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Credit Transactions -- Conditional Sale Contracts -- Default -- Remedies of Buyer and Seller -- Liability of Buyer on Check or Note Given as Down Payment or Installment Payment

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to own and operate racing establishments wherein pari-mutuel betting is permitted could not be declared unconstitutional as violative of Section 7, Section 31, or any other section of the North Carolina Constitution. If this contention is accepted, then the responsibility for permitting dog and horse racing with its counterpart, pari-mutuel betting, to infiltrate the North Carolina scene rests solely upon the General Assembly.[50]

ROBERT D. LEWIS.

Credit Transactions—Conditional Sale Contracts—Default—Remedies of Buyer and Seller—Liability of Buyer on Check or Note Given as Down Payment or Installment Payment

In 1893 the North Carolina Supreme Court remarked that conditional sale contracts "are becoming greater in frequency and general interest. They are principally used in connection with the sale of sewing-machines, pianos, furniture, soda-fountains, rolling stock on railroads, and the like."[1] Today the frequency of such contracts is still increasing, and the list of products sold under them must be enlarged to include a variety of recently developed chattels, such as automobiles, television sets, home appliances, adding machines, and factory equipment.

A typical form of conditional sale contract involves the credit sale of personal property, where the buyer usually makes a down payment and undertakes, often by a promissory note, to pay the balance of the price in installments. Under the contract the buyer receives immediate possession of the property, and the seller retains title as security together with the accompanying right to repossession and resale in case of default,[2] but the buyer has the power to gain complete title by making full payment. It is explained that the seller's *retention* of title distinguishes this contract from a purchase money chattel mortgage where complete title is vested in the buyer who immediately *reconveys* security title to the seller.[3]

[50] For an excellent résumé of racetrack operations in North Carolina, see *Raleigh News and Observer,* February 14 through 18, 1951, a feature story in five chapters by Jim Chaney.

[1] Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 378, 383, 17 S. E. 174, 175 (1893). The instrument that caused this comment was entitled a "lease," requiring periodic "rentals" until title to a "soda water machine" was conveyed upon full payment, but the court held it was a conditional sale contract.

[2] Earlier notes have stated that in North Carolina the secured party under a conditional sale contract has the right to repossession *before* default, unless the parties manifest a contrary intention by agreement or conduct, and all the writers suggest that this is undesirable. Notes, 21 N. C. L. REV. 387 (1943); 12 N. C. L. REV. 254 (1934); 11 N. C. L. REV. 321 (1933).

[3] Frick & Co. v. Hilliard, 94 N. C. 117, 119 (1886); Gaul v. Goldburg Furniture & Carpet Co., 85 Misc. 426, ———, 147 N. Y. Supp. 516, 518 (Sup. Ct. 1914); Bogert, *The Evolution of the Conditional Sales Law in New York,* 8 CORNELL L. Q. 303, 304 (1923).

However, the North Carolina court, in construing N. C. LAWS 1883, c. 342,

After default, the conditional sale contract gives rise to legal questions (1) as to the buyer's right to recover down payments or installment payments, (2) as to the seller's liability for a wrongful repossession or wrongful conduct while retaking the property sold, and (3) as to the seller's remedies: suit on the contract; repossession and disposition of the security; and suit for a deficiency judgment after repossession and a resale of the property.

According to the weight of authority, the defaulting buyer cannot recover any of the payments made prior to a proper repossession,[4] unless the seller has rescinded the agreement.[5] Otherwise, "it would be offering

later N. C. GEN. STAT. § 47-23 (1950), which provided for the registration of conditional sale contracts "with the same legal effect as . . . chattel mortgages," has stripped this analytical distinction of significance, indicating that conditional sale contracts and chattel mortgages are of identical legal effect. Observer Mfg. Co. v. Little, 175 N. C. 42, 43, 94 S. E. 526, 527 (1917). For a recent restatement, see Mitchell v. Battle, 231 N. C. 68, 69, 55 S. E. 2d 803 (1949): "Conditional sales contracts in which title is retained as security for the debt are treated here as chattel mortgages . . . and statutes relating to chattel mortgage foreclosures and incidents have more than analogical force." The 1883 statute was repealed at the last session of the North Carolina General Assembly. N. C. SESS. LAWS 1953, c. 1190, § 3. For comment on this statutory change see *A Survey of Statutory Changes in North Carolina in 1953,* 31 N. C. L. REV. 375, 429 (1953).

See Sneeden v. Nurnberger's Market, 192 N. C. 439, 440, 135 S. E. 328, 330 (1926), distinguishing a chattel mortgage where title but not necessarily possession is transferred to the secured party, from a pledge where the secured party takes possession immediately "with a right of retainer until the debt is paid," but no title. 2 WILLISTON, SALES § 337 (Rev. ed. 1948) explains that the conditional sale discussed herein does not involve land.

[4] 3 WILLISTON, SALES § 579c (Rev. ed. 1948); Note, 17 MINN. L. REV. 66, 70 (1932); Note, 37 A. L. R. 91, 100 (1925), and cases cited therein. *Contra:* Mo. REV. STAT. § 428.110 (1949), and OHIO REV. CODE § 1319.14 (1953), requiring a refund by the seller.

[5] Courts following the "election doctrine," as described below in the text, have used the term "rescission" in describing the seller's election to repossess the security rather than attempt a collection of the contract price. This is improper, because a true rescission obliterates the contract, requiring the seller to return any payments he has received. Daughley v. Peterson, 110 F. Supp. 885, 887 (D. Ala. 1953).

Decisions cited contrary to the rule allowing the seller to retain the defaulting buyer's payments under a conditional sale contract often involve recovery of payments following a true rescission of the conditional sale contract, and are therefore in accord with the majority view. See Weldon v. Witt, 145 Ala. 605, 40 So. 126 (1905), where there was a mutual rescission of the contract, and Moye v. Stobaugh, 199 Ark. 453, 135 S. W. 2d 334 (1940), where the security, a refrigerator, was found defective and the contract rescinded.

In the following cases the contract was rescinded by the seller's conduct, and the buyer was allowed to recover payments made less compensation for the use of the property sold: Southern Finance Co. v. Chambers, 65 Ga. App. 259, 15 S. E. 2d 903 (1941) (Seller received possession of car to repair and retained it, selling it after default made subsequent to the time he gained possession.); Carmichael v. Guenette, 61 Ga. App. 460, 6 S. E. 2d 365 (1939) (Seller rescinded by repossessing car after agreeing to extend time for payments.); Dickerson v. Universal Credit Co., 47 Ga. App. 512, 170 S. E. 822 (1933) (rescission by bringing trover suit). *Cf.* Burge v. Crown Finance Co., Inc., 81 Ga. App. 582, 59 S. E. 2d 541 (1950). Here the seller who had repossessed the security conducted a resale after promising the buyer that he would extend the payment date, and the court reasoned that the promise was without consideration, concluding that the buyer had no cause of action against the seller. The court failed to distinguish the case from *Carmichael v. Guenette,* and cited no authority.

a bounty for the violation of contracts," because the buyer could purchase a chattel for speculative resale and default without reason, yet his liability would be limited to compensation for the use of the property.[6]

The seller's right to sue for a breach of contract[7] or for the contract price[8] is recognized in North Carolina, but his most satisfactory remedy is to retake the property sold, resell it and recover any deficiency found by subtracting the down payment, installment payments and proceeds realized by the resale from the price due the seller and the costs of the sale.[9] After repossession of the property sold, the buyer retains an equity in it,[10] and has been given the opportunity to redeem the property before resale by paying the balance due under the contract.[11] If the payments and the proceeds of a resale exceed the total obligation, the buyer is entitled to this "surplus."[12] Although repossession and resale are ordi-

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Another manner of rescission by conduct applicable in jurisdictions that require a resale is explained in Blevins Aircraft Corp. v. Gardner, 66 Ga. App. 843, 845, 19 S. E. 2d 350, 352 (1942): "the mere retaking of the property by the seller would not constitute a rescission of the contract of sale, yet where the seller, after retaking the property, refrains for an unreasonable length of time from selling it . . . and devotes the property to a use inconsistent with an intention on his part to resell it . . . , the inference is authorized that the seller has elected to treat the property as his own, thereby rescinding the contract of sale."

The North Carolina Supreme Court has accurately stated that "repossession of the title-retained property is not to be referred to the principle of rescission, but to the power of sale given by statute [or contract]. . . ." Mitchell v. Battle, 231 N. C. 68, 69, 55 S. E. 2d 803 (1949). The statute referred to is N. C. GEN. STAT. § 45-21.13 (1950), conferring a power of sale upon the seller where the conditional sale contract does not contain an express power of sale.

[6] Pfeiffer v. Norman, 22 N. D. 168, 174, 133 N. W. 97, 99 (1911).

[7] *See* National Cash Register Co. v. Hill, 136 N. C. 272, 276, 48 S. E. 637, 639 (1904).

[8] *Ibid.*

[9] Mitchell v. Battle, 231 N. C. 68, 55 S. E. 2d 803 (1949); Hall v. Tillman, 103 N. C. 276, 9 S. E. 194 (1889); second appeal, 110 N. C. 220, 14 S. E. 745 (1892); third appeal, 115 N. C. 500, 20 S. E. 726 (1894).

Such procedure is specifically authorized in N. C. GEN. STAT. § 45-21.38 (1950): "Whenever a power of sale contained in a conditional sale contract, or granted by statute with respect thereto, is exercised, and the proceeds of such sale are not sufficient to defray the expenses thereof, and also the balance of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer."

Accord: Federal Credit Co. v. Boleware, 163 Miss. 830, 142 So. 1 (1932); Caraway v. Jean, 97 N. H. 506, 92 A. 2d 660 (1952); Knudson Music Co. v. Masterson, 240 P. 2d 973 (Utah 1952); *see* General Motors Acceptance Corp. v. Dickinson, 249 Ky. 422, 425, 60 S. W. 2d 967, 968 (1933).

N. C. GEN. STAT. § 45-21.36 (1950) limits deficiency judgments "When any sale of real estate or personal property has been made by a mortgagor, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser. . . ." Although this language is quite broad, *quaere* whether the statute is applicable to conditional sales, in light of N. C. GEN. STAT. § 45-21.38 (1950) *supra.*

[10] *See* Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 377, 384, 17 S. E. 174, 175 (1893).

[11] Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 377, 17 S. E. 174 (1893); *see* Hamilton v. Highlands, 144 N. C. 279, 284, 56 S. E. 929, 931 (1907).

[12] Hamilton v. Highlands, 144 N. C. 279, 56 S. E. 929 (1907); Puffer & Sons

narily carried out without judicial supervision, where the seller brings a well founded suit on the conditional sale contract after a default, the trial court may order that the property be resold and the proceeds applied to payment of the debt, and then enter a deficiency judgment or give a surplus to the buyer, depending upon whether the obligation is satisfied by the proceeds.[13]

Some jurisdictions are in accord with North Carolina,[14] but by what has been called the general holding apart from statute,[15] the seller must elect whether he will sue on the contract and relinquish his rights in the security, or repossess the property, thereby terminating both the buyer's liability under the contract and the buyer's equity in the property.[16] Since the use of one remedy is considered a bar to recovery under the other, and there is never a deficiency judgment, this rule may at first appear to protect the buyer. Actually, it works a great hardship on the individual who has purchased property and paid a large amount of the price, by allowing the seller to retain all these payments and repossess the security without accounting for its value, which may be far greater than the sum due under the contract. It may also be unfair to the seller who chooses to sue on the contract because the property is depreciated, only to find that the buyer is insolvent.[17] Still other states follow this

Mfg. Co. v. Lucas, 112 N. C. 377, 17 S. E. 174 (1893); *see* Universal C. I. T. Credit Corp. v. Saunders, 235 N. C. 369, 371, 70 S. E. 2d 176, 178 (1952), where the court said a repossessing seller must account to the defaulting buyer for the value of the property repossessed.

Accord: Epps v. Howard, 87 Ga. App. 277, 73 S. E. 2d 342 (1952); Cutting v. Whittmore, 72 N. H. 107, 54 Atl. 1098 (1903); *see* General Motors Acceptance Corp. v. Dickinson, 249 Ky. 422, 425, 60 S. W. 2d 967, 968 (1933); Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co., 72 Miss. 608, 615, 18 So. 364, 365 (1895).

[13] Hamilton v. Highlands, 144 N. C. 279, 56 S. E. 929 (1907); Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 377, 17 S. E. 174 (1893).

[14] See footnotes 9 and 12 *supra.*

The New Hampshire court has stated the rule, "Resort to repossession and suit for the price should not bar each other, and the remedies may well and properly be concurrent to the point of satisfaction," in Mercier v. Nashua, 84 N. H. 59, 62, 146 Atl. 165, 167 (1929).

Virginia gives the seller five remedies against a defaulting buyer: "(1) To seek the peaceable possession of the trucks (in the event redelivery was denied by the defendant); (2) to institute an action at law for the recovery of the unpaid purchase price; (3) to institute a suit in equity to foreclose the lien; (4) to proceed under the . . . Code for the sale or possession of the property and for a deficiency judgment; or (5) by action of detinue under . . ." statute; and the first three are said to be cumulative. Lloyd v. Federal Motor Truck Co., 168 Va. 72, 77, 190 S. E. 257, 259 (1937).

As discussed below in the text, the Uniform Conditional Sales Act and Uniform Commercial Code bear some similarity to the North Carolina view.

[15] 3 WILLISTON, SALES § 579b (Rev. ed. 1948).

[16] Thomas Auto Co. v. Moody, 206 Ark. XIX, 177 S. W. 2d 754 (1944); Igleheart Bros., Inc. v. John Deere Plow Co., 114 Ind. App. 182, 51 N. E. 2d 498 (1943) (Indiana court presumed the Illinois common law was identical to its own, that seller after default must make an election.); C. I. T. Corporation v. Fisher, 187 Okla. 314, 102 P. 2d 848 (1940).

[17] The uniform acts on this subject are designed to eliminate the possibility of either of these results, as shown below in the text.

election doctrine, but add a remedy called a "conditional sale contract vendor's lien,"[18] which enables the seller to bring a court action on the security, sell it and if the price is still unsatisfied, obtain a deficiency judgment[19]—the same process as that used in North Carolina when the seller seeks judicial enforcement of the conditional sale contract after default.

The seller is always penalized for an unauthorized retaking of the property sold,[20] and most jurisdictions condemn the use of actual[21] or "implied"[22] force in making an authorized repossession. Further, the seller has been held liable for conversion: where he gained possession of the security through an authorized retaking, extended the time in which payments could be made, but conducted a resale prior to the extended date of payment;[23] also, where the seller held the security under an agreement to repair it until a default was made under the conditional sale contract, and then resold the property without notifying the buyer of his intention to resell.[24] Although most of these cases contemplate an award of actual damages,[25] punitive damages are not unknown.[26]

[18] Explained in National Cash Register Co. v. Ness, 204 Minn. 148, 151, 282 N. W. 827, 829 (1938). See Note, 23 MINN. L. REV. 699 (1939).

[19] Smith v. Russell, 223 Iowa 123, 272 N. W. 121 (1937); National Cash Register Co. v. Ness, 204 Minn. 148, 282 N. W. 827 (1938); *see* Lloyd v. Federal Motor Truck Co., 168 Va. 72, 77, 190 S. E. 257, 259 (1937).

[20] Luke v. Mercantile Acceptance Corp. of Calif., 111 Cal. App. 2d 431, 244 P. 2d 764 (1952) (Seller tried to enforce a note that was not a part of the conditional sale contract, by repossessing the security.).

[21] Lamb v. Woodry, 154 Ore. 30, 58 P. 2d 1257 (1936). The courts of Louisiana are most strict in this regard, having held a seller liable where he peaceably entered the defaulting buyer's home and removed furniture that was security under his conditional sale contract, with the consent of the buyer's mother and minor son but without lawful process authorizing such action. Strahan v. Simmon, 15 So. 2d 164 (La. App. 1943).

[22] In American Discount Co. v. Wyckroff, 29 Ala. App. 82, ———, 191 So. 790, 794 (1939), implied force was defined as an act revealing an intention to take the security in any event, with force if necessary. North Carolina is in accord, applying this definition where the seller's agents emphatically replied to the buyer's objection to their retaking of the property that they would "take the car or have the money." Binder v. General Motors Acceptance Corp., 222 N. C. 512, 23 S. E. 2d 894, 896 (1942).

[23] Brewer v. Universal Credit Co., 191 Miss. 183, 192 So. 902 (1940); Central Ins. Co. of Baltimore v. Ehr, 18 Wash. 2d 489, 139 P. 2d 701 (1943). The agreement to extend the time for payments is effective, not because of any legal consideration, but "may be rested upon the ground of estoppel or of waiver." Reinkey v. Findley Electric Co., 147 Minn. 161, 163, 180 N. W. 236, 237 (1920).

Cf. Carmichael v. Guenette, 61 Ga. App. 460, 6 S. E. 2d 365 (1939). *Contra:* Burge v. Crown Finance Co., Inc., 81 Ga. App. 582, 59 S. E. 2d 541 (1950); see footnote 5 *supra.*

[24] Patton v. Alexander, 202 Ark. 883, 154 S. W. 2d 1 (1941); *cf.* Southern Finance Co. v. Chambers, 65 Ga. App. 259, 15 S. E. 2d 903 (1941); see footnote 5 *supra.*

[25] Quick v. Woodward Motor Co., 23 Tenn. App. 254, 130 S. W. 2d 147 (1938); Ashworth v. Fleenor, 178 Va. 104, 16 S. E. 2d 309 (1941).

[26] Binder v. General Motors Acceptance Corp., 222 N. C. 512, 23 S. E. 2d 894 (1942) (Seller was guilty of forcible trespass because he used implied force in retaking a car.); Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938) (Seller's assignee repossessed car knowing the buyer had failed to make

There are two uniform acts providing the seller with statutory remedies after default—the Uniform Conditional Sales Act[27] and the Uniform Commercial Code.[28] They provide for a redemption period following default and repossession,[29] during which the buyer may reclaim the security by paying the amount due under the contract. If there is no redemption, the buyer may demand a resale;[30] and resale is also compulsory under the Uniform Conditional Sales Act if the buyer has paid one-half the purchase price,[31] and under the Uniform Commercial Code if the security is "consumer goods"[32] and sixty per cent of the price is paid.[33] If there be a resale both acts hold the buyer liable for a deficiency[34] but grant him any surplus[35] realized from the resale, as in North Carolina. When resale is not compulsory, the seller may chose to resell or keep the property,[36] but the buyer is discharged from the contract

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final payments only because assignee refused to hand over the note that evidenced his indebtedness.).

[27] This act, prepared by Professor Bogert and recommended by the National Conference of Commissioners on Uniform State Laws, is now in force in Arizona, Delaware, Indiana, New Hampshire, New Jersey, New York, South Dakota, West Virginia, Wisconsin, and Alaska and Hawaii. 2 UNIFORM LAWS ANNOTATED 6 (Supp. 1954).

[28] A product of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, considered in many states and enacted last year in Pennsylvania. Schnader, *Pennsylvania Leads the Way: The First State to Enact the Uniform Commercial Code,* 7 CONFERENCE ON PERSONAL FINANCE LAW QUARTERLY REPORT 72 (1953).

[29] Pursuant to the UNIFORM CONDITIONAL SALES ACT §§ 17, 18, if notice of the seller's intention to repossess is given the defaulting buyer forty to twenty days before repossession, the buyer may redeem his interest in the security by paying the amount due at any time before repossession; if there is repossession without this notice, the buyer has a ten day period for redemption. Under the UNIFORM COMMERCIAL CODE § 9-506, the buyer may redeem the security at any time before resale or the seller's election to retain the security.

[30] UNIFORM CONDITIONAL SALES ACT § 20 (within ten days after the retaking); UNIFORM COMMERCIAL CODE § 9-505 (2) (within thirty days after receiving a required notice from the seller revealing his intention to retain the property).

[31] UNIFORM CONDITIONAL SALES ACT § 19 (Sale must be conducted within thirty days following repossession.).

[32] "Goods are consumer goods if they are used or bought for use primarily for personal, family or household purposes. . . ." UNIFORM COMMERCIAL CODE § 9-109(1).

[33] UNIFORM COMMERCIAL CODE § 9-505(1) (sale conducted within ninety days after repossession). Absent a request for it, resale is not compulsory if the buyer has signed away his right to it, or when the contract does not cover a "purchase money security interest." As defined in § 9-107, such an interest includes the type of conditional sale contract discussed herein.

[34] UNIFORM CONDITIONAL SALES ACT § 22; UNIFORM COMMERCIAL CODE § 9-504(1). The latter applies only where a "security agreement secures an indebtedness . . . ," which includes the type of conditional sale contract discussed herein.

[35] UNIFORM CONDITIONAL SALES ACT § 21; UNIFORM COMMERCIAL CODE § 9-504(1) (under the circumstances explained in footnote 33 *supra*).

[36] UNIFORM CONDITIONAL SALES ACT § 20; UNIFORM COMMERCIAL CODE §9-505(2). Under the former act, the seller must give the buyer notice of his intention to resell within ten days after repossession but no notice of a retention of the property is required of the seller; the Commercial Code is similar, but the seller must give notice of his intention to retain the security, and there is no strict time limit requiring a decision to retain or resell.

if there is no resale.[37] To compel the seller to abide by the acts, the buyer is given a cause of action against him for failure to meet the statutory requirements.[38] These uniform acts attempt to reconcile the interests of buyer and seller by giving each party the right to have a resale, providing for a redemption period and other more mechanical requirements, such as time limitations and notices of resale.[39] The buyer who has paid a certain large portion of the price is given additional protection by the mandatory resale. Although the acts are basically quite similar, the Uniform Commercial Code encourages private resales[40] and is drawn in broad terms to cover other types of security transactions in addition to conditional sales.[41]

An additional problem is posed by a 1954 decision of the West Virginia Supreme Court.[42] This case involved a check, given as a cash down payment by the buyer of a truck under a conditional sale contract, that remained unpaid after proceeds from a resale failed to satisfy the price, and the buyer was held liable on the check, although the seller's conduct discharged the buyer of "all obligation" under Section 23 of the Uniform Conditional Sales Act in force in West Virginia.[43] A dissent argued that the down payment, and the written undertaking for the balance of the price that described the rights of the parties, should be treated as one "obligation" under Section 23, and any discharge of the "obligation" would include an unpaid check given as down payment.[44]

Under the same fact situation, absent the Uniform Conditional Sales Act, the buyer would be liable on this check in jurisdictions holding the North Carolina view, for the seller is entitled to an amount equal to the

[37] UNIFORM CONDITIONAL SALES ACT § 23; UNIFORM COMMERCIAL CODE §9-505(2).

[38] UNIFORM CONDITIONAL SALES ACT § 25 (actual damages and in no event less than one-fourth of all payments made); UNIFORM COMMERCIAL CODE § 9-507(1) (actual damages and if security is "consumer goods," at least the amount of the "service charge" and ten per cent of the cash price).

[39] Also, requirement of a seller's statement of the balance due under the contract, UNIFORM CONDITIONAL SALES ACT § 18; seller's notice of resale where it is not compulsory, *Id.* at § 20, and UNIFORM COMMERCIAL CODE § 9-504(2); advertisement before a required public sale, UNIFORM CONDITIONAL SALES ACT § 19.

[40] See draftsmen's comment following UNIFORM COMMERCIAL CODE §9-504 (Text and comments ed. 1952): "Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties. The only restriction on the secured party's method of disposition is that it must be commercially reasonable."

[41] Compare the stricter time limits of the Uniform Conditional Sales Act with the requirements of "good faith" and "commercially reasonable" action that are set up in the Uniform Commercial Code. Draftsmen's comment, UNIFORM COMMERCIAL CODE § 9-507 (Text and comments ed. 1952).

[42] West Virginia Mack Sales Co. v. Henderson, 81 S.E. 2d 103 (W. Va. 1954).

[43] The seller had retained the truck over the resale period without giving notice of his intention to resell, which constituted an election to retain it and discharged the buyer, who had paid less than one-half the contract price, under § 23 of the Uniform Conditional Sales Act.

[44] West Virginia Mack Sales Co. v. Brown, 81 S. E. 2d 103, 111 (W. Va. 1954).

contract price in any event. Where the election doctrine prevails the buyer's liability turns on whether the check or note given as cash down payment was a part of the conditional sale contract.[45] However, the courts seem to differ on whether the term "conditional sale contract" includes only the written undertaking making the conditional transfer of the property, or encompasses paper given as down payment also.[46] If it is determined that the check or note given as cash down payment was a part of the conditional sale contract, an election to repossess the security is regarded as a bar to suit on it, as well as the undertaking for the balance;[47] and presumably, when the seller elects to sue on the contract rather than repossess, the paper given as cash down payment and the undertaking will stand together again, and the seller may recover on both. A check or note given as cash down payment that is not a part of the conditional sale contract is treated as consideration for the "use and wear of the property," and the buyer is liable thereon, even after repossession.[48]

An equitable treatment of the parties to a check or note given either as down payment or installment payment would: (1) adopt the North Carolina view on the remedies of buyer and seller after default; (2) disregard whether the paper is part of the conditional sale contract; and (3) hold the buyer liable unless he could recover the amount of the check or note had it been paid. Applying this treatment, the seller would recover if there were a suit for the price without repossession, or in case of a resale, to the extent of any deficiency apart from the check or note; but the buyer would not be liable where there was no deficiency or the seller rescinded the contract. This would not penalize the conscientious

[45] In Crute v. La Porte Discount Corp., 89 Ind. App. 573, ———, 167 N. E. 542, 543 (1929), after observing that the buyer's note given as a down payment was "a part of the original conditional agreement," the court held that the buyer was released by the seller's election to recover the security and distinguished Norman v. Meeker, 91 Wash. 534, 158 Pac. 78 (1916), where a buyer was liable on his note given as down payment, as follows: "In that case, the note sued on, and alleged to have been given in lieu of a cash payment for property purchased, was a plain promissory note, and was no part of the conditional sale contract."

[46] *Compare* Beene Motor Co., Inc. v. Dison, 180 Ark. 1064, 23 S. W. 2d 971 (1930), concerning a conditional sale contract that recited, "'The buyer has this day paid to the seller two hundred and eighty-six ($286.00) dollars . . . ,'" which the court interpreted as including the buyer's note for that amount given as down payment *with* Franz v. Hair, 76 Utah 281, 283, 289 Pac. 130, 131 (1930), where the conditional sale contract read, "'the purchaser has this day paid to the seller two thousand five hundred sixty-seven and No/100 dollars ($2,567.00) . . . ,'" and the court held the buyer's note given in down payment for a part of this sum was not included in the conditional sale contract.

[47] Beene Motor Co., Inc. v. Dison, 180 Ark. 1064, 1067, 23 S. W. 2d 971, 972 (1930): "Since the $286 note . . . was included in the conditional sale agreement for the sale of the truck, was a part of the purchase price recited therein, and title to the property was retained until the whole purchase price was paid, it necessarily follows . . . that when appellant [seller] elected to retake the truck, it also elected to cancel the balance of the indebtedness due against the car, which had the effect of relieving appellee [buyer]. . . ."

[48] Norman v. Meeker, 91 Wash. 534, 538, 158 Pac. 78, 80 (1916).

buyer who pays in cash or whose check or note is paid before repossession by allowing a tardy buyer to escape liability, and it would conform with the intention of the parties that the amount of a check or note given as cash down payment would be paid. In the final analysis, the seller and buyer would be neither better nor worse off than they would have been if cash had been paid in the place of the check or note.

ROY W. DAVIS, JR.

Labor Law—Fair Labor Standards Act—Nonexempt Work Tolerance for Executives

A great many decisions determining whether, under the Fair Labor Standards Act, a particular employee is a "bona fide executive," have turned on the sections of the regulations issued by the Administrator of the Wage and Hour Division of the Department of Labor relating to nonexempt work tolerance. One writer has estimated that at least half of the overtime violations of the Act emanate from misinterpretations of the executive exemption.[1] The various administrative regulations dealing with this exemption have therefore been chosen for comment in this note.

Section 13 (a) (1) of the Fair Labor Standards Act exempts from the provisions of Section 6 (minimum wage) and Section 7 (maximum hours) of the Act, any employee who is employed in a bona fide executive capacity, as such term is defined and delimited by the regulations of the Administrator.[2] The reason for this exemption is that a bona fide executive is not ordinarily in the group that requires the protection of the Act.[3]

It is to be noted at the outset that the Administrator's definition of a "bona fide executive" is given Congressional sanction and is controlling in determining who shall be exempt from the Act.[4] The North Carolina Supreme Court, in applying the Administrator's definition, has said: "Valid definitions within the delegated power speak with authority and become the dictionary of the law."[5]

Since 1938, when the Fair Labor Standards Act became effective, the Administrator has acted three times to define the term "bona fide

[1] Bookstabler, *Exemption of the "Boss Man" Under Section 13 (a) (1) of the Fair Labor Standards Act*, 69 N. J. L. J. 81 (1946). It is to be noted that since all of the requirements of the definition must be met and since Section (f) of the present definition requires that the employee be compensated on a salary basis at a rate of not less than $55 per week, except in Puerto Rico or the Virgin Islands where the minimum salary is $30, there are few cases where the general minimum wage requirements of the act have been involved; most of the cases involve compensation for overtime.

[2] 52 STAT. 1067 (1938), 29 U. S. C. § 213 (1952). The Act's original provision has remained unchanged since 1938.

[3] Bookstabler, *supra* note 1.

[4] Zaetz v. General Instrument Corp., 21 N. J. Misc. 76, 30 A. 2d 504 (1943).

[5] Pye v. Atlantic Co., 223 N. C. 92, 96, 25 S. E. 2d 401, 404 (1943).