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I. Commercial Transactions

There were no reported cases in either bills and notes or sales for the year 1962.[1] This, however, is the lull before the storm. The 1963 Tennessee Legislature adopted the Uniform Commercial Code [hereinafter cited as U.C.C. or the Code] which redrafts the statutory law in both of these areas.[2] Articles 3 and 4 of the U.C.C. replace the Negotiable Instruments Law,[3] which is repealed, as the law applicable to bills and notes. Article 2 replaces the Uniform Sales Act,[4] which is also repealed, as the applicable statute in the sales field. The Code was drafted and supported by the same organization which had previously drafted the N.I.L. and the Sales Act. It was designed to modernize the prior statutes, to codify much of the present case-law gloss on these statutes, to provide rules to cover problems and situations not touched by either the present statutes or presently decided cases, and to intergrate the various statutory laws concerning the commercial transaction. The Code was also, in part, a revision of the present uniform laws on commercial transactions and changes some well-known concepts, especially in sales and sales financing. The changes in bills and notes are relatively minor, however, and concern details only.

The Code attempts to regulate all facets of the commercal transaction and, when it becomes effective, repeals all prior statutes in the areas it covers. Thus, in Tennessee, in addition to the N.I.L. and the

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1. *But see* Part II (A) *infra* for developments in the law of implied warranties of bailment which may affect implied warranties in sales contracts.

2. At least 23 other states have adopted the Uniform Commercial Code [hereinafter cited at U.C.C.]. For a list of these states, see 31 U.S.L. Week (1963). See also 31 *id.* at 2652.

3. Chapters 1 through 5 of title 47, Tenn. Code Ann. (1956).

4. Tenn. Code Ann. §§ 47-1201 thru -1277 (1956).

Sales Act, the Uniform Warehouse Receipts Act,[5] local legislation on bulk sales,[6] and the Uniform Stock Transfer Act[7] are repealed in favor of articles 6, 7, and 8 of the U.C.C. The Uniform Trust Receipts Act,[8] and local legislation on conditional sales,[9] chattel mortgages,[10] factors liens,[11] and assignments of accounts receivable[12] are also repealed in favor of the Code's comprehensive regulation of secured transactions in article 9. The Code will also provide statutory rules on letters of credit (article 5) and bills of lading (article 7) which are not covered by any previous statutes.

The Code, and its repealer provisions, will not become effective in Tennessee until June 30, 1964. This delay gives the practicing attorney fifteen months to become familiar with its provisions. This amount of time will be needed for such education, for the Code is a very large and detailed piece of legislation,[13] and little has been written comparing the present Tennessee law to the Code.[14] It is not the purpose of this article to attempt to summarize the effect of the provisions of this legislation on the present Tennessee law, but only to give notice that it has been enacted and will change some of the present rules. In 1952, the *Tennessee Law Review* published a series of student notes comparing the Code and most of the Tennessee law it will affect, but the consideration was not very detailed.[15] The *Vanderbilt Law Review* has also published an article by this author, which considers in some detail the provisions of the Code which affect the bank-depositor relationship (article 4 of the U.C.C.).[16] It is to be hoped that both of these law reviews will publish further information giving detailed treatment of the effect of this new law.

II. PERSONAL PROPERTY

A. *Implied Bailment Warranties*

In *Redmon v. U-Haul Co.*,[17] a family had rented a covered moving van to move furniture from one town to another. The van was not

5. TENN. CODE ANN. §§ 47-901 thru -964 (1956).
6. TENN. CODE ANN. §§ 47-1401 thru -1403 (1956).
7. TENN. CODE ANN. §§ 48-1001 thru -1024 (1956).
8. TENN. CODE ANN. §§ 47-1001 thru -1020 (1956).
9. TENN. CODE ANN. §§ 47-1301 thru -1313 (1956).
10. TENN. CODE ANN. §§ 64-901 thru -912 (1956).
11. TENN. CODE ANN. §§ 47-1101 thru -1104 (1956).
12. TENN. CODE ANN. §§ 47-1801 thru -1804 (1956).
13. The bill, as introduced in the Tennessee Legislature, is 231 printed pages long.
14. This is true in spite of the fact that the published version of the U.C.C. with comments provides cross-indexes from each section of the prior uniform laws to the appropriate section of the U.C.C.
15. 22 TENN. L. REV. 776-872 (1953).
16. Spanogle, *The Bank-Depositor Relationship—A Comparison of the Present Tennessee Law and the Uniform Commercial Code*, 16 VAND. L. REV. 79 (1962).
17. 358 S.W.2d 300 (Tenn. 1962).

watertight, and during the trip rainwater leaked into it and damaged the furniture. The family sued the lessor for breach of an implied warranty of fitness for the purpose of moving furniture. The trial court sustained a demurrer to the complaint, thus denying recovery, and the Tennessee Supreme Court affirmed.

The affirmance could have been on four possible grounds: 1) The bailment contract created no implied warranty of fitness; 2) The van was fit for moving furniture, even though it was not watertight; 3) The van was unfit, but the conduct of the parties prevented the warranty from arising because plaintiff had made an inspection; or 4) The van was unfit, but the warranty was effectively disclaimed. From the opinion, however, it is not possible to determine which of these theories the court adopted. Each of the last three is mentioned, but none seems determinative of the case. It is clear that "there was no implied warranty that this vehicle was waterproof," and perhaps there were three alternative grounds for the holding. At least some of these grounds do not seem sufficient by themselves to preclude recovery, and so an examination of each ground is necessary.

The first problem for the court was whether a warranty of fitness was to be implied into a bailment for hire contract. Many cases, including Tennessee cases, have stated that bailment contracts create implied warranties of quality, and this seems to be a generally accepted proposition.[18] The court in this case does not directly answer this first question on whether such warranties are to be implied into bailment contracts. There is language which could mean that no such obligation may be read into the contract,[19] but the reasoning in the opinion indicates otherwise. If no such warranty obligations were imposed upon bailors, there would be no need to discuss the alternative grounds involving the scope of the warranty, inspection, and the disclaimer. However, these alternative grounds were discussed, indicating by a negative implication that the warranty arose.[20]

The real problem arises in defining what is meant by "warranty" in this context. At common law, there were two viewpoints: 1) that a warrantor was an insurer against all defects covered by the warranty; and 2) that the warrantor was bound merely to exercise due

18. See cases cited in 6 AM. JUR. *Bailments* § 190 (1950); Annot., 68 A.L.R.2d 854 (1959). For Tennessee cases, see, *e.g.*, Vaughn v. Millington Motor Co., 160 Tenn. 197, 22 S.W.2d 226 (1929); Hilton v. Wagner, 10 Tenn. App. 173 (E.S. 1928).

19. "There is no provision in this rental contract that in any way states or implies that the lessor warrants its moving vans to be waterproof." 358 S.W.2d at 301.

"[T]here was no implied warranty that this vehicle was waterproof." *Id.* at 302.

Note that this language expressly eliminates only an implied warranty that it was waterproof, not all implied warranties.

20. Some of the court's langnage also supports this conclusion. "[W]hatever implied warranty might exist in this situation would not extend to the described defects." *Id.* at 301.

care in placing goods on the market, so that he did not warrant against latent defects.[21] The Sales Act[22] determined that the insurer theory applies in all sales transactions, but the question is still open in transactions not covered by the act, such as bailments. Again, the court does not answer the question directly, but there is a strong implication that the insurer theory is to be used. The question of liability is discussed without any reference to any use of due care by the bailor, or to any lack thereof. Such reasoning implies that the bailor would have been liable, regardless of due care, if the warranty validly covered the defect.

Prior Tennessee cases have recognized the difference between the two theories and have broadly stated that the sales law analogy is to control bailment situations. "The contractual obligation of the bailor rests upon principles applicable to contracts of sale."[23] The minimum that this language can mean is that the insurer theory, not the due care theory, applies to bailment warranties. The silence of the court on this point in the present case should not be deemed to overrule its prior pronouncement. The court's earlier pronouncement could also mean that the sales analogy determines the scope of the bailment warranty and inspection and disclaimer problems. Such a rule would have been very beneficial, since the policy reasons for implying warranties are the same in each case,[24] and because the rights of the parties would be more definitely established. If such a result were intended by that language, however, its possibility has been virtually eliminated by the court's manner of consideration of such problems in the *Redmon* case.

The next question was to determine the nature and scope of the warranty. If the van was fit for the purpose of moving furniture, there was no breach of the implied warranty. The court seems to have considered the point, and found the van fit.

> There is no contention in this case that this moving van was unfit to transport personal property. Whether the moving van would leak in a heavy rain would merely diminish its convenience and appropriateness for

21. 1 WILLISTON, SALES §§ 233, 237 (1948 ed.); 26 COLUM. L. REV. 744, 748 (1926).

22. UNIFORM SALES ACT § 15, TENN. CODE ANN. § 47-1215 (1956). This rule will be continued nnder the U.C.C. See U.C.C. §§ 2-314, -315.

23. Vaughn v. Millington Motor Co., *supra note* 18, at 200, 22 S.W.2d at 227.

24. For a detailed comparison of the policies affecting the implication of warranties in both types of transactions, see Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 654, 667 (1957); 2 VAND. L. REV. 675 (1949); and 26 COLUM. L. REV. 744 (1926). All three commentators agree that the policies involved are the same in both fields, so that the law of implied warranty of bailments should be patterned after sales law.

> the use designed, and whatever implied warranty might exist in this situation would not extend to the described defects.[25]

No authority is given for these statements. Yet, in a prior case, an automobile seller was held to have breached the implied warranties of quality in a sales contract when he sold an automobile which leaked.[26] This must mean that a scope of warranties of quality is different in sales and in bailment contracts.[27] If this is so, then the court is in part abandoning its earlier statement that one should be based upon the principle applicable to the other;[28] and it should say so. Without such differentiation, the bailment case might be thought to overrule the prior sales decision. Also, knowing the reasons for making this distinction would be helpful in defining the scope of implied bailment warranties under any non-analogous rule.

The third line of reasoning used by the court is that the bailee, by having had an opportunity to inspect and having failed to discover the defect, was precluded from asserting the breach. The court quoted *American Jurisprudence* and stated that since plaintiffs had an opportunity to inspect both before and during the rain, no warranty could be implied. Again, an implied sales warranty would have been decided the other way.[29] First, the language of the Sales Act requires that there be an actual examination, not just an opportunity to inspect.[30] Second, since the warranty is created or not at the time of the sales contract, the opportunity to inspect after the contract and during the rain would have been irrelevant. Third, an inspection limits the sales warranty only as regards apparent defects and has no effect on warranties against latent defects.[31] The court did not discuss whether the defect was latent or apparent. The court therefore seems to have laid down a rule for bailment warranties that an opportunity to inspect, either before or after the creation of the bailment, destroys any implied warranty as to any apparent or latent defect. Yet this is

25. 358 S.W.2d at 301.

26. Kohn v. Ball, 36 Tenn. App. 281, 254 S.W.2d 755 (W.S. 1952).

27. In *Kohn*, recovery was based on an implied warranty of merchantability, not on an implied warranty of fitness for a particular purpose. *Id.* at 286, 254 S.W.2d at 757. The warranty of fitness was found inapplicable, however, solely because no particular purpose was involved, but only the general purpose of motoring. In this state, "a particular purpose" for warranty protection must be unordinary. *Compare* U.C.C. § 2-313(2c) *with* U.C.C. § 2-314, comment 2. Defects affecting use for ordinary purposes relate to merchantability. This distinction should not have affected the court's analysis of the present case, however. It seems accepted that moving furniture is a particular purpose.

28. See text at note 28 *supra.*

29. See, *e.g.*, Kohn v. Ball, *supra* note 25, at 287, 254 S.W.2d at 758.

30. UNIFORM SALES ACT § 15(3), TENN. CODE ANN. § 47-1215(3) (1956). The effect of inspection on sales warranties is even more limited under the U.C.C. See comment 13 to § 2-314 of the U.C.C.

31. *Ibid.*

tantamount to saying that there are no implied warranties in a bailment for hire contract, for such an opportunity will always be available if the subject of the bailment is ever used by the bailee. Thus, it is suggested that the court overreached itself and may wish to reconsider its broad language. Again, it is suggested that the rules applicable to a sales contract could appropriately be used by analogy in this situation since the reasons for implying warranties are the same in each case.[32]

The fourth line of reasoning used by the court is that the warranty was expressly disclaimed. A clause in the bailment contract read: "Lessee agrees to assume liability for any and all damage to personal property transported in said truck, including damage caused by fire, water, theft or collision."[33] This clause was held, without discussion, sufficient to exclude recovery of rain damage. This holding does not seem to conform to prior Tennessee cases on disclaimer clauses in sales contracts, especially the case of *General Motors Corp. v. Dodson*.[34] There, an express disclaimer of all implied warranties was ignored in the sale of an automobile.[35] Whether such disclaimers are ignored on public policy grounds or not,[36] they have always been strictly construed against the author.[37] Thus, the clause could have been given a limited construction that it only disclaimed water damage caused by third parties or accidents, for which the bailor is not responsible, not defects in the van itself, responsibility for which may be traced to the bailor. Such a construction, using the principle of *ejusdem generis*, would have been in conformance with the rest of the language in the clause: "fire . . . theft or collision."[38] The court did not, however, so

32. See note 24 *supra*.

33. 358 S.W.2d at 300.

34. 47 Tenn. App. 438, 338 S.W.2d 655 (M.S. 1960).

35. *Id.* at 450-51, 338 S.W.2d at 659. See Bass, *Personal Property and Sales--1961 Tennessee Survey*, 14 VAND. L. REV. 1349, 1350 (1961); 14 VAND. L. REV. 681 (1961).

36. Public policy grounds have been used in Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); and State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961). The *Dodson* court did not spell out its grounds for ignoring the disclaimer.

37. Roberts Distrib. Co. v. Kaye-Halbert Corp., 126 Cal. App. 2d 386, 272 P.2d 886, 889 (1956); Wade v. Chariot Trailer Co., 331 Mich. 576, 50 N.W.2d 162 (1951); D & W Co. v. Moch, 71 N.D. 649, 3 N.W.2d 471 (1942); Henningsen v. Bloomfield Motors, *supra* note 36, and authorities cited therein.

38. For an example of an analogous division of responsibility in the face of equally broad language, see the maritime cases involving "all risks" insurance. The cases are collected in Annot., 88 A.L.R.2d 1122 (1963). There, in spite of the comprehensive coverage in the expressed language (comparable to the language of the disclaimer clause), inherent defects in the goods shipped are not covered (comparable to damages due to defeets in the bailed goods present at the time of bailment), because "the purpose of the policy is to secure indemnity against *accidents* which may happen." Gulf Transp. Co. v. Fireman's Fund Ins. Co., 121 Miss. 655, 83 So. 730, 733 (1940). The same purpose, to disclaim liability against accidents which may happen, is shown in the present case by the language "fire . . . theft, or collision." The

construe the clause. Instead, the broadest possible construction was given—that it was a disclaimer of implied warranty on all water damage, regardless of the source, or responsibility over the source, of the damage. Further, the court cited the *American Jurisprudence* section on *sales* as authority for its holdings.[39] This raises the possibility that the court is willing to regard disclaimers in sales contracts more favorably also. A definite answer to that problem must await the decision of a case involving a sales contract, however.

At first glance, the *Redmon* case does not seem objectionable. The court has many arguments for its decision, and all seem feasible. On further analysis, however, the case creates many problems in both the field of bailments and in sales. In bailments, it is fairly certain that some warranty of quality is implied into a bailment contract, but its nature and scope are not known. It is probably not comparable to similar warranties in sales contracts, unless the law of such sales warranties has been drastically changed from prior decisions. This failure to use the available sales law analogy is unfortunate, because the policy considerations for imposing the warranties are similar in both cases, and because any non-analogous rule is so uncertain.[40] This bailment implied warranty, whatever its scope may be, may have been effectively withdrawn by the court's enunciated inspection doctrine. But there are adequate methods of retreat open, whether the court reads the language of *American Jurisprudence* more closely or adopts a viewpoint more adapted to present commercial practice. Finally, disclaimers of implied warranties may be very broadly construed in bailment contracts. In sales, the primary question is whether the pronouncements in the present case may be used by analogy to overturn or modify present law. This danger is present most clearly in construction of disclaimer clauses, but it is also present in defining the quality required by a warranty of fitness for a particular purpose.

B. *Forfeiture of Property for Illegal Use*

In *United States v. One Cadillac Hardtop Automobile*,[41] the federal

principle has not been limited to maritime cases. Chute v. North River Ins. Co., 172 Minn. 13, 214 N.W. 473 (1927).

39. 46 AM. JUR. *Sales* § 333 (1943), cited 358 S.W.2d at 301. There is no discussion of disclaimers in the *American Jurisprudence* sections on *bailments*, so the court was forced to consult sales law if it used *American Jurisprudence* for authority. This does not satisfactorily explain why *American Jurisprudence* should control prior Tennessee reported decisions.

Under the U.C.C., an express statutory provision will govern the effect of disclaimers. See U.C.C. § 2-316. This will not, however, solve all problems of construing particular language.

40. See authorities cited in note 24 *supra*.

41. 207 F. Supp. 693 (E.D. Tenn. 1962).

government filed a libel for the forfeiture of an automobile which had been used to transport narcotics illegally. The vendor of the car intervened on the ground that it had a lien on the automobile for the unpaid part of the purchase price and that this fact should entitle it to a remission of the forfeiture to the extent of the lien. The intervenor alleged that it had acted in good faith and, after investigation, had had no knowledge of any likely or proposed illegal use; and the United States did not dispute this allegation. This fact did not, however, allow the lienholder to obtain mitigation of the court's forfeiture order.

The federal district court first found that the automobile had been used to transport narcotics illegally, in spite of the fact that the users of the car had been acquitted on some of the counts in a criminal action based on the same evidence.[42] The car was therefore forfeited. The court then found that it had jurisdiction to remit such forfeitures only when a common carrier or a stolen car were involved.[43] The lienholder had argued that, although this was the only express statutory jurisdiction granted, it was not exclusive. The lienholder sought to incorporate, by a general reference, the provisions relating to the violations of the alcohol tax laws of the Internal Revenue Code.[44] The Revenue Code provisions allow judicial remission in other circumstances. This contention was rejected, however. The libel was brought under a chapter of the Transportation Code,[45] and one section of that chapter specifically states that the provisions of the customs laws[46] shall apply to forfeitures under the chapter. The Revenue Code provisions are therefore specifically inapplicable, and the customs laws do not provide for general judicial remissions of forfeitures.[47]

This holding is in agreement with the prior decisions.[48] The

42. The libel was submitted on the basis of the testimony in the earlier criminal trial. In the libel action, once the United States established "probable cause for seizing the automobile," the burden of proof was on the claimants—the owner of the car and the lienholder—to prove that the car had not been used illegally. 46 Stat. 757 (1930), as amended, 19 U.S.C. § 1615 (1958). In the criminal case, the Government was required to prove the defendants' guilt beyond a reasonable doubt. With these different standards of proof, it was not impossible to have different verdicts.

43. 53 Stat. 1291 (1939), 49 U.S.C. § 782 (1958). These are the only situations in which judicial remission is expressly allowed by the chapter under which the libel was brought.

44. INT. REV. CODE OF 1954, § 7301. The incorporation was attempted through a reference in 53 Stat. 1292 (1939), 49 U.S.C. § 786 (1958).

45. U.S.C. tit. 49 (1958).

46. U.S.C. tit. 19 (1958). The Internal Revenue Code is contained in title 26 of the United States Code.

47. See 46 Stat. 757 (1930), 19 U.S.C. § 1618 (1958).

48. See, *e.g.*, United States v. Andrade, 181 F.2d 42 (9th Cir. 1950); United States v. One 1941 Plymouth Sedan, 153 F.2d 19 (10th Cir. 1946); United States v. One 1952 Buick Auto, 136 F. Supp. 253 (D. Minn. 1955).

provisions allowing judicial remission in alcohol tax cases seem to be an exception to the general statutory scheme. The courts have always regarded them as such and have shown no inclination to extend this exception to other types of forfeitures.[49]

This statutory scheme does not, however, deprive the lienholder of all ability to obtain remission of the forfeiture. The court intimated that, if there were such a deprivation, "some constitutional violation may exist."[50] Instead of seeking judicial remission, the lienholder should seek administrative relief through an application to the attorney general.[51] Such relief is to be granted whenever the attorney general finds that the "forfeiture was incurred without willful negligence or without any intention on the part of petitioner to defraud the revenue or to violate the law."[52] Thus, if the lienholder can prove the facts alleged to the satisfaction of the administrative official, he should be able to obtain a remission to the extent of his lien. It is to be noted, however, that such relief is discretionary with the administrative official and, even though probably not reviewable in the courts,[53] is the sole relief available to this lienholder.

49. *Ibid.*

50. 207 F. Supp. at 699. The constitutional violation referred to is a "taking of private property for public use without fair compensation." *Id.* at 698.

51. The statutory scheme of the customs laws provides for discretionary remission by the secretary of the treasury. 46 Stat. 757 (1930), 19 U.S.C. § 1618 (1958). This power has been transferred to the attorney general. Exec. Order No. 6166. See 5 U.S.C. §§ 124-132 and note (1958).

52. 46 Stat. 757 (1930), 19 U.S.C. § 1618 (1958).

53. United States v. Cramling, 180 F.2d 498 (5th Cir. 1950); United States v. One 1951 Cadillac Coupe De Ville, 108 F. Supp. 286 (W.D. Penn. 1952).