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COMMERCIAL LAW

FREDERICK M. HART

THIS has been a year, as in the past, of many decisions. In contrast to some other years, none are striking in themselves and no single group of them indicates any important judicial development in the field of commercial law. However, the second fount of legal evolution, the legislature, has also been active and therein lies the principal story of this year's survey. The Statute of Frauds applicable to the sale of goods has been altered, chattel mortgage and conditional sales contract recording statutes have been revised, and the "fictitious payee" rule in negotiable instruments has been changed. In spite of the amount of legislation during the past year and despite the fact that the Uniform Commercial Code has now been adopted by six states, five of which are close by,¹ no visible signs have appeared indicating that any action will be taken in this state during the next few years to adopt the Code. However, in the belief that eventually it will be accepted by New York and by way of indicating how it would affect developments reported herein, frequent references to the Code have been incorporated in this article.

I

SALES

It was anticipated in last year's *Survey*² that the Court of Appeals would have the opportunity during 1960 to "clarify the legal atmosphere clouding the subject" of the privity requirement in warranty actions. However, no decision on this point has been reported, one of the cases³ scheduled for argument having been discontinued and the other⁴ put over to the present term. Warranty cases were practically nonexistent this year in sharp contrast to the past two

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¹ Connecticut, Conn. Gen. Stat. Ann. tit. 42a (1960) (effective Oct. 1, 1961); Kentucky, Ky. Acts 1958, ch. 77; Massachusetts, Mass. Gen. Laws Ann. ch. 106 (1958); New Hampshire, N.H. Rev. Stat. Ann. § 382A (Supp. 1959) (effective July 1, 1961); Pennsylvania, Pa. Stat. Ann. tit. 12A (1954); Rhode Island, see Rhode Island B.J., June 1960, p. 1, col. 2.

² Hart, Commercial Law, 1959 Survey of N.Y. Law, 34 N.Y.U.L. Rev. 1442-47.

³ Papp v. Jackson Mfg. Co., 8 App. Div. 2d 637, 185 N.Y.S.2d 872 (2d Dep't), motion for leave to appeal granted, 6 N.Y.2d 345, 160 N.E.2d 86, 188 N.Y.S.2d 551 (1959).

⁴ Greenberg v. Lorenz, 14 Misc. 2d 279, 178 N.Y.S.2d 404 (N.Y. City Ct. 1957), aff'd, 12 Misc. 2d 883, 178 N.Y.S.2d 407 (Sup. Ct., App. T., 1st Dep't 1958), modified mem., 7 App. Div. 2d 968, 183 N.Y.S.2d 46, motion for leave to appeal granted, 8 App. Div. 2d 609, 185 N.Y.S.2d 740 (1st Dep't 1959).

years, and those decided seem too unimportant to discuss.⁵ Emphasis, therefore, shifts to a more prosaic part of sales law, the Statute of Frauds and the requirements for an acceptance of an offer to sell.

Statute of Frauds.—Patterning its approach after that followed by the draftsmen of the Uniform Commercial Code,⁶ the legislature substantially revised the Statute of Frauds provisions governing contracts to sell and sales of goods.⁷ The minimum value of goods before the requirement of a written contract becomes applicable was raised from \$50 to \$500. In addition, the exception from the statute of goods specially manufactured for the buyer which are not suitable for sale in the ordinary course of the seller's business was extended to include cases where the seller did not manufacture the goods himself but instead ordered them from a third party who made them specially.⁸

Perhaps the most significant change relates to the substance of the memorandum of the transaction necessary to satisfy the statute. Prior to revision, New York courts had long emphasized that a memorandum had to be complete and free of inaccuracies.⁹ The

⁵ In *Goldberg v. American Airlines, Inc.*, 23 Misc. 2d 215, 199 N.Y.S.2d 134 (Sup. Ct., N.Y. Co. 1960), it was held that the place of the accident growing out of a breach of warranty determines the law to be applied. Justice Steuer made the following remark which is applicable to the present privity controversy in New York: "It must be conceded that the efforts to extend the doctrine of liability for breach of warranty, proceeding, as they do, on emotional rather than logical grounds, produce situations which are not easily resolved by reason. Basic principles are lost sight of or ignored. The consequences may be self-defeating. In this case extending plaintiff's theory to its next step, there would be no objection to suit against the person who supplied the manufacturer with either machinery, appliances or material. And then would come the one who did the same for that manufacturer or supplier until the chain of liability extended back to such a degree that a trial would involve so many parties and issues as not to be justifiable." *Id.* at 217, 199 N.Y.S.2d at 136.

⁶ See Uniform Commercial Code § 2-201. However, in three important particulars the Code differs from the New York legislation: (1) The Code provides that a writing may satisfy the requirements of a memorandum even though unsigned by the party to be charged where he is a merchant and has received it as confirmation of the contract, knowing that it is such a confirmation, and has failed to respond; (2) under the Code, if one admits in his pleadings that a contract for sale was made, it may be enforced against him; and (3) where the contract is taken out of the Statute of Frauds under the Code by part performance, it may be enforced only to the extent that it has been performed. See note 10 *infra*.

⁷ N.Y. Pers. Prop. Law § 85 (Supp. 1960), 24 Albany L. Rev. 486 (1960).

⁸ Thus, the new section adopts the holding of *E. G. Lumber Co. v. New York Bondstone Corp.*, 15 Misc. 2d 985, 179 N.Y.S.2d 45 (Sup. Ct., App. T., 2d Dep't 1958), 1959 Survey of N.Y. Law, 34 N.Y.U.L. Rev. 1449, contrary to the older rule that the exception did not apply where a third person was engaged to manufacture the goods. *Eagle Paper Box Co. v. Gatti-McQuade Co.*, 99 Misc. 508, 164 N.Y. Supp. 201 (Sup. Ct., App. T.), *aff'd mem.*, 181 App. Div. 924, 167 N.Y. Supp. 1097 (1st Dep't 1917).

⁹ See *Donald Friedman & Co. v. Newman*, 255 N.Y. 340, 174 N.E. 703 (1931);

revised section specifically states that a memorandum, otherwise sufficient, is not rendered insufficient because of an omission or an incorrect statement of a term agreed upon by the parties. Enforcement is limited, however, to the quantity of goods specified in the memorandum.¹⁰

The revision applies only to transactions involving goods and does not extend to contracts to sell or sales of choses in action. The latter transactions are now covered by a new section of the Personal Property Law which retains, unaltered, the old Statute of Frauds provisions.¹¹

Offer and Acceptance.—In another departure from the case law of New York in favor of the Uniform Commercial Code approach,¹² the legislature provided that an immaterial variance between an offer and an unconditional acceptance does not prevent the formation of a contract to sell or sale of goods.¹³ Since, as a general rule, the Uniform Sales Act does not attempt to lay down rules applicable to the formation of contracts, a question arises: When an offeree responds with an acceptance varying the terms of the original offer in some particular, has he accepted the offer or has he rejected it by making a counteroffer? New York courts have required, in practically all cases, that the acceptance exactly match the offer extended if a contract is to arise.¹⁴ Although some departure from this strict view was evident in the recent case of *Valashinas v. Koniuto*,¹⁵ that case did not concern a sale of chattels and it is doubtful whether, by itself, it indicated a trend away from previous holdings.

Carter, Macy & Co. v. Matthews, 220 App. Div. 679, 222 N.Y. Supp. 472 (1st Dep't 1927), aff'd mem., 247 N.Y. 532, 161 N.E. 171 (1928). See also N.Y. Leg. Doc. No. 65(O), 537-42, 551-52 (1953), wherein the Law Revision Commission recommended that the strict rule applied by the New York courts be modified as to contracts required to be in writing by § 31 of the Personal Property Law.

¹⁰ Apparently the rule stated in *John Thallon & Co. v. Edsil Trading Corp.*, 302 N.Y. 390, 98 N.E.2d 572 (1951), that where a part of the goods is received and accepted by the vendee the entire underlying contract may be enforced, has not been changed. No logical reason exists for the distinction, but the revised statute shows no intent to modify the rule of the Thallon case.

¹¹ N.Y. Pers. Prop. Law § 85-a (Supp. 1960).

¹² Sections 2-204 to -209 of the Uniform Commercial Code contain provisions governing the formation of sales contracts. The general approach of the Code is to recognize many contracts which would be of doubtful validity under traditional contract principles. Section 2-207(1) contains substantially the same provisions as the newly added provisions of the Personal Property Law here reviewed.

¹³ N.Y. Pers. Prop. Law § 84-a (Supp. 1960), 24 Albany L. Rev. 488 (1960).

¹⁴ The leading case in New York is *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915). The many cases which have followed the rule are collected and summarized in N.Y. Leg. Doc. No. 65(C), 295-98 (1955).

¹⁵ 308 N.Y. 233, 124 N.E.2d 300 (1954), 1955 Survey of N.Y. Law, 30 N.Y.U.L. Rev. 1527.

The present enactment will undoubtedly give rise to nice questions of whether a particular acceptance is unconditional within the terms of the statute and whether the variance is material. However, in providing the courts with greater discretion than they had taken upon themselves, it is an invitation for decisions more in harmony with commercial practices and the intention of the parties.

II

SECURED TRANSACTIONS

Filing of Chattel Mortgages and Conditional Sales Contracts.—Several amendments to the filing requirements for chattel mortgages and conditional sales contracts were passed during 1960. As a result, a greater degree of uniformity now exists between the separate statutes which control each type of security device, some uncertainty has been removed, and the re-filing provisions have been simplified.

Section 230 of the Lien Law, which formerly provided that chattel mortgages given on property remaining or placed in the possession of the mortgagor had to be recorded within a "reasonable time," was amended to require recordation within ten days.¹⁶ This is the same time period applicable to conditional sales contracts,¹⁷ and uniform treatment of the two is highly desirable.

It is unfortunate that the legislature did not go further in attaining this objective. A vast distinction between the two statutes, important in the decision of a number of doubtful cases,¹⁸ has been most evident in cases in which creditors have attacked conditional sales or chattel mortgages on the grounds of late filing. The Court of Appeals has interpreted Section 230 of the Lien Law, which applies to chattel mortgages, as rendering a mortgage filed late void as to any person who had extended credit to the mortgagor prior to the actual filing.¹⁹ There is no requirement that the attacking creditor obtain a lien before the mortgage is filed.²⁰ Belatedly filed conditional sales contracts, however, are void only as to those who have obtained a lien prior to the late filing.²¹ This distinction, illogical and unnecessary

¹⁶ N.Y. Lien Law § 230 (Supp. 1960).

¹⁷ N.Y. Pers. Prop. Law § 65 (1949).

¹⁸ Perhaps the most discussed and criticized case arising under § 230 is *Constance v. Harvey*, 215 F.2d 571 (2d Cir. 1954), cert. denied, 348 U.S. 913 (1955), 30 N.Y.U.L. Rev. 558, in 1954 Ann. Survey Am. L. 462 (1955). See also Marsh, *Constance v. Harvey—The "Strong-Arm Clause" Re-Evaluated*, 43 Calif. L. Rev. 65 (1955). Under the Uniform Commercial Code, the distinction between chattel mortgages and conditional sales contracts would be nonexistent for the purpose of filing. See Uniform Commercial Code § 9-302 and N.Y. Leg. Doc. No. 65(J), 52 (1955).

¹⁹ *Karst v. Gane*, 136 N.Y. 316, 320, 32 N.E. 1073, 1074 (1893).

²⁰ *Id.* at 325, 32 N.E. at 1075.

²¹ N.Y. Pers. Prop. Law § 65 (1949). It has been held that not only must a

in modern commercial use of these security instruments, might well have been abolished while the legislature was striving for uniformity between the two statutes.

Another amendment affecting the original filing²² provides that the residence of a corporation for filing purposes is the city or town and county in which its office is specified to be in its certificate of incorporation or the most recently filed amendment thereto. For a foreign corporation, residence is determined by the place indicated as its office in the statement presented to the Secretary of State for the purpose of obtaining a certificate of authority to do business in the state. For partnerships or persons transacting business under an assumed name, residence is the address set forth in the certificate required by Section 440 of the Penal Law to be filed in the county clerk's office.

Refiling requirements were changed in two particulars. Refiling of both a conditional sales contract and a chattel mortgage now extends the validity of the original filing for an additional three years instead of one.²³ Second, where a conditional vendee changes his residence from one filing district to another, or moves into the state, and gives notice to the conditional vendor,²⁴ refiling in the new district is now required within ten days of the change.²⁵

Double Financing.—In spite of legislative attempts to provide certainty and protection to security holders, there are a number of ways in which a retailer can double finance his stock, seemingly giving two or more creditors a paramount security interest in the same property.²⁶ *Rand's Discount Co. v. Universal C. I. T. Credit Corp.*²⁷ is such a case. Interesting because of its unusual facts, it is also valuable for the soundness of the decision and the rationale of the opinion.

creditor, in order to come within the provisions of § 65, have delivered a writ of execution to the sheriff, but there must also have been a levy on the property. *Baker v. Hull*, 250 N.Y. 484, 166 N.E. 175 (1929).

²² N.Y. Lien Law § 239-1 (Supp. 1960) (chattel mortgages); N.Y. Pers. Prop. Law § 81-b (Supp. 1960) (conditional sales contracts).

²³ N.Y. Lien Law § 235 (Supp. 1960) (chattel mortgages); N.Y. Pers. Prop. Law § 71 (Supp. 1960) (conditional sales).

²⁴ N.Y. Pers. Prop. Law § 75 (Supp. 1960) requires that such notice be given.

²⁵ N.Y. Pers. Prop. Law § 74 (Supp. 1960). This solves some, but not all, of the problems caused by the modification of the Uniform Sales Act when it was adopted in New York. Under the uniform act, the original filing is determined by the place where the goods are first kept for use; under Section 66 of the Personal Property Law, the residence of the buyer controls the initial filing. See 2A Uniform Laws Annotated 136 (1924).

²⁶ For a discussion of a recent case involving double financing by use of the trust receipt, see Collins, *The Retail Paper Purchaser and the Proceeds Lien*, 1 B.C. Ind. & Com. L. Rev. 97 (1959).

²⁷ 10 App. Div. 2d 240, 198 N.Y.S.2d 341 (1st Dep't 1960).

The defendant had filed a statement under Section 230-c of the Lien Law identifying a certain automobile dealer as a prospective chattel mortgagor. Subsequent to this filing, but before any mortgages were actually given, the dealer entered into an agreement with the plaintiff under which the plaintiff consented to purchase conditional sales contracts which the dealer had made with his customers. This agreement also provided that the dealer would repurchase any cars repossessed from defaulting customers by the plaintiff under the assigned contracts. All such cars were to be placed in the possession of the dealer, but title was to remain in the plaintiff until the dealer had paid the plaintiff the purchase price.²⁸ Ten cars were repossessed and turned over to the dealer in accordance with this plan. Motor Vehicle Bureau forms evidencing sales to the dealer were left in the dealer's possession by the plaintiff. Subsequently, the dealer, exhibiting the forms as evidence of his title, mortgaged the cars to the defendant. Then, apparently, he folded his tent and silently stole away.

The court considered both Section 65 of the Personal Property Law, which exempts conditional sales for the purpose of resale from its provisions voiding title if the contract is not recorded, and Section 69 of the Personal Property Law, which voids the title of a conditional vendor as to subpurchasers who buy in the ordinary course of business where the conditional vendee has the right to resell. However, in neither of these sections did the court find its answer.

Refusing to ground its decision on the proposition that section 69 protects bona fide mortgagees as well as purchasers,²⁹ the court decided that the case was controlled by the common law doctrine of equitable estoppel. The court held that the plaintiff had title but was estopped from asserting it, because he had given possession to a dealer while allowing him to retain documents of title which gave him the appearance of ownership.

III

BILLS AND NOTES

Legislation affecting the "fictitious payee" doctrine and the definition of an inland bill of exchange shares the limelight in this section with a case involving bank drafts.

Fictitious Payees.—Section 9(3) of the Uniform Negotiable Instruments Law³⁰ is often applied to situations where a faithless

²⁸ It was conceded that the repurchase plan between the plaintiff and the dealer constituted a conditional sale for resale. *Id.* at 242, 198 N.Y.S.2d at 343.

²⁹ See *Tchlenoff v. Jacobs*, 267 App. Div. 908, 46 N.Y.S.2d 875 (2d Dep't) (mem.), *aff'd mem.*, 293 N.Y. 904, 60 N.E.2d 32 (1944), which so held and which is noted in the instant case.

³⁰ N.Y. Negotiable Instr. Law § 28 (Supp. 1960).

employee arranges for checks to be drawn on his employer's account to the order of a "fictitious" person. The employee then obtains possession of the instrument, "endorses" it with the name of the ostensible payee, and cashes the check caring little whether the drawer-employer or the drawee-bank eventually suffers the loss. In the past, the right of the drawer to have his account recredited where such checks were paid by the bank depended upon the *modus operandi* of the employee. If the employee himself signed the check for the employer, the courts in this state held that the instrument was made out to a "fictitious payee," was bearer paper under section 9(3), and hence was rightly paid by the bank.³¹ If, however, the employee merely supplied the name of the payee to his employer or another agent of the employer, who then signed the instrument as drawer, it was held that the necessary intent on the part of the *drawer* to make the instrument payable to one who was to derive no interest therein was lacking, the paper was order paper, and the bank had to recredit the employer's account since it had paid over a forged endorsement.³²

By an amendment to Section 28 of the New York Negotiable Instruments Law passed during the last year, additional protection is afforded to banks in these situations. In order to make the instrument bearer paper under the new legislation, it is no longer necessary for the *drawer* to have the intention that the ostensible payee is to have no interest in the instrument. It is sufficient if the employee who supplied the name of the payee had knowledge of the fact that the check was payable to the order of a fictitious or nonexisting person, or an existing person not intended to have any interest in it.³³

This amendment, which has been adopted in a number of states, is said to be sponsored by the American Banking Association.³⁴ Grounded on the theory that the employer has more control over the instrumentality causing the loss than does the bank, it is inconsistent with the original reason for the fictitious payee doctrine,³⁵ and the logic of the argument for shifting the loss is not without its difficulties.

³¹ *City of New York v. Bronx County Trust Co.*, 261 N.Y. 64, 184 N.E. 495 (1933); *Seaboard Nat'l Bank v. Bank of America*, 193 N.Y. 26, 85 N.E. 829 (1903); *Shipman v. Bank of New York*, 126 N.Y. 318, 27 N.E. 371 (1891). The same rule applies to special endorsements. See *Hall v. Bank of Blasdell*, 306 N.Y. 336, 118 N.E.2d 464 (1954).

³² *Phillips v. Mercantile Nat'l Bank*, 140 N.Y. 556, 35 N.E. 982 (1894).

³³ N.Y. Negotiable Instr. Law § 28 (Supp. 1960). A similar amendment to the Illinois Negotiable Instruments Law, Ill. Rev. Stat. ch. 98, § 29 (1957), was construed by the Court of Appeals in *Swift & Co. v. Bankers Trust Co.*, 280 N.Y. 135, 19 N.E.2d 992 (1939).

³⁴ See Britton, Bills and Notes 710 (1943).

³⁵ *Ibid.*

Assuming the case where the employer had every reason for trusting the unfaithful employee and has exercised due care in his selection, there is no reason for transferring the loss from a banking institution, which is in a better situation to compensate for such losses, to an employer who cannot anticipate a loss of this nature in the ordinary planning of his business finances.

A similar result would obtain under the Uniform Commercial Code,³⁶ although the mechanics of the Code operate somewhat differently. Instead of making such an instrument bearer paper and, therefore, negotiable without any endorsement, the Code continues to label the instrument order paper, but provides that anyone may endorse it in the name of the ostensible payee.³⁷

Inland Bills of Exchange.—Under another amendment to the Negotiable Instruments Law which is in accord with the Uniform Commercial Code,³⁸ an inland bill of exchange was redefined as a bill which on its face purports to be both drawn and payable within the United States.³⁹ Previously, the limits of New York State furnished the territorial test.

Bank Drafts.—Two years ago the appellate division's opinion in *International Firearms Co. v. Kingston Trust Co.*⁴⁰ was approved in this *Survey*.⁴¹ During the past year the Court of Appeals reversed that decision and, in so doing, has given to bank drafts the status of super-negotiable instruments.⁴²

A remitter, in order to facilitate the purchase of goods from a Canadian firm, purchased from the defendant bank a bank draft which was drawn upon another bank. The draft was payable to the seller and sent to an escrow agent with instructions to deliver it to the payee when the goods cleared customs. The goods were never admitted into this country and, at the remitter's request, the defendant stopped payment of the draft. Physical possession of the draft was obtained by the seller's successor in interest by an *in rem* suit, brought in the Canadian courts, to which the defendant was not a party. Payment being refused by the drawee, the successor in interest to the seller, not a holder in due course, brought suit against the drawer bank.

³⁶ See N.Y. Leg. Doc. No. 65(D), 242 (1955).

³⁷ Uniform Commercial Code § 3-405.

³⁸ Uniform Commercial Code § 3-501(3).

³⁹ N.Y. Negotiable Instr. Law § 213 (Supp. 1960).

⁴⁰ 6 App. Div. 2d 171, 175 N.Y.S.2d 794 (3d Dep't 1958), rev'd, 6 N.Y.2d 406, 160 N.E.2d 656, 189 N.Y.S.2d 911 (1959), 23 Albany L. Rev. 169, 5 How. L.J. 105.

⁴¹ Hart, Commercial Law, 1958 *Survey of N.Y. Law*, 33 N.Y.U.L. Rev. 1146, 1151.

⁴² *International Firearms Co. v. Kingston Trust Co.*, 6 N.Y.2d 406, 160 N.E.2d 656, 189 N.Y.S.2d 911 (1959).

Two questions arose in the action: (1) What defenses can the drawer of a bank draft assert against a nonholder in due course, and (2) which, if any, of these was the defendant here prevented from raising because of the Canadian judgment? Two types of defenses are generally available to the drawer of a bill of exchange, and these may be conveniently labeled as property and contract. The drawer may show that the holder or payee lacks title to the instrument and therefore has no right to recover, or he may show that some defense to the contractual obligation to pay exists. A fair reading of the instant Court of Appeals decision, however, leads to the conclusion that the second class of defenses, those based on the contractual obligation of the drawer, may not be raised when the instrument involved is a bank draft.

Concluding that the Canadian judgment was entitled to effect in New York under principles of comity, the court found that the plaintiff had title to the instrument. Once having made this determination, which cannot be criticized, the court concluded that the plaintiff must recover because no other defense could be raised by the drawer. Analogizing the bank draft to money, the court said:

[T]he purchase of a bank draft results in an executed sale of credit which is not subject to rescission or countermand. Kingston Trust Company [the defendant] was not involved in the contract for the purchase and sale . . . between Retting [the remitter] and plaintiff's predecessor. Retting had simply bought the draft to be used as the equivalent of money in whatever manner he elected to pursue. The bank had no duty or function to take part in Retting's controversy. If Retting had remitted cash to his escrow agent in Canada, with instructions to apply it on his executory contract under the same condition, and the Canadian court had held the deposit to have been appropriated to the contract, plaintiff would have been entitled to retain the money.⁴³

If the court means what it says, the decision has important implications. A bank draft is no longer like other bills of exchange; it is an instrument no less invulnerable to defenses than money itself.⁴⁴

⁴³ Id. at 411-12, 160 N.E.2d at 658, 189 N.Y.S.2d at 914.

⁴⁴ The instant decision is not surprising in view of prior New York cases which have consistently held that a bank draft is a completed sale not subject to rescission. See *Kerr S.S. Co. v. Chartered Bank of India*, 292 N.Y. 253, 54 N.E.2d 813 (1944), criticized in 44 *Colum. L. Rev.* 777 and in 57 *Harv. L. Rev.* 918. For an excellent discussion of remitters in New York, see Comment, *Frustrated Remitters in New York*, 24 *Albany L. Rev.* 363 (1960).