Commercial Law

James G. De Jong
recently suggested that the decision may nullify some immunities granted to governmental bodies pursuant to section 895.43(3) with respect to their liability for the intentional torts of their agents and employees since state created immunities have been held in federal court to give way to the enforcement of section 1983.  

MICHAEL J. JASSAK

COMMERCIAL LAW

I. SECURED TRANSACTIONS—PRIORITIES

In *House of Stainless v. Marshall & Ilsley Bank*,

the Wisconsin Supreme Court considered for the first time the effect of a perfected security interest containing an after-acquired property clause on a seller's right pursuant to Wisconsin Statutes section 402.702(2)

2 to reclaim property sold on credit to a buyer who was insolvent when the property was received.

Marshall & Ilsley Bank (M&I) had entered into a security agreement with Alkar Engineering on November 1, 1971 providing for a security interest in Alkar's inventory both presently owned and after-acquired. M&I also properly perfected the security interest. 3 *House of Stainless Steel, Inc. (Stainless)* delivered goods to Alkar on credit in January, 1973. Stainless discovered that Alkar had received this shipment of goods while insolvent and accordingly Stainless made a written demand for the return of the goods from Alkar. This demand satisfied Wisconsin Statutes section 402.702(2), as it was properly made within ten days of the receipt of the goods by Alkar. In spite of the fact that on January 17, 1973, Stainless had given notice of this demand to M&I, the bank, acting pursuant to the after-acquired property clause in its security agreement with Alkar, sold the goods that Stainless was attempting to

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1. 75 Wis. 2d 264, 249 N.W.2d 561 (1977).

2. Wis. Stat. § 402.702(2) (1971) provides, in pertinent part, as follows: "Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within 10 days after the receipt"

3. 75 Wis. 2d at 265, 249 N.W.2d at 562.
reclaim to a third party on January 31, 1973.4

Stainless sued M&I for conversion of the goods. As affirmative defenses, M&I contended that its security interest in the inventory was superior to any interest that Stainless may have had in the same goods and that Stainless did not have capacity to sue. The trial court granted a motion by Stainless for summary judgment.5

On appeal, the supreme court quickly disposed of the contention by M&I that Stainless could not bring this action because it did not have a certificate of authority to transact business in Wisconsin as required by Wisconsin Statutes section 180.847(1).6 The court noted that even though Stainless maintained an office in this state, the fact that any orders secured in Wisconsin were subject to approval by Stainless' general office in Chicago, the operations of Stainless fit squarely within the statutory exception provided in Wisconsin Statutes section 180.801(4).7 Accordingly, the court held: "It follows that Stainless was not required to secure a certificate of authority and is entitled to bring this action in Wisconsin."8

The court next considered whether Stainless had any basis to claim priority over M&I under the provisions of Wisconsin Statutes section 409.312 which determines priority among conflicting interests in the same collateral. The facts were uncontested that M&I had a valid, perfected security interest while, on the other hand, Stainless was not a secured party because it had not filed any agreement or financing statement covering the property it had shipped to Alkar. Because the property involved was inventory9 the priorities to the property

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4. Id.
5. Id. at 265-66, 249 N.W.2d at 562.
6. Wis. Stat. § 180.847(1) (1971) provides, in pertinent part, as follows:
No foreign corporation transacting business in this state without a certificate of authority, if a certificate of authority is required under this chapter, shall be permitted to maintain or defend a civil action or special proceeding in any court of this state, until such corporation has obtained a certificate of authority.
7. Wis. Stat. § 180.801(4) (1971) provides, in pertinent part, as follows:
[A] foreign corporation shall not be considered to be transacting business in this state . . . by reason of carrying on in this state any one or more of the following activities:

   (d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts.
8. 75 Wis. 2d at 268, 249 N.W.2d at 564.
9. Id.
were to be determined by reference to Wisconsin Statutes section 409.312(3). The court correctly concluded that while a perfected purchase money security interest is entitled to priority over a conflicting security interest in inventory, "[s]ince Stainless does not have a perfected purchase money security interest, sec. 409.312, Stats., provides no basis for a priority claim in the property sold by it to Alkar."10

Stainless' remaining theory to support its claim against M&I was that as a seller of goods on credit who had made a timely demand to reclaim the goods, Stainless was entitled to the proceeds of the goods that had been resold by M&I. The court recognized that a seller has a right to reclaim under Wisconsin Statutes section 402.702(2) but also pointed out that the right to reclaim is subject to exception where "the rights of a buyer in ordinary course or other good faith purchaser"11 are involved. Accordingly, the issue was narrowed to "whether M&I is a 'good faith purchaser' and thus within the exception to the right of reclamation granted by sec. 402.702, Stats."12

In resolving this question the court adopted the reasoning used to resolve a similar issue in In re Hayward Woolen Co.,13 a 1967 Massachusetts case. In that case, the sellers who had delivered goods to a bankrupt buyer sought to reclaim the goods while a creditor with a perfected security interest in the bankrupt's after-acquired inventory claimed priority. The Hayward court ruled that the secured creditor was a "good faith purchaser for value" and therefore the sellers could not exercise any reclamation right against that party.14

The supreme court capsulized the reasoning in Hayward in the following manner: (1) A person with voidable title can transfer good title to a good faith purchaser for value;15 (2) an insolvent buyer has voidable title; (3) a security interest in after-acquired collateral qualifies one as a purchaser;16 (4) a

10. Id. at 271, 249 N.W.2d at 565.
11. Id. at 270, 249 N.W.2d at 564, citing Wis. Stat. § 402.702(3) (1971).
12. 75 Wis. 2d at 271, 249 N.W.2d at 565.
14. Id. at 1111-12.
16. The court cited Wis. Stat. §§ 401.201(32), (33) (1971) which provide: "'(32) 'Purchase' includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property. (33) 'Purchaser' means a person who takes by purchase.'"
pre-existing claim is value. The court also cited *First Citizens Bank & Trust Co. v. Academic Archives* in support of the same proposition. While both of the cited cases found that the holder of a perfected security interest in after-acquired property qualified as a good faith purchaser, it is interesting to note that reaching this result was made simpler by the fact that the good faith of the secured parties was never put in issue in either case.

A potentially distinguishing fact in the *House of Stainless* case was that M&I clearly had notice of the claim by Stainless before the goods were sold. This actual notice to M&I could have put the bank's good faith in question. Although the respondent maintained generally that M&I could not be a good faith purchaser, the question of this notice was not specifically addressed.

This is not to say that a different result would be warranted because notice was given to M&I. For example, in *In re Samuels & Co.* the Fifth Circuit Court of Appeals considered the situation of a secured creditor who had notice of a reclaiming seller's claim after the security interest was perfected but before the secured party sought to exercise any rights in the collateral. In resolving the priority question the court held that it was not necessary to prove lack of knowledge of any third party claims in order for a secured party to qualify as a good faith purchaser under Article Two of the Uniform Commercial Code. Instead, the court suggested that a secured party would be a good faith purchaser and therefore insulated from any claims of a reclaiming seller as long as the security agreement itself was not the product of bad faith.

The court's ruling in *House of Stainless* emphasizes the importance of properly perfecting a security interest pursuant

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20. 75 Wis. 2d at 265, 249 N.W.2d at 562.
22. 526 F.2d 1238 (5th Cir. 1976).
23. *Id.* at 1243-44, where the court said: "[T]he Code's definition of an Article Two good faith purchaser does not expressly or impliedly include lack of knowledge of third-party claims as an element."
24. *Id.* at 1243.
to Wisconsin Statutes chapter 409. Although equitable considerations may seem to lean in favor of an unsuspecting seller seeking to reclaim under Wisconsin Statutes section 402.702(2), this decision suggests that the prudent practitioner in Wisconsin should carefully protect his interests by properly perfecting a purchase money security interest in the goods sold. As the appeals court noted in the *Samuels* case, "The loss could have been avoided through his own [the seller's] efforts. This is not the kind of loss equity protects against."

II. **Contract Enforceability—Statute of Frauds**

The court construed the part performance exception to the Uniform Commercial Code statute of frauds in *Gerner v. Vasby*. This case arose as a result of a dispute over the sale of grain by the plaintiff Willard Gerner to Vasby Farms Grain Service operated by Helmer and Joannes Vasby. Gerner and Joannes Vasby had a telephone conversation in April of 1973 and discussed the sale of corn by Gerner to Vasby. Vasby testified that he had agreed to buy corn from Gerner to be delivered at a later date and that the price agreed upon for this corn was $1.25 per bushel for 10,000 bushels. Gerner on the other hand claimed that there was not a contract because Vasby had told Gerner that he would send him a contract for his acceptance or rejection. Gerner received only a confirmation slip which he never signed or returned. The supreme court affirmed the trial court's finding that an oral contract existed between the parties because such a finding was not "contrary to the great weight and clear preponderance of the evidence."  

Having affirmed the existence of the contract, the issue became whether the contract was enforceable. As the trial court had pointed out, the statute of frauds generally provides that a contract for the sale of goods for the price of more than $500.00 is unenforceable unless it is written. However, Wis-

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25. *Id.* at 1248.
26. 75 Wis. 2d 660, 250 N.W.2d 319 (1977).
27. *Id.* at 665, 250 N.W.2d at 323.
28. The statute of frauds is embodied in Wis. Stat. § 402.201 (1971) which provides, in pertinent part, as follows:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.
Wisconsin Statutes section 402.201(3) contains several conditions that render an oral contract enforceable even though the statute of frauds had not been complied with, and accordingly the court turned its attention to that statute. In particular, the court considered whether the oral contract was enforceable under section 402.201(3)(c) which allows for an enforceable oral contract with respect to goods "which have been received and accepted."

Because Gerner had delivered the corn to Vasby and Vasby had accepted the corn, the court held that such conduct constituted part performance under section 402.201(3)(c). Therefore, the contract was enforceable. The court was careful to point out that "receipt and acceptance" called for in the statute must involve more than the unilateral act of the buyer. Although acceptance alone is a unilateral act, receipt and acceptance are separate acts, receipt involving a change in possession or physical custody of the goods. Noting that there can be no receipt without a delivery but that Gerner delivered the corn to Vasby and Vasby accepted, the court held that there was part performance since the receipt and acceptance consisted of "conduct of a bilateral nature."

Gerner further contended that the part performance found by the court could not make the contract enforceable because it was not "exclusively referable" to the alleged oral contract. Prior cases in Wisconsin considering the part performance exception to the statute of frauds had consistently held that: "To constitute part performance, the facts that the party demanding specific performance must rely upon are required to be exclusively referable to the contract."

29. Wis. Stat. § 402.201(3)(c) provides: "A contract which does not satisfy the requirements of sub. (1) but which is valid in other respects is enforceable: . . . With respect to goods for which payment has been made or accepted or which have been received and accepted (s. 402.606)."

30. 75 Wis. 2d at 667-68, 250 N.W.2d at 324, citing 2 A. Corbin, Contracts § 482 at 640 (1963) which reads: "Acceptance is the unilateral act of the buyer alone, or of his personal representative; it requires no action or expression on the part of the seller."

31. Id. at 668, citing 2 A. Corbin, Contracts § 486 at 648-49 (1963) which reads: Receipt, on the other hand, is a change in the physical relations of those specific goods to the seller and to the buyer . . . . If the court finds that there has been a change in actual "custody" of the goods, it will also find that there has been "receipt by the buyer."

32. 75 Wis. 2d at 668-69, 250 N.W.2d at 324.

33. Id. at 669, 250 N.W.2d at 324-35.

34. Wiegand v. Gissal, 28 Wis. 2d 488, 495, 137 N.W.2d 412, 416 (1966) (emphasis
Gerner asserted that because he had dealt with Vasby in the past and because he usually dealt with Vasby on the basis of Vasby paying the current market price on the day of delivery without any previous agreement between the parties, that therefore his conduct was equally attributable to these past dealings. The contention was that the statute of frauds would render the oral contract unenforceable because the conduct was not exclusively referable to the alleged oral contract.\(^{35}\)

However, the court cited the 1975 case of *Toulon v. Nagle*\(^{36}\) and noted that although that case held that conduct which was “exclusively referable” to the oral contract would of course constitute part performance, the *Toulon* case did not say that it was not possible for other conduct to qualify as part performance.\(^{37}\) This reading of the *Toulon* case seems somewhat strained for the court said in that case, “[t]he performance must be exclusively referable to the contract or be performance which is reasonably to be anticipated in reliance on the contract.”\(^{38}\) In addition, the *Toulon* court cited several other cases as precedent in support of the same rule.\(^{39}\)

The court’s decision in *Gerner v. Vasby* seems to significantly expand the part performance doctrine as it had existed prior to the Uniform Commercial Code in Wisconsin. The court relied upon a portion of the official comment to Wisconsin Statutes section 402.201\(^{40}\) and held that it is not required that conduct be “exclusively referable” to the oral contract which

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35. 75 Wis. 2d at 669, 250 N.W.2d at 324-25.
36. 67 Wis. 2d 233, 226 N.W.2d 480 (1975).
37. 75 Wis. 2d at 669, 250 N.W.2d at 325.
38. 67 Wis. 2d at 248, 226 N.W.2d at 488-89 (emphasis added).
40. *Wis. Stat. Ann.* § 402.201 (West 1964) contains the Official UCC Comment which provides in part:

2. “Partial Performance” as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted.

Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists . . . . This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money.
is sought to be enforced. Instead, "where the conduct which is relied upon for part performance is consistent with the contract such conduct is sufficient to take the contract out of the statute of frauds even though such conduct is not inconsistent with some other dealings arguably had between the parties." \(^4\)

James G. De Jong

CRIMINAL LAW

I. INTOXICATION AS A DEFENSE TO CRIMINAL LIABILITY

Within the space of eight weeks the Wisconsin Supreme Court gave conflicting interpretations to the meaning of "involuntarily produced" intoxication as it pertains to Wisconsin Statutes section 939.42. The statute provides:

Intoxication. An intoxicated or a drugged condition of the actor is a defense only if such condition:

(1) Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed; or

(2) Negatives the existence of a state of mind essential to the crime.

In Staples v. State\(^1\) the defendant, whose principal defense was intoxication, was convicted by a jury of kidnapping, burglary and operating a motor vehicle without the consent of the owner. The issue on appeal was whether the trial court erred in restricting the evidence offered by the defendant in an attempt to prove his chronic alcoholism.

The court, relying upon Roberts v. State\(^2\) stated that proof of alcoholism, when "established by expert medical opinion,"\(^3\) could be relevant. "Alcoholism, in itself, is not now and never has been a separate defense to criminal liability in this state. . . . This court has, however, recognized that proof of alcoholism may be relevant to the defense of involuntary intox-

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\(^{41}\) 75 Wis. 2d at 670, 250 N.W.2d at 325.

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1. 74 Wis. 2d 13, 245 N.W.2d 679 (1976).
2. 41 Wis. 2d 537, 164 N.W.2d 525 (1969).
3. 74 Wis. 2d at 20, 245 N.W.2d at 683.