Kentucky Law Journal

Volume 31 | Issue 2 Article 6

1943

Statute of Frauds--Sales of Future Goods

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STUDENT NOTES

STATUTE OF FRAUDS— SALES OF FUTURE GOODS

Under the English Statute of Frauds,[1] an oral contract for the sale of goods in excess of the value of £ 10 was unenforceable unless: the buyer accepted part of the goods; or gave earnest money to bind the bargain; or, some note or memorandum of the contract was made and signed by the parties to be charged.

The courts have encountered much difficulty in determining whether a contract for the sale of future goods, i. e., goods to be manufactured, was governed by the Statute. The English decisions prior to 1861 were not consistent. At first, oral contracts for future goods were held to be without the Statute,[2] but in 1792 the English court reversed its former position.[3] In *Garbutt* v. *Watson*[4] the court explained the decisions prior to 1792 on the ground that it was not the mere non-existence of the goods that caused the courts to hold the contracts not governed by the Statute, but that it was the fact that work had to be performed upon the goods in order to put them in a deliverable state. The court further said that the former reason was not sufficient to remove the contract from the statute, particularly where the goods were not made to the special order of the buyer.

In 1828, Lord Tenterden's Act[5] sustained the rule of *Garbutt* v. *Waston,* in declaring:

> " The said enactments (i. e., the 17th section of the Statute of Frauds) shall extend to all contracts for the sale of goods of the value of £ 10 sterling, and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

It is to be noted that this statute included all future or incomplete goods irrespective of whether they were to be made to the special order of the buyer or whether they were suitable for general sale.

The courts had met the problem of distinguishing between a

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[1] 29 Chas. II, c. 3.

[2] Alexander v. Comber, 1 H. Bl. 20, 126 Eng. Rep. 13 (1788), Clayton v. Andrews, 4 Burr. 2101, 98 Eng. Rep. 96 (1767), Simon v. Metvier, 5 Burr. 1921, 96 Eng. Rep. 347 (1766), Towers v. Osborne, 1 Sta. 506, 93 Eng. Rep. 664 (1724).

[3] Rondeau v. Wyatt, 2 H. Bl. 63, 126 Eng. Rep. 430 (1792)

[4] 5 B. & Ald. 641, 106 Eng. Rep. 1315 (1822)

[5] 9 Geo. IV, c. 14, s. 7.

contract of sale and one of work and labor in allowing or denying recovery under the common count of goods sold and delivered and that of work and labor.[6] Seemingly as a revolt against the harshness of Lord Tenterden's Act, this distinction was carried over to cases involving the Statute of Frauds. The earlier cases made a distinction based on whether the buyer or the seller furnished the materials on which the work was to be done. In 1856, in the case of *Clay* v. *Yates*,[7] a printer was allowed to recover on an oral contract for goods sold and delivered, although he furnished the materials. The proportion of labor to materials seemed to be the determining factor. However, in the leading case of *Lee* v. *Griffin*,[8] decided only five years later, the court repudiated this doctrine by denying recovery to a dentist on an oral contract to make a set of false teeth for the defendant. Thus we find the English courts holding more strictly to the words of Lord Tenterden's Act and denying recovery on an oral contract regardless of the fact that the goods were not in existence at the time of the contract, or that they were to be made to the special order of the defendant, or that the amount of labor greatly exceeds the value of the materials furnished by the seller. Where the buyer supplies the materials it is still a contract of labor and hence not within the Statute.

The confusion in the English cases is reflected in the decisions in this country. In New York, the courts relied on the earlier English cases in holding that the existence or non-existence of the subject matter at the time of the contract determined whether it was a contract of sale or one of work and labor, but including within the Statute all contracts where the goods were in existence, regardless of the fact that the seller still had work to do in order to adapt them to the contract.[9] This rule had some following in other jurisdictions.

The leading American case is *Mixer* v. *Howarth*,[10] which allowed recovery on an oral contract whereby the plaintiff was to make and deliver a carriage to the defendant. In this case the buyer selected the covering for the upholstery and the court relied on the fact that the goods were made especially for this buyer rather than that the goods were not in existence at the time of the contract. This is the idea of the English case of *Garbutt* v. *Watson*,[11] which the court cited with approval. The application of the Massachusetts Rule, as finally evolved, depended on whether the goods to be made for the

[6] *E. g.*, see Atkinson v Bell, 8 B. & C. 276, 108 Eng. Rep. 1046 (1828).

[7] 1 H. & N. 73, 156 Eng. Rep. 1123 (1856)

[8] 1 B. & S. 272, 121 Eng. Rep. 716 (1861).

[9] Meyer Drug Co. v. McKinney, 121 N. Y. S. 845, 137 App. Div. 541, aff. 203 N. Y. 533, 96 N. E. 1122 (1911), Cooke v. Millard, 65 N. Y. 352, 22 Am. Rep. 619 (1875), Parson v. Loucks, 48 N. Y. 17, 8 Am. Rep. 517 (1871)

[10] 21 Pick. 205, 32 Am. Dec. 206 (1838).

[11] *Supra* note 4.

buyer were, or were not, suitable for sale to others in the ordinary course of the seller's business. Many jurisdictions followed this rule even prior to its adoption in the Uniform Sales Act.[12]

Although the present English rule is harsh and often results in injustice, it does have the element of certainty which is desirable in any law. The New York rule was probably too lax and is rapidly disappearing with the adoption of the Sales Act. But the Massachusetts Rule, as found in the Uniform Act, is not without its defects and difficulties. It looks to the purpose for which the goods are being made and to their availability for general use. Its attempt to distinguish between *ordinary* future goods and *special* future goods leads to the difficulty of determining, as a question of fact, what goods are "suitable for sale to others in the ordinary course of the seller's business." This difficulty is shown by many decisions since the adoption of the Sales Act. For example, an oral contract for a suit made to the defendant's order was held to be actionable[13] but a similar contract for suits of unusual sizes with the defendant's label attached was held to be within the Statute.[14] An oral contract for shoes of odd sizes and widths made to the defendant's order, and stamped with his name, was held to be enforceable[15] but a contract for silverware with the buyer's initials and crest stamped thereon was held to be within the Statute.[16]

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"POTENTIAL GOODS" IN KENTUCKY BEFORE AND AFTER THE UNIFORM SALES ACT

At common law contracts to sell goods to be acquired in the future were valid, but no title passed until the goods came into existence and had been appropriated to the contract.[1] There was a slightly different rule regarding the sale of future goods which had a potential existence.[2] When the seller purported to sell the product to be produced on his field, or the unborn young of animals which he owned, the title passed when the crops or the animal came into existence without further act or appropriation on the part of the seller.[3] The seller who had possession of the fields that

[12] U. S. C. A., sec. 3.
[13] Davis v. Blanchard, 138 N. Y. Supp. 202 (1912).
[14] Berman Stores Co. v. Hirsh, 240 N. Y. 209, 148 N. E. 212 (1925)
[15] Roth Shoe Co. v. Zager & Blessing, 195 Iowa 1238, 103 N. W 546 (1923).
[16] Bauer v. Victory Catering Co., 101 N. J. Law 364, 128 Atl. 262 (1925).
[1] Mariash, SALES (1930) Sec. 73.
[2] Mariash, SALES (1930) Sec. 74.
[3] Fonville v. Casey, 5 N. E. 389 (1810) Andrew v. Newcomb, 32 N. Y. 417 (1865), Mariash, SALES (1930) Sec. 74; Williston, SALES (2nd ed. 1924) Sec. 133.