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tiful";⁴³ thus often the only choice is between beauty and practicality. It may be advisable for the plaintiff to refer to his cause as a "sight nuisance" offensive to reasonable men. The court would thereby be asked to act, not on a lack of beauty, but on an unnecessary condition ugly in the eyes of a reasonable man, the sight of which, as in the case of the cemetery in *Jones v. Trawick*, seriously limits the use and enjoyment of property and incidentally reduces its value. If counsel could then prove the predominant residential character of the neighborhood, the improbability of unreasonable loss to the defendant, and for good measure the commercial nature of the offending element, the court might be willing to equate ugly sights with distracting noises and disagreeable odors. Traditional doctrine may continue for a while to be a stumbling block, but it would seem that in Florida the barrier steadily grows less imposing.

CHARLES J. CHEVES, JR.

FLORIDA CONDITIONAL SALES — RELIEF FROM FORFEITURE

Until very recently, Florida has provided surprisingly little statutory protection for retail installment buyers.¹ Florida's enactment of the Motor Vehicle Sales Finance Act² in 1957 marked a highly significant enlargement of consumer protection; but, as its title suggests, this act is limited in scope to installment sales of motor vehicles.³ There still remains an important area of installment purchasing outside the purview of this act, and the protection available to buyers under various contractual arrangements is somewhat unsettled.

The purpose of this note is to explore only the remedies available to a Florida vendee under a conditional sales contract, with particular emphasis on his rights, if any, to relief from the operation of a forfeiture clause in the contract. Since a Florida conditional vendee is afforded no protection by the various uniform acts, he must look to the common law of conditional sales and to the pertinent case law in Florida and other jurisdictions.

43. BLACK, LAW DICTIONARY (4th ed. 1951).

1. The Florida Legislature has not adopted the Uniform Sales Act, the Uniform Conditional Sales Act, or the Uniform Commercial Code.

2. Fla. Laws 1957, ch. 57-799, now FLA. STAT. §§520.01-13 (1959). Specific provisions of this act are considered in the text at note 43 *infra*.

3. FLA. STAT. §520.02(1) (1959) limits the application of this act to motor vehicles with a cash sales price of \$7,500 or less.

THE PROBLEM

Although conditional sales contracts sometimes contain express provisions for fair treatment of the vendee's interest upon default,⁴ a number of the contracts now used by various sellers contain instead, or in addition, a "forfeiture clause." Such clauses provide in effect that "if the buyer defaults in his payments, and the seller exercises his right to retake, all part payments previously made shall be treated as forfeited, or as rental payments, or as payments for damage and depreciation, or as liquidated damages."⁵

When amounts forfeited under the terms of the contract bear a reasonable relation to the rental value of the goods or fairly compensate the seller for losses sustained upon repossession and resale, there can be no objection to strict enforcement of the contract. However, when substantial payments have been made on the contract, and there is a great disparity between the amount paid and that required to fully compensate the repossessioning vendor, the question arises whether the defaulting vendee can protect his interest in a court of equity. The Florida Supreme Court has indicated by way of dicta that the seller's right to retake possession of the property is "subject to the power of equity to prevent an unconscionable forfeiture,"⁶ but research discloses no instance in which a Florida court of equity has intervened to relieve the vendee from the operation of an express forfeiture clause in a conditional sales contract.

THE LAW IN OTHER JURISDICTIONS

It is generally concluded by text writers⁷ and annotators⁸ that, under the common law, conditional vendors, upon default and repossession, were under no obligation to return amounts paid by the defaulting buyer. Strict enforcement of this position greatly favored the conditional vendor, resulting in extreme hardships to the vendee in individual cases, and early led legislatures and courts of equity to protect the buyer from a serious forfeiture.⁹

4. See 11 AM. JUR. LEGAL FORMS, *Sales* §1495 (1955), for a provision that entitles the vendee to any surplus when the vendor exercises an option to resell to the vendee's account. The enforceability of such a provision is considered in the text at notes 37, 40, 41 *infra*.

5. See Bogert, *Commentaries on Conditional Sales*, 2A UNIFORM LAWS ANN. §131 (1924).

6. *Malone v. Meres*, 91 Fla. 709, 757, 109 So. 677, 694 (1926).

7. See, e.g., 3 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES §1382 (6th ed. 1933).

8. See, e.g., Annot., 37 A.L.R. 91 (1925).

9. See *J. D. Pittman Tractor Co. v. Bolton*, 238 Ala. 300, 191 So. 360 (1939); *Barton v. W. O. Broyles Stove & Furn. Co.*, 212 Ala. 658, 103 So. 854 (1925); *Watkins*

Defaulting vendees have successfully urged the following theories:¹⁰

"[T]hat relief is to be granted because no forfeiture was authorized expressly in the contract, because there has been a rescission of the contract, that equity abhors a forfeiture, or simply that recognition of such an unconscionable advantage in the vendor is contrary to the fundamental principles observed in courts of equity."

Generally, when equitable relief has been obtained, the default was unintentional and the vendee acted promptly to arrange for payment of his remaining obligation or to seek a foreclosure sale in a court of equity. The power of equity to grant relief under such circumstances is clearly expressed in the Alabama case of *Barton v. Broyles Store & Furniture Co.*:¹¹

"When 'the stipulation concerning payment is only a condition subsequent, a court of equity has power to relieve the defaulting vendee from the forfeiture caused by his breach of this condition, upon his paying the amount due, with interest, because the clause of forfeiture may be regarded as simply a security for the payment. It is therefore held, in a great number of cases, that the forfeiture provided for by such a clause, on the failure of the purchaser to fulfill at the proper time, will be disregarded and set aside by a court of equity, unless such failure is intentional or willful'."

In other instances, courts, including the Florida Supreme Court,¹² have recognized a "lien theory," in which the contract is construed as being in the nature of a mortgage and the vendor's interest is treated merely as a security interest.¹³ Under this theory both the vendor's and the vendee's interests can be protected by a foreclosure sale. In effect, this theory provides the basis for vendee protection under the Uniform Conditional Sales Act.¹⁴

v. Carter, 267 Ky. 241, 101 S.W.2d 932 (1937); *Davis v. Wood*, 200 Ore. 602, 268 P.2d 371 (1954).

10. JONES, *op. cit. supra* note 7, §1382, at 471.

11. 212 Ala. 658, 659, 103 So. 854, 855 (1925).

12. See, e.g., *Livingston v. National Shawmut Bank*, 62 So. 2d 13, 15 (Fla. 1952); *G. F. C. Corp. v. Spradlin*, 38 So. 2d 679, 681 (Fla. 1949); *Malone v. Meres*, 91 Fla. 709, 757, 109 So. 677, 694 (1926).

13. See, e.g., *Owens Motor Co. v. Williford*, 67 F.2d 691, 692 (D.C. Cir. 1933); *Cartwright v. C. I. T. Corp.*, 253 Ky. 690, 694, 70 S.W.2d 388, 390 (1934).

14. Bogert, *supra* note 5, §119: "It thus appears that legislatures, courts of equity, and parties have recognized in a large number of instances that a foreclosure sale constitutes a fair method of enabling the seller to realize upon his security and still protect the buyer's equity. The Uniform Act adopts this well recognized method, subject to certain limitations."

The courts in many jurisdictions, however, have refused to apply the foregoing doctrines to contradict express provisions of the contract,¹⁵ and text writers¹⁶ and leading jurists¹⁷ have frequently criticized such "judge-made" law in the absence of statutory enactment.

THE UNIFORM ACTS

Both the Uniform Conditional Sales Act and the Uniform Commercial Code contain provisions designed to safeguard the vendee's interest from undue forfeiture. Both acts provide for a redemption period prior to or upon lawful repossession.¹⁸ When substantial payments have been made,¹⁹ public or private resale after due notice is compulsory, and in other cases a foreclosure sale may be guaranteed by timely written demand.²⁰ When no resale is made, the buyer is discharged from all liability for a deficiency.²¹ Upon resale, the proceeds must be applied to the expenses of retaking and resale and to the satisfaction of the indebtedness under the contract, with any surplus going to the buyer or a right to any deficiency remaining with the seller.²²

CONDITIONAL SALES LAW IN FLORIDA

Since the defaulting vendee is seldom financially able to pursue litigation to the appellate level, Florida case law respecting the rights and remedies of the conditional vendee has developed slowly. An early decision of the Florida Supreme Court indicated that, in the absence of protective legislation, the parties must be held to the terms

15. *E.g.*, *Silverthorne v. Simon*, 59 Cal. App. 494, 211 Pac. 26 (1922); *Niman v. Story & Clark Piano Co.*, 213 Mich. 397, 181 N.W. 1017 (1921); *Detroit Trust Co. v. C. C. Wormer Machinery Co.*, 177 Mich. 156, 142 N.W. 1090 (1913); *Newport Motor Sales, Inc. v. Bove Chevrolet, Inc.*, 84 R. I. 195, 122 A.2d 167 (1956).

16. See, *e.g.*, *JONES, op. cit. supra* note 7, §1382, at 471.

17. See, *e.g.*, *Wm. W. Bierce, Ltd. v. Hutchins*, 205 U.S. 340, 347 (1907), wherein Justice Holmes stated: "But courts are not legislatures and are not at liberty to invent and apply specified regulations according to their notions of convenience. In the absence of a statute their only duty is to discover the meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose."

18. UNIFORM CONDITIONAL SALES ACT §§17-18; UNIFORM COMMERCIAL CODE §9-506.

19. UNIFORM CONDITIONAL SALES ACT §19 (resale required when buyer has paid at least 50% of the price); UNIFORM COMMERCIAL CODE §9-505 (1) (when 60% paid).

20. UNIFORM CONDITIONAL SALES ACT §20; UNIFORM COMMERCIAL CODE §9-505 (2).

21. UNIFORM CONDITIONAL SALES ACT §23.

22. UNIFORM CONDITIONAL SALES ACT §21; UNIFORM COMMERCIAL CODE §9-504 (1)-(2).

of their bargain.²³ In *Evans v. Kloeppel*,²⁴ in which the replevying vendor was awarded damages for unlawful detention, the Court stated that upon rescission and repossession the conditional vendor was under no obligation to return partial payments made on the contract. In *Stokes v. Humphries*²⁵ the Court upheld a seemingly harsh recovery in favor of a conditional vendor in strict accordance with the terms of the sales contract and the 1906 replevin statute,²⁶ but expressly noted that no equitable relief was sought by the vendee. The Court stated that "this case illustrates the need of legislation regulating replevin procedure where forfeitures of large payments are involved."²⁷ In 1923 the legislature amended the replevin statute to limit the plaintiff's money judgment to the value of his special interest in the property.²⁸ It has been held under this proviso that a conditional vendor in replevin must recognize the vendee's equitable interest and that he is entitled to a money judgment only for the value of his security interest.²⁹ This proviso has also been held to limit the judgment of a conditional vendee who is successful in a replevin action.³⁰

Florida appears to be firmly committed to the "lien theory" of conditional sales.³¹ In the 1926 case of *Malone v. Meres*³² the Florida Supreme Court recognized a conditional vendor's right to treat the transaction as creating an equitable lien and affirmed a deficiency decree obtained by the vendor in a court of equity. On petition for rehearing, Justice Ellis pronounced the following dicta concerning the nature of a conditional sales contract:³³

"That feature of contracts for the sale of personal property

23. *Scotch Mfg. Co. v. Carr*, 53 Fla. 480, 483, 43 So. 427, 428 (1907): "It may well be that E. L. Hinote made rather a hard bargain with plaintiff, but with that we have nothing to do. The parties were free to make what contract they pleased, so long as there was no infraction of the law in so doing."

24. 72 Fla. 267, 73 So. 180 (1916).

25. 69 Fla. 468, 68 So. 448 (1915).

26. FLA. GEN. STAT. §2188 (1906).

27. 69 Fla. 468, 471, 68 So. 448, 449 (1915).

28. Fla. Laws 1923, ch. 9320, §1. The current provision, FLA. STAT. §78.19 (1959), reads: "[P]rovided, however, that where plaintiff's interest in said property is based upon a claim of lien or some special interest therein then said judgment shall be only for the amount of the lien or the value of such special interest duly established and costs, such judgment to be satisfied by the recovery of the property, or of the amount adjudged against the defendant and his sureties."

29. *Klein v. G. F. C. Corp.*, 103 So. 2d 120 (3d D.C.A. Fla. 1958).

30. *Wood v. Weeks*, 81 So. 2d 498 (Fla. 1955).

31. See *Livingston v. National Shawmut Bank*, 62 So. 2d 13 (Fla. 1952); *G. F. C. Corp. v. Spradlin*, 38 So. 2d 679 (Fla. 1949); *Malone v. Meres*, 91 Fla. 709, 109 So. 677 (1926).

32. 91 Fla. 709, 109 So. 677 (1926).

33. *Id.* at 756, 109 So. at 694. (Emphasis added.)

continuing the title in the vendor until payment in full of the purchase price, called conditional sales, is an attempt to reserve a vendor's lien, which existed at common law and was continued so long as the vendor retained possession of the property and which was lost upon the delivery of possession to the buyer.

"Such an agreement of sale, when signed by both vendor and purchaser, results in securing to the vendor the option of rescinding the sale and retaking possession of the property, *subject to the power of equity to prevent an unconscionable forfeiture*, or waiving the right to possession and forfeiture treating the instrument as one to secure the payment of money.

"Under such a contract, the vendor may proceed at law to recover possession of the property or in equity to enforce the payment of money."

A number of subsequent Florida cases, recognizing only a security interest in the vendor, have followed the doctrines expressed in the *Meres* case.³⁴

In an earlier case,³⁵ involving a retain-title contract that in effect provided the vendor with an option to conduct a foreclosure sale, with any surplus to be paid to the purchaser, the Florida Court held that upon sufficient proof such a sales transaction may be treated as a purchase-money mortgage, with an equity for prompt redemption. On another occasion a Florida court looked behind the express terms of a purported conditional sales contract and held the transaction to be merely a security device.³⁶ In *Pardo v. R. S. Evans-Lakeland, Inc.*³⁷ the Florida Supreme Court upheld, as against demurrer, the conditional vendee's right, under express provisions of the contract, to pursue by an action at law the surplus proceeds from a resale. When, however, the vendee seeks affirmative relief under a lien theory, he must go to a court with equity jurisdiction.³⁸

Florida also recognizes an election of remedies doctrine whereby, irrespective of the contract terms, a conditional vendor cannot sue for both purchase price and repossession.³⁹ Under this doctrine, repossession by the vendor constitutes an election whereby he cannot thereafter pursue the purchaser on the debt. In the leading case of

34. See cases cited notes 29, 31 *supra*.

35. *Ragsdale v. Miami Cadillac Co.*, 88 Fla. 302, 102 So. 494 (1924).

36. *Spencer v. Florida-Georgia Tractor Co.*, 114 So. 2d 466 (3d D.C.A. Fla. 1959).

37. 38 So. 2d 307 (Fla. 1949).

38. *Klein v. G. F. C. Corp.*, 103 So. 2d 120 (3d D.C.A. Fla. 1958).

39. *Baer v. General Motors Acceptance Corp.*, 101 Fla. 913, 132 So. 817 (1931); *Voges v. Ward*, 98 Fla. 304, 123 So. 785 (1929); *Helton v. Sinclair*, 93 Fla. 1121, 113 So. 568 (1927); *American Process Co. v. Florida White Pressed Brick Co.*, 56 Fla. 116, 47 So. 942 (1908).

*Voges v. Ward*⁴⁰ the Florida Supreme Court indicated that a special provision in a conditional sales contract that purports to give the vendor the right to hold the vendee liable for any deficiency after application of the proceeds from lawful repossession and resale to the purchaser's account is incompatible with the true theory of a conditional sale, and that pursuit of a deficiency after retaking the property as owner is precluded by the election of remedies doctrine. It should be noted, however, that such special provisions for resale to the conditional vendee's account have generally been upheld in other jurisdictions,⁴¹ and that the right to such a resale, subject to certain limitations, is now given to a Florida motor vehicle vendor by statute.⁴²

STATUTORY PROTECTION FOR AUTOMOBILE VENDEES

The Motor Vehicle Sales Finance Act⁴³ may well be the long awaited answer to installment purchasers' need for statutory protection in transactions with automobile vendors repossessing under conditional sales⁴⁴ and other automobile retail installment contracts. The provisions of this act pertaining to repossession⁴⁵ parallel very closely the vendee safeguards contained in the Uniform Conditional Sales Act.⁴⁶ The Florida act provides for compulsory public or private resale when the vehicle is repossessed after fifty per cent of the purchase price has been paid, or upon written demand when a lesser amount has been paid.⁴⁷ The vendee is entitled to any surplus after payment of expenses and satisfaction of the contract debt,⁴⁸ and is discharged of all obligations when there is repossession without resale.⁴⁹

The Florida Legislature appears to have expressly adopted the lien theory of retain-title contracts by providing in this act:⁵⁰

"The holder may at his option instead of retaking possession

40. 98 Fla. 304, 123 So. 785 (1929).

41. See JONES, *op. cit. supra* note 7, §§1317, 1327. See also Bogert, *supra* note 5, §119.

42. FLA. STAT. §520.11 (1) (1959).

43. FLA. STAT. §§520.01-13 (1959); see Hogan, *A Survey of State Retail Installment Sales Legislation*, 44 CORNELL L.Q. 38, 63 (1958).

44. FLA. STAT. §520.02 (5) (1959) expressly includes conditional sales contracts within its provisions.

45. FLA. STAT. §520.11 (1959).

46. See provisions cited notes 18-20 *supra*.

47. FLA. STAT. §520.11 (1) (1959).

48. FLA. STAT. §520.11 (2) (1959).

49. FLA. STAT. §520.11 (3) (1959).

50. FLA. STAT. §520.11 (5) (1959).