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Conditional Sales—Construction of Insecurity Clause.—Jacksonville Tractor Co. v. Nasworthy.

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purchaser, the court reflects a desire to place the preservation of the commercial transaction, on which one relies without reasonably being put on notice of any irregularity, above the policy considerations voiding gambling contracts. Such protection of the bona fide purchaser could also be accomplished if a similar situation should arise in a jurisdiction in which the Uniform Sales Act or the Uniform Commercial Code has become law. Both statutes contain provisions permitting the acquisition of title by a bona fide purchaser from one having voidable title[11] or, in the proper circumstances, where the true owner is estopped from asserting the lack of authority in the possessor to transfer the chattel.[12] However, before this protection can be afforded the bona fide purchaser in this situation, the statute concerning the recovery of gambling losses must treat such gambling contracts as voidable, or be so construed as by the court as in the principal case.

If perhaps this result seems severe, it should be recalled that it was the lender who, desirous of facilitating a repayment of his loan, granted permission to the borrower to retain possession of the secured chattel and sell it. In so doing, a prudent lender should be completely satisfied with both the honesty and responsibility of his borrower. Otherwise, he runs the risk of not only losing the chattel when sold in the regular course of business, but also when such chattel is ultimately acquired by a bona fide purchaser, although there has been an intervening transfer made in violation of such permission and in settlement of a gambling debt.

JOHN J. DESMOND, III

Conditional Sales—Construction of Insecurity Clause.—***Jacksonville Tractor Co. v. Nasworthy.***[1]—A conditional sales contract for the sale of a farm rake contained an insecurity clause which provided that if the "seller deems himself insecure or the property in danger of misuse or confiscation (of which seller shall be the sole judge), . . . seller . . . may . . . retake possession of said property, with or without process of law . . ." After a retaking by the seller under the clause, the buyer brought this action for conversion and obtained a favorable jury verdict in the Civil Court of Duval County. Defendant appealed on the ground that the trial court's refusal to grant his motion for a directed verdict was error in the light of his uncontradicted testimony that he had deemed himself insecure. The Court of Appeals First District affirmed, holding that the party exercising

construed and declare all such transactions utterly void in the possession of anyone; Ill. Rev. Stat. ch. 38, §§ 329, 333; N.J. Rev. Stat. § 2:57-3; Va. Code Ann. 1950 § 11-4; while others make exceptions in the case of negotiable instruments in the hands of a holder in due course or bona fide purchasers; Conn. Gen. Stat. 52-553 (1948); Ga. Code of 1933 § 20-505.

11 USA § 24; UCC § 2-403(1).

12 USA § 23; UCC §§ 2-403(2) & (3).

1 114 So. 2d 463 (Fla. Ct. App. 1st D. 1959).

his right under the clause has the burden of demonstrating that he was confronted with such circumstances as would lead a reasonable and prudent man in his position to deem himself insecure. Thus it was proper for the trial court to hold the defendant to this objective standard and submit to the jury the question of whether under all the circumstances he could reasonably have believed that his debt was in danger.

Lacking Florida precedent for the construction of such a clause in a conditional sales contract, the Court found support for its decision in a Mississippi case which set forth the three well-defined approaches to such a provision.[2] These constructions are: (1) that of the principal case which demands of the seller that he act in good faith and be able to demonstrate that he was reasonable in concluding that his debt was insecure, (2) that which demands of the seller only that he act in good faith, and (3) that which stipulates that the debt must have been actually in a precarious condition.[3] Most courts have deprived the seller of the advantage that would be his under a literal construction of the insecurity clause, and have used the objective standard of the Florida Court.[4]

The Uniform Conditional Sales Act contains no language pertinent to the insecurity clause. But it is certain that under § 1-208 of the Uniform Commercial Code the court would have come to an opposite conclusion and sustained the motion for a directed verdict because of plaintiff buyer's failure to establish a lack of good faith on the part of the defendant seller. The Code construction of the insecurity clause contained in § 1-208 differs from that of the principal case both in establishing the standard which seller must meet and in allocating the burden of proof.[5] It adopts the view that the seller is the sole judge of the facts, and that as long as he acts in good faith there is no requirement that there be reasonable grounds for his deeming himself insecure. Furthermore, the Code places the burden of demonstrating seller's lack of the requisite good faith upon the buyer.[6] The good faith requisite has some analogy to cases in which promises conditional on satisfaction have been construed to require at least an honest dissatisfaction.[7] The seller may be unreasonable in deeming himself insecure but as long as he has been honest in fact in his conduct then he has acted within his rights.[8] It is to be noted, however, that under the Code view

[2] Commercial Credit Co. v. Cain, 190 Miss. 866, 1 So. 2d 776 (1941).

[3] Ibid. at 777.

[4] Rochon v. Pacific Coast Mortg. Co., 111 Cal. App. 298, 295 Pac. 364 (2d Dist. 1931).

[5] UCC § 1-208. "Option to Accelerate at Will. A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral 'at will' or 'when he deems himself insecure' or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised."

[6] Id.

[7] Pa. Stat. Ann. Tit. 12A § 1-208. Restatement, Contracts § 265 (1932).

[8] UCC § 1-201(19) Provides: "'good faith' means honesty in fact in the conduct or transaction concerned."

the question of reasonableness has not become irrelevant, since an extreme unreasonableness on the part of the seller may indicate his lack of good faith.

The Code provision has the effect of holding the parties to the language of their contract without imposing upon the buyer a seller's arbitrary right to retake possession. It seems certain that if an insecurity clause is so phrased as to confer such an arbitrary right it will be either stricken under § 2-302 as unconscionable or so limited as to avoid an unconscionable result.[9] If, however, no unconscionable result would be effectuated, the buyer may nevertheless find protection under § 1-208. That Section imposes a duty upon the seller to use good faith in exercising his right under an insecurity clause. This good faith standard to which the seller is held would not constitute a deviation in most instances. But if the parties intended that the seller could act without any obligation of good faith then § 1-208 imposes only a minimum alteration of the contract term and thereby, in large, allows the parties to contract as they choose. It has been suggested that any further protection for the debtor in such transactions as retail installment purchases should be secured by legislation enacted separately from the Code.[10] The Code construction of the insecurity clause seems more logical and just than that used by the principal case which in effect varies the contract term to the liking of the court without sufficient justification.

WILLIAM M. BULGER

Contracts—Accord and Satisfaction—Enforcement of Executory Accord by Creditor upon Breach by Debtor.—*Oblson v. Steinhauser*.[1]— Plaintiff filed an action for breach of promise. Subsequently, by way of compromise and settlement and discharge of this cause of action, defendant agreed to pay and plaintiff agreed to accept $6000. Thereafter, the defendant refused to pay. The plaintiff then brought the present suit to obtain payment of the $6000. The defendant contended the agreement sued upon was an accord and satisfaction and not binding and enforceable until the satisfaction called for was paid, prior to which time either party could revoke. The trial court entered judgment for the plaintiff. On appeal, the Supreme Court of Oregon affirmed. Held: the defendant's failure to pay the satisfaction agreed upon could only bar the defendant from pleading the compromise agreement if the plaintiff had brought suit on the original cause of action. Such failure cannot be claimed as a defense to the present action.

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9 UCC § 2-302. "Unconscionable Contracts Clause. (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

10 See notes to UCC §§ 9-102, 9-203 (1957 ed.).

1 346 P.2d 87 (Ore. Sp. Ct. 1959).