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Security Interests—Doctrine of Inconsistent Remedies Affecting Secured Party's Interest Under the Uniform Commercial Code.—in re Adrian Research & Chemical Co.

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by the Circuit Court which found that the authorities fail to limit relief to consumers, and hold to the contrary that the remedies are available to any person who shall be injured, including competitors.[5]

The more interesting and more difficult problem to resolve is whether the particular act complained of constituted price discrimination within the meaning of § 2(a) of the Clayton Act. It should be noted that the action was brought not on the basis of unfair competition, but on the basis on an anti-trust violation. Therefore, to conclude that a statutory violation has occurred it must be shown that the price discrimination complained of will probably and substantially lessen competition.[6] In construing the Clayton Act, the Supreme Court has held various trade practices to amount to indirect price discriminations, as for example, the granting to favored customers of purchase options at existing prices in a rising market,[7] the granting of special quantity discounts,[8] and the granting to favored customers of additional time to take delivery of orders made on low price options.[9] In each case the probability of lessening competition was apparent. On the surface it is difficult to see how sales on consignment will have the effect of lessening competition, especially when so many businesses have a consignment sales policy. But when the practice is used to lure customers away from a smaller competitor who is unable for financial reasons to sell on consignment, the lessening of competition thereby becomes apparent. Such were the facts in the instant case. Consequently the holding appears to be a logical and justifiable addition to the list of recognized indirect price discriminations under § 2 of the Clayton Act as amended by the Robinson-Patman Act, § 1.

ROBERT A. ROMERO, JR.

Security Interests—Doctrine of Inconsistent Remedies Affecting Secured Party's Interest under the Uniform Commercial Code.—*In re Adrian Research & Chemical Co.*[1]—In consideration of an accumulation of rent arrearage due plaintiff, the defendant-lessee executed a promissory note containing a confession of judgment and also executed an agreement creating a security interest in certain items of the defendant's personal property. The plaintiff properly recorded the security agreement in conformity with the Uniform Commercial Code and also entered judgment on the note. By reason of a default in the payment of current rent, execution was issued on the judgment and a general levy was made on the personal property of the defendant. Subsequently the defendant filed a voluntary petition in bank-

5 Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235-236 (1948); see Streiffer v. Seafarer's Sea Chest Corp., 162 F. Supp. 602, 607 (D.C.E.D. La. 1958).

6 Lipson v. Socony-Vacuum Corp., 76 F.2d 213, 218 (1st Cir. 1935).

7 Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 740 (1945).

8 Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 42-44 (1948).

9 Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U.S. 746, 750 (1945).

1 269 F.2d 735 (3d Cir. 1959).

ruptcy and, upon the receiver's application, an order was entered restraining the sale of the levied goods. Plaintiff's reclamation petition, for the recovery of the personal property described in the security agreement, was denied by the referee. The U.S. District Court for the Eastern District of Pennsylvania affirmed the referee's order,[2] holding that by plaintiff's execution and levy upon the secured goods he chose one of several "cumulative but inconsistent" remedies available to him under § 9-501(1) of the Uniform Commercial Code[3] to the exclusion of all others and thereby lost his security interest under the agreement. HELD: The U.S. Court of Appeals, Third Circuit, reversed and remanded. The transaction involved does not lend itself to any theory of "inconsistency" in the choice of plaintiff's remedies.

The doctrine of "inconsistent remedies" is applicable where there is available to the litigant two or more remedies, the adoption of one of which precludes the adoption of any other due to an inherent repugnancy existing between them.[4] Where such inconsistency exists the courts are not in agreement as to what constitutes an irrevocable election, the consequence of which is to bar the litigant from pursuing the alternative remedies. Some courts hold that mere commencement of a suit is sufficient,[5] while others require that elements of estoppel be present to bar an alternative remedy.[6] The District Court, in affirming the referee's order, relied on *In re Fitzpatrick*[7] and *In re Elkins*,[8] which involved, respectively, "bailment lease"[9] and conditional sale arrangements wherein title was retained to secure payment. The holding in these cases, that when a creditor sues on the note and obtains a judgment he has thereby affirmed title to the goods in the debtor and cannot subsequently claim title and the right to possession in himself due to the inherent inconsistency of the remedies, finds support in some jurisdictions[10] and repudiation in others.[11] The U.S. Court of Appeals realized, however,

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[2] In re Adrian Research and Chemical Co., 169 F. Supp. 357 (E.D. Pa. 1958).

[3] Pa. Stat. Ann. tit. 12A § 9-501(1): "When a debtor is in default under the security agreement a secured party may reduce his claim to judgment . . . . If the collateral is goods, he may in addition do one or more of the following . . . (a) foreclose the security interest by any available judicial procedure, (b) take possession of the collateral under Section 9-503 . . . ."

[4] Frisch v. Wells, 200 Mass. 429, 86 N.E. 775 (1908); for textual discussion see 18 Am. Jur. Election of Remedies § 11 (1938) at page 134.

[5] Frisch v. Wells, supra note 4.

[6] Mansfield v. Pickwick Stage, 191 Cal. 129, 215 Pac. 389 (1923).

[7] 1 F.2d 445 (W.D. Pa. 1923).

[8] 38 F. Supp. 250 (E.D. Pa. 1941).

[9] A "bailment lease" is in the form of a bailment but in substance is a sale of the bailed goods. The "bailee" takes possession of the goods and agrees to pay a stipulated rent over a certain period, the total rent being equivalent to the sales price of the goods. Upon final payment of the "rent" and the additional payment of one dollar, the "bailor" thereupon passes title to the "bailee."

[10] Washington Cooperative Church Ass'n v. Jacobs, 42 Wash.2d 460, 256 P.2d 294 (1953); Frisch v. Wells, supra note 3.

[11] In re Steiner's Approved Dye Works, 44 F.2d 557 (7th Cir. 1930); in Midland Loan Finance Co. v. Osterberg, 201 Minn. 210, 213, 275 N.W. 681, 682 (1937), the court states: "The contract is, not that the seller shall keep the title until he sues for the price or gets a judgment, but that it shall remain in him until he gets his money.

that the security transaction involved in the principal case was more in the nature of a pledge or chattel mortgage[12] and that the pledgee or mortgagee who is also the holder of a note may maintain his action without first realizing or attempting to realize upon the collateral.[13] Courts which have applied the doctrine of inconsistent remedies to "bailment lease" and conditional sale arrangements have treated pledge and chattel mortgage agreements differently, for the reason that when a creditor obtains a judgment on a note secured by a pledge or mortgage he does not thereby forfeit his secured position.[14] Pennsylvania appears to have no case on the precise question as to whether by obtaining a judgment on a note secured by a pledge or mortgage and subsequently issuing an execution and levy as to mortgaged goods in the debtor's possession, the creditor thereby loses his security interest.[15] The few courts elsewhere which have faced the question have decided that no "inconsistency" exists and that, unless there is a final sale of the secured goods, the lien is not lost.[16] The Court appears, then, to be basing its holding on firm ground when it states at page 737, "The remedies are consistent both in kind and purpose, for each results in the application to the debt of the chattels covered by the security agreement and each has as its objective the reduction of the debt."

Although the Court did not discuss the issue, it would appear that the lower court's decision could be attacked on another ground. The "inconsistency" which the lower court discusses in the "bailment lease" and conditional sale arrangements that exists between the creditor "admitting title" in the debtor, due to his obtaining judgment on the note and levying on the goods, and the subsequent attempt to claim title in himself is based upon the title concept theory.[17] Such emphasis that was heretofore placed upon the title concept theory has been considerably diminished under the

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Is it not then to defeat rather than effectuate plainly expressed contractual intention to decide that the seller's unit for the price or a piece of it transfers title to the buyer?"

12 The UCC makes it clear that any prior distinctions between chattel mortgages, bailment leases, and conditional sales will no longer be recognized but that all such transactions will be known as "security interests." See on this point the Comment to Pa. Stat. Ann. tit. 12A § 9-101.

13 Harper v. Lukins, 271 Pa. 144, 112 Atl. 636 (1921).

14 Ely v. Ely, 72 Mass. (6 Gray) 439 (1856). Compare the Ely case with Frisch v. Wells, cited in footnote 4 supra, which involved a conditional sale. See also 121 A.L.R. 918 (1939) wherein the annotator states: " . . . the cases are uniform in holding that until the mortgage debt is actually satisfied the recovery of a judgment on the obligation secured by a mortgage, without the foreclosure of the mortgage, although merging the debt in the judgment, has no effect upon the mortgage or its lien, does not merge it and does not preclude its foreclosure in a subsequent suit instituted for that purpose, or the exercise of the power of sale contained in the mortgage or deed of trust —the conclusion often reached in such cases being that the debt is not destroyed by the merger and the mortgage secures the debt in its new form as merged in the judgment."

15 Anno., 37 A.L.R.2d 960 (1925).

16 Ames v. Young, 122 Me. 331, 119 Atl. 853 (1923); Conn. Mutual Life Ins. Co. v. Jones, 8 Fed. 303 (C.C.E.D. Mo. 1880); Jesse v. Burchell, 198 Ore. 393, 257 P.2d 255 (1953).

17 In re Elkins, supra note 8; In re Fitzpatrick, supra note 7.

UCC, §9-202 which states: "Each provision of this Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor."[18] Under the UCC, therefore, the court should not concern itself with the question as to who originally had title and what were the consequences of an "admission of title" in the debtor due to the choice of remedies by the creditor.

In discussing the doctrine of inconsistent remedies the Court states at page 736, "The Pennsylvania Courts have emphasized that distinct remedies may be used concurrently or alternately if they are consistent in purpose and kind; they must be inconsistent and not merely cumulative in order for the selection of one to operate as a bar to the pursuit of the other." This conclusion is of questionable validity as applied to the clearly indicated intention of the legislature in adopting § 9-501(1); the intention being that the remedies contained therein are additional and not substitutional. If it were intended that such concurrent remedies should not be cumulative but alternative due to some theoretical inconsistency existing between them when applied to certain secured agreements the legislature would have undoubtedly so indicated. Resistance to change is a human trait which often finds its way into the courts and often, either consciously or unconsciously, influences the courts' interpretation of statutes which clearly indicate an intention to alter existing law. Such influence is manifest in the Court's acceptance of that part of the lower court's decision which holds that, § 9-501(1) notwithstanding, the doctrine of inconsistent remedies is still applicable to "bailment lease" and conditional sale arrangements.[19]

ROBERT A. GORFINKLE

Subcontracts—Part Performance—Damages.—*Albre Marble and Tile Co., Inc. v. John Bowen Co., Inc.*[1]—A subcontractor brought an action against a prime contractor in which there were counts for breach of contract and quantum meruit. The defendant had previously contracted with the Commonwealth of Massachusetts for construction of a hospital. In a prior case[2] the Supreme Judicial Court of Massachusetts had held that contract invalid because Bowen Co. had violated Mass. G. L. (Ter. Ed.) c.149, § 44A-44D by including in its bid smaller sums for the work of certain subcontractors than the sums specified in their subbids. The plaintiff subsequently brought this action in the Superior Court. That court

[18] See also Comment appurtenant to this section.

[19] Massachusetts and Kentucky, in adopting the UCC in 1957 and 1958 respectively, have adopted the 1957 version which appears to have solved any problem of ambiguity in § 9-501(1). The 1957 version of § 9-501(1) reads as follows: "When a debtor is in default under a security agreement, a secured party has the remedies provided by this Part, *which are cumulative. In addition* he may reduce his claim to judgment, foreclose the security interest by any available judicial procedure, *or both* . . . " (emphasis added). See also the 1957 version which has added § 9-501(5) which defines the meaning of "foreclose" as used in § 9-501(1).

[1] 1959 Mass. Adv. Sh. 147, 155 N.E.2d 437.

[2] Gifford v. Commissioner of Public Health, 328 Mass. 608, 105 N.E.2d 476 (1952).