The Doctrine of Implied Warranties

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THE DOCTRINE OF IMPLIED WARRANTIES.

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THE DOCTRINE OF IMPLIED WARRANTIES.

CHAPTER I.

A warranty in a sale of personal property is a statement or representation made by the seller contemporaneously with, and as part of, the contract of sale, though collateral to the express object of it, having reference to the character or quality or the title to the goods or article sold, and by which he promises or undertakes that certain facts are or shall be as he represents them.

The warranty is of two kinds, the express and the implied warranty.

The warranty is express when created by the apt and explicit statements of the seller; it is implied when the law derives it from implication or inference from the nature of transaction or the relative situation or circumstances of the parties.

The warranty is not an essential of a contract of sale, though it is a usual accompaniment. A sale may be complete although there be no warranties and the warranty, when it exists, is therefore a mere collateral undertaking, though it forms no part of the contract.

In England the terms warranty and condition are used interchangeably, but in this country they are clearly distinguishable. The distinction is well settled in this
country that, in a breach of condition in an executory contract, the vendee has the right to reject the property tendered and bring an action for breach of the contract, or he must notify the vendor that he does not accept the property, and that it is held subject to the vendor's orders.

On the other hand, a breach of warranty affords grounds only for an action for damages and in but one instance can the article tendered be rejected. That is in a sale of an article of a particular description.

Reed v. Randall, 29 N. Y. 358.

Now having clearly in mind what we mean by warranty in connection with the contract of sale I intend, as is shown by the title, to deal only with the implied warranty.
CHAPTER II.

The implied warranty is a collateral contract which the law infers and raises from the transaction the relative situation, or circumstances of the parties.

Implied warranties may be classified, first,—Implied Warranty of Title, and, second,—Implied Warranty of Quality.

The implied warranty of title is a well known doctrine and has been a most important factor in the law of sales. It can be laid down as a general rule, both under the common law and modern decisions, that possession of personal property implies title, and in every case of sale of personal property in possession there is an implied warranty of title in the vendor.

2 Blackstone 451.
Morris v. Thompson, 85 Ill. 16.
Gross v. Kierski, 41 Cal. 111.

This seems to be an exceedingly just doctrine since, if the vendor who deals with the property as his own and under such circumstances sells them and there be no implication of law that he warrants his title, it would work great hard—
ship and fraud upon the vendee who is in no way chargeable with negligence. The purpose of the law is surely great protection to the vendee.

In the early English law, it seems that the courts did not recognize this doctrine of implied warranty of title to personal property any more than to realty, the doctrine of caveat emptor applying without limitation to the title to both species of property.

Parke, B. has explained why this was so. He says, "in early days the question of implied warranty of title did not enter men's minds because the sales were commonly made in market overt where the title obtained by the buyer was good against anybody but the sovereign."

Benj. on Sales, Sec. 636.

In 1849, Parke, B., first recognized the doctrine as existing in England. In Morley v. Attenborough, (3 Exch. 500), he says, "We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to the goods purchased. In such a case the vendor sells as his own and that is equivalent to a warranty of title."

This case, however, turned on another point. The doctrine was next recognized and a rule laid down by Erle, C. J., in Eichholz v. Bannister, (17 C. B. N. S. 708).

That was an action brought by the plaintiff to re-
cover back the purchase money paid to defendant for goods which were subsequently claimed by the true owner from whom they had been stolen. Erle, C. J. says, "But in almost all the transactions of sale in common life, the seller by his very act of selling holds out to the buyer that he is the owner of the article he offers for sale. The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion that, by offering an article for sale, the seller affirms that he has title to sell, and that the buyer may enjoy that for which he parts with his money."

The rule is followed in the following cases:

Rapheal v. Burt, Cab. & Ellis 325.
Page v. Cowasjee Edulizee, L. R. I P. C. 127-144.
Bagulley v. Hawley, L. R. 2 C. P. 625.

There seems to be a general rule in this country that in order to have the implied warranty of title, the vendor must have been in actual possession. If the vendor is not in actual possession at the time of the sale the rule of caveat emptor applies.

This doctrine was first laid down in New York in McCoy v. Artcher, (3 Barb. 323), where after a careful examination of the decisions at that time, the court came to the conclusion that if the property sold was, at the time of the sale, in the possession of a third person and there was no affirmation of title, warranty of title would not be implied.
This doctrine has become fixed in New York and is followed in the other states.

In Byrnside v. Burdeet, (15 W. Va. 718), Haymond, J. says, "And in such a case the vendor is to be held to an implied warranty though nothing be said on the subject between the parties. But if the property sold, be at the time of the sale in the possession of a third person, and there be no affirmation or assertion of ownership, no warranty of title will be implied."

In Huntington v. Hall, (36 Me. 501), the court held that plaintiff was not entitled to recover back the consideration paid for defendant's house upon the land of a third person. The court holding strictly to the above rule, held that since the defendant was not in possession, there was no warranty of title implied and plaintiff was properly nonsuited.

In Gross v. Kierski, (41 Cal. 111), Wallace, J. says, "The fact of the goods being out of the possession of the vendor may be considered to put the vendee upon his guard, and it is his own folly if, under the circumstances, he will not protect himself by exacting an express agreement to warrant the title. The doctrine of caveat emptor applies in this case."

The same rule is laid down in Scranton v. Clark, (39 N. Y. 220), and in England in Medina v. Sloughton, (1 Salk. 219 and Cro. Jac. 197).

The general rule, however, must be qualified and under certain circumstances the courts have seen fit to draw
the case from the application of the rule.

The Massachusetts courts have limited the doctrine and hold that whenever the vendor has constructive possession, as in the case where the property is in the hands of a bailee, there no warranty of title is implied.


Other states have limited the doctrine so that where the sale is made by a sheriff or an officer of the court, no warranty of title is implied.

Sheppard v. Earles, 13 Hun. 653.
The Monte Allegre Tenant, 9 Wheat. 616.

Whenever there is an assertion of ownership or an affirmation of title by the vendor this will amount to a warranty, and this is so even though the possession of the property in question be in some third person. The assertions or affirmations would take the case from the rules relative to implied warranty of title and would be more properly discussed under the subject of express warranty.
CHAPTER III.

The maxim of the common law, *caveat emptor*, (Let the buyer beware), is the general rule applicable to sales as far as the quality of the article sold is concerned. The buyer, in the absence of fraud, purchases at his own risk unless the seller has given an express warranty or unless a warranty can be implied from the nature and circumstances of the sale.

The rule of *caveat emptor* is founded upon the idea that the purchaser sees what he buys and the tendency of modern decisions is to imply a warranty of quality in all cases where the purchaser has no opportunity to exercise his own judgment, but relies on the judgment of the party with whom he deals.

So far as an ascertained specific chattel already in existence, and which the buyer has inspected, is concerned, the rule of *caveat emptor* admits of no exception by implied warranty of quality.

If the buyer has exercised his right of inspection and fails to make a complete examination of the subject of sale, he is nevertheless bound by the rule of *caveat emptor* as to that part which he has neglected to inspect.

Barnard v. Kellogg, (10 Wall. 388) is a good illustration of this principle. There the buyer inspected certain of the bales and neglected to examine the whole lot. The court held that as to the damage in the bales the rule of
caveat emptor applied.

In a similar case, Salisbury v. Stainer, (19 Wend. 158), the interior of the bales was inferior to the exterior; Bronson, J., "when the purchaser has an opportunity to inspect the goods, in the absence of fraud, the seller is not answerable for latent defects and the rule of caveat emptor applies."

In Carson v. Baillee, (19 Pa. St. 380), Lowrie, J. says, "Where goods are sold on inspection there is no standard but identity and no warranty implied other than that the identical goods sold and no others shall be delivered;" and "The name given them in the bill of sale is then immaterial because faith was placed, not in the name, but in the quality and kind discovered on inspection. If there be any fraud, concealment, or misrepresentation, the case is altered and for this the party can have remedies upon other principles."

In Lord v. Grow, (39 Pa. 88), there was a sale of summer wheat which proved to be winter wheat, and plaintiff lost the whole crop. The court held that there was no implied warranty of quality, the buyer having inspected, notwithstanding that the difference could not be determined by inspection.

This case is rather severe but it is explained that here the purchaser's knowledge was as great as the vendor's upon inspection of the article.

There are, however, several implied warranties in the sale of chattels recognized by law; first,- In the sale
of a chattel by description, there is an implied warranty that the goods delivered are of that description and are merchantable; second,- In a sale by sample, there is an implied warranty that the quality of the bulk is equal to that of the sample; third,- In the sale of a chattel manufactured or produced for a particular purpose, there is an implied warranty that the chattel will answer the purpose; fourth,- In the transfer of a negotiable instrument, there is an implied warranty of the competency of the parties to the instrument and that the signatures are genuine.

I shall now deal with each sub-division more in detail. First,—In the bargain and sale of a chattel of a particular description there is an implied warranty that the goods sold are of that description. This doctrine is sustained by a great weight of judicial authority both in England and America. The question was first raised in England in Chandler v. Lopas, (Cro. Jac. 4), which held that there was no implied warranty in a sale by description. This case has, however, been over-ruled.

In New York the question came up in Swett v. Colgate, (20 Johns. 196), and the court followed the doctrine laid down in Chandler v. Lopas, supra. This case has also been over-ruled and the doctrine first mentioned was declared and has ever since been recognized as the true rule in this state.

The question came before the court in Hawkins v. Pemberton, (51 N. Y. 198). The action was for damages for
non-acceptance of certain vitrol sold as blue vitrol when in fact it was but Salzburger Vitrol, a much inferior article. The court held that the defendants were justified in refusing to accept the goods and that the description given by the auctioneer, who sold the goods to defendants, was in fact a warranty that the goods were of that description.

In White v. Miller, (71 N. Y. 118), there was a sale of a particular seed described in defendant's catalogue as "Bristol Cabbage Seed". The plaintiff's crops, produced from the alleged "Bristol Cabbage Seed", proved that the seed was not such as described, but an inferior cabbage seed and wholly unfit for plaintiff's use. Earl, J. says, "We think the modern doctrine upon this subject is reasonable, and proceeds upon a just interpretation of a contract of sale. A dealer who sells an article, describing it by the name of an article of commerce, the identity of which is not known to the purchaser, must understand that the latter relies upon the description as represented by the seller, that it is the thing described and this constitutes a warranty."

The rule is laid down in the following cases:
Passenger v. Throburn, 34 N. Y. 634.
Lewis v. Rountree, 78 N. C. 323.
Darley v. Green, 15 Pa. St. 118.
Brantley v. Thomas, 22 Tex. 270.

In a sale of goods by description when the buyer has not inspected the goods, there is in addition to the war-
ranty, the condition precedent that the goods shall answer the description, and in a sale by sample an implied warranty that the goods shall be saleable and merchantable. This doctrine is well known to the law and is sufficiently illustrated by the following cases:

Howard v. Hoey, 29 Wend. 350.
Affirmed in 65 N. Y. 484.
Brunley v. Thomas, 22 Texas 271.
Merriam v. Field, 24 Wis. 640.
Murchie v. Cornell, 155 Mass. 60.

Second,- In a sale by sample there is an implied warranty that the quality of the bulk is equal to that of the sample. This is a general rule recognized both in England and America, except in Pennsylvania where certain modifications are made.

To constitute a sale by sample it must appear that the parties contracted wholly in reference to the samples exhibited and that both mutually understood that they were dealing with the sample with an understanding that the bulk was like it. The mere circumstance that the seller of the goods exhibits a sample at the time of the sale will not of itself make it a sale by sample so as to subject the seller to the liability of an implied warranty. To have the effect there must be a mutual understanding between the parties.

The principal reason for this rule is laid down by the courts to be that because there is no opportunity for a
personal examination of the bulk of the commodity which the sample is shown to represent.

The general rule is sufficiently illustrated by Schuchardt v. Allen, (I Wall. 359 - 370). In this case the action was for damages for false warranty. At the time of the sale of certain Dutch Madder the defendants exhibited a bottle of the same and upon its appearance in the bottle the plaintiffs purchased a large amount. The plaintiffs were not allowed to examine the sample except by its appearance. The court held that there was an implied warranty that the quality of the madder sent would be equal to that in the bottle exhibited as a sample and the parties so understood the sale.

It is further illustrated by Waring v. Mason, (18 Wend. 425). In this case there was a sale of cotton by sample. The bales delivered were packed in the interior with an inferior cotton. The Chancellor says, "A sale by sample does not come within the principle of the common law that the purchaser must look out for himself, as every agreement to sell by sample does, from its very nature, contain an implied, if not an express warranty, that the bulk of the article sold shall correspond with the said sample."

See also Hargous v. Stone, 5 N. Y. 85.


Pennsylvania courts have seen fit to modify this rule and disregard the great weight of authority by holding that in a sale by sample, the vendor guarantees only that the article to be delivered shall follow its kind and be merchant-
able.


West Republic Mining Co. v. Jones, 108 Pa. St. 55

Third,- Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is an implied warranty that the article shall be reasonably fit for the purpose to which it is to be applied. The liability is absolute because the specific purpose, rather than any specific article, is the essential matter of these contracts and the manufacturer or dealer undertakes without qualification to fulfill that purpose substantially.

Bluett v. Osborne, 1 Stark 384.

The courts have, however, found some trouble in laying down a uniform rule as to when latent defects in the article sold will be such as to give the buyer an action for the breach of this implied warranty.

The doctrine is well established that when there is a latent defect in the article of which the manufacturer or dealer is cognizant and he fails to call the attention of the buyer to the defect, he is liable to the buyer for this defect.

The New York courts have held to the uniform rule that a manufacturer is liable for any latent defect arising from the manner of manufacture, but not for any latent defect in materials which he is not shown and cannot be presumed to
have known.

This rule was laid down in Hoe v. Sanborn, (21 N. Y. 552). The action was brought upon a promissory note and defended on the ground that the articles for which it was given were defective. The defect being latent, in that the articles were of soft steel which rendered them wholly unfit for defendant's use. Selden, J. laid down the rule in this language, "The vendor is liable, in such cases, for any latent defect, not disclosed to the purchaser, arising from the manner in which the article was manufactured; and if he knowingly use improper materials he is liable for that also, but not for any latent defect in the material which he is not shown and cannot be presumed to have known."

This rule was extended somewhat in the case of White v. Miller, (71 N. Y. 131), to include a defective manner of cultivation.

In Ohio the courts have laid down a much broader rule than New York. They do not limit the implied warranty to the manufactures but allow a recovery for defect in material furnished.

In Rodgers v. Niles, 11 Ohio 48, the plaintiff brought an action for damages caused by a latent defect in the construction of three boilers. A divided court held "under these circumstances, the defendants must be regarded as having agreed to procure such materials and apply such workmanship as would furnish to the plaintiff steam boilers free from all defects, latent or otherwise, as would render
them unfit for the ordinary uses contemplated by the contract."

The English courts have a doctrine which in effect is the same as laid down by the Ohio courts. In Jones v. Bright, (5 Bing. 533), the action was brought upon a breach of implied warranty in the sale of copper by the maker thereof. It was sold to be used and fit for said use in bottoming a ship. It proved to be defective and resulted in damage to the plaintiffs. The courts allowed a full recovery holding the vendor to the absolute liability for latent defects.

This was followed by Randall v. Rawson, (2 Law Rep. Q. B. Div. 102), where the plaintiff ordered and purchased of the defendant, a coach builder, a pole for plaintiff's carriage. The pole broke while in use and the horses became frightened and were injured. The plaintiff was allowed to recover if the jury found that the damage was caused by the latent defect in the pole. This is surely equal to holding the defendant liable for the latent defect in carriages sold by him.

The rule in Hoe v. Sanborn, supra, has been followed in two important cases, White v. Miller, (71 N. Y. 118), and Kellogg Bridge Co., v. Hamilton, (110 U.S. 108), where the court in commenting upon Hoe v. Sanborn said it was a "carefully considered case".

The same doctrine is followed in Bragg v. Morrill, (45 Vt. 45). Here there was a sale of a shaft by the defendants. The defendants were not, however, manufacturers of the said shaft. The court held that for any latent defect in the
shaft the defendant was not answerable. This case practically overrules Brown v. Sayles, (27 Vt. 227).

See also Leopold v. Van Kirk, 27 Wis. 152.

After a close examination of the authorities hereinbefore mentioned, a rule can be deduced to the effect that where there is a sale of a definite existing chattel, specifically described, the actual condition of which can be ascertained by either party upon inspection, there is no implied warranty against the latent defects.

Fourth,—There is another implied warranty which does not originate from the law of sales but has sprung from the law merchant. In the sale or transfer of a negotiable instrument the transferor impliedly warrants that the signatures to the note are genuine and also that the parties thereto are competent to contract.

This is a well recognized doctrine and is sufficiently illustrated by the following cases:

Cabot Bank v. Merton, 4 Gray 156.

Terry v. Bissel, 36 Conn. 23.

CHAPTER IV.

It is now my intention to discuss the remedies which the buyer has, or may have, against the vendor for breach of any of the foregoing implied warranties.

First,- In this country it is very unsettled as to what time the implied warranty of title may be considered broken, so that an action for breach of warranty may be brought. Some of the authorities hold that the implied warranty of title is broken by the existence of an outstanding paramount title and that an action for the breach lies immediately and before there is an eviction of the vendee or any disturbance of his possession. Other authorities hold that the warranty is not broken until the vendee has been disturbed in his possession by one having a paramount title.

The Massachusetts courts, Perkinson v. Whelan, (116 Mass. 542), maintained that an action for breach of the implied warranty of title accrues at the time of the sale and that the vendee is entitled to bring an action at any time thereafter without any disturbance of the vendee's possession. The mere existence of a paramount title is sufficient.

This rule has not been followed to any great extent. The better doctrine seems to be that the right of action does not accrue to the vendee until he has been disturbed in his possession.

This rule has been followed in many of the states, and possibly can be laid down as the general rule.
Gross v. Keirski, 41 Cal. 111.
Wanser v. Massler, 29 N. J. L. 256.

The remedies which the vendee may have for breach of the implied warranty of quality can be enumerated as follows:

First,—He may, except in case of a specific chattel, refuse to accept the goods and return them or give notice that they are held subject to the vendor's orders and risk. If the vendee has paid the consideration he may bring an action to recover back the same.


Second,—He may accept the goods and bring an action for the breach of the warranty. If he has not paid the consideration he may set off or set up by way of counterclaim, in the vendor's action for the price, the damages for breach of warranty.

There is no apparent conflict of authorities in the buyer's first remedy. The authorities all agree that the buyer can send the goods back and sue for breach of contract. He must, however, return the goods as soon as he detects the deficiency, or at least give notice of his intention not to accept them. The omission to do so within a reasonable time debars him of his defense in an action for the purchase money.

Doane v. Dunham, 79 Ill. 131.
The courts are not all agreed upon the second proposition. The great weight of authority, however, is favorable to the proposition, and it can be said to be the general rule.

The United States Courts in English v. Spokane Com. Co., (57 Fed. 451), hold that "the great weight of authority, as well as reason, is now, we think, well settled that in cases of this kind, if the goods upon arrival at the place of delivery are found to be unmerchantable in whole or in part, the vendee has the option either to reject them or to receive them and rely upon the warranty; and if there be no waiver of the right, he may bring an action against the vendor to recover damages for breach of the implied warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods."

Under the rule the vendee ought to notify the vendor of the defects. The general rule is sufficiently illustrated by the following cases:—

Wolcott v. Mount, 36 N. J. L. 262.
Best v. Newton, 58 Vt. 543.
Lewis v. Rountree, 78 N. C. 323.
Hege v. Newson, 96 Ind. 431.

After a careful examination of the authorities, one must conclude that the New York Courts have drawn away from the general rule and hold that in an executory contract of sale by description, after an inspection or an opportunity to inspect, the acceptance of the goods is a bar to all subsequent
quent actions upon the breach of the implied warranty that the goods answer the description.

In Reed v. Randall, (29 N. Y. 358), there was a sale of a crop of tobacco by the defendant to the plaintiff. It appears that the tobacco was unmerchantable, but this was discovered upon inspection. The plaintiffs nevertheless accepted the tobacco and subsequently brought this action for damages. Wright, J. says, "The latter (meaning the vendee) is not bound to receive or pay for a thing that he has not agreed to purchase, but if the thing purchased is found, on examination, to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, and thereby rescind the contract or he will be presumed to have acquiesced in the quality. He cannot accept the delivery of the property under the contract, and retain it, after an opportunity of ascertaining its quality or description called for under the contract."

In Gaylord Mfg. Co. v. Allen, (53 N. Y. 515), the rule is stated thus, "in the absence of fraud or latent defects, an acceptance of the article upon an executory contract after an opportunity to examine it, is a consent and agreement that the quality is satisfactory and as conforming to the contract, and bars all claim for compensation for any defects that may exist in the article. The party cannot, under such circumstances, retain the property and afterward sue or counterclaim for damages, under pretense that it was not of the character and quality or description called for by the
The rule has been uniformly followed in,-


Norton v. Dreyfuss, 106 N. Y. 90.


Brown v. Foster, 106 N. Y. 387.


The courts have, however, placed a sale by sample within the general rule, and in that case allow the action upon the implied warranty after acceptance, even though there was an inspection or an opportunity to inspect.

The rule is stated in Zabriskie v. Central Vermont R. R., (131 N. Y. 72),- "upon an executory sale of goods by sample, with warranty that goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty, although he has accepted the goods after an opportunity of inspection.

The following cases also support the rule:-

Kent v. Friedman, 101 N. Y. 616.


Gurney v. Great Western, 58 N. Y. 358.

In all these cases, however, the courts have found an express warranty from the transaction, and it is doubtful whether the question squarely on implied warranty in sale by sample has ever been raised. The question has only been reviewed in cases where the warranty relative to the bulk could not be ascertained otherwise than by usage. This then leaves
the court to lay down a rule to govern the right of action after acceptance when the sale is by sample, without warranty and the deficiency can be discovered upon inspection.

It is the writer's opinion that the New York Courts would hold with the rule stated in Norton v. Dreyfuss, supra, and Gaylord v. Allen, supra, since the New York Courts are wont to construe that when the deficiency is ascertainable by inspection, the implied warranty does not survive the acceptance.
CHAPTER V.

It is well settled that the measure of damages for a breach of warranty as to the quality of the chattel sold is the difference between the actual value of the article sold at the time of the sale, and the value it would have been, had it been as warranted.

Hege v. Newson, 96 Ind. 431.
Case Plow Works, 63 N. W. 1013.

Some courts also include as damages the additional trouble and expense which are the natural and proximate result of the breach of warranty.

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