. Universal Credit Co. v. McKinnon, 106 Fla. 849, 143 So. 778 (1932).

27. Jasper v. Tuten, 62 Fla. 151, 57 So. 237 (1911).

28. See note 7 *supra*.

29. Pavlis v. Atlas-Imperial Diesel Engine Co., 126 Fla. 808, 172 So. 57 (1937).

30. *Ibid.*

31. EAGER, THE LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES AND TRUST RECEIPTS, §§ 403, 408 (1941)

32. Baer v. General Motors Acceptance Corp., 101 Fla. 913, 132 So. 817 (1931).

replevin to recover the goods from the defaulting buyer, he waives his right to sue on the unpaid purchase-money notes.[33] Peaceable repossession of the goods by the seller after default by the buyer also bars an action by the seller for the purchase price.[34] An assignee of the purchase-money notes cannot bring an action to recover from the buyer-maker if the assignee has assented to a repossession of the goods by the seller.[35] Florida allows equity to take jurisdiction over the conditional sales contract and establish a lien in favor of the seller which, like the chattel mortgage, can be foreclosed.[36] On the equitable remedy the doctrine of election also applies, and the seller is barred from pursuing his other remedies.[37]

Actions for purchase price

When the seller retains the title until payment is made in full,[38] he confers upon himself an absolute right to the purchase price, and imposes upon the buyer an unconditional obligation to pay.[39] The seller must show that he does not assert an absolute title to the goods since that would be inconsistent with an action to recover the purchase price.[40] He must show that all but his security title has passed to the buyer. However, the seller does not have to make a tender of title since, as holder of the buyer's note, he cannot be called on to execute a bill of sale before the agreed consideration has been paid.[41] Most conditional sales contracts provide for this contingency by including acceleration provisions.[42] Upon default of an installment payment the seller can then elect to sue for the recovery of his debt. This election waives his rights to repossess the property[43] and title vests absolutely in the buyer,[44] who then becomes a debtor for the remainder of the purchase price.[45] This rule applies even though the contract contains provisions either authorizing the seller to bring suit for the purchase price without waiving the right to pursue the property, or providing that the title will remain in the seller until the judgment is paid.

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33. Gale and Co. v. Wallace, 210 Ark. 161, 194 S.W.2d 881 (1946); H. V. Beasley Music Co. v. Cash, 164 Ark. 572, 262 S.W. 656 (1924).

34. Walcott v. Fuller, 118 Conn. 220, 171 Atl. 698 (1934); *contra*: 20th Cent. Machinery Co. v. Excelsior Springs Water Co., 273 Mo. 142, 200 S.W. 1079 (1917).

35. See note 32 *supra*.

36. Livingston v. National Shawmut Banuk of Boston, 62 So.2d 13 (Fla. 1953).

37. Malone v. Meres, 91 Fla. 709, 739, 109 So. 677, 692 (1926).

38. Payment in purchase-money notes does not make the sale absolute. Lakeland Silex Brick Co. v. Jackson and Church Co., 124 Fla. 347, 168 So. 411 (1936).

39. Phenix Ins. Co. v. Hilliard, 59 Fla. 590, 52 So. 799 (1910).

40. Malone v. Meres, 91 Fla. 709, 109 So. 677 (1926).

41. United States v. Bryant, 58 F.Supp. 663 (S.D. Fla. 1945), *aff'd* 157 F.2d 767 (5th Cir. 1946).

42. Kauffman v. International Harvester Co., 153 Fla. 188, 14 So.2d 387 (1943).

43. Voges v. Ward, 98 Fla. 304, 123 So. 785 (1929).

44. American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 So. 942 (1908).

45. Commercial Credit Co. v. Miller, 111 Fla. 554, 149 So. 482 (1933).

Such provisions are void in Florida,[46] and an election takes place in spite of them even though the suit is dropped before final judgment.[47]

The parties may agree to treat notes given in payment as not waiving the retention of title until the notes are paid. They may also agree that the seller does not waive his title should he take new or additional security (*e.g.*, a mortgage on property other than that sold).[48] Generally speaking, a conditional sales contract is not changed to one of absolute sale[49] by the fact that the buyer gives notes whereby he promises unconditionally to pay the purchase price.[50]

Successful actions on the purchase price are often followed by seizure of the goods, under a writ of execution, and sale by the sheriff.[51] This gives the seller some of the advantages of having both repossession and his contractual obligation. While this procedure does not entitle the seller to a return of the goods, it does enable him to realize the purchase price, or a part thereof, out of a sale of the very goods which he regarded as his security at the outset of the transaction. A graphic illustration of enforcing payment of price without proper realization of its effect is found in the case of *Central Farmers Trust Co. v. McCampbell Furniture Stores.*[52] The seller sued on the notes. He was not allowed to claim priority over a mortgagee whose prior mortgage deed contained an after-acquired property provision. The seller's action on the notes operated to pass title to the buyer, whereupon the furniture became subject to the prior lien. The seller probably would use this form of remedy only where the goods have depreciated so greatly in value that repossession would not be worthwhile. An action for the purchase price is based on a contractual obligation between the seller and the buyer and is subject to all available defenses to a contract. An advantage of this remedy is the possibility of a specific attachment.[53] Caution must be used since nonconformance to the statutory attachment provisions might lead to penalties[54] and leave the seller without a remedy because of the election hazard.

Repossession

The fundamental remedy under a conditional sales contract is the right of the seller to recover possession of the chattel upon the buyer's default. This right can be exercised only if the seller has not waived his title in the

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46. See note 43 *supra.*

47. Intertype Corp. v. Pulver, 2 F.Supp. 4 (S.D. Fla. 1932), *aff'd* 65 F.2d 419 (5th Cir. 1933), *cert. denied* 290 U.S. 660 (1933).

48. Mizell Live Stock Co. v. J. J. McCaskill Co., 59 Fla. 322, 51 So. 547 (1910).

49. Percifield v. State, 93 Fla. 247, 111 So. 519 (1927).

50. Campbell Printing-Press and Mfg. Co. v. Walker, 22 Fla. 412, 1 So. 59 (1886).

51. FLA. STAT., c. 55 (1951).

52. 127 Fla. 721, 174 So. 748 (1937).

53. If deterioration is imminent the court can order a sale quickly. FLA. STAT. § 76.22 (1951).

54. Attachment must be had on the statutory grounds or the seller will be liable for damages. Also an attachment bond, double the debt and covering all costs and damages must be raised. FLA. STAT. §§ 76.04, 76.05, 76.12 (1951).

chattel.[55] In Florida the matter is unaffected by statute. Conduct by the seller, after knowledge of the buyer's default,[56] showing an intent[57] not to rely on the reserved title operates as a waiver of title in the seller and affirms title in the buyer.[58] The seller, by this waiver, continues to treat the contract as being in force after defaults in payment.[59] Such conduct must be clearly inconsistent[60] with the seller's title before it will act as a waiver of his right to repossess.[61] The taking of purchase money notes evidencing the unpaid price[62] or the taking of an additional security on other property[63] are not the types of conduct inconsistent with a conditional sale. Only acts, such as the institution of a suit for the purchase price recognizing the existence of title in the buyer,[64] operates as a waiver, even though it is voluntarily abandoned,[65] or is not successfully prosecuted.[66] An assertion of a lien upon the property is another act inconsistent with the seller's title.[67]

It should be particularly noted that, in those conidtional sales agreements which have attributes of both the conditional sale and the chattel mortgage, the courts easily find waivers.[68] This occurs when the seller asserts the mortgage lien and receives an adverse decision, *i.e.*, that the instrument is not a mortgage but a conditional sales contract. He cannot thereafter replevy the goods since he has waived his title. This result is reached because the relation of conditional seller and conditional buyer, and of mortgagee and mortgagor, cannot subsist as to the same property at the same time. The relation of the parties must be one or the other — it cannot be both. The theory is that it is manifestly inconsistent that title remain in the seller[69] when he implies it is in the buyer in his action on the chattel mortgage. This situation, and others where the court has found a waiver,[70] are explained by the fact that the court attempts to avoid the

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55. See note 47 *supra*.
56. McKinnon v. Johnson, 59 Fla. 332, 52 So. 288 (1910).
57. Mere forbearance to elect a remedy on first default is not a waiver. Universal Credit Co. v. McKinnon, 106 Fla. 849, 143 So. 778 (1932).
58. There is no waiver in the states where the Uniform Conditional Sales Act is adopted. Defiance Mach. Works v. Gill, 170 Wis. 477, 175 N.W. 940 (1920).
59. Universal Credit Co. v. McKinnon, 106 Fla. 849, 143 So. 778 (1932).
60. Taking additional security by way of a chattel mortgage does not affect the seller's reservation of title. Mizell Live Stock Co. v. J. J. McCaskill Co., 59 Fla. 322, 51 So. 547 (1910).
61. Voges v. Ward, 98 Fla. 304, 123 So. 789 (1929).
62. Bailey v. Baker Ice Mach. Co., 237 U.S. 268 (1915).
63. See note 47 *supra*.
64. Frish v. Wells, 200 Mass. 429, 431, 86 N.E. 775, 776 (1909).
65. McKinnon v. Johnson, 59 Fla. 332, 52 So. 288 (1910); Weeke v. Reeve, 65 Fla. 374, 61 So. 749 (1913); Campbell v. Kauffman Milling Co., 42 Fla. 328, 29 So. 435 (1900).
66. See note 47 *supra*.
67. Robb v. Ves, 155 U.S. 4, 13 (1894).
68. Voges v. Ward, 98 Fla. 304, 123 So. 785 (1929) (suit on unmatured notes).
69. Central Farmers' Trust Co. v. McCampbell Furniture Stores, 128 Fla. 60, 174 So. 748 (1937).
70. Anderson v. Tradlock, 27 Ala. App. 513, 175 So. 412 (1937).

possibility of a forfeiture.[71] Waiver is the inevitable consequence of the forfeiture rule which allows the seller to keep the buyer's installments after default.[72] This is shown by the court's refusal to apply the waiver doctrine on the ground that no forfeiture is involved where the seller sues for the purchase price rather than for possession.

The conditional seller should be aware of the possibility of a partial waiver before he seeks to repossess. A partial waiver of title will prevent repossesion until the seller takes steps to end it, or when the next installment comes due.[73] Should the seller repossess during this period he will be liable to the buyer for conversion. If the seller extends the time of payment[74] he will be precluded from repossessing[75] before the expiration[76] of the new time limit because the seller's act is inconsistent with his title.[77] He has waived the right of forfeiture for default. In contracts containing acceleration clauses, extension of the time of payment of the installment also waives the right to immediate repossession.[78] These waivers can only be corrected by the seller giving notice or making a demand before repossessing.[79] In such a case, tender of the amount remaining due is sufficient to retain in the buyer the right of possession. Before the waiver, the seller could have repossessed without the necessity of a demand.[80]

If the seller has not waived his title he may repossess.[81] In Florida repossession results in an election and affirmation of title in the seller. The result of this election will be to preclude the seller from thereafter maintaining an action to recover the purchase price or any part of it remaining unpaid[82] or any other action which recognizes title in the buyer.[83] The seller cannot, for example, foreclose his lien or foreclose a mortgage on lands securing the purchase price.[84]

With these consequences in mind, the seller has two methods of recovering possession. He may either retake by self help or bring an

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71. Pound, *The Progress of the Law 1918-1919: Equity*, 33 HARV. L. REV. 929, 952 (1920).

72. Baer v. General Motors Acceptance Corp., 101 Fla. 913, 132 So. 817 (1931).

73. Kent v. Tallahassee Motor Co., 141 Fla. 789, 193 So. 821 (1940).

74. Mere delay in making an election of remedies is not a partial waiver. Universal Credit Co. v. McKinnon, 106 Fla. 849, 143 So. 778 (1932).

75. Repossession will not be denied when the seller redelivers to the buyer after payments are resumed. Commercial Credit Co. v. Miller, 111 Fla. 554, 149 So. 482 (1933).

76. Commercial Credit Co. v. Willis, 126 Fla. 449, 171 So. 304 (1936).

77. Even in the absence of an acceleration clause the seller may declare the remaining installments due and sue for the purchase price. Kanffman v. International Harvester Co., 153 Fla. 188, So.2d 387 (1943).

78. See note 73 *supra*.

79. See note 76 *supra*.

80. *Id.* at 306, 307.

81. Universal Credit Co. v. McKinnon, 106 Fla. 849, 143 So. 778 (1932).

82. See note 72 *supra*.

83. Jackson v. A. W. Wade Mfg. Co., 102 Fla. 1032, 136 So. 689 (1931).

84. Percifield v. State, 93 Fla. 247, 111 So. 519 (1927).

action in replevin. The privilege to retake may be exercised without recourse to the courts.[85]

Repossession by self help

Before the conditional seller resorts to the remedy of retaking, he should be aware of the common law approach followed by the Florida courts. The seller cannot use any physical force to retake the chattel without the consent of the buyer.[86] Similarly, he is prevented from entering upon another's land to retake without permission of the landowner.[87] Thus, the conditional seller is required to obtain prior consent in the conditional sales contract before he will have the right to retake over the objection of the purchaser. Such a clause will not be implied in the contract.[88] As a result, all standard conditional sales contracts contain a clause giving the seller the right to retake without process of law, and these clauses are valid in Florida.[89] They give the seller a right to retake without being liable for conversion or trespass, since the legal title and the consent given in the contract are sufficient to give the seller the immediate right to possession upon default.[90]

Generally speaking, repossession by retaking is strictly interpreted in light of the contract provisions. If the contract requires a demand, it must be made.[91] Only if so authorized by the contract may the seller repossess without giving notice.[92] Even if notice is not required the seller will be allowed to retake only if he can do so without committing a breach of the peace[93] or committing an unlawful trespess.[94] This occurs when the seller fails to distinguish between his rights arising from the contract and his duty not to invade the general rights of the buyer existing apart from the contract.[95] If his acts are unreasonable he is liable for damages.[96] Notwithstanding provisions waiving the requirement of notice or demand, the seller must not attempt to reposess after he has been expressly denied the right by the person in lawful possession. Such action constitutes a trespass.[97]

No matter what wording is followed in these clauses the common law jurisdictions will invalidate any terms[98] which would give rise to force or violence naturally calculated to provoke a breach of the peace in the retak-

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85. C.I.T. Corporation v. Reeves, 112 Fla. 428, 150 So. 638 (1933).
86. See note 84 *supra.*
87. PROSSER, TORTS 145 (1st ed. 1941).
88. See note 85 *supra.*
89. Voges v. Ward, 98 Fla. 304, 123 So. 785 (1929).
90. Universal Credit Co. v. McKinnon, 106 Fla. 849, 143 So. 778, 780 (1932); Commercial Credit Co. v. Neel, 91 Fla. 505, 107 So. 639 (1926).
91. Young v. Corbitt Motor Truck Co., 148 S.C. 511, 146 S.E. 534 (1929).
92. See note 85 *supra.*
93. See note 84 *supra.*
94. *Ibid.*
95. *Id.* at 639.
96. Singer Sewing Machine Co. v. Phipps, 49 Ind. App. 116, 94 N.E. 793 (1911).
97. C.I.T. Corp. v Brewer, 146 Fla. 247, 200 So. 910 (1941).
98. Girard v. Anderson, 219 Iowa 142, 257 N.W. 400 (1934).

ing of the property.[99] Following this general rule, such actions will preclude the seller from exercising his right to retake the property.[100] This is particularly important since actions which would forfeit the seller's right to retake (*e.g.*, a non-peaceful attempt at repossession) will make him liable for unlawful taking of the goods in addition to trespass and breach of the peace.[101]

There has been no specific Florida case to the effect that any entry or retaking must be made at a reasonable time and in a reasonable manner. However, jurisdictions that the Florida court followed in their earlier decisions in this field now hold that surreptitious entry, or one made in the absence of the buyer, is unreasonable.[102] It is also unreasonable to remove anything which might cause physical injury, *e.g.*, removing the only bed of a buyer when he is ill.[103] These jurisdictions express the realization that some evils arising from unconscionable acts of the seller (removing the only stove from the buyer's cabin in the middle of winter) might be too harsh.[104] It is to be hoped that the Florida court, when called upon, will also modify some of the extreme harshness that is possible under the present exercise of this remedy.

The problem has arisen in other jurisdictions as to whether the conditional seller can exercise this remedy when the chattel has been attached to some other property.[105] The prevailing common law view is that the parties know at the time of the sale that the seller may have to repossess.[106] It is held that the seller has the right to use whatever force is reasonably necessary in order to remove his chattel.[107] The liability of a seller for excessive damage depends upon whether the court adopts the rule that a condition precedent to the right of retaking is a reasonable exercise of the right,[108] or the rule that the seller is liable only for injury in excess of what was necessary to recapture the chattel.[109]

In no case may the seller use force against the person of the buyer when the latter wrongfully resists repossession.[110] If the conditional buyer resists and places his body in a position which obstructs the seller so that in order to take the chattel he must necessarily apply force to the person,

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99. See note 84 *supra*.
100. Crews v. Parker, 192 Ala. 383, 68 So. 287, 288 (1915).
101. Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938).
102. Evers-Jordan Furn. Co. v. Hartzog, 237 Fla. 407, 187 So. 491 (1939).
103. Dury v. Herney, 126 Mass. 519 (1879).
104. Comment, 36 GEO. L. J. 411, 444 (1948).
105. Commercial Finance Co. v. Brooksville Hotel Co., 98 Fla. 410, 123 So. 814 (1929).
106. Jones v. Greenspoon's Son Pipe Co., 381 Ill. 615, 46 N.E.2d 67 (1943).
107. Justus v. Universal Credit Co., 189, S.C. 487, 1 S.E.2d 508 (1939).
108. Sonlios v. Mills Novelty Co., 198 S.C. 355, 175 SE.2d 869 (1941)
109. Westerman v. Oregon Automobile Credit Co., 168 Ore. 216, 122 P.2d 435 (1942).
110. Silverstin v. Kohler and Chase, 181 Cal. 51, 183 Pac. 451 (1919). See Annotations, 105 A.L.R. 926 (1936), 9 A.L.R. 1180 (1920).

however slight, then he must desist and resort to legal process.[111] The reason for this rule is that to allow use of any force against the buyer invites brawls, and sanctions settlement of differences by force. The economic advantage of this remedy lies in the elimination of the added expense of litigation that would result if the seller were forced to resort to legal process in order to recover his goods. This advantage is so slight that the abuses the rule promotes should cause its final elimination from the legal system. Replevin is the proper remedy to recover possession.[112]

Replevin

The action of replevin is the remedy most frequently used by the conditional seller in Florida.[113] This action was extended to cover conditional sales contracts at an early date. Although this remedy is entirely governed by statute,[114] the election doctrine applies[115] and certain basic conditions must be complied with before the seller can proceed.[116] To sustain the action the buyer must have actual or constructive possession or control of the property, and the seller must be entitled to the immediate possession thereof when the action is brought. He exercises a retention of title by the election to replevy.[117] The right to possession can be acquired upon default by a demand, but the usual situation requires no demand. In the leading case of *Evans v. Kloepell*,[118] the court carefully pointed out that no demand is necessary where the buyer's possession was lawfully acquired and the seller claims ownership; or where the buyer by his own act or default converts the property, or where by the terms of a valid contract the default of the buyer confers upon the seller the right of possession.[119] Every carefully drawn conditional sales contract includes these provisions. If the contract fails to include the above provisions the seller merely puts up a bond which shows a prima facie assertion of title to the property in dispute. In any event, where the seller is entitled to possession of the conditionally sold property because of default and demands the property before institution of the replevin suit, the buyer will be guilty of unlawful detention of the property,[120] at least from the date the suit was instituted.[121] There can be no defense of limitations if the seller inter-

111. Lamb v. Woodry, 154 Ore. 30, 58 P.2d 1257 (1936). See Annotation, 105 A.L.R. 914 (1936).

112. Mergenthaler Linotype Co. v. Core, 118 Fla. 889, 160 So. 481 (1935).

113. Stokes v. Humphries, 69 Fla. 468, 68 So. 448 (1915).

114. FLA. STAT., c. 78 (1951).

115. Baer v. General Motors Acceptance Corp., 101 Fla. 913, 132 So. 817 (1931).

116. Mizell Live Stock Co. v. J. J. McCaskill Co., 59 Fla. 322, 51 So. 547 (1910).

117. Commercial Credit Co. v. Miller, 111 Fla. 554, 149 So. 482 (1933).

118. 72 Fla. 267, 73 So. 180 (1916).

119. See note 105 *supra*.

120. The buyer cannot set off payments against damages. Evans v. Kloeppel, 72 Fla. 267, 73 So. 180 (1916).

121. Pavlis v. Atlas-Imperial Diesel Engine Co., 126 Fla. 808, 172 So. 57 (1937).

mittently gets the buyer to acknowledge his right to repossess.[122] This can be accomplished, of course, by demanding payment periodically.

When the contract is assigned, the assignee can either retake the property[123] or look to the assignor for the remainder of the purchase price.[124] The buyer has no right to withhold possession.[125] Mere assignment of the purchase money notes for the purpose of collecting a portion of the note is not enough of a transfer of title to support an action for replevin.[126] If the *buyer* assigns his interest, his assignee will be liable on resale for any deficiency, notwithstanding the general rule that the conditional seller may not enforce the debt for the purchase price after retaking possession.[127] The seller can replevy only the specific goods which he has sold to the buyer,[128] and if the buyer has traded them to someone else the seller can replevy from him. As long as the seller does not agree to a transfer there can be no estoppel, waiver, or abandonment of his right against the buyer.[129]

After the seller does repossess, whether by self help or by replevin, he can keep the payments of the buyer by way of forfeiture.[130] If the payments by the buyer have been substantial, repossession may result in a forfeiture of the type against which equity grants relief in the case of mortgages of real and personal property. The Uniform Conditional Sales Act has obviated the difficulty by requiring the seller to offer the goods at public sale for the buyer's account if more than fifty percent has been paid;[131] but this point has never been developed in the common law of this state. Instead, it sometimes benefits the seller to include a resale provision in the contract[132] so that he can dispose of the goods (usually of little value after the buyer's use) and hold the buyer for a deficiency. Under repossession and resale provisions providing that the buyer should pay any deficiency in the event of resale, the buyer has an action on the common counts for money had and received, and on a special count stating the express contract for any surplus. The expenses of sale, cost of repossession, and other

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122. Lakeland Silex Brick Co. v. Jackson and Church Co., 124 Fla. 347, 168 So. 411 (1936).
123. See note 115 *supra*.
124. Commercial Credit Co. v. Neel, 91 Fla. 505, 107 So. 639 (1926).
125. Universal Credit Co. v. McKinnon, 106 Fla. 849, 143 So. 778 (1932).
126. Harmon-Hull Co. v. Burton, 106 Fla. 409, 143 So. 298 (1932).
127. White Motor Co. v. Briles, 137 Fla. 268, 188 So. 222 (1939).
128. Smith v. Gufford, 36 Fla. 481, 18 So. 717 (1895).
129. Mergenthaler Linotype Co. v. Gore, 118 Fla. 889, 160 So. 481 (1935).
130. Scotch Mfg. Co. v. Carr, 53 Fla. 480, 43 So. 427 (1907).
131. The Uniform Conditional Sales Act provides for mandatory public sales if the buyer has paid more than 50% (§ 19) and allows either party to demand one if less has been paid (§ 20). Any surplus goes to the buyer; if there is a deficiency the buyer is still liable in a suit on the contract for the remainder. Massachusetts requires that 75% be paid before public sale is compulsory. MASS. GEN. LAWS (1921) c. 255 sec. 11. North Carolina makes such sales compulsory in all instances. N. C. CODE, § 2587 (1927).
132. No obligation exists to account to the buyer, and the buyer is discharged after repossession. Helton v. Sinclair, 93 Fla. 1121, 1126, 113 So. 568, 570 (1928); Malone v. Meres, 91 Fla. 709, 109 So. 677 (1926).

charges are, by inference, matters to be set up in the answer.[133] As with the remedy of self help, replevin affirms title in the seller, thereby discharging the buyer from the note.[134] The seller will be precluded from thereafter maintaining an action to recover the purchase price or any part of it remaining unpaid,[135] or to foreclose his lien,[136] or to foreclose a mortgage on lands securing the purchase price.[137]

Criticism of Election Doctrine

The severity of the election rule has been mitigated somewhat by the courts' unwillingness to find an election to waive title in *every* move by the seller aimed at recovery of the price or the strengthening of his security. The election doctrine is based on the theory that the act of repossessing gives rise to a failure of consideration for the buyer's promise to pay the purchase price.[138] Conversely, a suit for the purchase price converts a contract of conditional sale into one of absolute sale.[139] This doctrine negatives the expressed written intent of the parties when the contract allows the seller to have both remedies concurrently, and to be allowed the security of one as a means of enforcing the other.[140] The buyer's terms are absolute, and not contingent upon whether the seller repossesses. When a man acts in consideration of a conditional promise, if he gets the promise he receives all that he is entitled to by his act, and if, as events turn out, the condition is not satisfied and the promise calls for no performance, there is no failure of consideration.[141] The property interest in a conditional sale is a divided one.[142] The buyer has the beneficial ownership of the property and may mortgage,[143] transfer, or insure[144] his interest in the goods as well as maintaining actions against wrongdoers.[145] The seller, on the other hand, retains nothing but a naked legal title for the purposes of security. His act of repossessiong should be treated, not as a termination of the contract in

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133. Pardo v. R. S. Evans-Lakeland, Inc., 38 So. 2d 307 (Fla. 1949).
134. Hamilton v. Vero Beach Reserve Mtg. Co., 107 Fla. 65, 144 So 362 (1932).
135. Baer v. General Motors Acceptance Corp., 101 Fla. 913, 132 So. 817 (1931).
136. Jackson v. H. W. Wade Mfg. Co., 102 Fla. 970, 136 So. 689 (1931).
137. Helton v. Sinclair, 93 Fla. 1121, 113 So. 568 (1928)
138. VOLD, SALES 289, 293 (1931).
139. This result could be avoided if the conditional sales contract provided that the seller could retake, sell at public sale, credit proceeds on the note and, should there still be a deficiency, *foreclose a chattel mortgage given as additional security in the same contract.* Dodson Printers' Supply Co. v. Corbett, 78 Fla. 257, 82 So. 804 (1919); Mizell Live Stock Co. v. J. J. McCaskill Co., 59 Fla. 322, 51 So. 547 (1910).
140. 2 WILLISTON, SALES §§ 1420, 1426 (2d ed. 1925); Note, 25 HARV. L. REV. 462 (1912).
141. 2 WILLISTON, SALES §§ 1420, 1423 (2d ed. 1925).
142. VOLD, SALES 298 (1931).
143. Dame v. C. H. Hanson and Co., 212 Mass. 124, 98 N.E. 583 (1912). See Annotations, 40 L.R.A. (N.S.) 873 (1912).
144. Phenix Ins. Co. v. Hillard, 59 Fla. 590, 52 So. 799 (1910). This rule is followed in Florida because in this state the risk of loss is on the buyer. United States v. Greenwood Products Co., 87 F. Supp. 785 (N.D. Fla. 1950), *aff'd*, 188 F.2d 401 (5th Cir. 1951). The majority view, based on the fact that the risk is on the seller, is *contra.* Fidelity Phenix Fire Ins. Co. of New York v. Raper, 242 Ala. 440, 6 So.2d 513 (1942).
145. Comment, 17 MINN. L. REV. 66, 72 (1932).

its entirety, but rather as an act of foreclosing his security interest.[146] Above all, great practical injustice often results from strict application of the election doctrine. If the buyer inadvertently neglects to pay one of the final installments the seller may repossess immediately,[147] and, in Florida, is under no obligation to return the payments which have been made.[148] There is also a hardship on the seller. If he sues for purchase price after receiving only a small down payment and if the judgment is not satisfied, he may not thereafter recapture the property. If he elects to repossess but, unknown to him, the property has deteriorated greatly, he has defeated his action for the purchase price. In reality the only real ground for support of this doctrine is the equitable principle against allowing a forfeiture. Or, as the Florida Supreme Court said in the *American Process Co.* case,[149] ". . . the seller can't collect the price or balance due and keep the property, too." These practical injustices have led the Florida Supreme Court to open a third possible remedy to the conditional seller — foreclosure of an equitable lien.

The Lien Remedy

Foreclosure of an equitable lien upon default is a comparatively recent addition to the remedies of the seller in Florida. As recently as 1926[150] there was some reason to believe that the conditional seller in Florida had only his traditional remedies at law. This belief was based on the supposition that the seller must pursue one remedy or the other in order to prevent him from collecting the contract price or balance due and also having the property by way of repossession. It was assumed that an action on a conditional sales contract concerned personal property only and consequently, there was no seller's lien for the unpaid purchase money on personal property such as there was on real estate. If the seller of personal property desired a lien, he should have taken a chattel mortgage. This reasoning was justified on the ground that, if one retained title under a conditional sales contract, he could have no lien, for he could have no lien upon his own property — the lien would be merged with the title. Today the Florida courts give equity jurisdiction over the conditional sales contract and establish a seller's lien which, like the chattel mortgage, can be foreclosed.[151]

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146. VOLD, SALES 289, 291 (1931).

147. Pfeiffer v. Norman, 22 N.D. 168, 133 N.W. 97 (1911); Ballantine, *Forfeiture for Breach of Contract*, 5 MINN. L. REV. 329, 344 (1921).

148. Helton v. Sinclair, 93 Fla. 1121, 1126, 113 So. 568, 570 (1928). Florida rejects provisions that allow the seller to keep all sums paid in as a forfeiture and, in addition to recovering possession, to collect all sums remaining unpaid as liquidated damages. Baer v. General Motors Acceptance Corp., 101 Fla. 913, 132 So. 817 (1931). *Contra:* Bedard v. Ranson, 241 Mass. 74, 134 N.E. 392 (1922).

149. American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 So. 942 (1908).

150. Brown, C. J. dissenting in Malone v. Meres, 91 Fla. 709, 109 So. 677, 689 (1926).

151. Livingston v. National Shawmut Bank of Boston, 62 So.2d 13 (Fla. 1953); G. F. C. Corp. v. Spradlin, 38 So.2d 679 (Fla. 1949).

On this equitable remedy, the doctrine of election also applies[152] and the conditional seller is barred from pursuing his actions at law.[153]

The equitable remedy had been developed in other states as a result of the unfairness that resulted in the application of the election doctrine. To avoid a choice between repossession and suits on the purchase price many states enacted special statutes. These required the seller, after retaking, to resell and turn over to the buyer any surplus which remained after paying the costs of the sale and the balance due on the contract.[154] The unfairness of the election doctrine also prompted the Florida Supreme Court, in the outstanding case of *Malone v. Meres*,[155] to hold without the benefit of legislative direction,[156] that the conditional sales contract created an equitable lien in property and afforded the seller an equitable remedy. The *Malone v. Meres* case had been preceded by a case[157] which allowed the seller, when terms of his contract were such that it could be shown to be either a mortgage or conditional sale, to "elect" to declare that a chattel mortgage existed, and to proceed for foreclosure. This allowed the seller, where the conditional sale contract expressly so provided, to be tantamount to a chattel mortgage, and to "elect" to proceed on the theory of a chattel mortgage.[158] This election was binding and operated to vest the title in the purchaser subject to a lien for the purchase money. As late as 1932 equity jurisdiction was denied where the credit instrument was clearly a conditional sale.[159]

Later, even where such a provision was not present in the contract,[160] or without attaching particular significance to it where it did exist,[161] the court permitted the conditional seller to treat his reserved title as a lien upon the property. The seller would merely allege that "said instrument is in law a mortgage and the complainant does hereby elect to claim a lien on said personal property."[162] He could foreclose his lien and as an incident thereto, recover a deficiency judgment from the buyer.[163] Still later,

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152. Robertson v. Northern Motor Securities Co., 105 Fla. 644, 142 So. 226 (1932).
153. Malone v. Meres, 91 Fla. 709, 738, 109 So. 677, 693 (1926).
154. See note 131 *supra*.
155. 91 Fla. 709, 109 So. 677, 682 (1926) (". . . which method gives the purchaser some advantages and protection by recognizing and protecting his equity in the property arising from the payments he has made on the purchase price. . .").
156. Other jurisdictions beside Florida have allowed such proceedings in the absence of special statutes. Gigray v. Mumper, 141 Iowa 396, 118 N.W. 393 (1909); McDaniel v. Chiaramonte, 61 Ore. 403, 122 Pac. 33 (1912).
157. Varn v. Ashbrook, 84 Fla. 626, 94 So. 384 (1922).
158. Refusal to interpret as a mortgage. Mizell Live Stock Co. v. J. J. McCaskill Co., 59 Fla. 322, 51 So. 547 (1910).
159. Jackson v. H. M. Wade Mfg. Co., 105 Fla. 560, 142 So. 228 (1932).
160. Reichert v. Nelson, 125 Fla. 347, 169 So. 726 (1936).
161. Kart v. Alexander, 108 Fla. 117, 145 So. 584 (1933).
162. Lawyer's Co-operative Pub. Co. v. McCracken, 111 Fla. 170, 150 So. 248 (1933).
163. A contract that required the foreclosure of a mortgage first, and then a conditional sales contract if there was still a deficiency, is proper. Reichert v. Nelson, 125 Fla. 347, 169 So. 726 (1936).

equity recognized the buyer's right to recover a surplus remaining in the seller's hands after a resale.[164]

Gradually, the seller came to have a lien under his conditional sales contract for certain purposes without having to pay lip service to an election between a mortgage and a conditional sale on the same instrument.[165] Interpreting the lien law in its context, with due regard for the purposes sought to be accomplished thereby, the court held that "lien" was a term broad enough to include a conditional seller, who, by virtue of his contract, is considered to have a lien for the unpaid purchase money.[166] It will be noted that in his concurring opinion Justice Barns set forth the completely equitable proposition that more complete justice might be accomplished if the special interests of each of the parties were determined.[167] This observation and the general proposition that a conditional sales contract creates a lien, whether or not it can be interpreted as a chattel mortgage, has apparently been accepted in Florida. In *Livingston v. National Shawmut Bank of Boston*[168] (1953) the court was confronted with protecting the subordinate interest of a subsequent purchaser. In holding that the subordinate interest is entitled to participate in any surplus on resale after a *lien* foreclosure, the court states, ". . . after all, the purpose of conditional or retain title contract is to secure the balance due and constitutes a lien upon the property to secure payment."

Conclusion

Florida has attempted to alleviate some of the harshness that accompanies the "election of remedies" doctrine by applying the "lien" theory to conditional sales contracts. The appointment of a receiver would mean that the buyer may lose the goods just as soon as he would have if the seller had retaken them, but the seller runs the very great danger of having all the other creditors of the buyer step in and claim their share. For this reason the lien remedy will probably be unpopular.

There is by no means complete agreement on the subject of regulation of the remedies of the seller. Many feel that the remedies for the creditor should be strengthened and made more effectual. This feeling is undoubtedly a reaction to the high pressure salesmanship and advertising programs forced on the public. The "dollar down and dollar a month" plan can be a dangerous instrumentality when directed at the quasi-solvent consumer. The argument that quick and effective creditor remedies would bring to that group of consumers an awareness of their real financial situation is met with the rebuttal that the creditor will be more likely not to apply high pressure selling tactics when he finds that the legal remedies are not entirely adequate in collecting. This view is an expression of the debtor's

164. Pardo v. R. S. Evans-Lakeland, Inc., 38 So.2d 307 (Fla. 1949).
165. G.F.C Corp. v. Spradlin, 38 So.2d 679 (Fla. 1949).
166. *Ibid.*
167. *Ibid.*
168. 62 So.2d 13 (Fla. 1953).

philosophy. It is this writer's view that to restrict the seller to just one of his remedies when he has a just debt against the buyer is inconsistent with the economic policy of greater distribution of goods. Statutory remedies like those employed in the Uniform Conditional Sales Act tend to be too cumbersome with their periods of redemption and forced sales. But this Act has proved itself to be, in the overall sense, a fairer remedy between the parties than that afforded by the election doctrine. Perhaps a revision of the U.C.S.A. to incorporate some of the advantages of the individual remedies that do exist from the seller's point of view might be beneficial to both the seller and buyer when simple financing is needed. At present, Florida is one of the few states that have enacted no legislation covering this problem.

ALBERT L. WEINTRAUB.

A HALF CENTURY OF JURISDICTIONAL DEVELOPMENT: FROM BANANAS TO WATCHES

It is conventional in an international sense to characterize States as members of a family of nations. The members of this community are considered to be equal from a legal point of view. Accordingly, a State's co-existence within this framework is conditioned upon its acceptance of limitations that should be observed in the exercise of its inherent sovereignty, *i.e.*, unlimited powers. The extent of such limitations is subject to several dynamic pressures. Among these constraining forces are the changing political beliefs and agitations within the community of nations and the external problems facing individual States.

The adjustment of such potential powers of States to the exigencies of a harmonized international community presents a fascinating aspect of international law as reflected by the internal law of the different countries. Not only are the constitutional and conflicts of law approaches of these States affected by this international interplay, but also influenced is their exercise of legislative and judicial powers.

Viewed in its broadest outlines there appears a surprisingly clear trend in our country away from what we may call our early legal introversion. This original unwillingness to deal, in a legal sense, with situations involving foreign elements changed gradually to the disposition to face such problems without evidencing too much concern over the possibility of a lack of legislative or judicial jurisdiction in the traditional sense.

It is elementary to say that all jurisdiction as exercised by a country through its various organs is prima facie territorial. Territorial boundaries are, under this proposition, identical with the limitations imposed upon all types of jurisdiction exercised by the States. Such a rigid territorialistic attitude was expressed by Huber to the effect that the laws of every State