

the depositor to countermand his order to pay from the account. In short, the funds represented by the item no longer belong to the depositor.

This case indicates the one point in time short of final payment when those rights are also terminated: a decision by the bank to pay the item accompanied by some action indicating that decision. This occurred two days before service of the trustee writ (garnishment), even though final payment itself did not occur until after service of the writ when the process of posting was in fact completed. As against the *owner* of the item, however, the bank could have changed its mind at any time before final payment without liability. Sections 4-303 and 3-418.

S.L.P.

ARTICLE 9: SECURED TRANSACTIONS

SECTION 9-204. When Security Interest Attaches; After-Acquired Property; Future Advances

CAIN V. COUNTRY CLUB DELICATESSEN
25 Conn. Sup. 327, 203 A.2d 441 (1964)
Annotated under Section 9-401, *infra*.

SECTION 9-301. Persons Who Take Priority Over Unperfected Security Interests: "Lien Creditor"

CAIN V. COUNTRY CLUB DELICATESSEN
25 Conn. Sup. 327, 203 A.2d 441 (1964)
Annotated under Section 9-401, *infra*.

SECTION 9-302. When Filing Is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of This Article Do Not Apply

CAIN V. COUNTRY CLUB DELICATESSEN
25 Conn. Sup. 327, 203 A.2d 441 (1964)
Annotated under Section 9-401, *infra*.

SECTION 9-312. Priorities Among Conflicting Security Interests in the Same Collateral

CAIN V. COUNTRY CLUB DELICATESSEN
25 Conn. Sup. 327, 203 A.2d 441 (1964)
Annotated under Section 9-401, *infra*.

SECTION 9-313. Priority of Security Interests in Fixtures

CAIN V. COUNTRY CLUB DELICATESSEN
25 Conn. Sup. 327, 203 A.2d 441 (1964)
Annotated under Section 9-401, *infra*.

**SECTION 9-401. Place of Filing; Erroneous Filing;
Removal of Collateral**

CAIN V. COUNTRY CLUB DELICATESSEN

25 Conn. Sup. 327, 203 A.2d 441 (1964)

The defendant opened its restaurant business in July, 1962, using kitchen and display equipment obtained from Hewitt Engineering, Inc.

On August 16, the defendant took a loan from First Hartford and gave in return a promissory note and security interest in all of its present and after-acquired personal property and fixtures. The day before, First Hartford had filed in accordance with Section 9-401 a financing statement with the local town clerk where filing was required in order to perfect security interests in fixtures, and a duplicate with the secretary of state where filing was required to perfect security interests in personal property.

On August 30, the defendant and Hewitt executed a conditional sales contract for the Hewitt property which the defendant had been using. The contract provided that "the equipment shall remain personal property regardless of any affixation to . . . realty. . . ." A financing statement which purported to give Hewitt a security interest in all of the defendant's then present property was filed the same day with just the local town clerk.

After less than four months, the defendant went into receivership. In this action the receiver sought a determination of priorities between First Hartford and the assignee of Hewitt, General Electric.

The court first distinguished between the Hewitt and the non-Hewitt goods. Despite the all-embracing financing statement which Hewitt had filed, the court found that the security agreement embraced only Hewitt goods. There being no security agreement with respect to non-Hewitt goods, no security interest could attach under Section 9-204(1). First Hartford, on the other hand, did have a security interest in the non-Hewitt goods by virtue of its comprehensive agreement with the defendant; therefore, its priority to those goods was assured.

By alternate reasoning which assumed *arguendo* that General Electric did have a security interest in non-Hewitt goods, the court confirmed First Hartford's priority. In regard to non-Hewitt personal property, First Hartford had perfected its security interest under Section 9-302 by filing with the secretary of state. Hewitt had not perfected by filing there, thus First Hartford took priority under Sections 9-312(5)(a) and 9-301(1)(a). In regard to non-Hewitt fixtures, First Hartford took priority under the same sections by filing first with the town clerk.

With regard to the Hewitt goods, the court first noted that as of August 15 when First Hartford filed or August 16 when the security agreement was executed, the defendant-debtor did not have "rights in the collateral." Therefore, First Hartford's security interest could not attach at that time. To hold otherwise, the court said, "could result in goods, such as equipment, becoming subject to the security interest . . . although the debtor's possession were only that of a mere bailee, apart from any purchase or contract to buy."

The court went on to say, however, that after the Hewitt goods were sold to the defendant on August 30, the defendant acquired rights in the goods, and that at this time, under Section 9-204(1), the goods became subject to the after-acquired property clause in First Hartford's security agreement. The court then held that, with respect to the Hewitt goods which had *not* been affixed to realty when First Hartford's security interest attached, First Hartford had priority; it had filed with the secretary of state whereas Hewitt and General Electric had not. Moreover, with regard to the Hewitt goods which *had* been affixed, First Hartford also took priority. Since Connecticut law was controlling on the definition of fixtures under Section 9-313(1), and since Hewitt and the defendant were competent under Connecticut case law to determine as between themselves the character of the Hewitt property, the court found in accordance with their conditional sales contract that the Hewitt goods were personal property, even if affixed to realty. Being items of personalty, security interests with respect to them could be perfected only by a filing with the secretary of state. This, however, Hewitt and General Electric failed to do, filing only with the local town clerk. Under Sections 9-312(5)(a) and 9-301(1)(a), the failure of Hewitt or its assignee to file with the secretary of state made their unperfected security interest subordinate to the perfected one of First Hartford.

COMMENT

By refusing to find any "rights" of the defendant-debtor in the Hewitt goods prior to the written contract of sale, the court stimulates curiosity about the business arrangements which allowed the restaurant to use Hewitt's equipment. Of course, a binding contractual intent might have been formed before First Hartford filed on August 15 if Hewitt and the restaurant had agreed on the essentials of their bargain nearly concurrently with the delivery of the equipment. Even a rental arrangement would seem to create at least an equitable contract right in the use of the equipment for the remaining lease term, to which in theory a security interest might attach if and when the right were sold. As the court indicates, however, a bailment in hopes of a sale would create no rights in the bailee. Instead of engaging in a sterile discussion of these possibilities, the court dwelt on the failure of the Hewitt-General Electric combination to file under the Code according to their own definition of the collateral. While the court was probably wrong in determining priorities on this basis, the lesson is clear: it is safer and cheaper for the attorney to suggest redundant filing rather than rely on an artificial definition of the property involved.

The court also recognized that where there is no intent to create a security interest, a financing statement cannot create one. Better practice would use consistent language to describe collateral in the security agreement and the financing statement. To the extent that the Hewitt-General Electric problems arose from lack of coordination or ignorance of the Code, the message of this case and the availability of related model forms should discourage repetition.

S.E.S. II

**SECTION 9-504. Secured Party's Right to Dispose
of Collateral After Default; Effect
of Disposition**

HUDSPETH MOTORS, INC. v. WILKINSON
382 S.W.2d 191 (Ark. 1964)

The defendant dairyman bought a used truck on conditional sale from the plaintiff automobile dealer who allegedly assured him that the truck was in good shape mechanically and used little or no oil. After having paid two installments over a period of five months, the defendant attempted to repudiate the contract by asserting breach of warranty. The plaintiff repossessed the truck, resold it at private sale, and brought the present suit for the balance due. More than a week before the sale, the plaintiff had sent the defendant notice by certified mail, but the defendant, living on a rural mail route, did not pick up the letter until after the sale. The defendant defended on two grounds, lack of knowledge of the sale and breach of warranty. He also counterclaimed for breach of warranty. At trial he testified that on the first day he drove the truck he discovered mechanical difficulties and high oil consumption but that after a test drive the plaintiff's mechanics denied that there was anything wrong with the truck. The defendant had the necessary repairs made by someone else at his own expense and drove the truck daily for more than five months until the engine "blew up." The trial court instructed the jury that if the defendant had no knowledge of the proposed resale before it took place, he was entitled to a verdict. The jury found for the defendant generally.

On appeal, the court found, first, that reasonable notification of resale as required by Section 9-504 had been given in accordance with Section 1-201(26), whether or not the defendant actually came to know of it. Second, the defendant had not effectively exercised his right to reject under Section 2-601, because he had failed to notify the seller of his rejection within a reasonable time as required by Section 2-602. He could have revoked his acceptance under Section 2-608 if his acceptance had been induced by the seller's assurances that the defects would be corrected, but the court found that no assurances had been given. Therefore, on the plaintiff's claim, judgment in favor of the defendant was reversed. Furthermore, on the counterclaim for breach of warranty the plaintiff was entitled to an instructed verdict.

COMMENT

Although its decision may have been wise in ending litigation without resort to another jury trial, the court wrongly limited the buyer's rights with respect to his acceptance of non-conforming goods. In constructing a brief for the defendant, the court ignored the full effect of the buyer's option to accept non-conforming goods, given him by Section 2-601. After acceptance, the buyer is obligated to pay under Section 2-607. But he also keeps the defensive remedies open to him, such as damages for breach under Section 2-714. Although the buyer's complaint to the seller's mechanics did not amount to notice of rejection or revocation of acceptance, it appears to have

been sufficient notice of breach of warranty under Section 2-607 (Official Comment 4) so that breach of warranty damages should have been considered as a possible support of the trial court's judgment for the defendant buyer on his counterclaim.

S.E.S. II

SKEELS v. UNIVERSAL C.I.T. CREDIT CORP.

222 F. Supp. 696 (1963), reversed in part, 335 F.2d 846 (1964)

Annotated under Section 1-203, *supra*.

ARTICLE 10: EFFECTIVE DATE AND REPEALER

SECTION 10-101. Effective Date

MEADOW BROOK NAT'L BANK v. ROGERS

253 N.Y.S.2d 501 (Nassau County Ct. 1964)

Annotated under Section 3-305, *supra*.