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**Uniform Commercial Code - Secured Transactions - Adequacy of Financing Statement To Cover After-acquired Property - National Cash Register Company v. Firestone & Company, Inc., 191 N.E. 2d 471 (Mass. 1963)**

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where he says: "In my opinion, the issue of validity here is one of law, or, at least, a mixed question of law and fact."<sup>24</sup> An issue was raised as to whether it amounted to invention to combine certain old elements. In analyzing this question the court said further: "The rule of law is clear and hence there is no need of citing the cases. A comparison of the prior art patents and the plaintiffs' patent gives the answer."<sup>25</sup>

The Up-Right case is the only instance where it has been found that a court has clearly stated that the question of invention is a mixed question of law and fact. The real nature of this question seems never to have been discussed in the court decisions. It has been only recently that a trend seems to be discernible tending towards regarding patentable inventions as a mixed question of law and fact, but as for definitely establishing this, the courts have a long way to go at the present time.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

#### UNIFORM COMMERCIAL CODE—SECURED TRANSACTIONS— ADEQUACY OF FINANCING STATEMENT TO COVER AFTER-ACQUIRED PROPERTY

On November 18, 1960, Firestone & Company, which was in the financing business, loaned Carroll, d/b/a Cozy Kitchen, \$1,911, taking a security agreement covering

. . . the following goods, chattels, and automobiles, namely: The business located at and numbered 570<sup>1</sup> Washington Street, Canton, Mass. Together with all its good-will, fixtures, equipment and merchandise, the fixtures specifically consist of the following: *All contents of the luncheonette including equipment such as: booths and tables, stand and counter (other items irrelevant)* . . . together with all property and articles now, and which may hereafter be, used or mixed with, added or attached to, and/or substituted for any of the foregoing described property.

Firestone filed financing statements with the local town clerk on November 18, and with the Secretary of State on November 22.<sup>2</sup> These contained only the italicized portion of the security agreement and described the debtor as Carroll, d/b/a Cozy Kitchen. Subsequent to this National Cash Register Company entered into a conditional sales contract with Carroll for the sale of a cash register. The cash register was delivered some time between November 10 and November 25. On the latter date, a new conditional sales contract superseding the old was executed and fi-

<sup>1</sup> The official reporter states the address as being 574, whereas it is actually 570.

<sup>2</sup> Massachusetts adopted the system of dual filing under the Uniform Commercial Code, section 9-401 (1c). Illinois did not adopt optional paragraph (c).

nancing statements were filed on December 20 and 21. Carroll defaulted on both transactions, and in December the defendant took possession of the cash register, and sold the same at an auction on January 18, 1961, even though plaintiff had notified him of its asserted right the preceding day. The Supreme Judicial Court of Massachusetts reversed the decisions of both the trial and Appellate Courts, holding that the cash register was after-acquired property with the priority in favor of Firestone. *National Cash Register Company v. Firestone & Co., Inc.*, 191 N.E. 2d 471 (1963).

The conflict between secured and unsecured creditors dates back at least to the days of the Roman Empire.<sup>3</sup> Traditionally the approach of the courts to the instant problem of settling conflicting priority interests was based on the concept of where title lay. Since the cash register was conditionally sold, title would have remained in the seller, and the chattel mortgagor's lien, which could only fall on the debtor's interest, would fail.<sup>4</sup> Even though Firestone included an after-acquired property clause in the mortgage, this in any event would only give rise to an equitable lien, and could never be used to preclude a bona fide legal interest of an intervening third party.<sup>5</sup>

<sup>3</sup> Radin, *Fraudulent Conveyances at Roman Law*, 18 VA. L. REV. 109 (1931).

<sup>4</sup> *Hodes v. Mooney*, 8 N.J. Misc. 851, 9 N.J. Misc. 48, 152 Atl. 205 (1930). In this case, the factual situation was practically identical to the case in question. The court stated: "It will be noted that the mortgage preceded the conditional sale and that the provision of the mortgage with reference to the future covered only 'after-acquired property'. Upon reasoning as well as authority, it seems clear that the property was never acquired by the mortgagor and, therefore, the lien of the mortgage never attached to such property. Acquisition of title was a condition precedent to its becoming subject to the mortgage. . . . The rights of a purchaser at a sale under a chattel mortgage cannot be superior to those of the mortgagee." *Accord*, *Hoe v. Rex Mfg. Co.*, 205 Mass. 214, 91 N.E. 154 (1910); *General Motors Acceptance Corp. v. Elder*, 24 Ill. App. 2d 55, 163 N.E. 2d 721 (1960). In Illinois the conditional sale was not recognized until *Sherer-Gillet Co. v. J. W. Long*, 318 Ill. 432, 149 N.E. 225 (1925), when in accordance with section 20 of the Uniform Sales Act (ILL. REV. STAT. ch. 121½, 1953), adopted ten years earlier, the secret lien was allowed. Paradoxical as it may seem, no filing was required for perfection, notwithstanding the courts' traditional abhorrence of such liens. After this decision, the title theory was applied as in other jurisdictions. For a decision under the Uniform Conditional Sales Act where filing was required, see *Central Chandelier Co. v. Irving Trust Co.*, 259 N.Y. 343, 182 N.E. 10 (1932). This act was not adopted in either Illinois or Massachusetts. See also McGraw, *Chattel Mortgages & Conditional Sales*, 42 ILL. B.J. 738 (1954).

<sup>5</sup> At early common law property to be created or acquired in the future could not be transferred or encumbered prior to its creation or acquisition. Massachusetts adopted the rule that an after-acquired property clause was valid as between the immediate parties. It created an equitable lien which a court of chancery would recognize and enforce, unless prior liens had attached. If an interest was acquired in the property by lien or purchase prior to the taking of possession by the mortgagee, the mortgagee's claim was inferior. *Cohen & Gerber, The After-Acquired Property Clause*, 87 U. PA. L. REV. 635 (1939). *Accord*, *Hunt v. Bullock*, 23 Ill. 258 (1860); *In re Danville Hotel Co.*, 33 F.2d 162 (E.D. Ill. 1929), 38 F.2d 10 (7th Cir. 1930).

Recently Massachusetts adopted the Uniform Commercial Code,<sup>6</sup> as have 28 other states, including Illinois.<sup>7</sup> The Code attempts to set up one comprehensive scheme for the regulation of security interests in personal property and fixtures. It merges the separate streams of chattel security law which had heretofore governed such security devices as the chattel mortgage and the conditional sale, and substitutes one single agreement in their stead, the security agreement.<sup>8</sup> The Code restates and supersedes not only existing legislation, but also case law, so as to apply only one set of rules.<sup>9</sup>

The problem in this case arises because plaintiff did not take advantage of the opportunity afforded it to perfect its purchase money security interest<sup>10</sup> and thereby gain priority over the defendant. The Code provides a statutory basis for determining priorities among conflicting security interests in the same collateral. To perfect a security interest a financing statement must be filed.<sup>11</sup> If more than one security interest is perfected by filing, the general rule is that the first to file prevails, regardless of which interest attached first, because the filing may be made before a security interest attaches.<sup>12</sup> This general result is inevitable under a notice filing system.

The major exception to this is the purchase money security interest in collateral other than inventory. This interest has priority over other conflicting interests in the same collateral, if it is perfected when the debtor received the property or within 10 days thereafter.<sup>13</sup> Since the plaintiff did not perfect its interest until more than ten days after delivery, it must be treated as any other secured party, falling under the priorities estab-

<sup>6</sup> MASS. GEN. LAWS ch. 106, §§ 1-101 *et seq.* (1957). (Hereafter referred to as U.C.C.).

<sup>7</sup> ILL. REV. STAT. ch. 26, §§ 1-101 *et seq.* (1961).

<sup>8</sup> Section 9-105 (1) (h) reads: "Security Agreement' means an agreement which creates or provides for a security interest." Section 1-201 (37), states: "Security Interest' means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 2-401) is limited in effect to a reservation of a 'security interest.'"

See also U.C.C. § 9-105, comment 1; U.C.C. § 9-202 (title to collateral immaterial).

<sup>9</sup> U.C.C. § 9-101 and comments.

<sup>10</sup> U.C.C. section 9-107 states, "A security interest is a 'purchase money security interest' to the extent that it is (a) taken or retained by the seller of the collateral to secure all or part of its price . . ."

<sup>11</sup> U.C.C. section 9-302 states, "A financing statement must be filed to perfect all security interests except the following:" (exceptions immaterial).

<sup>12</sup> U.C.C. § 9-204.

<sup>13</sup> U.C.C. § 9-312 (4). The rationale behind favoring the purchase money security interest is that the creditor is increasing the value of the estate rather than decreasing it.

lished by section 9-312, subsection 5 (a).<sup>14</sup> The court, therefore, had to determine whether defendant's earlier security interest effectively covered the cash register.

The court rejected the plaintiff's contention that Firestone never obtained a security interest in the cash register, because there was no intent to grant such an interest for, in the first place, Carroll had already purchased the cash register some five months earlier from plaintiff and delivery was to be made momentarily. Secondly, the cash register could be repossessed within a 21-month period in case of default, and finally, on its face, the list of collateral indicated that the loan of \$1,911 was well secured. The court stated that the intention of the parties to cover the after-acquired equipment in question is determined by the language of the security agreement.<sup>15</sup> It felt that the agreement in question was broad enough to include the cash register for it covered "all contents of the luncheonette including equipment such as: . . ." Contrary to plaintiff's idea, this does not mean "equipment, to wit," but covers all contents of the luncheonette,<sup>16</sup> because the agreement later adds the provision ". . . all property and articles now, and which may hereafter be, used or mixed with, added or attached to, and/or substituted for, any of the foregoing property." Section 9-204 subsection 3 as relevant here states that, ". . . a security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement." The architects of the Code frankly admit that they aimed to abolish all the common law prohibitions against the creation of liens in after-acquired property.<sup>17</sup> All that is requisite for the enforcement of this security interest is that it

<sup>14</sup> "In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section, priority between conflicting security interests in the same collateral shall be determined as follows: (a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under Section 9-204 (1) and whether it attached before or after filing. . . ." See *Thompson v. O. M. Scott Credit Corp.*, 10 Chest. 405, 28 Pa. D. & Co. 2d 85 (1962).

<sup>15</sup> U.C.C. section 9-201 in part provides: "Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. . . ."

<sup>16</sup> In the case of *Erwin v. Steele*, 228 S.W. 2d 882 (Tex. Civ. App. 1950), the phrase "such as" was interpreted to mean alike, similar to or of the like kind.

<sup>17</sup> See U.C.C. § 9-204, comment 3, subsections (1) and (3) when read together make it very clear that a security interest arising by virtue of the after-acquired property clause has equal status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement. The security interest in after-acquired property is not merely an "equitable interest" as it was in pre-code law but is a valid "legal" interest and no further action by the secured party, such as by taking a supplemental agreement covering the new collateral is required. See *Erb v. Stoner*, 56 LANC. REV. 434, 19 Pa. D. & C. 2d 25 (1959). See also Raphael, *The Status of the Unsecured Creditor in the Modern Law of Secured Transactions*, 2 B.C. Ind. & Com. L.R. 303 (Spring 1961).

contain a description of the collateral. To be sufficient the description must reasonably identify that collateral.<sup>18</sup>

In holding that the financing statement embraced the cash register, the Court, in this case of first impression, gave effect to the liberal requirements for creating a security interest in after-acquired property by the mere inclusion of a general description of the type or types of property, without specifically referring to when the property is to be acquired by the debtor. The Court felt that since the framers of the Code adopted the system of notice filing which was used in the Uniform Trust Receipts Act,<sup>19</sup> they would not restrict that intention; so that the financing statement did not have to refer to the after-acquired property clause in the security agreement. Under the Uniform Trust Receipts Act the entruster publicly filed a statement to the effect that he was engaged or expected to engage in financing under a trust receipt transaction. Section 13, subsection 1 (c) required only that there should be a description of the kind or kinds of goods covered or to be covered by such financing.

The Uniform Trust Receipts Act was the first major deviation from the chattel mortgage type of filing. In construction of the provisions of this act, with respect to describing collateral in financing statements, perhaps the leading case is *In re A. A. Appliance & T.V. Center, Inc.*, where the clause "Television, Appliances, and Other Similar Equipment" was interpreted to include certain refrigerators, ranges, washers, a dryer and a freezer. The court stated,

Certainly it cannot be successfully argued that the parties to such agreements are required by 241.43 (1) (c) to furnish a more detailed description of the kind or kinds of goods they are dealing in than such broad descriptive terms as "coffee, silk (or) automobiles" which the statute prescribes as constituting a sufficient description for notice to creditors. It is likewise abundantly clear that it is not the statutory purpose to require the filing of a statement that would supply, without further inquiry, all the information that a prospective creditor would need to know. . .

Rather than have to resort to exercises in semantics in each case, it seems to us that the intent of the act in respect of notice is met if the descriptive words used would inform an experienced and sophisticated creditor that goods in the possession of the trustee could not be relied on and that he should investigate further.<sup>20</sup>

<sup>18</sup> U.C.C. section 9-203 (1) (b) states, "[A] security interest is not enforceable against the debtor or third parties unless . . . the debtor has signed a security agreement which contains a description of the collateral. . . ." U.C.C. section 9-110 provides: "For the purposes 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." *E.g.*, *Nat'l-Dime Bank of Shamokin v. Cleveland Bros. Equip. Co.*, 74 Dauph. 194, 20 Pa. D. & C. 2d 511 (1959).

<sup>19</sup> U.C.C. § 9-402 (1) and comment 2.

<sup>20</sup> 170 F. Supp. 103, 106 (E.D. Wis. 1959), *aff'd* 271 F. 2d 800 (7th Cir. 1959).

Notice filing under section 9-402 does not require a specific reference in the financing statement to an after-acquired property clause. All that is required is found in subsection 1, which reads,

A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. . . ."

The formalities of filing under pre-code law are reduced to a minimum. Gone are the technical requirements of acknowledgement, accompanying affidavits, and indispensable special provisions. The security agreement itself does not have to be filed; all that is necessary is a simple notice indicating that the secured party might have (now or in the future) a security interest in the collateral described. Further inquiries will have to be made to determine exactly what the transaction involves.<sup>21</sup> In the case of *In re Drane*,<sup>22</sup> where a description read, "1-2pc. living room suite, wine; 1-5 pc. chrome dinette set, yellow; 1-3 pc. panel bedroom suite, lime oak, matt. & spgs.",<sup>23</sup> the Court even though it did not like abbreviations, held that the description was sufficient. In essence, if one really wanted to know what was included he could go to the debtor directly, since his address was given. There is also a statutory method of obtaining such information under the Code.<sup>24</sup>

No case has specifically held that a reference to property acquired after the filing of a financing statement is requisite, but there are several authorities which support this view.<sup>25</sup> In *Girard Trust Corn Exchange Bank v. Warren Leply Ford, Inc.*,<sup>26</sup> the Court stated,

The receivers state in their brief that the requirement of description of collateral in the financing statement is not as strict as the requirement of description

<sup>21</sup> See U.C.C. § 9-402 and comments; *Symposium on U.C.C.*, 53 Nw. U.L. Rev. 315 (1958).

<sup>22</sup> 202 F. Supp. 221 (W. D. Ky. 1962).

<sup>23</sup> *Id.* at 222.

<sup>24</sup> U.C.C. § 9-208. Plaintiff contended that this section was not sufficient to afford an adequate appraisal of the situation, but the court seems to feel that any change should be left to the legislature.

<sup>25</sup> See *Howarth v. Universal C.I.T. Credit Corp.*, 203 F. Supp. 279 (W.D. Pa. 1962), where even though the financing statement included the phrase "now owned or which may hereafter be acquired," the court did not rely on this clause to decide that the after-acquired property in question was included. This case, however, did involve inventory. The commentators on the Code seem to assume that there is no need to make specific references to property acquired after the filing of a financing statement in such statements. See e.g., Coogan & Bok, *The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture*, 69 YALE L.J. 203 (1959).

<sup>26</sup> 12 Pa. D. & C. 2d 351 (1957), 13 Pa. D. & C. 2d 119 (1958).

in the security agreement and admit that the financing statement must contain only a statement indicating the types of property covered: Code, section 9-402 (1). An examination of the financing statement<sup>27</sup>. . . shows that it meets this requirement.<sup>28</sup>

Notice filing separates the functions of the underlying security agreement from those of the public notice. Each serves a separate and distinct purpose, and the requirements for them are just as separate and distinct. The court does not actually state that the provisions of section 9-110 are not applicable as to the sufficiency of a description in a financing statement, but it evidently appears that they feel this way, since they do not apply the standards set by that section.<sup>29</sup>

Several other arguments made on behalf of the plaintiff were also rejected by the court. It was held that equipment was intended to be covered under this system of notice filing. "Goods are . . . 'equipment' if they are used or bought for use primarily in business . . . or if the goods are not included in definitions of inventory, farm products or consumer goods."<sup>30</sup> The comment to section 9-402 (5) states, "Notice filing has proved to be of great use in financing transactions involving inventory, accounts and chattel paper, since it obviates the necessity of refileing on each of a series of transactions in a continuing arrangement where the collateral changes from day to day. Where other types of collateral are involved, the alternative procedure of filing a signed copy of the security agreement may prove to be the simplest solution." This section only suggests that in some instances it is possible to file the security agreement, but this alternative method is not made an essential. There is no other part of the Code which would tend to limit its application so as to exclude equipment from its

<sup>27</sup> The statement read: "This financing statement covers the following types (or items) of property: (list) motor vehicles, tractors, tractors (sic) and their equipment, appurtenances, appliances, accessories and replacement parts, financed by Girard Trust Corn Exchange Bank under its Wholesale Credit Plan."

<sup>28</sup> In this case, however, the court did hold that other automobiles financed under individual installment sales contracts were not covered by the financing statement. See *Nat'l-Dime Bank of Shamokin v. Cleveland Bros. Equip. Co.*, 74 Dauph. 194, 20 Pa. D. & C. 2d 511 (1959); *in re Drane*, 202 F. Supp. 221 (W. D. Ky. 1962).

<sup>29</sup> The Massachusetts Commissioners on Uniform State Laws in their brief as *Amici Curiae* felt that the provisions of section 9-110 concerning the sufficiency of description of property were not applicable to a financing statement which indicated the "type" of collateral covered, and that section 9-402 (1) and (3) were the only sections necessary in this situation. The only time section 9-110 was applicable was when a description of real estate was required. However, in *Industrial Packaging Products Co. v. Fort Pitt Packaging Int'l, Inc.*, 399 Pa. 643, 161 A. 2d 19 (1960), the standards of section 9-110 were applied. The commissioners felt that this was an oversight on the part of the court, since the differences between these standards were immaterial on the facts of that case.

<sup>30</sup> U.C.C. § 9-109 (2).



scope, and in view of the broad policies as stated, to cover all purposes and not just some, this unexpressed distinction cannot be made.

After dispensing with the contention that a financing statement without reference to an after-acquired property clause is seriously misleading, the Court went on to hold that the description of the debtor in the financing statement was sufficient under section 9-402 (5). The debtor was described as "Carroll, Edmund d/b/a Cozy Kitchen 570 Washington Street, Canton, Mass." whereas, the proper spelling was Kozy. This at most, said the Court, was a minor error and not seriously misleading. The financing statement was correctly filed under "C" as per the debtor's name. The purpose of the above mentioned section was to discourage the fanatical and impossibly refined reading, heretofore required by Statutes.<sup>31</sup>

In conclusion, it can be noted that this Court and probably future Courts will give effect to the broad purposes of the Code as stated in section 1-102 and Comments thereto. In view of these broad purposes there will not be a restrictive construction of its provisions, even though certain commercial interests will be favored. In reference to the case in point, the attorney for appellee, plaintiff below, has said,

It seems to me that the Massachusetts Supreme Judicial Court had an opportunity in this case to relieve, in part, the charge that the Code was written for the benefit of the bankers. Indeed, one critic has referred to it as the "Bankers Relief Act". Instead, the Court preferred to accept the position of the Massachusetts Uniform Commissioners, thereby placing an added burden upon conditional sellers and the like who already operate at a disadvantage under the Code. It seems to me that had the Court decided the case in favor of National Cash Register Company it would have nudged the Code in a direction of more equitable adjustment of respective rights of various competing secured parties.

The importance of the decision in Massachusetts, alone, may be judged by the fact that many of the major banks and financial institutions had on record financing statements which made absolutely no reference to after-acquired property. Quite literally millions of dollars of financing would have been affected if National Cash Register had won, and many bankers would have arisen the next morning to find their large loans not completely secured. It is for this reason that, I believe, the Uniform Commissioners filed their brief after oral arguments had been made to the Court, the first time the Court clerk could recollect such a procedure being permitted.<sup>32</sup>

<sup>31</sup> U.C.C. § 9-402 (5) and comment 5. The standards as applied in the case of *General Motors Acceptance Corporation v. Haley*, 329 Mass. 559, 109 N.E. 2d 143 (1952), are specifically rejected. This case held invalid a filing where the trustee was identified as "E. R. Millen Co.," instead of "E. R. Millen Co., Inc." However, it appears that a different decision would have resulted had the financing statement been misfiled. In this instance, although a name was misspelled, the statement was properly indexed under "C" for Carroll. Dictum: "There is but one correct name . . . of the trustee. . . ." *In re A. A. Appliance & T.V. Center Inc.*, 170 F. Supp. 103 (E. D. Wis. 1959), *aff'd* 271 F. 2d 800 (7th Cir. 1959).

<sup>32</sup> Personal correspondence dated September 17, 1963, from A. L. Lefkowitz, attorney for Plaintiff.

The major significance of this decision is the liberality given to the sufficiency of a financing statement. A phrase such as, "All contents including equipment," is enough to put one on notice to ascertain what those contents consist of. Notice filing is not intended to provide a searcher of the records with exact information. Such a searcher has no right to assume anything, and is required to make inquiry beyond the public record. There are no technical rules requisite, beside those which are simply enumerated in the Code.<sup>38</sup>

<sup>38</sup> It should be noted that the court does state in its opinion that this result was not a harsh one to plaintiff, considering the simple and sure procedure for completely protecting its purchase money security interest under section 9-312 (4).