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## Conditional Sales—Waiver of Defense—Public Policy.—Walter J. Hieb *Sand and Gravel Inc. v. Universal C.I.T. Credit Corp.*

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mercial Code.<sup>15</sup> Generally, in § 9-504, the secured creditor, after default, is allowed to dispose of the collateral in any “commercially reasonable” manner. By virtue of § 9-504(3), the secured party is required to notify the debtor of the contemplated disposition of the collateral, unless “collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market.” The test of “commercially reasonable” is thus conditioned on notice to the debtor and to other interested parties, who fulfill certain stated requirements.<sup>16</sup> Once having satisfied the requirement of notification, the secured creditor under the UCC, unlike the chattel mortgagee in a lien-theory state, can proceed with the disposition of the collateral in any number of ways deemed “commercially reasonable,” as generally defined in § 9-507(2). The UCC, not unlike title-theory jurisdictions, affords the chattel mortgagee and other secured creditors many available means for realizing on their security. However in the UCC, contrary to title-theory law, the debtor, or any other party entitled to notice or whose interest in the goods is known to the creditor prior to the disposition, is afforded a right to recover from the secured party any loss occasioned by failure to give notice or by non-compliance with any of the other rules respecting disposition of collateral.<sup>17</sup> Thus, in the event of an irregular sale, the secured party is made liable by statute to the debtor and/or others with interests in the chattel security. This statutory liability serves as a penalty for wrongful sale, a penalty not apparent in New Jersey and other title-theory jurisdictions.

The UCC appears to obviate the defects apparent in the two systems of chattel mortgages under consideration by providing adequate sanction for lack of notice, thus protecting the mortgagor's equity, while at the same time supplying the mortgagee with a multiplicity of ways to realize upon his security, thereby encouraging the liberal extension of credit.

RALPH C. GOOD, JR.

**Conditional Sales—Waiver of Defense—Public Policy.—***Walter J. Hieb Sand and Gravel Inc. v. Universal C.I.T. Credit Corp.*<sup>1</sup>—Appellant, Hieb, purchased 10 trucks under a conditional sales contract, appellee, Universal, being the seller's assignee. In addition to the standard contract provisions it was stipulated that the buyer would “settle all claims against the seller directly with seller, and not set up any such claim in any action brought by Universal. . . .” In a suit by Universal to repossess the trucks, payment not having been made, the buyer asserted the defense of the seller's breach of implied warranty claiming the waiver of defense

<sup>15</sup> See, Shattuck, A Comparison of the Law in Washington and the UCC, 29 Wash. L. Rev. 1, 272 (1954).

<sup>16</sup> UCC § 9-504(3).

<sup>17</sup> UCC § 9-507(1).

<sup>1</sup> 332 S.W.2d 619 (Ky. 1960).

clause to be illegal as a violation of public policy.<sup>2</sup> HELD: Such a clause is valid in a conditional sales contract involving nonconsumer goods.

There is a conflict of authority as to whether these provisions are to be upheld,<sup>3</sup> or declared void.<sup>4</sup> The court in deciding this case of first impression relied in part upon the local sales act authorizing agreed variations of implied obligations usually incident to sales.<sup>5</sup> Though held not binding, mention is made of § 9-206(1) of the enacted but not yet effective Uniform Commercial Code which permits waiver of defenses in conditional sales contracts for nonconsumer goods.<sup>6</sup> In upholding such provisions the courts usually rely on two factors, first, the requirement that dealers in nonconsumer goods must be able to do business according to the demands of the market place, and the courts should not rewrite contracts by striking out such a clause intentionally inserted;<sup>7</sup> and second, the practice of financing conditional sales contracts by the sale and assignment of them. It is desirable from the viewpoint of the assignee that in his hands the contract be free from defenses and claims of the conditional vendee against his vendor.<sup>8</sup> Assuming fair dealing and absence of fraud on the part of the contracting parties no violation of public policy is involved.<sup>9</sup> A contrary result would be reached when an attempt is made to waive a defense of fraud<sup>10</sup> since most courts hold that the fraud which vitiates the contract also vitiates the waiver of defense clause.<sup>11</sup>

Kentucky has taken the view that the contracting parties should have great liberty in selecting the terms of their agreement. The court is not involved with parties dealing on unequal footing, but with experienced merchants who are presumed to be capable of looking after their own interests. Hesitancy on the part of the courts to interfere in the negotiations of the parties, and the advantages of greatly facilitating the financing of such contracts is leading courts to the conclusion that waiver of defense clauses in contracts for the conditional sale of nonconsumer goods do not

<sup>2</sup> For rights as among creditors see, *Universal C.I.T. Credit Corp. v. Edinger*, 332 S.W.2d 619 (Ky. 1960).

<sup>3</sup> *United States ex rel. F.H.A. v. Troy-Parisian, Inc.*, 115 F.2d 224 (9th Cir. 1940), cert. denied sub nom. *Troy-Parisian, Inc. v. United States ex rel. F.H.A.*, 312 U.S. 699 (1941); *Hartford-Conn. Trust Co. v. Clark-Barone Co.*, 21 Conn. Supp. 368, 154 A.2d 883 (1959); *Commercial Credit Corp. v. Biagi*, 11 Ill. App. 2d 80, 136 N.E.2d 580 (1956); *Glens Falls Nat'l Bank & Trust Co. v. Sansivere*, 136 N.Y.S.2d 672 (Saratoga County Ct. 1955).

<sup>4</sup> *San Francisco Securities Corp. v. Phoenix Motor Co., Inc.*, 25 Ariz. 531, 220 P. 229 (1923); *Dearborn Motors Credit Corp. v. Neel*, 184 Kan. 437, 337 P.2d 992 (1959); *Quality Finance Co. v. Hurley*, 337 Mass. 150, 148 N.E.2d 385 (1958); Annot. 44 A.L.R. 2d 162 (1955).

<sup>5</sup> Ky. Rev. Stat. § 361.710 (1959).

<sup>6</sup> For definition of consumer goods see UCC § 9-109(1).

<sup>7</sup> *Refrigeration Discount Corp. v. Haskew*, 194 Ark. 549, 108 S.W.2d 908 (1937).

<sup>8</sup> Eager, *Law of Chattel Mortgages & Conditional Sales* § 319 (1959).

<sup>9</sup> *United States ex. rel F.H.A. v. Troy-Parisian, Inc.*, supra note 3.

<sup>10</sup> Eager, op. cit. supra note 8.

<sup>11</sup> *President & Directors of Manhattan Co. v. Monogram Assoc. Inc.*, 276 App. Div. 766, 92 N.Y.S.2d 579 (Sup. Ct. App. Div. 1949).

violate public policy. The approval of these waivers by the Uniform Commercial Code should lead to a wider adoption of this liberal view.

LAWRENCE A. KLINGER

**Constitutional Law—State Wages & Hours Act—Equal Protection of the Laws.—***Peterson v. Hagan*.<sup>1</sup>—The Fair Labor Standards Act,<sup>2</sup> which establishes a maximum straight-time work week of forty hours for employees engaged in interstate commerce, gives to the states authority to fix a maximum straight-time work week lower than that created by the Federal Act.<sup>3</sup> The State of Washington passed a Wages and Hours Act,<sup>4</sup> covering employees in local commerce, which established an eight hour maximum work day after which overtime was to be paid, or a forty hour work week, to be selected at the option of individual employees.<sup>5</sup> The State Act expressly exempted those subject to the terms of the Federal Act from coverage under the higher standards of the State Act.<sup>6</sup> Respondent employers<sup>7</sup> sought under the Declaratory Judgment Act of Washington<sup>8</sup> to enjoin the enforcement of the State Act alleging it to be in its application to them an unconstitutional denial of the equal protection of the laws. This allegation was apparently grounded on the theory that the action of the State in failing to fully utilize the authority granted it by Congress, would force respondents who, it was stipulated, were not engaged in either the production of goods for interstate commerce or in interstate commerce itself and therefore not subject to the Federal Act, to maintain an overtime wage scale based on different standards than those provided by the Federal Act for employers engaged in interstate commerce within the State of Washington.

The Washington Supreme Court, affirmed the decision of the Superior Court, HELD: § 3 of the State Act is unconstitutional.<sup>9</sup> The failure of the State legislature, under the power granted by Congress to legislate for all Washington businesses whether inter or intra state, to apply its wages and hours regulations to such employees engaged in "identical"<sup>10</sup> businesses, separated only by the "accident of interstate commerce"<sup>11</sup> amounts to dis-

<sup>1</sup> 351 P.2d 127 (Wash. 1960).

<sup>2</sup> 52 Stat. 1060 (1938), 29 USC § 201 et seq. (1958), herein called the Federal Act.

<sup>3</sup> 52 Stat. 1069 (1938), 29 USC § 218 (1958).

<sup>4</sup> Wash. Rev. Code § 49.46 (Supp. 1959), herein called the State Act.

<sup>5</sup> Wash. Rev. Code § 49.46.030 (Supp. 1959).

<sup>6</sup> *Ibid.*

<sup>7</sup> Ivy Peterson, doing business as Bellevue Sanatorium; Kauffman Buick Company, Inc.; Top-Hat Cafe, Inc.; David L. Reiff, doing business as Acme Personnel Service. This action is a consolidation of four separate actions below.

<sup>8</sup> Wash. Rev. Code § 7.24 (Supp. 1956).

<sup>9</sup> Also held unconstitutional by the Court, as an unlawful delegation of legislative power, was Wash. Rev. Code § 49.46.050. It will not be treated in the context of this note.

<sup>10</sup> *Peterson v. Hagan*, supra note 1 at 133.

<sup>11</sup> *Ibid.*