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Sales - Uniform Commercial Code

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addition, section 2(a) is directed to the protection of primary-line, secondary-line and tertiary-line competition[27] while section 2(b) is confined in scope to primary-line competition—actual competitors of the discriminating seller.[28]

It is clear that the majority opinion discharged the Court's responsibility to effect the legislative intent. Thus, the Robinson-Patman funeral procession signalled in the Fifth Circuit was halted and new life restored to the Act. The Commission's construction adopted by the Supreme Court in this case is the only one warranted by the purpose of the Act. The basic underlying policy of all anti-trust legislation is the preservation of competition. The Court's decision here is consistent with that policy.

Andrew M. Schifino

SALES—Uniform Commercial Code—The Pennsylvania Supreme Court completely ignored the Uniform Commercial Code in a case where the Code was applicable.

C.I.T. Corp. v. Jonnet, 419 Pa. 435, 214 A.2d 620 (1965).

In 1961, the Commercial Appliance Company sold equipment to Miracle Lanes, Inc. under a conditional sales contract.[1] The Commercial Appliance Company then assigned its rights under the contract to the C.I.T. Corporation, which had financed the transaction.

In 1964, Miracle Lanes, Inc. assigned the lease for a cocktail lounge, where the equipment was located, to Penn Hills Center, Inc. The plaintiff, C.I.T. Corporation, through its authorized agent, was informed of and consented to the assignment with full knowledge that the payments would thereafter be made by the assignee, Penn Hills Center, Inc. When the installment payments ceased, the C.I.T. Corporation brought an action in assumpsit against the defendants, Miracle Lanes and Mr. Jonnet. The defendants alleged that through the circumstances surrounding the assignment they were released from further liability on the original contract.

The lower court granted a judgment on the pleadings in favor of the plaintiff. The defendants appealed, contending that the evidence of a subsequent parol agreement was sufficient to raise the issue of modification of the original contract.

27. 49 Stat. 1526, 15 U.S.C. § 13(a) (1936).

28. See, Federal Trade Comm'n v. Sun Oil Co., 371 U.S. 505 (1963).

1. Elmer J. Jonnet, Jr. guaranteed in writing, as a surety, Miracle Lanes' obligations under the contract.

The Pennsylvania Supreme Court, in affirming, stated that a provision of the original contract presented an insurmountable barrier to the defendants. The provision read "no waiver or change in this contract or related note, shall bind such assignee (in this case, the plaintiff) unless in writing signed by one of its officers."[2] The court required the allegation of cancellation of this condition prior to any consideration of the oral modification.

The defendants cited *Kirk v. Brentwood M. H. Inc.*,[3] in which the superior court said "Even where the written contract prohibits a non-written modification, it may be modified by subsequent oral agreement." The supreme court said, however, that the *Kirk* case must be read in connection with *Wagner v. Graziano Construction Co.*,[4] which required a proper allegation of waiver of the contractual provision prior to considering the effect of the parol agreement. The court concluded, therefore, that "the mere statement that the lease had been assigned to another and that the plaintiff's agent was apprised of this and payments had been made by the assignee did not indicate any waiver of the contractual provision in controversy."[5]

This explanation, however, is marred by dictum in the *Wagner* case. In that case Justice Musmanno said "even where the contract specifically states that no non-written modification will be recognized, the parties may yet alter their agreement by parol negotiation."[6] The fact that there was a waiver in the *Wagner* case does not effectively explain this statement and when this language is considered in connection with the decision in *C.I.T. Corp. v. Jonnet*, which never mentions the dictum in the *Wagner* case, the net result is confusion. It is indeed unfortunate that the court created confusion instead of removing some of that which already surrounds the Uniform Commercial Code.

The *C.I.T.* case presented an excellent opportunity for the court to interpret section 2-209 of the Uniform Commercial Code. This section was brought to the court's attention by the appellees[7] but, without explanation, the Supreme Court of Pennsylvania apparently ignored this Pennsylvania statute which was clearly applicable. Through its applicaiton the court would necessarily have interpreted it. A reading of the statute cleary demonstrates its need for explanation. Section 2-209(2) provides that "a signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded,

2. C.I.T. Corp. v. Jonnet, 419 Pa. 435, 438, 214 A.2d 620, 622 (1965).
3. 191 Pa. Super. 488, 492, 159 A.2d 48, 50 (1960).
4. 390 Pa. 445, 136 A.2d 82 (1957).
5. C.I.T. Corp. v. Jonnet, *supra* note 2, at 439, 214 A.2d at 622.
6. Wagner v. Graziano Construction Co., *supra* note 4, at 448, 136 A.2d at 84.
7. See, Brief for Appellee.

. . ."[8] while section 2-209(4) states "although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) [statute of frauds] it can operate as a waiver."[9] Dean Hawkland has attempted to explain the effect of section (4) upon section (2), and in discussing section (4) he states:

> The key term of this provision namely, "waiver," is not defined by the U.C.C. As used in subsection 2-209(5), however, it seems equivalent to estoppel. If 'waiver' means "estoppel" as it is used in section 2-209, the no-modification-unless-in-writing clause would be safe in all cases except those in which the party with the protected right had given it up, and the other party had changed his position in reliance thereon.[10]

Dean Hawkland then uses section 1-107[11] as support for stating that "an effective waiver . . . must be either written or supported by consideration."[12] Others, however, do not interpret section 1-107 as justifying this statement.[13]

This discussion merely demonstrates the problems that only judicial construction can solve. Justice Musmanno could have used the *Wagner* case, although not a Code case, as a vehicle to discuss, analogously, the effect of section 2-209. This action would have been commendable, for the application of a previously interpreted section, then, would have facilitated the *C.I.T.* decision. Having declined to discuss the Code in *Wagner,* however, Justice Musmanno was presented with an opportunity to apply the Code directly in the *C.I.T.* case. *C.I.T.* was decided without mention of the Code. It is unfortunate that a case which could have removed some confusion left in its wake more than it originally found.

Frank A. Mysliwiec

8. PA. STAT. ANN. tit. 12A, § 2-209(2) (Supp. 1964).

9. PA. STAT. ANN. tit. 12A, § 2-209(4) (Supp. 1964).

10. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 162 (1964).

11. § 1-107 Waiver or Renunciation of Claim or Right After Breach

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party. PA. STAT. ANN. tit. 12A, § 1-107 (Supp. 1964).

This section has never been judicially interpreted.

12. *Op. cit. supra* note 10.

13. N.Y.L. REV. COMM. REP. ON U.C.C. 647 (1955).