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Conditional Sales—Liability in Self-Help Repossessions

Plaintiff, a subscriber to defendant's telephone service, was delinquent in his payments. An agent of the defendant obtained unauthorized entrance to plaintiff's apartment from one of the apartment employees and removed the telephone. Plaintiff sued for wilful trespass. The South Carolina federal district court, following cases involving repossession of chattels sold under a conditional sales contract or chattel mortgage, found for the defendant.¹

The prevailing view as to rights and liabilities in actions for repossession of chattels is that the vendor has the right to repossess in the event of default.² The right is an irrevocable license to do whatever is necessary to accomplish the repossession, including entry upon the premises of the vendee. However, the retaking must be effected without a breach of the peace. If it cannot be executed without breaching the peace, the vendor must resort to the courts.³ The question in each case, then, is, did the repossessing vendor commit a trespass or breach of the peace? Because of the varied fact situations it is difficult to formulate a set of rules; but by examining the holdings, it is possible to define a guiding line in certain types of cases.

In cases involving trespass against land the vendor may enter the vendee's land to repossess a conditionally sold chattel even in the absence of a contractual stipulation to that effect.⁴ Where there is a contractual provision, the privilege to enter is deemed irrevocable on the grounds that it is a part of the consideration.⁵ However, the vendor will be held liable for any act constituting a trespass or a breach of the peace.⁶ Where

¹ *Plate v. Southern Bell Tel. & Tel. Co.*, 98 F. Supp. 355 (E. D. S. C. 1951).

² *Willis v. Whittle*, 82 S. C. 500, 64 S. E. 410 (1909). Quoted with approval in *Day v. Nat. Bond & Investment Co.*, 99 S. W. 2d 117 (Mo. 1936); *Lange v. Midwest Motor Securities*, 231 S. W. 272 (Mo. 1921); *Bear v. Colonial Finance Co.*, 42 Ohio App. 482, 182 N. E. 521 (1932); *Westerman v. Oregon Automobile Credit Corp.*, 168 Ore. 216, 122 P. 2d 435 (1942); *Soulias v. Mills Novelty Co.*, 198 S. C. 355, 17 S. E. 2d 869 (1941); *Hutchinson v. A. K. Brown Motors Inc.*, 191 S. C. 319, 4 S. E. 2d 268 (1939); *Justus v. Universal Credit Co.*, 189 S. C. 487, 15 S. E. 2d 508 (1939).

³ See RESTATEMENT, TORTS §272-b (1934); 14 C. J. S., CHATTEL MORTGAGES §185; UNIFORM CONDITIONAL SALES ACT §16.

⁴ *Flaherty v. Ginsberg*, 135 Iowa 743, 110 N. W. 1050 (1907); *Lange v. Midwest Motor Securities*, 231 S. W. 272 (Mo. 1921); *Westerman v. Oregon Automobile Credit Corp.*, 168 Ore. 216, 122 P. 2d 435 (1942); *Justus v. Universal Credit Co.*, 189 S. C. 487, 1 S. E. 2d 508 (1939). *Contra*: *Van Wrenn v. Flynn*, 34 La. Ann. 1158 (1882) (The right to retake the property did not confer upon the vendor the right to enter the house of the vendee in his absence, without his consent or notice, and carry off the property). *Carter v. Mintz & Goldblum*, 8 So. 2d 709 (La. 1942); *Luthy v. Philip Werlein Co.*, 163 La. 752, 112 So. 709 (1927).

⁵ *Walsh v. Taylor*, 39 Md. 592 (1874); *Lambert v. Robinson*, 162 Mass. 34 (1894); *First Nat. Bank & Trust Co. v. Winter*, 176 Okl. 400, 55 P. 2d 1029 (1936); *Soulias v. Mills Novelty Co.*, 198 S. C. 355, 17 S. E. 2d 869 (1941); *Justus v. Universal Credit Co.*, 189 S. C. 487, 1 S. E. 2d 508 (1939).

⁶ *American Discount Co. v. Wychroff*, 29 Ala. App. 82, 191 So. 70 (1939); *Dooley v. West American Commercial Insurance Co.*, 133 Cal. App. 58, 23 P. 2d

there is an actual forceful breaking-in, liability ensues,⁷ including liability for damages suffered as a consequence of the act.⁸ This is so even where the contract of sale permits the use of force or where the vendee waives his rights; the courts holding such stipulations as against public policy.⁹ However, at least one court has allowed forceful re-taking without liability.¹⁰

North Carolina is in accord with the general rule in allowing the vendor to repossess,¹¹ but does not hold that the seller has the right to enter the buyer's premises. In the only case found which is squarely in point,¹² nominal damages were awarded where defendant's agent entered plaintiff's office in his home while plaintiff was away and removed a machine used in his medical practice.

In cases where the retaking threatens a trespass against the person, the vendor proceeds with the undertaking at his peril.¹³ Where defendant's agent took a conditionally sold horse in the presence of plaintiff's mother and over her protests, there was no liability,¹⁴ but where the agent was rude, harsh, and high-handed the court awarded dam-

766 (1933); *Nat. Bond & Investment Co. v. Whithorn*, 276 Ky. 204, 123 S. W. 2d 263 (1939); *McLean v. Underdal*, 73 N. D. 74, 11 N. W. 2d 102 (1943); *Lamb v. Woodry*, 154 Ore. 30, 53 P. 2d 1257 (1936); *Childress v. Judson Mills Store Co.*, 189 S. C. 224, 200 S. E. 770 (1939). Compare *R. C. A. Photophone v. Shanum*, 189 Ark. 797, 75 S.W. 2d 59 (1934) (Court held that there was no basis for damages where defendant's agent surreptitiously entered plaintiff's motion picture theatre and removed part of the sound equipment), *with Girard v. Anderson*, 219 Iowa 142, 257 N. W. 450 (1934) (Defendant was liable when his agent, in plaintiff's absence, entered his unlocked house and removed his piano), and *Singer Sewing Machine Co. v. Hayes*, 22 Ala. App. 254, 114 So. 420 (1927) (If defendant went through an open door there was no liability, but if he broke into the house he was guilty of trespass).

⁷ *Dominick v. Rea*, 226 Mich. 594, 198 N. W. 184 (1924); *Wilson Motor Co. v. Dunn*, 129 Okl. 211, 264 Pac. 194 (1928); *Soulias v. Mills Novelty Co.*, 198 S. C. 355, 17 S. E. 2d 869 (1941) (Actual and punitive damages were awarded where the vendor ripped the padlock and staple off plaintiff's door to repossess a commercial ice cream machine); *Childress v. Judson Mills Store Co.*, 189 S. C. 224, 200 S. E. 770 (1939); *Lyda v. Cooper*, 169 S. C. 451, 169 S. E. 236 (1933).

⁸ *General Motors Acceptance Corp. v. Hicks*, 189 Ark. 62, 70 S. W. 2d 509 (1934) (Defendant's agent, in repossessing a refrigerator, broke into plaintiff's storehouse leaving the storehouse open. In addition to being held liable for trespass, defendant was assessed damages for other property subsequently removed by thieves).

⁹ *Girard v. Anderson*, 219 Iowa 42, 257 N. W. 400 (1934); *Sturman v. Polito*, 161 Misc. 536, 291 N. Y. Supp. 621 (1936); *Stewart v. F. A. North Co.*, 65 Pa. Super. 195 (1916).

¹⁰ *Fulton Investment Co. v. Fraser*, 76 Colo. 125, 230 Pac. 600 (1924) (Defendant was not liable for entering and taking possession of wheat held under a chattel mortgage even though he broke the lock on the gate to plaintiff's farm in the process).

¹¹ *Freeman v. General Motors Acceptance Corp.*, 205 N. C. 257, 171 S. E. 63 (1933).

¹² *Parris v. Fischer & Co.*, 221 N. C. 110, 19 S. E. 2d 128 (1942).

¹³ *Girard v. Anderson* 219 Iowa 142, 257 N. W. 400 (1934) (and cases there cited).

¹⁴ *Willis v. Whittle*, 82 S. C. 500, 64 S. E. 410 (1909).

ages.¹⁵ If actual physical force is used, liability almost always results. Thus, defendant was held liable when his agent pushed a front door against plaintiff who was barring his entrance;¹⁶ where plaintiff was pushed aside when she attempted to block defendant's exit;¹⁷ where plaintiff, plaintiff's companion and defendant engaged in a "tug-of-war" over a stove;¹⁸ and where defendant's agent tipped a sewing machine so that plaintiff, who was sitting on it to prevent its removal, slid to the floor.¹⁹ Liability was also found where defendant and two policemen pulled plaintiff's wife out of an automobile;²⁰ and where defendant, in repossessing a car, pushed and pinched plaintiff to get him out of the vehicle and then drove around at a dangerous speed in an endeavor to get plaintiff off the running board.²¹ In some cases, where the contract authorizes the use of force, the courts have held that the vendor may use a reasonable and necessary force in retaking.²² However, most courts refuse to recognize such contractual authority.²³

North Carolina adopted a strict view in *Freeman v. General Motors Acceptance Corp.*,²⁴ where defendant was held liable for his agent's harsh manners and raised voice. The court held: "Where there is such a show of force as to create a reasonable apprehension in the mind of the one in possession of premises that he must yield to avoid a breach of the peace, . . . , this is a yielding upon force and constitutes a forcible trespass."

If the seller resorts to trick or fraud to effect repossession, the court will generally find for the vendee.²⁵ The same is true where the goods

¹⁵ *Crews & Green v. Parker*, 192 Ala. 383, 68 So. 287 (1915); *Bordeaux v. Hartman Furniture and Carpet Co.*, 115 Mo. App. 556, 91 S. W. 1020 (1905); *Webber v. Farmers Chevrolet Co.*, 186 S. C. 111, 195 S. E. 139 (1938); *Cecil Baber Electric Co. v. Greer*, 183 Okl. 541, 83 P. 2d 598 (1938) (Defendant's agent acted in a high-handed manner, told plaintiff to "go to hell." Plaintiff left to get a weapon with which to protect himself. The court found that the agent's acts tended to breach the peace).

¹⁶ *Spangler-Bowers v. Benton*, 229 Mo. App. 919, 83 S. W. 2d 170 (1935).

¹⁷ *Culver v. State*, 42 Tex. Cr. 645, 62 S. W. 922 (1901).

¹⁸ *Deevy v. Tassi*, 21 Cal. 2d 109, 130 P. 2d 389 (1942); *Lamb v. Woodry*, 154 Ore. 30, 58 P. 2d 1257 (1936).

¹⁹ *Singer Sewing Machine Co. v. Phipps*, 49 Ind. App. 116, 94 N. E. 793 (1911). *But cf.* *Biggs v. Seufferlein*, 164 Iowa 241, 145 N. W. 507 (1914) (Defendant was held without liability for removing plaintiff from atop a stove).

²⁰ *Roberts v. Speck*, 169 Wash. 613, 14 P. 2d 33 (1932).

²¹ *Dooley v. West American Commercial Insurance Co.*, 133 Cal. App. 58, 23 P. 2d 766 (1933).

²² *Walsh v. Taylor*, 39 Md. 592 (1873); *Lambert v. Robinson*, 162 Mass. 34 (1894).

²³ *Singer Sewing Machine Co. v. Hayes*, 22 Ala. App. 250, 114 So. 420 (1927); *Singer Sewing Machine Co. v. Methuin*, 184 Ala. 554, 63 So. 987 (1913); *Motor Equipment Co. v. McLaughlin*, 156 Kan. 258, 133 P. 2d 149 (1943); *Frederickson v. Singer Mfg. Co.*, 38 Minn. 356, 37 N. W. 453 (1888); *Abel v. M. H. Pickering Co.*, 58 Pa. Super. 439 (1914).

²⁴ 205 N. C. 257, 171 S. E. 63 (1933), 47 HARV. L. REV. 884 (1934); *Accord*, *Binder v. Acceptance Corporation*, 222 N. C. 512, 23 S. E. 2d 894 (1943).

²⁵ *Burham v. Standridge*, 201 Ark. 1143, 148 S. W. 2d 648 (1941); *W. Cleve Stokes Co. v. Rushton*, 238 Ala. 458, 191 So. 614 (1939); *McCarty-Greene Motor*

are returned to the vendor for repairs and he repossesses them.²⁶ However, if the vendor's claim to possession is based *solely* on a repair lien, he is entitled to retain the chattel until the lien is satisfied.²⁷ Where the repossession is accomplished under color of legal authority, the taking is regarded as coercive and intimidating, amounting to force,²⁸ although in one instance it was held that the fraud did no more than make plaintiff do what he ought to do.²⁹ If the vendor resorts to legal process which is subsequently declared void, he may still act on his own behalf.³⁰

Cases sometime arise involving trespass against the property sought to be repossessed. Contracts for the conditional sale of automobiles often provide that the seller may repossess the automobile wherever found. Under such a contract if the vendor finds the car parked on the streets unattended and takes it into his possession he will not be held liable.³¹ In an Oregon case,³² plaintiff and defendant's agent got into a scuffle over an automobile repossessed by defendant's agent *after* the agent had gotten into the car and had taken possession. The court held for defendant finding that the repossession was peaceful and that plaintiff breached the peace in an effort to retake the car wrongfully. The only case found in which the seller was held liable under such circumstances based liability upon damage done to the car when defendant's agent broke the window to obtain entrance.³³ Even in the absence of a contractual provision that the car may be repossessed wherever found, North Carolina has not found liability where the vendor repossessed the car when found parked on the street.³⁴

Co. v. House, 216 Ala. 666, 114 So. 60 (1927). *Contra*: North v. Williams, 120 Pa. 109, 13 Atl. 723 (1888) (Defendant's agent obtained entrance to plaintiff's house by telling her that they had come to tune her piano. Instead of tuning, he removed and repossessed the instrument).

²⁶ Walker v. Ayers, 47 Ga. App. 113, 169 S. E. 784 (1933); Kaufman v. Simons Motor Sales, Inc., 236 App. Div. 98, 258 N. Y. Supp. 370 (1st Dep't 1932); Murray v. Federal Motor Truck Sales Corp., 160 Tenn. 140, 22 S. W. 2d 227 (1929).

²⁷ N. C. GEN. STAT. §44-2 (1951).

²⁸ McClure v. Hill, 36 Ark. 268 (1881); See v. Automobile Discount Corp., 330 Mo. 906, 50 S. W. 2d 993 (1932); Firebaugh v. Gunther, 106 Okl. 131, 233 Pac. 460 (1925).

²⁹ Day v. Nat. Bond & Investment Co., 99 S. W. 2d 117 (Mo. 1936).

³⁰ Ellis v. Smathers, 206 Ark. 247, 174 S. W. 2d 568 (1943); Hartford Acceptance Corp. v. Kirchheimer, 166 Misc. 219, 2 N. Y. S. 2d 224 (N. Y. Munic. Ct. 1938); Grossman v. Weiss, 129 Misc. Rep. 234, 221 N. Y. Supp. 266 (Sup. Ct. 1927); Mendelson v. Irving, 155 App. Div. 114, 139 N. Y. Supp. 1065 (1st Dep't 1913); Kismer v. Commercial Credit Co., 114 W. Va. 811, 174 S. E. 330 (1934).

³¹ Lange v. Midwest Motor Securities, 231 S. W. 272 (Mo. 1921); Morris v. Commercial Credit Co., 55 Ohio App. 391, 9 N. E. 2d 880 (1937); Lepley v. State 69 Okl. Cr. 379, 103 P. 2d 568 (1940); First Nat. Bank and Trust Co. v. Winter, 176 Okl. 400, 55 P. 2d 1029 (1936); Leedy v. General Motors Acceptance Corp., 173 Okl. 445, 48 P. 2d 1074 (1935).

³² Westerman v. Oregon Credit Corp., 168 Ore. 216, 122 P. 2d 435 (1942).

³³ Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938).

³⁴ State v. Stinnett, 203 N. C. 829, 167 S. E. 63 (1932); *accord*, Jackson v. Hall, 84 N. C. 489 (1881). (Mortgagee seized a mule, harness and carryall on the public streets).

Where a chattel not covered by the conditional sales contract is repossessed along with an automobile, the North Carolina court has found liability.³⁵ And, in South Carolina where the contract authorized the taking of any property in the automobile the court held that that privilege only applied to property not visible and found liability for property that could have been seen.³⁶

The principal case in denying liability in spite of the technical trespass on plaintiff's premises is clearly in accord with the general rule. However, if the same facts arose in North Carolina, the court would probably grant at least nominal damages since a repossessing seller has no right to enter the buyer's premises.³⁷

JAMES R. TROTTER.

Constitutional Law—"Separate but Equal" Test in Graduate Education

In *McKissick v. Carmichael*¹ the court decided that the separate law school furnished Negroes by the State of North Carolina was not substantially equal, as required by the Fourteenth Amendment, to the law school furnished white students at the University of North Carolina. The University law school was ordered to admit qualified Negro applicants. The decision followed by less than a year *Sweatt v. Painter*² and applied the principles first enunciated in that case to a situation approaching much nearer equality between the white and Negro schools.

The constitutions and statutes of the southern states require the segregation of the white and colored races in the public educational system.³ Educational segregation affording equal facilities has been authorized by the federal courts as a proper exercise of state police power since *Plessy v. Ferguson*⁴ in 1896, a case actually involving segregation in interstate carriers. Segregation in public education was specifically held to be constitutional in the later case of *Gong Lum v. Rice*.⁵ While segregation *per se* does not violate the Fourteenth Amendment,

³⁵ *Narron v. Chevrolet Co.*, 205 N. C. 307, 171 S. E. 93 (1933) (Personal belongings left in the glove compartment and on the back seat).

³⁶ *Sanders v. General Motors Acceptance Corp.*, 180 S. C. 38, 185 S. E. 180 (1936).

³⁷ *Parris v. Fischer & Co.*, 221 N. C. 110, 19 S. E. 2d 128 (1942).

¹ 187 F. 2d 949 (4th Cir. 1951), *cert. denied*, 341 U. S. 951 (1951).

² 339 U. S. 629 (1950).

³ "The children of the white race and the colored race shall be taught in separate schools, but there shall be no discrimination in favor of, or to the prejudice of, either race." N. C. Constitution, Art. IX, §2; N. C. GEN. STAT. §115-3 (1943). For provisions in other states see MANGUM, *THE LEGAL STATUS OF THE NEGRO*, 79 *et seq.* (1940).

⁴ 163 U. S. 537 (1896).

⁵ 275 U. S. 78 (1927). The state may impose segregation in private schools. *Berea College v. Kentucky*, 211 U. S. 45 (1908).