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## Vendor and Purchaser - Installment Contract - Waiver of Vendor's Right to Terminate Installment Purchase Contract through Acceptance of Belated Payments

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to which it has no vested right on condition that the prospective recipient surrender a constitutional right.<sup>13</sup> California previously enacted a law requiring a loyalty oath as a prerequisite for obtaining a tax refund. This was subsequently held unconstitutional by the United States Supreme Court.<sup>14</sup> It is submitted that should a case of this nature arise in North Dakota, the courts would follow the more liberal view espoused by the court in the instant case and align themselves with what would appear to be the majority.

K. M. BROWN.

VENDOR AND PURCHASER — INSTALLMENT CONTRACT — WAIVER OF VENDOR'S RIGHT TO TERMINATE INSTALLMENT PURCHASE CONTRACT THROUGH ACCEPTANCE OF BELATED PAYMENTS. — Plaintiff signed an installment contract for the purchase of an automobile which contained a non-waiver agreement. Plaintiff failed to make payments on time and defendant repossessed the automobile. Plaintiff brought an action against the finance company to recover installments paid on the basis that defendant had entered into a "quasi new agreement" with plaintiff under the Georgia statutes,<sup>1</sup> by accepting belated payments. Plaintiff was non-suited. On an appeal it was *held*, three judges dissenting, the judgment reversed. The majority held the evidence established a prima facie cause of action which would turn the question of waiver of contractual rights to the jury. The dissent argued that the provision against waiver in the contract should control the case and required affirmance of the judgment of non-suit, in accordance with Georgia's public policy statute.<sup>2</sup> *Few v. Automobile Finance, Inc.*, 115 S.E.2d 196 (Ga. App. 1960).

In the absence of automobile installment cases, the Georgia court referred to a case involving belated payment of insurance premiums, in which the jury considered whether the provision against waiver of contractual rights had itself been waived.<sup>3</sup> The court departed from Georgia cases which held that no departure from the terms of the contract is shown by a series of installments which are paid belatedly.<sup>4</sup>

The judgment is in general accord with decisions in other jurisdictions

13. *Frost v. Railroad Comm'n*, 271 U.S. 583, 593 (1926); *Danskin v. San Diego United School Dist.*, 28 Cal.2d 536, 171 P.2d 885 (1946); *Lawson v. Housing Authority of City of Milwaukee*, 370 Wis. 269, 70 N.W.2d 605 (1955).

14. *Speiser v. Randall*, 357 U.S. 513 (1958) Justice Black concurring, "California, in effect has imposed a tax on belief and expression. In my view, a levy of this nature is wholly out of place in this country."

1. Ga. Code Ann. § 20-116 (1935) "Where parties, in the course of the execution of a contract, depart from its terms and pay or receive money under such departure, before either can recover for failure to pursue the letter of the agreement, reasonable notice must be given the other of intention to rely on the exact terms of the agreement. Until such notice, the departure is a quasi new agreement."

2. Ga. Code Ann. § 102-106 (1935) "Laws made for the preservation of public order or good morals cannot be done away with or abrogated by any agreement; but a person may waive or renounce what the law has established in his favor, when he does not thereby injure others or affect the public interests."

3. *Commercial Casualty Ins. Co. v. Campbell*, 54 Ga.App. 530, 188 S.E. 362 (1936).

4. *Sovereign Camp, W.O.W. v. Hart*, 187 Ga. 123, 200 S.E. 296 (1938); *Hill v. Sterchi Bros. Stores, Inc.*, 50 Ga. 193, 177 S.E. 353 (1934) here the mere fact that defendant paid some installments of membership in a fraternal benefit association after they were due would not be sufficient to show departure as to require notice from plaintiff of intention to comply with strict terms thereof before plaintiff could insist upon forfeiture of same.

dealing with land contracts<sup>5</sup> and insurance premiums<sup>6</sup> which hold that a vendor who accepts default installment payments waives the contractual provision for payment on time. Acceptance of default payments, accompanied by protest against default, will not waive the right to rescind.<sup>7</sup> Generally speaking, after a condition of payment of installments on time has been eliminated by a mere waiver, it can be re-established by giving a definite notice to the debtor which specifies that installments must be paid as originally agreed.<sup>8</sup>

The larger portion of litigation concerning waiver of installment payments appears in the context of insurance cases where the insurer who knowingly accepts overdue premiums is deemed to waive prompt payment and is estopped from forfeiting the policy.<sup>9</sup> Any unequivocal act of an insurer indicating an intention to waive a right is sufficient.<sup>10</sup> Even a non-waiver agreement, whether contained in the policy or existing separately, may be waived by acts or conduct.<sup>11</sup> It appears forfeitures are not favored by the law, and the right to forfeiture of an insurance policy for late payment of premiums will be deemed waived if reasonably possible under the circumstances of the case.<sup>12</sup>

Georgia's statute on "quasi new agreements"<sup>13</sup> appears to be somewhat more definite than the comparable provisions of the North Dakota Code dealing with waiver by a creditor after acceptance of default payments.<sup>14</sup> North Dakota has held that a policy condition prescribing forfeiture may be waived by the insurer, as such waiver is regarded as being for the benefit of the insurer.<sup>15</sup>

Whether there has been a waiver in North Dakota nevertheless depends upon the facts and circumstances of the particular case.<sup>16</sup> With no case law on point, it would seem probable that the degree of default in payment of installments would have to be somewhat greater in North Dakota than in Georgia to establish a waiver in view of the difference in the language of the statutes.

JAMES D. SCHLOSSER.

WILLS — CONSTRUCTION — EFFECT OF DEVISE "TO A FOR LIFE AND THEN TO HIS ISSUE." — The testator's will gave his son A an equitable life estate in certain property and then provided that at A's death the property should pass

5. *Laffon v. Collins*, 212 Cal. 750, 300 Pac. 808 (1931); *Porter v. Harrington*, 262 Mass. 203, 159 N.E. 530 (1928); *Sliwinski v. Gootstein*, 234 Mich. 74, 208 N.W. 47 (1926); *Bommelyn v. Moss*, 121 N.J. Eq. 551, 197 Atl. 6 (1938); *Scott v. Molter*, 119 S.W.2d 603 (Tex. Civ. App. 1938).

6. *Bruzas v. Peerless Casualty Co.*, 111 Me. 308, 89 Atl. 199 (1913).

7. *Beltinck v. Tacoma Theater Co.*, 61 Wash. 132, 111 Pac. 1045 (1910).

8. *Mintle v. Sylvester*, 202 Iowa 1128, 211 N.W. 367 (1926); *Smith v. Carleton*, 185 Ore. 672, 205 P.2d 160 (1949).

9. *Floyd v. Life Casualty Ins. Co.*, 148 S.W.2d 620 (Mo.App. 1941); *Home Beneficial Ass'n v. Field*, 162 Va. 63, 173 S.E. 370 (1934).

10. *McDonald v. Equitable Life Assur. Society*, 185 Iowa 1008, 169 N.W. 352 (1918); *Sjoberg v. State Auto Ins. Ass'n of Des Moines*, 78 N.D. 179, 189, 48 N.W.2d 452, 457 (1951); *Equitable Life Assur. Society v. Ellas*, 185 Tex. 526, 147 S.W. 1152 (1912).

11. *Marblestone v. Phoenix Assur. Co.*, 169 Minn. 1, 210 N.W. 385 (1926).

12. *Page v. Washington Mut. Life Ass'n*, 20 Cal.2d 234, 125 P.2d 20 (1942), *Contra Clifton v. Mut. Life Ins. Co.*, 168 N.C. 499, 84 S.E. 817 (1915).

13. See Note 1 *supra*.

14. N.D. Rev. Code § 9-1218 (1943) "The creditor must make objections to the mode of an offer performance at the time it is made to him. If this is not done, any objection which could have obviated at that time is waived by his failure to make the same."

15. *Sjoberg v. State Auto Ins. Ass'n of Des Moines*, 78 N.D. 179, 48 N.W.2d 452 (1951).

16. *Ibid.*