RESALE BY UNPAID SELLER OF GOODS.

Sir Frederick Pollock in his essay on "Some Defects of our Commercial law,"[1] says:

> The sale of goods is one of the commonest transactions of life. It might seem not very rash to guess that the law relating to this transaction is eminently clear and well settled. Such a guess, however, would be wide of the truth. Let us take a case neither complicated in itself nor unreasonably remote from ordinary experience. Goods are sold on credit, and remain in the seller's possession, the buyer undertaking to remove and pay for them at a certain date. The time of credit expires, and the buyer makes default. What is the seller to do? Surely this is a question which one might expect a civilized system of law not to leave in doubt. But, in fact, it "is one on which the law is more unsettled than any person not practically acquainted with the subject could anticipate." So Lord Blackburn wrote more than thirty years ago, and his words are to this day, the essay was published in 1882, as true as they were then.

What the Law Should be as to Seller's Right to Resell.

It should be an easy matter to determine the rights of the unpaid seller when the buyer is in default. Convenience suggests that he should be at liberty to resell the goods under proper conditions in the interest of the defaulting buyer and, since he has lost the benefit of his contract with the buyer, he should be allowed to charge him with the loss on resale and the expenses of reselling. Whether the purchaser should get the benefit of any profit on the resale may be debatable. In his favour it may be suggested that if he is to be subjected to the loss he should be entitled to the profit on the resale. But on the other hand he has brought the loss upon himself by his own default and while it is quite fair that the unpaid seller should be indemnified there is no good reason why the defaulting buyer should derive a profit from his own actual default. It is conceded that this is fair and it is the law in cases where the power to resell has been expressly reserved. Would it have been going very far or at all beyond what is reasonable to consider such a power as implicitly reserved in every contract of sale? If so the consequence would follow that in all cases, upon the buyer's default, the seller could resell the goods, charging the loss and expenses to the purchaser and keeping the profits

[1] Essays in Jurisprudence and Ethics. p. 68.

for himself. Of course it should be the law that, except where the goods are perishable, or the price may, in the figurative language of Best, C.J., in *McLean* v. *Dunn*,[2] be perishable because of the fluctuating condition of the market, there should be proper precautions by way of notice and reasonable conditions of time and place of sale to prevent undue loss to the purchaser. But subject to these conditions the law, where there is no express reservation, should be the same as where the right to resell is expressly reserved. The cases before and since Lord Blackburn's day have, as it happens, left many simple questions unanswered and the Sale of Goods Act has perhaps opened as many and as difficult questions as it has closed.

What Blackburn Considered the Law as to Resale in 1845.

Blackburn in 1845, afterwards Lord Blackburn, stated the law in the following words:

> Assuming, therefore, what seems pretty well established, that the seller's rights exceed a lien, and are greater than can be attributed to the assent of the buyer, under the contract of sale, the question arises, how much greater than a lien are they? It is clear that in no case do they amount to a complete resumption of the right of property, or in other words, to a right to rescind the contract of sale, but perhaps come nearer to the rights of a pawnee with a power of sale, than to any other common law rights. At all events, it seems that a resale by the seller, whilst the buyer continues in default, is not so wrongful as to authorize the buyer to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it still due; nor yet so tortious as to destroy the seller's right to retain, and so entitle the buyer to sue in trover.

Was Blackburn's View Correct?

It is implied in the foregoing statement that even where the buyer is in default the vendor has no right to resell and that this was the law when Lord Blackburn, then Mr. Colin Blackburn, published his book in 1845. Yet the case of *McLean* v. *Dunn, supra,* had been decided in 1828. In this case the action was one of special assumpsit for not accepting and paying for a quantity of Russian and German wool, which the plaintiffs had resold at a loss. Defendant contended that the resale rescinded the contract and that the contract having been rescinded, the breach of it could not furnish a cause of action. Best, C.J., at p. 728 said:

> With regard to the resale, it seems clear to me, that it did not rescind the contract. It is admitted that perishable articles may be resold. It is

[2] 4 Bing. 723.

difficult to say what may be esteemed perishable articles, and what not; but if articles are not perishable, price is, and may alter in a few days, or a few hours. In that respect there is no difference between one commodity and another. It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it, except on the authority of decided cases. Those which have been cited do not apply.

It is difficult to understand how it was possible for Blackburn in 1845, after this pronouncement by the Court of Common Pleas in 1828, to suggest that a resale on the buyer's default was in any sense at all a tortious act. The right to resell seems to be clearly established by this case. In *Acebal* v. *Levy*,[3] the Court of Common Pleas had to consider whether, after reselling the goods, the vendor could bring an action for goods sold. Granting that the purchaser had no answer to the action against him for breach of his contract to accept and pay for the goods, because the contract had not been rescinded by the resale, yet the vendor could not sue for goods sold and delivered for they had not been delivered. As to the count for goods bargained and sold the Court pronounced an important dictum that it is not necessary to decide whether the plaintiff can or cannot maintain an action for goods bargained and sold after he has sold them to a stranger before action brought. That is a question which goes not to the merits but is a question as to the pleading only, for there can be no doubt that the plaintiff might, after reselling the goods, recover the same measure of damages in a special action framed upon the refusal to accept and pay for the goods bought. There had been a ruling on this very point by Lord Kenyon at *nisi prius* in 1797 in *Hore* v. *Milner*[4] that the vendor who had resold could only recover on a count for damages for breach of the agreement for which he had no count, having brought his action for goods bargained and sold. Long before this L.C.J. HOLT in *Langfort* v. *Administratrix of Tiler*[5] had held at *nisi prius* that:

After earnest given, the vendor cannot sell the goods to another without a default in the vendee: and, therefore, if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay, and take away the goods in a convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person.

[3] 10 Bing. 376.
[4] 1 Peake 58.
[5] 1 Salk. 113.

The later decisions have established that the agreement is not necessarily "dissolved" by the resale, and, as to whether it was necessary at common law to give notice or not, probably this was still an open question. The necessity for notice was not recognized by the Court of Common Pleas in *Fitt* v. *Cassanet.*[6] In this case which occurred in 1842 the purchasers of oil paid £22 on account of a purchase of thirteen tons of fat and palm oil scrapings at £8 a ton. After receiving five tons they refused to accept any more and gave notice to the vendors to take away what had been delivered and return the £22. This the vendors refused to do and resold the residue. The jury found that there had been no agreement to rescind the contract and no fraud on the part of the vendors. Tindal, C.J., refers to these findings and to a third circumstance alleged on the part of the buyers as entitling them to recover, to wit, the fact of the resale. As to this it was held to be necessary to the plaintiff's case to show that the resale had been before the buyers had given notice that they would not accept the rest of the goods. "If it was after the plaintiffs had signified that they would not receive the rest of the goods, it certainly was not necessary for the defendant (the seller) to keep them for an unlimited time. . . . The fair inference seems to me to be, that the plaintiffs were the first to repudiate the further performance of the contract, and then the conduct of the defendant would be consistent with what the law would allow. It is difficult to see how an action for money had and received could be maintained by the plaintiffs unless they were in a situation to recover upon the original contract. The action for money had and received would be a compendious form of recovering back the deposit, but it would stand upon the same footing as the right to sue on the contract. But in order to recover upon that, the plaintiffs must have averred that they were ready and willing to perform their part of the contract." The £22 is spoken of here as a deposit; but the evidence was that it was simply a payment on account, not a deposit which could be forfeited by the default of the buyers in performance of their obligations; and the case suggests the question which will have to be considered later whether if the buyers had received, say, only one ton of the scrapings worth £8 or if the payment on account had been £80 instead of £22 the seller would have been bound to return it, or if not the whole how much? Would he not be entitled to retain it until he learned the result of the resale, and then to retain so much of it as would be necessary to compensate him for his loss on the resale and

[6] 4 M. & G. 898.

expenses? Tindal, C.J., seems to have held that the plaintiff could not recover any of the money paid on account unless he could allege that he had been ready and willing to receive and pay for the goods.

As to the necessity for notice to the buyer before reselling, the case seems to be distinctly an authority that there was no such necessity. There was no notice of the intention to resell; the contract was held not to have been rescinded by the resale, and the vendor was held not to have been in the wrong in reselling without notice. Maule, J., said, at p. 905:—

> In order to entitle the plaintiffs to maintain *any* action against the defendant, it is necessary that he should be in the wrong. It is incumbent on the plaintiffs to shew that. Now it is quite consistent with the evidence in the case and the finding of the jury, that the oil delivered was of the quality which the plaintiffs were bound to receive; and that the defendant re-sold the residue after the plaintiffs had refused to receive it. If that is the state of the case the defendant has done nothing but what he had a right to do. Without considering whether a special action would not be necessary for the breach of the contract, if the defendant were in the wrong, or whether an action for money had and received would be maintainable, I think the evidence does not shew that the defendant has done anything wrong, and therefore that *no* action will lie against him on the part of the plaintiffs.

CONTRACT RESCINDED WHERE RESALE IS PURSUANT TO POWER EXPRESSLY RESERVED.

All the cases thus far considered occurred before the publication of Blackburn on Sale. Shortly after that date occurred the case of *Lamond* v. *Davall*[7], which was the case of a sale of stock to be paid for by a day named with an express reservation of the power to resell, which was exercised by reselling on default. An action was brought for goods bargained and sold on the theory of a subsisting contract which had been broken by the defendant. The trial Judge directed a non-suit, and Denman, C.J., delivering the judgment of the Court, said at p. 1031:

> We are of opinion that the non-suit was right. It appears to us that a power of resale implies a power of annulling the first sale, and that, therefore, the first sale is on a condition, and not absolute. There might be inconvenience to the vendor if the resale was held to be by him as agent for the defaulter; and there is injustice to the purchaser in holding him liable for the full price of the goods sold, though he cannot have the goods, and though the vendor may have received the full price from another purchaser. This inconvenience and injustice would be avoided by holding that the sale

[7] (1847) 9 Q.B. 1030.

is conditioned to be void in case of default, and that the defaulter in case of resale is liable for the difference and expenses.

There is an obvious logical difficulty here. If the sale is annulled, how can the vendor sue the purchaser on a contract that has been rescinded? We must understand the vendor to have agreed with the purchaser in these terms: You agreed with me that you would accept and pay for these goods, also that if you did not keep your promise I could resell them as my own goods, also that if I received less than you agreed to pay me you would make good the balance with the expenses of the resale.

CAN THE DEFAULTING BUYER, AFTER RESALE, RECOVER BACK THE PRICE PAID?

The case cited in the last preceding paragraph seems to answer this question in the negative. In the case of *Page* v. *Cowasjee Eduljee*[8], which arose out of the resale of a ship, Lord Chelmsford, delivering the judgment of the Privy Council, said at p. 145:

> There may be cases where the vendor might sell without rendering himself liable to an action, as where goods sold are left in the possession of the vendor, and the purchaser will not remove them and pay the price after receiving express notice from the vendor that, if he fail to do so, the goods will be re-sold. But the authorities are uniform on this point, that if before actual delivery the vendor re-sells the property while the purchaser is in default, the resale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due. If this is the case where possession of the property remains with the vendor, *à fortiori* must it be so where there has been a delivery, and the vendor takes it out of the possession of the purchaser and re-sells it.

A case of this sort was *Gillard* v. *Brittan*[9]. The retaking in such a case is simply a conversion which gives rise to an action for damages, and the trial Judge "was, therefore, clearly in error in telling the jury that they might consider the debt to the defendant (for the unpaid price) as diminished pro tanto by the value of the goods taken." Such a case would under the practice of these days be adjusted by a counterclaim. The conflicting claims in those days could not be the subject of set-off.

PURCHASER LIABLE ON BILL OR NOTE FOR PRICE, ALTHOUGH GOODS RETAKEN BY VENDOR.

In *Stephens* v. *Wilkinson*[10], Tenterden, C.J. stated the facts to be that the person who bought the goods paid part of the purchase

[8] L.R. 1 P.C. 127.
[9] 8 M. & W. 575.
[10] 2 B. & Ad. 320.

money and gave his bill for the residue, had possession of the goods delivered to him; kept them for two months and was then dispossessed by the vendor. It was held that this could not be treated as rescinding the contract and the buyer, even assuming the act of the vendor to be wrongful, could not defend the action against him on the note, but must bring an action of trespass. Parke, J. said that there had not been a total failure of consideration as the purchaser had been in possession of the goods for two months. The contract had not been dissolved. It could only be dissolved by mutual consent. No case has been cited, and no dictum, which confirms the position that the retaking of the goods by the vendor may be treated by the vendee as a dissolution of the contract.

Can the Buyer Claim the Profit on a Resale?

In the case of *Greaves* v. *Ashlin*[11], the plaintiff sued defendant for not delivering fifty quarts of oats. The oats had been resold by the defendant, who had, before reselling, complained to the plaintiff that the oats had not been carried away, and had given him notice that if they were not immediately carried away he would resell them to other persons. They were resold at an advance, and Lord Ellenbough told the jury that the buyer's neglect did not entitle the seller to put an end to the contract any more than the neglect of the person to take away the tithes set out for him entitled the farmer to confiscate them. The plaintiff had a verdict for the difference between the price at which he bought and the price at which the defendant resold. Mr. Benjamin bases on this case and on Blackburn's references to the analogy of a pledge the theory that the defendant had resold as agent of the buyer and must account to him for the profits. But this case occurred at *nisi prius* in 1813, and the editors of the Fifth Edition of Benjamin, p. 941, note 3, say that the subsequent case of *MacLean* v. *Dunn, supra,* has been treated in America as overruling *Greaves* v. *Ashlin, supra.* It may be safely concluded that Mr. Benjamin was mistaken in the inferences he drew from this case, which in fact seems to negative altogether the right of resale on the buyer's default.

Resale Before Buyer in Default.

Where goods are sold after the property has passed to the purchaser, whether they have been delivered or remain in the posses-

[11] 3 Camp. 426.

sion of the vendor, it is obvious that the vendor's act is purely and simply a conversion of the property for which, if the purchaser has a right of immediate possession, an action of trover will lie. Such was the case of *Chinery* v. *Viall*[12], where sheep had been sold on credit and left in the possession of the vendor, who sold them before the period of credit had expired. Under the case of *Gillard* v. *Brittan, supra,* cited in an earlier paragraph, the measure of damages would be the value of the goods. But there is a practical difficulty in that the plaintiff purchaser would receive as damages the whole value of the sheep sold to him while the vendor could not recover the price from the purchaser. He had estopped himself by reselling from claiming for goods bargained and sold, and there was no other form of action in which he could have made the purchaser liable. Besides, as Bramwell, B., points out, the value of the goods is not necessarily nor always the measure of damages for conversion. He instances the case of the defendant, after an act of conversion, returning the goods to the plaintiff. "The actual damage sustained and not the value is the measure of damages."

Must There be Notice Before Resale?

In more than one case, it has been suggested by the Court that the unpaid vendor should give notice and wait a reasonable time before reselling. Thus, in *Longfort* v. *Administratrix of Tiler* (*supra*), Holt, C.J., says that if the vendee does not come and take away the goods the vendor ought to go to him and request him to do so, etc., after which he is at liberty to resell. But there was no notice to the purchaser before the resale in *Fitt* v. *Cassanet* (*supra*), and it has been held that notice of resale in a case where the purchaser had not only delayed payment but absolutely repudiated the contract would be a useless formality. The only question is whether the provisions of the Sale of Goods Act as to resale have destroyed the authority of *Fitt* v. *Cassanet* (*supra*). It is suggested by Mr. Benjamin's latest edition that they have, because section 40, in setting out the rights of the unpaid seller, numbers among them a right of resale "as limited by this Act," and the Act permits resale without notice only in the case of perishable goods. Against this view, there is a majority decision of the Supreme Court of Nova Scotia, *McCowan* v. *Bowes*[13]. The reasons for dispensing with notice of resale in that case seem too narrow,

[12] 5 H. & N. 288.
[13] 56 N.S.R. 323; Falconbridge's *Cases on Sale of Goods*, 635.

and they ignore the principles laid down by Lord Herschell in *Vaglianno's Case* for the construction of a codifying act. The writer feels disposed to follow the fine example of Lord Bramwell in *Noble* v. *Ward* (Falconbridge's Cases, p. 62), and reverse his own decision on the question of notice. The only circumstance that would induce him to hesitate is the fact that it was concurred in by the late Mr. Justice Rogers. Mr. Justice Mellish, who tried the case, held that there was no need of notice as the purchaser had repudiated his bargain, but the right to resell without the notice called for by the Sale of Goods Act does not seem clear. The seller certainly did not mean to rescind the contract. If he had so intended he would have surrendered the note given in payment instead of suing the purchaser on it as he did shortly after the resale, and the purchaser could not rescind the contract simply by refusing to perform it.

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