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Accord and Satisfaction under Power of Sale Mortgage

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when a standard had been established for that product,¹³ was rejected when the court stated that nothing could be legally jam unless it contained the specified ingredients and hence the article here in question is not jam, but "imitation jam." Congress did not intend that a food product which is wholesome be withheld from consumers merely because it is an imitation. The word "imitation," the court said, is not to be given an "esoteric" meaning¹⁴ but is to be left to the understanding of ordinary English speech, that is, a less expensive but not debased food which is used as a substitute.

An imitation food, labeled as such, will not be condemned as misbranded, but if that food is represented to be a standard article, shipped in interstate commerce or held for shipment in interstate commerce, it will be condemned as misbranded. The decision thus determines the disposition of foods that contain a smaller quantity of expensive ingredients. What the result may be upon foods which simulate the standard product, but which contain completely different ingredients, is a question yet to be decided. However, the economy and importance to the consumer of being able to purchase less expensive and yet wholesome imitation food is evident at a time when the cost of living continues to rise.

J. L. HETTINGER.

ACCORD AND SATISFACTION UNDER POWER OF SALE MORTGAGE

Defendant gave the bank a chattel mortgage on a truck. The mortgage provided that in case of default the bank was to have the right to immediate possession and power of sale according to law. Default occurred and the mortgagor, defendant, delivered the certificate of title to the cashier of the bank, stating that he wished to be relieved of all responsibility. The cashier accepted the certificate of title and said, "All right." The bank sued to recover a judgment on the note and to foreclose the mortgage. *Held*, that if the delivery of the certificate of title did constitute a constructive delivery of the truck, yet, it did not give the bank any right which it did not already have by its power of sale mortgage, therefore, there was not any consideration to support an accord and satisfaction as claimed by the defendant. *Casper National Bank v. Woodin*, 232 P. (2d) 706 (Wyo. 1951).

It is submitted that the right decision was reached to the effect that there was no accord and satisfaction, not, however, because the delivery

13. Comment, 37 Virginia L.R. 755 (1951).

14. 62 Cases, More or Less v. United States, 340 U.S. 593, 71 S.Ct. 515, 95 L.Ed. 443 (1951).

was not a sufficient consideration, but because there was no agreement made for the delivery to constitute an accord and satisfaction. The Court admits that a debt can be discharged by the delivery of property, but they say it must be property "to which the creditor would not otherwise be entitled, at least at that time." Apparently they rely on the fact that a power of sale mortgage was involved and that the mortgagee had an immediate right to possession.

An accord, in its technical sense, is a bilateral contract by the terms of which a creditor having a cause of action against a debtor promises to accept and the debtor promises to give something other than was originally due in discharge of the claim. Performance of the accord and its acceptance by the creditor constitutes satisfaction.¹ The contract, being bilateral, calls for four requirements which must be met. There must be: (a) a proper subject matter, (b) competent parties, (c) an assent or meeting of the minds, and (d) consideration.²

With respect to the consideration necessary to support an accord and satisfaction, the fact that it is insignificant or merely technical is immaterial,³ and since *Pinnel's* case in 1600, the consideration necessary to support an accord and satisfaction has been slight, indeed. It was there said that a "hawk, horse, or robe" was good.⁴ It has been said that the courts should seize upon any possible or probable benefit to one party or inconvenience to another to find the consideration.⁵ In all cases discovered, it was held that if there was a delivery of mortgaged property by the mortgagor in exchange for an agreement to accept it in full satisfaction of the mortgage debt, it was a valid contract for accord and satisfaction, and the intrinsic value of the property was deemed immaterial.⁶

In the three cases cited by the Wyoming Supreme Court to corroborate their contention that consideration is necessary to support a contract for accord and satisfaction, the decisions were based, not on lack of consideration, but on lack of agreement.⁷ The Court accepts the principle laid down in the case of *Biggers v. Ingersoll* which says that if the transaction does not change the status of either party then the accord and satisfaction is unsupported by consideration. In that case the mortgagee of real property went into possession after default and collected rents and profits. The Alabama Court held that, according to Alabama law, the legal title passed to the mortgagee, and he was consequently entitled to immediate posses-

1. Dean Shepherd, 8 Wash. L. R. 112 (1934).

2. 1 Am. Jur., Accord and Satisfaction, sec. 4.

3. *Ibid.*, sec. 29.

4. *Pinnel's Case*, 5 Coke 117a, 77 Eng. Rep. 237, 1 Eng. Rule Cas. 368 (1600).

5. *Sigler v. Sigler*, 98 Kan. 524, 158 Pac. 864 (1916).

6. *Thomas v. Ogden State Bank*, 80 Utah 138, 13 P.(2d) 636 (1932); *Lamberton v. Harris*, 112 Ark. 503, 166 S.W. 554 (1914); *First National Bank of Tishomingo v. Latham*, 37 Okla. 286, 132 Pac. 891 (1913).

7. *Graham v. New York Life Ins. Co.*, 182 Wash. 612, 47 P.(2d) 1029 (1935); *Alfred Struck Co. v. Slicer*, 23 Ga. App. 52, 97 S.E. 455 (1918); *Biggers v. Ingersoll*, 236 Ala. 646, 184 So. 478 (1938).

sion unless specified otherwise in the mortgage; therefore, they said, no new right was conferred upon the mortgagee when he went into possession and the status of the parties was not changed. The decision, however, was based not on lack of consideration, but on the fact that the evidence pointed to no agreement for the possession to constitute an accord and satisfaction.⁸

The Court in the instant case stresses the fact that a power of sale mortgage was involved as a reason why the incidents of a delivery of the mortgaged chattel to the creditor is different than if an ordinary mortgage were involved. Therefore, they intimate that outright ownership is no different from the mortgagee's rights under a power of sale mortgage after default, but this is not borne out by the decisions. Under a power of sale mortgage in a title theory state the mortgagee has a right to immediate possession unless otherwise specified in the mortgage, but until default occurs this right is only for the purpose of collecting rents and profits and applying them to the mortgage debt.⁹ A sale by such mortgagee in possession is of no effect whatever upon the mortgagor's equitable estate unless it conforms to the power granted in the mortgage.¹⁰ Thus, even in a title theory state the power of sale is for the protection of the mortgagor's interest and for no other purpose.¹¹ In a lien theory estate the title does not pass to the mortgagee, and the rule is not altered by the circumstances that a power of sale is granted to the mortgagee.¹² Under an ordinary mortgage a valid sale can be had only by foreclosure and sale, and the power of sale mortgage is but a substitution by agreement of such method in lieu of the ordinary method. For a full execution of the power of sale contained in a mortgage of personal property it is necessary that the property should be in the possession of the mortgagee so that he may fully effectuate the sale by delivering possession.¹³ Therefore, the only difference in a power of sale mortgage between a title theory or lien theory state is that in the former the mortgagee has a right to possession from the time of the giving of the mortgage, whereas in the latter he has the right to possession only after default. In either case the right to possession after default is the same—to sell at a public sale and apply the proceeds to the mortgage debt.

In view of these decisions it is apparent that outright ownership of a chattel is a much different right from the right to immediate possession after default under a power of sale mortgage. In the latter case, the only rights of the mortgagee are (a) to take possession by legal process, (b) to

8. *Ibid*, *Biggers v. Ingersoll*.

9. *Ibid*.

10. *Stephens v. Clay*, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328 (1892); *Lewis v. Hamilton*, 26 Colo. 263, 58 Pac. 196 (1899).

11. 36 Am. Jur., *Mortgages*, sec. 174.

12. *Ibid*.

13. *Fulghum v. J. P. Williams Co.*, 114 Ga. 643, 40 S.E. 695, 1 L.R.A. (NS) 1055, 88 Am. St. Rep. 48 (1902); *Team v. Baum*, 47 S.C. 410, 25 S.E. 275, 58 Am. St. Rep. 328 (1896).

sell the chattel at a public sale, and (c) to apply the proceeds on the mortgage debt. The mortgagor has the right (a) to redeem at any time before the sale, (b) to have the rents and profits applied to the mortgage debt, and (c) to take the surplus proceeds from the sale. Also, if the mortgage is not recorded, it is void as against creditors of the mortgagor, and as against subsequent mortgagees and purchasers in good faith.¹⁴

In the instant case the chattel was sold for about one-half of the mortgage debt; but suppose it had been worth twice the mortgage debt, or that it was unrecorded and the mortgagor has sold it to a good faith purchaser? Could it then be said that the delivery of the truck could not constitute consideration for an accord and satisfaction if it was so agreed, or that the bank's interest as owner of the truck was not different from what it was under the power of sale mortgage? Therefore, whenever the mortgagor transfers possession to the mortgagee in full satisfaction of the mortgage debt, he sacrifices the above rights; and also, if the mortgage is unrecorded, the mortgagee gains the further advantage of having his interest in the property fully secured. The giving up of these rights by the mortgagor is sufficient consideration to support the mortgagee's agreement to cancel the mortgage debt, regardless of the relative value of the chattel to the mortgage debt.

WALTER SCOTT.

EFFECT OF JUDGMENT AGAINST ONLY ONE PARTNER ON
PARTNERSHIP PROPERTY

Plaintiff brought an action against two defendants doing business as partners to recover on a note executed by one of the partners in the name of the partnership. No service of process was obtained on one of the defendants. Garnishment process was served on a garnishee and it answered that it owed the partnership a sum certain. Thereafter judgment was entered against both partners and the garnishee was ordered to pay the money into court in satisfaction of the judgment. Failing to do so, a petition was filed by the plaintiff against the garnishee to satisfy the judgment against the partners. The garnishee answered that the District Court was without jurisdiction to render judgment against the partners, or either of them, and was without jurisdiction to enter any judgment against the garnishee. Trial court entered judgment in favor of plaintiff against the garnishee, and on appeal, *Held*, affirmed. *L. C. Jones Trucking Co. v. Superior Oil Co.*, 234 P. (2d) 802 (Wyo. 1951).

¹⁴ Wyo. Comp. Stat. 1945, sec. 59-105.