1957

Commercial Law

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CHAPTER 18

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§18.1. General. During the 1957 SURVEY year the Supreme Judicial Court has not been required to pass upon any particularly difficult questions in the field of commercial law. The cases surveyed represent no legal developments along unfamiliar lines. The decisions, with two exceptions,[1] appear to be logical extensions of positions previously taken by the Court in dealing with similar problems. To the extent that one agrees with the solutions provided in those earlier cases the current dispositions by the Court will arouse no controversy.

This relative lack of legal grist in the commercial law area at the appellate level may be difficult to rationalize with the claimed need for the wholesale repeal of our existing law on the subject and the enactment of the Uniform Commercial Code. Discussion of that compendious statute is reserved to some of those who are its proponents in other chapters in this volume. In the discussion of certain of the cases which follow, however, predictions will be hazarded as to whether the result reached by the Court would vary if the Code rule were applied to the same fact situation.

This kind of inquiry will become increasingly important to the practicing bar as the new Code is faced with proving its justification in the problem-solving area. Although "uniformity" is the claimed desideratum in the commercial law field (and the hypnotic quality of the term is conceded) the Massachusetts bar is certain to be faced for the predictable future with a constant consideration of the extent to which Massachusetts has achieved internal and external non-uniformity, both with its own past decisions and with the views of those other jurisdictions which have received the respectful attention of our courts.

§18.2. Acceleration clause in mortgage: Future interest. The case of *A-Z Servicenter, Inc. v. Segall*[1] raises the legal problem of whether,

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§18.1. [1] The National Cash Register Co. v. Warner, 1957 Mass. Adv. Sh. 597, 142 N.E.2d 584; Polonsky v. Union Federal Savings and Loan Assn., 334 Mass. 697, 138 N.E.2d 115 (1956).

§18.2. [1] 334 Mass. 672, 138 N.E.2d 266 (1956).

when a mortgage note is given for a fixed sum representing both principal and interest for the period of the note, the clause accelerating the maturity of the debt in event of default will be enforced as to future interest. The plaintiff-mortgagor sought a determination of the amount due on the mortgage and for an order of discharge and cancellation on payment of such amount. The mortgage note was given for the purchase price of $20,000 for realty and stated that $41,400, comprising principal and interest, was to be paid monthly over a period of fifteen years, and that in event of default the holder of the note had the option to declare the entire amount of $41,400 due and payable, less any payments made thereon, as liquidated damages and not as a penalty.

The Supreme Judicial Court affirmed the trial court's determination that the acceleration provision of the note constituted a penalty and was not enforceable as to future interest. The Court rejected both the language of the note and the mortgagee's contention that the future unearned interest was a part of the stated monetary obligation of the mortgagor and was properly recoverable as stated liquidated damages. The Court applied the settled rule that a contract designation of damages as "liquidated" is not decisive when, as in this case, actual damages for the breach are easily ascertainable and the stipulated sum is grossly disproportionate to actual damages.[2] The decision in this case does not change the legality and binding effect of an acceleration clause which, at the option of the holder, advances the maturity of principal and interest actually due at the time of breach.[3]

§18.3. Bank books: Exculpatory provisions. The nature of the relations between a savings bank and its depositor was involved in *Polonsky v. Union Federal Savings and Loan Assn.*[1] The critical issue in the case was whether the defendant bank, which had paid out funds to a person wrongfully in possession of plaintiff's bank book, was absolved from liability by an exculpatory clause printed on the inside of the bank book cover. The clause read: "This Association shall not be held responsible for money paid out to any person unlawfully presenting this book."

The evidence established that the plaintiff's husband had opened this savings account by a transfer of funds to himself and the plaintiff as joint tenants. The bank book was handed to the husband by the teller without any mention of the limitation of liability provision printed therein. The signature cards signed by the depositors, the certificate of membership in the savings association and its by-laws

2 Commissioner of Insurance v. Massachusetts Accident Co., 310 Mass. 769, 39 N.E.2d 759 (1942).

3 Charlestown Five Cents Savings Bank v. Zeff, 275 Mass. 408, 176 N.E. 191 (1931).

§18.3. 1 334 Mass. 697, 138 N.E.2d 115 (1956). See further comment on this case in §§5.2 and 14.5 *supra*.

did not contain any reference to the bank's nonresponsibility for payment to an unauthorized person. The trial court further found that there was no evidence that any of the printed matter contained in the bank book ever came or was brought to the attention of the plaintiff or her husband.

The Supreme Judicial Court, reversing the trial court, held that the depositor is bound by lawful provisions printed in a bank book even though he has not read them nor had them brought to his attention. The Court stressed that it is a matter of common knowledge that bank books frequently contain provisions defining rights between the bank and its depositors and that it is not unreasonable to treat such provisions as part of the contract between the parties. Specifically, the bank was deemed protected against unauthorized payment through operation of the exculpating clause when the bank used reasonable care and acted in good faith.

Lacking Massachusetts precedent on the precise issue of this case, the Court found support for its decision in cases decided by the courts of certain other states, including New York, Ohio and Vermont. It rejected contrary views followed by California, Georgia and Michigan. In thus adopting what the Supreme Judicial Court is pleased to term the "prevailing view" and the "weight of authority" on this issue, there remains the troubling fact that in every previous Massachusetts case wherein a depositor has been held bound by a rule or by-law printed in a bank book, it appears that the depositor had signed an instrument by which he expressly agreed to be bound by the rules or by-laws of the bank.[2]

The practical effect of the *Polonsky* decision is to impose upon the depositor of a bank, without his prior assent or notice, the obligation of doing business with the bank on terms of a wide variety of fine-print provisions tucked away in pass books, deposit slips or signature cards, or in generalized references-over to unstated bank rules and by-laws.

There are more forthright approaches to the central problem of arriving at the terms of the contract between a bank and its depositors than by this suspiciously indirect and unsatisfactory process. This would appear particularly true when, as in the present case, an exculpatory clause by its own terms imposed no limits upon the circumstances wherein the clause would be operative. The clause purported to relieve the bank of all liability under all circumstances for its payment to an unauthorized person; the Court-imposed limitation of "reasonable care and good faith" does not reduce the impression that this clause, even so limited, was indeed a trap for the unwary.

Application of Section 4-103 of the Uniform Commercial Code would probably produce the same result as that reached in the *Polonsky* case.

[2] Tapper v. Boston Penny Savings Bank, 294 Mass. 335, 2 N.E.2d 198 (1936); Wasilauskas v. Brookline Savings Bank, 259 Mass. 215, 156 N.E. 34 (1927).

§18.4. Conditional sales: Good faith purchaser. *The Budget Plan, Inc. v. Orr, Inc.*[1] marks the latest in a line of opinions[2] by the Supreme Judicial Court wherein the forward good faith purchaser of goods from a defaulting conditional vendee has prevailed against the claimed reserved security title interest of the original vendor. All of these cases turn upon the issue of whether a purported conditional sale is not in fact a sale without reservation of title interest by reason of a claimed noncompliance with statutory requirements which govern conditional sales of personal property.

The present case was complicated by additional problems in the conflict of laws area. The plaintiff brought this replevin action to recover an automobile in the possession of the defendant. The plaintiff had sold and delivered the car to one Smith at the plaintiff's place of business in Connecticut, under an alleged conditional sales contract by the terms of which title was to remain in the vendor until all payments under the contract were made. The plaintiff knew that Smith was a resident of Massachusetts and that the car would be brought immediately into this Commonwealth. Ten months after the date of sale Smith defaulted in his payments, owing about $1800 under the contract. Four months before this default Smith had resold the car to a Massachusetts used car dealer and by subsequent sales it had come into possession of the defendant who had purchased without notice of plaintiff's claimed title interest in the car.

The Court first disposed of the question of whether Massachusetts or Connecticut law would be applied to test the validity of the conditional features of the contract. It was held that Connecticut law applied and that plaintiff's failure to comply with the requirements of that law was fatal to the attempted reservation of a title interest as against the defendant, a bona fide purchaser.

The pertinent Connecticut statutes[3] provide that all conditional sales contracts "shall be acknowledged before some competent authority and filed within a reasonable time in the town clerk's office in the town where the vendee resides," and further, that sales not made in conformity with these provisions "shall be held to be absolute sales except as between vendor and vendee."

The contract herein was neither acknowledged nor filed, either in Connecticut or Massachusetts, the plaintiff contending that this recordation statute was intended for the protection of Connecticut residents only, as evidenced by the place of filing requirement. The Court rejected this contention but did not pass upon the question of whether in view of the vendee's Massachusetts residence the filing requirement was waived. The Court did hold that the statutory

§18.4. [1] 334 Mass. 599, 137 N.E.2d 918 (1956).

[2] Nickerson v. Zeoli, 332 Mass. 738, 127 N.E.2d 779 (1955), noted in 1955 Ann. Surv. Mass. Law §7.3; Clark v. A & J Transportation Co., 330 Mass. 327, 113 N.E.2d 228 (1953); Hurwitz v. Carpenzano, 329 Mass. 702, 110 N.E.2d 367 (1953); Mogul v. Boston Acceptance Co., 328 Mass. 424, 104 N.E.2d 427 (1952).

[3] Conn. Gen. Stat., c. 310, §§6692, 6694 (1949).

requirement for acknowledgment was separable from the act of filing and that failure to comply with that provision alone was fatal to the plaintiff's security interest.

The Connecticut cases [4] cited in support of this disjunctive reading of the acknowledgment and filing requirements of the statute seem equally in point when the plaintiff refers to the same case authority to support his view that acknowledgment and filing are inseparable parts of a single recordation process. Without benefit of legislative history the Court could reasonably conclude, as it did, that acknowledgment of conditional sales contracts under Connecticut law was not a mere formality incident to filing but was an independent, additional protection for the conditional vendee by providing formal identification of the person who is to be bound on the instrument to which his signature appears.

This is the type of case which indicates the need of a sensible plan for the title registration of motor vehicles, with a state-issued document of title upon which all interests will be noted and with no transfer possible without endorsement and delivery of the title certificate. When an automobile is sold under a conditional sales contract the document of title would be retained by the vendor until the contract obligations of the vendee had been discharged. The need for such legislation will be rendered critical in the face of the apparently unlimited protection which the Uniform Commercial Code affords the bona fide repurchaser of "consumer" goods.[5]

§18.5. Conditional sales contract terms: Defaulting vendee's liability for repossession expenses. Successive attempts to extend by terms of conditional sales contracts the defaulting conditional vendee's obligation for expenses incident to repossession and sale of the chattel have been struck down by Massachusetts courts [1] as violative of the language and legislative intent of the protective provisions of G.L., c. 255, §13A. But in the case of *National Cash Register Co. v. Warner*,[2] the Supreme Judicial Court held that a contract provision calling for the specific inclusion of "attorney's fees and court costs" as charges against the conditional vendee's interest on repossession and sale did not have the effect of invalidating the security title of the vendor.

The Court decided that the conditional character of the original transaction was not destroyed by the contract provision. It viewed the terms as meaning "reasonable" attorney's fees and statutory court

4 Commercial Credit Corp. v. Carlson, 114 Conn. 514, 159 Atl. 352 (1932); American Clay Machinery Co. v. New England Brick Co., 87 Conn. 369, 87 Atl. 731 (1913).

5 UCC §9-307(2).

§18.5. 1 Nickerson v. Zeoli, 332 Mass. 738, 127 N.E.2d 779 (1955) (removal and storage); Clark & White, Inc. v. Fitzgerald, 332 Mass. 603, 127 N.E.2d 172 (1955) (storage); Clark v. A & J Transportation Co., 330 Mass. 327, 113 N.E.2d 228 (1953) (repairing); Mogul v. Boston Acceptance Co., 328 Mass. 424, 104 N.E.2d 427 (1952) (repairing). This problem is also discussed in 1955 Ann. Surv. Mass. Law §7.3.

2 1957 Mass. Adv. Sh. 597, 142 N.E.2d 584.

costs and held that these charges are an inherent expense in proceedings for repossession and sale and clearly within the contemplation of the statute. The decision distinguishes these deductions from those which have been invalidated in past cases. The element of vagueness held to attach to earlier provisions for costs of "repairing" or for "storage" or for "removal and storage" was not deemed a factor in either attorney's fees or court costs, since the Court will control the reasonableness of the former and the latter are set by statute. Further, the use of legal process in repossession and sale is favored by law and must be used in all cases in which repossession cannot be effected without breach of the peace.[3]

The protection afforded the security interest of the conditional vendor in this case against claimed invalidity of the security interest raised by an assignee for benefit of creditors of the defaulting vendee seems thoroughly justified. The decision removes the confusion created by language of the Court in the *Clark* case [4] wherein it was intimated that the only attorney's fees recoverable in a Section 13A situation were those incident to an action to collect a deficiency previously established against the defaulting vendee. The *National Cash Register* decision permits assessment of reasonable fees and court costs in establishing the amount of the deficiency or overplus, by provision therefor in the conditional sales contract.

Similar reasoning should validate conditional sales contract provisions for reasonable storage and similar expenses incurred as a necessary incident to repossession and sale. The Court is equally as well equipped to apply "established legal principles" to such charges to refute the claim of vagueness and overreaching as it is to supervise the reasonableness of attorney's fees charged in a given case. While Section 13A now stands repealed by adoption of the Uniform Commercial Code, the Court will still be faced with the problem of protecting the unwary conditional vendee against contractual provisions for deductions which are vague as to amount and not necessarily reasonable or fairly incidental to the process of repossession and sale. At the same time, the conditional vendor should have maximum assurance that an overly legalistic approach to the problem does not result in conferring unwarranted windfalls upon devious debtors or creditors of bankrupts.

[3] G.L., c. 255, §13E.

[4] Clark v. A & J Transportation Co., 330 Mass. 327, 330, 113 N.E.2d 228, 230-231 (1953).