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Rights and Remedies Under California Conditional Sales

THE QUESTION of the rights and remedies of the parties to conditional sales has proved a troublesome one to the courts, "the rules prevailing at common law being in great confusion and in the majority of states being founded on no just principle."¹ Such confusion is to be expected in the development and recognition in the courts of a relatively new security device, where "just principle" must be built upon an economic rather than an analytical legal foundation. An attempt will be made not only to set out in some detail the results of California decisions in this field, but to organize and rationalize in some degree these decisions upon an economically realistic yet logically coherent body of principles.

It has been pointed out that much of the confusion as to these rights and remedies arises from divergent views as to the essential nature of the conditional sale transaction.² To obtain an understanding of this conflict, it is helpful to explore the respective interests of the parties in the subject-matter of the sale.

If the conditional sale contract is seen as a purely executory contract, transferring to the buyer no property rights, the seller's remedies are likely to be very different than if the buyer is held to have the beneficial property interest and the seller a security interest only. For example, on the theory of executory contract, the seller's repossession of the goods will constitute a rescission, or at least give the buyer, when sued for the balance of the price, the defense of failure of consideration.³ On the theory of foreclosure of the buyer's property interest, repossession will not prevent judgment for a deficiency after re-sale by the seller.⁴

¹ Williston, *The Progress of the Law 1919-1920* (1921) 34 HARV. L. REV. 741, 765.

² The writer is greatly indebted to Professor Vold of the University of Nebraska Law School for this approach to the problem. See Vold, *The Divided Property Interests in Conditional Sales* (1930) 78 U. OF PA. L. REV. 713, incorporated into VOLD, SALES (1931) § 95, pp. 267-288.

See also LLEWELLYN, CASES AND MATERIALS ON SALES (1930) p. 705.

³ See for example, *Murphy v. Hellman Commercial etc. Bank*; *Cocores v. Assimopoulos*, both *infra* note 125; and authorities cited in note 215, *infra*; VOLD, SALES (1931) p. 291; (1882) 6 VA. L. J. 584.

⁴ See *infra* note 232; VOLD, SALES (1931) p. 291.

In general the earlier decisions viewed the conditional sale as an ordinary executory contract of sale, by which the buyer acquired no interest in the property.⁵ The greater number of recent decisions recognize that the buyer has the beneficial interest in the property⁶ and that the seller retains legal title for security only.⁷ The distance the courts have traveled from the one viewpoint to the other is well illustrated in the following statements:

"This is not a sale, but only a contract for the sale of the property, and the legal title to the property is not thereby transferred or changed. . . . The rules of forfeiture do not seem to have any application to the question of the right to the possession of the property. Forfeiture involves both the idea of losing property by a delinquent party, and the transfer of it to another without the consent of the delinquent. Here the ownership was not transferred; for it remained in the plaintiff and his assignors; nor was the right of possession transferred; for the defendant had only such right to the possession as the contract gave, which was merely the right to the use and possession until default should be made in the payment of installments."⁸

⁵ Buyer has no property interest: *Hegler v. Eddy* (1879) 53 Cal. 597; *Morris v. Allen* (1911) 17 Cal. App. 684, 121 Pac. 690; *Wiley B. Allen v. Wood* (1916) 32 Cal. App. 76, 162 Pac. 121; *Smith v. Semon* (1917) 32 Cal. App. 640, 163 Pac. 1038; *Davis v. Young* (1925) 75 Cal. App. 359, 242 Pac. 743; *Garrett v. Swanton* (Cal. App. 1931) 3 P. (2d) 1025 (reversed on other grounds in (1932) 216 Cal. 220, 13 P. (2d) 725); *Pacific States Finance Corp. v. Freitas* (1931) 113 Cal. App. (Supp.) 757, 1 Cal. Supp. 112, 295 Pac. 804; *General Motors Acceptance Corp. v. Silva* (1931) 113 Cal. App. (Supp.) 773, 1 Cal. Supp. 121, 295 Pac. 810.

Seller is owner: *Lowe v. Woods* (1893) 100 Cal. 408, 34 Pac. 959; *Wyman v. Security Ins. Co.* (1927) 202 Cal. 743, 262 Pac. 329; *Wiley B. Allen v. Wood*, *supra*; *Lee v. De La Motte* (1920) 47 Cal. App. 23, 189 Pac. 1034; *McConnell v. Redd* (1927) 86 Cal. App. 785, 261 Pac. 506; *C. I. T. Corp. v. Biltmore Garage* (1934) 2 Cal. App. Dec. (Supp.) 137, 36 P. (2d) 247; *In re Ideal Laundry Inc.* (N. D. Cal. 1935) 10 Fed. Supp. 719 (citing only *Van Allen v. Francis*, *infra* note 95).

See also: *Notes* (1882) 6 VA. L. J. 584; (1934) 18 MINN. L. REV. 429; (1915) 3 CALIF. L. REV. 166.

⁶ *Coniglio v. Connecticut Fire Ins. Co.* (1910) 180 Cal. 596, 182 Pac. 275, 5 A. L. R. 805; *County of San Diego v. Davis* (1934) 1 Cal. (2d) 145, 33 P. (2d) 827; *Davenport v. Grundy Motor Sales Co.* (1915) 28 Cal. App. 409, 152 Pac. 932; *Carvell v. Weaver* (1921) 54 Cal. App. 734, 202 Pac. 897; *Rosander v. Market St. Ry. Co.* (1928) 89 Cal. App. 721, 265 Pac. 541; *Calif. Restaurant Equip. Co. v. Weber* (1929) 101 Cal. App. 646, 281 Pac. 1040; *Miller v. Modern Motor Car Co.* (1930) 107 Cal. App. 38, 290 Pac. 122; *Peronnet v. Ralph* (1931) 112 Cal. App. 97, 296 Pac. 329.

⁷ *Johnson v. Kaeser* (1925) 196 Cal. 686, 239 Pac. 324; *Walker v. Houston* (1932) 215 Cal. 742, 12 P. (2d) 952, 87 A. L. R. 937; *County of San Diego v. Davis*, *supra* note 6; *Standard Auto Sales Co. v. Lehman* (1919) 43 Cal. App. 763, 186 Pac. 178; *People's Bank v. Porter* (1922) 58 Cal. App. 41, 208 Pac. 200; *Davies-Overland Co. v. Blenkiron* (1925) 71 Cal. App. 690, 236 Pac. 179; *Bunch v. Kin* (1934) 2 Cal. App. (2d) 81, 37 P. (2d) 744. See also *Stockton Sav. & Loan Soc. v. Purvis* (1896) 112 Cal. 236, 44 Pac. 561, 53 Am. St. Rep. 210; *Matteson v. Equitable etc. Co.* (1904) 143 Cal. 436, 77 Pac. 144; *Coachella Valley State Bank v. Wilson* (1927) 83 Cal. App. 366, 256 Pac. 844; *Alexander v. Walling* (1930) 105 Cal. App. 525, 288 Pac. 138; *Notes* (1912) 25 HARV. L. REV. 462; (1923) 36 *ibid.* 740; (1934) 18 MINN. L. REV. 429.

⁸ *Hegler v. Eddy*, *supra* note 5, at 598, 599.

"In a conditional sale, the title in the seller is for security only, to assure the payment of the purchase price. It carries with it none of the ordinary incidents of ownership. The buyer has the possession and use of the property to the complete exclusion of the seller, subject only to the seller's remedies in case of default. Both in a practical and a legal sense the buyer is the beneficial owner."⁹

The succeeding pages will show that in California these contradictory viewpoints have been manifested in more than one line of cases. It has been pointed out that the California decisions have for the most part achieved equitable results upon the particular facts, but have spread a barrage of loose dicta which has done considerable damage to the logical development of doctrine.¹⁰

NATURE AND EXTENT OF THE INTEREST OF THE BUYER IN THE PROPERTY

The buyer under a contract of conditional sale has all the ordinary incidents of ownership. The outstanding beneficial incident is the right of the buyer, as long as he is not in default, to hold possession of the property against the seller¹¹ and against the world.¹²

The buyer, upon his performance of the contract, has further the unqualified right to become owner of the property. Upon payment of the price, the buyer automatically obtains legal title and becomes complete owner.¹³ Since the seller's security title is merely an incident of the buyer's obligation to pay the price, a tender of the price by the buyer has the same effect as payment.¹⁴ In other words, no further assent by the seller is necessary to the buyer's complete ownership.

⁹ County of San Diego v. Davis, *supra* note 6, at 147, 33 P. (2d) at 827, 828.

¹⁰ "We have seen that while the general rules governing conditional sales in California as contrasted with those of Massachusetts and Mississippi are somewhat confused, the California courts, and especially the California Supreme Court, have successfully managed to solve in an equitable manner the particular fact situations that were presented in the different cases. They have shown skill in avoiding unfortunate precedents to arrive at desirable results. The California lawyer has shown small skill in presenting the issues properly or in providing the court with a logical reason for its decision. Hence, we have this group of decisions, which could be molded into a coherent body of law, in a large part obscured by incoherent dicta and generalizations." Note (1929) 29 COL. L. REV. 1123, 1130-1131.

¹¹ Parker v. Funk (1921) 185 Cal. 347, 197 Pac. 83; Manor v. Dunfield (1917) 33 Cal. App. 557, 165 Pac. 983; Carvell v. Weaver, *supra* note 6. Rathbun v. Hill (1933) 129 Cal. App. 601, 19 P. (2d) 64. See also *infra* notes 191, 295, 296.

¹² Bickerstaff v. Doub (1861) 19 Cal. 109; Rhoades v. Lyons (1917) 34 Cal. App. 615, 168 Pac. 385; People v. One 1923 Buick Coupe Automobile (1925) 71 Cal. App. 601, 236 Pac. 198. Cf. Cardinell v. Bennett (1877) 52 Cal. 476.

¹³ Wilkinson v. Fishermen's etc. Supply Co. (1922) 57 Cal. App. 165, 206 Pac. 761; Coachella Valley State Bank v. Wilson, *supra* note 7; see Casady v. Fry (1931) 115 Cal. App. (Supp.) 777, 6 P. (2d) 1019.

¹⁴ Walker v. Houston, *supra* note 7; see Casady v. Fry, *supra* note 13.

CAL. CIV. CODE § 1504 provides as follows:

"An offer of payment or other performance, duly made . . . stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof."

Although no decisions upon the point have been found in California, it would follow from the buyer's right to become complete owner upon payment that any increase in value of the property would pass to the buyer, subject of course to his performance of the contract.¹⁵ The same principle would apply to the increase of animate chattels, possibly even though the buyer did not perform the contract.¹⁶ If the buyer defaulted, the seller's rights might depend upon whether or not the offspring had been in gestation when the contract was entered into,¹⁷ but probably the seller would prevail in any event.

The buyer likewise has the power to transfer his interest in the property and to give a mortgage good except as against the seller,¹⁸ even though the contract provides against assignment or mortgage of the property.¹⁹ In the *Davies*²⁰ and *Walker*²¹ cases, a tender of the full price was made to the seller by the transferee, but the court in the *Davies* case intimated that the seller was entitled only to a tender of the current installment.²² Other decisions have held that where the contract provides for the termination of the buyer's rights upon a transfer, the seller may upon such transfer retake the property.²³

Whether the buyer's interest passes by succession has not been decided in California, but there seems no reason why it should not do so.²⁴

The buyer has an insurable interest in the property, at least to the extent of his payments on account of the price.²⁵ The value of the buyer's property interest is more logically the value of the property less the balance due, however.²⁶ If the theory of election of remedies is followed, the buyer's insurable interest will vary according to the seller's election, of course.²⁷

¹⁵ See VOLD, SALES (1931) p. 280.

¹⁶ Cf. *Duff v. Anderson* (1920) 50 Cal. App. 397, 195 Pac. 445; 1 WILLISTON, SALES (2d ed. 1924) § 334.

¹⁷ See VOLD, SALES (1931) p. 280.

The contrary rule would seem settled in other jurisdictions. See 1 WILLISTON, *op. cit. supra* note 16, § 334; UNIFORM CONDITIONAL SALES ACT § 27.

¹⁸ *Pacific States Sav. & Loan Co. v. Strobeck* (1934) 139 Cal. App. 427, 33 P. (2d) 1063.

¹⁹ *Walker v. Houston*; *Davies-Overland Co. v. Blenkiron*, both *supra* note 7.

²⁰ *Davies-Overland Co. v. Blenkiron*, *supra* note 7.

²¹ *Walker v. Houston*, *supra* note 7.

²² Compare authorities cited in note 63, *infra*.

²³ *Teter v. Thompson* (1922) 57 Cal. App. 329, 207 Pac. 260; *Andrews v. DeLorme* (1929) 102 Cal. App. 623, 283 Pac. 393; cf. *Davies-Overland Co. v. Blenkiron*, *supra* note 7, and authorities cited, *infra* note 225.

²⁴ VOLD, SALES (1931) p. 279.

²⁵ *Coniglio v. Conn. Fire Ins. Co.*, *supra* note 6. See also *Davis v. Phoenix Ins. Co.* (1896) 111 Cal. 409, 43 Pac. 1115; cf. *Wyman v. Security Ins. Co.*, *supra* note 5.

²⁶ See cases cited, *infra* note 298.

²⁷ A full discussion following the theory of election of remedies is found in WILCOX, *Insurance of Interests under Contracts of Conditional Sale* (1927) 12 IOWA L. REV. 235.

Since the risk of loss falls on the buyer under the Sales Act,^{27a} it would seem that the buyer now has an insurable interest up to the full value of the property. The same result would follow where the contract placed the risk on the buyer.

The conflict between the old and new theories of the conditional sale has led to a conflict as to whether or not the buyer is entitled to the benefit of implied warranties.²⁸ Such warranties are clearly allowed the buyer by the Sales Act.²⁹

Although strictly speaking, the buyer has no equity of redemption,³⁰ nevertheless where time is not made of the essence, the buyer may restore his rights after repossession by a tender to the seller within a reasonable time of the balance of the price.³¹

The buyer's interest is recognized in the Motor Vehicle Act provision for issuance of a certificate of registration to the "owner" and a certificate of ownership to the "legal owner."³² The statutory definition of the term "owner" clearly includes a buyer under a conditional sale, and that of "legal owner" includes a conditional seller.³³

The buyer has likewise been given certain burdensome incidents of ownership. He and not the seller is liable as owner for personal property taxes.³⁴ So long as the buyer has possession of an automobile, he and not the seller is liable as owner of the car under the terms of Civil Code, section 1714 $\frac{1}{4}$, making the owner liable for damages from negligent operation of a car by another person with the owner's permission.³⁵

^{27a} See *infra* note 45.

²⁸ See *infra* notes 281-287.

²⁹ See *infra* notes 288, 289.

³⁰ See *infra* note 250; (1934) 18 MINN. L. REV. 429.

³¹ See *infra* note 223.

³² See CAL. VEHICLE ACT § 41.

³³ CAL. VEHICLE ACT § 16 provides as follows:

"'Owner.' A person having the lawful use or control or the right to the use or control of a vehicle under a lease or otherwise for a period of ten or more successive days."

Section 17 provides as follows:

"'Legal owner.' A person who holds the legal title of a vehicle or a mortgage thereon."

³⁴ County of San Diego v. Davis, *supra* note 6. See also R. C. A. Photophone, Inc. v. Huffman (1935) 80 Cal. App. Dec. 1189, 42 P. (2d) 1059; Houser & Haines Mfg. Co. v. Hargrove (1900) 129 Cal. 90, 61 Pac. 660. *Contra*: Houser & Haines Mfg. Co. v. Hargrove (1900) 6 Cal. Unrep. 384, 59 Pac. 947 (superseded by 129 Cal. 90, *supra*).

³⁵ CAL. CIV. CODE § 1714 $\frac{1}{4}$:

"If a motor vehicle be sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee shall retake possession of such motor vehicle."

Certain incidents of ownership were denied the buyer by the courts upon the theory of executory sale, but it is of considerable significance that all these incidents have finally been recognized by statutory enactment as being in the buyer. The theory of executory sale, while largely favorable to the seller, sometimes resulted in placing unexpected burdens upon him. Thus upon the principle that risk follows title, the risk of loss of the property was placed upon the seller, rather than the buyer.³⁶ Not only was the seller denied the balance of the price after loss of the property,³⁷ but the buyer could recover his payments, upon the theory of failure of consideration.³⁸ Such recovery probably should have been limited to the payments less the reasonable value of the use to the buyer.³⁹ If the loss is due to the buyer's fault, the buyer bears the risk, in any event.⁴⁰ Of course the risk may be placed upon the buyer by agreement,⁴¹ and as a practical matter the risk is always so shifted by the contract.

On the theory of security title in the seller and beneficial interest in the buyer, it seems clear that the buyer in possession should bear the risk of loss.⁴² Such a rule obtains in a majority of states as to conditional sales⁴³ and obtains in California as to a purchaser in possession of real property under a contract of sale.⁴⁴ The Sales Act in 1931 expressly placed the risk on the buyer in possession.⁴⁵

³⁶ *Tyson v. Wells* (1852) 2 Cal. 122 (*dictum*); *Rodgers v. Bachman* (1895) 109 Cal. 552, 42 Pac. 448 (*dictum*); *Kirtley v. Perham* (1917) 176 Cal. 333, 168 Pac. 351; *Wyman v. Security Ins. Co.*, *supra* note 5 (*dictum*), noted in (1928) 1 So. CALIF. L. REV. 302; *Cocores v. Assimopoulos* (1935) 90 Cal. Dec. 65; *Waltz v. Silveria* (1914) 25 Cal. App. 717, 145 Pac. 169, noted in (1915) 3 CALIF. L. REV. 166. See also *Smith v. Phoenix Ins. Co.* (1891) 91 Cal. 323, 27 Pac. 738; *Potts Drug Co. v. Benedict* (1909) 156 Cal. 322, 104 Pac. 432; *Smith v. Phoenix Ins. Co.* (1890) 3 Cal. Unrep. 244, 23 Pac. 38; *Peatland Realty Co. v. Edwards* (1913) 23 Cal. App. 402, 138 Pac. 357.

³⁷ *Waltz v. Silveria*, *supra* note 36; see also *Tyson v. Wells*, *supra* note 36.

³⁸ *Kirtley v. Perham*, *supra* note 36.

³⁹ See *infra* note 270.

⁴⁰ *Campbell Chevrolet Co. v. Walsh* (1929) 102 Cal. App. 100, 282 Pac. 510.

⁴¹ *Ibid.*; See *Cocores v. Assimopoulos*, *supra* note 36.

⁴² VOLD, SALES (1931) pp. 281, 282; Hale, *Is a Conditional Sale Note Negotiable?* (1922) 1 ORE. L. REV. 173.

⁴³ VOLD, SALES (1931) p. 281; 1 WILLISTON, *op. cit. supra* note 16, § 304; Bogert, *The Proposed Uniform Conditional Sales Act* (1917) 3 CORN. L. Q. 1; (1914) 3 CALIF. L. REV. 166; (1928) 1 So. CALIF. L. REV. 302.

⁴⁴ See by way of illustration *Kelley v. Smith* (1933) 218 Cal. 543, 24 P. (2d) 471, noted (1934) 7 So. CALIF. L. REV. 475.

As to what constitutes loss or destruction of the property, see the following cases:

Kirtley v. Perham, *supra* note 36 (right to deliver newspapers destroyed when publication stopped); *Campbell Chevrolet Co. v. Walsh*, *supra* note 40 (seizure of car by government for illegal transportation of liquor probably not "loss"); *Drown v. Haddock* (1923) 61 Cal. App. 654, 215 Pac. 689 (failure of machine to perform contemplated work not a destruction).

⁴⁵ CAL. CIV. CODE § 1742(a): "Where delivery of the goods has been made to

Early decisions held that the buyer, not being the owner of the property, could not create a statutory agistor's lien valid against the seller.⁴⁶ Under present statutes the buyer may create a valid lien for repairs⁴⁷ and for storage.⁴⁸ Such liens are limited to \$100.00 in amount unless express notice is given to the holder of the legal title prior to the creation of the lien.⁴⁹ This limit applies to individual lienors rather than to the total amount of liens which may be created, however.⁵⁰ The liens for repairs and for storage are expressly made dependent upon possession.⁵¹ The decisions are in sharp conflict as to the validity of the storage lien where the car is withdrawn daily for use.⁵² It is obvious that the storage lien is of little value if not upheld in this situation, yet the statutory language is clear.

Upon the theory that the buyer had no property interest, it was said that creditors of the buyer could not attach the property⁵³ or levy execu-

the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.⁵⁴

No decisions under this section have been found. The court was careful to point out, in *Cocores v. Assimopoulos*, *supra* note 36, that section 1742 was not in force at the time there in question.

⁴⁶ *Lowe v. Woods*, *supra* note 5. See also *McTigue v. Arctic Ice Cream Supply Co.* (1912) 20 Cal. App. 708, 130 Pac. 165; *C. I. T. Corp. v. Biltmore Garage*, *supra* note 5.

⁴⁷ *Davenport v. Grundy Motor Sales Co.*, *supra* note 6, (distinguishing *Lowe v. Woods*, *supra* note 5); *Goodman v. Anglo-Calif. Trust Co.* (1923) 62 Cal. App. 702, 217 Pac. 1078; *Hessel v. Pickwick Stages System, Inc.* (1929) 100 Cal. App. 682, 280 Pac. 1016; *Lindsay v. Kleiber Motor Truck Co.* (1930) 110 Cal. App. 479, 294 Pac. 454. Compare: *McTigue v. Arctic Ice Cream Supply Co.*, *supra* note 46; *C. I. T. Corp. v. Biltmore Garage*, *supra* note 5. See CAL. CIV. CODE § 3051, as amended in 1907.

⁴⁸ *Hessel v. Pickwick Stages System, Inc.*, *supra* note 47; *Pacific States Finance Corp. v. Freitas*; *General Motors Acceptance Corp. v. Silva*, both *supra* note 5. Compare: *Huie v. Howard Soo Hoo* (1933) 132 Cal. App. (Supp.) 787, 2 Cal. Supp. 63, 22 P. (2d) 808; *C. I. T. Corp. v. Biltmore Garage*, *supra* note 5, See CAL. CIV. CODE § 3051 as amended in 1929.

⁴⁹ *Lindsay v. Kleiber Motor Truck Co.*, *supra* note 47; CAL. CIV. CODE § 3051a.

⁵⁰ *Hessel v. Pickwick Stages System, Inc.*, *supra* note 47.

⁵¹ CAL. CIV. CODE § 3051; see also CAL. CIV. CODE § 2913. See the following cases: *Goodman v. Anglo-Calif. Trust Co.*, *supra* note 47; *Davis v. Young*, *supra* note 5; *Covington v. Grant* (1927) 82 Cal. App. 749, 256 Pac. 213.

⁵² *C. I. T. Corp. v. Biltmore Garage*, *supra* note 5 (lien lost). *Contra*: *Pacific States Finance Corp. v. Freitas*; *General Motors Acceptance Corp. v. Silva*, both *supra* note 5; see also *Huie v. Howard Soo Hoo*, *supra* note 48.

⁵³ *Kellogg v. Burr* (1899) 126 Cal. 38, 58 Pac. 306; *Berg v. Traeger* (1930) 210 Cal. 323, 292 Pac. 495; *Morris v. Allen*, *supra* note 5; *King v. Cline* (1920) 49 Cal. App. 696, 194 Pac. 290; *Coachella Valley State Bank v. Wilson*, *supra* note 7; *Heffner v. Jackson* (1928) 95 Cal. App. 476, 273 Pac. 37; *Redwine v. Trowbridge* (1929) 99 Cal. App. 762, 279 Pac. 666; *Casady v. Fry*, *supra* note 13. See also *Vermont Marble Co. v. Brow* (1895) 109 Cal. 236, 41 Pac. 1031, 50 Am. St. Rep. 37.

tion upon it.⁵⁴ Somewhat illogically it has also been held that a transfer from the buyer to a third person without change of possession is fraudulent as against the buyer's creditors.⁵⁵ Logically, the buyer's creditors should be able to reach the property as long as the buyer is in possession, even if the doctrine of election of remedies is followed, and certainly as long as the buyer is not in default.⁵⁶ Practically, the creditor's seizure lessens the value to the seller of the buyer's promise, since the buyer is not likely to pay if he has lost possession, and the creditor buying upon forced sale probably has a smaller stake in the property than the buyer had. On the other hand, the seller legally is no worse off by such a transfer and may still use his remedies on default. The decisions laying down the general rule that the buyer's interest was not leviabie property actually and properly held that the creditor could not obtain rights superior to those of the seller.⁵⁷ Thus the creditor could not retain the property after default by the buyer, even though the default occurred after the levy and before the seller's demand for possession,⁵⁸ or although the levy itself caused the default.⁵⁹ The earliest decision where the contract required immediate release of an attachment held that there could be no valid attachment, although there was no default except by reason of the attachment itself.⁶⁰ This case may be explained upon the accrual of the seller's right to possession simultaneously with the attachment levy, but the *King* case⁶¹ cannot be so reconciled since there the buyer was required to procure a release from attachment, not immediately but only within three days. The court has said by way of *dictum* that if the creditor upon attachment tenders the balance due, he will be subrogated to the buyer's rights.⁶² It has been held, however, that the tender of one installment is insufficient.⁶³ This result is possibly sound for the reasons given above—that the buyer is no longer likely to pay after seizure by the creditor, and the creditor is not obliged to pay. The case of the buyer's transferee may be distinguished on the ground that both the buyer and

⁵⁴ *Rodgers v. Bachman*, *supra* note 36; *Ward Land etc. Co. v. Mapes* (1905) 147 Cal. 747, 82 Pac. 426; *Ross v. Thomas* (1914) 24 Cal. App. 734, 142 Pac. 102. Distinguish *Helm v. Dumars* (1853) 3 Cal. 454.

⁵⁵ *Ross v. Thomas*, *supra* note 54; *Abrahams v. Hammel* (1919) 40 Cal. App. 11, 180 Pac. 41.

⁵⁶ See *Reeves, Conditional Sale Contracts in Indiana* (1926) 1 IND. L. J. 194.

⁵⁷ See cases cited, *supra* notes 53, 54.

⁵⁸ *Rodgers v. Bachman*, *supra* note 36; *Kellogg v. Burr*, *supra* note 53.

⁵⁹ *Morris v. Allen*, *supra* note 5; *King v. Cline*; *Heffner v. Jackson*, both *supra* note 53.

⁶⁰ *Morris v. Allen*, *supra* note 5.

⁶¹ *King v. Cline*, *supra* note 53.

⁶² *Morris v. Allen*, *supra* note 5 (*dictum*); *King v. Cline*, *supra* note 53 (*dictum*).

⁶³ *Heffner v. Jackson*, *supra* note 53; see Note (1932) 21 CALIF. L. REV. 51, 53.

the transferee are more likely to pay where the transfer is voluntary and not forced by a creditor.⁶⁴

The rule as to creditors was changed, or at least clarified, by statute in 1921, providing that personal property in possession of the buyer under an executory agreement for its sale may be taken under attachment or execution issued at the suit of a creditor, notwithstanding any provision in the agreement for forfeiture in case of levy or change of possession.⁶⁵ A tender of the balance by the creditor was also required.⁶⁶ The effect of a failure of the attachment, after the creditor has paid the seller the balance due, is a question involved in some confusion. Upon the reasoning that title has passed to the buyer, free of the seller's claim, and that the attaching creditor is subrogated only to the buyer's rights, not the seller's, it has been held that upon failure of the attachment, the creditor is without claim upon the property or remedy against the buyer of any sort.⁶⁷ The same result has been held to follow although the creditor obtains an assignment of the seller's rights after he has paid off the seller.⁶⁸ If the creditor obtains an assignment before or at the time of the payment, query as to what result the court would reach.⁶⁹ The statute⁷⁰ further provides that the proceeds of the sale on execution shall be applied first to the repayment of the sum paid to the seller, with interest. Query, whether a creditor taking the property on execution after failure of attachment, could deduct from the proceeds of the sale on execution the sum he paid to the seller.

NATURE AND EXTENT OF THE INTEREST OF THE SELLER
IN THE PROPERTY

Before default, the seller's beneficial incidents of ownership are in general limited in scope to conform to his security interest. The seller has an insurable interest in the property⁷¹ logically to the extent of the

⁶⁴ See *supra* notes 19-21.

⁶⁵ CAL. CODE CIV. PROC. § 689a.

⁶⁶ CAL. CODE CIV. PROC. § 689b.

⁶⁷ *Casady v. Fry*, *supra* note 13. See also *Kinsey v. Ryan* (1925) 74 Cal. App. 567, 241 Pac. 282; *Kinsey v. Boyes* (1927) 86 Cal. App. 248, 260 Pac. 834.

CAL. CODE CIV. PROC. § 689h provides that when payment is made "then the title shall pass to the buyer and the property may be sold as in this chapter provided, free of all lien or claim of the seller."

⁶⁸ *Casady v. Fry*, *supra* note 13.

⁶⁹ Cf. *Kinsey v. Ryan*, *supra* note 67, and see *infra* notes 304, 305.

Edises, in a full discussion of the rights of the buyer's creditors before and after the statute in Note (1932) 21 CALIF. L. REV. 51, indulges in well founded criticism of the *Casady* case and suggests that recovery should be allowed against the buyer in quasi-contract upon the theory of unjust enrichment, or that the buyer should be subrogated to the seller's rights.

⁷⁰ CAL. CODE CIV. PROC. § 689c.

⁷¹ *Wyman v. Security Ins. Co.*, *supra* note 5.

balance due.⁷² It has been held that the seller has the "sole and unconditional" ownership within the terms of an insurance policy,⁷³ but it has likewise been held that the buyer has such "sole and unconditional" ownership.⁷⁴ It is obvious that neither party is the sole and unconditional owner, but that unless the court holds each to be such owner, the legitimate insurable interest which each party has will fail of recognition under such a clause.⁷⁵ If the doctrine of election of remedies is followed, the seller's insurable interest will of course vary with his election.⁷⁶

It has not been decided in California whether or not the seller may recover for injury or conversion by a third person before default by the buyer.⁷⁷ Logically, the seller should have such right only where his security is impaired by the acts of the third person. As a practical matter this will cover most situations, whether of substantial injury to the property or of removal of the property from the possession of the buyer.

The seller has an interest in the property allowing him to redeem from the liens for repairs or storage which may be created by the buyer under Section 3051 of the Civil Code.⁷⁸

The seller, before default, likewise has certain burdensome incidents of ownership. He has been held liable for the use and occupation of premises occupied by the property, although such property was not in the seller's possession, where the buyer's lease of the premises had been terminated and the seller given notice to remove the property.⁷⁹

It has been seen that prior to statutory changes, creditors of the buyer were not successful in levying upon the property.⁸⁰ Consequently, it would be natural to expect that the seller's interest in the property is subject to levy by the seller's creditors, and it has been so held.⁸¹ On the other hand, if the buyer is not in default, the seller's creditors, having no better right than the seller, cannot seize the property from the buyer's

⁷² See *supra* notes 25, 26.

⁷³ *Wyman v. Security Ins. Co.*, *supra* note 5.

⁷⁴ *Coniglio v. Conn. Fire Ins. Co.*, *supra* note 6.

⁷⁵ See a good discussion in 3 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (6th ed. 1933) §§ 1187-1189.

⁷⁶ *Wilcox, op. cit. supra* note 27.

⁷⁷ See the following cases: *D. Q. Service Corp. v. Securities etc. Co.* (1930) 210 Cal. 327, 292 Pac. 497; *Ross v. Thomas*, *supra* note 54; *Covington v. Grant*, *supra* note 51; *Coachella Valley State Bank v. Wilson*, *supra* note 7.

⁷⁸ *Covington v. Grant*, *supra* note 51. See also *C. I. T. Corp. v. Biltmore Garage*, *supra* note 5.

⁷⁹ *Katz v. People's Finance etc. Co.* (1929) 101 Cal. App. 552, 281 Pac. 1097.

Such inaction by the buyer would probably constitute an abandonment of the property so that the seller might take possession without being held to an election of remedies. See *infra* note 156.

⁸⁰ See *supra* notes 53-70.

⁸¹ *Escobar v. Rogers* (1920) 182 Cal. 603, 189 Pac. 268.

possession.⁸² The buyer may, however, waive his right to possession by a failure to object to the levy.⁸³ Although no decisions in point have been found, there seems no reason why the seller's interest in the contract, as distinguished from the physical property itself, could not be levied upon by the seller's creditors in proper proceedings.

Other incidents show that the seller is not complete owner of the property before default. In the first place he is not liable for personal property tax as owner of the property,⁸⁴ but is liable for tax as owner of "credits."^{84a}

Civil Code, section 1714 $\frac{1}{4}$, making an owner of a motor vehicle liable for damages arising from its negligent operation by another with the owner's permission, expressly excepts the conditional seller or his assignee from the term "owner" and provides that the vendee is owner "until the vendor or his assignee shall retake possession of such motor vehicle." To escape liability under this section, the seller must either endorse over the certificate of ownership or give notice of the transfer to the department of motor vehicles.⁸⁵ Thus, as a practical matter, the seller's only choice is to give the required notice. If he fails to do so, he is liable as owner of the car.⁸⁶

The decisions with regard to assignment or transfer of the seller's interest also show that the seller has a bare legal title for security. As we have seen, the seller's title is merely an incident of the buyer's obligation to pay the price, and as such is discharged by the buyer's tender of the price.⁸⁷ It would follow that a transfer of the conditional sale notes would transfer as an incident of the obligation the seller's security title.⁸⁸ It has been held, however, that the assignment of the "within agreement" for collection only, without an assignment of the note, does not transfer the seller's security title.⁸⁹

The assignee of a conditional sale contract is subject to all defenses which could be used by the buyer against the original seller.⁹⁰ A conditional sale contract cannot be made negotiable by stipulations waiving

⁸² Bickerstaff v. Doub, *supra* note 81.

⁸³ Escobar v. Rogers, *supra* note 81.

⁸⁴ County of San Diego v. Davis, *supra* note 6. *Contra*: Houser & Haines Mfg. Co. v. Hargrove (1900) 6 Cal. Unrep. 384.

^{84a} CAL. POL. CODE § 3617, 3627a.

⁸⁵ CAL. VEHICLE ACT § 45 $\frac{3}{4}$.

⁸⁶ Bunch v. Kin, *supra* note 7.

⁸⁷ Walker v. Houston, *supra* note 7, and authorities cited, *supra* note 15.

⁸⁸ CAL. CIV. CODE § 1084 provides in part as follows:

"The transfer of a thing transfers also all its incidents."

See WILLISTON, *op. cit.* *supra* note 16, § 332. But *cf.* People's Bank v. Porter, *supra* note 7; (1912) 25 HARV. L. REV. 462.

⁸⁹ Dunn v. Price (1896) 112 Cal. 46, 44 Pac. 354.

⁹⁰ Parker v. Funk, *supra* note 11; Whiting v. Squeglia (1924) 70 Cal. App. 108, 232 Pac. 986.

such defenses,⁹¹ nor may such defenses be eliminated merely by notice of intended assignment.⁹² On the other hand, the holder in due course of a negotiable title-retaining note is not subject to defenses other than those to which the holder of an ordinary negotiable instrument is subject.⁹³

Where risk of loss was involved, the courts refused to view the seller as holder of a security interest only, and, following the executory contract theory coupled with the principle that risk follows title, placed such risk upon the seller, in the absence of agreement otherwise, until the enactment of the Sales Act in 1931.⁹⁴

Upon default, the incidents of the seller's ownership are greatly enlarged. Thus, upon the buyer's default the seller has the right to possession of the property as against the buyer,⁹⁵ the buyer's transferee,⁹⁶ the buyer's creditors,⁹⁷ and third persons in general,⁹⁸ and even against the state government seizing an automobile for illegal transportation of liquor by the buyer, or by a third person without the seller's knowledge or consent.⁹⁹ In an action for conversion the seller recovers under such circumstances not merely the payments due but the total value of the property at the time of conversion.¹⁰⁰ If his action is for possession or

⁹¹ American Nat. Bank v. A. G. Somerville (1923) 191 Cal. 364, 216 Pac. 376.

⁹² C. I. T. Corp. v. Glennan (1934) 137 Cal. App. 636, 31 P. (2d) 430; *cf.* Smith v. Semon, *supra* note 5.

⁹³ People's Bank v. Porter, *supra* note 7. See also Hale, *op. cit. supra* note 42.

⁹⁴ See *supra* notes 36-45.

⁹⁵ Hegler v. Eddy, *supra* note 5; Van Allen v. Francis (1899) 123 Cal. 474, 56 Pac. 339; Kellogg v. Burr, *supra* note 53; Wise v. Collins (1898) 121 Cal. 147, 53 Pac. 640; Dodge v. Carter (1903) 140 Cal. 663, 74 Pac. 292; Morrison v. Veach (1923) 190 Cal. 507, 213 Pac. 945; Green v. Carmichael (1914) 24 Cal. App. 27, 140 Pac. 45; Eastern Outfitting Co. v. Myers (1918) 39 Cal. App. 316, 180 Pac. 609; Haskett v. Hartwick (1920) 48 Cal. App. 34, 191 Pac. 553; Firpo v. Superior Court (1926) 77 Cal. App. 207, 246 Pac. 165; Redwine v. Trowbridge, *supra* note 53; Calif. R. Equip. Co. v. Weber, *supra* note 6; Davidson Investment Co. v. Dabney (1930) 103 Cal. App. 392, 284 Pac. 673; Peronnet v. Ralph, *supra* note 6.

⁹⁶ Wise v. Collins; Green v. Carmichael; Haskett v. Hartwick; Van Allen v. Francis; Eastern Outfitting Co. v. Myers, all *supra* note 95; Peronnet v. Ralph, *supra* note 6.

⁹⁷ Bailly v. Loock (1930) 103 Cal. App. 220, 284 Pac. 235; *In re Bastanchury Corporation* (C. C. A. 9th, 1933) 66 Fed. (2d) 653 (*certiorari denied, sub. nom.* Turner v. Deere (John) Plow Co. (1933) 290 U. S. 700); Krumm v. Southwest Finance Co. (C. C. A. 9th, 1933) 67 Fed. (2d) 1; *In re Ideal Laundry*, *supra* note 5. See cases cited *supra* notes 53, 54.

⁹⁸ See, as an illustration, D. Q. Service Corp. v. Securities etc. Co., *supra* note 77.

⁹⁹ People v. One 1923 Oakland Sports Automobile (1925) 71 Cal. App. 590, 236 Pac. 194; People v. One 1923 Buick Coupe Automobile, *supra* note 12; People v. One 1924 Studebaker Auto (1925) 71 Cal. App. 134, 234 Pac. 856; People v. One Harley Davidson Motorcycle (1935) 81 Cal. App. Dec. 742.

¹⁰⁰ Ross v. Thomas, *supra* note 54; King v. Cline, *supra* note 53. CAL. CIV. CODE § 3336 provides as follows:

"Damages for conversion of personal property. The detriment caused by the wrongful conversion of personal property is presumed to be:

value, he obtains either possession plus damages for the detention (including depreciation), or the value of the property at the time of the conversion.¹⁰¹ No decision has been found where the seller recovered for conversion by the buyer where the buyer took the property after the seller's repossession, but such recovery would probably be allowed.¹⁰² It has been held that the buyer's breach of a promise made after default to return the property within a certain time gives the seller a right to sue for conversion of the property.¹⁰³

REMEDIES OF THE SELLER

Before the seller is entitled to use any remedy, it must be determined that he has not waived the buyer's default. As an inevitable consequence of the forfeiture rule,¹⁰⁴ the doctrine of waiver has been liberally, not to say loosely, applied, to lessen the hardship on the buyer.¹⁰⁵ That waiver has been used solely to avoid forfeiture is shown by the court's refusal (on the ground that no forfeiture is involved) to apply the doctrine where the seller sues for the price rather than for possession.¹⁰⁶ It would seem more reasonable to relieve the defaulting party only where there is an equitable estoppel.¹⁰⁷

As is to be expected, the decisions upon waiver are in hopeless confusion, since the court is guided by its ideas of fairness as applied to the detailed situation. Some earlier decisions stubbornly refused to recognize

First—The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and

Second—A fair compensation for the time and money properly expended in pursuit of the property."

¹⁰¹ *Morris v. Allen*, *supra* note 5. The usual measure of damages in an action of claim and delivery is the value of the property at the time not of the conversion but of trial. See 5 CAL. JURIS. (1922) 204, CAL. JURIS. (1928 Supp.) Art. Automobiles, p. 43. Of course the result is the same if damages for the detention are also allowed.

¹⁰² *VOLD, SALES* (1931) p. 288.

¹⁰³ *Francisco v. Schleischer* (1920) 50 Cal. App. 670, 195 Pac. 691.

¹⁰⁴ See *infra* notes 215-222.

¹⁰⁵ Dean Pound, discussing contracts for the sale of land in California, said: "Strict doctrines as to forfeiture inevitably produce loose doctrines as to 'waiver.' Where before time for performance vendor signifies his intention not to insist on timely or exact performance and purchaser, in reliance thereon, acts accordingly, the principle of equitable estoppel is quite sufficient to preclude insistence upon the condition to purchaser's injury." Pound, *The Progress of the Law 1918-1919: Equity* (1920) 33 HARV. L. REV. 929, 952. See also Notes (1913) 1 CALIF. L. REV. 300; (1919) 8 CALIF. L. REV. 60; (1923) 11 CALIF. L. REV. 286; (1926) 14 CALIF. L. REV. 417.

¹⁰⁶ *Harris v. Kessler* (1932) 124 Cal. App. 299, 12 P. (2d) 467. Cf. *Johnson v. Kaeser*, *supra* note 7.

¹⁰⁷ See authorities cited *supra* note 105.

that any forfeiture was involved in the seller's retaking the property.¹⁰⁸ At the other extreme, recent decisions have given relief from forfeiture under Civil Code, section 3275, independently of the waiver doctrine.¹⁰⁹

Of course where time is not made of the essence, the buyer may cure his default by tender.¹¹⁰ Hence no unjust forfeiture occurs and the doctrine of waiver is unnecessary. It should be noted that since the two decisions in *Miller v. Steen*,¹¹¹ conditional sale contracts generally provide that time is of the essence of the contract.¹¹²

A waiver is said to result from conduct on the part of the seller consistent only with a purpose to regard the contract as still subsisting.^{112a} Where the contract provides that time is of the essence, it has been held that acceptance of late payments is a waiver of the "time of the essence" provision as to future defaults.¹¹³ Consequently most conditional sale contracts now provide that acceptance of late installments shall not constitute a waiver as to future defaults. Such provisions have been upheld as to future defaults,¹¹⁴ but acceptance of late payments has still been held to waive previous defaults occurring before the time of such acceptance.¹¹⁵ The seller may reinstate the "time of the essence" provision only by giving the buyer reasonable notice of the seller's intention to insist on strict performance.¹¹⁶

An oral extension of time to pay, although unenforceable as such, does constitute a waiver, in so far as acted upon by the buyer, of both

¹⁰⁸ *Hegler v. Eddy*; *Wiley B. Allen v. Wood* (quoting *Hegler v. Eddy*); *McConnell v. Redd*, all *supra* note 5.

¹⁰⁹ *Miller v. Modern Motor Car Co.*, *supra* note 6. See also Note (1930) 18 CALIF. L. REV. 681.

CAL. CIVIL CODE § 3275 provides as follows:

"Relief in case of forfeiture. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

¹¹⁰ See *infra* note 223.

¹¹¹ *Infra* note 215.

¹¹² See Note (1929) 29 COL. L. REV. 960, 1123.

^{112a} *Redd v. Garford Motor Truck Co.* (1928) 205 Cal. 245, 270 Pac. 447.

¹¹³ *Hesse v. Commercial Credit Co.* (1929) 97 Cal. App. 600, 275 Pac. 970; *Miller v. Modern Motor Car Co.*, *supra* note 6. See also *Carvell v. Weaver*, *supra* note 6. *Cf. McConnell v. Redd*, *supra* note 5.

¹¹⁴ *Pacific Finance etc. Co. v. Pierce* (1920) 48 Cal. App. 600, 191 Pac. 1115; *Lindsey v. Butte* (1929) 96 Cal. App. 465, 275 Pac. 525; *Calif. Restaurant Equipment Co. v. Weber*, *supra* note 6.

¹¹⁵ *Lindsey v. Butte*, *supra* note 114. *Cf. Benedict v. Greer-Robbins Co.* (1915) 26 Cal. App. 468, 147 Pac. 486.

¹¹⁶ *Miller v. Modern Motor Car Co.*, *supra* note 6 (notice held unreasonable); *Redd v. Garford Motor Truck Co.*, *supra* note 112a (*dictum*, since no notice was given).

past and future defaults, according to the better authority,¹¹⁷ unless, of course, the buyer fails to live up to the extension agreement.¹¹⁸ An oral agreement to accept partial payments is likewise a waiver, in so far as acted upon by the buyer.¹¹⁹ As to past defaults, it has been held that the acceptance of one installment waives a default of a prior installment accruing before the time of such acceptance.¹²⁰ Likewise, the acceptance of one installment waives the default upon an installment accruing later but in default before such acceptance.¹²¹ Acceptance of part of the price after all is due is not a waiver,¹²² nor is the seller's inaction or delay in enforcing his rights.¹²³

To be distinguished is the situation where upon default the contract has been formally terminated by the seller. Then any new agreement between the parties is upon such conditions as the seller may lay down, and such new agreement is not a waiver of past defaults under the original contract.¹²⁴

In the absence of special contract provisions otherwise, the general rule obtains that the seller has two remedies: to repossess the property or to recover the price, that these two remedies are mutually inconsistent, and that pursuit of one is an election of remedies which prevents later use of the other.¹²⁵

¹¹⁷ Johnson v. Kaeser, *supra* note 7; Wilkinson v. Fishermen's etc. Co., *supra* note 13. See also Hesse v. Commercial Credit Co., *supra* note 113; Redd v. Garford Motor Truck Co., *supra* note 116. *Contra*: Benedict v. Greer-Robbins Co., *supra* note 115; Middlecamp v. Zumwalt (1929) 100 Cal. App. 715, 280 Pac. 1003; Sohrokkoff v. Zumwalt (1932) 122 Cal. App. 768, 10 P. (2d) 511.

¹¹⁸ See Morrison v. Veach, *supra* note 95.

¹¹⁹ Johnson v. Kaeser, *supra* note 7.

¹²⁰ Redd v. Garford Motor Truck Co., *supra* note 116.

¹²¹ Lindsey v. Butte, *supra* note 114 (citing Redd v. Garford Motor Truck Co., *supra* note 116). *Contra*: Benedict v. Greer-Robbins Co., *supra* note 115.

¹²² *Ibid.*; Magee v. Burt Motor Car Co. (1918) 37 Cal. App. 737, 174 Pac. 687. *Cf.* Lindsey v. Butte, *supra* note 114; Redd v. Garford Motor Truck Co., *supra* note 116.

¹²³ McConell v. Redd, *supra* note 5; Middlecamp v. Zumwalt, *supra* note 117. See also People v. One 1924 Studebaker Auto, *supra* note 99.

¹²⁴ Morrison v. Veach, *supra* note 95; Calif. Restaurant Equipment Co. v. Weber, *supra* note 6.

¹²⁵ The rule of election of remedies is thus stated (often by way of *dictum*) in the following cases: Parke etc. Co. v. White River Lumber Co. (1894) 101 Cal. 37, 35 Pac. 442; Holt Mfg. Co. v. Ewing (1895) 109 Cal. 353, 42 Pac. 435; Rayfield v. Van Meter (1898) 120 Cal. 416, 52 Pac. 666; Van Allen v. Francis, *supra* note 95; Matteson v. Equitable etc. Co., *supra* note 7; Muncy v. Braim (1910) 158 Cal. 300, 110 Pac. 945; Boas v. Kneving (1917) 175 Cal. 226, 165 Pac. 690; Youmashef v. Weisgerber (1923) 191 Cal. 92, 214 Pac. 961; Johnson v. Kaeser, *supra* note 7; George J. Birkel Co. v. Nast (1912) 20 Cal. App. 651, 129 Pac. 945; Waltz v. Silveria, *supra* note 36; Pacific etc. Co. v. Haydes & Son (1915) 26 Cal. App. 607, 147 Pac. 988; Harter v. Delno (1920) 49 Cal. App. 729, 194 Pac. 300; People's Bank v. Porter, *supra* note 7; Covington v. Lewis (1927) 83 Cal. App. 8, 256 Pac. 277; Frankel v. Rosenfield (1928) 95 Cal. App. 647, 273 Pac. 122; Stavnow v. Winfree

Two theories of election have been advanced by the courts: first, that conduct showing an intent to rely upon one remedy constitutes an election;¹²⁶ second, that such conduct must not only occur, but must be relied upon by the buyer to the point of creating an equitable estoppel before there is an election.¹²⁷ The first theory has generally prevailed with regard to conditional sales,¹²⁸ although not with regard to other situations.¹²⁹ It is further held in regard to conditional sales that ignorance of the facts when the remedy is selected will not prevent an election.¹³⁰ This result seems opposed to decisions in other fields.¹³¹

It has long been recognized that the doctrine of election of remedies as applied to conditional sales is a purely artificial one.¹³² In the first place, there is no inconsistency between a suit for possession and recovery of the price.¹³³ By the terms of the contract itself, title, retained for security, is to remain in the seller until the price is paid. Furthermore, the election doctrine always aids the party who is in default.¹³⁴ The pecu-

(1929) 99 Cal. App. 566, 278 Pac. 905; *Maddux v. Mora* (1929) 99 Cal. App. 695, 279 Pac. 467; *Commercial Discount Co. v. Howard* (1930) 107 Cal. App. 83, 289 Pac. 906; *Martin Music Co. v. Robb* (1931) 115 Cal. App. 414, 1 P. (2d) 1000; *Jeanson v. Zangl* (1932) 119 Cal. App. 692, 7 P. (2d) 314; *Cocores v. Assimopoulos* (1932) 127 Cal. App. 360, 15 P. (2d) 892; *General Motors Acceptance Corp. v. Brown* (1934) 2 Cal. App. (2d) 646, 38 P. (2d) 482; *Smith v. Miller* (1935) 81 Cal. App. Dec. 103, 43 P. (2d) 347.

See also *Murphy v. Hellman Comm'l etc. Bank* (1919) 43 Cal. App. 579, 185 Pac. 485; *Automobile etc. Co. v. Salladay* (1921) 55 Cal. App. 219, 203 Pac. 163.

¹²⁶ *Martin Music Co. v. Robb* (criticised in (1932) 20 CALIF. L. REV. 206); *Smith v. Miller*, both *supra* note 125; see also *Boas v. Knewing*, *supra* note 125.

¹²⁷ *De Laval Pac. Co. v. United etc. Co.* (1924) 65 Cal. App. 584, 224 Pac. 766. See also *Pacific Carbonator Co. v. Haydes & Son*; *Harter v. Delno*, both *supra* note 125.

¹²⁸ See cases cited *supra* note 126, and *passim, infra* notes 141-158.

¹²⁹ *Brice v. Walker* (1920) 50 Cal. App. 49, 194 Pac. 721 (suit on note secured by chattel mortgage dismissed before judgment does not bar later foreclosure.) See also *Hines v. Ward* (1898) 121 Cal. 115, 53 Pac. 427; *Mailhes v. Investors Syndicate* (1934) 220 Cal. 735, 32 P. (2d) 610; *Verder v. American Loan Soc.* (1934) 1 Cal. (2d) 17, 32 P. (2d) 1081.

Further decisions will be found in 10 CAL. JURIS. (1923) 3, and biennial supplements thereto.

¹³⁰ *Holt Mfg. Co. v. Ewing*, *supra* note 125; see also *Parke etc. Co. v. White River Lumber Co.*, *supra* note 125.

¹³¹ *Verder v. American Loan Soc.*, *supra* note 129. See further cases cited in 10 CAL. JURIS. (1923) 6, and biennial supplements thereto.

¹³² (1932) 20 CALIF. L. REV. 206. See also *Hine, Election of Remedies, a Criticism* (1913) 26 HARV. L. REV. 707; *Deinard & Deinard, Election of Remedies* (1922) 6 MINN. L. REV. 341, 480; *Rothschild, A Remedy for Election of Remedies: A Proposed Act to Abolish Election of Remedies* (1929) 14 CORN. L. Q. 141.

¹³³ *VOID, SALES* (1931) § 96; 2 *WILLISTON, op. cit. supra* note 16, § 579; *Notes* (1932) 20 CALIF. L. REV. 206; (1912) 25 HARV. L. REV. 462; (1923) 36 HARV. L. REV. 740; (1932) 17 MINN. L. REV. 66.

Cf. decisions allowing resale and recovery of deficiency, *infra* note 232.

¹³⁴ 2 *WILLISTON, op. cit. supra* note 16, § 571; *HINE, op. cit. supra* note 132, at 719; *Notes* (1916) 4 CALIF. L. REV. 346; (1932) 17 MINN. L. REV. 66. *Cf.* *Covington v. Lewis*, *supra* note 125.

liar strictness of the doctrine as applied to conditional sales shows that its true reason for existence is to protect the buyer against recovery of the property and the price both, and to balance this hardship upon the seller against the buyer's forfeiture when the seller retakes.¹³⁵ There is of course a certain rough equalization of profit and loss to the seller in such a rule.¹³⁶ The supposed protection to the buyer is slight, however, since the seller may retake, resell and obtain a deficiency, even without a contract provision to that effect;¹³⁷ sue for the price and attach the property;¹³⁸ or provide in the contract for recovery of both the price and the property.¹³⁹ Thus the California decisions merely add confusion to an already confused subject. The net result of the courts' efforts to protect the buyer would seem merely to be the addition of numerous clauses to the contract.^{139a} It would seem preferable to apply the election doctrine only to the situation where the seller retakes and seeks to recover the full price and not merely a deficiency after resale.¹⁴⁰

The following conduct has been held sufficient to constitute an election to recover the price: obtaining judgment for the price;¹⁴¹ filing a suit for the price and attaching the property sold;¹⁴² filing a suit for the price¹⁴³ even though such suit is later voluntarily dismissed;¹⁴⁴ presentation and approval of a claim for the price against the estate of the buyer;¹⁴⁵ filing a claim for the price with the buyer's referee in bank-

¹³⁵ Horack, *The Uniform Conditional Sales Act in Iowa* (1920) 5 IOWA L. B. 129; Starr, *Conditional Sales and Chattel Mortgages* (1934) 9 WASH. L. REV. 143, 183; Note (1929) 29 COL. L. REV. 960.

¹³⁶ Cf. Magill, *The Legal Advantages and Disadvantages of the Various Methods of Selling Goods on Credit* (1923) 8 CORN. L. Q. 210.

¹³⁷ See *infra* note 232.

¹³⁸ See *infra* notes 173-187.

¹³⁹ See *infra* notes 159-168.

^{139a} Cf. Horack, *op. cit. supra* note 135.

¹⁴⁰ See *General Motors Acceptance Corp. v. Brown, supra* note 125. Cf. (1932) 2 CALIF. L. REV. 206.

Section 24 of the Uniform Conditional Sales Act expressly eliminates the doctrine of election of remedies. See Bogert, *loc. cit. supra* note 43.

¹⁴¹ Parke etc. Co. v. White River Lumber Co., *supra* note 125; Matteson v. Equitable etc. Co., *supra* note 7 (*dictum*).

¹⁴² Elsom v. Moore (1909) 11 Cal. App. 377, 105 Pac. 271; George J. Birkel Co. v. Nast, *supra* note 125.

¹⁴³ Parke etc. Co. v. White River Lumber Co., *supra* note 125, (*dictum*); Van Allen v. Francis, *supra* note 95 (*dictum*); Silverstin v. Kohler & Chase (1919) 181 Cal. 51, 183 Pac. 451, 9 A. L. R. 1177 (*dictum*); Johnson v. Kaeser, *supra* note 7; George J. Birkel Co. v. Nast, *supra* note 125; Waltz v. Silveria, *supra* note 36 (*dictum*); Campbell Chevrolet Co. v. Walsh, *supra* note 40; Honnold v. Pacific Finance Corp. (1930) 105 Cal. App. 152, 286 Pac. 1101 (per Strother, J. pro tem., dissenting); Martin Music Co. v. Robb, *supra* note 125. See also Dupont v. Allen (1930) 110 Cal. App. 541, 294 Pac. 409. Cf. (1932) 20 CALIF. L. REV. 206.

¹⁴⁴ Martin Music Co. v. Robb, *supra* note 125. Cf. Brice v. Walker, *supra* note 129.

¹⁴⁵ Holt Mfg. Co. v. Ewing, *supra* note 125.

ruptcy;¹⁴⁶ the seller's stating to the buyer's transferee that he is trying to collect the price from the buyer;¹⁴⁷ continued demands by the seller for payment and refusals to accept the property when offered by the buyer.¹⁴⁸

Taking notes for the balance of the price does not constitute an election,¹⁴⁹ nor can a demand for payment after the filing of a replevin suit be construed as an election to recover the price.¹⁵⁰

The following circumstances have been held sufficient to constitute an election to recover possession: retaking the property;¹⁵¹ filing a possessory action against the buyer¹⁵² or against a third person;¹⁵³ making a threat to replevy followed by voluntary surrender of possession by the buyer.¹⁵⁴

On the contrary, other circumstances have been held not sufficient to constitute an election to recover possession: repossession for the purpose of making repairs as authorized by the contract;¹⁵⁵ repossession to protect the property after abandonment by the buyer;¹⁵⁶ a demand for possession followed by a voluntary delivery of part of the property only, which the seller refused to accept;¹⁵⁷ a threat to retake if the price is not paid;^{157a} oral notice to a sheriff in possession of the property to hold the property for the seller, where the contract did not provide that default *ipso facto* terminated the buyer's rights.¹⁵⁸

Most decisions enforcing the doctrine of election of remedies have dealt with the simple form of conditional sale contract. May the seller by contract make his remedies of repossession and suit for the price concurrent? Many contracts so provide in express terms.¹⁵⁹ No decision in

¹⁴⁶ See *Martin Music Co. v. Robb*, *supra* note 125.

¹⁴⁷ See *Harter v. Delno*, *supra* note 125.

¹⁴⁸ *Smith v. Miller*, *supra* note 125.

¹⁴⁹ *Washington etc. Co. v. McGuire* (1931) 213 Cal. 13, 1 P. (2d) 437; see also *Van Allen v. Francis*, *supra* note 95.

¹⁵⁰ *Wiley B. Allen v. Wood*, *supra* note 5.

¹⁵¹ *Frankel v. Rosenfield*, *supra* note 125. See also *Murphy v. Hellman Comm'l etc. Bank*, *supra* note 125; *Cocores v. Assimopoulos*, *supra* note 125; *Harris v. Moreland Motor Truck Co.* (C. C. A. 9th, 1922) 279 Fed. 543 (*dictum*). Compare cases cited *infra* note 232.

¹⁵² *Wiley B. Allen v. Wood*, *supra* note 5; *Teter v. Thompson*, *supra* note 23; *Cocores v. Assimopoulos*, *supra* note 125. See also *Automobile etc. Co. v. Salladay*, *supra* note 125.

¹⁵³ *Covington v. Lewis*, *supra* note 125.

¹⁵⁴ *Boas v. Knewing*, *supra* note 125.

¹⁵⁵ *Maddux v. Mora*, *supra* note 125.

¹⁵⁶ *Lord v. Smith* (1928) 92 Cal. App. 747, 268 Pac. 929.

¹⁵⁷ *De Laval Pacific Co. v. United etc. Co.*, *supra* note 127; *cf.* *Boas v. Knewing*, *supra* note 125.

^{157a} *Pacific Carbonator Co. v. Haydes & Son*, *supra* note 125.

¹⁵⁸ *Kinsey v. Boyes*, *supra* note 67.

¹⁵⁹ See for example the following cases: *Silverthorne v. Simon* (1922) 59 Cal. App. 494, 211 Pac. 26; *Bice v. Harold L. Arnold, Inc.* (1925) 75 Cal. App. 629, 243 Pac. 468; *Kinsey v. Boyes*, *supra* note 67; *McConnell v. Redd*, *supra* note 5; *General Motors Acceptance Corp. v. Brown*, *supra* note 125.

California has been found, however, where the seller retook and also obtained the full price.¹⁶⁰ The language of the decisions is broad enough to indicate that there is virtually no limit to the remedies the seller may obtain by contract.¹⁶¹ It has been held that making the remedies concurrent and providing for resale and deficiency at the seller's option does not transform a conditional sale contract into a chattel mortgage.¹⁶² As will be seen, the seller may sue for installments due at the time of repossession, if the contract so provides.¹⁶³ He may use any other security given for the price and later retake the property, where the contract so provides, and the security has not fully satisfied the obligation.¹⁶⁴ If he does not retake, he may use his other security for the price, and obtain judgment for any deficiency.¹⁶⁵ Certainly the whole purpose of the election doctrine has been to prevent the seller's obtaining both the property and the price.¹⁶⁶ Although courts in some jurisdictions have allowed double recovery under concurrent remedies,¹⁶⁷ there seems little doubt that when the question arises in California the courts will find some way to protect the buyer.¹⁶⁸

Conditional sale contracts, or the notes given for the price, or both ordinarily provide that on any default by the buyer the seller may at his option declare the entire balance due. Consequently, upon the buyer's default, the seller may sue for the entire price.¹⁶⁹ In some cases the seller

¹⁶⁰ The seller attempted to do this in *Muncy v. Brain*, *supra* note 125, but was not fully successful in the lower court. Only the buyer appealed. See *infra* note 255.

¹⁶¹ *Muncy v. Brain*, *supra* note 126; *Adams v. Anthony* (1918) 178 Cal. 158, 172 Pac. 593; *Bice v. Harold L. Arnold, Inc.*, *supra* note 159. See also *Covington v. Lewis*, *supra* note 125; *Kinsey v. Boyes*, *supra* note 67. Cf. *General Motors Acceptance Corp. v. Brown*, *supra* note 125, where, although the contract made the seller's remedies concurrent, there was a *dictum* that repossession not followed by resale would constitute an election of remedies.

¹⁶² *Bice v. Harold L. Arnold, Inc.*, *supra* note 159; *McConnell v. Redd*, *supra* note 5. See also cases cited *infra* note 232. Contrary decisions are found in some jurisdictions. See *Lawson, Conditional Sales in Michigan* (1925) 1 A. B. REV. 209; *Cooper, Liability of Conditional Sale Vendee for Deficiency when Property Retaken* (1927) 12 VA. L. REG. (N. S.) 530; *Goodman, Deficiency Clauses in Conditional Sale Contract* (1927) 12 VA. L. REG. (N. S.) 712.

¹⁶³ See *infra* note 190.

¹⁶⁴ See *infra* note 256.

¹⁶⁵ See *infra* note 254.

¹⁶⁶ See Note (1920) 29 COL. L. REV. 960.

¹⁶⁷ See Note (1932) 17 MINN. L. REV. 66; (1931) 7 WIS. L. REV. 38; (1932) 1 FORTNIGHTLY L. J. 229.

¹⁶⁸ In *Monongahela Bridge Co. v. United States* (1909) 216 U. S. 177, at 195, Mr. Justice Harlan said: "It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

¹⁶⁹ See cases cited *supra* note 125 *passim*. See also *Bogert, The Evolution of Conditional Sales Law in New York* (1923) 8 CORN. L. Q. 303.

has been refused a right to sue for the price upon the ground that the terms of the contract made repossession his sole remedy.¹⁷⁰ The seller's suit for the price vests title in the buyer,¹⁷¹ under the doctrine of election of remedies, and the seller need not tender a bill of sale to the buyer before filing suit for the price.¹⁷²

Many times the seller's most advantageous course is to sue for the price and levy an attachment upon the property sold. Rapid depreciation of the property, together with the buyer's usual lack of other tangible assets at a given moment, makes this remedy a popular one. The seller has three theoretical obstacles to overcome, however. First, the statute allowing attachment is clearly designed to exclude situations where the plaintiff is secured. The statute expressly excepts actions upon contracts "secured by any mortgage, deed of trust or lien upon real or personal property or any pledge of personal property."¹⁷³ It has been held, however, that the seller's retained title does not constitute a mortgage, lien or pledge and hence that an attachment may issue.¹⁷⁴ This result is technically sound but clearly contrary to the spirit of the statute.¹⁷⁵ The courts purport to apply the rule that the statute is to be strictly construed,¹⁷⁶ but originally this meant strictly against the one attaching, not against the debtor.¹⁷⁷ The result may be justified since the seller, in the absence of special contract provision, has at present no other satisfactory

¹⁷⁰ *American-LaFrance etc. Co. v. Bagge* (1929) 98 Cal. App. 291, 276 Pac. 1066. See also *Rodgers v. Bachman*, *supra* note 36.

¹⁷¹ *Parke etc. Co. v. White River Lumber Co.*, *supra* note 125; *Holt Mfg. Co. v. Ewing*, *supra* note 125; *Van Allen v. Francis*, *supra* note 95 (*dictum*); *Silverstin v. Kohler & Chase*, *supra* note 143 (*dictum*); *Johnson v. Kaeser*, *supra* note 7 (*dictum*); *Elsom v. Moore*, *supra* note 142; *George J. Birkel Co. v. Nast*, *supra* note 125; *Waltz v. Silveria*, *supra* note 36; *Martin Music Co. v. Robb*, *supra* note 125; *Cocores v. Assimopoulos*, *supra* note 125 (*dictum*).

¹⁷² *Arnois v. Bell* (1924) 70 Cal. App. 222, 232 Pac. 758; *King v. Moreland* (1931) 116 Cal. App. 356, 2 P. (2d) 576.

¹⁷³ CAL. CODE CIV. PROC. § 537.

¹⁷⁴ *Eads v. Kessler* (1898) 121 Cal. 244, 53 Pac. 656; *Elsom v. Moore*, *supra* note 142; *George J. Birkel Co. v. Nast*, *supra* note 125; *Standard Auto Sales v. Lehman*, *supra* note 7; *Cocores v. Assimopoulos*, *supra* note 125 (*dictum*). See also *Stokes v. Balaam* (1887) 73 Cal. 154, 14 Pac. 574; *Rayfield v. Van Meter*, *supra* note 125; *Escobar v. Rogers*, *supra* note 81; *Katzenbach & Bullock v. Breslauer* (1921) 51 Cal. App. 756, 197 Pac. 967; *Bice v. Harold L. Arnold, Inc.*, *supra* note 159; *Heffner v. Jackson*, *supra* note 53; *Alexander v. Walling*, *supra* note 7; *Williams v. Lowenthal* (1932) 124 Cal. App. 179, 12 P. (2d) 75; *Harris v. Kessler*, *supra* note 106; *Garrett v. Swanton*, *supra* note 5. Cf. *Matteson v. Equitable etc. Co.*, *supra* note 7; *Richvale Land Co. v. Johnson* (1915) 28 Cal. App. 296, 152 Pac. 312; *General Motors Acceptance Corp. v. Brown*, *supra* note 125.

¹⁷⁵ Cf. *Walker v. Houston* (reserved title similar in purpose to a lien); *Alexander v. Walling*, both *supra* note 7; (1920) 8 CALIF. L. REV. 250.

¹⁷⁶ *Standard Auto Sales Co. v. Lehman*, *supra* note 7; criticised on this ground in (1920) 8 CALIF. L. REV. 250.

¹⁷⁷ *Payne v. Bensley* (1857) 8 Cal. 260 (holding that the word "mortgage" in the attachment statute included a pledge).

means of realizing upon the property as security without losing his right to a deficiency.¹⁷⁸ It has been held with regard to contracts for the sale of real property that the seller, having retained title, has security at least equal to a vendor's lien or a mortgage, and may not attach.¹⁷⁹ The only distinction between the two rulings seems economic rather than legal, *i.e.*, personal property ordinarily depreciates faster than real property.¹⁸⁰

The second obstacle is that under the theory of executory sale the buyer has no property interest,¹⁸¹ and the seller's attachment would be fruitless. As a corollary of the doctrine of election of remedies, however, title passes to the buyer automatically when the seller files suit for the price,¹⁸² and hence the attachment is levied upon property completely owned by the buyer,¹⁸³ and does not constitute a recaption by the seller under the terms of the contract.¹⁸⁴

A third obstacle is the buyer's claim of exemption from attachment. Since necessary household furniture is exempt,¹⁸⁵ such a claim would often be well founded. The only applicable exception made by the statute is in favor of execution issued upon a judgment recovered for the price of the property.¹⁸⁶ Attachment in a suit for the price could scarcely be included within this exception.¹⁸⁷

Of course the seller cannot, under the doctrine of election of remedies, procure an attachment in a possessory action, and the argument that past

¹⁷⁸ See *infra* note 238 as to uncertainty in remedy of resale.

¹⁷⁹ *Richvale Land Co. v. Johnson*, *supra* note 174.

¹⁸⁰ The *Richvale* case, *supra* note 174, is distinguished substantially on the economic ground in *Standard Auto Sales Co. v. Lehman*, *supra* note 7, at 771, where the court said: "The difference, however, between the two kinds of property is the reason for the difference in the rule applicable to each. Real property is fixed and cannot be destroyed, lost, stolen, or taken away. And the vendor, therefore, always has his security for the payment of the balance of the purchase price. While personal property, as the automobile in the present case, may be taken away or stolen or destroyed with the consequent loss of his security and without the knowledge of the vendor."

¹⁸¹ See cases cited *supra* note 5.

¹⁸² See cases cited *supra* note 171.

¹⁸³ *Elsom v. Moore*, *supra* note 142; *George J. Birkel Co. v. Nast*, *supra* note 125. See also *Williams v. Lowenthal*, *supra* note 174.

¹⁸⁴ *George J. Birkel Co. v. Nast*, *supra* note 125.

¹⁸⁵ CAL. CODE CIV. PROC. § 692 (2). The word "necessary" is given no restrictive meaning whatever according to the practice of the Sheriff's office in Los Angeles county.

¹⁸⁶ CAL. CODE CIV. PROC. § 690 (21).

¹⁸⁷ In *George J. Birkel Co. v. Nast*, *supra* note 125, the property attached was a piano, but no claim of exemption was made. In *Martin Music Co. v. Robb*, *supra* note 125, the seller's failure to attach allowed a successful claim of exemption and withdrawal from the bankrupt buyer's estate of a piano. See also Note (1932) 17 *ST. LOUIS L. REV.* 143.

due interest constitutes an obligation separate from the price has not prevailed.^{187a}

The seller may, without waiving his right to repossess upon a later default, sue for installments as they become due.¹⁸⁸ *Query*, whether under this rule the seller might sue for all but the final nominal payment under a conditional sale in the form of a so-called lease contract with the option of purchase.¹⁸⁹ The seller may, if the contract so provides, retake the property and still recover the amount due at the time of retaking.¹⁹⁰

Upon the buyer's default (but not before),¹⁹¹ the seller has the right to retake the property¹⁹² and may do so by virtue of his reserved title even in the absence of express provision for repossession.¹⁹³ Apparently the seller need not tender notes given for the price, as a condition of repossession.^{193a} It is unsettled whether or not a demand for possession is necessary before the seller may retake,¹⁹⁴ but after the seller has made such demand, the buyer is liable for any further depreciation in the value of the property.¹⁹⁵ The buyer's consent is not necessary to repossession by self-help and without legal process.¹⁹⁶ Such repossession may be taken forcibly without constituting a conversion, but the seller is liable for any damage or injury he causes if he fails to secure possession peaceably.¹⁹⁷

^{187a} *Cocores v. Assimopoulos*, *supra* note 125.

¹⁸⁸ *Silverstin v. Kohler & Chase*, *supra* note 143; *Covington v. Lewis*, *supra* note 125 (*dictum*). See also McMurray, *A Review of Recent California Decisions in the Law of Property* (1921) 10 CALIF. L. REV. 42, 49; Note (1919) 7 CALIF. L. REV. 442, 449; (1920) 8 CALIF. L. REV. 191.

¹⁸⁹ For full discussion, see (1920) 8 CALIF. L. REV. 191.

¹⁹⁰ *Adams v. Anthony*, *supra* note 161; *Commercial Discount Co. v. Howard*, *supra* note 125 (*dictum*). See also *Hogan v. Anthony* (1921) 52 Cal. App. 158, 198 Pac. 47; *Stavnow v. Winfree*, *supra* note 125.

¹⁹¹ *Maggio Bros. Co., Inc. v. Wood* (1932) 216 Cal. 260, 13 P. (2d) 694. See also cases cited *supra* note 11.

¹⁹² *Hegler v. Eddy*, *supra* note 5; *Magee v. Burt Motor Car Co.*, *supra* note 122; *Eastern Outfitting Co. v. Myers*, *supra* note 95; *Crawford v. Meadows* (1919) 41 Cal. App. 13, 181 Pac. 845; *People's Bank v. Porter*, *supra* note 7 (*dictum*); *Pacific Finance Corp. v. Roffalli* (1929) 98 Cal. App. 198, 276 Pac. 1064; *Calif. Restaurant Equipment Co. v. Weber*, *supra* note 6; *Davidson Investment Co. v. Dabney*, *supra* note 95. See also *supra* notes 95-99.

¹⁹³ *Liver v. Mills* (1909) 155 Cal. 459, 101 Pac. 299; *Los Angeles Furniture Co. v. Hansen* (1920) 46 Cal. App. 5, 188 Pac. 292; *Firpo v. Superior Court*, *supra* note 95; *Bailly v. Looock*, *supra* note 97.

^{193a} See *ESTRICH, INSTALLMENT SALES* (1926) pp. 746-750; but *cf.* *Van Allen v. Francis*, *supra* note 95.

¹⁹⁴ See *P. J. Freiermuth Co. v. Faustino* (1932) 120 Cal. App. 136, 7 P. (2d) 370. See also (1932) 18 CORN. L. Q. 71 to the effect that such demand is necessary unless the contract provides otherwise. No notice or demand is necessary where the contract so provides. See *Pacific Finance etc. Co. v. Pierce*, *supra* note 114.

¹⁹⁵ *P. J. Freiermuth Co. v. Faustino*, *supra* note 194.

¹⁹⁶ *Silverstin v. Kohler & Chase*, *supra* note 143.

¹⁹⁷ *Ibid.* See also (1933) 31 MICH. L. REV. 987; (1934) 47 HARV. L. REV. 884; (1934) 12 TENN. L. REV. 225.

Uniform Conditional Sales Act § 16, provides in part as follows: "Unless the

The usual ground of repossession is of course the buyer's default in the payment of the price.¹⁹⁸ Most conditional sale contracts provide numerous other grounds, however, for acceleration of the balance due and for repossession. For example, when a contract so provides, the seller may retake if he deems the financial condition of the buyer such as to endanger the seller's rights.¹⁹⁹ The seller must have reasonable ground to take advantage of this provision, however.²⁰⁰ The *Rochon* case²⁰¹ actually held that the seller's discovery of debts existing at the time the contract was made was not sufficient, although the buyer had stated in his application that he had no such debts. The court remarked that the buyer's financial condition had not changed. Nevertheless it certainly had changed so far as the seller's knowledge was concerned, and this would seem to be the important point. The seller may retake upon the buyer's transfer of the property,²⁰² or removal of the property from the county without the seller's consent,²⁰³ or if the buyer repudiates the contract,²⁰⁴ abandons the property,²⁰⁵ or fails to procure a release of attachment within a given time.²⁰⁶ It has not been decided whether the seller may by contract reserve the right to retake without default upon the buyer's part.²⁰⁷

Many conditional sale contracts of automobiles provide that all parts and accessories placed upon the car by the buyer shall become the property of the seller as security for the price. May the seller retake such added property upon the buyer's default? Upon the principle of accession, the seller without such contract provision might be entitled to retake as against the buyer, if the property were not readily severable,²⁰⁸ and *a fortiori* he may do so if the contract so provides.²⁰⁹ As against a

goods can be retaken without breach of the peace, they shall be retaken by legal process; but nothing herein shall be construed to authorize a violation of the criminal law."

¹⁹⁸ VOLD, SALES (1931) p. 287, n. 30.

¹⁹⁹ *Rogers Lamb Co. v. Coast Securities Co.* (1922) 58 Cal. App. 744, 209 Pac. 246 (If buyer financially involved or insolvent); *Andrews v. DeLorm*, *supra* note 23 (If the seller deems himself insecure); *Rochon v. Pacific Coast Mortgage Co.* (1931) 111 Cal. App. 298, 295 Pac. 364.

²⁰⁰ *Rochon v. Pac. Coast Mortgage Co.*, *supra* note 199.

²⁰¹ *Supra* note 199.

²⁰² *Teter v. Thompson*; *Andrews v. DeLorm*, both *supra* note 23.

²⁰³ *Crawford v. Meadows*, *supra* note 192; *Andrews v. DeLorm*, *supra* note 23.

²⁰⁴ *Rogers Lamb Co. v. Coast Securities Co.*, *supra* note 199 (without express contract provision).

²⁰⁵ *Ibid.* See also *supra* note 156.

²⁰⁶ *Morris v. Allen*, *supra* note 5; *King v. Cline*, *supra* note 53. See also *supra* notes 53-70.

²⁰⁷ *Cf. Magee v. Burt Motor Car Co.*, *supra* note 122 (where the contract so provided, but the court found the buyer to be in default). See also (1933) 11 N. C. L. Rev. 321; (1933) 12 *ibid.* 71.

²⁰⁸ See Note (1932) 12 B. U. L. Rev. 673; (1932) 7 IND. L. J. 507.

²⁰⁹ *Dersch v. Thomas* (1934) 138 Cal. App. (Supp.) 785, 30 P. (2d) 630.

conditional seller of accessories, however, it has been held that the seller of the car loses, both on the ground that the property (in this instance, tires) was severable, and that the conditional seller of the accessories retained title.²¹⁰ A different result would follow, of course, if there were grounds for estoppel of the seller of the accessories.²¹¹ It has been held that knowledge of the conditional sale contract of the car on the part of the seller of accessories may be sufficient to create such an estoppel if there has been a change of position in reliance.²¹² Where the seller of the car claims not against a conditional seller of the accessories but against one who purchased from the conditional buyer after the accessories had once been attached to the car, it has been held that the seller prevails, at least where the purchaser is on inquiry as to the conditional sale contract.²¹³ This result was reached even though the property (in this case a detachable truck body) was readily severable, on the ground that the contract provisions controlled over the principle of accession. Theoretically, the distinction is clear. The seller of the accessories never lost title, while the purchaser from the conditional buyer acquired only such title as the buyer had, under the terms of the contract.²¹⁴

Under ordinary circumstances repossession is not a rescission²¹⁵ and the seller after retaking need not return the payments made by the buyer.²¹⁶ The burden of proof, however, is upon the seller to show performance of all conditions necessary to his right to repossession before he may enforce a forfeiture.²¹⁷ Although the early decisions declared no

²¹⁰ D. Q. Service Corp. v. Securities etc. Co., *supra* note 77. See also *Hendy v. Dinkerhoff* (1880) 57 Cal. 3; *A. Meister & Sons Co. v. Harrison* (1922) 56 Cal. App. 679, 206 Pac. 106.

²¹¹ D. Q. Service Corp. v. Securities etc. Co., *supra* note 210.

²¹² *Ibid.* See also *Dersch v. Thomas*, *supra* note 209.

²¹³ *Ibid.* See also *A. Meister & Sons Co. v. Harrison*, *supra* note 210; (1932) 7 IND. L. J. 507.

²¹⁴ See (1932) 12 B. U. L. REV. 673.

²¹⁵ *Miller v. Steen* (1867) 34 Cal. 138; *Rayfield v. Van Meter*, *supra* note 125; *Dodge v. Carter*, *supra* note 95; *Hogan v. Anthony* (1917) 34 Cal. App. 24, 166 Pac. 861; *Hogan v. Anthony*, 52 Cal. App. 158, *supra* note 190; *Markus v. Lester* (1922) 59 Cal. App. 564, 211 Pac. 240. Cf. *Miller v. Steen* (1866) 30 Cal. 402; *Hogan v. Anthony* (1919) 40 Cal. App. 679, 182 Pac. 52.

²¹⁶ *Rayfield v. Van Meter*, *supra* note 125; *Bray v. Lowery* (1912) 163 Cal. 256, 124 Pac. 1004 (*dictum*); *Morrison v. Veach*, *supra* note 95; *Garrett v. Swanton*, *supra* note 5 (*dictum*); *L. A. Furniture Co. v. Hansen*, *supra* note 193; *Hogan v. Anthony*, 52 Cal. App. 158, *supra* note 190; *Markus v. Lester*, *supra* note 215; *Middlecamp v. Zumwalt*, *supra* note 117 (*dictum*). See also *Glock v. Howard & Wilson Colony Co.* (1898) 123 Cal. 1, 55 Pac. 713; *Oliver v. Santa Maria Gas Co.* (1927) 85 Cal. App. 616, 260 Pac. 333. Cf. *Miller v. Steen*, 30 Cal. 402, *supra* note 215; *Burr v. Gardella* (1921) 53 Cal. App. 377, 200 Pac. 493. See *Starr, loc. cit. supra* note 135.

²¹⁷ *Johnson v. Kaeser*, *supra* note 7 (*dictum*). See also *Miller v. Steen*, 30 Cal. 402, *supra* note 215; (1919) 8 CALIF. L. REV. 60.

forfeiture was involved since the buyer had no property right,²¹⁸ recent decisions tend to give relief against forfeiture under Civil Code, section 3275.²¹⁹ It would seem necessary to the seller's security, in view of the rapid depreciation of the type of property sold under conditional sale contracts, that he should have the right to retake without accounting for payments made.²²⁰ This also provides a simple procedure which (under ordinary circumstances) any layman may follow without the necessity of consulting attorneys and becoming involved in lawsuits.²²¹ The power of a court of equity to relieve against forfeiture aids the buyer (perhaps more in theory than in fact, however), and at the same time protects the seller by requiring the buyer to pay the full price.²²²

After the seller retakes, the buyer is entitled to possession upon making a tender of the price within a reasonable time,²²³ unless the contract expressly makes time of the essence.²²⁴ In an action by the seller for possession against the buyer's assignee, it has been held proper to render judgment for the seller conditional upon the defendant's failure to pay the balance due.²²⁵ This is, of course, in accordance with the trend to relieve not only the buyer but his transferee against forfeiture.²²⁶

Although the seller after repossession may not ordinarily obtain the price, the court has held that the seller may sue for the reasonable value

²¹⁸ See *supra* note 108.

²¹⁹ See *supra* note 109.

²²⁰ Magill, *loc. cit. supra* note 136; Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid* (1931) 40 YALE L. J. 1013, 1031; Note (1929) 29 COL. L. REV. 960; (1933) 8 IND. L. J. 501. Cf. Ackerman, *The Conditional Sales Act* (1915) 10 BENCH & BAR (N.S.) 356; Horack, *loc. cit. supra* note 135; Cruz, *The Validity of the Conditional Sale in Civil Law* (1930) 4 TULANE L. REV. 531; (1925) 14 CALIF. L. REV. 67; (1932) 17 ST. LOUIS L. REV. 143.

²²¹ "Above all things, it (business) abhors the necessity of going to court."

Isaacs, *The Economic Advantages and Disadvantages of the Various Methods of Selling Goods on Credit* (1923) 8 CORN. L. Q. 199, 206.

See also Magill, *loc. cit. supra* note 136.

²²² Cf. *Miller v. Modern Motor Car Co.*, *supra* note 6; (1930) 18 CALIF. L. REV. 681.

²²³ *Miller v. Steen*, 30 Cal. 402, *supra* note 215; *Miller v. Steen*, 34 Cal. 138, *supra* note 215; *Liver v. Mills*, *supra* note 193 (*dictum*). See also *Hegler v. Eddy*, *supra* note 5; *Morris v. Allen*, *supra* note 5; *Wiley B. Allen v. Wood*, *supra* note 5. Cf. *Middlecamp v. Zumwalt*, *supra* note 117.

In many states the buyer has been given a statutory right to redeem. See 2 WILLISTON, *op. cit. supra* note 16, § 579; Note (1933) 43 YALE L. J. 323; (1933) 47 HARV. L. REV. 128; (1934) 18 MINN. L. REV. 429; (1933) 11 N. Y. U. L. Q. REV. 281.

²²⁴ *Miller v. Steen*, 30 Cal. 402, *supra* note 215 (*dictum*); *Liver v. Mills*, *supra* note 193 (*dictum*); *Silverthorne v. Simon*, *supra* note 159. See also *Magee v. Burt Motor Car Co.*, *supra* note 122; *McConnell v. Redd*, *supra* note 5. Cf. *Miller v. Modern Motor Car Co.*, *supra* note 6.

²²⁵ *Martin v. Hollins* (1931) 118 Cal. App. 561, 5 P. (2d) 899, noted in (1932) 21 CALIF. L. REV. 60. Cf. *Liver v. Mills*, *supra* note 193.

²²⁶ See *supra* note 109.

of the buyer's use on *quantum meruit*.²²⁷ Obviously this remedy is useful only where the buyer has paid an insubstantial amount or nothing at all. It is doubtful whether the seller may sue for breach of contract and obtain the difference between the price and the value of the property,²²⁸ and certainly he cannot obtain the agreed rental of the property under the lease type of conditional sale.²²⁹ On the other hand, the seller is not restricted to a claim for damages rather than the price.²³⁰ There would seem no sufficient reason why the seller should not be allowed to sue for breach of contract the same as for breach of any other contract of sale.²³¹

It is settled that the seller without special provision in the contract may retake the property, resell and recover any deficiency from the buyer.²³² This result was originally reached on the theory that the seller had a lien enforceable by pledgee's sale.²³³ Although this theory of lien or pledge has been thoroughly discredited,²³⁴ the rule still holds.²³⁵ The resale really amounts, of course, to a foreclosure on the part of the seller.²³⁶ It is clear that if any method of sale is to be followed, it must be the procedure for sale of a pledge;²³⁷ no other statutory procedure would seem applicable. Nevertheless, one decision held, upon grounds that are far from clear, that a sale apparently following such procedure was invalid.²³⁸ This decision makes the resale remedy a hazardous one for the seller at present, unless, of course, the contract provides for the

²²⁷ *Burr v. Gardella*, *supra* note 216 (opinion of Supreme Court in denying hearing). See also (1929) 29 COL. L. REV. 960, 1123.

²²⁸ *Burr v. Gardella*, *supra* note 216 (opinion of Supreme Court in denying hearing). But see *Cocores v. Assimopoulos*, *supra* note 125. *Cf.* *Rayfield v. Van Meter*, *supra* note 125; *Murphy v. Hellman Comm'l etc. Bank*, *supra* note 125; *Burr v. Gardella*, *supra* note 216 (opinion of District Court of Appeals).

²²⁹ *Burr v. Gardella*, *supra* note 216 (opinion of Supreme Court).

²³⁰ *Bagwill v. Spence* (1932) 127 Cal. App. 263, 15 P. (2d) 810.

²³¹ *Cf.* Note (1929) 29 COL. L. REV. 960.

²³² *Matteson v. Equitable etc. Co.*, *supra* note 7; *Jeanson v. Zangl*, *supra* note 125. See also *Bagwill v. Spence*, *supra* note 230 (*dictum*); *General Motors Acceptance Corp. v. Brown*, *supra* note 125. *Cf.* *Covington v. Lewis*; *Maddux v. Mora*, both *supra* note 125.

See *Williston*, *loc. cit.* *supra* note 1; (1932) 17 MINN. L. REV. 66. *Cf.* *Cooper*, *loc. cit.* *supra* note 162.

²³³ See *Matteson v. Equitable etc. Co.*, *supra* note 7.

²³⁴ See cases cited *supra* note 174. See also *Simons v. Hill Street etc. Co.* (1924) 69 Cal. App. 129, 230 Pac. 955. Compare CAL. CIV. CODE § 2980, set out *infra* note 316. A good discussion of this point is found in Note (1932) 17 MINN. L. REV. 66, 80.

²³⁵ See *Jeanson v. Zangl*, *supra* note 125.

²³⁶ See *infra* note 248.

²³⁷ *Matteson v. Equitable etc. Co.*, *supra* note 7. See also *Alexander v. Walling*, *supra* note 7.

²³⁸ *Frankel v. Rosenfield*, *supra* note 125. Apparently California is not the only state where a similar uncertainty exists. See Note (1932) 17 MINN. L. REV. 66.

right of resale and for the method thereof.²³⁹ A provision for such resale does not make a conditional sale contract into a mortgage,²⁴⁰ at least not unless such resale is compulsory.²⁴¹ Since a resale is not ordinarily obligatory upon the seller,²⁴² the availability of this remedy puts the buyer at the seller's mercy. The seller may retake and then either keep the property if he decides it is worth more than the balance due or resell and sue for a deficiency, if he decides that it is worth less.²⁴³ Apparently the seller need not at the time of repossession give the buyer notice of his intent to resell on the buyer's account.²⁴⁴ Thus it may be argued that to protect the buyer, the resale by the seller should be compulsory, if the seller is ever to be allowed to recover a deficiency.²⁴⁵ On the other hand, if the buyer has a substantial equity, he should be able to find a purchaser for it.

Apparently the seller may not obtain a decree for strict foreclosure,²⁴⁶ although retaking does in itself constitute such foreclosure.²⁴⁷ Although allowing the seller to resell and obtain a deficiency is in substance a foreclosure by sale,²⁴⁸ he is neither obliged to make such resale,²⁴⁹ nor to foreclose the buyer's interest by court action.²⁵⁰ Indeed there are no decisions as to whether the seller may be allowed to foreclose by court action and obtain a deficiency.²⁵¹

²³⁹ See *Commercial Discount Co. v. Howard*, *supra* note 125; *General Motors Acceptance Corp. v. Brown*, *supra* note 125. The court in *Frankel v. Rosenfield*, *supra* note 125, pointed out that the contract did not provide for resale.

²⁴⁰ *Perkins v. Mettler* (1899) 126 Cal. 100, 58 Pac. 384; *Bice v. Harold L. Arnold, Inc.*, *supra* note 159; *McConnell v. Redd*, *supra* note 5. See also *Rodgers v. Bachman*, *supra* note 36. *Cf.* *Van Allen v. Francis*, *supra* note 95; *Lawson, loc. cit. supra* note 162.

²⁴¹ *Palmer v. Howard* (1887) 72 Cal. 293, 13 Pac. 858. See also *Bice v. Harold L. Arnold Inc.*, *supra* note 159; *Hannin v. Fisher* (1935) 81 Cal. App. Dec. 189.

²⁴² *Rayfield v. Van Meter*, *supra* note 125; *Magee v. Burt Motor Car Co.*, *supra* note 122; *Calif. Restaurant Equipment Co. v. Weber*, *supra* note 6. *Cf.* *Palmer v. Howard*, *supra* note 241.

²⁴³ See *Hale, The Uniform Conditional Sales Act* (1922) 2 ORE. L. REV. 1; *McDonald, Conditional Sales in Tennessee* (1925) 2 A. B. REV. 141; *Note* (1932) 17 MINN. L. REV. 66.

²⁴⁴ *Maddux v. Mora*, *supra* note 125. *Cf.* *Jeanson v. Zangl*, *supra* note 125.

²⁴⁵ Many statutes require such a resale. See, for example, 2 WILLISTON, *op. cit. supra* note 16, § 579; *Pharr, Installment Sales in Tennessee* (1933) 12 TENN. L. REV. 12.

The Uniform Conditional Sales Act § 19, provides for compulsory resale where the buyer has paid at least fifty per cent of the price.

²⁴⁶ *Youmashef v. Weisgerber*, *supra* note 125.

²⁴⁷ See (1932) 17 MINN. L. REV. 66.

²⁴⁸ See *supra* note 236.

²⁴⁹ See *supra* note 242.

²⁵⁰ *McConnell v. Redd*, *supra* note 5; *Andrews v. DeLorm*, *supra* note 23. See also *Rayfield v. Van Meter*, *supra* note 125; *People's Bank v. Porter*, *supra* note 7. Compare *Hill, Conditional Sales in Maine* (1925) 1 A. B. REV. 275.

²⁵¹ *Cf.* *Youmashef v. Weisgerber*, *supra* note 125.

After repossession by the seller, his right to resort to other security given for the buyer's performance will necessarily depend upon his right to recover a money judgment against the buyer.²⁵² On the election doctrine, the seller after repossession will ordinarily have no right to sue for the price and hence no right to use the security.²⁵³ Where, however, the seller is allowed to sue for a deficiency after resale, he may use the security to apply upon such deficiency.²⁵⁴ A contract provision giving the seller the right to use the security after repossession is probably not enforceable with regard to the whole balance of the price due.²⁵⁵ The seller after first using the security may later retake the property, if the contract so provides, at least where the buyer's obligation has not been fully satisfied.²⁵⁶ Security for the buyer's performance given by a third person is in the position of a surety and is released by any act which would discharge a surety.²⁵⁷

Fraud on the part of the buyer does not justify the seller's repossession.²⁵⁸ The seller must either rescind, which would apparently involve a return of the payments, or affirm the contract and sue for damages, or else seek other remedies under the terms of the contract.²⁵⁹

The seller's failure to deliver all of the property contracted for or to deliver the property specified by the contract prevents him from retaking the property that has been delivered to the buyer,²⁶⁰ unless the seller returns the payments made.²⁶¹ Apparently the seller may obtain *pro rata* the price for part of the property in spite of the failure of his title as to the balance of the property.²⁶² Where the seller has been guilty of fraud, he cannot retake without restoring the consideration.²⁶³

REMEDIES OF THE BUYER

Ordinarily the seller's retaking does not constitute a rescission and the buyer is not entitled to recover the payments made.²⁶⁴ This is true

²⁵² Parke etc. Co. v. White River Lumber Co.; Jeanson v. Zangl, both *supra* note 125. Cf. Murphy v. Hellman etc. Comm'l Bank, *supra* note 125.

²⁵³ See Covington v. Lewis; Frankel v. Rosenfield, both *supra* note 125. See also *supra* note 187a.

²⁵⁴ Jeanson v. Zangl, *supra* note 125. See also Muncy v. Brain, *supra* note 125.

²⁵⁵ *Ibid.* See Note (1929) 29 COL. L. REV. 1123.

²⁵⁶ See authorities cited *supra* note 255.

²⁵⁷ Parke etc. Co. v. White River Lumber Co. (1896) 110 Cal. 658, 43 Pac. 202; Murphy v. Hellman Comm'l etc. Bank; Frankel v. Rosenfield, both *supra* note 125.

²⁵⁸ Rochon v. Pacific Coast Mortgage Co., *supra* note 199.

²⁵⁹ *Ibid.* (*dictum*).

²⁶⁰ Heine Piano Co. v. Crepin (1904) 142 Cal. 609, 76 Pac. 493; Parker v. Funk, *supra* note 11.

²⁶¹ See *dicta* in authorities cited *supra* note 260.

²⁶² King v. Moreland, *supra* note 172.

²⁶³ Whiting v. Squeglia, *supra* note 90. Cf. authorities cited *infra* notes 265 and 273.

²⁶⁴ See *supra* note 215, 216.

even though the seller has been guilty of fraud, provided the buyer has failed to rescind.²⁶⁵ For the seller's fraud or upon failure of consideration, the buyer may rescind and recover the payments made,²⁶⁶ provided he does so promptly,²⁶⁷ at the same time returning the property.²⁶⁸ Where the seller retakes wrongfully, it has been said that the buyer may recover his payments without a formal rescission.²⁶⁹ The buyer's recovery upon rescission is of the payments less, not the reasonable rental value, but the reasonable value of the use to the buyer,²⁷⁰ which may be a very different amount. Of course the seller cannot deduct the value of such use, if he fails to put the matter in issue.²⁷¹ Rescission by agreement gives the buyer whatever rights and remedies the agreement may provide for.²⁷² The buyer may not rescind while he is in default.²⁷³ The buyer is entitled to interest upon the money paid the seller only from the date of rescission.²⁷⁴

The buyer may, of course, sue for damages for the seller's breach of

²⁶⁵ Hogan v. Anthony, 34 Cal. App. 24, *supra* note 215; Hogan v. Anthony, 52 Cal. App. 158, *supra* note 190. See also authorities cited *infra* note 273. *Cf.* Whiting v. Squeglia, *supra* note 90.

²⁶⁶ Kirtley v. Perham, *supra* note 36 (failure of consideration); Knight v. Bentel (1919) 39 Cal. App. 502, 179 Pac. 406 (fraud); Hogan v. Anthony, 40 Cal. App. 679, *supra* note 215 (fraud); Pendell v. Warren (1925) 76 Cal. App. 33, 243 Pac. 707 (fraud); Pendell v. Warren (1929) 101 Cal. App. 407, 281 Pac. 658 (fraud); Pacific Finance Corp. v. McGowan (1930) 105 Cal. App. 216, 287 Pac. 139 (fraud). See also Whiting v. Squeglia, *supra* note 90 (fraud).

²⁶⁷ Knight v. Bentel, *supra* note 266; Hogan v. Anthony, 52 Cal. App. 158, *supra* note 190; Markus v. Lester, *supra* note 215. *Cf.* Stewart v. Hollingsworth (1900) 129 Cal. 177, 61 Pac. 936.

²⁶⁸ Knight v. Bentel, *supra* note 266; Williams v. Lowenthal, *supra* note 174.

²⁶⁹ Bray v. Lowery, *supra* note 216; Hesse v. Comm'l Credit Co., *supra* note 113. *Cf.* cases cited *supra* note 265. This rule has been criticised. See Williston, *loc. cit. supra* note 1.

²⁷⁰ Bray v. Lowery, *supra* note 216; Pendell v. Warren, *supra* note 266.

²⁷¹ Hesse v. Comm'l Credit Co., *supra* note 113; Pendell v. Warren, 101 Cal. App. 407, *supra* note 266; Starr Piano Co. v. Martin (1932) 119 Cal. App. 642, 7 P. (2d) 383.

²⁷² Sauble v. Gary etc. Agency (1922) 56 Cal. App. 606, 206 Pac. 141 (return of payments on resale); Green v. Darling (1925) 73 Cal. App. 700, 239 Pac. 70 (return of payments); Miles v. Zadow (1927) 87 Cal. App. 406, 262 Pac. 396 (surplus on resale). See also Francisco v. Schleischer, *supra* note 103. *Cf.* (1933) 8 IND. L. J. 501.

²⁷³ Russell v. Penniston (1921) 55 Cal. App. 492, 203 Pac. 813. In this case the buyer alleged fraud but on appeal relied on implied warranty of title. The court pointed out that a party in default could neither sue on the contract nor rescind.

In decisions dealing with land sale contracts a distinction is made between the seller's breach of contract, where a buyer in default is not allowed to rescind, and the seller's fraud, where the buyer's default is held immaterial. See Graham v. Los Angeles-First National Trust and Savings Bank (1935) 89 Cal. Dec. 454, 43 P. (2d) 543; 25 CAL. JURIS. (1926) 716, and Supplements, and cases there cited. *Cf.* for example, Bryan v. Baymiller (1928) 95 Cal. App. 481, 272 Pac. 1106 (citing only Russell v. Penniston, *supra*). See also authorities cited *supra* note 265; Corbin, *loc. cit. supra* note 220. Compare authorities cited *supra* note 263.

²⁷⁴ Knight v. Bentel, *supra* note 266.

contract,²⁷⁵ but only where the buyer is not himself in default.²⁷⁶ Where the buyer sues for breach, it is error to allow him only the amount paid on the contract.²⁷⁷ No decisions have been found upon the measure of damages for the seller's breach.²⁷⁸

The conflict between the old and the new theories of the nature of a conditional sale appears again in the question whether implied warranties exist under a conditional sale contract. The old Civil Code, section 1764, repealed in 1931, provided: "Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty."

Numerous exceptions were made in the statute,²⁷⁹ however, and decisions involving situations covered by these exceptions are to be distinguished.²⁸⁰ On the theory of executory sale, most decisions held that there were no implied warranties under a conditional sale contract,²⁸¹ but other decisions allowed recovery.²⁸² One decision attempted to establish the distinction that the buyer may recover special damages, but not general damages for breach of warranty on the ground that the buyer is not entitled to the difference between the price and the value until he becomes complete owner.²⁸³ In the first place, this measure of damages seems incorrect; the buyer should get the benefit of his bargain. Later decisions use as a measure of damages the difference between the actual value of the property and the value it would have had if there had been no breach of warranty.²⁸⁴ This attempted distinction is not generally followed.²⁸⁵

There seems no valid reason why the buyer should not have the benefit of implied warranties.²⁸⁶ He gives a consideration and is en-

²⁷⁵ *Hogan v. Anthony*, 52 Cal. App. 158, *supra* note 190 (*dictum*); *Starr Piano Co. v. Martin*, *supra* note 271.

²⁷⁶ *Russell v. Penniston*, *supra* note 273.

²⁷⁷ *Starr Piano Co. v. Martin*, *supra* note 271.

²⁷⁸ For measure of damages for breach of warranty, see *infra* note 284.

²⁷⁹ See old CAL. CIV. CODE §§ 1675-1771.

²⁸⁰ See, for example, *American Soda Fountain Co. v. Martin* (1929) 100 Cal. App. 43, 279 Pac. 680 (under old CAL. CIV. CODE § 1767).

²⁸¹ *Wardlow v. Sanderson* (1923) 190 Cal. 417, 213 Pac. 35; *Silverthorne v. Simon*, *supra* note 159 (*dictum*, since breach of warranty held waived; also contract provided against warranties); *Lacy v. Greer-Robbins Co.* (1935) 80 Cal. App. Dec. 715, 41 P. (2d) 372. See also *Hogan v. Anthony*, 52 Cal. App. 158, *supra* note 190.

²⁸² *Hot-N-Cold Corp. v. Todd* (1930) 105 Cal. App. 718, 288 Pac. 687; *Starr Piano Co. v. Martin*, *supra* note 271 (warranty probably express); *Williams v. Lowenthal*, *supra* note 174 (*dictum*). See also *People's Bank v. Porter*, *supra* note 7; *King v. Moreland*, *supra* note 172.

²⁸³ *Lichtenthaler v. Samson Iron Wks.* (1916) 32 Cal. App. 220, 162 Pac. 441.

²⁸⁴ *Starr Piano Co. v. Martin*, *supra* note 271. See old CAL. CIV. CODE §§ 3313-3314. See also *Harron, Riccard & McCone v. Wilson, Lyon & Co.* (1906) 4 Cal. App. 488, 88 Pac. 512.

²⁸⁵ (1934) 14 B. U. L. REV. 853.

²⁸⁶ 2 WILLISTON, *op. cit. supra* note 16, § 607; (1934) 14 B. U. L. REV. 853.

titled to complete ownership upon payment of the price.²⁸⁷ The Sales Act enacted in 1931 allows implied warranties in "contracts to sell or a sale."²⁸⁸ Although no decisions have dealt with contracts made after 1931, it would seem clear that the rule has been changed.²⁸⁹

Of course an express warranty in a conditional sale contract will be given effect.²⁹⁰ Where a warranty is allowed, the buyer may rescind,²⁹¹ providing he does so promptly,²⁹² or he may sue for the breach.²⁹³ The buyer cannot do either, however, if he himself is in default.²⁹⁴

Upon the seller's wrongful repossession, the buyer may use a possessory action,²⁹⁵ or sue for conversion.²⁹⁶ If there is no re-delivery in the first action, the buyer may sue in a second separate action for conversion.²⁹⁷ The measure of damages for such conversion is the value of the buyer's special property interest only—that is, the difference between the market value of the property at the time of the conversion and the balance of the price due.²⁹⁸ Where the plaintiff was the assignee of the original buyer, it was held that he was entitled only to the amounts paid by him to the seller.²⁹⁹ The trial court had held that the plaintiff was entitled to the full value of the property, without deduction. While a modification of the trial court's opinion was obviously proper, the plaintiff should have recovered according to the ordinary measure of damages, since presumably he had to pay to the buyer the value of his equity.

²⁸⁷ See authorities cited *supra* note 286.

²⁸⁸ CAL. CIV. CODE § 1733.

²⁸⁹ See Note (1933) 7 SO. CALIF. L. REV. 96; (1928) 28 COL. L. REV. 957. Cf. (1916) 1 CORN. L. Q. 126.

Uniform Conditional Sales Act § 2, gives the buyer the benefit of warranties, express and implied. See Bogert, *loc. cit. supra* note 43; Burdick, *Codifying the Law of Conditional Sales* (1918) 18 COL. L. REV. 103.

²⁹⁰ California Press Mfg. Co. v. Stafford Packing Co. (1923) 192 Cal. 479, 221 Pac. 345 (*dictum*); Starr Piano Co. v. Martin, *supra* note 271.

²⁹¹ Hot-N-Cold Corp. v. Todd, *supra* note 282.

²⁹² Hogan v. Anthony, *supra* note 190.

²⁹³ Starr Piano Co. v. Martin, *supra* note 271.

²⁹⁴ Russell v. Penniston, *supra* note 273.

²⁹⁵ Redd v. Garford Motor Truck Co., *supra* note 112a; Davies-Overland Co. v. Blenkiron, *supra* note 7; Miller v. Modern Motor Car Co., *supra* note 6.

²⁹⁶ Webb v. M. J. Brandenstein & Co. (1928) 89 Cal. App. 499, 264 Pac. 1102; Lindsey v. Butte, *supra* note 114; Bunnell v. Baker (1930) 104 Cal. App. 313, 286 Pac. 1090; Dupont v. Allen, *supra* note 143; Rochon v. Pacific Coast Mtge. Co., *supra* note 199; Rathbun v. Hill, *supra* note 11. See also (1932) 18 CORN. L. Q. 71. Cf. Brice v. Walker, *supra* note 129.

²⁹⁷ Carvell v. Weaver, *supra* note 6.

²⁹⁸ Lindsey v. Butte, *supra* note 114; Bunnell v. Baker, *supra* note 296; Dupont v. Allen, *supra* note 143. See also (1932) 18 CORN. L. Q. 71.

²⁹⁹ Rathbun v. Hill, *supra* note 11.

REFUSAL TO EXTEND CONDITIONAL SALE REMEDIES TO THE
LOAN SITUATION

It is significant that the courts have consistently refused to extend the rights and remedies of the conditional seller to a lender under a loan masked as a conditional sale.³⁰⁰ Such a transaction is held to be merely a chattel mortgage.³⁰¹ It has thus become as true that "not at first a conditional sale, never a conditional sale" as that "once a mortgage, always a mortgage." Although most recent decisions have involved the rights of third persons,³⁰² the leading decisions involved only the parties to the transaction.³⁰³ These decisions may be interpreted to mean that the rights and remedies of the seller which are peculiar to the conditional sale transaction and which give the seller an advantageous position in order to protect his security, are economically undesirable to be given an ordinary lender as against an ordinary borrower. The chief reason may well be greater inequality of bargaining power in the loan situation, but the greater need for security in order to make conditional sales possible is surely an important factor. The technical distinction made by the decisions is extremely narrow. It has been held that where the contract is originally one of conditional sale and the seller assigns to a lender of the balance due, the lender succeeds to the seller's rights,³⁰⁴ but that if there is no assignment by the seller to the lender and a new and subsequent conditional sale contract is drawn up between the lender and the borrower, the contract is only a

³⁰⁰ *Blodgett v. Reinschild* (1922) 56 Cal. App. 728, 206 Pac. 674; *Bonestall v. Western Automotive Finance Corp.* (1924) 69 Cal. App. 719, 232 Pac. 734; *Commercial Securities Corp. Consolidated v. Lindsay etc. Co.* (1928) 92 Cal. App. 91, 267 Pac. 766; *Booth v. People's Finance Co.* (1932) 124 Cal. App. 131, 12 P. (2d) 50; *Mercantile Acceptance Corp. v. Pioneer etc. Co.* (1932) 124 Cal. App. 593, 12 P. (2d) 988; *Wehrle v. Marks* (1933) 134 Cal. App. 141, 25 P. (2d) 51; *Abdallah v. Jacob* (1935) 80 Cal. App. Dec. 568, 40 P. (2d) 918. See also *Reeves, loc. cit. supra* note 56; *Starr, op. cit. supra* note 135, at 183; (1929) 2 So. CALIF. L. REV. 502; (1934) 47 HARV. L. REV. 534.

³⁰¹ *Blodgett v. Reinschild*; *Bonestall v. Western Automotive Finance Corp.*; *Commercial Securities Corp. Consolidated v. Lindsay etc. Co.*; *Mercantile Acceptance Corp. v. Pioneer etc. Co.*; *Wehrle v. Marks*; *Abdallah v. Jacob*, all *supra* note 300.

³⁰² *Commercial Securities Corp. Consolidated v. Lindsay etc. Co.*; *Mercantile Acceptance Corp. v. Pioneer etc. Co.*; *Wehrle v. Marks*; *Abdallah v. Jacob*, all *supra* note 300.

³⁰³ *Blodgett v. Reinschild*; *Bonestall v. Western Automotive Finance Corp.*, both *supra* note 300. See also *Houser & Haines Mfg. Co. v. Hargrove, supra* note 34; *Hogan v. Anthony, supra* note 215. *Cf. Houser & Haines Mfg. Co. v. Hargrove*, 6 Cal. Unrep. 384, *supra* note 34.

³⁰⁴ *Haskett v. Hartwick, supra* note 95; *Coachella Valley State Bank v. Wilson, supra* note 7. See *Greene v. Carmichael, supra* note 95; *Kinsey v. Ryan, supra* note 67; (1934) 9 WASH. L. REV. 143, 183.

Banks in making modernization loans under the terms of Title 1 of the National Housing Act, use conditional sale forms but carefully follow this distinction by taking an assignment from the original seller of the supplies to the borrower. The

chattel mortgage.³⁰⁵ This distinction seems without sound economic foundation except possibly to prevent a cloak for usury.³⁰⁶ In any case where the contract was originally a *bona fide* conditional sale, the lender should be given the rights of a seller, as to the balance advanced. The evils aimed at would seem to exist only where the original transaction is merely a loan and not an actual sale.

CONCLUSION

The economic function of the conditional sale would seem to be this: It makes possible mass consumption of goods for use, by persons who have no established credit rating and are unable to pay cash.³⁰⁷ Obviously the seller has an absolute need for reliable security before he can afford to make sales involving such great credit risk.³⁰⁸ His reserved title is not effective as security, unless he may enforce it in a summary, simple, and inexpensive manner.³⁰⁹ Repossession and forfeiture have been allowed by the courts as such a remedy. Obviously the seller is entitled to no more than the price, but the difficulty is to find an efficient and inexpensive method of foreclosure.³¹⁰ The Uniform Conditional Sales Act seeks to provide such a method where the buyer has paid a substantial proportion of the price,³¹¹ and the act is generally favored by academic opinion.³¹² Only eight states and Alaska have

conditional sale contract forms furnished by the bank provide for later application for a modernization loan and for assignment of the contract to the bank upon its approval of the application.

³⁰⁵ *Blodgett v. Reinschild; Mercantile Acceptance Corp. v. Pioneer etc. Co.; Ahdallah v. Jacob*, all *supra* note 300.

³⁰⁶ *Cf. Blodgett v. Reinschild*, *supra* note 300; (1929) 2 So. CALIF. L. REV. 502.

³⁰⁷ See LLEWELLYN, *op. cit. supra* note 2, at 704; Wilson, *Recent Developments in the Law of Conditional Sales* (1932) 66 U. S. L. REV. 421; Starr, *loc. cit. supra* note 135; Note (1923) 36 HARV. L. REV. 740.

³⁰⁸ VOLD, SALES (1931) p. 283; Corbin, *loc. cit. supra* note 220. See also *supra* note 180.

³⁰⁹ And, of course, unless he may maintain it against third persons, including creditors and transferees of the buyer. See Isaacs, *loc. cit. supra* note 221; Magill, *loc. cit. supra* note 136.

³¹⁰ See Reeves, *loc. cit. supra* note 56; Hanna, *The Nebraska Law of Conditional Sales* (1931) 10 NEB. L. BULL. 141; (1929) 29 COL. L. REV. 960.

³¹¹ See *supra* note 245.

For a comprehensive discussion of the Uniform Act, see BOGERT, COMMENTARIES ON CONDITIONAL SALES (1924) 2a U. L. A.

³¹² 2 WILLISTON, *op. cit. supra* note 16, § 579c; Bogert, *loc. cit. supra* note 43; Burdick, *loc. cit. supra* note 289; Horack, *The Uniform Conditional Sales Act in Iowa* (1920) 5 IOWA L. BULL. 129; Mueller, *Conditional Sales in Pennsylvania Since the Adoption of the Sales Act* (1924) 72 U. OF PA. L. REV. 123; Reeves, *loc. cit. supra* note 56; Hanna, *loc. cit. supra* note 310; Notes (1926) 14 CALIF. L. REV. 417; (1932) 20 CALIF. L. REV. 206; (1933) 22 CALIF. L. REV. 114; (1923) 36 HARV. L. REV. 740; (1934) 18 MINN. L. REV. 812; (1934) 6 ROCKY MOUNTAIN L. REV. 221. See also Bogert, *The Evolution of Conditional Sales Law in New York* (1923) 8 CORN. L. Q. 303. *Cf. Note* (1932) 17 ST. LOUIS L. REV. 143.

adopted the Act,³¹³ although most states have some statutory provisions intended to protect the buyer from oppression by the seller.³¹⁴ Probably no foreclosure method can furnish a satisfactory remedy. It would seem preferable to allow the seller to use, at his option, either strict foreclosure by repossession, or resale and suit for a deficiency, although the advantage thus given may occasionally result in injustice to the buyer, rather than to make such sales economically impossible by denying such remedies. This argument involves two assumptions. The first, difficult of proof, is that the requirements of the Uniform Act would materially diminish the usefulness of the conditional sale device. The second, more suited for debate in another forum, is that conditional sales for mass consumption are economically desirable.

It should be noted that the recording requirement of the Uniform Act places a triple burden of expense, red tape, and publicity upon the transaction without being of much practical value,³¹⁵ except with regard to fixtures intended to be attached to real property.³¹⁶ The registration requirements with regard to automobiles, the most valuable single articles widely sold under conditional sale contracts, suffice to protect the rights of the seller and of unsuspecting third persons.³¹⁷

The law of conditional sales in California has been purely a development of case law, without statutory interference. While a statute might do much to clarify and simplify the remedies of the parties, no essential change from the case law seems necessary or desirable.

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³¹³ 2 U. L. A., 1934 Supp., p. 4.

³¹⁴ *Ibid.*; 2 WILLISTON, *op. cit. supra* note 16 § 579; (1934) 18 MINN. L. REV. 429. See also *supra* note 223.

³¹⁵ See GLENN, CREDITORS' RIGHTS AND REMEDIES (1915) p. 169; Isaacs, *loc. cit. supra* note 221; Magill, *loc. cit. supra* note 136; Notes (1932) 21 CALIF. L. REV. 51; (1923) 36 HARV. L. REV. 740; (1932) 17 ST. LOUIS L. REV. 143. *Cf.* Reeves, *loc. cit. supra* note 56; (1926) 20 ILL. L. REV. 708; WILLISTON, *op. cit. supra* note 16 § 327.

³¹⁶ See (1923) 22 CALIF. L. REV. 114; (1934) 18 MINN. L. REV. 812.

Conditional sale contracts upon animate chattels or upon mining machinery must be recorded, or the conditional sales contract "shall be void as to the lien of the seller" against bona fide purchasers and creditors without notice. See CAL. CIV. CODE § 2980. *Query*, as to the effect upon this provision, if any, of the decisions holding the seller has not a lien but title. See *supra* notes 174, 234.

Conditional sales of railroad or street railway rolling stock must likewise be recorded by filing with the Secretary of State. See CAL. GEN. LAWS, Act 6475.

³¹⁷ See CAL. VEHICLE ACT § 45.