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American Nat. Bank of Denver v. Tina Marie Homes, Inc.

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NO. 23817

IN THE SUPREME COURT OF THE STATE OF COLORADO

THE AMERICAN NATIONAL BANK OF DENVER, a National Banking Association, Plaintiff in Error, v. TINA MARIE HOMES, INC., a Colorado corporation, Defendant in Error.	Error to the District Court of the County of Adams State of Colorado HONORABLE OYER G. LEARY Judge

BRIEF OF PLAINTIFF IN ERROR

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INDEX

Page

Page

TABLE OF CASES CITED

Page

Page

OTHER AUTHORITIES

Page

Page

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Plaintiff in Error,	)	
v.	)	
TINA MARIE HOMES, INC., a Colorado corporation,	)	HONORABLE OYER G. LEARY Judge
Defendant in Error.	)	

BRIEF OF PLAINTIFF IN ERROR

PRELIMINARY STATEMENT

This appeal arises from a replevin action initiated by The American National Bank of Denver ("Bank") against Fincham Equipment Co., Inc. ("Fincham") to recover possession of several heavy construction machines. After the Bank had obtained possession of the machines and after default had been entered against Fincham, Tina Marie Homes, Inc. ("Tina Marie Homes") claiming a superior

interest in one of the machines was permitted to intervene in the action. This appeal involves that intervening claim by Tina Marie Homes against the Bank.

In this brief folio references to the record on error are designated in parentheses.

STATEMENT OF THE CASE

Fincham, a Colorado corporation, was a dealer at Commerce City, Colorado in new and used heavy construction machines (74) such as crawler tractors and dozers, cranes, and trenchers (Plaintiff's Exhibits 209, 210). Mr. John M. Fincham was the operator and owner (206) and the corporation is frequently characterized in the record as "his company" (241). Fincham's annual sales volume was approximately three million dollars (813). Since 1959 (497) the Bank provided Fincham with financing secured by new and used machines which Fincham was currently holding for sale, such financing being commonly referred to as "floor planning" (498).

Floor planning under Colorado law was streamlined when the Uniform Commercial Code ("Code") first became effective in our state on July 1, 1966. On that date the Bank filed with the

Secretary of State a financing statement which gave public notice that the Bank was claiming security interests in the "Construction equipment, machines and tractors" which Fincham then held or would later hold for sale (75, Plaintiff's Exhibit 201). A Security Agreement, dated December 5, 1966 (Plaintiff's Exhibit 202), the last of several, was made to give the Bank security interests in Fincham's current and after-acquired inventory of machines. On December 12, 1966, Fincham advised the Bank that it had purchased as part of its inventory one Cleveland Trencher, Serial No. 502287 ("Trencher"), valued at $17,000 to $20,000 (1035), and requested that this machine be included under its floor plan Security Agreement with the Bank (Plaintiff's Exhibit 204). The Bank verified that Fincham had possession of the Trencher (546). Fincham delivered to the Bank a Schedule of Additional Inventory dated December 12, 1966 (Plaintiff's Exhibit 204), listing the Trencher and stating in part:

> ". . . [Fincham] hereby represents, certifies and agrees as follows:
>
> 1. Except for the security interest of Bank, the inventory above described is free from any liens, security interest, encumbrance or other right, title or interest of any other person, firm or corporation."

Consequently, the Bank gave Fincham credit for the Trencher, along with another machine, under the existing Security Agreement and the credit was evidenced by Fincham's promissory note to the Bank dated December 12, 1966 (Plaintiff's Exhibit 203). That promissory note was consolidated with others under a new promissory note dated January 23, 1967, which, like all those consolidated, had reference to the Security Agreement dated December 5, 1966 (547, Plaintiff's Exhibit 205).

When Mr. John M. Fincham's death occurred in March, 1967, his company was in default on its indebtedness to the Bank covered by the Security Agreement dated December 5, 1966. On March 21, 1967, the Bank initiated its replevin action against Fincham and through writs of replevin obtained possession of the machines which Fincham was holding for sale and which were covered by the Bank's Security Agreement with Fincham, including the Trencher (74). On May 29, 1967, judgment for possession of the machines, including the Trencher, was entered in favor of the Bank and against Fincham (45-49). Fincham went into bankruptcy (Plaintiff's Exhibit 213).

After the Bank had taken possession of the Trencher and other machines, Tina Marie Homes gave notice through its motion seeking leave to intervene in the replevin action (26-29) that it was claiming to be the owner of the Trencher.

"Tina Marie Homes, Inc." is the corporate name of an organization owned by Mr. Fred L. Spallone and engaged in construction, home building, commercial building and pipe line work (183-184). "Turnpike Construction" is a trade name used by that organization for its pipe line work (186-187).

For the pipe line portion of its business activities, Tina Marie Homes owns between thirty and forty machines such as bulldozers, backhoes, loaders, trucks, trailers and trenchers (187).

In November, 1966, Tina Marie Homes had decided to sell the Cleveland Trencher involved in this case (204). On November 15, 1966, Tina Marie Homes delivered the Trencher to Fincham (27, 208). It is disputed whether Tina Marie Homes sold the Trencher to Fincham or consigned it with Fincham. It was placed in Fincham's yard (208) where Fincham kept all the other machines it held for sale. Tina Marie Homes did not file a financing statement or otherwise indicate to the public that

it claimed any interest in the Trencher. The Trencher remained in Fincham's possession until replevied by the Bank on March 21, 1967 (74).

During January, 1967, with Fincham's collaboration, Mr. Spallone executed a Retail Installment Sale Contract (Plaintiff's Exhibit 208) giving the appearance that Tina Marie Homes was then agreeing to buy the Trencher from Fincham. The design was to show a sale from Fincham to Tina Marie Homes so that Fincham could assign the retail contract to Ingersoll-Rand Financial Corporation to effect a loan for Tina Marie Homes (218-225). The plan succeeded. Mr. Spallone after executing the Retail Installment Sale Contract received $30,000 (226-227).

As previously detailed, the Bank acquired a security interest in the Trencher after Tina Marie Homes had delivered it to Fincham.

Finding that the "Bank complied with the [Colorado Uniform Commercial] Code as far as perfecting their security interest [in the Trencher]" (1000) the trial court nevertheless concluded that the Bank rather than Tina Marie Homes "would have to pick up the tab . . ." (1032). At the conclusion of a trial without jury held May 31 and June 3, 1968, the trial court entered judgment against the Bank

ordering it to turn over the Trencher and to pay damages for wrongful detention in the amount of $6,300.00 plus costs (89).

The Bank's Motion For New Trial (101-122) was denied by the trial court (124).

SUMMARY OF ARGUMENT

I. THE TRIAL COURT ERRED BY REFUSING TO APPLY COLORADO'S UNIFORM COMMERCIAL CODE.

The underlying purpose of the Code is to state the ground rules for commercial transactions. The rules governing this case appear as the Code's "sale or return" provisions in C.R.S. 1963 § 155-2-326, as amended.

The trial court chose to disregard the Code, relying upon its condemnation of the business methods of the Bank and its own innovative pre-Code interpretations of the transactions among the parties.

II. THE TRIAL COURT ERRED BY REFUSING TO RECOGNIZE THAT THE DELIVERY OF THE TRENCHER BY TINA MARIE HOMES TO FINCHAM IS TO BE DEALT WITH AS A "SALE OR RETURN" TRANSACTION UNDER COLORADO'S UNIFORM COMMERCIAL CODE.

The Code provides that goods either (i) sold to a dealer subject to a right

of return or (ii) consigned with a dealer are to be considered to be on "sale or return." The Code then states that goods on "sale or return" are subject to claims by the dealer's creditors. That is the statutory program which governs the case.

The trial court, apparently without understanding the scope of these "sale or return" provisions, erroneously concluded that delivery of the Trencher to Fincham by Tina Marie Homes was not either type of sale or return transaction.

The evidence shows that the Trencher was sold to Fincham subject to a right of return. That puts this case within the first type of sale or return transaction under the Code. There being no exceptions allowed by the Code with respect to this type of sale or return transaction, the Trencher automatically became subject to the claims of Fincham's creditors, including the Bank.

The Trencher was at the very least consigned with Fincham. Under the Code this constitutes the second type of sale or return transaction and here the Code does allow exceptions as ways to overcome the operation of its automatic creditor priority rule. If Tina Marie Homes had invoked one of those exceptions by merely filing a

financing statement with the Secretary of State revealing its alleged consignment, the Bank would have had notice and there would have been no loss and no lawsuit. But having failed to make such filing, Tina Marie Homes was relegated at trial to a far more difficult exception requiring Tina Marie Homes to prove that Fincham was "generally known by its creditors to be substantially engaged in selling the goods of others."

Tina Marie Homes called some witnesses in an attempt to invoke this exception. The trial court erred by denying several objections to much of the testimony of those witnesses. Its conclusion that Tina Marie Homes had successfully invoked this exception was contrary to the evidence and without any finding of the essential fact that Fincham was "generally known by its creditors to be substantially engaged in selling the goods of others."

III. THE TRIAL COURT ERRED BY RULING THAT THE SALE OR RETURN PROVISIONS OF COLORADO'S UNIFORM COMMERCIAL CODE DO NOT OPERATE FOR THE PROTECTION OF SECURED CREDITORS SUCH AS THE BANK.

The Code's sale or return provisions say that goods held by a dealer on sale or return are subject to the claims of "creditors." The Code defines its term "creditor" expressly to

include a "secured creditor." In direct conflict with the Code's own definition, the trial court concluded that even if the Code were otherwise applicable the Bank would not be protected by the sale or return provisions because it is a secured creditor.

IV. THE TRIAL COURT ERRED BY RULING THAT IN SPITE OF COLORADO'S UNIFORM COMMERCIAL CODE THE BANK IS ESTOPPED TO ASSERT ITS SUPERIOR CLAIM TO THE TRENCHER.

The Code's sale or return provisions lead to the same result in a case such as this as would be obtained if the alleged owner of goods who had given a dealer possession and ostensible ownership were estopped to assert his ownership against that dealer's creditors. Since equity follows the law, any actual application of the equitable doctrine of estoppel should lead to the same result as would application of the Code. Equity does not overrule the law.

But the trial court in this case used equity's doctrine of estoppel precisely to do just that. Its erroneous ruling was that even if the evidence were such that the Bank would prevail under the Code, the Bank is estopped to assert its superior claim to the Trencher.

V. THE TRIAL COURT ERRED BY ASSESSING AGAINST THE BANK DAMAGES FOR WRONGFUL DETENTION OF THE TRENCHER IN THE ABSENCE OF ANY EVIDENCE SUPPORTING SUCH DAMAGES.

The damages assessed against the Bank in the amount of $6,300.00 had to be based erroneously on conjecture and speculation. There simply was no evidence to support the trial court's computation that Tina Marie Homes would have earned that amount of rent for the Trencher during the fifteen-month period between the Bank's replevin and the date of trial. Tina Marie Homes was not in the business of renting machines to others and Tina Marie Homes never had rented the Trencher. The trial court speculated that Tina Marie Homes would have been receiving $1,200.00 per month rent for the Trencher whenever it would have had no use for the machine on its own construction projects. But the evidence was that Tina Marie Homes had decided to sell the Trencher when it had no use for it. The trial court speculated that Tina Marie Homes would have rented the Trencher during 35% of that fifteen-month period. But the record is absolutely void of evidence to support that assessment.

ARGUMENT

I. THE TRIAL COURT ERRED BY REFUSING TO APPLY COLORADO'S UNIFORM COMMERCIAL CODE.

Colorado's Uniform Commercial Code is a comprehensive statute. C.R.S. 1963 § 155-1-101 et seq., as amended. If applied according to its terms, the Code promises much towards commercial development of our state by bringing certainty to commercial transactions in many areas where uncertainty once existed. But if the Code is not to be applied according to its terms, it will breed much deception and litigation against those who, like the Bank in this case, conduct their affairs in reliance upon its provisions.

The Code includes a specific method for resolving disputes, such as the present case, between one (Tina Marie Homes) who delivers personal property (Trencher) to a dealer (Fincham) to have it sold and a creditor of that dealer (Bank) which obtains an interest in the same property. The Code in C.R.S. 1963 § 155-2-326, as amended, provides in relevant part:

> "Sale on approval and sale or return--consignment sales and rights of creditors.--(1) Unless otherwise agreed, if delivered goods may be

returned by the buyer even though they conform to the contract, the transaction is:

* * *

(b) A 'sale or return' if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3) of this section, goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then, with respect to claims of creditors of the person conducting the business, the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as 'on consignment' or 'on memorandum'; however, this subsection is not applicable if the person making delivery:

(a) Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or

(b) Establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others; or

(c) Complies with the filing provisions of the article on secured transactions (article 9 of this chapter)."

The operation, scope and inherent fairness of these "sale or return" provisions of the Code will be discussed at some length in this brief. That discussion is postponed, however, until it can be demonstrated how and perhaps why the trial court in this case first displaced the Code with some other body of law and then ruled that even if the Code were otherwise applicable Tina Marie Homes had established an exception.

According to the trial court "any protection of the Uniform Commercial Code, as to perfecting a security transaction is lost to somebody conducting business in [the] fashion" which the trial court assigned to the Bank (1023). Apparently the Bank's method of doing business, as the trial court

misunderstood that method, was the sole determining factor. The trial court as part of its findings and conclusions stated:

> ". . . and I think that between that method of that business and what happened to Mr. Spallone [owner of Tina Marie Homes] when he took his equipment down there, I think the Bank is going to have to pick up the tab as far as this Court is concerned for this matter." (1032)

So the trial court ruled that the Code's sale or return provisions which specifically deal with the factual pattern involved in this case would not apply (972). As rationale for that ruling, the trial court held (1) that the Code provision does not protect any secured creditor such as the Bank (88, 973-975) and (2) that the delivery of the Trencher by Tina Marie Homes to Fincham was not a "sale or return" within the Code but rather was something purportedly different which the trial court called a "bailment, leading to a possible future sale . . ." (1001). Both of those rationale are clearly fallacious. But with the Code set aside, the trial court stated that "the law would revert back to pre-Code operation here . . ." (1001) and that "the law in Colorado going back practically from admission to Statehood would then apply, under the common law and decisions of Colorado . . ." (1002).

The Bank should not "have to pick up the tab" even if the Code had not been enacted. See Finance Corp. v. Bauer, 21 Colo. Bar Ass'n Adv. Sht. 151 (Dec. 23, 1968). The question is academic, however, because contrary to the effect of the trial court ruling, the Code in fact has been enacted in Colorado to apply to transactions entered into and events occurring after July 1, 1966. C.R.S. 1963 § 155-10-101, as amended. The critical event leading to this lawsuit, the delivery of the Trencher by Tina Marie Homes to Fincham, occurred during November, 1966 (27). No amount of sympathy for Tina Marie Homes and no amount of personal disdain for the business methods of the Bank can justifiably extract this case from the Code. Article 2 of the Code, containing the sale or return provisions applicable here, states that it applies to transactions in goods, C.R.S. 1963 § 155-2-102, as amended, and the Trencher assuredly is "goods." C.R.S. 1963 § 155-2-105(1), as amended.

The Code states that all its provisions, including the sale or return provisions, "shall be liberally construed and applied to promote its underlying purposes and policies." C.R.S. 1963 § 155-1-102(1), as amended. As discussed in the following section, the Code's provisions should have been applied here.

II. THE TRIAL COURT ERRED BY REFUSING TO RECOGNIZE THAT THE DELIVERY OF THE TRENCHER BY TINA MARIE HOMES TO FINCHAM IS TO BE DEALT WITH AS A "SALE OR RETURN" TRANSACTION UNDER COLORADO'S UNIFORM COMMERCIAL CODE.

A. One Policy Of Colorado's Uniform Commercial Code Is To Protect A Dealer's Creditors Against Any Undisclosed Claims To Goods Held By The Dealer For Sale.

A delivery of goods to a dealer to have the goods sold with an understanding that the goods are to be returned if not sold is commonly referred to as a "consignment." The Code states in C.R.S. 1963 § 155-1-201(37), as amended, that all consignments are subject to its provisions on consignment sales in C.R.S. 1963 § 155-2-326, as amended. Those provisions use the phrase "sale or return" to refer to "consignment." C.R.S. 1963 § 155-2-326, as amended. The phrase "sale or return" was borrowed from pre-Code law but given an enlarged meaning by the Code. 2 Williston, SALES §§ 270, 273 (Rev. Ed. 1948); Rio Grande Oil Co. v. Miller Rubber Co., 31 Ariz. 84, 250 P. 564 (1926).

The background for the Code's policy toward and treatment of consignment transactions, or what the Code characterizes as "sale or return" transactions, has been summarized as follows:

"Prior to the U.C.C. it was generally held that the consignee's

creditors had no claim against the consignor if the consignee's assets were inadequate to satisfy their respective claims. This was so despite the fact that the consignor was not required to record the transaction or give notice that he retained title to the goods. The basic reason for ruling in the consignor's favor was that title had not passed to the consignee and the creditor could not secure an interest in or attach any goods to which the debtor did not have title. This decisional law placed a creditor of the consignee in an unfavorable position, particularly if he had relied on the consignee's possession of consigned goods and failed to ask for proof of ownership. It was difficult for a creditor to discover a consignment because the consignor was not required to give notice in order to protect his interests. For example, if a consignee presented his goods as collateral for a loan, the creditor who relied on the consignee's possession would have no protection if the goods involved were consigned.

* * *

Section 2-326 is intended to alleviate this problem since its purpose is to protect creditors from the problems of the consignee's ostensible

ownership described above." Comment, "Consignments, Creditors' Rights And U.C.C. Section 2-326," B. C. Ind. & Com. L. Rev. 62 (Fall 1967). [Emphasis Added.]

From another source:

"Before adoption of the Code, admittedly, there was nothing but the agency relationship -- and precious little in that -- which might alert the consignee's creditors to the fact that the goods in the consignee's possession were not his. But the Code now requires a protective step of notoriety, failing which the consignor will lose control of the goods as against the consignee's creditors." Duesenberg, "Consignment Distribution Under The Uniform Commercial Code: Code, Bankruptcy and Antitrust Considerations," 2 Valp. U. L. Rev. 227, 241 (1968).

A leading authority on the Uniform Commercial Code, Professor William D. Hawkland, has similarly described the purpose of C.R.S. 1963 § 155-2-326(3), as amended:

"What is needed is a clear recognition that consignment selling is a form of chattel security, for this recognition would permit consignors to protect themselves by recording and creditors to protect themselves by checking records.

> This need is answered by section 2-326 (3) of the Uniform Commercial Code." Hawkland, "Consignment Selling Under The Uniform Commercial Code," 67 Com. L. J. 146, 147 (1962).

Before the Code, valid interests of creditors were defeated by consignors, in the words of Professor Hawkland, "not on the merits, but on the battle-field of dry legal conceptualism" pinned on locating something called "title." Id. The Code in C.R.S. 1963 § 155-2-401, as amended, overrules that general approach to commercial transactions:

> "Passing of title - reservation for security - limited application of this section. -
>
> Each provision of this article with regard to the rights, obligations, and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods, except where the provision refers to such title . . . ."

"[T]his article" includes the Code's sale or return provisions; those provisions apply "irrespective of title to the goods."

> "Creditors of consignees are thus placed by the Code in a definitely

enhanced position over their previous common law status. Even though title is reserved to the consignor, creditors prevail unless the consignee conducts business under the same name as the consignor, or unless one of the three exceptions [§ 2-326(3)(a), (b) and (c)] obtains . . . The entire complexion of the consignment has thus been changed by the Uniform Commercial Code.

* * *

The transformation of a consignment into a sale or return for purposes of protecting creditors is automatic and requires no discussion of good faith [on the part of the consignor].

* * *

The protection of creditors has always occupied the attention of courts, and it is doubtless desirable to discourage devices created to subvert creditors' rights. The enactment of § 2-326 should be encouraged because it reaches a reasonable result which protects the proper interests of all parties. The consignor may be protected by having the security protection afforded by filing under Article 9. The creditor is protected by being given an automatically paramount

> position in the absence of filing." Comment, "Consignments and the Rights of Creditors Under the Uniform Commercial Code," 14 Cath. U. L. Rev. 89, 95-98 (1965). [Emphasis Added.]

Fundamentally, the Code's approach is to shift to the consignor the burden to give public notice of the fact of consignment or have his claim to the consigned goods subordinated to claims by creditors of the consignee.

> "The Uniform Commercial Code adopts a unique approach to consignment transactions. The emphasis is on inducing a consignor to publicly reveal a consignment, or suffer the consequence of having his claim to consigned goods subordinated to the claims of a consignee's creditors. To the satisfaction of creditors this objective will undoubtedly be accomplished." Note, "Commercial Transactions: Consignors, Creditors and the U.C.C.," 19 Okla. L. Rev. 407 (1966).

The sale or return provisions follow the general policy of the Code which requires good faith not only between the parties to a commercial transaction but as against third parties as well. Comment 2, C.R.S. 1963 § 155-2-326, as amended.

The Code's sale or return provisions will never be effective in Colorado unless the trial court is reversed in this case. The trial court by ruling in favor of Tina Marie Homes, at the expense of the Code as well as the Bank, in effect has endorsed non-observance of the Code's modern public notice filing requirement by exhuming legal concepts applicable when Colorado was admitted to statehood (1002).

B. The Code Offers Two Approaches Where Goods Are Delivered To A Dealer To Be Sold: (1) The "Actual Sale Or Return" And (2) The "Constructive Sale Or Return."

The Code contains two sale or return concepts. Whichever concept applies in a particular case, the goods are subject to the claims of creditors of a dealer having possession. C.R.S. 1963 § 155-2-326(2), as amended.

One concept may be thought of as "actual sale or return." It is described in subsection (1)(b) of C.R.S. 1963 § 155-2-326, as amended:

> "(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:
>
> * * *

(b) A 'sale or return' if the goods are delivered primarily for resale."

The other concept of "sale or return" may be thought of as "constructive sale or return." It is described in subsection (3) of C.R.S. 1963 § 155-2-326, as amended:

"(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then, with respect to claims of creditors of the person conducting the business, the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as 'on consignment' or 'on memorandum'; however, this subsection is not applicable if the person making delivery:

(a) Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or

(b) Establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others; or

(c) Complies with the filing provisions of the article on secured transactions (article 9 of this chapter)."

Two distinctions exist between actual sale or return and constructive sale or return. First, by agreement between the parties a delivery of goods to a dealer can be exempted from the actual sale or return concept. The parties cannot, however, stipulate that a consignment transaction will not be a constructive sale or return. The Code's constructive sale or return provision exists for the protection of third party creditors.

"When a creditor advances funds to a merchant relying on his inventory, differences in the underlying relationship between the merchant and his supplier should have no bearing on the creditor's rights in the inventory. . . . The relevant question is simply whether the supplier has taken the steps necessary to warn creditors of the merchant that his inventory is subject to a superior claim." Comment, "Consignments And Similar Transactions Under The Uniform Commercial Code," 68 Col. L. Rev. 1210, 1217 (1968).

Second, an actual sale or return involves a sale of the goods, although subject to rescission, from the deliveror to the deliveree. But no sale from deliveror (consignor) to deliveree (consignee) is involved in a constructive sale or return transaction. Under the Code's scheme, the delivery is deemed to be a sale or return so that the goods, absent proper public notice, will be subject to claim by the consignee's creditors. C.R.S. 1963 § 155-2-326(2) and (3), as amended; General Electric Co. v. Pettingell Supply Co., 347 Mass. 631, 199 N.E.2d 326 (1964); Note, "Commercial Transactions: Consignors, Creditors and the U.C.C.," 19 Okla. L. Rev. 407, 409 (1966) (the constructive sale or return provision "clearly precludes any inquiry into the nature of the transaction to determine whether the goods were actually delivered pursuant to a sale. Even if the transaction is a bona fide consignment . . . the goods are subject to the claims of the consignee's creditors.").

Manifestly, if the delivery of the Trencher to Fincham by Tina Marie Homes was not an actual sale or return transaction, that delivery was at least a constructive sale or return transaction. But the distinctions failed the trial court. Without once referring to the alternative that the Trencher should be

deemed to have been on sale or return with Fincham, the trial court stated:

> ". . . I think it is clear that under the definition of a sale or return there actually has to be a sale in the terms as that is used." (977)

The final ruling below was simply:

> ". . . Section 155-2-326 Uniform Commercial Code did not apply since under the facts of this case there was no 'Sale or Return' as defined therein but merely a bailment or limited consignment . . . ." (88) [Emphasis By Trial Court.]

If the statutory alternatives are recognized, it is apparent from the evidence that the Trencher should at least be deemed to have been on sale or return. Indeed, the evidence indicates even that Tina Marie Homes delivered the Trencher to Fincham under an actual sale or return.

C. Delivery Of The Trencher To Fincham By Tina Marie Homes Was An "Actual Sale or Return" Within Sub-section (1) Of C.R.S. 1963 § 155-2-326, As Amended.

In November, 1966, as the winter months were approaching, Tina Marie Homes had little use for the Trencher

(206) and was trying to sell it (204). After talking with others (204), Tina Marie Homes took the Trencher to Fincham's yard (208). Specific terms were never discussed between Tina Marie Homes and Fincham (211-213). Mr. Spallone at the time the Trencher was delivered to Fincham "had no idea what the Trencher was worth" (862) and was unable to discuss sale price with Fincham (209, 211). The tacit agreement was that Fincham would not pay Tina Marie Homes until Fincham could make a deal with one of Fincham's own customers (211) and the price to be paid by Fincham was dependent upon what Fincham's own customer would be willing to pay, in other words, the market price (209, 863). So when Fincham got a "deal" with one of its customers Fincham was to discuss it with Tina Marie Homes (209). This lawsuit has arisen because Fincham never made a deal with any of its customers, and consequently, never paid Tina Marie Homes for the Trencher (209). But payment from Fincham would have been welcomed by Tina Marie Homes (861); Mr. Spallone was concerned only about getting paid (861).

Subsection (1) of C.R.S. 1963 § 155-2-326, as amended, provides in effect that goods are held on "sale or return" if those goods have been delivered primarily for resale. An official comment on that Code provision

further explains what is meant by an actual sale or return transaction:

> "The type of 'sale or return' involved herein is a sale to a merchant whose unwillingness to buy is overcome only by the seller's engagement to take back the goods (or any commercial unit of goods) in lieu of payment if they fail to be resold." Comment 1, C.R.S. 1963 § 155-2-326, as amended.

Other Code provisions should be enlisted here. C.R.S. 1963 § 155-2-106, as amended, provides in part that a " 'sale' consists in the passing of title from the seller to the buyer for a price." C.R.S. 1963 § 155-2-401(2), as amended, states when title will be deemed to pass:

> "(2) Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading:
>
> (a) If the contract requires or authorizes the seller to send the

> goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but,
>
> (b) If the contract required delivery at destination title passes on tender there." [Emphasis Added.]

There was no explicit agreement between Fincham and Tina Marie Homes so under the above Code section title in the Trencher passed to Fincham when Tina Marie Homes delivered it to Fincham on November 15, 1966 (27, 208). C.R.S. 1963 § 155-2-104, as amended, reveals that " 'merchant' means a person who deals in goods of the kind . . . involved in the transaction . . . ." Without dispute, Fincham was a merchant (74). C.R.S. 1963 § 155-2-305, as amended, teaches that a sale can occur even though the price is not settled, mentioning the particular case where, as here, "the price is to be fixed in terms of some agreed market or other standard . . . ." See Sylvia Coal Co., Inc. v. Mercury Coal & Coke Co., 151 W. Va. 818, 156 S.E.2d 1 (1967); Mickelian Sales Co., Inc. v. Nathan Gilbert & Sons, Inc., 26 A.D. 988, 4 UCC Rptg. Serv. 852 (1967).

Returning to the official comment first quoted under this Caption C explaining an actual sale or return, the present case fits the explanation well. There was a sale to Fincham. Fincham was a merchant. Fincham was obviously unwilling to buy the Trencher but its unwillingness was overcome because Tina Marie Homes, anxious to sell the Trencher, was willing to have payment deferred or to take the Trencher back in lieu of payment. That, as the Code says, is an actual sale or return.

Tina Marie Homes, of course, has taken an almost consistent position in this lawsuit that there was never any sale to Fincham. It has zealously contended even that Fincham did not have the right to buy the machine (210) while common sense and Mr. Spallone say that Tina Marie Homes was concerned only about getting paid (861). Tina Marie Homes would have been pleased to receive payment from Fincham at any time.

The defect, a fatal defect, in the argument that Tina Marie Homes never sold the Trencher to Fincham is that Mr. Spallone testified that it was sold:

> "Q. You were just concerned about getting paid.
>
> "A. Wouldn't you be concerned if you sold something without getting paid for it?" (862) [Emphasis Added.]

A second defect, again fatal, lies in Plaintiff's Exhibit 208, a document executed by Mr. Spallone on January 25, 1967, two months after delivery of the Trencher to Fincham, by which Tina Marie Homes acknowledged that title in the Trencher then belonged to Fincham.

The evidence is clear that there is an actual sale or return. The trial court disregarded that evidence and its ruling should be reversed.

D. Alternatively, Delivery Of The Trencher To Fincham Was At Least A "Constructive Sale Or Return" Within Subsection (3) Of C.R.S. 1963 § 155-2-326, As Amended.

After the trial court had concluded that the Trencher was not on actual sale or return with Fincham, it is difficult to understand how the trial court avoided the conclusion that the Trencher was to be "deemed to be on sale or return," i.e. a constructive sale or return, within the Code. Assuming throughout this Caption D that the Trencher was not on actual sale or return, the only other explanation of the evidence is that the Trencher was on constructive sale or return.

The Code's protection for creditors is much broader than just the actual sale or return situation. The Code

assimilates the broad spectrum of consignment transactions (including a "bailment or limited consignment" (88) and a "bailment, leading to a possible future sale" (1001) found here by the trial court) into its sale or return provisions to give creditors as automatic priority over consignors. This assimilation comes through subsection (3) of C.R.S. 1963 § 155-2-326, as amended, by which goods on consignment are deemed to be on sale or return:

> "(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then, with respect to claims of creditors of the person conducting the business, the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as 'on consignment' or 'on memorandum'; however, this subsection is not applicable if the person making delivery:
>
> (a) Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or

(b) Establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others; or

(c) Complies with the filing provisions of the article on secured transactions (article 9 of this chapter)." [Emphasis Added.]

That Code provision fits this lawsuit like a glove. The Trencher was delivered by Tina Marie Homes to Fincham (208) on or about November 15, 1966 (27, 152). The ultimate purpose of the delivery was to have the Trencher sold by having Fincham show the Trencher to Fincham's customers as prospective purchasers (27, 152, 205-207, 211, 216). Fincham maintained a place of business at which it dealt in goods like the Trencher (74) and under a name other than "Tina Marie Homes, Inc." (74). As night follows the day, under the first sentence of subsection (3) of C.R.S. 1963 § 155-2-326, as amended, the Trencher is to be deemed to have been on sale or return.

Tina Marie Homes pleaded that "on or about November 15, 1966 [it] placed subject Trencher in the hands of Fincham Equipment Co., Inc. for the purpose of showing such equipment to prospective purchasers and finding a buyer acceptable to [it]" (27). Counsel for Tina Marie

Homes told the trial court in opening argument that "in November of 1966 [Tina Marie Homes] delivered this piece of equipment with two other pieces of equipment to Mr. Fincham and Fincham Equipment Company to see if he could obtain a buyer for them, in order to obtain a deal" (152). Mr. Fred Spallone testified for Tina Marie Homes that the purpose of delivering the Trencher to Fincham was to have it sold:

"Q. And what transpired then?
"A. Well, we were going into the winter months [November, 1966] and we decided to try to sell it.

"Q. And did you try to sell it?
"A. Uh - huh. So I talked to George Peak about selling it.

"Q. George Peak is who?
"A. He is from H. W. Moore Equipment Company.

"Q. O.K.
"A. And then I talked to Jack Fincham of Fincham Equipment Company and decided to bring that and two other pieces down to the Fincham yard and he was going to try to get a deal for us. Try to sell them for us.

* * *

"Q. And why did you decide to sell this machine?
"A. Well, we were going into the winter months and we didn't have too much use for it, at the time.

"Q. O.K. Now you talked about selling it. Did you talk about selling it to these two people, with H. W. Moore or Fincham?
"A. No I talked to them about them selling it for us.

"Q. Selling it for you?
"A. Yes." (204-206)

Mr. Spallone further testified:

"Q. And what was the specific purpose of leaving that machine in the yard?
"A. They were trying to sell it, get a sale on it." (216)

The trial court made the finding that the delivery of the Trencher to Fincham by Tina Marie Homes was a "bailment, looking to a possible future sale, as distinguished from what the Court feels is a consignment, as I would understand in this trade, involving heavy machinery" (992). The trial court's own understanding of what is a consignment in the heavy machine trade is not relevant. What is critically relevant is that even the trial court found that the

delivery in this case was a bailment and that the purpose of the bailment was to sell the Trencher.

A bailment for sale is a consignment and a consignment with a dealer such as Fincham is a constructive sale or return under subsection (3) of C.R.S. 1963 § 155-2-326, as amended. See Comment, "Consignments and the Rights of Creditors Under the Uniform Commercial Code," 14 Cath. U. L. Rev. 89, 90 (1965) (a consignee is a bailee of goods for the purpose of selling them).

Every consignment transaction has its own peculiarities but, just as fingerprints do not hide a man, those peculiarities do not erase the consignment. The trial court apparently found something peculiar in consignments in the heavy construction machine industry (988-994). It is not clear whether the trial court judged the delivery of the Trencher to Fincham as typical or atypical in the industry. It is clear only that the trial court concluded there had been no consignment of the Trencher. That conclusion is wholly unfounded. It was not even disputed that the Trencher was delivered to Fincham ultimately to get it on the market and to find a buyer (28).

"Nor is there anything in Section 2-326--the one section of the Code

> specifically dealing with consignment deliveries--which would rule out as a true consignment any delivery intended primarily as a means of finding a market for the goods. The contrary may be said to be the case." Duesenberg, "Consignment Distribution Under The Uniform Commercial Code: Code, Bankruptcy and Antitrust Considerations," 2 Valp. U. L. Rev. 227, 242 (1968).

See Vonins, Inc. v. Raff, 101 N.J. Super. 172, 243 A.2d 836 (1968) (agreement couched in "subcontractor" language held to be a constructive sale or return). To paraphrase another authority, if cases like the present one are decided in light of the purpose of the Code's sale or return provisions rather than on a purely technical and semantic basis, peculiarities in the consignment relationship will not matter. Comment, "Consignments, Creditors' Rights And U.C.C. Section 2-326," B. C. Ind. & Com. L. Rev. 62, 69 (Fall 1967). See, also, Comment, "Commercial Transactions: U.C.C. Section 2-326 and Creditor's Rights to Consigned Goods," 65 Col. L. Rev. 547, 549-50 (1965). The repugnant feature common to all consignments is that creditors are likely to be deceived by the fact that the goods are in the consignee's possession. The purpose of the Code's sale or return provisions

is to prevent such deception and the Code is to be "liberally construed and applied to promote its underlying purposes and policies." C.R.S. 1963 § 155-1-102(1), as amended.

The trial court did not construe or apply the Code as directed. It must be reversed.

E. Tina Marie Homes Established No Exception Under The Code's Constructive Sale Or Return Provision.

(1) The Code's Constructive Sale Or Return Provision Does Not Operate If A Consignor Can Carry The Burden Of Proving An Exception Prescribed By That Provision.

The Code's actual sale or return provision in subsection (1) of C.R.S. 1963 § 155-2-326, as amended, operates without exception. As previously discussed in Caption II-C of this brief, the evidence indicates that the Trencher was delivered to Fincham by Tina Marie Homes in November, 1966, on actual sale or return. If this Court agrees with that, the matters discussed in this Caption II-E will have no effect on the outcome. Only if delivery of the Trencher was a consignment, or constructive sale or return, will the Court have to consider the matters raised here.

The Code's constructive sale or return provision in subsection (3) of C.R.S. 1963 § 155-2-326, as amended, provides in part:

> ". . . however, this subsection is not applicable if the person making delivery:
>
> (a) Complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or
>
> (b) Establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others; or
>
> (c) Complies with the filing provisions of the article on secured transactions (article 9 of this chapter)." [Emphasis Added.]

Thus there are three stated exceptions to the constructive sale or return provision. All three exceptions are founded upon notice of the fact of consignment having been given in some form to the consignee's creditors. The emphasis of the Code is upon inducing a consignor to give public notice by filing a financing statement. See Note, "Commercial Transactions: Consignors, Creditors and the U.C.C.," 19 Okla. L. Rev. 407 (1966). The

incentive built into the Code is that creditors will have an automatically superior claim if the consignor has not made certain that creditors have notice. Both the consignor and the creditors are protected when everyone knows about the consignment. A consignor who does not share with creditors his own knowledge of a consignment does not deserve and does not receive protection. A consignor under the Code has the burden to show that he deserves protection. The burden can be satisfied only through one or more of the three exceptions in the constructive sale or return provision.

Exception (a), which in a very few states provides an alternative method of giving notice of consignment, has no vitality in Colorado since our state, like most other states, has no applicable sign law. Vonins, Inc. v. Raff, supra; In re Levy, 3 UCC Rptg. Serv. 291 (E.D. Pa. 1965); In re Downtown Drug Store, Inc., 3 UCC Rptg. Serv. 27 (E.D. Pa. 1965).

Exception (c) did provide Tina Marie Homes an easy method to notify Fincham's creditors, including the Bank, about its alleged consignment of the Trencher with Fincham. By merely filing a financing statement with the Secretary of State, Tina Marie Homes could have been protected. It would have cost

only $2.00, C.R.S. 1963 § 155-11-102(1), as amended, and it would have prevented the loss underlying this lawsuit. But Tina Marie Homes did not take that very simple precautionary measure. That failure relegated Tina Marie Homes at trial to exception (b).

Exception (b) called upon Tina Marie Homes to establish two facts: (i) that Fincham was in fact substantially engaged in selling the goods of others and (ii) that the first fact was generally known by Fincham's creditors. Tina Marie Homes had the burden of proof on both points.

As one writer has said, exception (b) "is a tough fact situation to get within." O'Connor, "Establishing Forms And Procedures," 1 UCC L. J. 163, 164 (1968). Cases where exception (b) might typically apply would be those where the consignee is a pawnbroker or a manufacturer's representative. Shanker, "The Unsecured Secured Party," 1 UCC L. J. 73, 81 (1968). Exception (b) is tough with good reason. Under the Code, when a consignment is made the consignor may put all creditors on notice by very simply filing a financing statement utilizing exception (c). Failing that, exception (b) requires the consignor to prove that the consignee was so substantially engaged in consignment dealing that

nearly all creditors had notice even without the filing. Exception (b) is an alternative to exception (c) and should be applied to require an equal scope of notice to creditors.

(2) The Trial Court Misapplied Exception (b) By Finding Merely That Fincham "Was Substantially Engaged In Selling Goods Of Others" And By Ignoring The Issue Whether Fincham's Creditors Generally Had Such Knowledge.

The trial court did not understand that exception (b) required Tina Marie Homes to show what knowledge Fincham's creditors generally had. It simply made the finding that "Fincham Equipment Company was conducting or was substantially engaged in selling goods of others . . ." (995). For reasons later discussed, that finding was itself erroneous. In any event, that finding is clearly inadequate to support the trial court's conclusion of law that exception (b) had been successfully invoked by Tina Marie Homes (88, 994).

There was no finding and there was no evidence to support any finding that Fincham was generally known by its creditors to be substantially engaged in selling the goods of others. That is the finding which exception (b) required to exclude the delivery of

the Trencher to Fincham from the Code's constructive sale or return provision.

(3) Even If Measured At The Point Of Trial When Tina Marie Homes Had Rested And The Bank Had Yet To Present Witnesses, The Preponderance Of Evidence Was Not That Fincham Was Generally Known By Its Creditors To Be Substantially Engaged In Selling The Goods Of Others.

The partial and insufficient finding which the trial court did make under exception (b) was itself contrary to the evidence.

Much of the evidence offered by Tina Marie Homes in its effort to invoke exception (b) was objectionable. As the record reflects, many objections were raised by the Bank but denied by the trial court. The Bank preserves those objections for this appeal. But more deserving of emphasis here is that Tina Marie Homes was allowed to introduce every scrap of evidence it had mustered in hopes of carrying its burden under exception (b) and even with all those scraps it was not shown that Fincham was generally known by its creditors to be substantially engaged in selling the goods of others.

The condition of the evidence after Tina Marie Homes had rested and before the Bank had presented any witnesses is

summarized in this paragraph. Fincham had 275 creditors (369). Fincham usually had between 60 and 80 machines for sale in its yard (555). Only one witness, Charles Vivian, representing one creditor, General Electric Credit Corporation, had been able to testify from personal knowledge about any consignments with Fincham; Vivian knew of only two instances since 1958 when Fincham had held consigned goods for sale in its yard (326-327). Five other witnesses, namely George Peak, Thomas Allen, Floyd Winslow, Victor Thomas and Kenneth Bechtold, had been allowed to testify in varying degrees of generality about information second hand to them concerning occasional consignments with Fincham and even concerning occasional consignments with other dealers. Two of those witnesses, namely Thomas Allen and Kenneth Bechtold, were not creditors and did not even represent creditors of Fincham. Alfred Phillips testified about three specific instances when Fincham might have had consigned goods (482-484), but neither was Phillips a Fincham creditor (491). John Macleod, the Bank officer, testified that two other Fincham creditors, namely Dommerich (incorrectly transcribed as "Dockery") and Ingersoll-Rand, with whom the Bank had exchanged credit information, had never reported that Fincham was engaged in selling the goods of others (553). Russell Hanselman,

who had been Fincham's office manager since 1959 (354), testified in effect that consignments with Fincham did not happen very often (360-362). But the trial court found anyway that Fincham was substantially engaged in consignment dealing (611). Only 4 of 275 Fincham creditors had been heard at that point in the trial and none had any knowledge concerning the extent to which Fincham might have been engaged in selling the goods of others. This evidence was clearly deficient for the burden of proof belonging to Tina Marie Homes under exception (b).

The Bank moved to dismiss the claim of Tina Marie Homes (562-579). The trial court erroneously denied the motion (620) even though Tina Marie Homes had not established exception (b) by any preponderance of the evidence. See Rowe v. Bowers, 160 Colo. 379, 417 P.2d 504 (1966); Teodonno v. Bachman, 158 Colo. 1, 404 P.2d 284 (1965). Under the evidence at this point in the trial, anything was still possible so far as creditor knowledge was concerned. That condition of the evidence should have caused the trial court to grant the motion to dismiss. Dilts v. Baker, ___ Colo. ___, 427 P.2d 882 (1967); Widefield Homes, Inc. v. Griego, 160 Colo. 225, 416 P.2d 365 (1966); Safeway Stores, Inc. v. Rees, 152 Colo. 318, 381 P.2d 999 (1963); Mosko v. Walton, 144 Colo. 602, 358 P.2d 49 (1961);

Baeza v. Remington Arms Co., 122 Colo. 510, 224 P.2d 223 (1950); Coakley v. Hayes, 121 Colo. 303, 215 P.2d 901 (1950); Polz v. Donnelly, 121 Colo. 95, 213 P.2d 385 (1949). Tina Marie Homes had the burden under exception (b). Its evidence clearly fell short.

In Guardian Discount Co. v. Settles, 114 Ga. App. 418, 151 S.E.2d 530 (1966), a case arising in Georgia under the Code's constructive sale or return provision, the defendant had consigned four automobiles with Hubbard, a dealer. Plaintiff had given credit to Hubbard secured by the same automobiles. To defeat plaintiff's otherwise superior claim under the Code's constructive sale or return provision, the defendant in Guardian Discount had tried to show that Hubbard was generally known by his creditors to be substantially engaged in selling the goods of others. Hubbard himself had testified (as indicated by the appellate record) that between 25% and 30% of the cars on his lot were on consignment. Reversing the trial court, the Georgia Court of Appeals held that the evidence was not sufficient to present a question for the jury under exception (b). The court in Guardian Discount Co. v. Settles explained:

> "While this court cannot agree . . . that 'substantially engaged in selling the goods of others' means 'primarily'

> engaged in selling the goods of others, yet evidence of isolated sales for one creditor or of what the dealer knows of his own business or even what the supplier of the goods knows about the merchandise delivered to such dealer by him is not sufficient to show that the dealer's creditors generally know he is substantially engaged in selling the goods of others." [Emphasis Added.]

The evidence of two isolated consignments with Fincham during 9 years known to 1 among 275 Fincham creditors was so meager the trial court should have dismissed the case on the Bank's motion. But the trial court made the Bank proceed with its witnesses.

(4) After The Bank Had Presented Its Evidence The Overwhelming Preponderance Was That Fincham Was Not Generally Known By Its Creditors To Be Substantially Engaged In Selling The Goods Of Others.

No fewer than 25 witnesses each representing a different Fincham creditor testified they had no knowledge whether Fincham was engaged in selling the goods of others. Photographs of the signs and office on the front of Fincham's yard (Plaintiff's Exhibits 206 and 207) received in evidence (811) proved there was nothing

in Fincham's presentation to the general public that Fincham sold anything other than new machines. See In re Griffin, 1 UCC Rptg. Serv. 492 (W.D. Pa. 1960). Copies of Fincham advertising brochures (Plaintiff's Exhibits 209 and 210) received in evidence (651) each consisting of lengthy lists of machines currently held by Fincham for sale contained the bold caption "ALL EQUIPMENT LISTED IS OWNED BY THE FINCHAM EQUIPMENT COMPANY." These brochures were sent out regularly by Fincham (647). Finally, Harold R. Markisen testified by deposition (Plaintiff's Exhibit 213) that as an investigator for Fincham's trustee in bankruptcy he had spent 215 hours reviewing Fincham's business records (Deposition p. 9, l. 18) collecting in part information about 280 different machines in which Fincham had dealt (Deposition p. 4, l. 12 et seq.). Mr. Markisen testified that according to Fincham's own records no more than 6 of those 280 machines had been consigned with Fincham (Deposition p. 9, l. 3).

The trial court disregarded all the Bank's creditor witnesses en masse. For whatever relevance it had, 9 of the 25 witnesses representing different Fincham creditors who had no knowledge whether Fincham was selling the goods of others testified that it did not

matter to them. Ignoring that exception (b) speaks about creditor knowledge and not creditor "worries," the trial court expanded the numbers and said with respect to the Bank's witnesses:

> ". . . and evidence of those 32 general creditors was that they could care less how Fincham was doing their business because in effect they loaned,--they didn't loan, but they extended thirty day credit to him, just based on his operation. In fact if he was doing business on consignment or any other way it was immaterial to them, but certainly would be material to a secured creditor such as the Plaintiff [Bank] in this particular case." (1033-1034)

Quite inconsistently, the trial court on another point ruled that the Code's sale or return provisions operate only for the protection of general creditors and not secured creditors (88, 973). So according to the trial court, the Colorado legislature has enacted a statute solely for the protection of general creditors who "could care less" about the problem against which the statute affords protection. The inconsistency of these rulings illustrates the extent of the trial court's confusion affecting the entire case.

The evidence showing that Fincham was not substantially engaged in selling the goods of others and that Fincham's creditors generally had no such knowledge was overwhelming. It is usually true to a certain extent that the weight of evidence is not entirely dependent upon its volume or the number of witnesses. But where exception (b) requires proof concerning what creditors generally know and where each creditor witness, as here, has legitimately testified only about his own knowledge, a head count of witnesses attains special importance. In this case not one single creditor testified from personal knowledge that Fincham was substantially engaged in selling the goods of others. Only 6 Fincham creditors of 275 had any slim knowledge that Fincham occasionally sold the goods of others. And 25 Fincham creditors had no knowledge. Another 244 creditors were never heard. Tina Marie Homes had the burden of proof.

In Vonins, Inc. v. Raff, supra, a case arising in New Jersey under the Code's constructive sale or return provision, the appellate court stated at 243 A.2d 842:

> "The trial court also found subsection (3)(b) to be applicable since it felt that the evidence demonstrated 'general knowledge' by Crest's creditors that Crest was

> 'substantially engaged in selling the goods' of Vonins. However, the uncontroverted evidence establishes that although Crest's trade creditors, approximately ten in number, may have known of the Vonins transaction, some 55 to 60 of its general creditors did not have such knowledge. This does not support the trial court's conclusion that the Vonins-Crest transaction was 'generally known' by Crest's creditors. Consequently, we find that subsection (3)(b) does not apply."

Likewise, in the present case the evidence did not support any finding that Fincham was generally known by its creditors to be substantially engaged in selling the goods of others. And no such finding was made.

But in spite of the evidence and in spite of having failed to find that Fincham's creditors generally had the knowledge, the trial court concluded that exception (b) should in any event protect Tina Marie Homes:

> "Now, the next finding of the Court is that, even if the Court is in error in applying that this is not a sale or return, or that 155-2-326 is involved in this case, the Court still feels that Tina Marie established their burden under the Statute by showing under sub-head B

> thereof, that in fact Fincham Equipment Company was conducting or was substantially engaged in selling goods of others as that would be defined to protect, as I have heretofore found, general creditors and not specific or secured creditors." (994-995)

The trial court misunderstood and misapplied exception (b). As revealed by its ruling just quoted, the trial court also misunderstood what class of creditors is protected by the Code.

III. THE TRIAL COURT ERRED BY RULING THAT THE SALE OR RETURN PROVISIONS OF COLORADO'S UNIFORM COMMERCIAL CODE DO NOT OPERATE FOR THE PROTECTION OF SECURED CREDITORS SUCH AS THE BANK.

Whether the Trencher was delivered to Fincham by Tina Marie Homes under an actual sale or return or under a constructive sale or return, the Trencher while in Fincham's possession was subject to the claims of Fincham's creditors. Sandwiched between the actual sale or return provision and the constructive sale or return provision is subsection (2) of C.R.S. 1963 § 155-2-326, as amended:

> "(2) Except as provided in subsection (3) of this section, goods held on approval are not subject to the claims of the buyer's creditors

> until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession."

The term used in this statute is "creditors" not "general creditors" and not "unsecured creditors."

The trial court stated as part of its conclusions:

> ". . . this Court feels that at least considering the official comment and reason for the adoption of this particular Section that the reason and legislative intent of this Section would actually apply under other factual situations than the case at bar, -- involving a secured creditor." (973)

The final ruling below on this point was as follows:

> "That the intent of said Statute [Section 155-2-326 Uniform Commercial Code] was to protect general creditors and offered no protection to Plaintiff [Bank] occupying position of a secured creditor . . . ." (88)

With this ruling the trial court was attempting to second guess the drafters of the Code and the Colorado legislature. The trial court guessed wrong.

The Code itself in C.R.S. 1963 § 155-1-201(12), as amended, says what it means by the term "creditor":

> "(12) 'Creditor' includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate." [Emphasis Added.]

Obviously secured creditors along with other creditors are protected by the sale or return provisions. Secured creditors probably more than other types of creditors deserve the protection because secured creditors are the ones who, when extending credit and acquiring security interests, would rely upon the debtor's ostensible ownership of goods in the debtor's possession and offered for sale.

> " 'Creditor' is a term encompassing general creditors, secured creditors, lien creditors, and any representative of creditors, including assignees for the benefit of creditors, trustees in bankruptcy, receivers and executors and administrators of insolvent estates. A consignor who fails to satisfy one of the notoriety provisions of

> Section 2-326(3) exposes his goods, even though delivered pursuant to a true consignment, to the claims of all of these parties." Duesenberg, "Consignment Distribution Under The Uniform Commercial Code: Code, Bankruptcy and Antitrust Considerations," 2 Valp. U. L. Rev. 227, 259 (1968). [Emphasis Added.]

The Trencher was exposed while in Fincham's possession to the claims of all of Fincham's creditors. Fincham focused that exposure on the Bank by reporting to the Bank that it had purchased the Trencher for its inventory (Plaintiff's Exhibit 204) thereby causing the Bank to extend additional credit (502, Plaintiff's Exhibit 203) under the existing floor plan Security Agreement dated December 5, 1966 (Plaintiff's Exhibit 202).

What happened here is precisely the type of occurrence where the Code's sale or return provisions should apply. The Code did not give the trial court liberty to redefine the term "creditor." By assuming that liberty, the trial court committed an obvious error.

IV. THE TRIAL COURT ERRED BY RULING THAT IN SPITE OF COLORADO'S UNIFORM COMMERCIAL CODE THE BANK IS ESTOPPED TO ASSERT ITS SUPERIOR CLAIM TO THE TRENCHER.

The Code's sale or return provisions in essence are statutory embodiments of the doctrine of estoppel. By providing that goods held on sale or return are subject to the claims of creditors, the Code accomplishes the same result as would be accomplished if the deliveror of the goods were estopped to assert any claim superior to creditors.

Having reversed the Code the trial court also reversed the doctrine of estoppel by concluding not that Tina Marie Homes, the deliveror, should be estopped but rather that the Bank, the creditor, should be estopped. In the language of the trial court:

> "The Court would make a fifth and general, final finding here that even though the Court would be incorrect in all of its heretofore four findings, that I have indicated, that the Court feels that the Plaintiff, American National Bank is estopped under the equitable estoppal (sic) in this particular case to deny the superior claim to Tina Marie Homes, Inc., because of their method of dealing and their failing to ascertain the true status of title." (1003)

Manifestly the trial court believed that the equitable doctrine of estoppel should operate to overcome a contrary result otherwise reached by law, in this case the Code. An elementary maxim of equity is that "equity follows the law." Equity does not overrule the law.

> "The maxim that equity follows the law is applicable to the interpretation of statutes and to matters of public policy. Indeed, equity follows the law more circumspectly in the interpretation and application of statute law than otherwise. Equity courts cannot disregard, or in effect repeal, statutory and constitutional requirements and provisions." 27 Am. Jur. 2d EQUITY § 124.

In re Scholtz - Mutual Drug Co., 298 F. 539 (D. Colo. 1924), involved a petitioner as lessor seeking a forfeiture of lease by a bankrupt as lessee pursuant to an express lease forfeiture provision. Sustaining the lessor's contractual right, the court in the Scholtz - Mutual Drug case said at 298 F. 541:

> "It is urged, however, that forfeitures are not favored, either at law or in equity, and that a provision for forfeiture will be construed

> strictly in favor of the tenant. While this is probably a correct statement of the law, we see no reason for its application here, because the lessor is only asking for the enforcement of a well-established legal right, and in such case equity ought to, and does, follow the law and enforce the legal right. Equity follows the law so far as the law goes in securing rights to the parties, and where a legal right is clearly established, it would be inequitable to refuse its enforcement in a case such as that presented. Otherwise, we would be forcing upon the lessor an agreement entirely different from that actually made." [Emphasis Added.]

The trial court in this case did not follow either law or equity.

The essential elements of the equitable doctrine of estoppel include some conduct by the party to be estopped amounting to a misrepresentation made to the party asserting the estoppel. 28 Am. Jur. 2d ESTOPPEL AND WAIVER § 35. The only representation made by the Bank to Tina Marie Homes occurred on July 1, 1966, prior to delivery of the Trencher when the Bank by filing its financing statement informed the public that it claimed security interests in machines held by Fincham (Plaintiff's Exhibit 201).

The Bank made no other representation, true or false, to Tina Marie Homes. Indeed the Bank had no knowledge prior to this litigation that Tina Marie Homes had ever had any interest in the Trencher.

The trial court did not like the Bank's business methods (1003-1007, 1023, 1028-1032) so it predicated its estoppel on the Bank's failure to uncover that Tina Marie Homes had delivered the Trencher to Fincham in the manner alleged by Tina Marie Homes (1023). If this case was supposed to be decided by determining who should have learned what, Tina Marie Homes would still lose. Tina Marie Homes, not the Bank, was privy to the terms of delivery to Fincham. Mr. Spallone, not the officers of the Bank, by having collaborated with Fincham was aware that Fincham sometimes gave business transactions a false appearance in order to obtain credit (Plaintiff's Exhibit 208, 243-252). Tina Marie Homes, not the Bank, failed to disclose its claim to the Trencher by not filing a financing statement as required by the Code.

> "It is fundamental that a person cannot predicate an estoppel in his favor on his own dereliction, omission or inadvertence where there is no concealment, misrepresentation, or other inequitable

conduct by the other party; . . ." 28 Am. Jur. 2d ESTOPPEL AND WAIVER § 35.

In 28 Am. Jur. 2d ESTOPPEL AND WAIVER § 63, the proper application of the law of estoppel against one who, like Tina Marie Homes, sets the stage for lawsuits like the present one is summarized as follows:

> "Although mere possession and control of personal property are not ordinarily sufficient to estop the real owner from asserting his title against a person who has dealt with the one in possession on the face of his apparent ownership, slight additional circumstances may turn the scale against the owner and estop him from asserting title against one who has purchased the property in good faith. Thus, an estoppel will arise against the real owner where he clothes the person assuming to dispose of the property with the apparent title to it or with apparent authority to dispose of it, and when the person setting up the estoppel acts and parts with value or extends credit on the face of such apparent ownership or authority." [Emphasis Added.]

This Supreme Court has held in a case similar to the present one that estoppel operates against the deliveror.

Zuckerman v. Guthner, 105 Colo. 176, 96 P.2d 4 (1939) (plaintiff who delivered two automobiles to dealer to have them sold estopped to assert ownership against dealer's judgment creditor who had levied on the automobiles). See, also, Finance Corp. v. Bauer, supra.

This Court is called upon now to maintain compatibility between law and equity by reversing the trial court's decision applying the doctrine of estoppel perversely in order to reach a result contrary to the Code.

V. THE TRIAL COURT ERRED BY ASSESSING AGAINST THE BANK DAMAGES FOR WRONGFUL DETENTION OF THE TRENCHER IN THE ABSENCE OF ANY EVIDENCE SUPPORTING SUCH DAMAGES.

Without one thread of support in the evidence, the trial court computed and assessed damages against the Bank for wrongful detention of the Trencher in the amount of $6,300.00. Excerpts from the trial court's findings and conclusions best indicate the conjecture used to compute such damages:

> "Now, I think that as far as applying the general law as to damages in this case involving rulings in favor of the Intervenor [Tina Marie Homes], that if I

applied even $1,200.00 per month rental, the rental on this piece of equipment would exceed just about the appraised value of the property itself or $18,000.00. Now, I think the authorities say that it would be ridiculous to award damages, in considering what would be proper elements to be considered by the Court, an amount equal or nearly so of the value of the property itself. . . . now I think that as far as the evidence, Mr. Spallone's superintendent here indicated certain loss on the Stanley Lake project and Aurora project, but not having benefited me by how much, the only thing I can predicate the damages on, is that there were some inconveniences and Mr. Spallone could have leased the equipment at different times when they were shut down. At one time they were shut down on fifty percent of their operation and there were opportunities to lease this equipment, and I think that they are not entitled as an element of damages to $1,200 for every month they had that outstanding, because obviously that would equal the amount of the value of the Trencher itself and there is nothing in the evidence that can tell the Court that they had that many jobs, that they would be leasing at all times. Obviously they would have been using it,

> probably from the evidence that I have, at least half of the time, they would be using it, and I wasn't told how much they lost when they could have been using it, so I think that the Court can only apply less than half of the operations on lease, and I think that a proper application of that would be, considering the method of operations there, at approximately thirty-five percent of what the total lease arrangement would have been. That would be $6,100. [Revised upward by trial court to $6,300.00 (1046)]." (1039-1041) [Emphasis Added.]

Counsel for the Bank then presented argument to the trial court that there was no evidence to support such damages and the trial court continued:

> "I am going to dispense with any further argument and just limit the damages as contained in the Trial Brief submitted by Tina Marie Homes, that the depreciation, Tina Marie, having prevailed, that they have lost value and considera-tion . . . there is certainly evidence as to what the lease amount would have been, if leased and there is sufficient evidence as to the method of operation and opportunities that the Court can predicate some loss of lease use,

> involving this particular equipment, because I think the Court can certainly conclude that the equipment would not have set idle in the yard and it would have either been used as a profit to Tina Marie, or they could have leased it at a lease element of brokerage consideration, concerning their over-all operation." (1047-1048)

A fundamental assumption made by the trial court apparently was that if Tina Marie Homes had kept possession it would have leased the Trencher for a monthly rental of $1,200.00 whenever Tina Marie Homes had no use for the Trencher on its own projects. That assumption was very much in conflict with the evidence. Indeed, the lawsuit itself arises from a situation when Tina Marie Homes had no use for the Trencher (206) and decided to sell it (204). Mr. Spallone testified:

> "Q. And why did you decide to sell this machine?
>
> "A. Well, we were going into the winter months and we didn't have too much use for it, at the time." (206)

The Trencher sat idle in Fincham's yard from November 15, 1966, until it was replevied by the Bank on March 21, 1967 (74). Mr. Dale Bruntz, general

superintendent for Tina Marie Homes, testified:

> "Q. Now while this machine was in the Fincham yard did you have any use for it?
> "A. Not at this time." (281)

Had it been so automatic, as the trial court reasoned, that Tina Marie Homes would lease the Trencher for $1,200.00 per month whenever it had no use for it, Tina Marie Homes would not have decided to sell the Trencher in November, 1966, and Tina Marie Homes would not have allowed the Trencher to set idle through more than four months and $4,800.00 of lost rentals. Obviously, it was not automatically true that Tina Marie Homes could have leased the Trencher whenever it had no use for it on its own projects. Tina Marie Homes had never rented the Trencher (292). Mr. Bruntz testified that Tina Marie Homes had received "inquiries" about renting the Trencher (287, 293) and would have rented the machine (293). That conclusory testimony hardly alters the facts that Tina Marie Homes never had rented the Trencher and never intended to rent the Trencher even when it had no use for it.

Moreover, the record is completely void of evidence to support the trial court's own conclusion that the Trencher would have been on lease during 35% of

the fifteen-month period between March, 1967, and the trial. The only testimony even remotely relevant was given by Mr. Bruntz:

"Q. During the last year -- year and a half, your company has been busy all the time. You didn't have a lay-off?
"A. Yes, we have.

"Q. For very much time?
"A. Quite a bit of time.

"Q. About how much?
"A. I would say 50% of the time, because we didn't have the work.

"Q. Because you couldn't get a trencher?
"A. No, this is not the cause.

"Q. For other reasons?
"A. Yes." (296-297)

The fact that business had been slow in the pipe line construction industry cannot by any logic mean that Tina Marie Homes would have leased the Trencher during 35% of the same period. But to the trial court it meant just that (1042).

In Eccles v. Sylvester, 131 Colo. 296, 281 P.2d 1006 (1955), this Court stated at 131 Colo. 303 the rule of damages which is applicable here:

> "Where there is no reasonable basis or standard for determining the amount of damages chargeable to defendant's conduct, there can be no recovery."

Plaintiffs in the Eccles case had sought to recover, among other items of damages, the amounts of salary and reasonable rental allegedly wrongfully taken by defendant while operating with his son their own lending business both on and off the business premises of plaintiffs' corporation and while defendant and his son were officers of that corporation. The trial court in the Eccles case denied the defense motion to dismiss those claims for recovery of salary and reasonable rental. This Supreme Court reviewed the record and determined that there was no evidence to support any apportionment of the extent of personal business conducted by defendant and his son on the corporate premises. This Court held that in the absence of such evidence the award of damages to plaintiffs necessarily had to rest on speculation. The lower court was reversed. The present case on its damage issue is directly analogous to the Eccles case. The finding below

that Tina Marie Homes would have had the Trencher on lease during approximately 35% of the detention period rested only on conjecture or speculation. See Mosko v. Walton, supra; Polz v. Donnelly, supra. The assessment of damages for wrongful detention in the amount of $6,300.00 must be overruled.

CONCLUSION

Fincham was a culprit. The trial court engaged in gross understatement by remarking as part of its findings that "Fincham Equipment Company was slow in paying" (985). Fincham did not pay Tina Marie Homes for the Trencher. The Bank sympathizes with Mr. Spallone while reminding him that Fincham did not pay the Bank either for its debt secured by the Trencher.

In the final analysis this lawsuit is an effort by Tina Marie Homes to recover from the Bank the debt owed to Tina Marie Homes by Fincham. The lawsuit would have been avoided if Tina Marie Homes had merely filed a financing statement as the Code provides. But having failed to do that, basic fairness enunciated through the Code says "No" to this collection effort by Tina Marie Homes.

Something led the trial court to disregard the Code and the rights of the Bank. For the many reasons expressed in this brief, the Bank respectfully urges this Supreme Court to reverse the trial court and cause judgment to be entered in favor of the Bank.

Respectfully submitted,

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