

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. Steinbauser*.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.

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).

At common law an executory accord furnished no defense at law to a suit by the creditor on the original cause of action.² This was true even after recognition of the validity of bilateral contracts.³ Although it has been subject to much criticism⁴ the prevailing view today accepts this common law doctrine.⁵ The Restatement of Contracts,⁶ however, states that although an executory accord does not discharge the claim, it does suspend the right to enforce it as long as there has not been a breach of the contract of accord.⁷

Both in England⁸ and in the United States⁹ the prevailing view is

² *Peytoe's Case*, 9 Co. Rep. 77b, 77 Eng. Rep. 847 (1611).

³ In *Allen v. Harris*, 1 Ld. Raym. 122, 91 Eng. Rep. 978 (1696), the court held that: "Upon accord no remedy lies. And the books are so numerous that an accord ought to be executed that it is now impossible to overthrow all of the books. But if it had been a new point it might have been worthy of discussion."

⁴ Gold, *Executory Accords*, 21 B.U.L. Rev. 465 (1941); *Shepherd, The Executory Accord*, 26 Ill. L. Rev. 22 (1931).

⁵ See 6 Williston, *Contracts*, §§ 1842, 1843 (Rev. ed. 1938) and cases cited therein; see also Gold, *op. cit.*, supra note 4.

The accord itself may be accepted as satisfaction and thus be a bar to a suit on the original cause of action but the intent of the creditor to accept it as such must be clearly shown. See e.g., *McArney v. Scott*, 146 F.2d 624 (2d Cir. 1944); *Simmons v. Clark*, 56 Ill. 96 (1870); *Langlois v. Langlois*, 5 App. Div. 2d 75, 169 N.Y.S.2d 170 (3d Dep't 1957); *Pacific Employers Ins. Co. v. Brannon*, 150 Tex. 441, 242 S.W.2d 185 (1951); 6 Williston, *Contracts*, §§ 1846, 1847 (Rev. ed. 1938) and cases cited therein; *Restatement, Contracts*, §§ 418, 419 (1932).

It is important to distinguish the executory accord from other arrangements. The creditor may merely make an offer for a unilateral contract; the parties may enter into a bilateral contract whereby the debtor's promise to give some new performance is taken as satisfaction; or the parties may enter into a bilateral contract by which the debtor promises to give and the creditor to receive some new performance without the creditor accepting the debtor's promise itself as satisfaction. This last type of arrangement is the executory accord. *Shepherd, op. cit.*, supra note 4, at 22.

⁶ *Restatement, Contracts*, § 417(a) (1932). *American Textile Machine Corp. v. United States*, 220 F.2d 584 (6th Cir. 1955); *N.Y. Pers. Prop. Law* § 33-a(2)(3) and *N.Y. Real Prop. Law* § 280(2)(3), interpreted in *Langlois v. Langlois*, 5 App. Div. 2d 741, 169 N.Y.S.2d 170 (3d Dep't 1957). See also 6 Corbin, *Contracts*, § 1274 (1951); 6 Williston, *Contracts*, § 1842 (Rev. ed. 1938).

⁷ At common law a cause of action could not be suspended without extinguishing it. *Ford v. Beech* [1848] 11 Q.B. 852. For criticism of this rule see *Shepherd, op. cit.*, supra note 4, at 29-41.

⁸ *British Russian Gazette Etc. v. Associated Newspapers* [1933] 2 K.B. 616, 650-655.

⁹ *Corrigan v. Payne*, 312 Mass. 589, 45 N.E.2d 829 (1942); *Hunt v. Brown*, 146 Mass. 253, 15 N.E. 587 (1888); *Schweider v. Lang*, 29 Minn. 254, 13 N.W. 33 (1882) (enforceable by the debtor); *American Textile Machine Corp. v. United States*, 220 F.2d 584 (6th Cir. 1955); *General Foods Corp. v. The Filipe Camarao*, 172 F.2d 131 (2d Cir. 1949); *Jefferson Island Salt Mining Co. v. Empire Box Corp.*, 41 Del. 386, 23 A.2d 106 (Sup. Ct. 1941), *aff'd*, 42 Del. 432, 36 A.2d 40 (Sup. Ct. 1944); *Alexander v. Handley*, 136 Tex. 110, 146 S.W.2d 740 (1941) (creditor has alternative rights).

See 6 Corbin, *Contracts*, § 1271 (1951) and cases cited therein; 6 Williston, *Contracts*, § 1840, 1848 (Rev. ed. 1938) and cases cited therein; *Restatement, Contracts*, § 417 (1932).

See also *Calif. Civ. Code* § 1522; "Though the parties to an accord are bound

that an executory accord is a valid contract upon which, on default in performance by one of the parties, the other can maintain an action for damages. Upon a breach by the debtor the creditor has alternative rights: he can enforce either the original claim or the accord. Further, there is authority, and the better view would seem to be, that upon breach of the executory accord by the creditor, the debtor may specifically enforce the accord in equity.¹⁰ Some courts, however, continue to hold that an unexecuted accord is revocable by either party and, therefore, furnishes no ground for a cause of action.¹¹

The decision of the court in the instant case fails to make clear whether the court is treating the agreement involved as one in which the plaintiff creditor accepted the promise to pay the \$6000 as accord and satisfaction and thereby extinguished the original claim, or one in which only the actual payment was to be the satisfaction.¹² But the court seems to recognize the enforceability of both types of agreement.¹³ However, it appears from the facts found by the trial court that the promise to pay was not accepted by the plaintiff as satisfaction of the original claim. That court found the defendant agreed to pay and the plaintiff agreed to accept the \$6000 by way of compromise and settlement of the claim. This language indicates an intent that only the payment of the \$6000 was to be the satisfaction and that the parties have merely made an agreement of accord.

The principal case appears to be the first case in Oregon which recognizes the enforceability of an executory accord. Although the court distinguishes *State ex rel. Bayer v. Funk*¹⁴ on its facts, it necessarily overrules the dicta in that case that "... as long as the accord is executory, it is revocable at will by either party, and neither party can maintain an action against the other thereon."¹⁵

In holding that the creditor can maintain an action for breach of the accord, the court adopts the prevailing view.¹⁶ The court does not have before it the question of whether the executory accord can be pleaded

to execute it, yet it does not extinguish the obligation until it is fully executed." Discussed in Case Comment, 12 Calif. L. Rev. 411. Similar or identical provisions may be found in Ala. Code 1940, tit. 9, §§ 1, 2; Georgia Code Ann., §§ 20-1201, 1202; §§ 58-501, 502, Rev. Codes of Mont. 1947; N.Y. Pers. Prop. Law § 33-a(2)(3) and N.Y. Real Prop. Law § 280(2)(3); §§ 9-1304, 1306, N.D. Rev. Code of 1943; S.D.C., §§ 47.0233, 47.0234.

¹⁰ *Very v. Levy*, 54 U.S. 345 (1851); *Union Central Life Ins. Co. v. Imsland*, 91 F.2d 365 (8th Cir. 1937); *Dobias v. White*, 239 N.C. 409, 80 S.E.2d 23 (1954); *Liggins v. Stewart*, 218 S.W.2d 1011 (Tex. Civ. App. 1949); *Restatement, Contracts*, § 417(d) (1932).

¹¹ *Karvalsky v. Becker*, 217 Ind. 524, 29 N.E.2d 560 (1940); *Whayne Supply Co. v. I. H. Gregory*, 291 S.W.2d 835 (Ky. Ct. App. 1956); *Konqueror Building and Loan Ass'n v. G. R. Kinney Co., Inc.*, 315 Pa. 318, 172 Atl. 719 (1934).

¹² See *supra* note 5.

¹³ The court cites *Restatement, Contracts*, § 417 (1932) with approval. This section recognizes the enforceability of executory accords.

¹⁴ 105 Ore. 134, 209 Pac. 113 (1922).

¹⁵ *Id.* at 152; 209 Pac. at 116.

¹⁶ See *supra* notes 8 and 9.

as a defense to a suit on the original cause of action if brought by the creditor before breach of the accord. The court indicates approval, however, of the common law rule that an executory accord is not a bar to a suit on the original claim. The sounder view would seem to be that the right to enforce the original cause of action is suspended until breach of the contract of accord.¹⁷ This would give effect to the apparent intent of the parties, namely, that the debtor should have the chance to give the satisfaction within the specified time during which he could not be subjected to an action on the original claim.

The decision, limited by the facts of the case, leaves unanswered the questions: whether the original cause of action is suspended until breach of the accord and whether, upon breach of the accord by the creditor, the debtor can maintain an action for damages or specifically enforce the accord. It would seem however, that since the court has now apparently adopted the view that an executory accord is an enforceable contract, the breaching creditor should be liable to the debtor in an action for damages. Further, it would not be too great a step to hold that the original cause of action is suspended until breach of the executory accord. These remedies are provided in § 417 of the Restatement of Contracts, which also provides that upon breach by the creditor the debtor may specifically enforce the accord. It is suggested that when cases arise in these areas the better course would be to follow these provisions.

JOSEPH P. WARNER

Contracts—Economic Duress.—*Wolf v. Marlton Corporation*.¹—Defendant housing developer contracted to build a house for the plaintiff, title to pass on completion. A down payment of \$2450 was made, with a second payment to be made on the final enclosing of the house. Plaintiff, prior to the time when the second payment was due, sought to terminate the contract and proposed that the contractor keep \$450 of the down payment upon cancellation. Upon the developer's refusal to cancel, plaintiff threatened that if agreement was not reached on his proposition, he would, on completion of the contract, resell the house and lot to an undesirable purchaser and thus ruin the developer's business. Defendant took plaintiff's threats as a breach of the contract and refused to continue. In suit for recovery of the down payment, the trial court found for the plaintiff, and the defendant appealed. The Superior Court of New Jersey, Appellate Division, remanded for further findings of facts. If, on further hearings, it is found that the threats were in fact made and defendant actually believed that they would be carried out, as a result of which his will was overborne, he was justified in treating the contract as breached and is entitled to recover whatever damages resulted therefrom.

¹⁷ See *supra* note 6.

¹ 57 N.J. Super. 278, 154 A.2d 625 (1959).