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Personal Property and Sales

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PERSONAL PROPERTY AND SALES

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SALES

Two sales cases were decided during the survey period. One of the cases, *Henson v. Wright*,[1] was an action by the buyer of a tractor to rescind the purchase for breach of warranty. Complainant in that case inquired of defendant, an automobile dealer, about the purchase of a second hand tractor suitable for working a truck garden. Defendant, who was not a regular tractor dealer, told complainant that he thought he knew where he could procure a tractor for complainant. Some time thereafter complainant, defendant, and one of defendant's mechanics went to the home of a Mr. Johnson (who was away at the time) to look at a tractor that Johnson had, and complainant agreed to buy it. While being delivered to complainant's home, the tractor, broke down and defendant had it taken to his place of business for repair. Later, after delivery to complainant, it broke down again and proved incapable of doing complainant's work. In the suit to rescind, defendant contended (1) that he did not sell the tractor to complainant but merely acted as a go-between and accommodated complainant by getting the transaction financed at the bank, and (2) that he did not make any warranty of any kind as to the fitness or usefulness of the tractor. On appeal, the court of appeals affirmed the chancellor's decree. In support of the chancellor's finding that there was privity of contract between defendant and complainant and that defendant and not Johnson sold the tractor to complainant, the court pointed out the following: the note which complainant gave in connection with the transaction was made payable to defendant, not to Johnson; Johnson was nowhere mentioned as seller in the transaction; the record did not show how much defendant paid Johnson for the tractor or how much profit defendant received; there were never any negotiations between complainant and Johnson; and Johnson testified he sold the tractor to defendant. In sustaining the chancellor's finding that defendant made an express warranty as to the fitness of the tractor, the court commented that "the actions of the defendant immediately after the sale and purchase of the tractor tip the scales in favor of the complainant's contention. When the tractor broke down and quit running while being driven to complainant's home, the defendant sent for and had

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1. 296 S.W.2d 367 (Tenn. App. W.S. 1955).

the tractor towed to his garage and made repairs thereon, and then later, upon complaint by complainant either in person or through mechanic, made two trips to complainant's home for adjustments to the tractor before he, in vexation, announced to the complainant's wife that he would make no further repairs on the tractor."[2]

Judd v. Fruehauf Trailer Co.[3] is a questionable decision which perhaps opens a way for a seller in a conditional sale contract to circumvent provisions of the conditional sales act designed to protect the conditional buyer. The statutory provisions involved in that case state that whenever a conditional seller regains possession of property sold because the consideration remains unpaid at maturity, he shall within ten days after regaining possession advertise the property for sale for cash to the highest bidder by posters posted in specified public places,[4] and that if the seller fails to do so, the conditional buyer may recover from the conditional seller that part of the consideration which has been paid to the seller.[5] In the *Judd* case, defendant sold plaintiff a trailer. When plaintiff fell behind in his payments, defendant directed plaintiff to bring the trailer and leave it on defendant's lot while plaintiff attempted to make arrangements for refinancing or for bringing the payments up to date. Plaintiff eventually brought suit under the statutes mentioned above to recover the amount that he had paid on the purchase price of the trailer, insisting that all negotiations for refinancing the trailer had ended not later than February and that defendant had not begun to advertise the trailer for sale until the latter part of May. The circuit court dismissed the suit, and on appeal the judgment was affirmed. The court of appeals stated that the record clearly showed that neither plaintiff nor defendant considered that placing the trailer on defendant's lot was for the purpose of immediately enforcing defendant's claim for the balance of the purchase money; that the trailer was placed there pending negotiations for refinancing; that even though active negotiations for refinancing were not carried on after the middle of February, nevertheless defendant was "indulging" plaintiff with the hope that he would catch up the delinquent installments or refinance the purchase and thus save the money he had already put into the trailer; and that defendant was not in any way trying to impose on plaintiff or take advantage of him. The court concluded that, as the statutory provisions were passed for the protection of the buyer of goods, defendant could not in equity and good conscience be penalized for undertaking to afford plaintiff even more protection than the law required.

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2. *Id.* at 371.
3. 293 S.W.2d 591 (Tenn. App. M.S. 1956).
4. TENN. CODE ANN. § 47-1302 (1956).
5. TENN. CODE ANN. § 47-1306 (1956).

PERSONAL PROPERTY

Liability of Common Carrier: Is a carrier liable to a shipper for breach of contract for failure to deliver an animal lost en route from point of shipment to point of delivery? This question was considered by the Western Section of the Court of Appeals during the survey period in *Frye v. Railway Express Agency, Inc.*[6] In this case the Court decided that the evidence presented a question for the jury as to whether the carrier's employees were negligent in not preventing the animal (dog) from escaping.

Since a very early date the general rule has been that a common carrier is an insurer of goods entrusted to his care, liable for their loss or damage at all events.[7] With the passage of time certain exceptions to this rule of absolute liability were developed until at the present time the following exceptions are generally recognized, viz., (1) act of God, (2) act of the public enemy, (3) act of the state, (4) act of the shipper, and (5) damages due to the inherent nature of the goods themselves.[8]

In addition to these exceptions, common carriers have succeeded in limiting the rigorous nature of the liability imposed upon them by the common law by the use of contracts with the shipper. Though common carriers may be somewhat more circumscribed in their freedom to contract with a view to limiting their liability than is an ordinary bailee, it is generally accepted that they may by contract place suitable restrictions and limitations on their common-law liability for loss of the shipped goods.[9]

In the *Frye* case the shipment of the dog was made under a special livestock contract. The validity of this contract was not in dispute. By its terms the shipper agreed to assume many of the risks for loss of or damage to the animal that absent such agreement the carrier would have had to bear. The general nature of this contract is to limit the liability of the carrier to injury or loss caused by the carrier or by the negligence of its agents or employees and it attempts to place the burden of proving the negligent loss by the carrier on the shipper.[10] Absent such a contractual undertaking the carrier is generally presumed to be liable and the burden of proving that the loss is due to an excepted cause is on the carrier.[11]

But just what significance did the court attribute to the clause in the

6. 296 S.W.2d 362 (Tenn. App. W.S. 1955).
7. Coggs v. Bernard, 3 Salk. 268, 91 Eng. Rep. 817 (K.B. 1703).
8. See BROWN, PERSONAL PROPERTY 423-48 (2d ed. 1955).
9. *Id.* at 470.
10. *Id.* at 425.
11. Such a provision was present in the case at hand. "Section 8. The Shipper agrees that as a condition precedent to recovering hereunder for loss or injury or damage to or delay in delivery of this shipment, such loss, injury, damage or delay shall be proved by the Shipper to have been caused by the negligence of the Carrier. . . ." 296 S.W.2d at 365.

contract placing the burden of proving negligence of the carrier on the shipper? The case is not entirely clear on this point. Quoting from a prior Tennessee decision[12] the court stated: "The mere factum of the loss or damage does not fix absolutely the liability of the carrier but simply operates to impose upon it the necessity of showing that the loss or damage did not result from its negligence. . . ."[13] Yet the court recognized[14] that a carrier may "exonerate itself from responsibility by either showing that the case falls within one of the exceptions of the common law, or within one of the stipulations of the special contract."[15] And the ultimate question was stated in terms of whether or not there was any material evidence upon which the jury could have found the defendant guilty of proximate negligence and therefore liable to the plaintiff for the loss of the dog. The court concluded that there was such evidence and that the action of the circuit judge who set aside a verdict in favor of the shipper and directed a verdict for the carrier was in error.

Pledges: In *First Nat'l Bank v. Ivie*[16] the Eastern Section of the Court of Appeals had occasion to consider the duties and obligations of a pledgee of certain promissory notes. A pledge is a bailment of personal property to secure an obligation of the bailor.[17] In this case Ivie had endorsed and delivered a number of promissory notes in which he was named as payee to Judge Dannel for the purpose, among other things, to hold the balance of these notes " 'as collateral or as security for the payment of the balance due' "[18] a certain creditor. The amount due and owing such creditor was apparently in dispute. The pledgee sold the notes to the bank and used the money obtained therefrom to discharge the claims of pledgor's creditors. Since the court could find no authority for such an act it concluded that this amounted to a conversion even though the pledgor might eventually be unable to establish any damage from the sale.[19]

The court cited ample authority for the proposition that the violation by the pledgee of any condition under which the pledged property is received by him is a conversion of the property. While as a general rule a pledgee can legally sell the pledged property after default by the pledgor on the principal obligation if he proceeds in a proper manner, it is generally true that where the articles of pledge are choses in action (promissory notes, bills of exchange, etc.) they cannot be

12. Illinois Cent. Ry. v. H. Rouw & Co., 25 Tenn. App. 475, 159 S.W.2d 839, 841 (W.S. 1940).
13. 296 S.W.2d at 365.
14. *Ibid.*
15. Louisville & N. Ry. v. Wynn, 88 Tenn. 320, 14 S.W. 311 (1890).
16. 293 S.W.2d 34 (Tenn. App. E.S. 1955).
17. RESTATEMENT, SECURITY § 1 (1941).
18. 293 S.W.2d at 39.
19. *Ibid.*

sold absent an agreement between pledgee and pledgor permitting such sale. An unauthorized sale by the pledgee of this type of security constitutes a conversion of the property and the pledgee is liable in damages for the reasonable value of the property disposed of.[20] Where such is the nature of the pledged property and there is no agreement for sale, the pledgee upon default can enforce his security only by collecting from the obligor of the pledged close.

Gifts: There were two significant developments affecting the law of gifts during the survey period. The first of these was a decision by the Western Section of the Court of Appeals[21] in which there is an extensive discussion of the law in this jurisdiction bearing on gifts of personal property. The fact situation presented a question never before directly considered by a Tennessee court and the court resolved the question by holding that there was a good inter vivos gift of decedent's account in a savings and loan association where he had executed an assignment in the pass book, placed it and a letter explaining the assignment in a sealed and stamped envelope properly addressed to assignee, and then deposited in a rural mail box where it was subsequently picked up by the mail carrier. The difficulty the court faced arose from the fact that donor was contemplating suicide when he made the gift and committed suicide before the pass book was in the hands of the donee. This case is fully discussed elsewhere in this survey[22] and no further treatment is justified here, other than to say that the result reached appears to be a sound one although it is difficult to understand just why the court spent so much time in justifying its classification of the gift involved as inter vivos rather than causa mortis. It is submitted that the result should be the same even if the conclusion is that the gift was causa mortis.[23]

The second significant development was legislative in character. The Eightieth General Assembly passed and the Governor signed the "Uniform Gifts to Minors Act" which became effective March 7, 1957.[24] This Uniform Act has now been adopted in some fourteen states and has been made applicable by Congress to the District of Columbia.[25]

The Uniform Gift to Minors Act was approved by the National Conference of Commissioners on Uniform State Laws in 1956. It was based upon a model act drafted and sponsored by the New York Stock Exchange and the Association of Stock Exchange Firms. In the Com-

20. BROWN, PERSONAL PROPERTY 670 (2d ed. 1955).
21. Ray v. Leader Federal Sav. & Loan Ass'n, 292 S.W.2d 458 (Tenn. App. W.S. 1953).
22. Hartman, *Contracts—1957 Tennessee Survey*, 10 VAND. L. REV. 1013, 1026 (1957).
23. See BROWN, PERSONAL PROPERTY 151 (2d ed. 1955).
24. Tenn. Pub. Acts 1957, c. 112, TENN. CODE ANN. §§ 35-801 to -810 (Supp. 1957).
25. 9A UNIFORM LAWS ANN. 32 (Supp. 1957).

missioner's prefatory note the following statements appear.[26]

> The Model Act provides a simple, inexpensive method for making gifts of securities to minors, for accomplishing what could previously be done under a trust instrument.
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> A direct gift of securities to a minor involves serious practical difficulties, particularly upon the sale of the security during minority. The minor may disaffirm the sale; hence, brokers, issuers and transfer agents deal with a minor at their peril.
>
> A formal guardianship provides no adequate substitute. The guardian may be liable for losses if a "non-legal" security is retained. Generally he cannot reinvest except in "legals." Generally also he is required to furnish a bond and to make frequent expensive formal accountings.
>
> The net result is to discourage, if not prevent, small gifts of securities to minors. Statutes or regulations eliminate those complications when the subject of the gift is a United States Savings Bond or, in many states, money deposited in a banking institution. The Model Act seeks a similar result when the subject of the gift is a security.
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> The theory underlying the Model Act is simple. A donor who gives a security to a minor in the manner prescribed by the Act thereby makes a gift which vests indefeasibly in the minor (and qualifies for the $3000/$6000 gift tax exclusion provided for in Internal Revenue Code Section 2503) and, in addition subjects the gift to the prescribed administrative powers, rights, duties and immunities of the custodian named by the donor and third person dealing with the custodian.
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> The Uniform Act broadens the Model Act to permit gifts of money for investment under the "prudent man" rule prescribed in the act.

It would be well for lawyers to study this legislation in order to advise clients who contemplate gifts of money or securities to minors.[27]

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26. *Ibid.*

27. 1956 INT. REV. BULL. No. 11, at 11; 2 CCH FED. EST. & GIFT TAX REP. ¶ 8066 (Jan. 6, 1956); MacNeill, *Giving to Minors Made Easy—In Eight States,* TRUST BULL. Nov. 1955 p. 28. See Moore, *Uniform Gifts of Securities to Minors Act: A Consideration of Its Merits,* 33 U. DET. L. J. 298 (1956); Notes, 69 HARV. L. REV. 1476 (1956); 54 MICH. L. REV. 883 (1956).