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A SELLER'S REMEDIES ON DISCOVERY OF BUYER'S INSOLVENCY UNDER THE UNIFORM COMMERCIAL CODE

The *Uniform Sales Act*¹ provides that in the event of a buyer's insolvency the unpaid seller has the right of stopping goods in transitu after he has parted with possession of them² and the right to a lien on the goods in his possession until payment or tender of the price for them has been made.³ The comparable provisions in the *Uniform Commercial Code*⁴ are all contained in one section.⁵

The *Code* provision allowing the unpaid seller to withhold delivery except for cash closely parallels the right given the unpaid seller under the *Sales Act* "to retain possession of them until payment or tender of the price."⁶ The *Code* provision makes it explicit that delivery may be held up except for payment of cash regardless of whether or not title has passed.⁷

Where there has been partial delivery of the goods, the *Sales Act*⁸ raises a presumption that the lien on the goods remaining in the seller's possession has not been waived unless there are circumstances to show a contrary intent. The *Code* is explicit in giving the right of lien not only as security for goods remaining in the unpaid seller's possession but also for the entire purchase price due under the contract.⁹

Under the *Sales Act*¹⁰ the unpaid seller, on discovering the buyer to be insolvent, has the right of stoppage in transitu, that is, he may resume possession of the goods at any time while they are in transit. The goods are in transit until the buyer or his agent takes delivery of them from a carrier or other bailee or if the buyer rejected them and the carrier retains possession of them.¹¹ The goods are no longer in transit if the buyer or his agent obtains delivery of the goods before they arrive at their destination, or if on arrival, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent. A carrier's or other bailee's wrongful refusal to deliver the goods to the buyer or his agent also ends the transit within the meaning of the act.¹²

The *Code* provision¹³ is substantially the same, giving the seller a right to stop delivery until the goods are received by the buyer. This section provides that acknowledgment by any bailee, other than a carrier, that he is holding the goods on behalf of the buyer will cut off the seller's right to stop delivery.¹⁴ In the case of

¹ Act of May 19, 1915, P.L. 543, 69 P.S. 1.

² Sec. 53 (b).

³ Sec. 54 (c).

⁴ Act of 1953, April 6, P.L. 1, 12A P.S. The effective date of this act is July 1, 1954.

⁵ Art. 2, § 702.

⁶ Sec. 54, sub. 1(c).

⁷ Art. 2, § 702, sub. 1(a) and comment 1.

⁸ Sec. 55.

⁹ Art. 2, § 702, sub. 1(a).

¹⁰ Sec. 57.

¹¹ Sec. 58, sub. 1.

¹² Sec. 58, sub. 2.

¹³ Art. 2, § 705.

¹⁴ Art. 2, § 705, sub. 2(b).

a carrier, however, acknowledgment can be made only by reshipment or as warehouseman.¹⁵ The effect of this would seem to be that the right of stoppage in the case of a carrier is prolonged beyond notice of arrival being given from carrier to buyer and would require a separate contract with the buyer.

The right of stoppage in transitu under the *Sales Act*¹⁶ may be exercised by the unpaid seller either by actually retaking possession of the goods or by giving notice of claim to a carrier who then has a duty to redeliver according to the seller's instructions. The notice must state that the buyer is insolvent and has not paid the seller. It is also necessary that the notice be given under circumstances such that the carrier, by the exercise of reasonable diligence, can prevent delivery to the buyer. The *Code*¹⁷ makes no material changes in this requirement.

A negotiable bill of lading overrides the right of stoppage under both the *Sales Act*¹⁸ and the *Code*.¹⁹

Under the *Code* an unpaid seller has a remedy not available under the *Sales Act*. If the buyer becomes insolvent within ten days after receiving the goods the seller has an automatic right to reclaim the goods.²⁰ The framers of the *Code* make clear their intent. "Any receipt of goods by the buyer within ten days of overt insolvency amounts to a tacit business misrepresentation of solvency at the time of their receipt and therefore is fraudulent against the particular seller."²¹

This provision raises the question of whether allowing the seller to reclaim the goods under a presumption of fraud is a voidable preference of creditors under bankruptcy legislation. The question, stated another way, is whether the trustee in bankruptcy, who has the rights of a creditor holding a lien by legal or equitable proceedings on property in the possession of the bankrupt at the time the petition in bankruptcy is filed,²² has rights superior to the rescinding party.

It has long been recognized that a party induced by actual fraud to enter into a contract has a right to rescind and reclaim the goods, and intervention of bankruptcy between bargain and rescission will not interfere with this right.²³ But the courts have been strict in requiring an actual misrepresentation where fraud is claimed. There has to be a false representation on the part of the buyer or his agent.²⁴ Mere intention not to pay or unrevealed insolvency did not make the sale fraudulent.²⁵ A positive misrepresentation inducing credit has, however, been held sufficient to give a seller the right to reclaim.²⁶

¹⁵ Art 2, § 705, sub. 2(c).

¹⁶ Sec. 59.

¹⁷ Art. 2, § 705, sub. 3.

¹⁸ Sec. 59, sub. 2.

¹⁹ Art. 2, § 705, sub. 2(d), 3(c).

²⁰ Art. 2, § 702, sub. 1(b).

²¹ Art. 2, § 702, Comment 2.

²² Bankruptcy Act, 11 U.S.C. § 70 (c).

²³ Collier, *Bankruptcy Manual* (1948), § 70:26.

²⁴ *Meyerhoff v. Daniels*, 173 Pa. 555, 34 A. 298 (1896).

²⁵ *Smith v. Smith*, 21 Pa. 367 (1853).

²⁶ *In Re Perelstine*, 19 F.2d 408 (W. D. Pa. 1927).

Where a seller has attempted to rescind on the basis of presumed fraud, the courts are reluctant to allow the seller to reclaim. This presumption that insolvency known to a buyer is equivalent to fraud on a seller is evidently easily rebutted. Thus, where it was shown that the seller did not rely on a representation of solvency or that the buyer, in spite of insolvency, believed he could pay for the particular goods,²⁷ the seller was not allowed to reclaim.

The *Code* further provides that the ten day limitation on the right to reclaim does not apply if the buyer made a representation of solvency to the seller within three months of insolvency. To fall within this exception the statement of solvency must be in writing addressed to the particular seller and dated within three months of delivery.²⁸ The three month limitation is entirely new. The courts in Pennsylvania have not indicated how long a seller is justified in relying on a buyer's representation of solvency. One case has held that two and one-half years is too long a time.²⁹

Recognizing that the right to reclaim goods is preferential treatment against other creditors, the *Code* provides that successful reclamation will bar other remedies with respect to them.³⁰

In conclusion it may be said that the *Code* has broadened the rights of one who sells and delivers goods on credit, especially where delivery is made just prior to the buyer's insolvency. The *Code* remedies generally parallel those given under the *Sales Act*. The right to withhold delivery except for cash is made more explicit as is the right to a lien on goods still in the seller's possession as security for the entire purchase price due under the contract. The right of stoppage in transitu is extended to all bailees and in the case of a carrier the right is extended by the provision that attornment must take the form of reshipment or as warehouseman. The *Code* affords a new remedy in allowing the seller an automatic right to reclaim goods if the buyer becomes insolvent within ten days of receipt. Allowing reclamation under a presumption of fraud seems inconsistent; however, with bankruptcy legislation and it is therefore questionable whether this provision will stand.

J. David Young

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²⁷ *Matter of Garfinkel*, C.C.A. 2d., 286 F. 374 (1922); *In re Tate-Jones and Co.*, 85 F. Supp. 971 (W.D. Pa. 1949).

²⁸ Art. 2, § 702, sub. 1(b).

²⁹ *Sharpless v. Gummy*, 166 Pa. 99, 30 A. 1127 (1895).

³⁰ Art. 2, § 702, sub. 2 and comment 3.