was not included in the lease extension rider indicated that the parties did not intend the lease as security.

COMMENT

(1). In *United Rental Equip. Co. v. Potts & Callahan Constr. Co.*, 231 Md. 552, 191 A.2d 570 (1963), it was held that where a lessee had the right to apply eighty-five percent of a rental of $800 a month against the purchase price of $14,500, the owner retained nothing more than a security interest in the property by virtue of Section 1-201(37). Similarly, in *In Re Royer's Bakery, Inc.*, 56 Berks County L.J. 48 (1963), the court held that giving the lessee the right to apply eighty percent of the total rentals against the purchase price was sufficient to show that the parties intended the agreement as security.

In the instant case, however, although Wheatland had the right to apply seventy-five percent of the rental, he could only use this against seventy-five percent of the list price. While it was possible that there would be no "additional consideration" in *United Rental* and *Royer's Bakery*, twenty-five percent of the list price, or $2,000, had to be paid if Wheatland desired to become owner of the machinery. These cases thus show that if a lease contains a purchase option which provides that *all* of the price may be paid by all or a percentage of the rental, it is intended as security under Section 1-201(37).

(2). Even though Article 2 is entitled "Sales," the court properly applied the parol evidence rule of Section 2-202 to the lease agreement. See Willier & Hart, Forms and Procedures under the Uniform Commercial Code ¶ 12.02 (1964).

R.J.D.

IN THE MATTER OF MERKEL, INC.
258 N.Y.S.2d 118 (Sup. Ct. 1965) [Section 1-201(37)]
Annotated under Section 9-301, infra.

IN THE MATTER OF EXCEL STORES, INC.
341 F.2d 961 (2d Cir. 1965) [Section 1-201(39)]
Annotated under Section 9-402, infra.

SECTION 1-205. Course of Dealing and Usage of Trade

KORESKA V. UNITED CARGO CORP.
258 N.Y.S.2d 432 (App. Div. 1965)
Annotated under Section 7-303, infra.

ARTICLE 2: SALES

SECTION 2-105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit"

STERN & CO. V. STATE LOAN & FIN. CORP.
238 F. Supp. 901 (D. Del. 1965)
Annotated under Section 2-202, infra.

SECTION 2-107. Goods to Be Severed From Realty: Recording

NEWTON V. ALLEN

141 S.E.2d 417 (Ga. 1965)

The plaintiff contracted with the defendant to lease "all . . . [her] workable timber for turpentine purposes on all lands owned . . . by [her] . . . , for a period of five years for a percentage of 30% of each and every dipping." The defendant was working the plaintiff's timber under this lease when the plaintiff brought this action to enjoin his activity. In upholding the plaintiff's contention that the lease was invalid, the court reasoned that this was a lease of realty, the trees themselves, and, where the parties evidenced "no intent to pass a lesser interest . . . it will be presumed they intended to convey an estate for years." Since an instrument that transfers an interest in land must meet the formal requirement of description, this instrument failed because the words "all lands owned . . . by [her]" did not adequately describe the lands transferred.

The defendant's contention that the Code applied was rejected by the court on the grounds that this was a lease of the trees themselves and the Code does not affect instruments which transfer interests in land.

COMMENT

The court presumed from the outset that this was a transfer of an interest in land rather than a contract for the sale of the turpentine. After such a presumption, the defendant's contention that the Code applied was easily rejected. However, the issue remains not whether the Code affects transfers of interests in land, but whether this instrument was a transfer of an interest in land at all.

The Georgia Code, Section 85-1902, provides that the crude gum of a living tree is included in the word "crops," and Section 85-1901 of the Georgia Code declares all crops to be personalty. Section 2-107(2) of the Code, to which Section 85-1902 makes a cross reference, states that a contract to sell "crops or other things attached to realty" which may be severed from the land "without material harm thereto" is a contract for the sale of goods within Article 2 of the Code.

In finding that this was a lease of the trees themselves, the court was more impressed by the form of the contract than the right which was actually transferred. Under the facts presented, it appears that the parties executed a contract for the sale of the turpentine and that this contract was thus governed by Article 2 of the Code.

W.L.M.

SECTION 2-202. Final Written Expression: Parol or Extrinsic Evidence

IN THE MATTER OF WHEATLAND ELEC. PROD. CO.

237 F. Supp. 820 (W. D. Pa. 1965)

Annotated under Section 1-201, supra.

STERN & CO. V. STATE LOAN & FIN. CORP.
238 F. Supp. 901 (D. Del. 1965)

On August 30, 1956, while the defendant was negotiating with the plaintiff for the purchase of the stock of the plaintiff's four loan subsidiaries, the defendant sent the plaintiff a letter which stated, in part, that the gain or profit realized by the plaintiff on the sale would be taxed at capital gain rates. On September 7, 1956, the parties agreed that final settlement would be made on September 20, 1956, noted this agreement on the bottom of the letter of August 30, and then signed the letter below this notation. The plaintiff and the defendant also signed a longhand memorandum containing arrangements for payment by the defendant. On September 20, 1956, the parties signed four "Agreements," each pertaining to one of the plaintiff's subsidiaries. Two of the agreements contained provisions whereby the plaintiff agreed not to compete in the vicinity for five years.

The plaintiff reported the purchase price as a capital gain; the defendant, on the other hand, reported one-half of the purchase price as a sale of the covenants not to compete. The Commissioner issued a notice of deficiency to the plaintiff for the year 1956 on the ground that he had received one-half of the purchase price as payment for the covenants not to compete and that this income was thus taxable at ordinary income tax rates. The Tax Court sustained the Commission's finding, and the plaintiff brought suit against the defendant for breach of contract.

In rendering judgment for the plaintiff, the district court held, *inter alia*, that the parol evidence rule had no application. Under previous case law, if competent evidence shows that the parties did not intend any one writing to embody the whole understanding, the parol evidence rule does not apply and the documents which were to embody the parties' understanding were to be read together. In the instant case, though the four agreements executed on September 20 were seemingly complete, the plaintiff and the defendant must have intended that the letter of August 30 and the memorandum of September 7, as well as the four documents, be the memorial of their agreement. This could fairly be inferred from the fact that both the letter and the memorandum contained crucial terms which the parties clearly intended to be part of their bargain. In footnote two, the court cited Section 2-202 of the Code as consistent with the parol evidence rule under Pennsylvania decisional law and as analogously supporting its decision not to apply the parol evidence rule to this case. Although Section 2-105 excludes investment securities from the operation of Article 2, the court stated that the Comment thereto: "makes clear that the application by analogy of a particular section of Article 2 to securities was not intended to be excluded when the reason of the section makes such application sensible, and the situation involved is not covered by Article 8 which deals specifically with securities."

R.G.K.

SECTION 2-314. Implied Warranty: Merchantibility; Usage of Trade

LONZRICK V. REPUBLIC STEEL CORP.
205 N.E.2d 92 (Ohio Ct. App. 1965)

Republic Steel manufactured and sold "steel bar joists" to a general contractor. Lonzrick was employed as a construction worker by the subcontractor when the joists collapsed in a building, causing him personal injuries. He brought an action against Republic Steel for breach of duty to furnish merchantable joists to the general contractor. The lower court sustained Republic Steel's demurrer to the complaint. On appeal, the court of appeals concluded that Section 2-314 of the Code did not apply since Lonzrick had no "contractual relations" with Republic Steel and hence could not be the recipient of the implied warranties of that section. It reversed the lower court's finding, however, and held that Lonzrick's complaint stated a cause of action on strict tort liability.

COMMENT

Although Section 2-318 was not discussed by the court, this section raises the issue whether the subcontractor and his employee can be the beneficiaries of the implied warranty given to the general contractor. See Section 2-318, Comment 3 and *Kennedy v. General Beauty Prod., Inc.*, 112 Ohio App. 505, 167 N.E.2d 116 (1960).

W.P.S.

SECTION 2-315. Implied Warranty: Fitness for Particular Purpose

HENRY V. JOHN W. ESHELMAN & SONS

209 A.2d 46 (R.I. 1965)

Annotated under Section 2-318, infra.

SECTION 2-316. Exclusion or Modification of Warranties

FIRST NAT'L BANK V. HUSTED

205 N.E.2d 780 (Ill. 1965)

Annotated under Section 9-206, infra.

SECTION 2-318. Third Party Beneficiaries of Warranties Express or Implied

BERRY V. AMERICAN CYANAMID CO.

341 F.2d 14 (6th Cir. 1965)

The American Cyanamid Co. produced and marketed "Orimune," the Sabin oral polio vaccine. The vaccine was distributed in its original closed package to physicians. One of these physicians, who was not an agent of American Cyanamid Co., administered the drug to Berry. Berry allegedly contracted anterior poliomyelitis within the incubation period for the disease and brought an action against American Cyanamid Co. based on *res ipsa loquitur* and on a breach of implied warranty of merchantability under the Tennessee Uniform Sales Act.

The court below held, and the present court affirmed, that since Berry was not in privity with American Cyanamid Co., he could bring no action for breach of implied warranty under the Sales Act. In a footnote the court made reference to Section 2-318 of the Code which was not then effective in Tennessee and noted that the extension of warranty protection under this section would not have changed the result of this case.

The court remanded on the ground that Berry might still prevail on a *res ipsa loquitur* theory.

W.P.S.

HENRY v. JOHN W. ESHELMAN & SONS
209 A.2d 46 (R.I. 1965)

Plaintiff brought an action for breach of implied warranties of merchantability and fitness for intended purpose, alleging that the defendant had manufactured and packaged poultry feed which was distributed to a local retailer which in turn sold to the plaintiff; that the defendant impliedly warranted the feed was merchantable and suitable for the purpose intended, and these warranties followed the product into the plaintiff's hands; and that the feed was not as warranted, causing the plaintiff damage. The lower court sustained the defendant's demurrer on the ground that the plaintiff had not alleged privity of contract between the defendant and himself. In affirming, the supreme court rejected plaintiff's contention that Comment 3 to Section 2-318 gave the court the power to eliminate the privity requirement and held that any such reduction in the privity requirement must be made by the legislature. The court reasoned that the Comment did not form part of Section 2-318 and that even if the Comment were a rule of construction of the statute, nothing in the Comment indicated that the plaintiff's view was correct. The court then held that Sections 2-315 and -318 were not applicable to this case: Section 2-315 presupposes that the buyer was in privity with the seller and Section 2-318 extends such privity only "to any natural person who is in the family or household of his buyer or who is a guest in his home" and no further.

COMMENT

The court was in error when it refused to extend the warranty protection on the ground that it lacked the power to do so. Comment 3 to Section 2-318 states that the section "is not intended to enlarge or restrict the developing case law on whether the seller's warranties . . . extend to other persons in the distributive chain." The natural import of the words is that it falls on the courts to make further reductions in the privity requirement. Moreover, other courts have viewed Section 2-318 itself as a liberalizing force in the area which presages further breakdown of the privity rule by the courts. See, e.g., *Chairaluce v. Stanley Warner Management Corp.*, 236 F. Supp. 385 (D. Conn. 1964). The court in the present case, therefore, should have first acknowledged that it had the authority to extend warranty protection and then, if it wished, refused to do so.

W.P.S.

SECTION 2-401. Passing of Title; Reservation for Security; Limited Application of This Section

UNDERWOOD v. COMMONWEALTH
390 S.W.2d 635 (Ky. 1965)

The defendant had been employed by Kentucky Cardinal Dairies to collect milk from various farmers in conventional milk cans and deliver it to Kentucky Dairies' plant. If Kentucky Dairies were to reject the milk, the defendant would have had to return it to the farmer from whom it had come. Neither the defendant nor the farmer were to receive compensation for rejected milk.

In the instant case the defendant was criminally prosecuted and convicted on a charge that he had unlawfully converted to his own use milk "which was the property of Kentucky Cardinal Dairies." The prosecution's theory was that the defendant had poured milk from the cans of various farmers into his own cans which he then sold to another dairy.

On appeal, the defendant contended that the indictment, on the one hand, charged conversion of the milk "which was the property of Kentucky Cardinal Dairies." The proof, on the other hand, indicated that the milk was not the property of Kentucky Dairies since it showed that Kentucky Dairies neither received nor paid for milk.

In affirming the trial court's judgment, the court of appeals held, *inter alia*, that there was no fatal variance between the indictment and the proof. In rejecting the defendant's contention and holding that the milk was the property of Kentucky Dairies, the court relied solely on Section 2-401 of the Kentucky Code. It reasoned that the farmers' delivery of the milk to the defendant for delivery to Kentucky Dairies was the equivalent of the delivery to Kentucky Dairies for the purpose of title passage under Section 2-401. The court further held that the fact Kentucky Dairies had retained a right of rejection strengthened its decision, since Section 2-401(4) provides that a rejection, under such conditions, would have "revested" title in the farmers.

R.G.K.

SECTION 2-403. Power to Transfer; Good Faith Purchaser of Goods; "Entrusting"

CHARLES S. MARTIN DIST. CO. v. BANKS
142 S.E.2d 309 (Ga. 1965)

The plaintiff, a wholesaler, had entrusted to the defendant retailer certain furniture and appliances for retail sale under a "floor plan" arrangement. In a suit in trover brought by the plaintiff to recover the unpaid balance due under the terms of the arrangement, there was uncontradicted evidence to the effect that the defendant had sold all the property in the regular course of business prior to the institution of the plaintiff's suit. The trial court entered judgment for the defendant on the ground that the plaintiff did not have title to the property at the time he brought the suit.

The court of appeals affirmed, reasoning that previous case law required the plaintiff to show, in a trover action, legal title to, or right of possession of, the property at the time the suit was brought. In the instant case, by operation of Section 2-403(2) of the Georgia Code, legal title had passed from the plaintiff to the retail purchasers before the plaintiff brought his suit.

R.G.K.

GREATER LOUISVILLE AUTO AUCTION, INC. v. OGLE BUICK, INC.
387 S.W.2d 17 (Ky. 1965).
Annotated under Section 2-507, infra.

SECTION 2-507. Effect of Seller's Tender; Delivery on Condition

GREATER LOUISVILLE AUTO AUCTION, INC. v. OGLE BUICK, INC.
387 S.W.2d 17 (Ky. 1965)

Every week for over two years, the defendant Auction advanced by check to Caylor, an independent used car buyer, the funds necessary to purchase used cars to be sold by the defendant at its weekly auction. Caylor, in turn, would immediately give the defendant his check to cover the advances. Prior to the July 18 auction, Caylor purchased used cars from the plaintiffs and issued checks amounting to $12,500 in payment. The defendant sold these cars at the July 18 auction and kept the proceeds. Because checks totalling $35,000, which Caylor had given the defendant to cover the advances, had been returned for insufficient funds, the defendant on July 18 and 19 ordered its bank to stop payment on checks totalling $36,000 which had previously been given to Caylor. As a result of this action, Caylor's checks to the plaintiffs were rendered uncollectible. The plaintiffs then brought this action against the defendant to recover the $12,500. The trial court found in favor of the plaintiffs and on appeal this court affirmed.

The present court first held that there was no issue as to the title of the cars since under Section 2-403 title passed to the new buyers at the July 18 auction. Furthermore, any implied lien which the plaintiffs held on the cars was lost when they delivered possession of the cars to Caylor. The question before the court, then, was whether the plaintiffs "had, as between them and Caylor, any rights with respect to the property which under the particular circumstances were good against Auction's [defendant's] seizure of the proceeds." The court held that the plaintiffs had such rights.

Under Section 2-507(2), Caylor's right to dispose of the cars purchased from the plaintiffs was conditional on his "making the payment due." But Caylor's payment was defeated when his checks were dishonored by virtue of Section 2-511(3). The court thus concluded that Caylor had no right to dispose of the cars.

The court next noted that Section 2-507 did not specifically give the plaintiffs a right of reclamation. However, by means of Comment 3 to Section 2-507, the court arrived at Section 2-702(2) which gives a seller the right to reclaim any goods which the buyer received on credit while insolvent.

In applying Section 2-702(2) to the plaintiffs' claim, the court concluded that (1) Caylor was insolvent within the meaning of Section 1-201(23) when he traded with the plaintiffs and (2) the right of reclamation under Section 2-702 applied to a sale by check as well as one on credit. The court then extended the remedy of reclamation to the plaintiff against Auction since it had acted merely as the agent of Caylor in selling the cars.

Finally, the court noted that since the cars were resold to good faith purchasers at the July 18 auction, technically the right to reclaim them was then lost. It held, however, that since the plaintiffs would have had an uncontested right to the cars, equity would not allow the defendant to retain the proceeds from the resale of these cars.

COMMENT

The applicability of Section 2-702 seems strained. This section would give the plaintiffs a right of reclamation only if Caylor had been insolvent "when he traded with" the plaintiffs on July 14 and 15. The stop payment orders, on the other hand, which had the effect of "wiping out" Caylor's bank account, did not reach the defendant's bank until July 18 and 19, and all that is reported about Caylor's financial position before July 18 is that the checks which he had given the defendant had "bounced." It is not clear, therefore, whether Caylor was insolvent when he dealt with the plaintiffs.

It appears, however, that the court did not need to use Section 2-702; reclamation is implied in Section 2-507 independent of Section 2-702. Under Section 2-507, Caylor could not "retain or dispose of" the cars because the checks given to the plaintiffs were not paid. Thus, at the time the checks were dishonored, the plaintiffs were the only ones who had any rights to the cars. If Caylor could not "retain or dispose of" the cars, the plaintiffs could enforce their right to possession of the cars by reclamation. See *In the Matter of Mort Co.*, 208 F. Supp. 309 (E.D. Pa. 1962). Compare *In re Kravitz*, 278 F.2d 820 (3d Cir. 1960).

W.P.S.

SECTION 2-511. Tender of Payment by Buyer; Payment by Check

GREATER LOUISVILLE AUTO AUCTION, INC. v. OGLE BUICK, INC.
387 S.W.2d 17 (Ky. 1965)
Annotated under Section 2-507, supra.

SECTION 2-606. What Constitutes Acceptance of Goods

GRANDI v. LESAGE
399 P.2d 285 (N.M. 1965)
Annotated under Section 2-711, infra.

SECTION 2-608. Revocation of Acceptance in Whole or in Part

GRANDI v. LESAGE
399 P.2d 285 (N.M. 1965)
Annotated under Section 2-711, infra.

SECTION 2-702. Seller's Remedies on Discovery of Buyer's Insolvency

GREATER LOUISVILLE AUTO AUCTION, INC. v. OGLE BUICK, INC.
387 S.W.2d 17 (Ky. 1965)
Annotated under Section 2-507, supra.

SECTION 2-711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods

GRANDI v. LESAGE

399 P.2d 285 (N.M. 1965)

Relying upon a misrepresentation by the defendant seller's agent, the plaintiff buyer purchased a horse from the seller believing that it could be used for breeding purposes. Three months after the sale, the plaintiff discovered that the horse had been gelded and offered to return the horse to the seller if he would return the sales price and compensate the plaintiff for any necessary expenses. Upon the seller's refusal to rescind the sale, the plaintiff brought an action against the seller and his agent for rescission and for compensatory and punitive damages.

The trial court ordered a rescission and awarded joint and several judgments against the seller and his agent for reasonable expenses and for punitive damages. Both defendants appealed. The supreme court reversed the judgment against the agent and affirmed the judgment against the seller.

As to the agent, the court held, first, that while Sections 2-711(1)(b), -713 and -715(1) gave the plaintiff the right to recover damages from the seller in addition to the right of rescission, there was nothing in the Code which indicated that an agent of the seller could also be held liable for damages when the buyer had been granted rescission. Secondly, in the absence of a compensatory damage award against the agent, the agent could not be liable for punitive damages.

As to the seller, the court held that even if the plaintiff "accepted" the horse under Section 2-606, the acceptance was without discovery of the "nonconformity" and was reasonably induced by the seller's assurances. Under Section 2-608, consequently, the plaintiff had the same rights to rescission as if he had rejected the horse in the first place. The court, citing prior case law which permitted punitive damages in breach of contract actions accompanied by fraud, concluded that since the seller had ratified the actions of the agent, the award of punitive damages against him was correct. It noted in this regard that "since [Section 2-711] . . . permits recovery of damages in an action for rescission, punitive damages may be recovered in such action where the breach is accompanied by fraudulent acts which are wanton, malicious and intentional."

COMMENT

Since the Code does not expressly permit or preclude the awarding of punitive damages, the court was correct in going outside the Code to determine that New Mexico permits punitive damages in contract actions accompanied by fraud. See Section 1-103.

A.S.G.

SECTION 2-725. Statute of Limitations in Contracts for Sale

RUFO v. BASTIAN-BLESSING CO.

207 A.2d 823 (Pa. 1965)

On July 12, 1960, the plaintiff Rufo filed this action in assumpsit for breach of implied warranties of merchantability and fitness for intended purpose under Sections 2-314 and -315. He alleged that in March 1956, he had purchased a cylinder of liquified gas and that on December 8, 1957, the cylinder had exploded due to a defective valve manufactured by the defendant Bastian-Blessing Company. Rufo also claimed that he suffered personal injuries for which he was entitled to recover under Section 2-715(2)(b). The court affirmed the lower court's decision that the complaint on its face was barred by the four-year statute of limitations of Section 2-725(1). Since Section 2-725(2) states that "a breach of warranty occurs when tender of delivery is made," the court held that the statute of limitations began to run on the date of delivery and that the date of the explosion was irrelevant.

COMMENT

For a complete discussion of the problem presented in the instant case, see *Natale v. Upjohn Co.*, 236 F. Supp. 37 (D. Del. 1964), annot. 6 B.C. Ind. & Com. L. Rev. 783 (1964); *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964), annot. 6 B.C. Ind. & Com. L. Rev. 90 (1964); *Engelman v. Eastern Light Co.*, 30 Pa. D. & C.2d 38 (Carbon County Ct. 1962).

W.P.S.

ARTICLE 3: COMMERCIAL PAPER

SECTION 3-104. Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note"

D'ANDREA V. FEINBERG

256 N.Y.S.2d 504 (Sup. Ct. 1965)

Annotated under Section 3-105, infra.

SECTION 3-105. When Promise or Order Unconditional

D'ANDREA V. FEINBERG

256 N.Y.S.2d 504 (Sup. Ct. 1965)

The plaintiff was the holder of a promissory note which had been indorsed by the president of the corporate maker, both in his official capacity and as an individual. The note contained the notation "as per contract" on its face. After presentment, dishonor and protest, the plaintiff brought this action seeking to hold the defendant personally liable.

In granting summary judgment for the plaintiff, the court held that the note was negotiable and that the plaintiff was a holder in due course. The note had fulfilled all the requirements for negotiability set forth in Section 3-104 with the possible exception that it did not contain an unconditional promise because of the notation "as per contract." The court noted, however, that under Section 3-105(1)(c) and the Comment thereto, the note was not made conditional because it referred to a separate agreement. It concluded that under Section 3-122(3), the plaintiff had a cause of action against the defendant upon demand following dishonor of the note.

A.S.G.