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William E. Hogan

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C H A P T E R 7

Commercial Law

WILLIAM E. HOGAN

§7.1. The Uniform Commercial Code. On October 1, 1958, the Uniform Commercial Code became the law of the Commonwealth.¹ Elsewhere the Code was enacted in Kentucky to become effective on July 1, 1960.² Locally the Special Commission studying the Code, between the time of its enactment and its effective date, found the statute to be a desirable improvement in the law, “with no hidden pitfalls or substantial mistakes in drafting,” and accordingly recommended that its effective date should not be deferred.³ Certain amendments to the Code were proposed by the Commission, and the General Court substantially concurred by enacting Chapter 542 of the Acts of 1958. For the most part the amending act is concerned with the elimination of clerical errors and with the record-keeping mechanics related to the filing system for secured transactions. Of these only the revision of the suggested form for notice-filing is of general interest.⁴ The new form provides for the insertion of a maturity date, the entry by the filing officer of the file numbers and the time of filing, and for a check system of indicating a claim to proceeds and the presence of collateral related to realty.⁵

Of more substantive significance is the amendment of Code Subsec-

WILLIAM E. HOGAN is Associate Professor of Law at Boston College Law School and a member of the Massachusetts Bar. He was formerly Special Assistant to the Chief of the Armed Services Medical Procurement Agency.

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§7.1. ¹ Acts of 1957, c. 765, §21. Careful note should be made of §19 of that act which permits the termination and enforcement of transactions entered into prior to the first of October in accordance with the prior law.

² Ky. Laws of 1958, S.B. No. 169, effective July 1, 1960. Fourteen other states will be asked to consider the Code in 1959. They are Colorado, Connecticut, Georgia, Illinois, Indiana, Maine, Michigan, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Utah and Vermont. Schnader, *New Movement Toward Uniformity in Commercial Law*, 13 *Business L.* 646, 672 (1958). For an excellent discussion of the development of the Code, see Braucher, *The Legislative History of the Uniform Commercial Code*, 58 *Colum. L. Rev.* 798 (1958).

³ House No. 3175, p. 5 (1958). The Commission was extended to December 30, 1958. Resolves of 1958, c. 46.

⁴ G.L., c. 106, §9-402.

⁵ Acts of 1958, c. 542, §14.

tions 9-312(3) and (5).⁶ In the terminology of the law prior to the Code, former Subsection 9-312(3) dealt typically with the means by which a conditional seller of inventory may obtain priority over a prior chattel mortgagee claiming under an after-acquired property clause. Under the Code the seller is required to perfect his security interest and to notify the mortgagee of the seller's interest prior to the time when the buyer obtains possession of the new inventory. The amendment clarifies the definition of the group entitled to notification by requiring the conditional seller to notify those who had filed a financing statement covering the same kind of inventory prior to the filing by the seller. The amendment of Subsection 9-312(5) makes it clear that, if the conditional seller is not entitled to priority under the special provisions of Subsections 9-312(2) and (4), priority may still be obtained on the basis of the "first-to-file" rule set forth in Subsection 9-312(5).⁷

The other substantial amendment concerns the sales article warranty against patent infringement claims.⁸ A new provision eliminates that warranty as to any claims for which the exclusive remedy of the claimant is by action against the United States in the federal courts. This amendment is designed to leave unaffected by the Code the legal relationship of parties contracting to supply goods to the federal government when the contract terms and federal statutes spell out the special obligations and remedies.

§7.2. Retail instalment sales. Significant legal problems are perhaps the inevitable attendants of extraordinary expansion in any single commercial activity. Instalment selling at the retail level has grown at a startling rate since the beginning of World War II. Federal Reserve Board studies reveal that automobile and other consumer goods paper grew nearly seven times from 1939 to 1955.¹

Locally the appellate cases have mirrored this growth mainly in a single area, namely, interpreting the provisions of G.L., c. 255, §13A, which requires as a mandatory contract term the provision that a conditional buyer must be credited with the proceeds of any sale upon default "after deducting the reasonable expenses of repossession and resale." Apparently the stringently literal application of Section 13A, penalizing violations with the loss of the security interest, was being gradually eased.² This trend continued in *Lepore v. Atlantic Corporation*,³ in which the conditional sales agreement called for a flat 15 percent attorney's fee. The contract also contained the required statu-

⁶ Id. §§12, 13.

⁷ See Bankers' Manual on the Uniform Commercial Code, p. 121, n. ** (1958).

⁸ G.L., c. 106, §2-312(3).

§7.2. ¹ Federal Reserve Board, Consumer Instalment Credit, Part I, p. 148 (1957).

² Compare *National Cash Register Co. v. Warner*, 335 Mass. 736, 142 N.E.2d 584 (1957), with *Clark v. A & J Transportation Co.*, 330 Mass. 327, 113 N.E.2d 228 (1953).

³ 1958 Mass. Adv. Sh. 335, 147 N.E.2d 817. The case also held that the disclosure provisions of G.L., c. 255, §12 were not violated when the contract failed to state affirmatively that there was no trade-in and no down payment.

tory language with the preface, "Anything herein contained to the contrary notwithstanding," together with a general clause attempting to conform the contract to any applicable regulatory laws. It was held that the financing agency had not lost its security interest because the contract was read as a whole to exclude any deduction forbidden by the statute. Although the decision may at first appear to be of only academic interest because Section 13A is repealed by the local enactment of the Uniform Commercial Code, it adopts a theory that dangerously impairs other instalment sales regulatory legislation, both present and future.⁴ The regulatory acts detailing contract terms are aimed at informing the consumer and protecting him against the overreaching made possible by the disparate bargaining position and skill of the seller or financing agency.⁵ When default occurs, the creditor will first seek payment without resorting to litigation, and the forbidden clause then becomes either a tool to coerce payment or a means of increasing the amount to be paid. Savings clauses or language tucked away in another part of the form will hardly be brought to the attention of the debtor. Thus, although the *Lepore* case may be justifiable on its facts as it involved a sale to a businessman rather than a consumer, its theory nonetheless offers a weapon to the small unscrupulous segment of the consumer lending industry.

Another major problem resulting from the growth of consumer instalment selling stems from the tripartite nature of the transaction and the natural desire of the lender to reduce his risks. Commonly the seller and buyer make their arrangement, and the seller transfers his rights to a financing agency in the form of a note and either a chattel mortgage or conditional sale. If the buyer claims a defense against the seller, he sometimes finds an imposing array of legal notions barring the assertion of that defense against the financing agency.

First, the traditional protection afforded a holder in due course of a negotiable instrument frees such a holder from the maker's personal defenses such as breach of warranty, fraud in the inducement, and failure of consideration. Elsewhere there is a significant body of relatively recent case law denying holder-in-due-course status to a financing agency in these circumstances on the basis of the dealer-financer relationship, even in the absence of actual notice.⁶ In Massachusetts

⁴ After the close of the 1957 SURVEY year, the legislature enacted Chapter 674 of the Acts of 1958, effective January 19, 1959. The new statute establishes regulatory controls over secured instalment sales of motor vehicles used primarily for personal, family, or household purposes. Sales finance companies dealing with such contracts must be licensed under rules and regulations to be promulgated by the Commissioner of Banks. Furthermore, there are specific provisions governing the making and terms of the contract, prepayment, refinancing and the amount of the finance charge. This statute will be discussed in detail in the 1959 ANNUAL SURVEY.

⁵ Donaldson, *An Analysis of Retail Instalment Sales Legislation*, 19 *Rocky Mt. L. Rev.* 135, 136 (1947). Generally, see Hogan, *A Survey of State Retail Instalment Sales Legislation*, 44 *Cornell L.Q.* 38 (1958).

⁶ See, e.g., *Commercial Credit Co. v. Childs*, 199 Ark. 1073, 137 S.W.2d 260 (1940); *Commercial Credit Corp. v. Orange County Machine Works*, 34 Cal. 2d 766, 214 P.2d 819 (1950); *Associates Discount v. Goetzinger*, 245 Iowa 326, 62 N.W.2d 191

the financing agencies prevailed in such cases in two decisions which failed to consider explicitly the financing agency's relationship to the seller.⁷

Second, when a note is not employed, the financing agency may still assert a contractual provision whereby the buyer agrees not to assert such defenses against the assignee. This is the problem presented by *Quality Finance Co. v. Hurley*,⁸ in which a finance company, assignee of a conditional sales contract, sought and failed to avoid as a matter of law the buyer's assertion of lack of delivery based on such a clause. The Supreme Judicial Court, faced with a novel case, reached for several reasons in declaring such a broad clause to be ineffective. One, it used the very strong public policy of protecting conditional vendees against the imposition by conditional vendors and instalment houses, which has heretofore mainly been expressed in interpreting the statutory restrictions on retail instalment sales.⁹ Further, it held that the waiver clause is an attempt to give the attributes of negotiability to a non-negotiable agreement and is therefore much more dangerous from the viewpoint of developing rules of law that can dynamically absorb developing new and honest business practices.¹⁰ The Uniform Commercial Code appears to reject this argument, except in the case of consumer transactions, when it validates contractual waivers of defenses.¹¹ The third basis of the Court's position is founded upon G.L., c. 231, §5, which permits suits in the name of the assignee but also explicitly preserves the obligor's defenses against an assignee. The Court noted the weakness of a position based on this point when it acknowledged that the statute is mainly procedural and was designed to insure that the assignee's direct suit does not deprive the obligor unwillingly of defenses he may have against the original obligee. All things considered, a policy of consumer protection seems to be the real root of this decision, and the case may portend a future erosion of the earlier cases insulating the financing agency as a holder in due course. However, it should also be noted that the case did leave open to the finance company the power to make out factually a claim of estoppel by affirmative conduct which in part could be based upon the contractual waiver of defenses.

(1954). See also *Jones, Finance Companies as Holders in Due Course of Consumer Paper*, 1958 Wash. U.L.Q. 177.

⁷ *Standard Acceptance Corp. v. Chapin*, 277 Mass. 278, 178 N.E. 538 (1931); *Commercial Credit Co. v. McDonough*, 238 Mass. 73, 130 N.E. 179 (1921).

⁸ 1958 Mass. Adv. Sh. 397, 148 N.E.2d 385.

⁹ *Mogul v. Boston Acceptance Co., Inc.*, 328 Mass. 424, 104 N.E.2d 427 (1952).

¹⁰ *Kripke, Chattel Paper as a Negotiable Specialty*, 59 Yale L.J. 1209 (1950).

¹¹ G.L., c. 106, §9-206. Under the Code the issue in consumer goods transactions is referred entirely to local law. If the *Quality Finance* case "establishes a special rule for consumer goods transactions as to contractual waiver of defenses," it does not necessarily follow that Massachusetts law makes a similar provision for cases involving negotiable instruments. Article 3 of the Code appears to reject the all or nothing approach indicated in the opinion since the formal requirements for negotiability are made determinative of the paper's inclusion within the negotiable instrument provisions.

To many the most startling rule of law embodied in the Uniform Commercial Code protects the ownership claims of a buyer in the ordinary course of business from a merchant seller who was entrusted with possession by the true owner.¹² Using the tools of Connecticut law, the Massachusetts Court recently reached a result consistent with this provision of the Code. In *Budget Plan, Inc. v. Savoy*,¹³ the facts involved successive, recorded conditional sales of the same motor vehicle by an automobile dealer. Upon default by the first buyer the finance company, assignee of the first contract, caused the car to be repossessed and placed the original dealer in possession of the car. Subsequently, the dealer sold and delivered the car to a second buyer and assigned the second conditional sales contract to a different finance company. When the first finance company claimed title and took possession of the car, the second buyer (joined by the second finance company) brought an action of tort for conversion. First, the Court determined that there was sufficient basis for the conclusion that the first finance company permitted the dealer to remain in possession with the expectation that the past practices of the parties, which included listing repossessed cars for resale, would be followed. This was apparently enough to preclude the first finance company from denying the dealer's authority to sell. Second, the Court concluded that the constructive notice from the recording of the first conditional sale did not extend to affect the rights of the second buyer and the second finance company. This result is also consistent with the Code. Under Section 1-201(9) a "buyer in the ordinary course of business" is defined as one who buys in good faith and without knowledge that the sale violates the ownership rights of another. Knowledge is elsewhere defined in terms of actual not constructive knowledge.¹⁴

Some of the most troublesome legal problems arising from retail installment sales transactions relate to the secured party's right to recover from a third party who negligently injures the goods. Basically the issues are threefold. Does the secured creditor have a sufficient interest in the goods to bring suit against the negligent third party? Will the recovery be limited to the amount of the debt? What is the effect of the debtor's contributory negligence upon the secured party's right of recovery against the negligent third party?

In *Bell Finance Co. v. Gester*¹⁵ it was held that the assignee of a conditional seller of an automobile could recover full damages from a negligent third party for injuring the goods prior to default while the car was in the possession of the non-negligent buyer.¹⁶ The Supreme

¹² G.L., c. 106, §2-403(2) and (3). See 1957 Ann. Surv. Mass. Law §3.6.

¹³ 336 Mass. 322, 145 N.E.2d 710 (1957).

¹⁴ G.L., c. 106, §1-201(25).

¹⁵ 1958 Mass. Adv. Sh. 305, 147 N.E.2d 815 (1958).

¹⁶ In *Morris Plan Co. v. Hillcrest Farms Dairy, Inc.*, 323 Mass. 452, 82 N.E.2d 889 (1948), the conditional seller was permitted to recover from a negligent third party when the buyer was in default and guilty of contributory negligence at the time of the accident and when it did not appear that the damage was greater or less than the debt.

Judicial Court indicated that to the extent that the finance company's recovery exceeded the amount of the debt the surplus would be held for the benefit of the buyer. Thus full recognition is given to the bargained for position of the conditional vendor by permitting him a property interest in the goods prior to any default by the buyer. A contrary result, limiting recovery to cases in which the buyer is in default at the time of the accident, would not only deprive the seller of the benefits of his bargain but would also call for testing the seller's standing prior to the time of greatest risk to the seller. It seems obvious that a buyer is more likely to lose interest and default after injury to or destruction of the goods. Furthermore, this kind of approach can lead to rather meaningless distinctions between cases in which the buyer merely failed to make payments and those in which the seller has "put the buyer in default."¹⁷

Determining the amount of the secured party's recovery is a more complex question. One might argue that so long as the damaged goods are sufficiently valuable to permit realization of the amount of the debt, the secured party has sustained no loss; but this conclusion is based upon an oversimplification. Injury to the collateral should not automatically accelerate the non-negligent debtor's obligation even when acceleration might be effected at the creditor's option. There is no apparent reason for precluding the creditor from permitting the debtor to continue to repay the debt according to the original terms. Under some agreements the debtor may have a right to continue the credit extension. In such circumstances damaged collateral equal in value to the amount of the debt at the time of the injury will probably decrease in value more rapidly during the remaining period of the credit extension. The creditor's assumption of a risk that the collateral would decline in value should not be enlarged to include that peril when the collateral has been harmed solely by the negligence of a third party.¹⁸

On the other hand, the secured party is fully protected if the recovery is limited to the amount of the debt outstanding. The property interest exists primarily as a source for satisfying the debt in the event of a default, so that recovery against the negligent third party should be limited to that amount.¹⁹ However, faced with considerable prec-

¹⁷ *Lacey v. Great Northern Railway Co.*, 70 Mont. 346, 255 Pac. 808 (1924). See also *Gas City Transfer Co., Inc. v. Miller*, 107 Ind. App. 210, 21 N.E.2d 428 (1939). Compare *First National Acceptance Corp. v. Annett*, 121 N.J.L. 356, 2 A.2d 650 (1938). The confusion attendant upon a rule depending upon default is greater when one considers the problem of the mortgagee's estoppel. See *Francis v. Mogul*, 1958 Mass. Adv. Sh. 871, 150 N.E.2d 924.

¹⁸ For an apparently contrary argument, see Note, 40 Yale L.J. 135, 136 (1930).

¹⁹ If a court had power to enter a conditional judgment or stay execution dependent upon the buyer's later default, the problem of measuring the damages would be eased. Similarly the question in the *Racheotes* case, discussed in text supported by notes 22-26 *infra*, would be greatly simplified because a means would be available for shifting the risk of the buyer's default and solvency to the negligent third party.

edent involving other security devices,²⁰ the Court in the *Gefter* case permits full recovery by the conditional seller, indicating that the surplus over and above the amount of the debt is held for the conditional buyer. In one aspect this rule limits the effective recovery to the amount of the debt and reduces the number of lawsuits required to adjust the position of the parties.

It is noteworthy that the opinion carefully and explicitly avoids making decisive distinctions based upon the kind of legal form utilized by the parties. To this extent the case is consistent with the policy of the Uniform Commercial Code, which itself contains no provision directly dealing with this problem.²¹ A second case during the SURVEY year took this same attitude. In *Harvard Trust Co. v. Racheotes*,²² a collision insurer, as subrogee to the position of a chattel mortgagee, was the real plaintiff seeking to recover from a negligent third party for injury to the mortgaged car resulting from the concurring negligence of the defendant and the mortgagor.

This fact situation presents the very issue reserved in the *Bell Finance Co.* opinion: what is the effect of the negligence of the mortgagor upon the measure of the mortgagee's right to recover? Omitting for the moment the presence of the insurer, the resolution of the problem must take into consideration several of the relationships in this multiple-party fact situation. First, the secured party's interest in the collateral should be preserved, and the debtor's negligence cannot be imputed to the mortgagee.²³ Secondly, the contributory negligence of the mortgagor should be a defense in favor of the negligent third party in any action brought by the contributorily negligent debtor. Thirdly, neither the third party nor the debtor, each negligent to the same degree and in the same manner, is entitled to any contribution from the other in the event one responds to the mortgagee for injuring the goods.²⁴ Finally, to avoid a windfall to the mortgagee, the secured party should not be permitted to recover for the injury to the goods and still collect the full debt from the mortgagor. Because of the last consideration any recovery by the mortgagee must in a sense ultimately benefit the mortgagor. This upsets the allocation of the loss as between the mortgagor and the negligent third party imposed by the doctrine of contributory negligence. However, contributory negligence is not based upon consideration of allocation of loss.²⁵ It is

²⁰ See, e.g., *Codman v. Freeman*, 3 Cush. 306 (Mass. 1849) (mortgage); *Pomeroy v. Smith*, 17 Pick. 85 (Mass. 1835) (pledge).

²¹ UCC §2-722 might be stretched to cover this case, although it is aimed mainly at the similar seller-buyer problem.

²² 1958 Mass. Adv. Sh. 309, 147 N.E.2d 817 (1958). Compare comments on this case in §3.2 *supra*.

²³ *Morris Plan Co. v. Hillcrest Farms Dairy, Inc.*, 323 Mass. 452, 82 N.E.2d 889 (1948) (conditional vendor); *Nash v. Lang*, 268 Mass. 407, 167 N.E. 762 (1929) (bailor).

²⁴ Restatement of Restitution §102.

²⁵ 2 Harper and James, *The Law of Torts* §22.3, at 1207 (1956): "The foregoing, it is submitted, shows that there is no justification—in either policy or doctrine

particularly in the bailment and chattel security cases, rather clearly wholly a personal bar to suit by the contributorily negligent individual. Thus in a case like *Racheotes*, although the recovery which the secured party is entitled to retain for itself inures indirectly to the contributorily negligent debtor, the doctrine of contributory negligence should not be given a reverse twist to permit the third party an affirmative cause of action against the debtor. If by means of subrogation to the mortgagee's creditor position or otherwise the third party is able to collect from the debtor the amount paid to the secured party, the debtor's contributory negligence will be the real basis for giving the negligent third party the derivative cause of action. Furthermore, the negligent third party will obtain not merely contribution but full indemnification from his co-tortfeasor, the mortgagor. Such a result is not tenable without a substantial revision of the law based upon concurring fault.

On the other hand, in measuring the amount of the mortgagee's recovery against the negligent third party, consideration can well be given to the mortgagor's concurring negligence. Recovery by the mortgagee over and above the amount of the mortgage indebtedness is at best questionable as indicated by the requirement in *Gester* that the secured party holds the surplus for the benefit of the debtor. No harm is really done to the mortgagee who recovers only the amount of the indebtedness and it is sensible to limit the mortgagee to that amount when any excess would be paid over to the concurrently negligent debtor.

Is there any basis for altering the analysis when we allude to the fact that the real plaintiff in *Racheotes* is the collision insurer? Two policy considerations can be urged here. First, in allowing the collision insurer a right of subrogation to the mortgagee's position against the third party, the *Racheotes* case really shifts the responsibility from the plaintiff's collision insurer to the defendant's liability insurer. This can be said to be undesirable since the collision insurer took on and was compensated for the risk of harm to the vehicle wholly or partially arising from the mortgagor's negligence while the liability insurer was not undertaking the risk of liability when its insured had a defense of contributory negligence. A short response to this analysis is that it ignores the secured party's distinct position as a plaintiff. More importantly, however, the approach goes beyond the facts of the case and assumes the presence of enforceable property liability insurance. Great caution should be exercised in denying the collision insurer subrogation rights to the mortgagee's position on such a basis without a clear indication that both kinds of insurance are present. Insurance undertakings should not rise to a status in which they determine the

— for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of *him who seeks to enforce that liability* should also be considered." (Emphasis supplied.) See also Prosser, *Law of Torts* §51, at 283 (2d ed. 1955).

liabilities of parties who are strangers to the policy, at least in the absence of some strong expectation that coverage is present.

Secondly, one can argue that the collision insurer should not be subrogated to the mortgagee's position because upon payment of the insurance to the mortgagee, the debt between the mortgagee and mortgagor is discharged by the terms of the mortgage agreement. The consequence of such a discharge is that the mortgagee is made whole and loses his cause of action against the third party for negligent impairment of the security. In *Racheotes* itself the parties to the litigation stipulated that the collision insurer was subrogated to the mortgagee's position. In the absence of such a stipulation the outcome should not be altered. Otherwise, the result will turn wholly upon whether the insurer and mortgagee time these actions prior to litigation so that the mortgagee has not been paid by the insurer. In that event the mortgagee will be able to proceed first against the negligent third party and then collect on the insurance. Certainly the mere presence of collision insurance should not preclude the mortgagee from recovering from the third party. That the mortgagee and insurer will so jointly plan their trial strategy is not an unrealistic consideration when one appreciates the great number of cases where automobile financing and insurance are furnished by "tied-in" companies.²⁶

§7.3. Warranties of quality. Twice during the 1958 SURVEY year the Supreme Judicial Court divided over the effectiveness of the implied warranty of merchantability in rather common fact situations. In *Taylor v. Jacobson*¹ the plaintiff purchased by trade name her regular brand of hair dye from the defendant, a retail druggist, and had the dye applied by a friend without complying with the accompanying manufacturer's directions, which called for a preliminary patch test to ascertain the user's sensitivity to the product. The plaintiff indicated that she failed to follow the known directions because ". . . she had used Roux so many times she didn't need a patch test . . ." It was held that the lower court erred in denying the retailer's motion for a directed verdict. In reaching this result the Supreme Judicial Court first decided that the maker's cautionary directions were a part of the retail sale transaction. Despite the absence of any reference to those instructions at the time of the sale, the Court concluded that as a practical matter a retail druggist by necessary inference adopts any cautionary statements, disclaimers, and limitations made by the manu-

²⁶ The extent of the phenomenon of the tied-in insurer can be seen in the statistical data that the contracts of the four major sales finance companies had insurance premiums for car insurance included in nearly 65 percent of their contracts in 1954 and 1955. Federal Reserve Board, *Consumer Instalment Credit*, Pt. IV, p. 76 (1957). Further evidence of such arrangements appears in the financial structure of some of the finance companies: e.g., from 1950-1956, Motor Insurance Corp., owned by GMAC, had average yearly earnings of nearly \$3 million. Moody, *Bank and Financial Manual* 841 (1957). Compare *GMAC v. Commissioner of Banks*, 258 Wis. 56, 45 N.W.2d 83 (1950), *rehearing denied*, 258 Wis. 64a, 46 N.W.2d 328 (1951).

§7.3. 1 336 Mass. 709, 147 N.E.2d 770 (1958).

facturer on the package or in accompanying circulars of an item purchased by trade name. The buyer admitted that she read the instructions after the sale, and this coupled with her prior long use of the product, led the Court to infer that the plaintiff had or should have had the instructions in mind when the sale was made. Although the record revealed that the plaintiff had read the instructions in the past and had in fact taken patch tests before for the product involved, the Court phrased its determination in terms of reason to know as well as actual knowledge of the limitations. The Court relied upon the sale by trade name and the plaintiff's prior use in distinguishing an earlier case calling for a more stringent test of adoption.² Under the Uniform Commercial Code in these factual circumstances, it would seem that the retailer would adopt as part of the implied warranty of merchantability any claims of the manufacturer appearing on the label.³ Dealing with the converse of the problem, the *Taylor* case reaches a consistent result as to language of disclaimer on the label.

No real threat to the consumer results from the finding of an adoption even on the basis of the buyer having reasonable cause to know of the limitation, so long as the safeguard set by the Court is maintained. That safeguard requires the limiting language to be sufficiently clear. On this issue the Court split, the majority concluding that the language on the bottle and in the accompanying descriptive folder was adequate to warn the purchaser and to limit the retailer's liability. Mr. Justice Cutter, the author of the opinion, joined by Mr. Justice Counihan, concluded that the language was not sufficiently explicit to operate as a disclaimer.

It has been suggested that the kind of difference of opinion revealed in the *Taylor* opinion will continue under the Code.⁴ Section 2-316 permits written disclaimers of implied warranties only when the language is "conspicuous," that is when a court determines that "a reasonable person against whom it is to operate ought to have noticed it."⁵ Certainly, this test is not greatly different from the test of the *Taylor* case, even though one can distinguish the cases in which the buyer should have seen the instruction from those in which he should have understood the disclaimer.

The Court divided again on the effect to be given to directions on a label in *Vincent v. Tsiknas*.⁶ The plaintiff was cut when a jar of baby food broke while she was removing the metal cover from the jar with an ordinary metal beer can opener. The cover contained the direction "Pry up gently at points indicated." In opening the jar, the plaintiff inserted the curved end of the opener into the space between the shoulder of the jar and the cover with the handle of the opener extended

² *Sokoloski v. Splaun*, 311 Mass. 203, 40 N.E.2d 874 (1942) (manufacturer's disclaimer on tag attached to seed bag not adopted by retailer).

³ G.L., c. 106, §2-314(1)(f).

⁴ Braucher, Article 2—Sales, Uniform Commercial Code of Massachusetts 97, 115-116 (1958).

⁵ G.L., c. 106, §1-201(10).

⁶ 1958 Mass. Adv. Sh. 1039, 151 N.E.2d 263.

upward. The jar broke when the plaintiff applied downward pressure. A majority of the Court concluded that the use of the beer can opener was not responsive to the directions and that failure to call for a specific tool did not support the plaintiff's judgment that the glass would withstand the pressure applied. It is noteworthy that no mention was made of the requirement of adoption in the *Vincent* case and that there was no indication that this was a sale by trade name. Furthermore, the Court determined that such a method of removing a lid from the glass jar is not within the expectation of sellers and buyers; consequently, the warranty of merchantability was not breached under a test of suitability for the ordinary uses for which goods of the kind and description are sold. It would seem that the Code would lead to this same sort of analysis under the ordinary purposes test of Section 2-314.

A test of reasonable expectations of the parties also seems to be invading the cases analyzing the problem of the allergic plaintiff. In *Jacquot v. Wm. Filene's Sons Co.*,⁷ the plaintiff, a cosmetic demonstrator with a history of skin eruptions after the use of cosmetics, purchased a fingernail kit from the defendant. The kit included instructions warning against the continued use of the product by persons with allergies. Over a four-month period the plaintiff used the cosmetic in accordance with the directions as to application and then her nails became cracked and inflamed with an accompanying discoloration. The Supreme Judicial Court affirmed an order of the Appellate Division, which ordered findings for the defendant after the trial court had found for the plaintiff. Fundamentally, the decision turned upon the plaintiff's failure to prove that the article was unfit to be used by a normal person.

Recognizing a possible presumption of normalcy in rather cautious terms, the opinion concluded that such a presumption disappeared in the face of the plaintiff's history of cosmetic allergy and her dermatologist's testimony that the plaintiff became "abnormal to the reaction," that "the average normal person does not have" such eruptions, and that the plaintiff "had a peculiar sensitivity to this particular product." The dermatologist also testified that this "unusual case" was the first case of dermatitis resulting from the use of the kit in his ten to eleven years of practice. With the case in this posture, no inference of normalcy was permitted.

The second avenue of fixing liability on the defendant in the allergy cases was also rejected. If the plaintiff establishes that she is one of a class of persons sensitive to the product, the implied warranty of fitness might protect her under *Bianchi v. Denholm & McKay Co.*⁸ Relying upon the testimony of the dermatologist that this was the first case of such sensitivity in his ten to eleven years of practice and the evidence of over 500 sales of the kit with only one such claim, the Court evaluated the record adversely to the plaintiff. The case rather quietly seems to have eliminated one of the possible evidentiary positions of

⁷ 1958 Mass. Adv. Sh. 575, 149 N.E.2d 635 (1958).

⁸ 302 Mass. 469, 19 N.E.2d 697 (1939).

the plaintiff on the issue of normalcy spelled out in *Payne v. R. H. White Co.*⁹ If *Jacquot* holds that the inference of normalcy is not permissible in the face of contrary evidence, the assumption of normalcy does not rise to the status of prima facie evidence and is at most a presumption. On the other hand, the *Jacquot* case should be read as distinguishing rather than overturning the *Bianchi* case. In *Bianchi* the record was rather carefully constructed to show that the face powder contained aniline dyes which are irritants to some persons. Allergy in this framework is something far different from the peculiar individual susceptibility of the plaintiff in *Jacquot*. This very difference has been suggested to be the distinction between the two separate lines of cases, one denying relief and the other granting relief.¹⁰ When a class of buyers may be allergic to an element in the product, the reasonable expectation test should result in the allergy being no bar to liability.¹¹

§7.4. Impact of federal law on interests in aircraft. Periodical comment has recently centered heavily upon the federal statutory controls over property interests in carrier's mobile equipment.¹ Under Section 503 of the Civil Aeronautics Act recordation of conveyances affecting aircraft has been lodged with the Civil Aeronautics Administration.² This provision obviates difficulties arising from multiple state recordings but requires an analysis of the rights of third parties in the absence of the mandatory recording of "conveyances."³

A somewhat involved problem of third parties' rights confronted the Supreme Judicial Court in *Marrs v. Barbeau*.⁴ A sold a Lockheed aircraft to B, who failed to record the transfer with the federal agency. B's creditor then caused the defendant sheriff to attach the airplane. Thereafter A, induced by B's fraudulent misrepresentations, executed and delivered a bill of sale covering the aircraft to C Corporation. C Corporation recorded and in turn sold the plane to the plaintiff, an innocent purchaser for value. The plaintiff also recorded.

The plaintiff then sued the sheriff for conversion. The Court re-

⁹ 314 Mass. 63, 49 N.E.2d 425 (1943).

¹⁰ Horowitz, Allergy of the Plaintiff as a Defense in Actions Based upon Breach of Implied Warranty of Quality, 24 So. Cal. L. Rev. 221, 233-234 (1951).

¹¹ *Merrill v. Beaute Vues Corp.*, 235 F.2d 893, 898-900 (10th Cir. 1956) (concurring opinion), cited and quoted in part in *Wright v. Carter Products Inc.*, 244 F.2d 53, 58 n.3 (2d Cir. 1957).

§7.4. ¹ Adkins and Billyou, Developments in Aircraft Equipment Financing, 13 Business L. 646, 672 (1958); Scott, Liens in Aircraft: Priorities, 25 J. Air L. & Comm. 193 (1958); Comment, 67 Yale L.J. 1024 (1958); Note, 71 Harv. L. Rev. 156 (1958). See the new Federal Aviation Act of 1958, Pub. L. No. 726, 85th Cong., 2d Sess. (Aug. 23, 1958), effective sixty days after the administrator takes office.

² 52 Stat. 1006 (1938), as amended, 49 U.S.C. §523 (1952). Compare the validation provisions for security interest in vehicles of interstate carriers. Pub. L. No. 728, 85 Cong., 2d Sess. (Aug. 23, 1958), effective January 1, 1959.

³ "'Conveyance' means a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property." 52 Stat. 977, as amended, 49 U.S.C. §401(18) (1952).

⁴ 336 Mass. 416, 146 N.E.2d 353 (1957).

solved the problem by concluding that the attachment operated to reach only B's interest in the airplane and, because of the lack of recording, that interest was a defeasible one as against a later bona fide purchaser for value. Further, even though the plaintiff's transferor, C Corporation, may not have qualified as an innocent purchaser, the plaintiff clearly did so qualify, and his purchase defeats the attachment.

Under the theory adopted by the Court, it was not essential to consider the effect of the non-recording of the attachment with the Civil Aeronautics Administration. However, the Court in passing rejected the lower court's position that the failure to record the attachment was fatal to the creditor's claim. This dictum rested upon an *eiusdem generis* construction of the statutory definition of conveyance which is not reflected in the administrative regulations dealing with recording.⁵ It seems somewhat odd that, under the dictum concerning recording the attachment, the subsequent purchaser would be required to inquire into the possession of the plane and could not rely upon the record, while on the facts of the *Marrs* case the subsequent purchaser had no such obligation. In any event, prudent counseling calls for recording a notice of any such attachment until the question of federal law is more definitively settled.⁶

§7.5. Bank deposits and collections. The 1957 ANNUAL SURVEY pointed out that under Section 4-208 of the Code a bank taking a draft for collection has a "security interest" in that draft and its proceeds to the extent that credit has been withdrawn.¹ This year the Supreme Judicial Court was confronted by a fact situation in which Article 4 of the Code, if applicable, would have furnished a ready solution. In *Shapiro v. Sioux City Dressed Beef, Inc.*,² it was held under Iowa law that an Iowa bank, which under the terms of a deposit slip took for collection a draft drawn by its depositor payable to the Iowa bank, held sufficient title to the draft to defeat a creditor of the drawer who sought by trustee process to reach the proceeds of the draft in the hands of a Boston bank.

Under the Iowa law a presumption of passage of title arises when, as in this case, a depositor is given credit upon his account as cash and a right to draw against that amount. Furthermore, this presumption is not defeated by a deposit slip providing for a right of charge back. If the Code applied to this transaction,³ the result here would still favor

⁵ The regulations permit recording of judicial decrees and notices of tax liens. 14 C.F.R. §503.2 (Supp. 1958).

⁶ Compare *Wilson v. Barnes*, 359 Mo. 352, 221 S.W.2d 731 (1949) (indicating that attaching creditor prevails over unrecorded purchase); *Marshall v. Anderson*, 169 Kan. 534, 220 P.2d 187 (1950) (purchaser's failure to record does not bar assertion of title against subsequent attaching creditor).

§7.5. 1 1957 Ann. Surv. Mass. Law §7.4.

2 1958 Mass. Adv. Sh. 1031, 151 N.E.2d 492. Compare *Universal C.I.T. Credit Corp. v. Guaranty Bank and Trust Co.*, 161 F. Supp. 790 (D. Mass. 1958).

3 Compare G.L., c. 106, §4-201.

the Iowa bank, since the bank would have a security interest under Section 4-208. In the present case the security interest would cover the entire amount of the draft and would be perfected without any filing. Hence the Iowa bank would have priority over the drawer-depositor's creditor who seeks to reach the proceeds of the draft.

Another aspect of the bank collection process concerned the Court in *Krinsky v. Pilgrim Trust Co.*⁴ The drawer delivered three checks, payable to a third party, to one Healey with instructions to deliver the checks to the payee. Healey tendered these checks to one Krinsky, a creditor of Healey, who insisted that the checks be certified by the drawee. Healey obtained the certification. Each check bore the words, "Pay to the order of Hyman Krinsky," followed by the payee's written name. Krinsky gave Healey his own check for the difference between the total of the three certified checks and the debt owed by Healey. The certified checks were deposited in the defendant bank to Krinsky's account with the indorsement "Credit to Hyman Krinsky, Trustee." Krinsky was then credited with the amount of the checks, which were presented to the drawee, canceled, and returned to the drawer. The next month the drawer claimed that the payee's indorsement was forged. The drawee credited the drawer's account and requested a refund from the defendant bank. The defendant complied and charged back the total on Krinsky's account. Krinsky sued for money had and received against his bank. Assaying the record on the issue of whether the payee's indorsement was forged, the Court found sufficient conflict to sustain the exceptions to the lower court's directed verdict in favor of the defendant bank. However, the Court pointed out that if the indorsement was forged, the defendant bank could recover any money paid from its customer either on the theory of unjust enrichment because of mistake or upon the warranties implied under the NIL upon the transfer of the checks to the defendant for collection. The defense of the bank was treated as a claim in set-off arising out of this right of recovery.

No quarrel arises from basing the bank's claim upon notions of mistake. However, categorizing the defendant bank as the beneficiary of warranties under former G.L., c. 107, §88 is a more complex problem.⁵ First of all Section 88 imposes the warranty only upon those negotiating an instrument. Since Krinsky's indorsement can be classified as restrictive, i.e., vesting the title in the indorsee in trust, serious doubt arises as to whether Krinsky negotiated the check to the defendant bank.⁶

Under the Code it seems that the result would be unchanged, although perhaps the means of reaching the decision would be less complex. In Section 4-207(1) the Code establishes certain warranties in

⁴ 1958 Mass. Adv. Sh. 691, 149 N.E.2d 665.

⁵ NIL §66.

⁶ Compare *First National Bank of Minneapolis v. City National Bank of Holyoke*, 182 Mass. 130, 65 N.E. 24 (1902), with *In re Ziegenhein*, 187 S.W. 893 (Mo. App. 1916).

favor of payor banks and other payors. A payor bank is defined in Section 4-105 as "a bank by which an item is payable as drawn or accepted." Payor is an undefined term apparently covering those cases where a non-bank is to pay or accept an item.⁷ This would not seem to be pertinent to the resolution of the problem of the warranty in favor of a collecting bank such as the defendant here. Section 4-207(2) sets out the warranties in this case and includes an undertaking that all signatures are genuine or authorized.

The operative word in Section 4-207(2) of the Code is transfer and not negotiation, so that the problem of Section 88 of G.L., c. 107 is avoided. Furthermore, Section 4-201 of the Code makes the question of the collecting bank's status as a purchaser or agent immaterial in applying Article 4, Bank Deposits and Collections. Finally, the Code would leave unaffected the defendant's right of set-off based upon such warranty, even though there had been final settlement or payment of the check.⁸

In *Polonsky v. Union Federal Savings and Loan Association*⁹ the Supreme Judicial Court held that a bank which had paid out funds to a person wrongfully in possession of the depositor's passbook was free from liability to its depositor because of a broad exculpatory clause printed on the inside of the bank book cover. The case was a harsh one primarily because of the broadness of the exculpatory provision and doubt as to the depositor's awareness of the clause.¹⁰ The General Court responded by reversing the result of the case in a rather broadly worded statute, Chapter 213 of the Acts of 1958.

Any agreement between a depositor, certificate holder or shareholder and any bank, credit union or savings and loan association doing business in this commonwealth which exculpates such bank, credit union or savings and loan association when a deposit or share account, or any part thereof, is paid by such bank, credit union or savings and loan association to a person unlawfully presenting a pass book, certificate or other evidence of such account is hereby declared to be contrary to public policy and void.

It is noteworthy that the statute voids any such exculpatory agreements whether or not the bank explicitly and particularly calls the provision to the attention of the depositor. Furthermore, it may possibly catch within its provisions negotiable instruments such as treasurer's checks and register checks, thus increasing the bank's liability in connection with such instruments. In any event, the statute is noteworthy as the first enactment that alters a Code provision without specific reference to the Code. As noted in the 1957 ANNUAL SURVEY, the rule of

⁷ Comment No. 4 to §4-207, Ann. Laws Mass., Special Supplement, G.L., new c. 106 (1958).

⁸ General Laws, c. 106, §4-213(3) explicitly preserves the right of the bank to apply any credit to any obligation of its customer. See also §3-418.

⁹ 334 Mass. 697, 138 N.E.2d 115 (1956).

¹⁰ 1957 Ann. Surv. Mass. Law §18.3.

Section 4-103 on variation by agreement was probably consistent with the *Polonsky* case.¹¹ The enactment of this special statute clearly limits the effect of the Code.

§7.6. **Secured transactions: Liens arising by operation of law.** In addition to the cases previously discussed in connection with retail instalment sales transactions, one other decision of the Supreme Judicial Court during the 1958 SURVEY year merits discussion in connection with lending or extending credit secured by personal property.¹ *North End Auto Park, Inc. v. Petringa Trucking Co.*,² involved a garage keeper's lien under G.L., c. 255, §§25 and 26. During a one-year period the garageman stored trucks, trailers and tractors, supplied them with gas and oil, and repaired the vehicles.³ For the first nine months of this period, the owner used all the vehicles in its trucking business, taking them away daily with the garage's knowledge and consent. During the following three months the vehicles remained in the uninterrupted possession of the garage under claim of the lien. The Supreme Judicial Court reversed a lower court determination that the interruptions in the garageman's possession during the first nine months caused the loss of the lien. With a careful reservation of the question of the rights of intervening third parties, both the statutory and the common law liens were held to have revived by a return of the property after a temporary interruption of possession.⁴ Practical justification for the result quite properly rests in the fact that a contrary determination would limit the lien to the small amount accruing after the vehicle's last return.

What effect does this decision have upon other secured creditors of the owner of the vehicles? Under Section 9-310 of the Code, when goods are subject to a perfected security interest, a lien upon goods in the possession of a person furnishing services or materials with respect to such goods takes priority unless the lien is statutory and the statute provides otherwise. There seems to be no reason for reading "possession" here as requiring something more than the "possession" called for by the enforcement of the lien. Consequently, on the facts presented in *Petringa* a prior perfected security interest in the vehicles will be subordinated to the garageman's lien. The priority is apparently based upon the fact that the services enhance or preserve the collateral and thus benefit the earlier secured creditor.⁵

But this provision does not solve the question of the vitality of the lien when the owner while in temporary possession creates a security

¹¹ 1957 Ann. Surv. Mass. Law §5.2.

§7.6. ¹ Other chattel security cases are discussed in §9.6 *infra*.

² 1958 Mass. Adv. Sh. 929, 150 N.E.2d 735.

³ It should be noted that the statutory lien for "storage and care" did not extend to the claim for gas and oil, and that the garageman's common law lien was held to cover the obligation arising from the repairs.

⁴ See Restatement of Security §80, Comment *c*. Compare the renewal of the seller's lien in *Jones v. LeMay-Lieb Corp.*, 301 Mass. 133, 16 N.E.2d 634 (1938).

⁵ Comment No. 1 to §9-310, G.L., new c. 106, Special Supplement (1958).

interest in an innocent third party. In such a case the Code will not supply a definitive rule because the question really revolves about a matter to be set by the lien law, i.e., the owner's power to convey the collateral. If the later security interest under Article 9 does not prevail over the lien-holder, the lien has serious potential as a source of creditor deception. The ultimate solution should be in favor of the innocent secured creditor, since the lien-holder has in a sense created a situation by which the secured party has been misled. Consequently, the secured party should be treated as an intervening purchaser, and the garageman should be precluded from asserting his lien.