Chapter 6: Commercial Law

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CHAPTER 6

Commercial Law

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§6.1. General. The 1959 Survey year has proved to be a dynamic one for commercial law. Although little case law was made, the statutes enacted — and the suggestion of statutes yet to be enacted — hold a promise of having a greater impact on actual commercial practices within the Commonwealth than did the passage of the Uniform Commercial Code.¹ The important policy changes this year occurred in the field of consumer credit, with a comprehensive scheme of regulation for instalment sales of motor vehicles and the beginnings of regulation of instalment sales involving other consumer goods.

§6.2. The Uniform Commercial Code. The Massachusetts legislature amended Article 9 of the Massachusetts Uniform Commercial Code, entitled "Secured Transactions," to provide a specific form that may be used for financing statements and, in addition, has made a number of purely technical and corrective changes.¹ At the same time, the Pennsylvania legislature has amended the Pennsylvania version of the Uniform Commercial Code to conform more closely to the revised version that has been adopted by Massachusetts and Kentucky.² Elsewhere, both New Hampshire and Connecticut have joined the pioneers, the Code to become effective in New Hampshire on July 1, 1961,³ and in Connecticut on October 1, 1961.⁴ Thus, substantially similar versions of the Code will soon be in force in five states.

§6.3. Consumer credit: Motor vehicles. Although the Uniform Commercial Code contains a complete article on secured transactions, not only does it not purport to regulate consumer credit as such but it provides expressly that charges or practices illegal under usury laws, retail instalment sales acts, or the like, are not validated by the

¹ As pointed out in the 1957 Ann. Surv. Mass. Law §1.2 at page 7: "In general, the Code makes no revolutionary change in the commercial law of Massachusetts."

In the past, regulation in Massachusetts was generally limited to the usury laws (which apply to loans, but not to finance charges) and to some disclosure requirements and protections against forfeiture when mortgages or conditional sales agreements were used. However, since October 21, 1958 (and effective sixty days thereafter) a new chapter has been added to the General Laws to provide a comprehensive scheme of regulation of consumer purchase of motor vehicles on the instalment plan. This chapter parallels quite closely the recently enacted New York Motor Vehicle Instalment Sales Act with some minor and a few major variations. Perhaps the most striking difference between the New York and Massachusetts versions is the omission from the Massachusetts statute of a provision prohibiting the use of notes which, if negotiated separately by the seller, might cut off defenses which the buyer had against the seller. The New York act does allow the purchaser of such notes to acquire the rights of a holder in due course, since the buyer may agree to waive any defenses that he does not bring to the attention of the purchaser of the obligation within ten days after receiving notice of an assignment of the obligation. Thus, the buyer may not be able to defend a suit brought by the finance company by showing a breach of warranty which was not discovered until after the ten-day period; but he may show a complete failure of consideration, or breaches of warranty that did come to light early — protections which a buyer in this Commonwealth does not have.

The purposes of this statute are threefold: compulsory disclosure of the terms of sale, limitation on the amount of permissible finance charges, and prohibitions against certain harsh terms in instalment contracts. These regulations apply to every sale of a motor vehicle for consumer (as opposed to business) purposes in which the price is payable in two or more instalments and in which a security interest (such as a conditional sale agreement or chattel mortgage) in the vehicle is retained by the seller. There is no requirement that the seller be a "dealer," so that even a casual sale by an individual owner must comply with the statute if the price is payable in instalments and if a security interest is retained. (It may be noted that the New York act also limits its application to sales involving a security interest, although the companion "All Goods" act regulates time sales of other consumer goods by dealers whether or not any such interest is retained.)

§6.3. 1 G.L., c. 106, §9-201.
2 G.L., c. 255, §12A, which still applies to sales of consumer goods other than motor vehicles, provides that the agreement must state in boldface type: "The Finance Charges Provided Herein Are Not Regulated by Law. They Are a Matter for Agreement between the Parties." Usury laws generally are found in G.L., c. 140.
4 N.Y. Personal Property Law §§301-312. Although comparisons herein are made only to the New York statutes, a substantial number of other states have virtually identical legislation covering consumer purchases of motor vehicles, other goods, or both. For the text of these statutes, see CCH Conditional Sale-Chattel Mortgage Service.
5 Id. §§401-419.
Thus, the seller of an automobile who is willing to forego the security of a conditional sale contract or chattel mortgage need not comply with any of the provisions of this chapter, even those regulating the finance charges.\(^6\)

As part of the enforcement scheme for these regulations, all sales finance companies other than banks must secure licenses from the Commissioner of Banks, the licenses being revocable for a variety of reasons, including "defrauding any retail buyer to the buyer's damage."\(^7\) The definition of a "sales finance company" includes the seller himself, if he is in the business of holding retail instalment contracts.\(^8\) Therefore, a dealer who regularly holds his own paper must be licensed; but an individual seller, although amenable to the regulatory provisions of the statute, needs no license.

The disclosure provisions of the statute require that every retail instalment contract be in writing and signed by both buyer and seller and that the writing include specified information and notices in prescribed size of type. The heart of the disclosure requirements relates to the determination of the price, since the validity of the finance charges may now be questioned. Contracts of conditional sale in the past also required a disclosure of the "cash price," but this was solely to make the buyer aware of his contract, and the term was not even defined.\(^9\) The requirement now is that the contract disclose the "cash sale price," and the term is defined to mean the price at which the seller would have sold to the buyer and the buyer would have sold to the seller for cash.\(^10\) Probably the practice of stating "list" price as the cash sale price and adding finance charges to that while still giving a discount to purchasers who pay cash will not disappear. Actually, the statute does not require the seller to sell to all buyers at the same price; on the contrary, apparently it would allow adding finance charges to whatever problematical price might have been agreed upon had the particular buyer been in a position to pay cash. In the absence of regulations, this could lead to a considerable amount of thwarting of one of the purposes of the statute.

The requirement that the agreement be in writing is further supplemented by a prohibition against signing an agreement containing blank spaces, except that identifying marks of the motor vehicle and the due date of the first instalment may be inserted afterward if the vehicle is not delivered at the time of execution of the contract.\(^11\) In addition, delivery of a copy of the contract to the buyer is required. In fact, this delivery is essential to the enforceability of the contract by the seller so long as the contract remains executory, for the buyer

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\(^6\) Rebates of finance charges in case of prepayment, however, are now compulsory even in the unsecured sale. See §6.4 infra.

\(^7\) G.L., c. 255B, §7.

\(^8\) Id. §1.

\(^9\) G.L., c. 255, §12.

\(^10\) Id., c. 255B, §§1, 9.

\(^11\) Id. §12.
§6.3 COMMERCIAL LAW

has a right to rescind the purchase at any time until either the contract is delivered or he accepts the vehicle.

Permissible finance charges depend upon the age of the motor vehicle, presumably on the theory that the greater risk in financing an older vehicle warrants a higher return. The rates vary from a maximum of 8 percent per year in the case of a new vehicle purchased in the year that it is new to 12 percent for vehicles over two years old.\(^{12}\)

This charge is applied to the principal balance. Therefore, since the entire principal is outstanding only until the first instalment is paid, the effective rate of interest approaches twice the stated rate. The contract may provide for an additional delinquency charge, but this charge may be imposed only if a default continues for at least fifteen days; and the maximum charge that may be imposed is the lesser of 5 percent of the delinquent instalment or five dollars.\(^{13}\)

If a buyer is consistently late by at least fifteen days, or if he is allowed to miss several instalments before being pressed for payment, these delinquency charges, although limited, may add substantially to the effective interest.

Prepayment at any time, with a refund of unearned finance charges, must be permitted. This provision is one of the few protections that buyers in Massachusetts have had since 1955, and its application extends also to consumer goods other than motor vehicles.\(^{14}\)

A reading of the regulatory features of the statute would seem to indicate that there are six provisions that will be unenforceable if included in a retail instalment contract and one which will be unenforceable if contained either in the retail instalment contract or in a separate instrument executed in connection therewith.\(^{15}\)

In a recent New York decision,\(^{16}\) a New York trial court held that an assignment of wages contained in a separate instrument executed in connection with an instalment contract was ineffectual, relying upon a provision, not found in the Massachusetts statute, requiring the contract to contain the complete agreement of the parties in certain respects. It is at least doubtful whether the prohibitions could be avoided in Massachusetts by putting them in a separate instrument.\(^{17}\)

The provision that clearly may not be contained in either the contract or a separate instrument is one relieving the seller from liabilities for any legal remedies that the buyer may have against him. Appar-

\(^{12}\)Id. §14. Note that Section 18 expressly disclaims any intention of regulating the charges on the purchase of a contract by a sales finance company. Therefore, if the "cash sale price" is set high by the dealer and if a sales finance company is able to purchase the contract from the dealer at a substantial discount, the finance company may realize considerably more on its investment than the consumer is theoretically permitted to pay.

\(^{13}\)Id. §11.

\(^{14}\)G.L., c. 255, §12B. For the method of computing the refund, see §6.4 infra.

\(^{15}\)Id., c. 255B, §20.


\(^{17}\)G.L., c. 255, §12, as it read prior to its revision in conformity with the Uniform Commercial Code, also required conditional sale contracts to contain the entire agreement. As Section 12 now reads, this is not expressed.
ently the buyer may waive his defenses vis-à-vis a sales finance company, although he would retain his recourse against the seller. The six provisions that are ineffective if contained in the contract but which might be effective if contained in a separate instrument (such as a note) relate to harsh collection practices. Several of these are invalid in Massachusetts anyway, such as provisions authorizing confession of judgment or allowing repossession if a breach of the peace is thereby committed. These provisions, therefore, would present no problem if contained in separate instruments. The validity of a wage assignment contained in a separate instrument, however, is left in some doubt. Perhaps of greater importance is one relating to acceleration. Unlike the New York act, the Massachusetts statute allows no acceleration in the absence of default. If such a provision may be contained in a separate instrument, then it is possible that the note given in connection with an instalment contract might be accelerated upon the happening of an event that might justifiably lead the holder to believe that payment might be impaired, although the right to foreclose the security interest might not be accelerated without an actual default.

The penalty clauses of this statute provide for both criminal and civil redress. The criminal penalty of a fine or imprisonment or both applies to a violation of any portion of the chapter, and seems to apply whether or not the violation is willful. The civil penalty becomes available only if the violation is of certain portions of the chapter, concerned chiefly with disclosure, maximum permissible charges, and prohibited provisions. The penalty itself is simply that the person who has committed the violation is barred from recovering any finance charge, delinquency or collection charge, or refinancing charge. This, coupled with the failure to mention rebates of charges already paid, would seem to make the civil penalty somewhat illusory in many cases.

§6.4. Consumer credit: General. A change in a few words of Section 12B of G.L., c. 255, approved on September 14, 1959, contains a small bombshell for Massachusetts lawyers. Although Chapter 255 provides certain protection for instalment buyers in its disclosure provisions by requiring written agreements for consumer purchases when the seller retains title to the goods, no protection whatsoever was afforded in the past if the transaction was unsecured. However, Section 12B (providing for compulsory rebate of unearned interest if the buyer prepays his obligation) now applies to any sale of consumer goods on credit, secured or unsecured. This, coupled with the fact

18 Id., c. 231, §15A.
19 Id., c. 255, §13E.
20 In the absence of default, the New York statute prohibits only those accelerations that are arbitrary and without reasonable cause.
22 Id. §22.

§6.4. 1 Acts of 1959, c. 593.
that a special commission was established by the legislature on June 12, 1959, to investigate the feasibility of control of retail installment contracts might indicate that it is quite likely that the regulation of time-purchases of motor vehicles will be supplemented with further legislation covering other consumer goods.

The actual computation of the rebate of unearned finance charges may be made by the "sum of the digits method," a simple method which takes into account the fact that a greater amount of interest should be attributed to the early periods of the payments than to the later periods, when the principal still due has been reduced. The rebate required is that portion of the total finance charges that the sum of the number of periods for which payment has been anticipated bears to the sum of the number of periods provided for by the contract. Thus, if payments were to be made in twelve equal monthly installments but if the remaining balance is paid after the sixth installment, the rebate would not be one half of the finance charge, but \( \frac{21}{2} \) or a little over one fourth. This is arrived at by adding the numbers 1 through 6 for the anticipated payments and dividing by the sum of the series 1 through 12, since the original finance charges were based on twelve periods.

The new section uses the term "consumer goods." In so doing, the definition given by the Uniform Commercial Code is intended, so that goods are "consumer goods" if used primarily for personal, family, or household purposes. Goods used both for personal and business purposes will have to be classified according to their primary use.

### §6.5. Banking: Dividends and investments.

Section 60 of Chapter 168 of the General Laws has been amended to allow savings banks to construe deposits made on or before the ninth day of a month as having been on deposit one full month, and therefore entitled to ordinary dividends. A practice common in many parts of the country is now specifically authorized for banks within the Commonwealth. Either the regulations or the by-laws of the bank must provide for this, so that existing banks do not have to amend their by-laws to avail themselves of this provision.

The "Small Business Investment Act of 1958," passed by the 85th Congress, authorized the incorporation under federal or state law of privately owned "small-business investment companies" which could then provide long-term and equity-type financing for small businesses, to supplement the business loan program of the Small Business Administration, which provides direct loans from the federal government on a short-term or intermediate-term basis. These investment

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2 Resolves of 1959, c. 70.
4 G.L., c. 106, §9-109(1).
6.5. 1 Acts of 1959, c. 89.
companies may receive financial assistance from the federal government through the purchase by the Administration of not more than $150,000 of their debentures. Section 302 of this act allows national banks and other member banks of the Federal Reserve System to invest in the capital stock of these small-business investment companies (up to a limit of 1 percent of the capital and surplus of such banks), and it also allows non-member insured banks to do so to the extent permitted by state law. By Chapter 87 of the Acts of 1959, this Commonwealth has authorized trust companies (the commercial banks in Massachusetts) to invest in the stock as permitted by the federal act. The purpose of this provision in the federal act is to allow institutional investors otherwise limited by law from making direct long-term or equity-type investments in small business to do so indirectly to a limited extent.

§6.6. Sales: Remedies of the seller. Neither the Uniform Commercial Code nor the prior Massachusetts statutes specifies conversion as a remedy of an unpaid seller. Nevertheless, a count for conversion was allowed in a suit by the seller against the buyer in *Rock-Ola Manufacturing Corp. v. Music & Television Corp.*1 The plaintiff had sold phonographs to the corporate defendant on consignment, under a distributor's agreement whereby title was to remain in the seller until he had received the invoice price out of the proceeds of any sale by the buyer. Claiming that the buyer had sold certain phonographs without turning over the price out of the funds collected, the plaintiff-seller sued upon both an account stated and for conversion. The trial judge found for the buyer on the conversion count, and for the seller on the count in contract.

Since the plaintiff did receive a judgment on the contract count, at least against one of the defendants, it might seem that the availability of the count for conversion raises no practical question. As a matter of fact, the evidence of damages for conversion that the plaintiff had tried to introduce at the trial was that the invoice price was the fair market value of the phonographs. However, the point of practical departure between the contract and tort recovery would seem to involve the measure of damages; and since on the retrial the plaintiff will not be limited to the attempted testimony which was improperly rejected in the first trial, he may prove greater damages in tort than in contract.

The Supreme Judicial Court held that the circumstances adduced by the evidence could have constituted a conversion both by the corporate defendant (the purchaser) and by the individual defendant (the purchaser's sole stockholder who was its president, treasurer, and general manager). Insofar as this decision allows a finding of liability of the buyer's president in tort although he was not liable in contract, it seems proper. But insofar as it allows liability for conversion by the

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4 Amending G.L., c. 172, §§33, 43.

§6.7 COMMERCIAL LAW

buyer himself with the possibility that damages may exceed the price agreed upon by the parties, it does appear a little strange. Among the cases cited in support of this proposition, the one most closely in point was Crohon & Roden Co. v. Rudnick. In that case, however, the property the Court found to have been converted was the checks received by the buyer which had not been turned over to the seller. This is not quite a finding that the buyer converted the goods themselves.

Aside from any pleading problems or problems of bringing in a defendant — such as the buyer’s agent — who might not have been liable in contract, it would seem that the decision in the Rock-Ola case ought not to be applied to give a seller who has retained title the right to receive a greater sum as damages from the buyer than the agreed-upon price. The difficulty in this case lies in the distinction between a “sale” on the one hand and the agency or bailment relationship of a true “consignment” on the other. Even though the parties may have designated the transaction a “consignment,” if in fact the distributor was to sell the goods as his own then it would seem that the transaction was actually a “sale on approval” or a “sale or return.” At least with respect to the rights of creditors of the distributor, since this distributor did not seem to be generally known to be engaged in selling the goods of others, the transaction would be deemed by the Uniform Commercial Code to be a sale or return even though the term “on consignment” had been used. It is, perhaps, regrettable that the Court assumed the transaction to be a pure bailment, without any discussion of the distinction.

§6.7. Commercial paper: General. In Sun Oil Co. v. Redd Auto Sales, Inc., one merchant gave a blank signed check to another as an accommodation. The second filled in the amount and the name of his creditor as payee in the presence of the creditor’s agent. When the accommodated merchant did not reimburse the accommodation drawer, payment was stopped. The Supreme Judicial Court held that the payee’s status as a holder in due course was not affected by the fact that he knew the instrument was incomplete when signed by the drawer, since it was complete when delivered to him. Accordingly, the drawer’s defense was not available. The Uniform Commercial Code would require the same result, since neither knowledge by a purchaser that an incomplete instrument has been completed nor knowledge that any party has signed for accommodation is notice of a defense or claim.

A rather unusual situation was presented in Gill Equipment Co. v. Freedman. The contract purchaser of certain power equipment drew
a check for the down payment payable both to the vendor and to the vendor's agent. Both payees endorsed the check which was then cashed, and the proceeds were taken by the vendor. The testimony warranted an inference that the agent was to see to the application of the check to discharge liens on the equipment if there were any. The equipment was never delivered, and the purchaser sued the agent to recover back the proceeds of the check. The Supreme Judicial Court held that since the agent of the vendor had complete control over the check and had breached his fiduciary obligation to the drawer, he was liable to return the proceeds which he himself had not received. The case shows that there are still some actions on commercial paper that are not governed by statute, but by the law of trusts or quasi-contract. The fact that a check was involved was of little importance except insofar as it aided in proving the agent's control over the funds. This problem is of special interest to attorneys, who are frequently named as payees together with their clients.

Several cases decided by the Supreme Judicial Court involved problems of construction. In Phinney v. Turcotte, a note secured by a mortgage provided for interest at the rate of 6 percent per annum, the first payment to be made on January 1, 1955. Payments on principal were to be made annually, beginning on January 1, 1956. Although payment of only the first instalment of interest was specified, the court held that "It is implicit in the note that thereafter interest was to be payable at the times when instalments of principal became due." Since subsequent payments of interest were not made, the mortgage was adjudged to be in default, and foreclosure was allowed.

The place of presentment of a note negotiated to a bank for collection was the issue in Batchelder v. Granite Trust Co. The holder of a time note placed it with the defendant bank for collection. The note did not specify either the place of presentment or the address of the maker. In accordance with its custom, the bank sent a notice by mail to the maker informing him that the bank held the note and that it would fall due on the specified date. The bank continued to hold the note through maturity and, upon non-payment, sent notices of protest to the maker and indorsers. The maker subsequently became bankrupt, and the holder, claiming that the indorsers were discharged by failure of the defendant bank to make a proper presentment, brought this suit against the bank. Although Section 96 of G.L., c. 107, provides that presentment of a note of this type is made at the proper place if made at the usual place of business or residence of the person to make payment, the Supreme Judicial Court held that this section does not necessarily disapprove the earlier practice sanctioned by cases prior to the adoption of the Negotiable Instruments

5 338 Mass. at 730, 157 N.E.2d at 248.
7 The plaintiff's attempted introduction of testimony in a prior action against an indorser, to prove that the indorser had in fact been held to have been discharged by this failure, was rejected since the defendant was not a party to that action.
Law in 1898 which allowed banks to make presentment by mailing a notice without actually having someone take the note to the maker's residence or place of business. As the Court mentioned, this practice is specifically authorized for transactions occurring after October 1, 1958, by the Uniform Commercial Code. Nevertheless, the case is an important one because of its approach—the reluctance of the Court to allow a statute to rule out prior law by implication—even though the precise issue it decides may be moot for future transactions.

While the Batchelder case faced a problem the decision of which would be foreclosed under the Uniform Commercial Code, the case of Cassiani v. Bellino concerned a choice of law that would appear to be left open in the Code as well as in the prior statutes. A two-year instalment note provided for acceleration at the option of the holder upon any default of thirty days, the balance becoming "due and payable on demand." Although it is clear that no "demand" is necessary to entitle the holder of a demand note to bring suit, the defendant makers contended that this suit for the accelerated balance could not be brought without a demand. (Had the question been the time that the statute of limitations began to run, the contentions of the parties would, of course, have been reversed.) The Supreme Judicial Court noted the conflict of authorities and that the matter was one of first impression in this Commonwealth, and decided that to require the holder to give a special notice stating that he has elected to accelerate, as a condition precedent to suit, would place an unnecessary burden upon the recovery of the loan. The decision was somewhat hedged, or at least softened, by the recognition that by the time of this decision the original maturity date had already passed. Thus, if the result of any particular acceleration in a future case was harsh and inequitable, it might be possible to limit somewhat the effect of this decision.

Despite the careful analysis in the Uniform Commercial Code of the time that a cause of action accrues, the Code does not seem to preclude either determination of this issue on facts similar to the Cassiani case. If in any particular case the bringing of suit for the accelerated balance without a prior demand would result in a forfeiture by someone who might have been able to pay if given the opportunity, or in some other harsh consequence, the acceleration might well be construed as a violation of the obligation of good faith imposed by Section 1-203. Therefore, the possibility of requiring a demand in some cases seems to be left open in the Code, although a demand might be unnecessary in the absence of special circumstances.

§6.8. Secured transactions: Assignment by vendee. The defendant in Cadillac Automobile Co. of Boston v. Engian had purchased an automobile from the plaintiff on a contract of conditional sale. Sometime later, she requested the plaintiff to transfer her rights under the contract to her brother. The plaintiff effected the transfer by deleting

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8 G.L., c. 106, §4-201(1).
10 G.L., c. 106, §3-122.

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the defendant's signature from the contract and securing as a substitute her brother's signature, and the defendant was required to sign an instrument entitled "Personal Guaranty by Third Party" which stated that it was "in consideration of the making of the within contract." Subsequent events included a default in payment, repossession, seizure of the automobile by the United States because of its use in the illegal transportation of narcotics, and this action in contract on the guaranty for the balance due.

The trial judge found the defendant liable as a guarantor, and the defendant (among other grounds of alleged error) contended that the conditional sale to her brother was unenforceable because no copy of the contract was delivered to him, urging that the guaranty was therefore a nullity. In this appeal, the Supreme Judicial Court held that as the only contract for conditional sale between the plaintiff and this defendant was the original one, the defendant's contention was not well founded.

This decision raises — and leaves unanswered — several problems of more than academic interest, especially in view of the new Chapter 255B of the General Laws. At the outset, it ought to be noted that the only civil penalty imposed upon a conditional vendor who fails to deliver a copy of the contract involved in an executed sale is a bar to the recovery of finance charges, interest charges, and fees. The contract itself is certainly not unenforceable, as claimed by the defendant. Therefore, if the transaction was in fact a recission of the first sale and a new sale to the defendant's brother, noncompliance with the requirement of delivery of a copy of the contract should have operated to the benefit of the defendant as guarantor to the extent of the charges imposed, but to no greater extent. On the other hand, if the effect of the guaranty and the substitution of names in the original contract was simply a consent by the conditional vendor to the transfer of the property by the vendee, it would seem that no burden whatsoever of compliance with the statutory requirements is placed upon the vendor. However, if the vendor desires to keep his security interest effective against purchasers from this assignee, he will have to file a financing statement, and to do this the transaction will have to be treated as a new sale. Therefore, it would behoove a dealer to weigh the inconvenience of entering into a new contract against the diminution in the security interest resulting from a consent to the assignment, and to draw his papers accordingly, in no uncertain terms.

2 Chapter 255B is discussed in detail in §6.3 supra.
4 Conceivably, the first vendee may have become a "retail seller" under G.L., c. 255B, §1, subject to the criminal penalties imposed for failure to comply in the resale. Although the vendee might have considered the assignment to be by way of gift, the assignee does agree to pay the remaining price in instalments, and the vehicle is subject to a security interest. Admittedly, this is not the type of transaction for which Chapter 255B was enacted, but the wording of the statute could be so construed.
5 G.L., c. 106, §9-307(2).