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C H A P T E R 7

Commercial Law and Banking

WALTER D. MALCOLM *and* FREDERICK D. BONNER

A. COMMERCIAL LAW

§7.1. **Bills and notes: Accommodation party.** In *Gibbs v. The Lido of Worcester, Inc.*¹ the plaintiff held a note of the defendant corporation, Lido, payable to plaintiff's order and executed as part of a transaction in which the plaintiff made a loan to two other defendants to enable them to purchase the stock of Lido from an associate of the plaintiff. On these facts the Supreme Judicial Court held Lido an accommodation maker under G.L., c. 107, §52 and that it was for the jury to determine for whose accommodation the note was made.

The Court also held under G.L., c. 231, §29 that not only the genuineness of the signature but also any question of authority to sign must be specially pleaded in the answer. This statute, although well known to the Bar, is apt to be misleading inasmuch as no explicit reference is made therein to the question of *authority* to sign.

§7.2. **Bills and notes: Larceny.** General Laws, c. 266, §37 has been amended¹ to make it larceny to obtain *services* through the use, with intent to defraud, of a check drawn against insufficient funds. The statute formerly applied only to the fraudulent drawer of a check who received *money* or *property* therefor. The amendment thus affords additional protection to insurance brokers, lawyers, doctors and other persons engaged in the business of furnishing services rather than property or money.

§7.3. **Conditional sale contracts: Technical requirements.** In two cases the Supreme Judicial Court has again held invalid provisions in

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§7.1. 1 332 Mass. 426, 125 N.E.2d 406 (1955).

§7.2. 1 Acts of 1955, c. 133.

conditional sale contracts which provide for the deduction, upon repossession, of expenses other than those allowed by G.L., c. 255, §13A. In *Clark & White, Inc. v. Fitzgerald*¹ the contract provided for the deduction of "liens, storage charges [and] attorney's fee" and in *Nickerson v. Zeoli*² for the deduction of "the reasonable expenses of repossession, removal, storage and sale." (Emphasis supplied.) These cases re-emphasize the attitude of the Court as expressed in *Clark v. A & J Transportation Co.*³ that "amplification of [the statutory language] in the agreement is not only unnecessary but extremely hazardous."

In *Crown Shade & Screen Co. v. Karlburg*⁴ an unpaid conditional vendor of shades, screens and combination doors brought an action of conversion against the purchasers of these articles from the conditional vendee. The defendant contended that inasmuch as the conditional sale contract was not recorded, the plaintiff's security interest must fail under G.L., c. 184, §13.⁵ The Court, in sustaining the plaintiff's exceptions to the trial court's finding for the defendant, held that the statute applied only to articles of personal property set forth in the statute or such as are ejusdem generis. Shades, screens and combination windows are not, as a matter of law, within the statute. The Court finds a legislative intent to confine the statute's operation to such items from a history of amendments adding specific categories.

§7.4. Conditional sale contracts and chattel mortgages: Prepayment. By the insertion¹ of a new Section 12B, G.L., c. 255 now requires that a rebate of a proportionate part of the finance charge be given to a buyer who prepays a debt secured by a conditional sale contract of personal property or a purchase money chattel mortgage. The method set forth in Section 12B for the computation of the rebate involves the use of the so-called sum of the digits method or the "Rule of 78" and provides legislative recognition of the fact that in installment loans the debtor has the use of a larger amount of money in the early months of the loan and that therefore the creditor is entitled to a proportionately larger portion of the finance charge in these months.

§7.5. Sales: Warranties and misrepresentation. Three cases have dealt with the requirement of reasonable notice of breach of warranty under G.L., c. 106, §38. In *Mastercraft Wayside Furniture Co.*

§7.3. ¹ 1955 Mass. Adv. Sh. 559, 127 N.E.2d 172.

² 1955 Mass. Adv. Sh. 725, 127 N.E.2d 779.

³ 330 Mass. 327, 330, 113 N.E.2d 228, 231 (1953).

⁴ 332 Mass. 229, 124 N.E.2d 238 (1955).

⁵ "No conditional sale of heating apparatus, plumbing goods, ranges . . . portable or sectional buildings, elevator apparatus or machinery, seats for theatres [etc.], or other articles of personal property, which are afterward wrought into or attached to real estate, whether they are fixtures at common law or not, shall be valid . . . unless . . . recorded . . ."

§7.4. ¹ Acts of 1955, c. 455.

*v. Sightmaster Corp.*¹ the Court sustained a finding of notice within a reasonable time where oral notice was given within six months and written notice within ten months. In *Lieberman v. W. M. Gulliksen Mfg. Co.*² it was held that letters of complaint from the plaintiff's customers shown to the vendor were sufficient notice even though no express assertion of legal rights was made nor was the notice connected with any specific sale.

In *Barrett Roofing & Supply Co. v. Ross*,³ Judge Aldrich, in considering when the vendee ought to have known of the breach of warranty, stated that there is no Massachusetts case deciding whether a vendee is obliged to make a reasonable inspection for easily discoverable defects or is only required to discover obvious defects. In this case the plaintiff did not meet the former standard, but the court held it to be immaterial since the notice requirement is for the benefit of the vendor and here the vendor knew of the defects at the time of the sale. Damages on this branch of the case were limited to the loss incurred by the buyer, in this case the amount the plaintiff paid to settle the claim against it, together with attorneys' fees incurred thereby.

§7.6. Debt pooling. Ideally, the business of "debt pooling" is one of prorating the income of a debtor to his creditors for the purpose of consolidating all debts, and discharging the debtor's obligations, and re-establishing his credit. In an effort to correct abuses stemming largely from false or misleading advertising, a new Section 48C was inserted¹ in G.L., c. 221, imposing a fine on any person who is not a member of the Bar furnishing "debt pooling" advice or services. The legislature apparently felt that because the business involves many legal problems (e.g., statute of limitations, unwitnessed notes, reviving notes) lawyers, who are required to adhere to high standards of professional conduct, are best suited to conduct such a business.

§7.7. The Uniform Commercial Code. During the 1955 session of the General Court no serious effort to obtain enactment of the Uniform Commercial Code in Massachusetts was made for the reason that in 1955 and 1956 certain amendments to the Code have been and will be made by the sponsoring organizations¹ and it seemed inadvisable to press for enactment where such changes were in prospect. The amendments are and will be a number of clarifying amendments considered desirable as a result of actual experience with the Code in Pennsylvania since it became effective July 1, 1954, and as a result of a very extensive study of the Code by the Law Reversion Commission of the State of New York. Experience with the Code in Pennsylvania

§7.5. ¹ 332 Mass. 383, 125 N.E.2d 233 (1955).

² 332 Mass. 439, 125 N.E.2d 396 (1955).

³ 131 F. Supp. 348 (D. Mass. 1955).

§7.6. ¹ Acts of 1955, c. 697.

§7.7. ¹ The National Conference of Commissioners on Uniform State Laws and the American Law Institute.

has been favorable and the changes contemplated are not expected to affect the basic framework of the Code or the substance of most of its provisions.

B. BANKING

§7.8. The recodification of the savings bank laws. This was an important legislative year for Massachusetts savings banks. The recodification of Chapter 168 of the General Laws, the principal statute governing the law applicable to savings banks, was approved June 14 and became effective September 12, 1955. It is Chapter 432 of the Acts of 1955, entitled "An Act Revising the Laws Relative to Savings Banks." Two subsidiary bills, which were part of the recodification project, also were enacted.

The first Massachusetts savings bank was organized in 1816. There were no express statutory provisions governing savings banks in the early years, except their respective charters. About 1834 the General Court undertook to impose restrictions and to confer express powers. Since then level upon level of express grants and of specific restrictions have been legislated. This has resulted in present Chapter 168. There had been no prior revision of savings bank laws in the nature of a complete recodification. The last substantial revision of the principal savings bank chapter was in 1908, and in 1933 there was a revision of twenty-seven sections or clauses. In the current recodifying, no change was sought in the historic legislative policy of prescribing specific powers for savings banks in detail. Thus the length of Chapter 168 was not diminished as a result of the recodification, but was increased slightly to a total of about 33,000 words.

§7.9. Results of the recodification. The recodification accomplishes two fundamental purposes. It substantially revises the principal savings bank laws to permit the banks to meet present economic and competitive conditions and to conform their operating procedure to modern developments. Also it simplifies and improves the text of Chapter 168 and incorporates new titles and numerous subtitles for convenience in locating the various provisions of the chapter; for example, old Section 54 containing the investment provisions has been broken up into twenty-three separate sections with appropriate titles and subtitles.

§7.10. Important changes. Summarized below are the changes considered of sufficient importance to mention here. Of course, there are many other changes of more or less importance occurring in the eighty sections of the revised Chapter 168.

1. *Deposits.* The limits of \$7500 for an individual account and \$15,000 for a joint account, plus interest, remain unchanged. However, there have been added to the classes of deposits exempt from these limits educational funds, private pension funds, deposits of fiduciaries and of housing authorities. There are special provisions for

the receipt of deposits through payroll deduction, and the school savings section now makes it possible for savings banks in a large community to combine and operate their school savings through a central office.

2. *Investments.* Mortgage loan limits have been increased to some extent. The maximum limits of the popular 80 percent of value mortgage, providing for direct reduction payments monthly, have been increased from \$12,000 to \$20,000 and from 20 to 25 years, and corresponding increases in other classes of mortgages have been made. The limits of the 70 percent of value mortgage have been revised so as to permit a maximum mortgage loan of this classification of the greater of \$50,000 or 1 percent of the bank's deposits.

A bank still cannot invest more than 70 percent of its deposits in mortgage loans, except that in addition to the 70 percent, the bank is authorized to invest in FHA and GI mortgages, the difference between the amount which it may invest in bank and fire insurance stocks, and the amount actually invested therein.

So-called participation loans among savings banks are expressly authorized so as to spread the risk among two or more savings banks in larger real estate mortgage investments. Mortgage loans on real estate developments have been increased from \$12,000 to \$15,000 per parcel and the aggregate limit from 1 percent to 2 percent of deposits. The household improvement loan limit has been increased from \$1000 to \$1500.

Under present law there is no limit on the amount which may be loaned on mortgages to one person, but a new provision for the first time fixes a limit at the greater of \$50,000 or 2 percent of deposits, including indorsers' or guarantors' liability.

In addition to the changes in real estate mortgages there have been some modifications in other types of loans. Although the personal loan limit has not been increased, the maximum term has been increased from 24 to 30 months. In addition, a new procedure has been established for loans on real estate leases whereby such loans will be listed as collateral loans on the leases with a first mortgage on the real estate as additional collateral rather than as real estate mortgage loans as at present. A single such loan must not exceed $\frac{1}{2}$ of 1 percent and the aggregate of such loans 5 percent of the bank's deposits. The credit standing of the leases as well as the value of the real estate must be certified by the bank's board of investment.

There have been many refinements in the bond and securities provisions. The principal substantive change permits a wider use of the section authorizing savings banks, with the approval of the Mutual Savings Central Fund, Inc., and the Commissioner of Banks to invest in limited types of revenue bonds, such as toll road obligations.

3. *Operating provisions.* Some important changes in operating provisions are as follows: The amount that a savings bank may maintain on deposit in a commercial bank has been increased from 25 percent to 40 percent of the capital funds of the commercial bank. A new

provision permits a bank to borrow, other than to pay depositors, in amounts not exceeding 5 percent of deposits, but only for a term of one year. Any renewal must receive the approval of the Bank Commissioner. Under the new law as well as the prior law, a bank may borrow without limit for the purpose of paying depositors.

4. *Other changes.* The savings bank branch office provisions are clarified and there have been some changes in the provisions governing incorporators and trustees and in the reporting requirements at trustees' meetings. The merger and consolidation sections, as well as the sections relating to the organization of new banks, remain substantially the same but the text has been rearranged and clarified. This concludes the comments on Section 1 of Chapter 432, which substitutes the eighty sections of the new Chapter 168 for the old chapter. Sections 2 to 24, inclusive, contain technical or conforming amendments, except that Sections 13 and 14 exempt savings departments of trust companies from several of the investment limitations applicable to savings banks.

§7.11. Savings bank retirement benefits. Subsidiary to the recodification, supplemental retirement benefits are permitted by Chapter 501 of the Acts of 1955, approved June 28 and effective September 26, 1955. Under that act a savings bank which is a member of a retirement system is authorized to pay to an officer or employee 65 years of age or over and who has served 15 years or more in the bank an annual retirement benefit of 2 percent of his average salary for the 5 years preceding his retirement for each year of service not exceeding 25 years less his social security and less the amount, if any, received by him from the bank's contributions to any retirement fund of which he is a member; provided that the combined total paid to any person in any one year under this act and from the bank's contributions above referred to shall not exceed \$7500. The act permits such payments to be made to those officers or employees retired or retiring after November 1, 1954, the commencement of the bank's fiscal year.

§7.12. Savings Bank Investment Fund. This is a common trust fund for savings banks only established by Chapter 283 of the Acts of 1954. Chapter 624 of the Acts of 1955 was enacted as an incident to the recodification and approved August 1, effective November 1, 1955. Chapter 624 permits the Fund to invest in common and preferred stocks registered on national securities exchanges as provided in the Securities Exchange Act of 1934 subject to several limitations on the Fund itself and on the amount which a savings bank may invest therein.

§7.13. Cooperative banks: Real estate loans. Two new acts were passed amending G.L., c. 170, §24 relative to real estate loans by cooperative banks. The first¹ permits twenty-five, rather than twenty, year loans where the amount does not exceed 70 percent of the value of the mortgaged property. The second² raises the limit on a loan se-

§7.13. ¹ Acts of 1955, c. 118.

² *Id.*, c. 146.

cured by a single parcel of real estate from \$20,000 to \$25,000 and raises the limit on the aggregate of such loans, where the principal outstanding is in excess of \$16,000, from 5 percent to 10 percent of the deposits of the corporation, provided that no more than half of the 10 percent may be invested in loans in excess of \$20,000. One other act³ affecting cooperative banks amends G.L., c. 170, §38, so as to permit the practice, hitherto authorized by special acts from year to year, of a transfer to the guaranty fund from the surplus account when together they equal at least 11 percent of the share liability of the bank.

§7.14. Trust companies. Two acts amending G.L., c. 172 dealing with trust companies were passed. One¹ permits the participation by such corporations in loans secured by first mortgages of real estate whether or not such corporation is the originating bank, and the other² provides detailed procedure for the consolidation, merger or sale of assets of a trust company. It should also be noted that the investment provisions of the savings bank recodification apply to investments of savings departments of trust companies.

§7.15. Credit unions. Under an amendment¹ to G.L., c. 171, §24, a credit union with assets of more than \$500,000 may now lend up to \$12,000 on a single parcel of real estate but not more than \$24,000 to any one borrower.

Another act² affecting credit unions was apparently intended to broaden the power of a director of credit unions to borrow from the corporation of which he was a director where he is able to provide collateral of the sort described in the act. A close reading of the act, however, discloses that in fact it has the effect of restricting the power of a director to borrow without the approval of two thirds of the other members of the board of directors.

§7.16. Usury and small loans legislation. Numerous bills affecting G.L., c. 140, §§96-114 (small loans) were introduced this SURVEY year but due to the inability of the House and Senate to agree all failed of passage. All these bills sought to raise the maximum limits on loans to which §§96-114 would apply, usually from \$200 to \$1000, and some of them would have imposed burdens upon lenders more onerous than those presently imposed by any other state. Although a bill the provisions of which were reasonably fair to both the lender and the borrower was ultimately passed by the House, it failed of passage in the Senate, and since a compromise between the two branches proved to be impossible no legislation was enacted.

Attempts were also made to pass usury legislation of some sort. Again, because of the inability of the two branches of the legislature to agree, no such legislation was enacted.

³ Id., c. 257.

§7.14. ¹ Acts of 1955, c. 197.

² Id., c. 275.

§7.15. ¹ Acts of 1955, c. 122.

² Id., c. 147.