(2) As regards the obvious nature of the inequality Larenz and Wolf[422] write: "There may only by said to be a "striking" disparity where the disparity is so great that it patently goes beyond the limits of what is justifiable in all the circumstances" (*"Von einem 'auffälligen' Mißverhältnis wird man nur dann sprechen können, wenn das Mißverhältnis so groß ist, daß die Grenzen dessen, was sich nach den gesamten Umständen gerade noch rechtfertigen läßt, eindeutig überschritten sind"*).[423]

(3) *"Ausbeutung"* is the exploitation of a weakness, enumerated in §138(2) BGB, on the part of the other party. The party exploiting the weakness must have had knowledge of the weakness and of the obvious disparity. Constructive knowledge does not suffice, nor is an intention to exploit required See for example BGH, 8 July 1982.[424] The weaknesses enumerated in §138(2) BGB are discussed in detail by Soergel-Hefermehl.[425] If in a particular case the requirements of §138(2) BGB have not been fulfilled, the contract may be void under paragraph (1) of §138 BGB (as a *"wucherähnliches Geschäft"*, a "usury-like contract") which lays down the general rule on juristic acts, such as contracts, contrary to *bonos mores*. The courts have held that a contract is void under paragraph (1) of §138 BGB if there is an obvious disproportion between the mutual performances and the advantaged party displayed a reprehensible attitude (*"verwerfliche Gesinnung"*) by either deliberately exploiting the weaker economic position of the disadvantaged party, or by grossly negligently failing to realize that the disadvantaged party entered into the contract only because of his predicament.[426] It should be noted, however, that the subjective requirement of a *"verwerfliche Gesinnung"* is in a sense fictitious[427] since the courts are prepared to infer the reprehensible attitude from the objective circumstances of the individual case—especially from (the extent of) the disparity.[428] As the courts have brought the *"wucherähnliche Geschäfte"* under the sphere of application of §138(1) BGB, para.(2) of §138 BGB has lost much of its practical importance.

Req., 27 April 1887[429]

3.F.110.

EXTORTIONATE SALVAGE

The "Rolf"

The abuse by the one party of the other party's state of necessity, which has led that party to enter into an onerous (salvage) agreement renders the agreement voidable on the ground of "violence" as the consent to enter into the agreement is not freely given.

[422] Larenz, *AT*, at 761.

[423] See also *Palandt*, under §138 BGB, para. 4 bb; Soergel and Hefermehl, under § 138 BGB, para. 74; BGH, NJW 1979.758, cit. in **3.3.3** at 456; for a *"Ratenkreditvertrag"*, extensively, BGHZ 80, 153, 162 ff. *supra* at 460.

[424] NJW 1982.2767, 2768; See also *Palandt*, under §138 BGB, para. 74; Soergel and Hefermehl, under §138 BGB, para. 82; Larenz, *AT* at 762.

[425] Under §138 BGB, paras. 78–81.

[426] See e.g. BGHZ 80, 153, 160–161, *supra* at 460.

[427] See *Münchener Kommentar* (*Mayer-Maly*), under § 138 BGB, para. 102.

[428] Cf. e.g. BGH, NJW 1979.758, in **3.3.3**, at 456; BGHZ 80, 153, 161, *supra* at 460; Soergel and Hefermehl, under § 138 BGB, para. 73.

[429] D. 1888.1.263; S. 1887.1.372

Facts: On 22 September 1886 Mr Fleischer, captain of the steamship *Rolf*, which had run aground on the sands of the bay at the mouth of the Seine and was on the point of being lost, together with her cargo, agreed to a price of 18,000 francs fixed by the captain of a tug as the value of the provision of salvage and towage services. It was only through this agreement that Mr Fleischer could avoid a total loss of the *Rolf* and the cargo. However, upon being subsequently sued for payment of the agreed sum, Mr Fleischer argued that the agreement was void on the ground that it was vitiated by an absence of freely given consent on his part.

Held: On 13 October 1886 the Rouen *Tribunal de commerce* (Commercial Court) accepted that argument and ordered Mr Fleischer to pay to the tug owner, Mr Lebret, the sum of 4,190 francs by way of recompense for the towage services provided. On appeal by Mr Lebret, the *Cour de Rouen* on 10 December 1886 upheld that judgment. Mr Lebret appealed to the Cour de Cassation, but again his appeal was rejected.

Judgments: [In the Cour de Rouen (appellate court)]:—Whereas at the time when the agreement in issue was concluded, Fleischer, the master of the *Rolf*, could have been in no doubt that, unless he received prompt assistance, his vessel, which was aground on the sand, would, upon the arrival of the next high tide, become fatally submerged and would be lost, and further that his only chance of salvation lay in being refloated by Delamer, the master of the tug *Abeille No 9*, who had been the only person to answer his distress signals and to offer his services.

—Whereas in requiring in advance, as the price of the salvage and towage, one twentieth of the value of the vessel and its cargo, namely a sum of approximately 18,000 francs, Delamer had abused the desperate situation in which the master of the *Rolf* found himself; as having tried in vain to get him to accept less harsh terms, Fleischer was constrained and forced to submit as a matter of necessity to the agreement imposed on him; since his consent was not freely given, the agreement, which is vitiated as a matter of principle, is not merely rescindable but voidable in its entirety; as it must be declared null and void.

—Whereas leaving the contract to one side, however, the owner of the *Abeille No 9* is entitled to be rewarded for the service rendered by his tug to the *Rolf*. In order to determine the level of remuneration to which he is entitled, it is appropriate to some extent to take into account the value of the vessel and her cargo, which were saved, but regard must also be had, primarily and above all, to the efforts deployed and the risks faced or run by the salvor; as the value of the *Rolf* and her cargo was not less than 363,000 francs; however, the *Abeille No 9*, sailing on 22 September between the hours of half past five and seven o'clock in the evening, was drawing little water in a sufficient depth of sea and was exposed to no serious danger.

—Whereas although she remained stationary until about half past three in the morning, at anchor in the Seine estuary and within range of the *Rolf*, waiting for the tide to enable her to bring assistance to the *Rolf*, that wait involved merely a waste of time without any risk; as the refloating, which was commenced at twenty past three in the morning of 23 September and completed less than three quarters of an hour later in normal conditions, caused the *Abeille* to suffer no accident or damage apart from the insignificant breakage of a towing cable, for which Captain Fleischer offered to pay.

—Whereas although the tug's engine had to be run on full power, it did not exceed its capacity; and it has not been alleged that it suffered any deterioration as a result.

—Whereas it is necessary to encourage salvage operations as a beneficial activity, and, having regard to the circumstances, generously to reward those undertaking them, they must nevertheless not be allowed to become a means of exploiting the perils or misfortunes faced by others.

—Whereas the sum awarded to Lebret by the court at first instance is adequate, even taking into account the contingent stipulation whereby nothing was to be payable in the event of an unsuccessful outcome, etc.

[In the Cour de Cassation]: Judgment: On the sole appeal ground alleging misuse of powers, infringement of Article 1134 of the Civil Code and misapplication of Articles 1109, 1111 et seq. of that Code:—Under Article 1108 of the Civil Code, the consent of the person assuming the obligation is an essential condition governing the validity of an agreement.

—Whereas such consent is not freely given, and is given only out of fear instilled by some substantial and present ill to which the person or chattel concerned is exposed, a contract entered into in those circumstances is vitiated by a defect rendering it voidable.
—Whereas the contested judgment found that the master of the *Rolf* assumed the obligation at issue only in order to save his ship, which would otherwise have swiftly become fatally submerged and lost.
—Whereas that obligation was assumed as a result of constraint and by force of circumstance. Having sought in vain to secure less onerous terms, the master of the *Rolf* was forced as a matter of necessity to enter into the agreement which the master of the *Abeille No 9*, exploiting the desperate situation in which the former found himself, imposed on him.—Whereas in consequently declaring that agreement void, the appellate court neither misused its powers nor infringed or misapplied any of the abovementioned articles.
On those grounds, the Court dismisses the appeal.

Note
Cases of salvage were later dealt with by statute; see L.67-545 of 7 July 1967 (replacing a statute of 1916).

Cass. soc., 5 July 1965[430] **3.F.111.**

EXTORTIONATE LABOUR CONTRACT

A pressing need for money

A (labour) contract which is disadvantageous for the the one party is voidable on the ground of "violence" if that party's consent to enter into the agreement is not freely given because of his urgent need for money.

Facts: Pursuant to a contract dated 22 January 1959, Mr Maly was engaged for six months on a probationary basis as a salesman by Frameco, a manufacturer of concrete products, on terms whereby he was to receive a 3% commission on the net price of direct and indirect sales. As he had to move from Paris to Grenoble, he resigned on 21 September 1959. At that time Mr Maly was in urgent need of money to provide medical treatment for his sick child. On 12 October 1959 he entered into a new agreement with I.M.A.C., a firm, whereby he was, with the authorization of Frameco, to sell the same product as an independent operator and was to receive a commission of 1.5% on direct sales only; this arrangement was to have retroactive effect. On 17 February 1960 Mr Maly sued I.M.A.C., seeking an order requiring that company to pay commission on the basis on the agreement of 22 January 1959.

Held: The Cour de Cassation upheld the decision of the appellate court that the contract of 12 October 1959 was to be declared void on the ground of "*violence*" as Mr Maly's consent, given, among other things, his pressing need of money, had been constrained.

Judgment:—Whereas the contested judgment is challenged in that (a) it declared the agreement of 12 October 1959 void on the ground that it was vitiated by "violence", (b) it held that the relationship between the parties continued to be governed by the agreement of 22 January 1959 and (c) it appointed an expert to calculate the commission due, on the grounds that Maly had had certain doubts as to the enforceability against I.M.A.C. of the agreement entered into with Frameco and that Maly had only agreed to accept the conditions laid down in the agreement of 12 October 1959 because of the constraint in which he found himself.

[430] Bull. civ. IV.545.

—Whereas according to the appellant, it is patently clear that Maly at all times worked on behalf of I.M.A.C., that it was that company which paid him his commission and which he sued for payment of the commission provided for under the original agreement, and that he could not therefore have been unaware that that agreement could if necessary be enforced against I.M.A.C.; as furthermore, the legal status of a salesman is such that he is required to exercise his profession on an exclusive and steadfast basis, and the contested judgment, which did not examine the question whether, as is contended by I.M.A.C., Maly had sold goods for a competitor, provided no legal basis for the decision delivered by the court below; as lastly, the appellant contends that the findings in the contested judgment do not adequately establish, first, that the rate of commission was not reduced in pursuance of an agreement between the parties and, second, that the contract of 12 October 1959 was entered into in circumstances of compelling constraint amounting to "violence".
—Whereas the contested judgment found, however, that, at the time of his resignation, Maly, who was required to leave Paris and take up residence in Grenoble with a sick child, was in pressing need of money, that his employer refused to perform the obligations imposed by the initial contract, that he was faced with the alternative of either bringing what might prove to be protracted proceedings or agreeing to the immediate receipt of a reduced sum by consenting to pursue his activities on draconian terms which involved a considerable reduction in the rate of commission and the renunciation of social benefits, etc., one of those terms being unlawful and their provisions as a whole being inequitable; As the complaint that Maly had effected sales for a competitor undertaking—which Maly contested, stating that the company had agreed to his carrying out such operations on an occasional basis—was not levelled against him by the company at the time of his departure, the company having, on the contrary, expressed its regret at seeing him go, and was only raised in the course of the proceedings; as moreover, he had not exerted any influence on the signature of the second agreement.
Whereas in inferring from this that Maly's consent had been vitiated by intellectual "violence" ["*violence morale*"] and that the contract of 12 October 1959 was void, the contested judgment provided a legal basis for the decision therein contained.

Notes

(1) French law has been struggling with the question whether or not a contract is voidable on the ground of "*violence*", in the sense of the Code Civil, if the constraint of the will of the one party (the plaintiff) did not arise from a threat exercised by the other party, but from the external circumstances in which the one party found himself, such as a state of necessity or economic dependence. The courts and authors are divided over this issue.[431] Relevant cases are few but there are decisions in which a contract was held to be voidable because of "*violence*"—in this context often referred to as "*violence morale*"—arising from a state of necessity ("*état de necessité*"). The courts seem to require that the other party has gained an excessive advantage by abusing the state of necessity (when an advantage can be said to be excessive, the courts have not specified; it appears that all the relevant circumstances of the case, such as the market value, are to be taken into consideration).[432] The above cited case of *The "Rolf"* illustrates this position: the Cour de cassation upheld the decision of the appellate court that the agreement was voidable because of "*violence (morale)*" as the captain of the *Rolf*, which was in danger of being lost unless it was pulled of the sandbank on which it had grounded, gave in to the captain of the tug

[431] For a discussion see Terré, Simler and Lequette, paras 239–240; Nicholas, at 108–10.
[432] See e.g. Ghestin, at 568.

Williams v. Walker–Thomas Furniture Co.

District of Columbia Court of Appeals, 1964.
198 A.2d 914.

■ QUINN, ASSOCIATE JUDGE. Appellant, a person of limited education separated from her husband, is maintaining herself and her seven children by means of public assistance. During the period 1957–1962 she had a continuous course of dealings with appellee from which she purchased many household articles on the installment plan. These included sheets, curtains, rugs, chairs, a chest of drawers, beds, mattresses, a washing machine, and a stereo set. In 1963 appellee filed a complaint in replevin for possession of all the items purchased by appellant, alleging that her payments were in default and that it retained title to the goods according to the sales contracts. By the writ of replevin appellee obtained a bed, chest of drawers, washing machine, and the stereo set. After hearing testimony and examining the contracts, the trial court entered judgment for appellee.

Appellant's principal contentions on appeal are (1) there was a lack of meeting of the minds, and (2) the contracts were against public policy.

Appellant signed fourteen contracts in all. They were approximately six inches in length and each contained a long paragraph in extremely fine print. One of the sentences in this paragraph provided that payments, after the first purchase, were to be prorated on all purchases then outstanding. Mathematically, this had the effect of keeping a balance due on all items until the time balance was completely eliminated. It meant that title to the first purchase, remained in appellee until the fourteenth purchase, made some five years later, was fully paid.

At trial appellant testified that she understood the agreements to mean that when payments on the running account were sufficient to balance the amount due on an individual item, the item became hers. She testified that most of the purchases were made at her home; that the contracts were signed in blank; that she did not read the instruments; and that she was not provided with a copy. She admitted, however, that she did not ask anyone to read or explain the contracts to her.

We have stated that "one who refrains from reading a contract and in conscious ignorance of its terms voluntarily assents thereto will not be relieved from his bad bargain." Bob Wilson, Inc. v. Swann, D.C.Mun.App., 168 A.2d 198, 199 (1961). "One who signs a contract has a duty to read it and is obligated according to its terms." Hollywood Credit Clothing Co. v. Gibson, D.C.App., 188 A.2d 348, 349 (1963). "It is as much the duty of a person who cannot read the language in which a contract is written to have someone read it to him before he signs it, as it is the duty of one who can read to peruse it himself before signing it." Stern v. Moneyweight Scale Co., 42 App.D.C. 162, 165 (1914).

A careful review of the record shows that appellant's assent was not obtained "by fraud or even misrepresentation falling short of fraud." Hollywood Credit Clothing Co. v. Gibson, supra. This is not a case of mutual misunderstanding but a unilateral mistake. Under these circumstances, appellant's first contention is without merit.

Appellant's second argument presents a more serious question. The record reveals that prior to the last purchase appellant had reduced the balance in her account to $164. The last purchase, a stereo set, raised the balance due to $678. Significantly, at the time of this and the preceding purchases, appellee was aware of appellant's financial position. The reverse side of the stereo contract listed the name of appellant's social worker and her $218 monthly stipend from the government. Nevertheless, with full knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a $514 stereo set.

We cannot condemn too strongly appellee's conduct. It raises serious questions of sharp practice and irresponsible business dealings. A review of the legislation in the District of Columbia affecting retail sales and the pertinent decisions of the highest court in this jurisdiction disclose, however, no ground upon which this court can declare the contracts in question contrary to public policy. We note that were the Maryland Retail Installment Sales Act, Art. 83 §§ 128–153, or its equivalent, in force in the District of Columbia, we could grant appellant appropriate relief. We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar.

Affirmed.

Williams v. Walker–Thomas Furniture Co.

United States Court of Appeals, District of Columbia Circuit, 1965.
121 U.S.App.D.C. 315, 350 F.2d 445.

■ J. SKELLY WRIGHT, CIRCUIT JUDGE. Appellee, Walker–Thomas Furniture Company, operates a retail furniture store in the District of Columbia. During the period from 1957 to 1962 each appellant in these cases purchased a number of household items from Walker–Thomas, for which payment was to be made in installments. The terms of each purchase were contained in a printed form contract which set forth the value of the purchased item and purported to lease the item to appellant for a stipulated monthly rent payment. The contract then provided, in substance, that title would remain in Walker–Thomas until the total of all the monthly payments made equaled the stated value of the item, at which time appellants could take title. In the event of a default in the payment of any monthly installment, Walker–Thomas could repossess the item.

The contract further provided that "the amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; *and all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills and accounts* due the Company by [purchaser] at the time each such payment is made."

(Emphasis added.) The effect of this rather obscure provision was to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.

On May 12, 1962, appellant Thorne purchased an item described as a Daveno, three tables, and two lamps, having total stated value of $391.10. Shortly thereafter, he defaulted on his monthly payments and appellee sought to replevy all the items purchased since the first transaction in 1958. Similarly, on April 17, 1962, appellant Williams bought a stereo set of stated value of $514.95.* She too defaulted shortly thereafter, and appellee sought to replevy all the items purchased since December, 1957. The Court of General Sessions granted judgment for appellee. The District of Columbia Court of Appeals affirmed, and we granted appellants' motion for leave to appeal to this court.

Appellants' principal contention, rejected by both the trial and the appellate courts below, is that these contracts, or at least some of them, are unconscionable and, hence, not enforceable. In its opinion in Williams v. Walker–Thomas Furniture Company, 198 A.2d 914, 916 (1964), the District of Columbia Court of Appeals explained its rejection of this contention as follows:

[The court quoted the last two paragraphs of Judge Quinn's opinion, reported supra.]

We do not agree that the court lacked the power to refuse enforcement to contracts found to be unconscionable. In other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable. While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel. In Scott v. United States, 79 U.S. (12 Wall.) 443, 445 (1870), the Supreme Court stated:

"* * * If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to. * * *"

Since we have never adopted or rejected such a rule, the question here presented is actually one of first impression.

Congress has recently enacted the Uniform Commercial Code, which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made. 28 D.C.Code § 2–302 (Supp. IV 1965). The enactment of this section, which occurred subsequent

* At the time of this purchase her account showed a balance of $164 still owing from her prior purchases. The total of all the purchases made over the years in question came to $1,800. The total payments amounted to $1,400. [Footnote of the court.]

to the contracts here in suit, does not mean that the common law of the District of Columbia was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the District of Columbia. In fact, in view of the absence of prior authority on the point, we consider the congressional adoption of § 2–302 persuasive authority for following the rationale of the cases from which the section is explicitly derived. Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case." Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place...." We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract.

Because the trial court and the appellate court did not feel that enforcement could be refused, no findings were made on the possible unconscionability of the contracts in these cases. Since the record is not sufficient for our deciding the issue as a matter of law, the cases must be remanded to the trial court for further proceedings.

So ordered.

■ DANAHER, CIRCUIT JUDGE (dissenting). The District of Columbia Court of Appeals obviously was as unhappy about the situation here presented as

any of us can possibly be. Its opinion in the *Williams* case, quoted in the majority text, concludes: "We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar."

My view is thus summed up by an able court which made no finding that there had actually been sharp practice. Rather the appellant seems to have known precisely where she stood.

There are many aspects of public policy here involved. What is a luxury to some may seem an outright necessity to others. Is public oversight to be required of the expenditures of relief funds? A washing machine, e.g., in the hands of a relief client might become a fruitful source of income. Many relief clients may well need credit, and certain business establishments will take long chances on the sale of items, expecting their pricing policies will afford a degree of protection commensurate with the risk. Perhaps a remedy when necessary will be found within the provisions of the "Loan Shark" law, D.C.Code §§ 26–601 et seq. (1961).

I mention such matters only to emphasize the desirability of a cautious approach to any such problem, particularly since the law for so long has allowed parties such great latitude in making their own contracts. I dare say there must annually be thousands upon thousands of installment credit transactions in this jurisdiction, and one can only speculate as to the effect that these cases will have.

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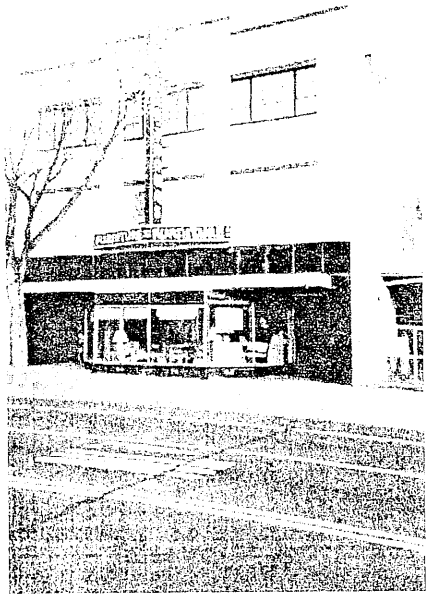

The Walker-Thomas Furniture Company

NOTES

(1) *What happens when security interests are seized?* Some readers of the case are left with the impression that the clause gives Walker–Thomas the right to keep all of the property in the event of default. This is wrong. A secured creditor has no right to keep collateral in the event of default. It is obliged to sell the property and return any surplus to the debtor. Douglas G. Baird, The Boilerplate Puzzle, 104 Michigan L. Rev. 933, 942 (2006). Given that surplus must be disgorged after sale, how could Walker–Thomas be unjustly enriched by this contract? Why would they have an improper incentive to enter into this arrangement?

A more benign rationale that Walker–Thomas had in establishing a security interest is that under a local statute, "All beds, bedding, household furniture and furnishings, sewing machines, radios, stoves, cooking utensils, not exceeding $300 in value" was "free and exempt from distraint, attachment, levy, or seizure and sale on execution or decree of any court in the District of Columbia." District of Columbia Code § 15–401. As Douglas Baird explains: "Walker–Thomas took the security interest in William's other household goods because these assets were exempt. It had to take a security interest in them in order to be able to reach them in the event of default. The cross-collateralization clause served this purpose and no other." Id. at 948.