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CONDITIONAL SALES — TORT LIABILITY OF VENDOR FOR RECAPTION OF PROPERTY CONDITIONALLY SOLD — Defendant transferred a piano to plaintiff under a conditional sales contract retaining the right in case of any default in payment "to peacefully or forcibly, and without process of law, enter the premises where said property is . . . and to take . . . possession thereof." Plaintiff defaulted in payment. Employees of defendant, entering the house of plaintiff in his absence and without notice, removed the piano. *Held*, plaintiff may not recover for a conversion, but may recover for a breaking and entering whether defendant's agents broke into the house with actual force, or mere technical force, as by merely turning the door knob and walking in. The contract affords defendant no protection. *Girard v. Anderson*, (Iowa 1934) 257 N. W. 400.

By the great weight of authority the vendor is not liable for conversion if he retakes his property conditionally sold¹ although he gives no prior notice.² He may not, however, escape liability for his acts incidental to the retaking. It is clear that he may be liable in trespass for excessive force,³ but the exact amount of force he may permissibly use is uncertain.⁴ There are isolated cases holding that the force reasonably necessary to recapture the property is permissible as the natural incident of the right to retake.⁵ But the great weight of authority limits the right of recaption by the requirement that the taking be accomplished peaceably.⁶ The Uniform Conditional Sales Act reaffirms the common law upon this

¹ 55 C. J. 1287, sec. 1313 (1931); 12 N. CAR. L. REV. 154 (1934). For peculiar rules applicable in Tennessee and Kentucky upon this question, see *Rice v. Lusk Furniture Co.*, 167 Tenn. 202, 68 S. W. (2d) 107 (1934); *Cartwright v. C. I. T. Corp.*, 253 Ky. 690, 70 S. W. (2d) 388 (1934).

² 2 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES, 6th ed., secs. 431-432 (1933); 59 A. L. R. 134 (1929); *Proctor v. Tilton*, 65 N. H. 3, 17 Atl. 638 (1888); *Heath v. Randall*, 4 Cush. (58 Mass.) 195 (1849). Notice or demand may be required where the vendor has waived prompt payment of previous installments. *Mosby v. Goff*, 21 R. I. 494, 44 Atl. 930 (1899); *Abel v. M. H. Pickering Co.*, 58 Pa. Super. Ct. 439 (1914). By the Uniform Conditional Sales Act, secs. 17-19, the vendor has the option of giving notice of intention to retake or allowing a ten-day period of redemption.

³ 19 L. R. A. (N. S.) 607 (1909); *Lambert v. Robinson*, 162 Mass. 34, 37 N. E. 753 (1894).

⁴ Unfortunately in nearly all the reported cases the amount of force used was excessive and hence these cases are not clear authority for a situation involving only a gentle laying on of hands. 31 MICH. L. REV. 987 (1933).

⁵ 47 HARV. L. REV. 884 (1934); *Walker Furniture Co. v. Dyson*, 32 App. D. C. 90, 19 L. R. A. (N. S.) 606 (1908); *Lambert v. Robinson*, 162 Mass. 34, 37 N. E. 753 (1894); *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493 (1893).

⁶ 55 C. J. 1287, sec. 1313 (1931); cases collected in 9 A. L. R. 1180 (1920); 36 A. L. R. 853 (1925); 55 A. L. R. 184 (1928), and 19 L. R. A. (N. S.) 607 (1909). 17 ST. LOUIS L. REV. 143 (1932); 31 MICH. L. REV. 987 (1933); *Stewart v. F. A. North Co.*, 65 Pa. Super. Ct. 195 (1916); *Van Wren v. Flynn*, 34 La. Ann. 1158 (1882); *Pagan v. Drake Furniture Co.*, 73 S. C. 364, 53 S. E. 542 (1905); *Culver v. States*, 42 Tex. Cr. 645, 62 S. W. 922 (1901); *Blackford v. Neaves*, 23 Ariz. 501, 205 Pac. 587 (1922); *Silverstin v. Kohler & Chase*, 181 Cal. 51, 183 Pac. 451 (1919); *Gaffney v. O'Leary*, 155 Wash. 171, 283 Pac. 1091 (1930); *Driver v. State*, 116 Neb. 666, 218 N. W. 588 (1928); *Morrison v. Galyon Motor Co.*, 16 Tenn. App. 394, 64 S. W. (2d) 851. "Any act or action manifesting force or vio-

point and requires that "unless the goods can be taken without breach of peace," resort must be had to law.⁷ However, this requirement of peaceableness does not furnish a definite measure of the amount of force permissible. With the exception of the few cases above noted, the authorities all hold that against the person of the vendee or his representatives, the vendor may not use any force without incurring liability for a battery.⁸ If he meets resistance he must resort to the courts. As to the amount of force permissible against the vendee's property, some courts have held that there is no right to retake if the retaking involves a simple trespass, although the contract may expressly give a right of entry.⁹ This seems to have been the theory of the instant case. It is notable, however, that in every case so holding there was actually involved a display of force either excessive or tending to provoke a breach of peace. Quite a few courts have held that the vendor whose contract gives him a right of entry has an irrevocable license, or a license coupled with an interest, which justifies a bare entry upon the vendee's premises with or without the actual consent of the vendee.¹⁰ Similarly, where entrance was gained by a trick but the taking was peaceable, the vendor was not held liable to trespass.¹¹ So also where an officer under a writ void on its face did the retaking, it was held that this was justifiable as a peaceable retaking by an

lence, or naturally calculated to provide [provoke?] a breach of the peace, in the recaption of property renders the actor a trespasser." *Crews & Green v. Parker*, 192 Ala. 383 at 387, 68 So. 287 (1916).

⁷ Uniform Conditional Sales Act, sec. 16.

⁸ 9 A. L. R. 1180 (1920); 7 NEB. L. BULL. 210 (1928); 17 ST. LOUIS L. REV. 143 (1932); 12 N. C. L. REV. 154 (1934); 47 HARV. L. REV. 884 (1934); Biggs v. Seufferlein, 164 Iowa 241, 145 N. W. 507 (1914); *Crews & Green v. Parker*, 192 Ala. 383, 68 So. 287 (1916); *Abel v. Pickering*, 58 Pa. Super. Ct. 439 (1914); *Singer Sewing Machine Co. v. Phipps*, 49 Ind. App. 116 (1911); *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670 (1862); *Levi v. Brooks*, 121 Mass. 501 (1877); *Peddie v. Gally*, 109 App. Div. 178, 95 N. Y. S. 652 (1905); *Lowry v. Singer Sewing Machine Co.*, 62 Pa. Super. Ct. 364 (1916).

⁹ *Narron v. Holleman Chevrolet Co.*, 205 N. C. 307, 171 S. E. 93 (1933); *Percifield v. State*, 93 Fla. 247, 111 So. 519 (1927); 17 ST. LOUIS L. REV. 143 at 149 (1932).

¹⁰ 17 ST. LOUIS L. REV. 143 (1932); 36 A. L. R. 853 (1925); *Lowry v. Singer Sewing Machine Co.*, 62 Pa. Super. Ct. 364 (1916); *Wilmerding Adm'r v. Rhodes-Harverty Furniture Co.*, 122 Ga. 312, 50 S. E. 100 (1905); *White Sewing Machine Co. v. Conner*, 111 Ky. 827, 64 S. W. 841 (1901); *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493 (1893); *Willis v. Whittle*, 82 S. C. 500, 64 S. E. 410 (1908); *Fredericksen v. Singer Mfg. Co.*, 38 Minn. 356, 37 N. W. 453 (1888); *Heath v. Randall*, 58 Mass. (4 Cush.) 195 (1849); *Walsh v. Taylor*, 39 Md. 592 (1873). In *Singer Sewing Machine Co. v. Hayes*, 22 Ala. App. 250, 114 So. 420 (1927), it was held that while the contract gave no right to break and enter, it would give the vendor the right to enter if he saw the door open. In *Street v. Sinclair*, 71 Ala. 110 (1881), the court said if it was necessary to enter the premises of the mortgagor in order to reduce the property to possession this the mortgagor could do in a peaceful and lawful manner without becoming a trespasser.

¹¹ *North v. Williams*, 120 Pa. St. 109, 13 Atl. 723, 6 Am. St. Rep. 695 (1888). *Contra*, *McCarty-Greene Motor Co. v. House*, 216 Ala. 666, 114 So. 60 (1927) (dictum).

agent of the vendor.¹² The New York court seems to have reached a result even more liberal to the vendor under the Uniform Conditional Sales Act.¹³ It is submitted that the scope of the right of recaption of the conditional vendor should include the right to enter upon the premises of the vendee with at least technical force so long as the limitation that it must not be calculated to induce a breach of peace is recognized.¹⁴ Otherwise it is difficult to see that this well-recognized right of the vendor is of any practical efficacy.

J. S. W.

¹² *Mendelson v. Irving*, 155 App. Div. 114, 139 N. Y. S. 1065 (1913). In *Proctor v. Tilton*, 65 N. H. 3, 17 Atl. 638 (1888), a deputy of X county was held not liable in trespass for taking a horse for a conditional vendor in Y county because as agent of vendor he had the right to take possession peaceably.

¹³ In *People v. Halliday*, 237 App. Div. 302, 261 N. Y. S. 342 (1932), the court held that the only limitation upon the right of recaption was that it must not be conducive of a breach of peace — which was defined as a disturbance of public order by an act of violence or any act likely to produce violence, or which by causing consternation and alarm disturbs the peace and quiet of the community. This was held a question for the jury.

¹⁴ This is the view taken by the court in *Willis v. Whittle*, 82 S. C. 500, 64 S. E. 410 (1908).