

1940

# Max Fausett v. General Electric Contracts Corporation and William Holdaway : Brief of Appellant General Electric Contracts Corporation

Utah Supreme Court

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Fabian, Clendenin, Moffat & Mabey; Attorneys for Appellant;

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# In the Supreme Court of the State of Utah

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MAX FAUSETT,

*Plaintiff and Respondent,*

vs.

GENERAL ELECTRIC CONTRACTS  
CORPORATION, a foreign corpora-  
tion, and WILLIAM HOLDAWAY,  
*Defendants and Appellants.*

No. 6251

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## BRIEF OF APPELLANT GENERAL ELECTRIC CONTRACTS CORPORATION

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FABIAN, CLENDENIN, MOFFAT  
& MABEY

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General Electric Contracts Corporation*

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## BRIEF OF APPELLANT GENERAL ELECTRIC CONTRACTS CORPORATION

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### STATEMENT OF THE CASE

In July, 1938, Defendant William Holdaway and one Earl Fausett were doing business in Price, Utah, as the Carbon Furniture & Appliance Company, selling, among other things, Hot Point refrigerators. On July 7, 1938 these partners sold Plaintiff Max Fausett a Hot Point refrigerator for a total purchase price, including sales tax, of \$216.64. The contract attached to Plaintiff's Amended Complaint as Exhibit "A" (Tr. 19a, Ab. 12) recited a cash payment of \$75.00, the balance due in fourteen consecutive monthly installments of \$10.00 each, commencing July 25, 1938, and the final payment being in the sum of \$11.64.

Plaintiff was given possession of the refrigerator and placed it in his home in Price, Utah. On May 29, 1939 Defendant William Holdaway went to the home of Max Fausett in Price, Utah for the purpose of repossessing the refrigerator. No one was at home, the door was open and Defendant Holdaway took the refrigerator out of the house. (Tr. 254-255, Ab. 134).

On July 13, 1939 Plaintiff commenced this action against the Defendants General Electric Contracts Corporation and William Holdaway for the unlawful repossession of the refrigerator.

After July 7, 1938, when the refrigerator in question was sold to Plaintiff, the partnership between William Holdaway and Earl Fausett was dissolved. (Tr. 30, Ab. 89).

The contract which was taken by the Carbon Furniture & Appliance Company from the Plaintiff Holdaway, which is Plaintiff's Exhibit "A", and a copy of which is attached to Plaintiff's Amended Complaint (Ab. 13) among other things provided that

"Title to said property shall not pass to the Buyer until said Total Time Price is fully paid in cash. \* \* \* Should the Buyer fail to pay said Time Price or any part thereof when due, \* \* \* the entire unpaid balance shall at once become due and payable at the Seller's election, and the Seller may, without notice or demand, by process of law

or otherwise, take possession of said property wherever located, and retain all moneys paid thereon for the reasonable use of said property, \* \* \*. The Buyer waives all claims, damages and demands against the Seller arising out of the repossession, retention and sale as aforesaid."

"Time is of the essence of this contract. All rights and remedies hereunder are cumulative and not alternative."

This contract was sold to General Electric Contracts Corporation shortly after its execution. (Tr. 14, Ab. 87). Pursuant to a dealer's agreement between General Electric Contracts Corporation and Carbon Second Hand Store, which is Defendants' Exhibit 1, (Tr. 31, Ab. 89) (also Tr. 405 to 413) whereby the Carbon Second Hand Store, sometimes referred to as Carbon Furniture & Appliance Company, guaranteed "the payment of all deferred payments on accounts sold to you (General Electric Contracts Corporation) hereunder at the time and in the manner specified in the accounts, and we (Carbon Furniture & Appliance Company) further covenant that if there shall be default in the payment of any two installments of an account or in the performance of any requirement imposed on the Buyer therein, we shall pay you in cash, on demand, an amount equal to the unpaid balance on said account less such proper portion of your purchase charge as you may determine."

After the contract had been purchased by General Electric Contracts Corporation the following payments were received:

Payment due July 29, 1938, received August 15, 1938;

Payment due August 29, 1938, received September 19, 1938;

Payment due on September 29, 1938, received December 1, 1938;

Payment due October 29, 1938, received one-half December 1, 1938 and one-half February 21, 1939;

Payment due November 29, 1938, received February 21, 1939;

Payment due December 29, 1938, received February 21, 1939;

Payment due January 29, 1939, received April 7, 1939;

Payment due February 29, 1939, received one-half April 7, 1939.

There were no further payments made and the refrigerator was repossessed on May 29, 1939.

During the time that Plaintiff was in possession of the refrigerator in question Defendant General Electric Contracts Corporation wrote collection letters to the Plaintiff or his wife under the following dates:

November 3, 1938	February 27, 1939
November 9, 1938	March 27, 1939
November 16, 1938	March 13, 1939
November 22, 1938	March 23, 1939
December 1, 1938	April 7, 1939
December 16, 1938	April 27, 1939
December 22, 1938	May 4, 1939
December 28, 1938	May 11, 1939



The letter of May 11, 1939, reads as follows: (Tr. 434, Defendants' Ex. 8).

"Dear Mr. Fausett:

"Your lack of response to my letter of May 4 is disappointing.

"I cannot believe you would willingly lose the large equity which you have without making some effort to protect it.

"However, since you have not replied to my previous letters and have not made payment on your account, we are instructing your dealer to take immediate action to enforce the penalties outlined in your contract.

"You may still keep the merchandise if you wish, upon payment of \$66.64, which represents the balance due on the account.

"Very truly yours,

H. P. GOUGH, *Manager.*"

"hpg/lb

On May 12, 1939, General Electric Contracts Corporation wrote to Defendant Holdaway, who was then running the Carbon Furniture & Appliance Company, as follows: (Tr. 436, Defendants' Ex. 10).

"Dear Bill:

"In accordance with our conversation, we are attaching our formal repurchase request on the



Max Fausett account. I wish you would advise me as soon as you are successful in obtaining this merchandise.

“Very truly yours,

H. P. GOUGH.”

On May 29, 1939 Defendant Holdaway repossessed the refrigerator (Tr. 254, Ab. 134) and stored it in the William Campbell warehouse in Price. (Tr. 255, Ab. 135) and eventually resold it in the latter part of June to J. R. Moyle, for \$100.00.

About July 13, 1939 Pete Woolsey, brother-in-law of Plaintiff, offered Defendant Holdaway a check for \$66.64 as the balance due on the refrigerator. (Tr. 286, Ab. 137). Defendant Holdaway refused to accept it and claimed there was a balance due of \$96.64, that there was still \$30.00 due him as the down payment on the refrigerator. (Tr. 287, Ab. 138). Defendant Holdaway figured that he was entitled to the \$4.00 difference between the amount due him and the amount received from the resale of the refrigerator as part of his expenses and costs. (Tr. 294, Ab. 139).

At the trial of the case the Defendant General Electric Contracts Corporation moved for a non-suit on the following grounds: (Tr. 173, Ab. 116).

First: That there is no evidence of a conversion of the personal property described in the plaintiff's complaint.

Second: That there is no evidence to go to the jury as to any damages suffered by the defendants.

Third: That there is no evidence that the defendant, William Holdaway, was, at the time that he repossessed the refrigerator, acting as the agent of this defendant.

And at the conclusion of the Defendants' case the Defendant General Electric Contracts Corporation moved for directed verdict upon the following grounds: (Tr. 306, Ab. 142).

First: That there is no evidence to go to the jury of any conversion of the refrigerator in question by the Defendant, General Electric Contracts Corporation.

Second: That there is no evidence of damage, if any, suffered by plaintiff, to be passed upon by the jury.

Third: That there is no evidence to be considered by the jury relative to the question whether the defendant Holdaway, at any time, acted as agent for the General Electric Contracts Corporation.

Fourth: That counsel for plaintiff has stated that his action is an action in claim and delivery, and the evidence affirmatively and without dispute shows that at the time of the commencement of the action that this defendant was not in possession of the refrigerator in question.

This motion was joined in by Defendant William Holdaway. Both of these motions were overruled and the case submitted to the jury. (Tr. 386, Ab. 57). The jury returned a verdict for \$75.00 for wrongful possession and retention of the refrigerator and \$184.14 the value of the refrigerator. It being apparent that the amount fixed by the jury as the value of the refrigerator was greater than its cost less the amount still due upon the same, Plaintiff filed a document captioned "Remittitur" whereby Plaintiff attempted to remit from the verdict of the jury the sum of \$66.64. (Tr. 141, Ab. 60). This was accompanied by Plaintiff's motion to reduce judgment, (Tr. 142, Ab. 60) which motion was granted and the judgment reduced on February 19, 1940. (Tr. 145, Ab. 61).

Defendant General Electric Contracts Corporation, filed a motion for new trial (Tr. 136, Ab. 59) which was, on the 19th of February, 1940, duly denied. (Tr. 146, Ab. 62).

### QUESTIONS TO BE DETERMINED UPON THIS APPEAL

A multitude of questions could be made out of the errors which were committed in the trial of this case and that are raised by the Assignment of Errors. However, they may be simply grouped and determined as follows:

1. There was no unlawful repossession of the Fausett refrigerator by William Holdaway, and the evidence

failing to support such an unlawful repossession, the court erred in refusing Defendants' motion for non-suit and Defendants' motion for a directed verdict, and the same question is incorporated in the exceptions taken to the instructions of the court.

2. There is no evidence that William Holdaway, in repossessing the refrigerator, was acting as the agent of General Electric Contracts Corporation, and accordingly the court erred in denying Defendants' motion for a non-suit and Defendants' motion for directed verdict, as well as in his instructions to the jury on this point.

3. The court erred in his instructions to the jury on the question of damages and the jury failed to follow the instructions of the court in returning a verdict for more than the initial cost price of the refrigerator less the admitted unpaid balance due thereon and the court could not correct this error by arbitrarily deducting from the verdict of the jury the unpaid balance due thereon.

## THERE WAS NO UNLAWFUL REPOSSESSION OF THE FAUSETT REFRIGERATOR

There seems to be no dispute about the following facts.

The refrigerator was sold under a title retaining contract, reciting a \$75.00 down payment, calling for fourteen monthly installments of \$10.00 each, with the

exception of the final installment which was to be \$11.64. The first installment was due July 25, 1938. This contract, which has been discussed in the statement of facts, retained title in the seller and gave the seller the right, without notice or demand or process of law, to retake possession of the refrigerator wherever located upon the buyer's failing to make any of the payments when due. There is no question whatever but that the buyer had been in default under said contract from the beginning, and that at no time was the contract current. (Ab. 126, Tr. 215). At the time the refrigerator was repossessed only one-half of the payment due in February had been paid and all of the installments for March, April and May were past due. In addition thereto the Defendant General Electric Contracts Corporation had written the Plaintiff on May 11, to the effect that by reason of the payments not having been made the dealer was going to take immediate action to enforce the penalties in the contract. The Plaintiff's attention was also called to the fact at that time that he could redeem the merchandise upon the payment of \$66.64. (Defendants' Ex. 8, Tr. 434).

As to the manner in which the refrigerator was repossessed, there is no dispute and all witnesses are agreed that no one was at home at the Fausett dwelling when the refrigerator was repossessed. The wife of Plaintiff, Sylvia Fausett, so testified. (Ab. 95, Tr. 62). She said that she left the house unlocked and when she returned about five days later she found the refrigerator

was gone, but that the contents had been taken out and placed upon a chair. Mrs. Fausett's statement to Defendant Holdaway over the telephone on her return was as follows: "Well, I asked him just what business he had going in my home when I was not there and taking my refrigerator." This would indicate that she had sort of expected to have the refrigerator repossessed.

The only other witnesses to testify concerning the repossession of the refrigerator are Defendant Holdaway and the man who accompanied him, Clarence Packer. On this subject Defendant Holdaway said (Ab. 134, Tr. 254), "There was no one home, the door was open and I could see the refrigerator in there."

There is no testimony or evidence offered or introduced in this matter indicating that there was any breach of the peace of any sort committed by Defendant Holdaway in repossessing the refrigerator. The evidence is, furthermore, without dispute that the Fausett contract was sadly in default when the refrigerator was repossessed. The evidence further shows without dispute that during the period from July to May, during which the Fausetts had had possession of the refrigerator, the Defendant General Electric Contracts Corporation had written the Fausetts fifteen collection letters, and that at each time the contract was in default and in addition thereto Defendant Holdaway had made numerous personal calls and telephone calls to the Fausetts relative to their delinquent account.



The general rule applicable to this situation is well stated in

24 R. C. L. 486  
as follows:

“On the default of the buyer the seller may, ordinarily, exercise his right to retake possession without resort to the courts. And it is said that the seller has an implied irrevocable license to enter the buyer’s premises and remove the goods on breach of the contract; and a fortiori, if the right so to re-enter is expressly reserved to the seller it cannot be revoked by the buyer and, after an attempted revocation, it may be exercised without liability to the buyer for trespass.”

This rule has been sustained in a great many cases. The Massachusetts court, in the case of

*Lambert v. Robinson*, 37 N. E. 753

held that where the contract so provided the seller had a right to forcefully enter a farmer’s dwelling house for the purpose of taking property conditionally sold when the buyer had failed to meet the payments provided therein.

The Maryland court, in the case of

*Walsh v. Taylor*, 39 Md. 592

held that under a contract similar to that now before the Court, upon the default of the buyer, the seller had a right to enter upon the buyer’s property to reclaim possession of the buyer’s property sold under a conditional



sale contract. The court said that the clause in the conditional sale contract giving the seller the right to repossess the property without legal proceedings, and also the right to enter upon the buyer's property for that purpose, gave the seller an irrevocable license or a license coupled with an interest which the buyer could not withdraw so as to hold the seller to be a trespasser. To the same effect see

*Walker Furniture Co. v. Dyson*, 32 App. D. C. 90.

The Alabama court, in the case of

*McCarty-Greene Motor Co. v. House*, 216 Ala. 666, 114 S. 60

supports the same rule.

The Iowa court, in the case of

*Flaherty v. Ginsberg*, 135 Iowa 743, 110 N. W. 1050

sustained the right of the vendor to retake without judicial process where such a right was given in the contract.

The courts have held in a number of cases that a peaceable retaking by the vendor upon the default of the vendee without legal process gives the vendee no cause of action against the vendor.

*Swain v. Schild* (1917), 66 Ind. App. 156, 117 N. E. 933

*Van Wren v. Flynn* (1882), 34 La. Ann. 1158

*Heath v. Randall* (1849), 4 Cush. (Mass.) 195

- Vorenberg v. American House Hotel Co.*  
(1923), 246 Mass. 108, 140 N. E. 297  
*Lynch v. Sable-Oberteuffer-Peterson*, 260 P.  
222, 122 Ore. 597  
*North v. Williams* (1888), 120 Pa. 109, 6 Am.  
St. Rep. 695, 13 A. 723  
*Abel v. M. H. Pickering Co.* (1914), 58 Pa. Sup.  
Ct. 439

Although the Plaintiff has not specifically pleaded a case contending that the Plaintiff had a right to redeem the refrigerator after it had once been repossessed, nevertheless the court saw fit to allow considerable testimony to be introduced on Plaintiff's request and particularly the testimony of Sylvia Fausett (Ab. 97, Tr. 78-90) and the testimony of the brother of Plaintiff's wife, Myron Woolsey (Ab. 107, Tr. 134-138) and the testimony of Clara Pierce, (Ab. 108, Tr. 139-141) all to the effect that after the refrigerator had been repossessed by Defendant Holdaway they tendered the balance due thereon, \$66.64.

The authorities are quite uniform to the effect that after property has been lawfully repossessed by the seller the buyer has no right of redemption.

- Penchof v. Heller*, 176 Minn. 493, 223 N. W. 911  
*Lynch v. Sable-Oberteuffer-Peterson*, *supra*  
*Silverthorne v. Simon*, 59 Cal. App. 494, 211  
P. 26

In view of the foregoing authorities Appellant contends that there was no evidence of any unlawful repossession of the refrigerator in question and that the court

erred in refusing Appellants' motion for a non-suit on that ground and further erred in refusing Appellants' motion for a directed verdict, and in refusing and denying Appellants' requested Instructions Nos. 1 and 2, and on this ground alone the case should be reversed.

**THERE IS NO EVIDENCE THAT WILLIAM HOLD-  
AWAY IN THE REPOSSESSION OF THE REFRIG-  
ERATOR WAS ACTING AS AGENT OF GENERAL  
ELECTRIC CONTRACTS CORPORATION.**

This question was squarely presented to the Court in this Defendant's motion for non-suit as well as its motion for a directed verdict, both of which motions were denied. It was also squarely presented in Defendant's requested instructions Nos. 4 and 5 which were refused by the court and the court in his instructions definitely held that as a matter of law the Defendant Holdaway in repossessing the refrigerator in question was acting as the agent of Defendant General Electric Contracts Corporation. In this respect Instruction No. 15 is informative where the court said,

“The court instructs the jury that it is immaterial who was the actual owner of said refrigerator on May 30, 1939, yet, if you find that the plaintiff was entitled to the possession of said refrigerator on that date, then your verdict must be for the plaintiff and against the defendants for the possession of said refrigerator \* \* \* .”

Let us take a look at the testimony and evidence bearing upon this question of agency. There is no question but what the refrigerator in question was purchased from the Carbon Furniture & Appliance Company, which was owned by William Holdaway and Earl Fausett, and that subsequently Earl Fausett sold all his interest in the Company to William Holdaway. There was no question but that Defendant William Holdaway was the party who repossessed the refrigerator on May 29. There was also no question but what the Carbon Furniture & Appliance Company at the time of the sale of the refrigerator in question to Plaintiff, and also at the time of the repossession of said refrigerator, was bound to Defendant General Electric Contracts Corporation by a dealer's contract. (Defendants' Ex. 1, Tr. 405.)

There is further no question but what Plaintiff's contract with the Carbon Furniture & Appliance Company was duly sold and assigned to the General Electric Contracts Corporation pursuant to the terms of said dealer contract. Among other things said dealer contract contained a promise on behalf of the Carbon Furniture & Appliance Company (the Defendant Holdaway as of the time of trial) in the following language:

“We hereby guarantee the payments of all deferred payments on accounts sold to you hereunder at the time and in the manner specified in said accounts, and we further covenant that if there shall be default in any two installments of an account or in the performance of any require-

ments imposed upon the buyer therein, we shall pay you in cash, on demand, an amount equal to the unpaid balance on said account, less such proper portion of your purchase charge as you may determine.”

This contract further provided:

“As and when you have received payment in full from us (Carbon Furniture & Appliance Company) of any account on which the Buyer has not made payment in full you will, on written demands from us, reassign to us without recourse to you, such account \* \* \* .”

It is therefore apparent that during the whole period that the Defendant General Electric Contracts Corporation held the Plaintiff's contract the Defendant Holdaway was a surety and guarantor of the Plaintiff's obligation to Defendant General Electric Contracts Corporation and that he therefore had a direct interest on his own account in seeing that the Plaintiff's payments to the Defendant General Electric Contracts Corporation were promptly made. He was also interested in the protection of the security, that is, the refrigerator, and after notification from the General Electric Contracts Corporation to repurchase the Plaintiff's contract, which notice is Defendant's Ex. 10, Tr. 436, the obligation of collecting Plaintiff's account was solely the obligation of Defendant Holdaway and the question of repossession for non-payment of the purchase price was solely that of Defendant Holdaway.

Plaintiff will contend that in the face of these indisputable facts the jury should have been allowed to speculate upon Defendant Holdaway's agency and by reason of such testimony as that of Sylvia Fausett, where she said that she talked with Holdaway after finding the refrigerator was gone and he said (Ab. 95, Tr. 67) that he was working under orders. It will be noted that even the wife of Plaintiff did not go so far as to say under whose orders.

Plaintiff will also probably contend that the occurrence in the office of the General Electric Contracts Corporation at Salt Lake City, after the repossession of the refrigerator, at which time Mrs. Fausett tendered the balance due on the refrigerator and Mr. Lyon, of General Electric Contracts Corporation said in response to such tender that \$66.64 would clear said account as far as said Corporation was concerned, but he did not know how they stood with Defendant Holdaway, would be some evidence to go to the jury.

On this point Appellant will undertake to call to the court's attention the pertinent sections of the Restatement of Agency for the purpose of illustrating the error of the trial court in submitting the question of agency to the jury. For the purpose of delimiting the question before the court let us first say that there is no question of an express agency involved in this matter. Any agency which the court or jury might find would, of



necessity, have to be an agency arising out of "apparent authority." Furthermore, there is no question of affirmance or ratification involved in this case.

Section 220 defines a servant and sets up the factors to be considered in determining whether or not a person at a given time and place is the servant of another.

*"Section 220. Definition. (1) A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control.*

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentality, tools and the



place of work for the person doing the work;

- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by time or by the job;
- (h) whether or not the work is a part of the regular business of the employer; and
- (i) whether or not the parties believe they are creating the relationship of master and servant.”

There is no claim on the part of anyone that Defendant Holdaway was acting as an independent contractor in repossessing the refrigerator. It is conceded by all that he was acting for himself but Plaintiff contends that in addition thereto he was acting for and on behalf of Defendant General Electric Contracts Corporation. If this is true, then Defendant General Electric Contracts Corporation must have been in a position of a principal, as set forth in Section 14 of the Restatement of Agency:

“*Section 14.* A principal has the right to control the conduct of the agent with respect to matters intrusted to him.”

It would also be necessary to find some manifestation from the agreement to the agent that the agent may act on account of the principal, as set forth in Section 15.

“*Section 15.* An agency relationship exists if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.”

There is not one scintilla of evidence that Defendant General Electric Contracts Corporation had the right to control Defendant Holdaway in the repossession of the refrigerator, nor is there any evidence that General Electric Contracts Corporation indicated in any way that Defendant Holdaway could repossess the refrigerator on its account.

The question of apparent authority is covered by Section 27 in the following language:

“*Section 27. Apparent Authority.* Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act may be created by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.”

There is no question but what there is no evidence of any conduct on behalf of Defendant General Electric Contracts Corporation which could be construed as authorizing Defendant Holdaway to repossess the refrigerator on its behalf. Section 26 outlines in the following language what constitutes the creation of authority:

*“Section 26. Creation of Authority. Except for the execution of instruments under seal or for the performance of transactions required by statute to be authorized in a particular way, authority to do an act may be created by written or spoken words or other conduct of the principal, which reasonably interpreted causes the agent to believe that the principal desires him to act on the principal’s account.”*

It goes without saying that there is no contention by Plaintiff of the creation of any such authority by this Defendant.

The restatement, in Section 33, indicates that any authorization or claimed authorization must be interpreted as of the time it is acted upon and in the light of the conditions under which it was made.

*“Section 33. An authorization is interpreted as of the time it is acted upon in light of the conditions under which it was made and changes in conditions subsequent thereto.”*

In this connection it is well to again recall that at the time the refrigerator was repossessed the Defendant General Electric Contracts Corporation had called upon Defendant Holdaway to repurchase the Fausett contract because it was delinquent, all under the terms and conditions of the dealer contract existing between Defendant General Electric Contracts Corporation and Defendant Holdaway. The evidence conclusively shows,

and without dispute, that Defendant General Electric Contracts Corporation, at the time of repossession, was looking to Defendant Holdaway for reimbursement against the advances made by it and not to Fausett or the refrigerator, and that if Defendant Holdaway were to make himself whole out of the Fausett contract it was necessary for him to exercise the rights given to him under that contract, and that was to realize upon the security.

THE COURT ERRED IN HIS INSTRUCTIONS TO  
THE JURY ON THE QUESTION OF DAMAGES,  
AND THE JURY FAILED TO FOLLOW THE  
INSTRUCTIONS OF THE COURT.

On this point let us call the court's attention first to the law on this very important item. The rule seems to be well established that the measure of damages for the unlawful conversion by the seller of property sold under a conditional sales contract after the buyer has made payments thereon is the actual value of the property at the time of the conversion, less the unpaid purchase price.

*Roper Wholesale Grocery v. Favor* (1910), 8  
Ga. App. 178, 68 S. E. 883

*Smith v. Goff* (1909), 29 R. I. 439, 72 A. 289

*Goggan v. Garner* (1909) (Tex.) 119 S. W. 341

*Clark v. Clement* (1903), 75 Vt. 417, 56 A. 94

There seems to be no dispute in the authorities concerning this rule of law.

The court in his 15th Instruction instructed the jury as to the measure of damages, should they find for Plaintiff and find that the refrigerator could not be returned to the Plaintiff, in the following language: (Ab. 51, Tr. 71)

“You must find and determine the value of the refrigerator from the evidence in this case.”

The court further touched upon this matter in his 16th Instruction (Ab. 51, Tr. 72) in the following language:

“\* \* \* that the Defendant William Holdaway pay to the Plaintiff the reasonable value of said refrigerator at the time it was taken, with legal interest thereon from May 30, 1939.”

It is worthy of note that the court at no place in his instructions instructed the jury as to the true measure of damages. Nowhere in the court's instructions did he tell the jury that they should take into consideration the unpaid balance still due thereon at the time of the repossession. On this point there is no dispute whatever that there was a balance due on the refrigerator at the time of its repossession in the sum of \$66.64.

As to the value of the refrigerator, the facts are undisputed, as shown by the purchase contract introduced in evidence. The refrigerator was sold for \$75.00 cash upon the closing of the contract and 14 consecutive monthly installments all in the sum of \$10.00, with the exception of the last installment, which was in the sum

of \$11.64, or a total price of \$216.64. This would indicate that Plaintiff had an equity in said refrigerator of not to exceed \$150.00. In other words, if the jury had found that the refrigerator was worth as much at the time of its repossession in May, 1939 as when sold in July, 1938, they could have returned a verdict for Plaintiff in the sum not to exceed \$150.00. However, there was no evidence introduced which would justify a value as high as this.

Plaintiff produced as a witness on his behalf on the question of value one Thomas Jensen, who testified that an electric refrigerator depreciated 10% of its value each year. In other words, this \$216.64 refrigerator would depreciate \$21.16 a year, which would leave a value at the end of the first year of \$195.48, which, after deducting \$66.64 would amount to a value of \$128.84. If this testimony were followed out to its ultimate conclusion, a deduction for depreciation of  $\frac{5}{6}$  of 10%, or \$17.65 would result, and this deducted from the cost price of \$216.64 would give a figure of \$198.99. Deducting the balance due, that is \$66.64, from \$198.99, leaves a balance of \$132.35 as the value of Plaintiff's interest which was converted by the Defendants.

Defendant General Electric Contracts Corporation, however, elicited from its witness, Stephen Lyon, who had been engaged in the electric appliance business for 13 years, that a refrigerator depreciates 40% of its value the first year and 30% of its remaining value each suc-

ceeding year. According to this the depreciation on the refrigerator in question the first year would amount to \$86.66, leaving a value of \$129.98 and after deducting the unpaid balance of \$66.64 there would remain the sum of \$63.34 as the value of Plaintiff's interest in said refrigerator.

The jury, however, saw fit to disregard all of this testimony, as well as the instructions of the court, and assessed the value of the refrigerator at \$184.14, which was the sum of \$34.14 more than the amount paid in by Plaintiff for the refrigerator. Thus, not only was the instruction of the court on the question of damages completely outside the pale, but the jury completely disregarded the testimony.

Plaintiff recognized this error and attempted to correct the same by filing on February 16, 1940, a motion to reduce judgment, which had been entered upon the verdict, in the amount of \$66.64. Although Plaintiff does not so state, it is probably upon the assumption that if the jury had been properly instructed and if the jury had followed the testimony and instructions that they would have returned a verdict of \$66.64 less than the verdict they returned. On the same date the Plaintiff filed a document he captioned a "Remittitur" in which he said that the Plaintiff remits from the verdict of the jury the sum of \$66.64. Thereafter on February 19, 1940 the court made and entered an order reciting that a verdict had been returned and that a motion to reduce



judgment had been filed and that a remittitur had been filed, and the court ordered "That the said motion to reduce judgment be and the same is hereby granted and that the remittitur of \$66.64 is by the court approved."

There is nothing in the record to show exactly what the judgment now is in this matter. Appellant takes the position that the motion to reduce judgment, the remittitur and the order of the court reducing judgment, all of which papers are found in the transcript between pages 141 and 145 and in the abstract on pages 60, 61 and 62, are a complete nullity. The errors of the court in his instructions and the errors of the jury in failing to follow the instructions of the court cannot be so corrected. There is no such procedure provided by statute or by common law, and to assume that because the jury has returned a value for the refrigerator in excess of the undisputed evidence and that this may have been caused by failure of the court to give proper instructions on damages, that therefore it became the province of the attorney for Plaintiff and the court to fix the value of the refrigerator, is to say the least, new, novel and unique.

## CONCLUSION

It is respectfully submitted that there was no unlawful repossession of the Fausett refrigerator. Plaintiff was in default on his contract and under his contract a repossession such as accomplished by Defendant Hold-

away was authorized. Defendant Holdaway, in repossessing the refrigerator, was acting for and on behalf of himself alone in protecting his obligation as a guarantor, and under his agreement with General Electric Contracts Corporation he had been instructed to repurchase the Fausett obligation at the time he repossessed the refrigerator.

The instruction as to damages was erroneous and the jury failed to follow the evidence and these errors can not be corrected by the court's assuming the function of the jury in fixing the amount of damages which he believes the jury would have returned had the jury been properly instructed and had the jury followed the testimony and evidence adduced before it.

Respectfully submitted,

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