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Conditional Sales Contract-Vendor's Election of Remedies Where Breach Occurs

CONDITIONAL SALES CONTRACT—VENDOR'S ELECTION OF REMEDIES WHERE BREACH OCCURS—On October 18, 1926, defendant Crute purchased of Prince Motor Co., a certain motor truck, title to remain in vendor until the consideration was paid. The conditional sales contract was evidenced by two promissory notes, one for $250 due 5 months after date, the other for $682.50 payable in monthly installments of $45. Each note was executed by Crute as principal, payable to Prince Motor Co., and each contained a description of the truck and a provision that it was given "as a part of contract for the automobile" which was "to remain the property of the Prince Motor Co. until all notes given" shall have been paid in full; that

on default of payment of said notes at maturity, or any of said payments, all of them were to become due, the rights of the vendee under the contract were to be forfeited, and the vendor could resume possession of said automobile without liability to refund any money previously paid on account of the contract. The notes were assigned to plaintiff for valuable consideration, and later, defendant having defaulted as to monthly payments, plaintiff repossessed the truck and commenced this action to enforce the collection of the $250 note. Trial resulted in a finding and judgment for plaintiff, and defendants appeal. *Held*: Judgment reversed. *Crute et al. v. La Porte Discount Corporation* (No. 13507), App. Ct. Ind., August 1, 1929, 167 N. E. 542.

A vendor of property conditionally sold, reserving title to himself until the purchase price is paid, may in case of default by the vendee either sue to recover the specific property, or affirm the sale and sue for the price; but he cannot do both, as the remedies are inconsistent. *Quality Clothes Shop v. Keeney*, 57 Ind. App. 500, 106 N. E. 41; *Reeves v. Miller*, 91 N. E. 812; *Randall v. Chaney*, 84 Ind. App. 280, 151 N. E. 105; *Peoples State Bank of Indianapolis v. Hall*, 83 Ind. App. 385, 148 N. E. 486; *Turk v. Carnahan et al.*, 25 Ind. App. 125, 57 N. E. 729; *Green v. Sinker, Davis & Co.*, 135 Ind. 434, 35 N. E. 262; and having disaffirmed and taken possession of the property, the consideration for the note is destroyed and his right to recover on the note is lost, with one exception noted below.* *Randall v. Chaney, supra.* The courts are in conflict as to what constitutes an election between the two remedies, some holding that it is not the judgment which may be obtained, but the commencement of a suit to enforce a coexisting, inconsistent remedy in a court having jurisdiction which constitutes the decisive act and makes the election binding; *Eilers Music House v. Douglas*, 90 Wash. 683, 156 P. 937, L. R. A. 1916F 613; *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (NS) 144; *Orcutt v. Rickenbrodt*, 59 N. Y. S. 1008; (but see *Ratchford v. Cayuga County Cold Storage & Warehouse Co.*, 217 N. Y. 565, 112 N. E. 447); *Truax v. Parvis*, 7 Houst (Del.), 32 Atl. 227; *Merchants and P. Bank v. Thomas*, 69 Tex. 237, 6 S. W. 565; *Boas v. Knewing* (Cal.), 165 P. 690, L. R. A. 1917F, 462; *Osborne & Co. v. Walther*, 12 Okla. 20, 69 P. 953; while other courts hold that where the seller brings suit and obtains judgment he has not lost the right to retake the property where the judgment remains unpaid; *Thomason v. Lewis*, 103 Ala. 426, 15 So. 830; *Vaughn v. Hopson*, 10 Bush 337; *McPherson v. Acme Lumber Co.*, 70 Miss. 649, 12 So. 857; *Campbell Printing Press and Mfg. Co. v. Rockaway Pub. Co.*, 56 N. J. L. 676, 29 Atl. 681; *Root v. Lord*, 23 Vt. 568; *Moon v. Wright*, 12 Ga. App. 659, 78 S. E. 141; or where the suit is discontinued before judgment. *Matthews v. Lucia*, 55 Vt. 308. The authority seems about equally divided, and there is apparently no case directly in point in Indiana. In some jurisdictions, on default of the buyer, part payments are regarded as forfeited, and it is not therefore necessary to return the payments received or notes given for the price as a condition precedent to a recovery of the goods. *Fields v. Williams*, 91 Ala. 502, 8 So. 808; *Hughes v. Keely*, 40 Conn. 148; *Latham v. Sumner*, 89 Ill. 233, 31 Am. Rep. 79; *Fleck v. Warner*, 25 Kans. 492; *White v. Oakes*, 88 Me. 367, 34 Atl. 175; *Lorain Steel Co. v. Norfolk etc. Ry. Co.*, 187 Mass. 500, 73 N. E. 646; *Tufts v. D'Arcambal*, 85 Mich. 185, 48 N. W. 497; *Duke v. Shackel-*

ford, 56 Miss. 552; *Humeston v. Cherry*, 23 Hun 141; *Morgan v. Kidder*, 55 Vt. 367. In other jurisdictions, however, the rule has been adopted that a return of the payments made or notes given is a condition precedent to a recovery of the property. *American Soda Fountain Co. v. Dean Drug Co.*, 136 Iowa 312, 111 N. W. 534; *Ketchum v. Brennan*, 53 Miss. 596; *Shafer v. Russell*, 28 Utah 444, 79 P. 559; *Segrist v. Crabtree*, 131 U. S. 287. Of course, the right to retain the amounts paid may depend upon express stipulation; *Singer Mfg. Co. v. Treadway*, 4 Ill. App. 57; and on the other hand the contract may preclude a forfeiture of payment by stipulating that the vendor may recover the property and reasonable charges. *Fairbanks v. Malloy*, 16 Ill. App. 277. So too, it has been held that the seller may retain such amount as will compensate him for any deterioration of the goods in the hands of the buyer. *Commercial Pub. Co. v. Campbell Printing Press, etc. Co.*, 111 Ga. 388, 36 S. E. 756. The settled rule in Indiana is, that in the absence of a forfeiture clause either express or implied, by virtue of which all prior payments are to be retained by the vendor as liquidated damages, upon retaking the property, he must account to the vendee for the payments made to him. *Quality Clothes Shop v. Keeney, supra.* Where a note is not included within the conditional terms of a contract of sale, but is given as the equivalent of cash for a preliminary payment, its consideration does not fail by reason of the recaption of the property by the vendor upon the vendee's default, and the vendor may still enforce it. *Norman v. Meeker*, 91 Wash. 534, 158 Pac. 78, Ann. Cas. 1917D, 462; *Randall v. Chaney, supra.* Here, however, the conditional provisions of the sale contract were inserted in the note, and no mistake is alleged or reformation sought. The note in suit being part of the original conditional agreement, and the consideration having failed therefor, the general rule prevails, and it follows that the vendor cannot recover on the note. K. J. M.