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Sales--Notice of Filing Under Uniform Commercial Code

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supra, represents the better view. 1A BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE ¶ 370 (1960).

Second, where the nonresident defendant has already made a motion, but before his answer, the resident defendant is dismissed, it seems that the nonresident defendant should be able to challenge venue by either motion or answer. A waiver of defenses only occurs if the defendant fails to raise a defense "then available" to him. W. VA. R.C.P. 12(g) & (h). For this reason it would appear that the nonresident defendant would not waive any defense not available to him at the time he made his motion. In *Frank v. Brownell*, 149 F. Supp. 928 (D.D.C. 1957), defendant's failure to object to venue was not a waiver where the complaint was insufficient to put the defendant on notice of an issue upon which an objection to venue could be made.

In the third and fourth situations which occur after the answer and either before or during the trial, the basic question is how soon the nonresident defendant must raise the objection to venue after the dismissal of the resident defendant before the right to object is waived. In the light of the *Harley* case, *supra*, in which waiver occurred when the nonresident defendant filed an additional pleading, it would appear that any affirmative action by the nonresident defendant, other than an objection to venue, might constitute a waiver of the right to object to venue. This would indicate that an objection to venue should be made immediately after the dismissal of the resident defendant regardless of the stage of the proceedings and before any other action is taken.

Frank Thomas Graff, Jr.

Sales—Notice Filing Under Uniform Commercial Code

D loaned money to A, a restaurateur, who by a security agreement, conveyed the contents of his restaurant and all after-acquired property to D, who filed a financing statement in accordance with the Uniform Commercial Code. P then entered into a conditional sale contract with A for the sale of a cash register, delivered the chattel to A, but failed to file a financing statement within the ten-day grace period specified by the Uniform Commercial Code. A subsequently defaulted on both obligations. D sold the cash register. P brought an action of tort for conversion. The trial court

entered judgment for *P*. The Appellate Division affirmed on the omission of reference to after-acquired property in the *D*'s financing statement. *Held*, reversed. The requirements of notice filing are met without a detailed disclosure of the security agreement. *National Cash Register Co. v. Firestone & Co.*, 191 N.E.2d 471 (Mass. 1963).

Had this case been litigated in West Virginia under present law, the result probably would have been the same. An unrecorded conditional sale contract is no protection from a prior creditor holding a chattel mortgage containing an after-acquired property clause. W. VA. CODE ch. 40, art. 3, § 5 (Michie 1961); *Triumph Elec. Co. v. Empire Furniture Co.*, 70 W. Va. 164, 73 S.E. 325 (1911).

West Virginia is one of twenty-eight states to have adopted the Uniform Commercial Code. It has been enacted as Chapter forty-six of the West Virginia Code and becomes effective July 1, 1964.

One of the major changes in West Virginia law occasioned by the adoption of the Uniform Commercial Code is the system of recordation. Presently West Virginia operates under a detailed filing system which demands a sometimes painfully complete description of chattel, realty or financial agreements. The system is the source of much litigation. With the number of "credit purchases" increasing each day, the physical bulk of these documents could be a problem in the foreseeable future.

As of July 1, 1964, the theory that a recorded security agreement provides notice to the world of the creditor's rights, *Banks-Miller Supply Co. v. Bank of Marlinton*, 106 W. Va. 583, 146 S.E. 521 (1929), will be supplemented by the system of "notice filing." Notice filing is basically much simpler than our present system. It does not purport to provide notice of anything more than an outstanding security interest. Once filed, a financing statement provides constructive notice to the world that the creditor may have a security interest in the collateral described. UNIFORM COMMERCIAL CODE § 9-402, Comment 2.

Under present law, the responsibility is upon the creditor to record the contract entered into with the debtor, and, as there is no statutory provision for the description of the security, the creditor

must be as precise as possible. Annotation to W. VA. CODE ch. 40, art. 3, § 6 (Michie 1961).

Under the Uniform Commercial Code, one may file the contract or a financing statement. The financing statement need only contain the address of the secured party from whom information concerning the security interest can be obtained, the mailing address of the debtor, the signatures of the parties, and a statement indicating the types or items of collateral. W. VA. CODE ch. 46, art. 9, § 402(1) (Michie Supp. 1963). A statutory form is provided. W. VA. CODE ch. 46, art. 9, § 402(3) (Michie Supp. 1963). The actual filing takes place in the office of the clerk of the county court, or in the secretary of state's office, and in some instances both. W. VA. CODE ch. 46, art. 9, § 401 (Michie Supp. 1963).

If the intent of the American Law Institute be followed, the present strict construction of descriptions, *Sturgill v. Lovell Lumber Co.*, 136 W. Va. 259, 265-66, 67 S.E.2d 321 (1951), will be abolished. UNIFORM COMMERCIAL CODE § 9-110, Comment. Under the new provisions, ". . . any description of personal property or real estate is sufficient whether or not it is specific, if it reasonably identifies what is described." W. VA. CODE ch. 46, art. 9, § 110 (Michie Supp. 1963). The Institute's intent has been recognized in litigation involving the Uniform Trust Receipts Act. A financing statement describing the security as "television appliances and other similar equipment" was held to include refrigerators, washers, a dryer, and a freezer. *In the Matter of AA Appliance & TV Center, Inc.*, 170 F. Supp. 103 (E.D. Wis. 1959). A federal case, *In the Matter of Drane*, 202 F. Supp. 221 (W.D. Ky. 1962), decided under the Uniform Commercial Code, held: "A description is sufficient if the facts shown will enable a third party, assisted by external evidence to identify the property."

P, in the principal case, would have been protected had he filed a financing statement perfecting his purchase money security interest prior to the delivery of the chattel, or within ten days thereafter. W. VA. CODE ch. 46, art. 9, § 301(2) (Michie Supp. 1963). A filing within the ten-day grace period will also cut off intervening security interests of bulk purchasers and lien creditors. UNIFORM COMMERCIAL CODE § 9-301, Comment 5.

Here, then, *P* held a "protected" security interest during the ten-day grace period only, at the end of which his interest became

subordinate to the *D*'s interest arising from the after-acquired property clause. The failure of *D*'s financing statement to include the after-acquired property clause was held immaterial as the financing statement gave notice only that there might be a security interest. Had *D* had actual notice of *P*'s interest, the after-acquired property clause would have been void as to *P*'s interest. W. VA. CODE ch. 46, art 9, § 301(1)(b) (Michie Supp. 1963).

The notice filing system is a simplification of protective recording statutes brought about by increased economic endeavor in the field of credit purchases. Where formerly the security instrument needed to be recorded in its entirety, now mere notice of its existence on a one-page financing statement will suffice. The requirements of the financing statement are typical of the simplicity contemplated by the Uniform Commercial Code.

Charles Marion Love III

Wills—Devise of Specific Portion of Property Held in Cotenancy

D's father attempted by codicil to devise to *D* a specific portion or parcel of a tract held as cotenants by *D*'s father and mother. The residue of his estate was to go to his eight children, including *D*. The surviving cotenant failed for seventeen years to object to the purported devise, and at her death her one-half undivided interest in the tract passed to the seven surviving children. To *P*'s action for sale and distribution *D* asserted the purported devise from her father as a defense. The trial court ruled that *D* took her father's one-half undivided interest in the portion purportedly devised by the codicil. *Held*, reversed. The owner of an undivided interest in real property does not have the power to devise a particular portion of the tract or his interest in that portion. *Mauzy v. Nelson*, 131 S.E.2d 389 (W. Va. 1963).

In the principal case the court declared that the testator's purported devise to *D* "is void and can be given no effect." The rationale was that the mother's interest would have been prejudiced had the codicil been effective. The testator, having attempted to devise more than he owned, succeeded in devising nothing.