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Article 9: Secured Transactions (Comment) of Uniform Commercial Code Annotations

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**SMALL SCHOOL.
BIG VALUE.**

ARTICLE 9: SECURED TRANSACTIONS

SECTION 9-103. Accounts, Contract Rights, General Intangibles and Equipment Relating to Another Jurisdiction; and Incoming Goods Already Subject to a Security Interest

AL MAROONE FORD, INC. v. MANHEIM AUTO AUCTION, INC.
208 A.2d 290 (Pa. 1965)
Annotated under Section 1-201, supra.

SECTION 9-104. Transactions Excluded from Article

IN RE KING FURNITURE CITY, INC.
240 F. Supp. 453 (E.D. Ark. 1965)

On March 21, 1963, the petitioner leased certain premises to King Furniture. The lease provided, in part, that "to secure the payment of all rent due . . . , Tenant hereby gives the Landlord an express contract lien on all property, chattels or merchandise which may be placed in the leased premises." Neither the original lease nor a memorandum lease was recorded pursuant to Section 9-401 of the Arkansas Code, but a memorandum lease was filed pursuant to a realty recording statute. On June 10, 1964, the petitioner brought suit in the chancery court to foreclose his lien under the lease, alleging that King Furniture had not paid its rent. The chancery court decreed that the merchandise on the leased premises was to be marked as subject to the lien, and sold in the ordinary course of business. The proceeds were to be paid into the court's registry. On August 7, 1964, King Furniture filed a voluntary petition in bankruptcy, and the proceeds from the sale of the merchandise were transferred to the trustee in bankruptcy. The referee in bankruptcy entered an order denying the petitioner a lien on the proceeds.

On petition to review, the district court affirmed the referee's order that the petitioner's lien could not be given priority under the Bankruptcy Act. It held, *inter alia*, that since Arkansas law construed the lien created by the lease as one created by contract, the lien was subject to the applicable provisions of the Arkansas Uniform Commercial Code. The court then held that the lien created by the lease was not a "landlord's lien" within the meaning of Section 9-104(b) and therefore was not excluded from the operation of the Code. The court reasoned: first, that to permit a lien created by a contract between landlord and tenant to qualify for exclusion from the Code as a "landlord's lien" would restrict greatly the benefits which the Code was meant to obtain; and second, that a "landlord's lien" as used in Section 9-104(b) refers only to a landlord's lien created by statute.

After determining that the Code was applicable, the court held that the petitioner had not met the Code's filing requirements. It rejected the petitioner's contention, that the recording of his memorandum lease pursuant to the realty recording statute was sufficient, on the ground that Section 1-104 of the Arkansas Code had impliedly repealed this statute as to the recording for goods and chattels. The petitioner also contended that his memorandum

lease met the formal requirements of a financing statement; that he had filed the lease in the real estate records; that all persons were deemed to have knowledge of the lease's contents since it had been filed in the real estate records; and that consequently he should prevail under Section 9-401(2) of the Code. The court rejected this contention on the grounds that filing in the real estate records was not notice as to personalty and that under Section 1-201(25), "knowledge," as used in Section 9-401(2), means actual knowledge.

COMMENT

In limiting the term "landlord's lien" to a *statutory* landlord lien, the court in the present case is at variance with at least two Pennsylvania decisions. In *In re Einhorn Bros., Inc.*, 272 F.2d 434 (3d Cir. 1959) and *Firestone Tire & Rubber Co. v. Dutton*, 205 Pa. Super. 506, 205 A.2d 656 (1964), the landlord, pursuant to his common law right of distress, had levied a distraint for rent against personalty already subject to a perfected security interest under the Code. In each case, the court allowed the landlord to prevail. Even though Pennsylvania does not have a statute granting a landlord's lien for rent, the courts held that the Code did not apply because Section 9-104(b) excludes a landlord's lien from the operation of Article 9. Compare Comment, 65 W. Va. L. Rev. 40 (1962).

R.G.K.

SECTION 9-206. Agreement Not to Assert Defenses Against Assignee; Modification of Sales Warranties Where Security Agreement Exists

B. W. ACCEPTANCE CORP. V. RICHMOND
259 N.Y.S.2d 965 (Sup. Ct. 1965)

In September, 1961, the defendant executed two conditional sales contracts concerning certain laundry equipment in favor of Massachusetts Laundry. Under the contracts, the defendant promised not to assert against any assignee of Massachusetts Laundry "any defense, counterclaim, or offset on account of breach of warranty or otherwise in any action for the purchase price or for possession" brought by the assignee. The contracts also identified the plaintiff as Massachusetts Laundry's factor, contained assignment and endorsement provisions and provided that the instruments embodied the entire agreement between the parties. Massachusetts Laundry then assigned the contracts to the plaintiff who, in October 1964, brought suit on the contracts. The defendant raised defenses of breach of warranty and failure of consideration. The plaintiff moved for summary judgment.

In granting the plaintiff's motion, the court held, *inter alia*, that under previous case law the clause whereby the defendant had promised not to assert against an assignee of the seller any defense which it might have had against the seller was enforceable against the defendant. Comparatively, the court noted that Section 9-206 of the Code, which was not in effect at the time of the transaction in the instant case, indicates that the same policy would be applied to subsequent transactions of this type.

R.G.K.

FIRST NAT'L BANK V. HUSTED
205 N.E.2d 780 (Ill. 1965)

The defendant entered into a retail installment contract with Reed Motors for the purchase of a used car. According to the terms of the contract, the defendant acknowledged "delivery, examination and acceptance of said car in its present condition." The reverse side of the contract contained a warrant of attorney, a confession clause and a dealer's assignment which provided that the buyer would settle all his claims with the seller and not set them up as defenses to any action brought by the assignee. Pursuant to this assignment clause, the contract was assigned to the plaintiff. The defendant claimed that the car subsequently became inoperative and that he returned it to the seller, who promised to repair it. When the seller failed to do so, the defendant discontinued payments to the plaintiff. The car was finally sold by either Reed Motors or the plaintiff.

In a motion to reopen a judgment confessed against him in favor of the plaintiff, the defendant, among his other contentions, alleged that the defenses of failure of consideration and subsequent promise and failure to repair were available to him and that he had purchased the car upon implied warranty that the car was in good working condition.

The appellate court, in affirming the lower court's denial of the defendant's motion, held that, by the terms of the retail installment contract, the defendant had waived his defenses of failure of consideration and subsequent promise and failure to repair as against the plaintiff according to Section 9-206(1) of the Code. The court was satisfied that the plaintiff had taken his assignment for value, in good faith, and without notice of a claim or defense. The only defenses which could not be so waived were those enumerated in Sections 3-305(2) and 9-206(2). The defendant's remaining defense of breach of implied warranty was not a Section 3-305(2) defense, but did come within the defenses of Section 9-206(2). In accordance with the latter subsection the court referred to Article 2 to hold that the defense of breach of implied warranty was not available to the defendant since he had purchased the car "in its present condition." These words were similar to "as is" and "with all faults," the terms used in Section 2-316 to preclude all implied warranties. Furthermore, implied warranties were precluded by the fact that the defendant had acknowledged examination of the car.

COMMENT

(1). The court did not cite Section 2-316(3)(b), under which examination of goods precludes implied warranties. This subsection, however, does not preclude all implied warranties, only those "with regard to defects which an examination ought in the circumstances to have revealed to him."

(2). The court erred in holding that "a buyer may contractually waive, as against an assignee, any defenses except those enumerated in Sections 3-305(2) and 9-206(2)." Section 9-206(1) is explicit: when the buyer agrees not to assert defenses against the seller's assignee and an assignee subsequently takes for value, in good faith and without notice of a claim or defense, the assignee can enforce the buyer's agreement and the buyer can raise

against the assignee only Section 3-305(2) defenses (those available against a holder in due course of a negotiable instrument). Thus the only defenses a buyer cannot waive by a Section 9-206(1) agreement are Section 3-305(2) defenses.

What the court might have meant by its holding is that a simple agreement by a buyer not to assert defenses against the seller's assignee is insufficient to waive defenses based on breach of the implied warranty of merchantability. Specifically, it may have reasoned (1) that such an agreement by the buyer is a disclaimer of the seller's warranties *as to the assignee* and that Section 9-206(2) refers to *any* disclaimer of the seller's warranties; (2) that consequently, under Section 9-206(2), the question of whether the buyer's agreement not to assert was an *effective* disclaimer of the seller's warranties as to the assignee was governed by Article 2; (3) that under Section 2-316(2) a disclaimer of the implied warranty of merchantability, to be effective, had to mention merchantability; and (4) that the simple agreement, therefore, by the buyer not to assert defenses against the assignee was insufficient to disclaim the implied warranty of merchantability. This would also explain why the court then proceeded to Section 2-316(3)(a), under which the language "in its present condition" was sufficient to disclaim all implied warranties.

While this position appears logical, it can be maintained only by disregarding the explicit language of Section 9-206(1). Moreover, it misses the purpose behind Section 9-206(2) which was intended to cover the situation in which the seller retains a purchase money security interest in the goods and attempts to disclaim his warranties. As Comment 3 to Section 9-206 points out, subsection (2) simply states that in this situation "purchase money security transactions are sales . . . , warranty rules for sales are applicable," and the seller may disclaim his warranties only to "the extent permitted by Article 2." Thus Section 9-206(2) makes specific reference to a seller's disclaimer of warranties *as to himself*, not as to his assignee.

W.L.M.

SECTION 9-301. Persons Who Take Priority Over Unperfected Security Interests; "Lien Creditor"

IN THE MATTER OF MERKEL, INC.

258 N.Y.S.2d 118 (Sup. Ct. 1965)

On November 29, 1961, Monarch Marking System Company (Monarch) leased certain machinery to Merkel, Inc. The lease, which was not recorded, contained an option giving Merkel the right to purchase the machinery at the end of the rental period. Sometime after the effective date of the Uniform Commercial Code in New York, Merkel assigned the machines to an assignee for the benefit of creditors who had no notice of the transaction between Monarch and Merkel. Monarch then brought this action for an order directing the assignee to turn over and deliver the machinery. The court held for the assignee for the benefit of creditors.

Relying upon Section 10-102 of the New York Code, the court first decided that the agreement between Monarch and Merkel was a "conditional

sale" under pre-Code law and "in law a 'security interest' within the purview of Section 1-201 of the Uniform Commercial Code." Since Monarch had not recorded the lease agreement as required by pre-Code law, the court concluded that the lease was in law an unperfected security interest. The assignee for the benefit of creditors, on the other hand, was a lien creditor under Section 9-301(3). Under Section 9-301(1)(b), therefore, the assignee who took the machinery without knowledge of Monarch's unperfected security interest, had the superior interest in the machinery.

COMMENT

See the comment to *In the Matter of Merkel, Inc.*, annotated *infra*.
S.L.B.

IN THE MATTER OF MERKEL, INC.

259 N.Y.S.2d 514 (Sup. Ct. 1965)

The petitioner Tipper leased to Merkel, Inc. twelve machines pursuant to a lease agreement which was not recorded. Subsequently, the machines were assigned by Merkel to an assignee for the benefit of creditors. The plaintiff sought to compel the assignee to relinquish the machines. The assignee contended that the lease agreement was in effect a conditional sale which was ineffective against him since it had not been recorded. Furthermore, he argued that Section 9-301 of the Code "includes an assignee for the benefit of creditors from the time of assignment" as a "lien creditor." The court held for the plaintiff on the ground that the agreement between Merkel and the petitioner was not a conditional sale but a lease which did not have to be recorded. The court further stated that even if the agreement were construed as a conditional sale, a filing required by Section 65 of the Personal Property Law was still unnecessary. The purpose of this section was to protect innocent purchasers and creditors of the vendee. The assignee for the benefit of creditors fell into neither category, but stood in the shoes of the buyer, Merkel. The court then dismissed the assignee's Code argument stating that the Code did not apply to transactions occurring before September 27, 1964, "with exceptions here not applicable."

COMMENT

See *In the Matter of Merkel, Inc.*, annotated *supra*.

The decisions of both *Merkel* cases can be reconciled on a factual difference. In the first case, the lease agreement was held to be a conditional sales agreement; in the second, it was held to be a lease. There is, however, an inconsistency in the two court opinions concerning the application of the New York Code to each case.

Both cases present a situation where the original transaction was entered into before the Code became effective in New York while the assignee for the benefit of creditors was appointed after the effective date of the Code. It was the decision of the first *Merkel* court that the lessor, since he had not recorded the lease agreement under pre-Code law, retained in law only an "unperfected security interest." The assignee, on the other hand, attained

the status of a "lien creditor" under the Code. Section 9-301. Under Section 9-301(1)(b), therefore, the assignee had priority over the lessor.

The court in the second *Merkel* case, in its dictum, stated that pre-Code law should determine the assignee's status as well as that of the lessor. Relying on Section 10-102, it reasoned that since the lease agreement was entered into before the effective date of the Code, any event affecting the property involved must be governed by pre-Code law. For another court adopting this interpretation, see *First Nat'l Bank v. Bahan*, 26 Ohio Op. 2d 429, 109 N.E.2d 272 (C.P. 1964), annot. 6 B.C. Ind. & Com. L. Rev. 105 (1964).

It is submitted that the interpretation of the first *Merkel* court is correct. First, Section 10-102(2) of the Code begins:

Transactions validly entered into before the effective date . . . of this Act and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law repealed or modified by this Act as though such repeal or modification had not occurred

Section 10-101, however, provides that the Code controls all transactions and events occurring after the effective date of the Code. While the lease agreement was a transaction entered into before the effective date of the Code, the appointment of the assignee was an event occurring after such date. Section 9-301 provides that an assignee for the benefit of creditors is a lien creditor "from the time of [his] appointment."

Secondly, the New York adoption of Section 10-102(2), as it read at the dates of these two cases, seems to have required such a result. Section 10-102(2) added to the Official Code the requirement that any "security interest as defined in this Act (Section 1-201) and however denominated in any law repealed by this Act" would remain perfected under the Code for a stated period if it were "perfected" under pre-Code law. This provision is giving cognizance to the fact that the Code will control an event occurring after its effective date. It appears that the court in the first *Merkel* case looked upon Section 10-102 similarly, for it decided that the lease agreement was a "security interest" within the meaning of Section 1-201(37). For this reason it decided that the agreement was an "unperfected security interest" since it had not been "perfected" under pre-Code law.

Finally, the present enactment of Section 10-102 of the New York Code (amended July 16, 1965) would call for a result similar to that of the first *Merkel* case. Section 10-102(3)(c) states in part: "A security interest, however denominated in any law repealed or modified by this Act, which was not perfected when this Act takes effect but which could have been perfected before this Act takes effect . . . and which if this Act applied, could be perfected . . . may be perfected . . . in accordance with this Act." It seems that the legislature realized that a "security interest" which was not "perfected" under pre-Code law would remain "unperfected" under the Code with the result that the priority rules of the Code would govern the disposition of the property involved.

S.L.B.

AL MAROONE FORD, INC. v. MANHEIM AUTO AUCTION, INC.
208 A.2d 290 (Pa. 1965)
Annotated under Section 1-201, supra.

SECTION 9-302. When Filing Is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of This Article Do Not Apply

COMMONWEALTH LOAN CO. v. BERRY
207 N.E.2d 545 (Ohio 1965)
Annotated under Section 9-310, infra.

IN THE MATTER OF WHEATLAND ELEC. PROD. CO.
237 F. Supp. 820 (W.D. Pa. 1965)
Annotated under Section 1-201, supra.

SECTION 9-307. Protection of Buyers of Goods

AL MAROONE FORD, INC. v. MANHEIM AUTO AUCTION, INC.
207 A.2d 290 (Pa. 1965)
Annotated under Section 1-201, supra.

SECTION 9-310. Priority of Certain Liens Arising by Operation of Law

COMMONWEALTH LOAN CO. v. BERRY
207 N.E.2d 545 (Ohio 1965)

Defendant garage repaired an automobile on which the plaintiff held a chattel mortgage which was properly noted on the certificate of title. When the owner of the car failed to pay for the repairs, the defendant claimed the right to retain the car by virtue of a garageman's lien. The plaintiff brought this action to replevin the car.

The trial court and the court of appeals found for the plaintiff. The supreme court affirmed, holding that under Section 4504.13 of the Ohio Revised Code, a lien noted on a certificate of title of a motor vehicle is valid against other liens. The court noted that there is an apparent conflict between the priority granted under Section 9-310 of the Code (Section 1309.29 of the Ohio Revised Code), which provides that an artisan's lien "takes priority over a perfected security interest," and the priority granted under Section 4505.13. The court reasoned that since Section 4505.13 was specifically designed to cover motor vehicle liens and since the legislature had expressly excluded motor vehicles from the filing requirements of Section 9-302 of the Code (Section 1309.21 of the Ohio Revised Code) and had expressly eliminated motor vehicles from Section 1333.41 of the Ohio Revised Code, the Ohio lien law, Section 4505.13 prevails over the general provisions of Section 9-310 of the Code.

COMMENT

It appears that the confusion in the present case was generated by the failure of the Ohio Legislature to amend Section 9-310 of the Ohio Code so

that a garageman's lien on a motor vehicle would have been expressly excluded from it.

W.L.M.

SCHLEIMER V. ARROWHEAD GARAGE, INC.

260 N.Y.S.2d 271 (Civ. Ct. 1965)

The plaintiff was the assignee of a retail installment contract executed pursuant to the sale of an automobile. On September 28, 1964, while the vendee of the auto was in default, the auto was brought to the defendant's garage for repairs. When no one returned to recover the auto, the defendant foreclosed his mechanic's lien. On receiving notice of the foreclosure, the plaintiff demanded the automobile. The defendant did not comply, and the plaintiff brought an action for conversion. The court held that the defendant's lien had priority over the plaintiff's interest and ordered judgment in favor of the defendant for the amount of the repairs.

The court grounded its holding upon prior decisions in New York which had held that a repairman's lien had priority over the interest of a conditional vendor and that such priority was not defeated because the conditional vendee had defaulted in payment. The court was also of the opinion that since the auto had been brought to the defendant's garage on September 28, 1964, the day after the Code became effective in New York, Section 9-310, under which the defendant also prevailed, should apply.

COMMENT

The court concluded its discussion of the applicability of the Code with the statement: "In any event, *Motor Discount Corp. v. Scappy & Pick* . . . [12 N.Y.2d 227, 238 N.Y.S.2d 670, 188 N.E.2d 907 (1963)], is the controlling law whether the Uniform Commercial Code applies or not." The Code, however, did apply, and it was the controlling law.

Section 10-101 of the New York Code provides that the Code applies to all transactions and events occurring after September 27, 1964. On September 28, 1964, the defendant received the automobile. When he repaired the auto without being compensated, he had "a lien upon such motor vehicle." N.Y. Lien Law § 184. Under Section 9-310, this took priority over the plaintiff's interest. See Section 9-310, Comment 1. Contra *First Nat'l Bank v. Bahan*, 26 Ohio Op. 2d 429, 198 N.E.2d 272 (C.P. 1964), annot. 6 B.C. Ind. & Com. L. Rev. 105 (1964).

For the applicability of the Code in determining priority between a pre-Code security and a lien accruing after the Code has become effective, see *In the Matter of Merkel, Inc.*, 258 N.Y.S.2d 118 (Sup. Ct. 1965), annotated under Section 9-301, supra.

R.J.D.

SECTION 9-401. Place of Filing; Erroneous Filing; Removal of Collateral

IN RE KING FURNITURE CITY, INC.

240 F. Supp. 453 (E.D. Ark. 1965)

Annotated under Section 9-104, supra.

SECTION 9-402. Formal Requisites of Financing Statement; Amendments

IN THE MATTER OF EXCEL STORES, INC.

341 F.2d 961 (2d Cir. 1965)

Excel Stores, Inc. entered into a conditional sales contract with the plaintiff for the purchase of six cash registers. The treasurer of Excel Stores, however, mistakenly signed the contract "Excel Department Stores" instead of "Excel Stores, Inc." The contract was then properly filed. Subsequently, the store went into bankruptcy, and the plaintiff brought a petition for reclamation of the cash registers. The district court denied the petition on the ground that there was not sufficient compliance with Section 9-402 of the Connecticut Code because the conditional sales contract had not been properly signed. In reversing, the court of appeals held that the error was merely a "minor one," which was "not seriously misleading," and thus permissible under Section 9-402(5).

The court also noted that despite the defective signature, under Section 1-201(39) the parties entered into a valid and binding contract since they clearly intended to execute a contract.

W.L.M.

IN THE MATTER OF MUTUAL BD. & PACKAGING CORP.

342 F.2d 294 (2d Cir. 1965)

Annotated under Section 9-403, *infra*.

SECTION 9-403. What Constitutes Filing; Duration of Filing; Effect of Lapsed Filing; Duties of Filing Officer

IN THE MATTER OF MUTUAL BD. & PACKAGING CORP.

342 F.2d 294 (2d Cir. 1965)

The plaintiff sold a gluing machine to Mutual Board Corp. under a conditional sales contract. In order to record this contract, the plaintiff, on June 20, 1962, sent the contract and a check to cover the filing fee to the county clerk in the county in which Mutual Board Corp. was located. The clerk received the contract and check on or about June 21, 1962, but would not accept the contract for filing because the plaintiff had failed to have a notarial certificate attached to the contract. He thus returned the contract to the plaintiff which obtained the notarial certificate. On June 29, 1962, the plaintiff's conditional sales contract was finally accepted for filing. In the meantime, Mutual Board Corp. executed a chattel mortgage on the same machine in favor of the defendant which recorded the mortgage on June 25, 1962. Subsequently, Mutual Board Corp. was adjudged bankrupt. The plaintiff brought a reclamation proceeding in the bankruptcy court to recover the proceeds from the sale of the machine. The defendant, in turn, claimed the sum by virtue of its chattel mortgage. The referee and the district court held that the defendant had priority since its instrument had been accepted for filing before the plaintiff's.

In vacating the trial court's judgment and remanding for further proceedings, the court of appeals held that presentation of the conditional sales contract together with the filing fee constituted filing for priority purposes. While the Uniform Commercial Code was not in effect at the time of the present transaction, the court, in its third footnote cited Section 9-403(1) as consistent with its holding.

Less importantly, the court in its first footnote cited Section 9-402 in connection with the proposition that there is no requirement that the contract had to contain an acknowledgment, attestation or a notarial certificate to be filed.

R.G.K.

ARTICLE 10: EFFECTIVE DATE AND REPEALER

SECTION 10-102. Specific Repealer; Provision of Transition

IN THE MATTER OF MERKEL, INC.

258 N.Y.S.2d 118 (Sup. Ct. 1965)

Annotated under Section 9-301, supra.