Personal Property and Sales – 1960 Tennessee Survey

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A foreigner given to rash generalizations would quickly conclude upon reading this year's sales and personal property cases that the three most flourishing and litigation-producing institutions in Tennessee are the automobile, the General Motors Acceptance Corporation and bootlegging. The automobile is responsible for all five of the cases covered in this survey; in four of the five the General Motors Acceptance Corporation is the defendant; and two of the five grow out of bootlegging activities.

I. PERSONAL PROPERTY

A. Bailments

1. Innkeeper's Liability for Damage to Guest's Auto.—The difficult question of the innkeeper's liability for damage to his guest's personal property came before the Eastern Section of the Tennessee Court of Appeals during the survey period. In Sewell v. Mountain View Hotel the court had to decide whether a guest, who parks his automobile in an open, unattended parking area provided by the hotel free of charge, can recover from the hotel for damage to the auto caused by the negligent driving of a motorist who had no connection with the hotel. The guest parked and locked his car on a lot adjacent to the hotel after seeing a sign indicating that the lot was for the use of guests; and the car was damaged when a drunk driver, neither a guest nor an employee of the hotel, lost control of his automobile and careened into the parking area. The plaintiff conceded that the hotel had not been negligent and relied instead on the common-law theory that an innkeeper is strictly liable for damage to his guest's personal property. Affirming the trial court's directed verdict in favor of the hotel, the court of appeals held the theory of strict liability inapplicable.

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1. 325 S.W.2d 626 (E.S. Tenn. 1959).
since the hotel, unaware that the guest had parked his car in its lot, had neither accepted control of the car nor directed that it be parked in the lot.

Tennessee follows the ancient common-law doctrine that an innkeeper is an insurer of goods entrusted to his care. Where the guest brings property into the hotel, it is established that such liability extends not only to goods placed in the custody of the innkeeper but also includes property which the guest keeps in his possession in the hotel. Innkeepers have also been held strictly responsible for property such as horses and automobiles placed in their custody, but the Mountain View Hotel case refuses to allow recovery for damage to vehicles parked in a specified area at the invitation of the hotel when possession and control are retained by the guest.

The extent of the innkeeper's duty to protect his guests' automobiles from damage is not clearly settled. Courts, in many cases reluctant to hold hotel garage facilities strictly liable, have found it difficult to give a satisfactory explanation for their results. And the court here found difficulty in providing adequate theoretical underpinning for what seems to be a proper result. Even though the hotel had installed a sign inviting guests to use its parking area, the court states the conclusion that there is no liability since possession and control of the automobile remained with the guest, and no attempt is made to distinguish cases holding innkeepers strictly liable for goods which are brought into the inn by the guest and retained in his exclusive control.

Some language in the opinion suggests that the court is merely applying what it conceives to be a common-law rule: "whenever the guest retains the custody and control of his property . . . the innkeeper . . . is not responsible for the acts of third persons with whom he is in no way connected." This is not, however, an accurate statement of


6. The complete statement is: "[W]henever the guest retains custody and control of his property in such a way as to indicate that he is not trusting the innkeeper to guard and protect it and concedes to the innkeeper no control or right of control, the property of the guest is not impliedly in the custody of the innkeeper and he is not responsible for the acts of third persons with
the rule for it does not take into account the cases in which innkeepers are held strictly liable for damage or theft of goods such as clothing and baggage over which the guest retains complete possession.\textsuperscript{7}

Innkeepers who provide garage facilities or parking space for their guests should be liable, it seems, only for negligence; and it is believed that the court should have settled Tennessee law in favor of such a rule. Commercial garages and parking lots are liable for negligence only,\textsuperscript{8} and no cogent reason appears for placing a higher standard of care on hotel-kept parking lots. By statute Great Britain recently clarified this area of the law by excepting hotel parking facilities from strict liability while retaining the common-law doctrine elsewhere.\textsuperscript{9}

The instant case suggests another interesting problem, one that has not been raised in Tennessee or other states: namely, the liability of motels for damage to the automobiles of their guests. This case may be precedent for the proposition that motel proprietors will not ordinarily be held strictly responsible for damage to a guest's auto since guests normally retain complete control of their cars while staying at the motel.

2. Bailee's Liability for Negligence.—While the courts decided no other cases during the survey period dealing with the substantive law of bailments, the Tennessee Supreme Court rendered a decision interpreting a Tennessee statute which presumes negligence on the part of a bailee who fails to redeliver the bailed goods according to the bailment contract or redelivers them in a damaged condition. For a discussion of this case, see the surveys of torts and procedure.\textsuperscript{10}

whom he is in no way connected.” 325 S.W.2d at 628. (Emphasis added.)
The italicized language, which was omitted from the quotation in the text, suggests that the court may be taking the view that the plaintiff by locking his car in the unattended lot assumed the risk of damage by a stranger; but the court treated the issue as a question of law, whereas “assumption of the risk” is usually treated as a question of fact for the jury. See Brown, Personal Property 487 (2d ed. 1955); Prosser, Torts 343 (3d ed. 1955).

7. See Brown, Personal Property §§ 102, 105 (2d ed. 1955).
8. Dickson v. Blacker, 194 Tenn. 504, 253 S.W.2d 728 (1952); Andrew Jackson Hotel v. Platt, 19 Tenn. App. 360, 89 S.W.2d 179 (Tenn. 1938); Malone v. Harth, 12 Tenn. App. 687 (Tenn. 1930).
II. Sales

A. Conditional Sales

1. Waiver of Public Sale of Repossessed Goods.—Two recent cases interpret provisions of the Tennessee Conditional Sales Act prescribing the requirements for a valid waiver of compulsory public sale. Section 47-1302 of the code provides that the conditional seller, after retaking the goods upon default by the buyer, is obliged to resell them, satisfying the amount of his claim from the proceeds and paying the excess, if any, over to the buyer. This sale must be public rather than private unless “the original seller, or his assignee, and the purchaser . . . by agreement in writing, entered into after default, waive the [public] sale provided for in this section.”\(^1\) Section 47-1306 then provides that unless there is a valid waiver of public sale under section 47-1302 “the original purchaser may recover from said seller or assignee that part of the consideration paid to him” if he fails to resell the goods at public auction.\(^2\)

In *Douglas v. General Motors Acceptance Corp.*,\(^3\) the defaulting purchaser of an automobile brought suit under section 47-1306 against the assignee of the conditional sales contract for installments paid under the contract, claiming that the assignee sold the repossessed auto at private rather than public sale without receiving a valid waiver of public auction under section 47-1302. The plaintiff admitted writing a letter waiving the requirement of public auction and authorizing the defendant to sell the car by private sale. But he claimed that the waiver lacked consideration and was therefore invalid.

The question facing the supreme court was whether the word “waive” as used in section 47-1302 (“but . . . the purchaser . . . may . . . waive the [public] sale”) is to be given its common-law meaning which requires that in order to have a valid waiver of a legal obligation there must be either a contract supported by consideration or the element of estoppel—though there are many exceptions to this rule.\(^4\) While the court did not discuss the issue in terms of statutory construction, it apparently assumed that the legislature did not use the word “waive” in the sense of “elect” or “dispense with” but rather in its common-law sense as denoting a promise to surrender a right supported by consideration or estoppel.\(^5\) Having made this assumption, the supreme court then affirmed the court of appeal’s

\(^{11}\) TENN. CODE ANN. § 47-1302 (1956).
\(^{12}\) TENN. CODE ANN. § 47-1306 (1956).
\(^{13}\) 326 S.W.2d 846 (Tenn. 1959).
\(^{14}\) WILLISTON, CONTRACTS § 679 (rev. ed. 1936).
\(^{15}\) See generally SUTHERLAND, STATUTORY CONSTRUCTION §§ 5301-03 (3d ed. Horack 1949).
decision for the defendant by holding the plaintiff's waiver of public sale effective because both consideration and circumstances raising a promissory estoppel were present. To find consideration, the opinion relied on a statute creating a presumption of consideration in the absence of proof to the contrary. The court also reasoned that plaintiff is estopped to deny the validity of the waiver since the defendant sold the auto at private sale acting in reliance on plaintiff's letter expressly permitting such a sale.

Though the court was deterred by an earlier Tennessee decision requiring consideration for the waiver of public sale, a much shorter and more intellectually satisfying path to this result is to say simply that the legislature did not intend by its use of the word "waive" to embody all of the word's common-law nuances. "Waive" is a word of everyday speech and does not necessarily mean the relinquishment of a right in exchange for a valid consideration.

In *Tedesco v. General Motors Acceptance Corp.*, the facts were practically the same as those of the *Douglas* case above except that when plaintiff surrendered the auto to defendant he signed a contract whereby he was given until a specified date to redeem the auto by paying the delinquent installments. In the redemption contract, plaintiff also waived the statutory requirement of public sale if the delinquencies were not paid. The auto was sold at private sale according to the agreement when the delinquencies were not paid. The plaintiff could hardly contend that the contract lacked consideration, as did the plaintiff in the *Douglas* case; instead he argued that the waiver was invalid because the waiver agreement was not "entered into after default" according to the terms of section 47-1302. He contended that repossession under such a redemption agreement is not a "default" within the meaning of section 47-1302 but in effect extends the time for payment, vitiating the "default." The Court of Appeals for the Western Section, relying heavily on one of its prior unreported cases, accepted plaintiff's argument and reversed the trial court's decision in favor of the defendant.

The court reasoned that the purpose of the statute disallowing waivers entered into before "default" is to prevent conditional sellers from inducing a delinquent purchaser to consent to forego a public sale in exchange for such consideration as the opportunity to redeem. The purchaser's decision to forego a public auction should be voluntary and not induced by "bait" dangled before him on a string. Such reasoning is in direct conflict with the requirement of the *Douglas* case that the waiver be supported by consideration. Consideration is usually nothing more than "bait," the exchange of something of value

for something else of value. The supreme court in *Douglas* said that a waiver is invalid if not supported by consideration while the court of appeals in *Tedesco* reasoned that the waiver is premature and invalid if some kind of consideration is given to induce the waiver. It is difficult to believe that the legislature, in passing the Conditional Sales Act, intended such a contradiction; yet the supreme court's opinion in the *Douglas* case contains language which apparently approves the court of appeals decision in *Tedesco*.17

As the supreme court aptly observed in the *Douglas* opinion, private sales through commercial channels usually result in higher realization on collateral for the benefit of all parties than do public sales:

Forty years ago public sales of distress property under these conditional sales transactions had much greater efficacy than they do today. It is a matter of common knowledge among the legal profession, as well as a great many business people, that so many of these notices required by the statute to be posted in 3 public places in the county are never seen by anybody . . . . In addition to that, experience has shown that in sales of this kind so frequently the public sale does not bring as good a price as a private sale . . . . Therefore, a great many defaulting purchasers prefer to sign these waivers on the belief that they will obtain a larger price for the article, thereby reducing the balance remaining due on the debt.18

It is hoped that private sales will be encouraged.19 In order to encourage such sales, it would seem that courts should not read into the statute the requirement that a waiver of public sale be supported by consideration. Neither are private sales encouraged by reading into the statute language which renders invalid waivers given in exchange for the opportunity to redeem the repossessed goods—especially since agreements allowing this opportunity should likewise be encouraged.

2. Seizure of Vehicles Illegally Transporting Liquor.—In *General Motors Acceptance Corporation v. Atkins*,20 the conditional buyer of an automobile was caught unlawfully transporting liquor; and the plaintiff, the Commissioner of Finance and Taxation, confiscated the car under a statute authorizing seizure of vehicles used to transport contraband goods.21 Defendant, the assignee of the conditional sales contract, claimed a superior interest in the automobile on the ground that it had satisfied the requirements of the statute. Under the statute the commissioner's power over such confiscated vehicles is superior to the rights of persons holding a security interest therein

17. See *Uniform Commercial Code* § 9-504 and the explanatory notes thereto.
18. 326 S.W.2d at 850.
19. 326 S.W.2d at 851.
20. 325 S.W.2d 270 (Tenn. 1959).
unless the lienholder, prior to the acquisition of his interest in the vehicle, investigates the owner's reputation for dealing in liquor by making "inquiry at the headquarters of the sheriff, chief of police, principal federal internal revenue officer engaged in the enforcement of the liquor laws, or other principal local or federal law-enforcement officer of the locality in which the owner resides." (Emphasis added.) Affirming the trial court's decision restoring the auto to defendant, the supreme court held that the defendant satisfied the requirements of the statute when he made inquiry of the Federal Alcohol and Tobacco Tax Unit in Nashville and was informed that the owner had no record or reputation for violation of liquor laws. Justice Tomlinson dissented on the ground that inquiry was not made of an official in the correct locality since the owner, a resident of Humboldt, bought the auto in Jackson and inquiry was made in Nashville, one hundred fifty miles away.

In Boyd v. General Motors Acceptance Corp., the fact situation was similar. The supreme court held that the conditions of the statute requiring inquiry of a local official were not met when the assignee merely asked the automobile dealer who sold the car about the reputation of the owner and was informed that he was not engaged in transporting liquor illegally. The trial court's decision restoring the auto to the defendant was reversed.

23. 330 S.W.2d 13 (Tenn. 1959).