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Article 2: Sales

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of business means a person who buys goods in ordinary course from a person in the business of selling goods of that kind”]

[Annotator’s Comment: Although the decision is correct, the court found little help from the 1953 draft of the Code in reaching the desired result. The 1959 amendment greatly strengthens the secured party’s position in tripartite transactions such as this by requiring the buyer to proceed in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party.]

ARTICLE 2: SALES

SECTION 2-202. Final Written Expression: Parol or Extrinsic Evidence

Terms . . . set forth in a writing intended by the parties as a final expression of their agreement . . . may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208). . . .

Provident Tradesmens Bank and Trust Company v. Pemberton, 24 D.&C.2d 720, 173 A.2d 780 (Pa. 1961).

Defendant executed a security agreement with plaintiff which required that insurance be placed on the automobile collateral as a condition to making the loan. After paying a claim for damages sustained to the vehicle, the insurance company cancelled the coverage. The bank as loss payee was notified of the cancellation. Subsequently, the automobile was involved in another collision and was damaged irreparably. Defendant defaulted on the note and judgement was entered by confession.

In a per curiam decision affirming a decree to open judgement, the court held that evidence revealed that pursuant to the custom in the trade and a course of dealing between the parties, the bank as loss payee should have given notice to the defendant when the collision policy was cancelled so that he could protect himself.

Although the defendant, by written agreement, waived all notices whatsoever in respect to the agreement as well as those to which he might be entitled, the court opined that the waiver provisions were not sufficient to “carefully negate” the custom or usage and thus the usage was admissible as provided by the cited section.

[Annotator’s Comment: In predicating its decision on Section 2-202, the court has overindulged the liberal parol evidence rule of the Code. This section provides that custom or usage may be used to *explain* or *supplement*, but *not* to *contradict* the agreement of the parties. Comment (2) to Section 2-202 states that “unless carefully negated,” the customs and usages of the trade become terms of the contract. The court reasoned that the well established custom was not “carefully

(Where a cited case interprets only a portion of a Code section only that portion is set out.)

negated" by the use of a printed form which contained words applicable solely to the agreement itself without any reference to the custom or usage. Thus, even though the usage in the instant case contradicts the words of the waiver provision, the court allowed it to be introduced into the agreement.

The court seems to place more emphasis on the Code Comment than it does on the specific words of the Code. The Comment cannot broaden the coverage of any section.¹ It is believed that this is so although the contradiction, in this case, between the written contract and the usage consists of words from a printed form.]

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

(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.

Independent News Co. v. Williams, 293 F.2d 510 (1961).

Independent News, a distributor, sold comics to wholesalers pursuant to a written contract which provided that the wholesalers receive full credit for unsold books by returning the covers. The contract further provided that the remaining portion of the comics be destroyed or resold as waste paper only. It was stipulated that title to all comics would remain in the distributor until they were destroyed or rendered unusable except for waste.

Williams, a second hand paper dealer, unaware of this contract, bought coverless comics from one of the wholesalers and resold them as literary material. In an action for injunctive relief, Independent urged six theories for recovery, one of which was conversion under the cited section of the Code. In denying relief, the court held that Williams was a buyer in ordinary course of business within the purview of Section 2-403, and therefore acquired full property rights in the books. The reservation of title in the contract had no effect on the waste paper dealer since he was a "buyer" as defined by the Code.

[Annotator's Comment: Another section of the Code seems applicable to the instant case, although it was not discussed by the court. It is submitted that the definition in Section 2-326(1)(b) of a "sale or return" would apply to the transaction between the distributor and wholesaler. Under this section, title to the comics would have originally vested in the buyer, wholesaler, upon sale to him. However, the wholesaler had the power to revest ownership to unsold comics in the distributor as seller.

If the wholesaler had not returned the comics he would have had good title to transmit to Williams. Since the wholesaler did return the covers, this should be considered a return under the contract with title

¹ See Section 1-102(3)(f) of the 1953 Text, under which this case was decided. (Where a cited case interprets only a portion of a Code section only that portion is set out.)

revesting in the distributor. Therefore, it is necessary to apply, as this court did, Section 2-403, conferring full rights on Williams as though the wholesaler had good title.

Another noteworthy facet of the present case is the court's application of the cited section referring to "buyer in ordinary course" to a transaction between two dealers rather than to the usual retail sale.]

ARTICLE 9: SECURED TRANSACTIONS; SALES OF ACCOUNTS, CONTRACT RIGHTS AND CHATTEL PAPER

SECTION 9-104. Transactions Excluded From Article

This Article does not apply . . .

(d) to a transfer of a claim for wages, salary or other compensation of an employee;

Opinion of the Justices, 173 A.2d 578 (N.H. 1961).

In answering a question propounded to them by the Governor and Executive Council, the Justices of the Supreme Court of New Hampshire opined that the State was not bound to honor assignments of wages of state employees or officials, and that the Governor and Council could not honor such wage assignments in their discretion.

The conclusion was reached on the basis that there is no existing legislation in New Hampshire authorizing such assignments. The court noted as significant that Section 9-104(d) excludes such assignments from the Code and leaves the solution open to local regulation.

SECTION 9-110. Sufficiency of Description

For the purpose of this Article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described.

Attorney General's Opinion, No. 60-425, Ky., May 31, 1960.

See Section 9-402(1) *infra*, for a discussion of this opinion.

SECTION 9-203. Enforceability of Secured Interest; Proceeds, Formal Requisites

(1) . . . a security interest is not enforceable against the debtor or third parties unless . . .

(b) the debtor has signed a security agreement which contains a description of the collateral

Mertz Estate, 24 D.&C.2d 587 (Pa. 1961).

Decedent in his lifetime executed a judgment note and delivered a certificate of title to a truck with a lien noted thereon in favor of the judgment creditor. Petitioner on behalf of the estate sought to recover the certificate of title on the ground that no written security agreement had been executed as required by the cited section. HELD: Petition

(Where a cited case interprets only a portion of a Code section only that portion is set out.)