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# Contracts—Arbitration

Richard C. Wagner

re-orders received from your accounts, and unless you submit objections or corrections to such statements within 10 days from the date when they are rendered to you, the same shall be deemed conclusive and binding upon both of us and shall form the basis upon which computation of your compensation shall be made." Judge Desmond, writing for the court in affirming the employer's motion for summary judgment, held (5-2) the agreement was conclusive and the salesman was foreclosed from disputing the account submitted in a later suit.

An account stated is nothing more or less than a contract express or implied between parties. It is an agreement which they have come to regarding the amount due on past transactions. Unless the party receiving the account objects within a reasonable time, his silence will be construed as an acquiescence in its correctness. An account stated is conclusive unless fraud, mistake or other equitable considerations are shown which make it improper to be enforced.[7] A fiduciary relationship may be a factor in determining the presumption of correctness, but it does not preclude parties who are capable of contracting with each other from entering into such an agreement.[8]

Judge Burke, in his dissent, contends that the salesman was not in a position to have knowledge of all of the accounts and transactions between his employer and large national accounts, thereby creating an issue of fact for trial. However, as the majority points out, the parties were dealing at arms length and there was nothing in the record to show that the salesman could not or was prevented by his employer from investigating the facts as to sales made by the corporation. The position of the majority effectuates the purpose of the contract and is consistent with sound business policy. The view of the dissent would seem to unduly encourage parties to "sit on their rights."

## Arbitration

For the third time in three years the Court of Appeals was faced with the problem of a contract of sale which referred to an outside agreement containing a mandatory arbitration clause. In *Level Export Corp. v. Aiken & Co.*,[9] the court held that an agreement incorporating by direct reference the provisions of the Standard Cotton Textiles Sales Note bound the buyer to arbitration. In *Riverdale Fabrics Corp. v. Tellingbest Stiles Co.*,[10] a sales memorandum providing, "this contract is also subject to the Cotton Yarn Rules of 1938 as amended" was held

7. *Radkinson v. Haecker*, 256 N. Y. 254, 176 N. E. 383 (1931).
8. *Carr v. Hoffman*, 256 N. Y. 254, 176 N. E. 383 (1931).
9. 305 N. Y. 82, 111 N. E. 2d 818 (1953). See 3 BFLO L. REV. 86 (1953).
10. 306 N. Y. 288, 118 N. E. 2d 104 (1954). See 4 BFLO L. REV. 55 (1954).

not to create an intention to proceed to arbitration. In *Riverdale* Judge Van-Voorhis distinguished *Level* by stating that the parties had not incorporated the outside agreement and were merely using it for reference purposes in closing the sale.

In the instant case the purchase order provided: "This contract is placed in accordance with the conditions of contract Form ISM Rev. Copy attached and can be modified or supplemented only in writing and signed by both parties hereto."[11] The form in fact was not attached to the purchase order. Judge Dye, writing for a unanimous court, reversed the Appellate Division and Special Term and granted a stay of arbitration.[12] The situation was held to more closely resemble *Riverdale* than *Level* and the court did not think that an intent to arbitrate was so clearly expressed as to direct the parties to so settle.

It has been the policy of the courts not to compel a party to surrender his right to resort to the courts unless he has agreed to do so in writing and by clear language.[13] Each case must be decided on its own facts with consideration being given to the knowledge, background, experience and intent of the parties. In view of the above decisions, it would seem to be the better practice for businessmen to make a specific reference to the arbitration provision of any outside agreement in their sales memorandum if they wish to avail themselves of this exclusive remedy.

The court added further emphasis to its policy of refusing to allow parties to be unwittingly led into arbitration in *In re Arbitration of Princeton Rayon Corp. v. Gayley Mill Corp.*[14] A customer was sent a confirmation together with a quotation sheet containing an arbitration clause and another clause stating: "The shipment of any goods for processing shall be deemed an acceptance by the customer of all of the terms of this quotation." The customer's president stated in his affidavit that he called respondent's president to disclaim any agreement. Although goods were shipped for processing, the customer's president never signed the quotation sheet, even though a space was provided. Special Term denied the motion for a stay of arbitration. The majority per Judge Dye held that a substantial issue of fact was raised as to the making of an agreement to arbitrate. This issue should not be determined by the use of affidavits but by a trial in the usual manner.[15] The test of clear expression of intention to proceed to arbitration as established by the *Riverdale Fabrics*[16] case was found to be absent here.

11. *In re American Rail and Steel Co.* (India Sales Mission), 308 N. Y. 577, 127 N. E. 2d 562 (1955).

12. C. P. A. § 1458, subd. 2 provides for a stay of arbitration where a party puts in issue the making of the contract.

13. *Philip Export Corp. v. Leatherstone Inc.*, 275 App. Div. 102, 87 N. Y. S. 2d 665 (1st Dep't 1949). *Lehman v. Ostrowsky*, 264 N. Y. 130, 190 N. E. 208 (1934).

14. 309 N. Y. 13, 127 N. E. 2d 729 (1955).

15. C. P. A. § 1450.

16. See note 10 *supra*.