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COMMERCIAL TRANSACTIONS

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The title of this section is new to the Annual Survey issue. It covers such traditional divisions of the law as sales, commercial paper (bills and notes), and chattel security. This combination is thought to be a more functional one when a commercial transaction is defined as the sale of and payment for goods. This process may involve a number of facets. There may be a sales contract, the giving of a check for part of the purchase price which may be negotiated and ultimately pass through banks for collection, and the acceptance of some form of security to insure the payment of the balance as evidenced by a promissory note. Frictions which develop between the parties calling for legal solutions will be treated within the scope of this single subject of the law.¹

I. SALES

The three cases decided in the sales area all dealt with the frequently litigated matter of warranty obligations. *J. T. Herndon v. Southern Pest Control Co.*² was originally tried in the United States District Court for the Eastern District of South Carolina to recover damages for the loss of a number of pigs from "TGE," a disease which plaintiff alleged was caused by an insecticide purchased from the defendant under an express warranty that it would kill flies without harming his pigs. On the factual question of the causal connection between the use of the insecticide and the death of the pigs, the plaintiff presented evidence to show that shortly after its use the mortality rate increased several times over that normally expected, and returned to normal when he discontinued its use. In addition, the plaintiff's veterinarian testified that after performing fifty autopsies on the dead pigs, he was of the definite opinion that they had died from the continued inhalation of the insecticide. At the conclusion of the plaintiff's evidence, the district judge directed a verdict for the defendant. The Court of Appeals reversed, holding that the

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1. This concept is the basic approach of the Uniform Commercial Code, now enacted in 28 states and presently being considered in South Carolina by a Legislative Study Committee. See summary treatment in Foster, *The Proposed Uniform Commercial Code* 15 S.C.L. REV. 623 (1963). In the discussion of the cases which follow, reference will be made to points covered by the Uniform Commercial Code.

2. 307 F.2d 753 (4th Cir. 1962).

plaintiff's evidence was sufficient to make out a prima facie case and he was thus entitled to go to the jury.

The principal cases on which the district court judge and the appellees had relied in support of the view that the plaintiff's evidence was insufficient as a matter of law were *Thomas v. Kasco Mills, Inc.*³ and *Ralston Purina Co. v. Edmunds*.⁴ Both of these cases dealt with the sufficiency of evidence of the alleged defects in the quality of turkey feed which it was claimed caused nutritional deficiency and disturbance of the turkey's reproductive processes, thus substantially reducing the expected growth of the flocks. In both cases the turkey growers adduced evidence of unsatisfactory results during the time period when the feed in question was being used and expert witnesses testified that there was a possibility that the feed could have caused the trouble. In these cases, the Court of Appeals held, as a matter of law, that the evidence was insufficient to make out a prima facie case of causal relationship between the use of the feed and the disappointing results.

While this writer does not profess any expert knowledge of the sex life and the feeding habits of a turkey, it would seem that disturbances in their reproductive processes, if not necessarily invoking greater sympathy than the death of a hog, would be more difficult of definite proof. The expert witnesses in the turkey cases were thus necessarily equivocal while the expert opinion in the *Herndon* case on the relationship between the use of the defendant's product and the death of the pigs was more definite. This seems to be the court's principal basis of distinguishing the cases without disturbing the standard of a probable relationship between the claimed cause and the results complained of in order to resist a directed verdict in a breach of warranty suit brought in the federal courts.⁵ In its application to cases such as those discussed above, the practical effect seems to be that the plaintiff who brings his action in the federal court will not be able to go to the jury on the question of causal connection when there is more than one possible cause for the damages.

3. 218 F.2d 256 (4th Cir. 1955).

4. 241 F.2d 164 (4th Cir. 1957).

5. The standard of proof necessary may be less stringent when the case is brought in the state courts of South Carolina. See *Spartanburg Hotel Corp. v. Alexander Smith, Inc.*, 231 S.C. 1, 97 S.E.2d 199 (1957); *Patterson v. Orangeburg Fertilizer Co.*, 117 S.C. 140, 108 S.E. 401 (1921).

*Durant v. Palmetto Chevrolet Co.*⁶ was an action for breach of an oral express warranty of the defendant automobile dealer covering defects in material and workmanship of an automobile purchased by the plaintiff for a period of one year or 12,000 miles. The principal defense asserted by defendant was that the written express warranty contained in a separate document supplied by the manufacturer and delivered to the plaintiff at the time of the sale was limited to 90 days or 4,000 miles, was expressly in lieu of all other warranties, and thus precluded proof of the broader oral warranty. In support of its argument for a directed verdict and the exclusion of the oral warranty, the defendant relied on the case of *Sanders v. Allis Chalmers Mfg. Co.*⁷ where the purchaser of a combine sought to recover from the manufacturer on an oral warranty based on statements made by the defendant's dealer. An express written warranty was incorporated in the sales contract which excluded all other warranties. The court held that the written warranty ran to the purchaser and that oral representations made at the time of the sale were superseded by the contract in writing and, therefore, inadmissible for the purpose of varying the terms of the written agreement. In the *Durant* case, the court did not dispute the general proposition that a written expressed warranty, which disclaimed all other warranties, would be given effect to prevent the proof of inconsistent oral warranties. In affirming the lower court's admission of parol evidence to show the oral warranty made by the dealer, the court refused to apply the above principle on the ground that it was incumbent upon the defendant to establish that the restrictive written warranty was called to the plaintiff's attention at the time of the sale.

The policy of freedom of contract generally supports the right of a seller to expressly disclaim warranty obligations. Furthermore, the policy objective of safeguarding commercial transactions and the stability of written contracts is expressed by the parol evidence rule and by the generally recognized duty imposed on a contracting party to know the contents of a written contract to which he is a party.⁸ Occasionally a court is faced with the holding the seller to oral assurances concerning the quality of the goods which induced the contract to buy. Such was the conflicting policy objective of protecting a buyer of goods by

6. 241 S.C. 508, 129 S.E. 2d 323 (1963).

7. 237 S.C. 133, 115 S.E.2d 793 (1960).

8. *J. B. Colt Co. v. Britt*, 129 S.C. 226, 123 S.E. 845 (1924).

tion of the South Carolina Supreme Court in the *Durant* case. In selecting the latter objective over the former, the court had ample authority to sustain its conclusion that in order for a writing to limit warranty obligations to its express written terms, it must be brought to the attention of the buyer.⁹ Furthermore, the court may have been able to distinguish the *Durant* case from the earlier *Sanders* case on the ground that in the latter the restrictive, express written language which served to preclude the oral assertions made by the seller was set out in the contract which the buyer signed, while in the *Durant* case the writing was a separate document given to the buyer with the signed sales contract.

Apart from such judicial rationale as the express basis of the decision, the result is undoubtedly an implicit reflection of judicial disfavor of contractual disclaimers and restrictions on warranty obligations, especially where the seller drafts a standardized contract of adhesion which he is able to impose on buyers who occupy a grossly unequal bargaining position.¹⁰ The point at which the court will forego principles of freedom of contract and refuse to hold a buyer of goods to the disclaimer of warranties term of a written contract in the future is necessarily uncertain. Recognizing that freedom of contract does not mean freedom to deceive, recent cases and statutes in other jurisdictions have, with increasing frequency, adopted the standard of "unconscionable" as the point at which contractual disclaimers will not be enforced.¹¹ The seller of goods may still protect himself against false allegations of oral warranties and even over-enthusiastic affirmations of fact concerning the goods at the time of the sale by the use of an intergrated written contract which conspicuously sets out a disclaimer of warranty obligations, and which conveys to the buyer the risks he is required to assume. He may find it more difficult to accomplish this by unexpected and unbargained for language.

9. *E.g.*, *Stevenson v. B. B. Kirkland Seed Co.*, 176 S.C. 345, 180 S.E. 197 (1935); *Reliance Varnish Co. v. Mullins Lumber Co.*, 213 S.C. 84, 48 S.E.2d 653 (1948).

10. The form warranty involved in the *Durant* case has been used in the past by the vast majority of automobile manufacturers. See *AUTOMOBILE FACTS AND FIGURES* 69 (1958).

11. *E.g.*, *Henningsen v. Bloomfield Motors, Inc., & Chrysler Corp.*, 32 N.J. 358, 161 A.2d 69 (1959); *UNIFORM COMMERCIAL CODE* § 2-302, "If the Court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract" Also see, *UNIFORM COMMERCIAL CODE* § 2-316 on the exclusion and modification of warranties.

An application of the general rule that a buyer waives the right to assert a breach of warranty of quality when he accepts defective goods where the defect was apparent and was, or could have been, discovered by reasonable examination, was involved in *Johnson Cotton Co. v. Cannon*.¹² The testimony in that case indicated that the buyer of irrigation equipment knew that it was defective within a week after its delivery and yet executed a note secured by a conditional sales contract for the unpaid purchase price thirty-six days thereafter. The defendant testified that he notified the seller of his objection to the operation of the equipment several times prior to the execution of the conditional sales contract, and that the seller made several attempts to remedy the defect. The court affirmed a directed verdict for the plaintiff-seller rejecting the argument that the question should have gone to the jury to determine whether the defendant-buyer had waived his right to rely on breach of warranty.

There is abundant authority in South Carolina,¹³ as well as other jurisdictions,¹⁴ to support the general rule of waiver of breach of warranty on which the *Cannon* case was based. Furthermore, the conclusion that there is a waiver of the right to object when the buyer, with knowledge of the defect, executes an agreement to pay the purchase price, has ample support.¹⁵ On the other hand, these general propositions do not automatically apply as a matter of law in all cases where there is an acceptance of goods with actual knowledge of their defective condition. Payment for goods received while constantly demanding full performance, does not justify an inference of waiver of rights,¹⁶ particularly where necessity compels such acceptance. Rights are not waived where a person is led by promises of settlement or adjustment.¹⁷ There is a wide factual area within which the question of waiver of right must be submitted to the jury.¹⁸

The court's conclusions that as a matter of law the *Cannon* case was beyond the area of jury determination was based pri-

12. 242 S.C. 42, 129 S.E.2d 750 (1963).

13. *Reliance Varnish Co. v. Mullins Lumber Co.*, 213 S.C. 84, 48 S.E.2d 653 (1948); *Monroe v. Wood*, 186 S.C. 507, 197 S.E. 39 (1938).

14. UNIFORM SALES ACT §§ 15(3) and 49; UNIFORM COMMERCIAL CODE § 2-607(2).

15. *Rouse Hempston & Co. v. Sarratt*, 74 S.C. 575, 54 S.E. 757 (1906); *Sullivan v. Huff*, 24 S.C. 348 (1885).

16. *Griffith v. Newell*, 69 S.C. 300, 48 S.E. 259 (1904).

17. *Empire Buggy Co. v. Moss*, 154 S.C. 424, 153 S.E. 788 (1930).

18. *Southern Brick Co. v. McDaniel*, 187 S. C. 243, 196 S.E. 893 (1938); *C. W. Anderson Hosiery Co. v. Dixie Knitting Mills*, 204 F.2d 503 (4th Cir. 1953).

marily on the fact that the buyer did not register any objection at the time he executed the note and security instrument for the purchase price of the goods purchased.

II. CHATTEL SECURITY

In addition to the issue of waiver of breach of warranty discussed under the sales heading, the defendant in *Johnson Cotton Co. v. Cannon*, appealed from a directed verdict for plaintiff to recover a deficiency judgment after repossession and resale. The position of the defendant was that the plaintiff had waived its claim for any deficiency judgment on the ground that public notice was given only fourteen days prior to the sale in violation of the statutory requirement of at least fifteen days notice prior to a valid public sale.¹⁹ In affirming the lower court's judgment, the court held that since the defendant had actual notice and ample opportunity to be present at the sale, he had not been prejudiced and thus may not now complain of any defects in the statutory notice requirements.

It has long been recognized that a repossession conditional sales vendor after reselling, may recover from the purchaser any resulting deficiency,²⁰ but only where there has been a proper resale, that is, in accordance with the terms of the statute.²¹ The South Carolina statutory prescription for a valid public sale is similar to those found in other jurisdictions, including the time for giving notice, and is designed to protect the interest of the debtor by insisting that a fair purchase price be paid.²² The court in the *Cannon* case gave a practical interpretation to the statute in view of its purpose and read into it a qualification that the debtor must show some prejudice resulting from a technical non-compliance affecting the fairness of the price paid as a condition of complaint. This result seems to be in line with the early South Carolina case law,²³ the modern trend of decisions,²⁴ and recent statutory treatment in other jurisdictions.²⁵ Greater

19. S.C. CODE § 45-164 (1962).

20. *Straub v. Screven*, 19 S.C. 445 (1883).

21. *National Exch. Bank v. Holman*, 31 S.C. 161, 9 S.E. 824 (1888).

22. *Cf.* UNIFORM CONDITIONAL SALES ACT § 19 requiring "not less than ten days' written notice."

23. *Dornall & Susong v. Darlington*, 28 S.C. 255; 5 S.E. 620 (1887); *National Exch. Bank v. Holman*, 31 S.C. 161, 9 S.E. 824 (1888).

24. *Bulldog Concrete Forms Sales Corp. v. Taylor* (7th Cir. 1952).

25. UNIFORM COMMERCIAL CODE § 9-504, "Sale . . . must be commercially reasonable . . . reasonable notification of the time and place of any public sale . . ."

flexibility in the procedure for disposing of repossessed chattels will often make it possible to get more money for the collateral disposed of provided the secured party acts in a commercially reasonable manner.

In a mortgage foreclosure action commenced by claim and delivery, the defendant mortgagor counter-claimed for punitive damages for conversion alleging that the plaintiff in a wilful manner caused a boat trailer which the defendant owned to be taken from his possession. Evidence at the trial showed that the plaintiff had made a substitution on its books of the serial number of the trailer taken for a similar one on which it held a chattel mortgage when it could not be found on defendant's premises. There was conflicting evidence as to whether the defendant had authorized the substitution. The trial judge set aside the jury verdict for punitive damages which was affirmed on the ground that there was insufficient evidence to support a reasonable inference of "fraud, wilfulness, reckless or conscious disregard of appellants' rights."²⁶

While it is well established that upon default of a secured debt the chattel mortgagee has an alternative remedy to commence foreclosure proceedings by bringing an action for claim and delivery,²⁷ but he is exposed to an action for conversion when he causes unencumbered goods to be taken from the debtor. In such a situation, of course, the usual prerequisite for the establishment of punitive damages in a conversion action applies; *i.e.*, something more than negligence and variously described by the courts as malice, ill will, a conscious indifference to the rights of others, and the like.²⁸ It seemed clear from the record of this case that while the plaintiff may have been guilty of technical conversion of the defendant's property, there was no evidence of such conduct which would justify an award of punitive damages.

Haverty Furniture Co. v. Worthy,²⁹ raised a priority question between a lien under a conditional sales contract and a landlord's lien for rent where the landlord had actual notice of the unrecorded conditional sales contract at the time he filed a distress for rent against the property. The appeal was based on the re-

26. *South Carolina Nat'l Bank v. Florence Sporting Goods*, 241 S.C. 110, 127 S.E.2d 199 (1962).

27. *Stokes v. Liverpool & London & Globe Ins. Co.*, 130 S.C. 513, 126 S.E. 649 (1924).

28. *Cox v. Coleman*, 189 S.C. 218, 200 S.E. 762 (1938); *Sample v. Gulf Refining Co.*, 183 S.C. 399, 199 S.E. 209 (1936).

29. 241 S.C. 369, 128 S.E.2d 707 (1962). This case is also noted in the Pleading section at note 9 and in the Property section at note 20.

fusal to grant a motion to strike from the complaint the allegation of actual notice on the ground that this was irrelevant in determining priority. In affirming, the court relied on Section 41-155 of the 1962 Code, which provides in part: "And if the landlord have actual notice of any unpaid purchase money lien, such lien shall have priority to his claim for rent in the same manner as above provided for certain chattel mortgages," and concluded that the term "purchase money lien" was synonymous with the conditional sales contract.

Priority problems between landlords and holders of a security interest in the tenant's chattel on leased premises have been the subject of considerable uncertainty and litigation in South Carolina.³⁰ The result in the *Haverty Furniture Co.* case is consistent with the usual rule that actual knowledge of a security interest is a substitute for recording.³¹ Whether such will be the case where the landlord has notice of an unrecorded security instrument other than a purchase money lien remains an open question.

III. COMMERCIAL PAPER

*Southern Frozen Foods, Inc. v. Hill*³² was a suit on two promissory notes executed by the only stockholders of a corporation, given to the plaintiff in payment of the debts of the corporation's predecessor in business, but made payable to a bank. (Apparently this was the form requested by the plaintiff in anticipation of discounting the note with the bank.) The first point raised by the defendants by way of a motion for directed verdict was that the plaintiff who was not named as payee and whose name does not otherwise appear on the note as an indorsee, failed to show any interest in the note. In rejecting this assertion, the Supreme Court held that the plaintiff was a holder of a bearer instrument. The court quoted from the Negotiable Instruments Law which defines an instrument payable to bearer as, "When it is payable to the order of a fictitious or nonexisting person and such fact was known to the person making it so payable,"³³ and concluded

30. *E.g.*, *Simpson v. McDonald*, 79 S.C. 277, 60 S.E. 674 (1907) reversed by *Fidelity Trust & Mortgage Co. v. Davis*, 158 S.C. 400, 155 S.E. 622 (1930) and restored in part by *U.S. Hoffman Machinery Corp. v. Harris*, 167 S.C. 443, 166 S.E. 163 (1932) and *Mather-James Co. v. Wilson*, 172 S. C. 387, 174 S.E. 265 (1933).

31. S.C. CODE § 60-101 (1962).

32. 241 S.C. 524, 129 S.E.2d 420 (1963). This case is also noted in the Corporations section at note 31.

33. S.C. CODE § 8-820 (1962).

that since the defendants did not intend the named payees to receive any beneficial interest, this was not order paper requiring the indorsement of the named payee.

This is a well established interpretation of the quoted statutory language based on the reasoning that the intent of the maker determines the character of commercial paper and that "fictitious person" does not necessarily mean a "nonexisting" person.³⁴

In asserting an additional defense of lack of consideration, the defendant raised the question of whether the pre-existing debt of a corporation is valid consideration for the personal note of its principal stockholders. There is no doubt under the Negotiable Instruments Law that lack or failure of consideration is a defense as between the immediate parties to a negotiable instrument³⁵ and that generally a pre-existing debt constitutes sufficient consideration.³⁶ In rejecting the defendant's argument that they received no benefit and that there was no loss or detriment to the plaintiff by the execution of the note, the court found that the note gave an extension of time within which to pay the debt which was also sufficient consideration to the co-defendant even though he had no direct interest in the debtor company.

While this question in the case has been subject to a conflict in other jurisdictions, and had not previously been passed on in this state, South Carolina has joined the apparent majority of states which have held that sufficient consideration exists by virtue

34. *Bourne v. Maryland Cas. Co.*, 185 S.C. 1, 192 S.E. 605 (1937); *Ellis Weaving Mills v. Citizens & So. Nat'l Bank*, 91 F.Supp. 943, *aff'd* 184 F.2d 43 (4th Cir. 1950). An application of this rule has resulted in some surprising and unexpected results. For example, when an employer relying on his fraudulent employee to submit names of persons entitled to payment, receives the name of a non-existent person whom he names as payee of a check, this is said to be an order instrument since the drawer intends that the named payee receive the beneficial interest. Thus, when the employee indorses in the name of the payee and receives payment from the drawee bank, it has been held that the bank may not debit the drawer's account having paid an order instrument with a forged indorsement. *Commonwealth v. Farmers Depositor's Bank of Frankfort*, 264 Ky. 839, 95 S.W.2d 793 (1936). UNIFORM COMMERCIAL CODE § 3-304(k) would change this result, not through bearer-order analysis, but by making the indorsement by the payee "effective," thus placing the loss on the drawer-employer and not on the payee bank.

35. S.C. CODE § 8-845 (1962) applied in *Johnston v. Farmers & Merchants Bank*, 229 S.C. 603, 93 S.E.2d 916 (1956).

36. S.C. CODE § 8-842 (1962). Applied in *Stalmaker v. Tolbert*, 121 S.C. 437, 114 S.E. 412 (1922). The present statute does not make a clear distinction between "value," properly applied to the question of a holder in due consideration and "consideration," applicable to a defense against a person who is not a holder in due course. UNIFORM COMMERCIAL CODE §§ 3-303, 3-408, make this distinction in the interest of clarity but this would not change the result that a pre-existing debt serves for both purposes.

of the incidental benefit to the stockholder because of his relationship with the corporation.³⁷

IV. LEGISLATION

The Motor Vehicle Certificates of Title Law³⁸ was amended to require the owner of a vehicle subject to a lien to deliver the application for a Certificate of Title to the lien holder for forwarding to the department which will then issue a new certificate with the lien interest noted and mail it to the lienholder.³⁹ The obvious purpose of this change is to give the lienholder an added degree of protection by enabling him to be assured that his interest is protected by notation on the certificate,⁴⁰ and by giving the lienholder the physical possession of the certificate.⁴¹

Another amendment to the Certificate of Title Law requires a lienholder in possession of the Certificate of Title to execute a release of his security interest within thirty days after satisfaction of the security interest "in any event."⁴² The prior law imposed this duty on the lienholder "within ten days after demand." This 1963 amendment also adds the provision that a failure to comply with this section is a misdemeanor punishable by fine of up to 100 dollars or imprisonment of not more than 30 days.⁴³

37. For a collection of the cases, see 10 C.J.S. *Bills and Notes* § 151 (1955).

38. S.C. CODE § 46-150 (1962).

39. S.C. CODE §§ 46-150.13, 46-150.45 (1962). Prior law required the department to mail the certificate to the owner.

40. Except as to certain statutory liens and a security interest created by a dealer, S.C. CODE § 46-150.41 (1962), this is the only way that a lien interest on a motor vehicle can be perfected as against creditors or subsequent transferees. S.C. CODE §§ 46-150.42, 46-150.43 (1962).

41. This does not afford complete protection since *Clanton's Auto Auction Sales, Inc. v. Harvin*, 238 S.C. 352, 120 S.E.2d 237 (1961) and *Clanton's Auto Auction Sales, Inc. v. Young*, 239 S.C. 250, 122 S.E.2d 640 (1961) held that the lien holder in possession of the certificate of title may not assert his interest against a subsequent purchaser or mortgagee from a dealer who is given possession of the vehicle with the apparent authority to sell.

42. S.C. CODE § 46-150.48 (1962).

43. Cf. UNIFORM COMMERCIAL CODE § 9-404 requiring a secured party of record to execute a "termination statement" after satisfaction of the debt within ten days after demand. Refusal to comply results in liability to the debtor for one hundred dollars plus any loss caused to the debtor.