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I. Introduction

Obviously, the biggest event in the Tennessee law of commercial transactions this year was the enactment of the Uniform Commercial Code [hereinafter referred to as the U.C.C.]. That statute became effective in this state on July 1, 1964. Its effect on the prior Tennessee law is discussed in great detail elsewhere in this issue,[1] and need not be re-examined here.

It should also be pointed out that the enactment of the U.C.C. required some modifications in the criminal statutes relating to security agreements. In particular, executing a second security agreement covering personalty, without disclosing a prior security agreement covering the same property, will now be punishable under Tennessee Code Annotated section 39-1936; and removing outside the state or disposing of any personalty subject to a security agreement will now be punishable under Tennessee Code Annotated sections 39-1956 and 39-1957. These sections supplant Tennessee Code Annotated sections 39-1933, -38, -54 and -55 in their respective areas on the effective date of the U.C.C.[2]

There were also three commercial law cases decided during the year—all of which were decided by the western section court of appeals. One case involved a determination of when the risk of loss during shipment passes to the buyer under a delivery contract. Two other cases involved the extent of warranty protection available to buyers. Most of the issues decided in these cases are also covered by express language in the U.C.C., which would modify, and in one case overturn, the holdings of the court.

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1. Bigham, *Tennessee Law and the Sales Article of the Uniform Commercial Code*, 17 Vand. L. Rev. 873 (1964); White, *Tennessee Law and the Secured Transaction Article of the Uniform Commercial Code*, 17 Vand. L. Rev. 835 (1964). See also, Spanogle, *The Bank-Depositor Relationship—A Comparison of the Present Tennessee Law and the Uniform Commercial Code*, 16 Vand. L. Rev. 79, (1962); Notes, 22 Tenn. L. Rev. 776-872 (1953).

2. These sections have been amended to apply only to contracts entered into before July 1, 1964, the effective date of the U.C.C.

II. RISK OF LOSS DURING SHIPMENT

At 5 A.M. on Sunday morning, Carrier delivered goods in leaky barges to Buyer's place of business, and tied these barges up at Buyer's dock. Earlier that night, Carrier had notified Buyer's night-watchmen that the barges would arrive; and after arrival Carrier's crewmen had talked to a watchman about the leak; but Carrier had then left without giving further notification to Buyer of the arrival of the goods. By 2 P.M. Sunday both barges had sunk. *Parish & Parish Mining Co. v. Serodino, Inc.*[3] presented the issue of who had the risk of loss at that time, Buyer or Seller. A "destination" contract was involved. It specified that the purchase was F.O.B. barge at Buyer's terminal, and further provided that "title to the goods and risk of loss or damage shall remain in [Seller] until delivery in acceptable condition by the carrier at Destination."[4]

The court of appeals held that the risk of loss was still on Seller at the time the barges sank. In so doing, it alluded to three possible grounds for its holding: (1) In order to "deliver" the goods, Carrier must properly notify Buyer of their arrival, and this requires notification of some employee who has authority to accept the goods. Since Carrier notified only watchmen who had no such authority, the goods were never delivered, and the risk of loss could not pass to Buyer under the terms of the contract. (2) Title to the goods, and risk of their loss, does not pass until the goods have been accepted by Buyer. Buyer is not deemed to have accepted until he has had a reasonable opportunity to inspect. Since Buyer never had such an opportunity in this case, the risk of loss did not pass. (3) Since the barge was leaking, the goods were delivered in an unacceptable condition, so that the risk of loss could never pass to Buyer.

From the written opinion, it is not clear whether any one of these grounds was relied upon by the court as determinative of the case.[5] The first ground is unobjectionable and a complete answer to the issue before the court,[6] and perhaps the court should not have con-

3. 372 S.W.2d 433 (Tenn. App. W.S. 1963).

4. *Id.* at 437, 438.

5. See *Id.* at 447.

6. F. E. Grauwiller Transp. Co. v. Gallager Bros. S & G Corp., 173 F.2d 708 (2d Cir. 1949); Dean v. Vaccaro & Co., 39 Tenn. 488 (1859). Seller appears to have argued that notification was shown by the facts that: (1) one watchman *sent* another down to the docks at the time of arrival; and (2) Carrier tied up the barges at their usual place of mooring. The first would seem irrelevant if neither watchman was a proper person to notify. If the second fact showed a custom on the part of Buyer to accept delivery in this manner, it would show a completed delivery and shift the risk to Buyer. The court apparently did not find such a custom but did not, however, discuss the point. 372 S.W.2d at 445.

sidered the alternative grounds. The second[7] and third[8] grounds raise very disturbing questions of statutory and contractual interpretation under the Uniform Sales Act [hereinafter referred to as Sales Act].[9] These questions were ignored by the court however.

What processes of analysis the court should have followed under the Sales Act became moot on July 1, 1964, when the U.C.C. became effective. Under that statute, the same result would be obtained, but neither of the alternative grounds would be available. Under the contract, the risk of loss does not pass until there has been a delivery. To accomplish delivery, section 2-503(1) requires that the Seller put and hold the goods at the destination and give the Buyer "any notification reasonably necessary to enable him to take delivery."[10] Section 1-207(27) requires that such notification be given to the individual employee who is conducting that transaction, and this condition is not satisfied by notifying a watchman.[11] Thus "delivery" would not have occurred, so that under the contract terms the risk of loss could not have passed to Buyer before the barges sank. Even without the contract language, the U.C.C. would hold Seller responsible. The contract is, by its terms, a destination contract. Under such a contract, Seller is responsible until Carrier has tendered delivery, which again requires notification to the individual conducting the transaction.[12]

7. The court continually asserted that both delivery and acceptance were conditions precedent to passing the risk of loss to Buyer, 372 S.W.2d at 443. This seems to ignore the plain wording of the contract clause which shifts the risk "upon delivery." Delivery alone does not require acceptance, as the authorities quoted by the court itself show. Nor did the court find any right of inspection in the contract language. *Id.* at 446. If the contract is to be ignored, there are still problems of statutory interpretation involved. There seems to be a split of authority under the Sales Act on the point at which title passes under an F.O.B. contract. 46 AM. JUR., *Sales* § 444 (1943), and authorities cited therein. The better reasoned cases hold that title to identified goods does not pass until the goods are accepted, because there has been no prior assent to any appropriation of the goods to the contract. TENN. CODE ANN. § 47-1219, rules 4(1), 5 (1956). *But cf.* TENN. CODE ANN. § 47-1219, rule 4(2) (1956). Such a result is necessary to a proper resolution of other incidents of title to the goods under the Sales Act. See 3 WILLISTON, SALES § 472, at 74 (rev. ed. 1948). It is not necessary to a proper allocation of the risk of loss, however, and is changed under the U.C.C. See note 13 *infra* and text following.

8. This ground was used primarily as a method of distinguishing a prior Alabama case. 372 S.W.2d at 445-47. Therefore, it may not be an alternative ground for the holding. It was, however, originally posed as an alternative ground when the court stated the issues in the case. *Id.* at 440. It appears that the leak did not damage the goods, or make them non-conforming. Therefore, the goods do not seem to have been "unacceptable" in the sense that Buyer could rightfully refuse to accept them. If the court used "unacceptable" in a different sense, it did not indicate what its new definition was, or what are the limitations on the new usage.

9. TENN. CODE ANN. §§ 47-1201 to -1277 (1956). These sections are repealed as of July 1, 1964.

10. TENN. CODE ANN. § 47-2-503(1) (1956).

11. TENN. CODE ANN. § 47-1-207(27) (repl. vol. 1964).

12. TENN. CODE ANN. § 47-2-509(1)(b) (repl. vol. 1964).

Neither alternative ground will be available to the court, however, because the U.C.C. separates the shift of the risk of loss from the passage of other incidents of title. If there had been notification to the proper individual, then the risk of loss as to conforming goods would have passed to Buyer upon such a tender of delivery, regardless of Buyer's right of inspection.[13] Thus the second ground used by the court will no longer be available. Since the passing of the risk of loss is no longer bound to the passing of the other incidents of title, the shift can be made dependent upon physical control of the goods rather than upon assent.[14]

If the goods had been non-conforming, the risk of loss would have remained on the Seller, even after physical delivery, until either Buyer accepted or Seller cured the defect.[15] But, as far as the record shows, the goods were conforming, at least under the U.C.C.[16] Thus, Buyer could not rightfully reject the goods.[17] As long as Buyer could not rightfully reject the goods, the risk of loss would pass to him upon proper tender.[18] He may not prevent the shift of that risk unless Seller has breached the contract in some respect, which did not occur in this case.[19] Thus the third ground mentioned by the court will not be available under the U.C.C. Once delivery is properly tendered, which means that Buyer has a reasonable opportunity to take control, the risk of Carrier's negligence falls on Buyer. Under the statute,[20] Seller has only the duty of making a reasonable contract with Carrier, not of overseeing Carrier's performance.[21]

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13. TENN. CODE ANN. § 47-2-513(4) (repl. vol. 1964). This rule would apply to both the statutory right of inspection and any right which might derive from the language of the contract. Certainly the language in the contract clause quoted does not expressly state that the shift of the risk of loss is postponed until after inspection.

14. See note 7 *supra*.

15. TENN. CODE ANN. § 47-2-510(1) (repl. vol. 1964).

16. See TENN. CODE ANN. §§ 47-2-314(2), -504 (repl. vol. 1964). Seller made a reasonable contract with Carrier. Further, it is doubtful that the entire barge would be considered "a container." UNIFORM COMMERCIAL CODE § 2-314, comment 10. The result should be the same under the Sales Act, but see note 8 *supra*.

17. TENN. CODE ANN. § 47-2-601 (repl. vol. 1964).

18. TENN. CODE ANN. § 47-2-510(1) (repl. vol. 1964). UNIFORM COMMERCIAL CODE § 2-510, comment 1. Seller probably could not make a proper tender of delivery on Sunday, TENN. CODE ANN. § 47-2-503(1)(a) (repl. vol. 1964), unless Buyer had a work crew on duty that day, which seems not to have been the case. 372 S.W.2d at 439-40. Thus the risk of loss would not have passed to Buyer, but this would not be due to any leak in the barges.

19. TENN. CODE ANN. § 47-2-510(1) (repl. vol. 1964); UNIFORM COMMERCIAL CODE § 2-510, comment 1.

20. The contract may, of course, expressly impose additional duties on Seller, or relieve him of the statutory duties.

21. TENN. CODE ANN. § 47-2-504(a) (repl. vol. 1964). This includes providing full insurance coverage where customary. UNIFORM COMMERCIAL CODE § 2-504, comment 3.

III. WARRANTIES

A. *Disclaimer Clauses*

In a sale of a bean packaging machine, Seller expressly warranted in one sentence that the machine would produce commercially acceptable packages and disclaimed all liability for damages due to breach of that warranty in the next sentence.[22] When the machine produced defective packages and Buyer was forced to repossess large quantities of beans, the Tennessee courts were called upon to construe the "no damage" clause.[23]

Both parties were merchants, and the trial court held that there was no fraud or overreaching in the formation of the contract; but it did find that the clause was not available as a defense (1) because it denied buyer any effective remedy for breach of warranty; and (2) because it was inconsistent with the express warranty in the sentence preceding it, making the entire paragraph ambiguous. The appellate court reversed, holding that several other remedies were available, even though Buyer could not claim damages.[24] As long as *some* remedy was available, the "no damage" clause was held to be consistent with the express warranty, and therefore was effective. The court was incorrect in stating that Buyer had *several* other remedies—only one effective remedy remained for breach of warranty; Buyer could rescind the sale.[25] The court's basic point remains valid, however; Buyer had an effective remedy, so that the express warranty was not entirely illusory.

Under the U.C.C., the "no damage" clause might be considered a limitation of remedy under section 2-719, if the language were considered sufficiently explicit, which is doubtful.[26] As such, the clause

22. Seller also in one sentence guaranteed the machine against mechanical defects for one year and in the next sentence limited its obligation under that guarantee to replaeing defective parts *at Seller's factory.*

23. Hayssen Co. v. Donelson & Poston, Inc., 364 S.W.2d 489 (Tenn. App. W.S. 1962).

24. *Id.* at 495.

25. See TENN. CODE ANN. § 47-1269 (1956). Subsection (a) allows recoupment to diminish the price, which is what Buyer tried to do in this case and failed. Subsection (b) allows an action for damages, which is expressly prohibited by the clause. Subsection (c) allows rejection of the goods, but Buyer had to accept and install the machine before the breach could become apparent. Therefore, subsection (d), which allows reseission, is the only available remedy.

26. TENN. CODE ANN. § 47-2-719(1)(a) (repl. vol. 1964). One problem would be that this section, by its terms, applies only to clauses which "substitute" a remedy for the statutory remedies, or "limit or alter the *measure* of damages." The clause in the present case did none of these. It merely disclaimed liability for any damages without expressly providing a substitute remedy. Yet none of the language used in the various non-liability clauses would qualify as a disclaimer of all liability for implied warranties, because the language is too ambiguous. TENN. CODE ANN. § 47-2-316 (repl. vol. 1964). A second problem would be that the clause does not specifically prohibit the setting up

may not limit or modify the remedial provisions of that statute in an unconscionable manner.[27] The U.C.C. does not define "unconscionable," so case law must be consulted in determining whether a clause meets this test. But the court did not consider whether the clause in the present case was unconscionable, except to acknowledge the trial court's finding of no fraud or overreaching, which might be inapplicable under the appellate court's different interpretation of the contract.[28] There is authority in this state,[29] and in others,[30] that such a clause is invalid, at least in sales to the consuming public. Since the court did not discuss the point, it did not reconcile its views with any of the prior authority. This disregard may be based on the fact that the parties were merchants,[31] but it may also indicate a division of opinion between the courts of appeal as to the general validity of disclaimer and "no damage" clauses. However, neither reading of the case precludes a future holding that such a clause is invalid under the U.C.C., even between merchants,[32] because the U.C.C. allows the courts to pass directly on the question of unconscionability, rather than requiring manipulation of other, indirectly related, legal concepts, such as fraud.[33]

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of the breach of warranty by way of recoupment to deduct from the price under TENN. CODE ANN. § 47-2-717 (repl. vol. 1964). *Cf.* note 24 *supra;* (repl. vol. 1964). UNIFORM COMMERCIAL CODE § 2-719.

27. TENN. CODE ANN. § 47-2-719, comment 1 (repl. vol. 1964).

28. Reliance on the trial court's finding may be misplaced. The appellate court concluded that the trial court misread the contract language. Therefore, the trial court found only that there was no fraud or overreaching if the "no damage" clause had only a limited effect. It would seem that the case should have been remanded for a determination as to whether there was fraud or overreaching if the contract was given the appellate court's interpretation; a point which was never decided by the trial court.

29. General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (M.S. 1960).

30. The leading case is Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). Among the features of the clause criticized by the *Henningsen* court, the most important is that the form of expression used gives insufficient notice that the Buyer is yielding most of his basic rights under the contract. The paragraph is labelled a warranty, but is in fact a disclaimer of liability for damages. It promises much, but gives little and withdraws more. Whether the full meaning of the present clause, as interpreted by the appellate court, was appreciated by the merchant buyer was not decided by either court. See note 28 *supra.* For a discussion of the illusory character of the guarantee, see 32 N.J. at 370-78, 161 A.2d at 76-80.

31. See TENN. CODE ANN. § 47-2-719(3) (repl. vol. 1964), where a distinction is made as to the validity of limitations on recovery of *consequential* damages by a merchant and by the consuming public. The clause in the present case does not, however, merely withdraw the power to recover consequential damages, but withdraws the power to collect any damages.

32. Such a holding could be grounded either on the ambiguities of the clause's language, see note 26 *supra,* or on the more general objection that such a clause is unconscionable under the type of reasoning used in Dodson, *supra* note 29, or Henningsen, *supra* note 30.

33. TENN. CODE ANN. § 47-2-302 (repl. vol. 1964).

B. *Transactions Covered*

Buyer purchased a "take out"[34] order of food from a drive-in restaurant. The food allegedly caused Buyer and his wife to become sick, and they sued Seller for damages under a breach of warranty theory.[35] The Tennessee court held that no warranty recovery was available and directed a verdict for Seller.[36] The appellate court first reasoned that statutory warranties were available only in sales transactions, and that restaurateurs usually "serve" food for immediate consumption on the premises, which is not a "sale." It further reasoned that, even though this particular food was not served for immediate consumption on the premises, since it was a "take out" order, there still had been no sale because Seller's establishment was maintained for the purpose of selling food to be consumed on the premises.[37]

The result itself is of little importance because it is expressly overturned by the U.C.C. as of July 1, 1964.[38] It does, however, show an unhealthy antagonism by the court toward both warranty protection to the consuming public and use of analogies drawn from statutory provisions. In order to maintain the distinction between "served" food and "sold" food, the court must be more interested in observing technicalities than in making sense. Preservation of such a distinction is contrary to all of the recent decisions on the issue.[39] It is also opposed to any reasoning process which examines the underlying policies for warranty protection in this area.[40] The health of the person who obtains food at a drive-in restaurant would seem no less important than the health of a person who obtains food at a supermarket. The former may be protected by either a "sale" warranty or by an analogous "service" warranty. The fact that sales warranties are

34. The food was delivered in a paper sack and wrapped in white paper, at the side door of the drive-in. The court found that it was delivered "to be eaten off the premises."

35. Buyer also sued in tort for negligence. However, neither court found any evidence of negligence by Seller.

36. Walton v. Guthrie, 362 S.W.2d 41 (Tenn. App. W.S. 1962).

37. *Id.* at 44. Sueh a statement is directly contrary to Seller's testimony that he did "sell food to customers to be eaten away from the premises." *Id.* at 43.

38. TENN. CODE ANN. § 47-2-314(1) (repl. vol. 1964). Buyer's wife would also be able to recover for her injuries. Any possible privity problems in such a recovery are obviated by TENN. CODE ANN. § 47-2-318 (1956).

39. See, *e.g.*, Kyle v. Swift & Co., 229 F.2d 887 (4th Cir. 1956); Zorinski v. American Legion, 163 Neb. 212, 79 N.W.2d 172 (1956); Sorfman v. Denham, 37 N.J. 304, 181 A.2d 168 (1962) (modifying the prior New Jersey rule); Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960). See also Conn. Pub. Acts 1951, No. 318, changing the prior Connecticut case law. This new statutory rule was carried forward in the U.C.C., Conn. Gen. Stat. § 42a (1963 Supp.). For pre-1948 cases, which do show a split of authority, but with a majority of decisions allowing warranty recovery, see Annot., 7 A.L.R.2d 1027,1034,1056 (1949).

40. See Note, 1961 WIS. L. REV. 141, and authorities cited therein.

of statutory origin should not prevent the exchange of ideas and authority between sales and non-sales cases.[41]

Further, when the court holds that this transaction was not a "sale," it ignores the technicalities involved as well as any reasoning process, for this transaction was obviously a sale for consumption off the premises.[42] Even though this Seller may well have in most cases "served" food for consumption on the premises, in this particular transaction he was willing to make extra money by venturing outside this normal pattern.[43] While undertaking this extra venture, Seller should be held to subject himself to the sales warranty liabilities which normally attach to the contract he actually made. The Sales Act does not make the distinctions relied on by the court.

It is to be hoped that the court will show more understanding of the purposes which are sought to be achieved when it construes the U.C.C. In particular, it is hoped that the court will look to cases from other jurisdictions when construing a supposedly uniform statute. In this case it did not, and proclaimed a decision contrary to the law in a vast majority of other Sales Act jurisdictions,[44] even though no Tennessee case required the result reached by the court. If such methods are continued, Tennessee will soon again have non-uniform commercial law, regardless of its enactment of the Uniform Commercial Code.

41. See Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, at 12-14 (1936); Note, 2 VAND. L. REV. 675 (1949). See also Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 654, 667 (1957); Ferson, *Agency to Make Warranties*, 5 VAND. L. REV. 1 (1951); Landis, *Statutes and the Sources of Law*, HARVARD LEGAL ESSAYS 213 (1934); Note, 26 COLUM. L. REV. 744 (1926). This same point was not recognized by the Tennessee Supreme Court in Redmon v. U-Haul Co., 358 S.W.2d 300 (Tenn. 1962). See Spanogle, *Commercial Transactions and Personal Property—1962 Tennessee Survey*, 16 VAND. L. REV. 637, at 638-43 (1963).

42. Compare the reasoning in Sorfman v. Denham, *supra* note 39, wherein cafeterias were held to sell food, not serve it.

43. See note 34 *supra*. Further, "take out" sales seem to have been a recognized part of Seller's business. See note 37 *supra*.

44. See notes 39 and 40 *supra* and accompanying text.