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PERSONAL PROPERTY AND SALES—1961 TENNESSEE SURVEY

JAMES O. BASS, JR.*

There were no cases decided during the survey period dealing with the law of personal property. There was one case concerning the Uniform Sales Act, one case construing provisions of the Conditional Sales Act, and a statute enacting the Retail Installment Sales Act.

I. SALES

A. Express Warranty

Privity of Contract.—The Tennessee courts have heretofore denied recovery in actions for breach of warranty in the absence of privity of contract between the plaintiff and the defendant.[1] The required privity had not previously been found when a manufacturer was sued by a consumer who purchased from an intermediate dealer.[2] A case was decided during the survey period which casts a shadow upon the requirement of privity in such actions. In *General Motors Corp. v. Dodson*[3] the wife of a purchaser of an automobile was allowed to recover from the manufacturer for personal injuries sustained as a result of defective brakes. The suit was based solely on the theory of breach of warranty.[4] The effect of this case is not entirely clear. Strictly speaking, it did not hold that privity is no

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1. Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S.W.2d 721 (1942).

2. It is necessary to distinguish between a suit by a consumer against a manufacturer on the contractual theory of breach of warranty and a tort action for negligence. It is recognized in Tennessee that "where a product is such that, if negligently made, it may reasonably be expected to injure the person or property of an ultimate user of it, then, irrespective of contract, the manufacturer is under a duty to such user to make it carefully." Dunn v. Ralston Purina Co., 38 Tenn. App. 229, 272 S.W.2d 479 (M.S. 1954). The distinction is important because it may often be possible to prove a breach of warranty although a manufacturer had exercised the utmost care and would consequently not be responsible in tort.

3. 338 S.W.2d 655 (Tenn. 1960). For an excellent comment on this case and a similar New Jersey case, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), see 14 VAND. L. REV. 681 (1961).

4. 338 S.W.2d at 658.

longer required to support an action for breach of warranty. However, it evidenced a strong tendency to find privity in a relationship in which it had not previously been recognized by the courts of this state.

In holding that General Motors was liable on the theory of breach of an express warranty the court stated that there was evidence from which the jury could have found that the dealer was a "conduit or subterfuge" and that General Motors was the entity with whom the consumer-plaintiff dealt.[5] Thus there was found a basis on which to predicate liability, even though the warranty was actually given to the purchaser by the dealer. However, on petition to rehear, the court said that the facts would support a recovery even if there were no privity between General Motors and the plaintiff.[6] Although the strength of this statement is weakened by the fact that it is not necessary to the holding, as well as by the court's citation of negligence rather than breach of warranty cases,[7] the fact that it appears in the opinion is a strong indication that the privity requirement may be abolished in the near future.

B. Implied Warranty

Contractual Disclaimer.—In the *Dodson* case, there was an alternative holding that the consumer could recover on the theory of an implied warranty of quality or fitness.[8] The significance of such a holding lies in the fact that the express warranty which the court found running from General Motors to the plaintiff recited that it was "expressly in lieu of all other warranties, expressed or implied . . . ."[9] This disclaimer was ignored in spite of the fact that Tennessee Code Annotated section 47-1215(6) seems to allow this method

5. 338 S.W.2d at 661. The evidence from which the jury could have found this to be true was the fact that General Motors gave a written warranty to the dealer and required the dealer to give the same warranty to the purchaser of the automobile. The court said that "the practical effect of this entire plan was that General Motors gave the warranty to the ultimate consumer." 338 S.W.2d at 660. On petition to rehear, the court found that advertisements made by General Motors are for the benefit of purchasers rather than dealers, and therefore "form a part of the express warranty which General Motors gives to the consumer." 338 S.W.2d at 665.

6. 338 S.W.2d at 665.

7. Dunn v. Ralston Purina Co., 38 Tenn. App. 229, 272 S.W.2d 479 (M.S. 1954); Burnett v. Studebaker Bros. Mfg. Co., 126 Tenn. 467, 150 S.W. 421 (1912).

8. TENN. CODE ANN. § 47-1215 (1956) governs the existence of implied warranties of merchantability. The court cited § 47-1215(1), which provides that when goods are bought for a specified purpose there is an implied warranty of fitness for that purpose; § 47-1215(2), providing for implied warranty of merchantable quality when goods are bought by description; and § 47-1215(6), which provides that an express warranty does not exclude an implied warranty "unless inconsistent therewith."

9. 338 S.W.2d at 659.

of eliminating an implied warranty. Although a definite determination of the effectiveness of contractual disclaimers of implied warranties must await a case in which the outcome rests solely on a resolution of this issue, the *Dodson* case reveals a tendency to ignore this provision of the Uniform Sales Act.

C. Conditional Sales

Sale Postponed Until Final Judgment in Replevin Action.—Under the Conditional Sales Act as enacted in Tennessee, a conditional vendor must advertise the property for sale within ten days after repossession and proceed to sale under such advertisement.[10] If the vendor fails to advertise and sell as required by statute, the defaulting vendee may recover from the seller any part of the consideration which he has paid.[11] Such a recovery seems to be based on the theory of rescission of the contract by the seller and restitution of the benefits conferred upon him, rather than a penalty.[12]

A problem arises in such a situation when the vendor regains possession of the chattel by means of replevin. It has been held in Tennessee that if the vendee contests the vendor's right to retake possession, the vendor is not obligated to sell the property prior to a final judgment in the replevin suit.[13] However, he may proceed to sale prior to a final determination of the replevin action and make reparation on his replevin bond if he loses in that proceeding.[14] On the other hand, if the right of the vendor to repossess by replevin is not controverted, he must proceed to advertise and sell within the statutory period.[15]

Atkinson v. Commerce Union Bank,[16] decided during the survey period, reaffirms the prior holdings that a conditional vendor who repossesses by replevin is not obligated to sell until the replevin suit is finally determined, if the vendee contests the replevin. To what extent the purchaser controverted the right to repossess by replevin does not appear.[17]

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10. TENN. CODE ANN. § 47-1302 (1956).
11. TENN. CODE ANN. § 47-1306 (1956).
12. See Nashville Auto Sales Co. v. Wright, 26 Tenn. App. 326, 171 S.W.2d 834 (M.S. 1943).
13. Lieberman v. Puckett, 94 Tenn. 273, 29 S.W. 6 (1895).
14. Model Garage Co. v. Sanders, 165 Tenn. 168, 54 S.W.2d 939 (1932). This makes sense, since the replevin bond is double the value of the property, so that the defendant-vendee cannot be prejudiced by a sale before determination of the replevin action. On the other hand, if the vendee could delay a sale by appealing the replevin suit, without having to give bond, the seller might stand to lose much of the value of his security.
15. Nashville Auto Sales v. Wright, 26 Tenn. App. 326, 171 S.W.2d 834 (M.S. 1943).
16. 337 S.W.2d 894 (Tenn. 1960).
17. Counsel for the purchaser argued that the replevin judgment was an agreed judgment. However, the court said that it could have been appealed

D. Retail Installment Sales Act

A Retail Installment Sales Act was enacted in 1961 for the purpose of regulating retail installment transactions.[18] The act requires certain items to appear on installment contracts and charge agreements, a copy of which must be given to the buyer; the act's purpose is to make clear to the buyer the additional price attributable to the fact that the goods are purchased on time.[19] The amount of such time price differential is also regulated.[20] The buyer can prepay at any time and secure a refund credit of the proper proportion of the time price differential, notwithstanding any provision in the contract to the contrary.[21] Any waiver of the requirements of this statute is unenforceable and void,[22] and an intentional violation of its provisions is made a misdemeanor.[23] Failure to meet the statutory requirements also renders the seller liable for the time price differential and all amounts payable under the contract, or for double the time price differential if the violation is unintentional.[24]

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within thirty days and therefore the vendor could await the expiration of that period. This may be a departure from Nashville Auto Sales v. Wright, *supra* note 15, which held that the vendor must advertise and sell within the statutory time limit if the replevin is not litigated. Unfortunately, the facts are insufficient to determine this with certainty.

18. TENN. CODE ANN. §§ 47-1901 to -1911 (Supp. 1961).

19. TENN. CODE ANN. § 47-1903 (Supp. 1961).

20. The time price differential is limited to 10% on the first $500, 8% on the amount of the principal balance exceeding $500 but less than $5000, and 6% on any balance exceeding $5000. TENN. CODE ANN. § 47-1903(d) (Supp. 1961). In the case of retail charge agreements, the limit is fifteen cents per ten dollars per month, with a minimum of 70¢.

21. TENN. CODE ANN. § 47-1903(h) (Supp. 1961).

22. TENN. CODE ANN. § 47-1908 (Supp. 1961).

23. TENN. CODE ANN. § 47-1907 (Supp. 1961).

24. *Ibid.*