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CHAPTER 4

Contracts

FREDERICK M. HART

§4.1. Introduction. None of the contract cases decided during the 1963 SURVEY year requires extensive comment. This conclusion probably reflects an approval of the manner in which the Supreme Judicial Court handled the many issues presented by litigants. In reviewing a year's judicial production, it is easier to get excited about a decision that one disapproves.

One trend is worthy of note. From the cases discussed in this and other chapters, it is apparent that the Court is becoming more sophisticated in its understanding and use of the Uniform Commercial Code.¹

§4.2. Draws against commission. In *Perma-Home Corp. v. Nigro*¹ the Supreme Judicial Court was presented with the question of whether a salesman is required to repay money drawn against his commissions when the draw exceeds commissions earned at the time his employment is terminated. The defendant had agreed to supply the names of prospective customers to the plaintiff in return for a commission of 10 per cent on all sales ultimately made. The defendant was to receive a draw against commissions in the amount of \$100 per week. According to the facts, no express agreement to repay any of the advances was made by the defendant. When the defendant's employment was terminated, he had drawn considerably more than he had earned under the commission arrangement, and this action was brought to recover the difference.

The Court adopted what it found to be the prevailing rule that "in absence of an express or implied agreement to repay any excess of advances over the commissions earned, the employer may not recover from the employee the amount of the excess."² The rationale of this rule is that the employer and employee are viewed as partaking in a

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§4.1. ¹ See cases discussed in §4.3, Chapter 6, and §9.2 *infra*.

§4.2. ¹ 1963 Mass. Adv. Sh. 977, 191 N.E.2d 745.

² *Id.* at 980, 191 N.E.2d at 747.

joint venture and it is assumed that some of the risk is assumed by the employer.

The decision should be compared with the earlier case of *Therriault v. E. L. King & Co.*,³ which involved a written contract whereunder the employee was to be paid a commission on all sales made by him. The term of the contract was one year and the contract provided that the employee was to be advanced a drawing account of \$100 per week, payable against commissions earned. The employer failed to pay the draw for a substantial number of weeks and at the end of the year an action was commenced for its recovery. The Court held that the employer was not obligated to pay the employee the weekly payment at the end of the term when there was no showing that the commissions earned were equal to or exceeded the draw. The parties did not intend that a minimum salary was guaranteed to the employee. The Court said that the "advancements have resemblance to a loan which was to be repaid the defendant at the termination of the agreement to the extent or amount it was in excess of commissions then earned."⁴

This language was correctly characterized as dicta by the Court in *Perma-Home*, but the two cases are nevertheless difficult to harmonize. In both, commissions were less than the draw. In one, *Therriault*, the employer failed to pay the draw and the Court found that he was correct. In the other, *Perma-Home*, the draw was paid and the Court found that the employer had no right to recover that part of it which was in excess of the commissions. If, as the Court reasons in *Perma-Home*, the arrangement is in the nature of a joint venture in which the risk is to be shared, it would appear that the employer's contractual obligation to advance money each week is his contribution to the venture and that it should be paid irrespective of whether the expected gains are realized. On the other hand, if the Court's characterization of the transaction in *Therriault* as a loan is basically sound, recovery should be allowed against the employee at the end of the term when the draw paid exceeds the commissions earned.

In spite of the apparent inconsistency between the opinions, the result reached in each seems to be right. Perhaps this is because the plaintiff does not make an effective showing in either case that the status quo ought to be disturbed. However, if one must choose between the two opinions, *Perma-Home* appears the better, and the one more in line with current authority.

§4.3. Provisions prohibiting assignments. Two cases decided during the 1963 SURVEY year reaffirmed the validity of clauses prohibiting assignments. Although the enactment of the Uniform Commercial Code will affect the result in both cases, they are worthy of note as examples of the basic approach of the Massachusetts courts in this area.

³ 282 Mass. 109, 184 N.E. 386 (1933).

⁴ *Id.* at 112, 184 N.E. at 387.

*McLaughlin v. New England Telephone and Telegraph Co.*¹ involved a dispute between a trustee in bankruptcy and the assignor of contracts over the right to money owing the bankrupt-assignor. The bankrupt had entered into several construction contracts with the Telephone Company, each of which contained a clause providing: "Neither party . . . shall assign the contract . . . without the written consent of the other, nor shall the contractor [the bankrupt] assign any moneys due or to become due to him hereunder, without the previous written consent of [the Telephone Company]." Subsequently, the bankrupt delivered to the United States Trust Company account receivable assignment forms purporting to assign his contract rights to the bank as security for loans. When the Trust Company instructed the Telephone Company that it was an assignee and should be paid, the Telephone Company objected to the assignment and refused the demand. Upon the commencement of this action for a declaratory judgment to determine whether the trustee in bankruptcy or the Trust Company had superior rights to the money ultimately becoming due from performance of the contracts, the Telephone Company paid the money into court with the consent of all parties.

The trustee argued that the assignments were ineffective as against him because of the nonassignment clause, and claimed a right to the fund under Sections 70(a) and 60 of the Federal Bankruptcy Act. The Supreme Judicial Court affirmed the validity of the nonassignment clauses, but held that the prohibition was for the benefit of the Telephone Company and did not prevent an assignee from acquiring rights against the assignor. By implication, the Court also held that the assignments were perfected for the purposes of Section 60 of the Bankruptcy Act as soon as they were made.

Much of the Court's opinion is rendered obsolete by the Uniform Commercial Code,² but there is one point that must be considered in future transactions. In the course of the opinion, the Court was required to decide whether the assignment was intended to cover only money owing at the time of the assignment or also money to become due in the future. Although the form signed by the contractor used the term "contracts," it also stated that the accounts were "owing to" the debtor. Adopting a narrow construction of the agreement, the Court held that it covered only those owing to the contractor at the time of the assignments. Since Section 9-106 of the Uniform Commercial Code separately defines accounts and contract rights, it is likely that the same result would be reached under the Code. The case indicates that any security agreement that is designed to cover both should clearly describe the collateral as "all present and future contract rights and accounts of the assignor."³

§4.3. 1 345 Mass. 555, 188 N.E.2d 552 (1963).

² See Willier and Hart, *Forms and Procedures Under the Uniform Commercial Code* pars. 91.20, 91.21 (1963).

³ 5 B.C. Ind. & Com. L. Rev. 171 (1963).

The validity of contractual provisions forbidding assignments was also at issue in *Security National Bank of Springfield v. General Motors Corp.*⁴ The Court held that an assignee took no rights as against the debtor when the contract provided that the creditor "shall not transfer or assign nor attempt to transfer this Agreement or any right or obligation hereunder." The decision is consistent with the *McLaughlin* case, but is contrary to the Uniform Commercial Code.⁵

§4.4. Finders' fees. When one merely brings to the attention of another a possibility for making a profit, his right to recover compensation for this service is nebulous at best. Many of the cases in this general area involve the presentation of "new ideas" to a going corporation. *Davidson v. Robie*¹ presented another typical factual situation of this nature. The defendant had told the plaintiff to "keep his eyes open for deals," as the defendant was interested in them, and had promised that he would "take care" of the plaintiff. When the plaintiff informed the defendant of an opportunity to buy stock in a close corporation, the defendant promised to pay him 10 per cent of any profit he might make on the deal. The defendant subsequently purchased it and sold it some years later at a substantial profit. In this action the plaintiff sought compensation for having brought the possibility of the deal to the defendant's attention.

Although the Supreme Judicial Court found that there was insufficient evidence to prove either that the plaintiff was a broker, in the sense that he was hired to negotiate, or that he had been the effective cause of arranging the transaction, recovery by the plaintiff was affirmed on the ground that there was sufficient evidence to prove an express contract. The most notable feature of the case is the willingness of the Court to leave the question of whether a contract existed to the jury, even though the evidence was "imprecise" and "scanty." The arrangement between the plaintiff and the defendant is of the type that is as likely to be informally stated as it is to be written, and the Court's opinion is highly commendable.

§4.5. Promise to pay debt discharged in bankruptcy. *Howard v. Zilch*¹ presented a novel fact situation raising the question of whether a check constitutes a sufficient written promise to pay a debt discharged in bankruptcy. After the defendant's obligation to the plaintiff had been discharged, he made oral promises to pay the debt out of an expected recovery from a tort claim against a third party. When the tort action was settled, the defendant instructed his attorney to make arrangements for payment of the discharged debt. His attorney drew a check payable to both the defendant and the plaintiff and delivered it to the defendant who indorsed it and gave it to the plaintiff.

Soon thereafter the defendant asked his attorney to stop payment on

⁴ 345 Mass. 434, 187 N.E.2d 820 (1963).

⁵ See G.L., c. 106, §§118.

§4.4. ¹ 345 Mass. 333, 187 N.E.2d 371 (1963).

§4.5. ¹ 1963 Mass. Adv. Sh. 609, 190 N.E.2d 77.

the check, which was accomplished before the plaintiff received payment. In this action the plaintiff argued that the attorney's signature, made as agent for the defendant, was sufficient to satisfy the statutory requirement that promises to pay a discharged debt be in writing. The Supreme Judicial Court, demonstrating considerable facility in interpreting the Uniform Commercial Code, held that the drawer of a check makes a promise to pay the amount of the check to any holder and that this promise meets the requirements of the statute.

Because of the necessity of tying together several sections of the Uniform Commercial Code to arrive at the conclusion that the drawer of a check makes a "promise" to pay, the Court's opinion has an appearance of cleverness rather than depth. Since a check is basically a payment rather than a promissory instrument, initial reaction to the opinion is that the Court was more impressed by technicalities than by the underlying issue of whether this was the type of writing intended to satisfy the statute. But when it is remembered that the writing requirement is primarily designed to assure that a promise was in fact made, it must be admitted that a check is as good evidence of this as can be obtained. Also, in the face of prior Massachusetts cases that have held that an informal promise contained in a letter is sufficient,² it would be difficult to conclude that a check is less representative of the debtor's serious intent to promise payment of the barred claim.

§4.6. Contracts between husbands and wives. In 1944, Frank W. Grinnell asked the question "Why not allow written contracts between husband and wife in Massachusetts?"¹ His own answer was a tentative draft act to permit such contracts, and his proposal was presently introduced into the Senate. However, the Judicial Council found a reason to deny enforceability to contracts of husband and wife inter se: the possibility of fraud on creditors.²

The argument of the Judicial Council delayed the legislation for some twenty years, but during the 1963 legislative session Mr. Grinnell's suggestion was adopted.³ Section 3 of Chapter 209 now provides: "Husbands and wives may make contracts with each other, written, oral, sealed or unsealed."⁴

² See *Nathan v. Leland*, 193 Mass. 576, 79 N.E. 793 (1907); *Cook v. Shearman*, 103 Mass. 21 (1869).

§4.6. 1 29 Mass. L.Q., No. 2, p. 29 (1944).

² 30 Mass. L.Q., No. 4, p. 20 (1945).

³ G.L., c. 209, §3, as amended by Acts of 1963, c. 765, §2.

⁴ The same act (Acts of 1963, c. 765) amended G.L., c. 209, §6, to permit suits by marriage partners against one another on contracts permitted by G.L., c. 209, §3.