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SALES - EFFECT OF BUYER'S INSOLVENCY ON SELLER'S DUTY TO DELIVER OR TENDER GOODS

John H. Uhl
University of Michigan Law School

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SALES — EFFECT OF BUYER'S INSOLVENCY ON SELLER'S DUTY TO DELIVER OR TENDER GOODS — The plaintiff ordered goods from the defendant for immediate delivery, terms, \$1,500 down, balance in three and six months, notes being given for the unpaid balance. The defendant accepted the order. When the check which the plaintiff gave for the down payment was dishonored, the defendant investigated his financial condition and discovered that there were a number of unsatisfied judgments against him. On learning this, the defendant notified the plaintiff that he could not make the sale on credit but would do so on a cash basis. Upon the plaintiff's refusal to accede, the defendant notified him that the order had been cancelled and returned the check, whereupon plaintiff brought suit for breach of contract. *Held*, a seller of goods on credit, upon learning of his buyer's insolvency, may refuse to deliver except for cash; the fact that the buyer has given a note for the price, payable at the expiration of the credit, does not vary the rule; neither need tender of the goods be made with the seller's demand for cash. *Rock-Ola Mfg. Corp. v. Leopold*, (C. C. A. 5th, 1938) 98 F. (2d) 196.

The court states a generally accepted rule of the law of sales when it declares that the vendor in a contract of sale of goods on credit, upon learning of the insolvency of the purchaser may refuse to deliver the goods except for cash.¹ The basis of the rule seems to be that in the usual sale where nothing is

¹ 2 MECHEM, SALES 947 (1901); Havighurst, "Clauses in Sales Contracts Protecting the Seller against Impairment of the Buyer's Credit," 20 MINN. L. REV. 367 (1936); *Ex parte Chalmers*, L. R. 8 Ch. 289 (1873); *H. Muehlstein & Co. v. Hickman*, (C. C. A. 8th, 1928) 26 F. (2d) 40.

stated as to payment or delivery, the seller has a lien upon the goods, title to which has passed to the purchaser, to secure payment of the purchase price.² However, when a credit term is injected into the contract, the indication is that the vendor has waived his lien.³ This waiver, though, is only upon condition that the purchaser keep his credit unimpaired.⁴ Thus if the purchaser becomes insolvent while the vendor still has the goods in his possession, the lien reattaches and the vendor may hold the goods until the purchase price is paid to him. The contract is not rescinded or altered by the vendor's demand for cash, since the right to hold the goods as security arises as a constructive condition in the original contract upon the insolvency of the purchaser.⁵ Insolvency which serves to revive the lien need not be insolvency in the bankruptcy sense. It is sufficient that the purchaser be unable to meet his obligations as they become due.⁶ The principal case is interesting in that it states that the vendor need make no tender of performance with his demand for cash.⁷ Most of the decided cases fail to mention this, either assuming that a proper tender was made or ignoring the point. The courts which have committed themselves on the point are not in agreement but seem to reach different conclusions depending upon who is the acting party in the suit for breach of the contract. A Wisconsin case holds that the seller may enforce the contract, eliminating the credit feature, but not eliminating any other element, such as delivery at a point distant from the location of the goods at the time of the sale.⁸ This would indicate the necessity for

² *Willis v. Glenwood Cotton Mills*, (D. C. S. C. 1912) 200 F. 301; *Burke v. Dunn*, 117 Mich. 430, 75 N. W. 931 (1898); *Arnold v. Delano*, 4 Cush. (58 Mass.) 33 (1849).

³ *Southwestern Freight & Cotton Press Co. v. E. O. Stanard*, 44 Mo. 71 (1869); *Conrad v. Fisher*, 37 Mo. App. 352 (1889).

⁴ *Pratt v. S. Freeman & Sons Mfg. Co.*, 115 Wis. 648, 92 N. W. 368 (1902); *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113 (1893); *Thompson v. Baltimore & Ohio R. R.*, 28 Md. 396 (1867).

⁵ *H. Muehlstein & Co. v. Hickman*, (C. C. A. 8th, 1928) 26 F. (2d) 40; *Conrad v. Fisher*, 37 Mo. App. 352 (1889); *Arnold v. Delano*, 4 Cush. (58 Mass.) 33 (1849). In the case of a contract to sell, when title to the goods has not vested in the purchaser, there is of course no basis for claiming a lien on the goods. However, the net result would be the same when the buyer becomes insolvent before the sale and delivery which were to be made on credit. In this case the vendor would be excused from making the sale and delivery because of the purchaser's prospective breach of contract and at the same time would have the right to assert the usual remedies on the contract just as if he had performed. See 3 WILLISTON, CONTRACTS, rev. ed., § 880 (1936).

⁶ *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113 (1893); *Conrad v. Fisher*, 37 Mo. App. 352 (1889); *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. 1124 (1892).

⁷ *Rock-Ola Mfg. Corp. v. Leopold*, (C. C. A. 5th, 1938) 98 F. (2d) 196 at 198.

⁸ *Lincoln v. Alshuler Mfg. Co.*, 142 Wis. 425, 125 N. W. 908 (1910); a similar position is indicated in dicta in the case of *Patten's Appeal*, 45 Pa. 151 (1863). The court declares "the vendor may also, notwithstanding his exercise of the right of stoppage, maintain an action against the vendee for goods bargained and sold, provided he be ready and willing to surrender the goods according to the terms of the original contract."

a tender by the vendor if he is enforcing the sale contract. *Muehlstein v. Hickman*⁹ is another case of suit by the vendor. Here the court declares that the seller must be in a position to perform and should tender performance.¹⁰ However, a number of other cases¹¹ in which the action is by the purchaser, as in the principal case, indicate, though do not in so many words declare, that there is no necessity for tender by the vendor. They say that the vendor's lien reattaches and that he may retain the goods and demand cash before parting with them; thus the burden of tendering performance by offering the cash seems to be put upon the purchaser. An English case holds that there is no duty on the vendor to tender the goods, and that if the purchaser fails to fulfill the contract by paying cash within a reasonable time he may treat the contract as broken and may sell the goods to a third person and claim any loss in an action against the purchaser.¹² It is submitted that the principal case states the better rule. The situation under this rule is the same as it is in any other case where the unpaid vendor has a lien together with the usual remedies for its enforcement.¹³

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⁹ (C. C. A. 8th, 1928) 26 F. (2d) 40.

¹⁰ The court goes on to say that the necessity of a formal tender may be obviated by acts of the party sought to be charged; for instance, by his express refusal in advance to comply with the terms of the contract in that respect, or where it appears that he is in such a position that performance is impossible.

¹¹ *Crummey v. Raudenbush*, 55 Minn. 426, 56 N. W. 1113 (1893); *Hunter v. Talbot*, 3 Sm. & M. (11 Miss.) 754 (1844); *Arnold v. Delano*, 4 Cush. (58 Mass.) 33 (1849); *Pratt v. S. Freeman & Sons Mfg. Co.*, 115 Wis. 648, 92 N. W. 368 (1902); *Ex parte Chalmers*, L. R. 8 Ch. 289 (1873).

¹² *Ex parte Stapleton*, 10 Ch. Div. 586 (1879). This case is contrary to *Morgan v. Bain*, 10 C. P. 15 (1874), decided five years before, in which it was held that the vendor was relieved from delivering if the purchaser did not tender cash, but if he insisted on completing the contract, he must do so in accordance with its terms even to the extent of giving the original credit.

¹³ 2 WILLISTON, SALES, 2d ed., 1315 (1924). The so-called vendor's lien is more than a common-law lien, which gave the vendor a mere right of retention until paid. *Dustan v. McAndrew*, 44 N. Y. 72 at 78 (1870): "The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. (1.) He may store or retain the property for the vendee, and sue him for the entire purchase price. (2.) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3.) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price."

The Uniform Sales Act, which has been enacted in a majority of the states, contains the following provisions on this point: "Part IV. Unpaid Seller's Lien. § 54. When right of lien may be exercised.—(1) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: . . . (c) Where the buyer becomes insolvent."

"Resale by the Seller. § 60. When and how resale may be made.—(1) Where the goods are of perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of

lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale."

"Rescission by the Seller. § 61. When and how the seller may rescind the sale. —(1) An unpaid seller having the right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale."

The burden seems to be on the purchaser to discharge the lien and redeem the goods by paying or tendering the purchase price. *Witt v. Dersham*, 146 Mich. 68, 109 N. W. 25 (1906). If he does not do so, the vendor may proceed to enforce his lien in the manner which he elects.