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Article 2: Sales

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UNIFORM COMMERCIAL CODE ANNOTATIONS

This section contains a digest of all those decisions interpreting provisions of the Uniform Commercial Code published from August 16, 1962, through December 1, 1962, in the National Reporter System, Pennsylvania District and County Reports, 2d series, and Pennsylvania county reports. Case citations preceded by a dagger (†) indicate decisions which are based upon language contained in the 1953 version of the Code. Case citations preceded by an asterisk (*) indicate decisions construing or interpreting provisions of the Code even though the Code did not govern the decision.

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ARTICLE 2: SALES

SECTION 2-201. Formal Requirements; Statute of Frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

Arcuri v. Weiss, 198 Pa. Super. 506, 184 A.2d 24 (1962).

Arcuri's accountant made a $500 check payable to Weiss with the following notation: "Tentative deposit on tentative purchase of 1415

City Line Ave., Phila. Restaurant, Fixtures, Equipment, Goodwill." Two weeks later both parties' representatives drew up a contract for the sale of the restaurant. When Weiss telephoned Arcuri to inquire as to what Arcuri intended to do, Arcuri informed him that he was no longer interested in the restaurant and requested Weiss to return the $500. When Weiss refused, Arcuri brought this action for the return of the $500.

The court felt Section 2-201 is one of the Uniform Commercial Code's many safeguards against sharp commercial practices. "While the section does not require a writing which embodies all the essential terms of a contract and even goes so far as to permit omission of the price, it does require some writing which indicates THAT A CONTRACT FOR SALE HAS BEEN MADE." [Emphasis court's.]

The court held that Section 2-201 (statute of frauds) renders Weiss' defense of the formation of an enforceable contract insufficient as a matter of law. The use of the word "tentative" in the notation on the check is taken in its common meaning. This indefinite writing does not satisfy the requirement of the statute.

John H. Wickersham E & C Co. v. Arbutus Steel Co., 58 Lanc. Law Rev. 164 (Pa. 1962).

On April 15, Moody, acting as agent for Arbutus, submitted a proposal to Wickersham containing an offer to furnish a certain quantity of steel for $22,000, later reduced to $21,800. The proposal contained the following statement:

> Should you desire to enter into a contract with us on the basis set forth, please so indicate by signing and returning to us, within 10 days from the date hereof . . . which shall become a contract upon, but not before, acceptance by Arbutus.

On April 22, Wickersham sent to Moody the following memorandum:

> It is our intention to award you a contract for furnishing all short span steel joints, bridging, anchors, ceiling extensions . . . for the sum of $21,800. . . .
>
> This award will be contingent upon our receiving a contract from the Owners for the General Construction and upon your furnishing us reasonable assurance of your ability to furnish the material when required.
>
> It is also understood that you will prepare Shop Drawings . . . prior to the receipt of a formal order, this work to be performed at your own risk.

Arbutus did not respond to this memorandum within ten days. On May 14, Wickersham received notice that it had been awarded the contract. Arbutus communicated withdrawal of its "May 1 proposal" on June 30. Plaintiff brought an action to recover the difference between the contract price and the price it was forced to pay on the open market. Arbutus demurred on the grounds that there had been no writing sufficient to

satisfy Section 2-201(1). Although not denying this, the plaintiff maintained that the memorandum of April 22 sent to the defendants and not objected to by them was sufficient to bring the contract within Section 2-201(2).

The court noted that this provision of the Code established four basic requirements which must be satisfied in order to impose liability on one who has not signed the contract. These are: (1) there be a writing in confirmation of the oral contract, (2) the writing bind the sender, (3) the writing be received and (4) no reply has been made.

(1) The court found that the memorandum did not refer to any prior dealing and was not a confirmation of an oral contract.

(2) The court found words only of future intent rather than any present offer. The order was made contingent on the general award. The court supported this view by noting the requirement that work on the shop drawings be done at the risk of the defendant. Finally, the memorandum did not indicate the quantity that the plaintiff had agreed to take. This was contingent on the plans of the architect. Hence, it was not sufficient to bind plaintiff sender.

(3) The cause of action failed to state that the April 22 memorandum had been received. (Under the standards established by the court this fact was necessary in order to show not only that the writing had been received but that the defendant had the opportunity to reply.) The court granted that an amendment could correct this objection, but the complaint could not be amended to overcome the objections made to the interpretation of the memorandum itself. Because the writing did not satisfy the four requirements of Section 2-201(2) the court sustained the demurrer.

Kessler v. Green Co., 28 Pa. D. & C.2d 186 (1962).

See the Annotation to Section 8-319, infra.

SECTION 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from courses of dealing or usage of trade.

† *Childs v. Austin Supply Co.*, 408 Pa. 403, 184 A.2d 250 (1962).

Employer purchased two portable heaters from seller in 1956. The heaters were in daily use without incident for four months. When employee attempted to light the heater in the usual manner, it exploded and severely injured him. Employee brought an action against seller contending that the heater was not safe for industrial use and that seller had impliedly warranted it to be safe. In his charge to the jury, the trial court explained the meaning of "warranty" and "implied warranty" by direct reference to Section 2-314. He also explained that seller was a merchant under Section 2-104(1). Jury returned a verdict for seller. The trial judge granted employee's motion for a new trial because he felt his charge to the jury was not specific enough.

This court reversed the granting of the motion for a new trial. It held that Section 2-314 is clear as to implied warranties and that the trial judge's explanation of this section was not confusing to the jury but was a proper instruction. The court did not decide seller's contention that there was no privity between employee and seller as it was not necessary to do so.

[Annotator's Comment: This case points out the fact that a charge to the jury as to the definition of merchantability is acceptable when lifted directly from Section 2-314. This being so, attorneys would be wise to direct their evidence to the existence or nonexistence of the elements in the definition in Section 2-314.]

SECTION 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting."

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in

goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

* *Hudiberg Chevrolet Inc. v. Ponce*, 17 Wis. 2d 281, 116 N.W.2d 252 (1962).

James obtained delivery of an automobile from an Oklahoma dealer under a conditional sales contract after giving a check as down payment. He was not to remove the automobile from the state without permission. The contract was recorded. Subsequently the check was dishonored and the dealer attempted to regain possession. James had taken the automobile to Georgia where he had obtained a certificate of title under an assumed name. Then he took it to Wisconsin where he obtained another certificate. He sold the car to a Milwaukee dealer who, having purchased it in good faith and for value, sold it to the defendant, a customer.

The lower court dismissed the action brought by the secured party against the customer who purchased from the Milwaukee dealer. In affirming, the court noted with approval Section 2-403(1), and used it and prior case law to support the finding that James had a voidable title as a result of the bad check, rather than a void title as the Oklahoma dealer had urged. The voidable title became indefeasible upon the bona fide sale to the Milwaukee dealer. Thus the defendant was protected.

Although the dealer had attempted to rescind, his actions were not so effective as to preclude James from passing title to a good faith purchaser. He would have had to repossess or in some other way make it impossible for the purchaser to buy in good faith.

Under applicable Wisconsin law the secured party was required to file within ten days after he had notice that the automobile had been brought into the state. Because he had failed to make such a filing, he could not enforce his reservation of title against the local dealer or his transferee.

[Annotator's Comment: Although the Code has not been adopted in Wisconsin, a legislative committee has recommended such adoption. Had the Code been in effect, the secured party would, by reason of Section 9-103(3), have been given four months in which to perfect his interest in Wisconsin while allowing his out of state perfection to remain effective during that period. Therefore, the decision in this case might well have been different.

Assuming that the secured party's interest had been perfected or that the transaction in this case occurred during that four month per-

fection period, the defendant might have urged two possible defenses to the dealer's claim. The buyer in the ordinary course might have stressed Section 9-307(1), but this offers him little protection for by its terms such a buyer takes free of any interest created by his seller. However, Section 2-403(2) allows a merchant in possession of goods to transfer all rights of his entruster. The section speaks in terms of "any entrusting"—therefore, if the "entruster" is viewed as the secured party rather than the party subject to the security interest, the section allows the merchant who handles the goods, the Milwaukee dealer, to transfer all the rights of his entruster, the secured party. This construction of Section 2-403(2) would afford the buyer a defense. Absent this construction, the dealer-merchant could transfer only what his immediate transferor had—the rights of a conditional buyer subject to the seller's security interest.

The court in the instant case, however, seems to be referring to subsection (1) of Section 2-403. That subsection refers to a person with a *voidable* title and does not apply to the interest of a debtor subject to a perfected security interest. That interest does not include a power to transfer to a good faith purchaser, as would the interest of a buyer who had made conditional payment by check which was later dishonored. The Milwaukee dealer in this case is a good faith transferee who would be subject to a perfected security interest under Section 9-301; so, it would seem, would be his transferee, the defendant.]

SECTION 2-502. Buyer's Right to Goods on Seller's Insolvency.

(1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

In the Matter of Mort Co., 208 F. Supp. 309 (E.D. Pa. 1962).

See the Annotation to Section 2-507, infra.

SECTION 2-507. Effect of Seller's Tender; Delivery on Condition.

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

In the Matter of Mort Co., 208 F. Supp. 309 (E.D. Pa. 1962).

Debtor called a meeting of its creditors in July 1961 for the purpose of effectuating a settlement. No settlement was consummated. Debtor continued doing business but on a strict C.O.D. basis. Two days prior to the filing of bankruptcy, seller delivered goods to debtor and received debtor's check for their value which seller deposited but was not paid because of the filing of the bankruptcy petition. There was sufficient money in debtor's account to have paid the check. Seller petitioned for reclamation of the goods within ten days.

The court held that seller could reclaim the goods since the sale was not on credit and Section 2-507 allows seller to reclaim the goods of a C.O.D., save when payment is not made upon demand of seller when due. Debtor's check was not post-dated and since there were sufficient funds to pay the check in the bank, debtor outwardly appeared solvent. A businessman in financial difficulty is able to carry on cash transactions and this transaction was of that category.

The court states that had the transaction been on credit, the trustee would have the rights against the goods as any creditor would have under state law. *In re Kravitz*, 278 F.2d 820 (3d Cir. 1960). However, under "the Pennsylvania U.C.C." as the court interprets it, if the seller has a right to reclaim the goods, he stands in a position superior to any creditor.

[Annotator's Comment: This opinion distinguishes the controversial prior holding, which gave a trustee in bankruptcy a superior interest over the seller in goods sold on credit to a buyer who becomes insolvent before payment is made, by pointing out that the goods in this case were sold C.O.D. *In re Kravitz*, 278 F.2d 820 (3d Cir. 1960). However, the reasoning this court used in reaching its decision drives a wedge into the *Kravitz* case, which could lead to a desirable overruling in line with the apparent intention of the Code.

In three different sections, the Code makes provision for obtaining possession of goods sold under or identified to a contract for sale. Section 2-502 provides that the buyer who pays for goods but does not receive them before seller's insolvency, has a right to obtain them with no given exception. The Official Comment indicates that, for the ten days allowed by the statute, this right is superior to that of a lien creditor; thereafter, the buyer's interest becomes a non-possessory security interest requiring compliance with Article 9 for protection. Section 2-702 gives a correlative right to the seller upon the buyer's insolvency. That section then provides that "the seller's right to reclaim . . . is subject to the rights of a . . . lien creditor under this Article." Nowhere in Article 2 or in Article 9 is a lien creditor given rights superior to those of the seller. The *Kravitz* case went outside the Code to hold that such a creditor had prior rights. Section 2-507(2) is construed by the *Mort* decision as giving the seller to a subsequent bankrupt the *absolute* right of reclamation when the buyer's check in a non-credit sale is not paid. Their is no statutory time limitation on this right. Yet the lan-

guage of Section 2-507(2) is far less certain than that of either 2-502 or 2-702: ". . . [the buyer's] right *as against the seller to retain or dispose* of them is conditional upon his making the payment due." (Emphasis supplied.) The seller's right to get the goods back could more easily be held to be a right good only against the buyer, but not his creditors, than the right given in Section 2-702 which was so limited by the *Kravitz* case.

The court in the *Mort* case puts the intended meaning back into the Code by interpreting "the Pennsylvania U.C.C." (Not Section 2-507 by itself.) The decision in the *Kravitz* case did not give the UCC this meaning and even though the court in the *Mort* case distinguished *Kravitz*, it would have no choice but to re-examine or alter its reasoning in *Mort* when confronted with the *Kravitz* facts.]

SECTION 2-511. Tender of Payment by Buyer; Payment by Check.

(1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this Act on the effect of an instrument on an obligation (Section 3-802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

Commonwealth v. Kelinson, 199 Pa. Super. 135, 184 A.2d 374 (1962).

Defendant was majority stockholder of a corporation engaged in the wholesale meat business. In 1960 a delivery of meat was made to corporation by transfer company. Defendant gave the driver a postdated check for the shipment as was the accustomed method. The check was returned for want of sufficient funds and has never been paid. Defendant was indicted and convicted under the "Worthless Check Act" which provides that anyone who intentionally passes a worthless check is guilty of a misdemeanor.

The court reversed the conviction holding that the fraud necessary for conviction under the "Worthless Check Act" cannot be predicated upon non-performance of a future promise and under case law a postdated check is a mere promise to discharge a present obligation at a future date. The court also adopted Comment 6 to Section 2-511 and held acceptance of a postdated check amounts to a delivery on credit; the acceptor has a remedy against the maker for breach of contract. It was easily shown that the driver had authority to make this contract for his principal.

SECTION 2-702. Seller's Remedies on Discovery of Buyer's Insolvency.

(1) Where the seller discovers the buyer to be insolvent he may refuse

delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

In the Matter of Mort Co., 208 F. Supp. 309 (E.D. Pa. 1962).

See the Annotation to Section 2-507, supra.

ARTICLE 3: COMMERCIAL PAPER

SECTION 3-419. Conversion of Instrument; Innocent Representative.

(1) An instrument is converted when

(a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or

(b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or

(c) it is paid on a forged indorsement.

(2) In an action against a drawee under subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under subsection (1) the measure of liability is presumed to be the face amount of the instrument.

(3) Subject to the provisions of this Act concerning restrictive indorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

Stone & Webster Eng'r Corp. v. First Nat'l Bank & Trust Co. of Greenfield, — *Mass.* —, 184 N.E.2d 358 (1962).

See case note, infra, for a summary and full discussion of this case.

ARTICLE 4: BANK DEPOSITS AND COLLECTIONS

SECTION 4-406. Customer's Duty to Discover and Report Unauthorized Signature or Alteration.

(4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the state-