1891

Caveat Emptor

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C A V E A T E M P T O R

by

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C o r n e l l U n i v e r s i t y,

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1891.

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Contracts. Blackstone. Coke on Litt.

The writer need hardly apologize in choosing the subject of CAVEAT EMPTOR for a thesis subject for he has fully had his first views strengthened, that is, that it was an important and interesting subject.

Arising as it did in a commercial age, it took the form best adapted to promote commercial welfare, and although it was extremely strict in its first usage it has now become an almost perfect rule, whereby not only the seller but also the buyer is protected.

It has been the purpose of the writer to give a clear and accurate analysis of the law in the following pages. For this purpose he has divided the subject into several heads, endeavoring thus to make them more complete. With this slight introduction I hesitatingly offer my work.

CAVEAT EMPTOR.

The meaning of the maxim caveat emptor is given to be, let the buyer beware, and applied to purchases of all descriptions. whether of lands or goods, as well to the title as to the quantity and quality.

The law requires the purchaser in all cases to use the utmost diligence in the investigation of the right, title and quality of the thing to be purchased, and if he does not, then, in the absence of positive fraud on the part of the vendor, he must take the goods as he finds them with all faults. If the buyer wishes to secure himself against being imposed upon , he can require a warranty and the article must agree with this warranty. In view of these facts, we can formulate the general rule as follows: In the absence of either fraud on the part of the seller or the buyer not having required a warranty, the rule of caveat emptor usually applies.#

1. Morris v. Thompson, 85 Ill. 16; Boman v. Clemmer, 50 Indiana 10; Richardson v. Bauk, 42 Iowa, 185; Seixas v. Wood, 2 Cainnes 48. Hargous v. Stone, 5 N.Y. 73; Parkinson v. Lee, 2 Easts, 320; Hopkins v. Tanquerey, 15 C.B. 30.

The early law of England partook of the civil law and the decisions were based upon the rule of that system, known as caveat venditor.

Under both systems there is an implied warranty of title on the sale of chattels, but in regard to the responsibility of the seller to answer for the quality there is a vast and irreconcilable difference.

According to the civil law and this was the very early English doctrine, a sound price implies a warranty of the soundness of the article sold. Under the present rule, the vendor is not bound to the vendee for the quality or goodness of the thing sold except in the case of fraud or warranty.

The historical growth of the rule has to me always seemed the best way to learn the rule at the present time and with this point in view, I have endeavored to find the early English cases upon this subject and to trace their subsequent changes. Also to note the American decisions which we will see have not changed so much.

Before the case of Stuart v. Wilkins, decided#

L 1 Dry. 20

in 1778, and the earliest case which places the doctrine before us, it was the current opinion that a sound price was a warranty of soundness.

In this case the most exptreme rule was formulated, in the endeavor to escape from the civil doctrine and it even went so far as to set aside implied warranties entirely making the rule, that the maxim would apply in every case where there was no fraud or an express warranty. In the case of Chandellor v. Lupus, decided in 1792, the defendant, a goldsmith, sold a stone which he said was a bezoar, it was, however, a cheap stone of another kind of lesser value. It was held that the bare affirmation that it was a bezoar, without warranting it to be such was no cause of action, and although the seller knew that it was not a bezoar, it was not material. For as the learned judge says "Everyone in selling wares will affirm them to be good, or the horse he sells to be sound".

In Parkinson v. Lee# decided in 1802, all the judges agreed that the rule of caveat emptor applied to sales of all kinds of commodities and that without an express

1. 2 East's 320.

warranty by the seller or fraud, the buyer must stand to his losses.

The English judges, however, look with disfavor upon these early cases and endeavored to again change the law, so as to raise an implied warranty in certain cases, feeling as Mr. Woodson who in his lecture says# "The doctrine is decidedly unfair". Thus they took upon themselves to change it, admitting for that purpose some of the doctrine of the civil law; this doctrine was that of an implied warranty on the sale of the goods.

In the case of Hilbert v. Shea decided in 1807 and in Gardner v. Gray, 1815 where Lord Ellenborough decided that a sale by sample raised an implied warranty that the bulk equalled the sample. This case however, was decided in this manner because the buyer had no opportunity to inspect the goods, but it is sufficient to show us that the doctrine of implied warranty was being accepted by the English courts. In the case of Okell v. Smith# tin cans were sold and did not answer the purpose for which they were ordered; it was held that there was an implied warranty that

1. 2 Wood, 415.
2. 4 Camp. 76.
3. 1 Starkie, 86.

they were fit for use and further that if the buyer gave the seller notice he was bound to take them away, or they remained at his risk. In Brown v. Edington#, it was held that the implied warranty existed in the sale of rope for a specific purpose, and in Jones v. Bowden#, the English Common Pleas decided that a warranty was implied from the usages of trade. And so I could name innumerable cases changing the early doctrine in England. The English cases at the present time follow these cases rather than those which so strictly enforce the rule of caveat emptor, and it places upon the seller certain restrictions which are fair and just.

While the English courts have drifted from the very strict rule and have raised an implied warranty in some cases, yet the general rule requires an express warranty. Likewise in this country we find the cases to be almost similar and to the effect that there must be an express warranty which is followed in all states except South Carolina and Louisiana and enforced in Maryland with only

1. 2 Man. and Gran. 279.
2. 4 Taun. 847.

one exception i. e. where inspection is impossible.

In Seixas v. Wood#, Thompson, J. says: "In all cases express warranties must be made"but this was a very early case and should not be taken without some modification. No judge at the present time would say "in all cases".

So Justice Selden says "Where there is neither fraud nor warranty, and the buyer receives and retards the goods without objection, he waives the right to object afterward. Ordinarily this is the rule in this country#.

We have noticed in the preceding pages that there is a continual reference to warranty, and that express warranty is generally required to guard against caveat emptor; we have likewise endeavored to show that this is not always the case.

Although express warranty has little to do with our subject, we will introduce some slight suggestions in regard to it as it may not be without value. In the sale of real property express warranty is usually given, but in

1. 2 Cainnes 48.
2. 1 Wall 301.
3. Dean v. Morey, 33 Iowa, 120; Moore v. McKinlay, 5 Cal., 471; Pac. I. W. v. Newell, 34 Conn., 67; Bernard v. Kellog 10 Wall, 383. Welch v. Carter, 1 Wendell, 185.

the sale of personalty unless the seller actually assures the buyer of the existence or nonexistence of a fact pertaining to the bargain, the seller does not warrant the goods expressly.

The intention of the party is of the greatest importance in these cases and the whole force of the bargain may be changed by showing that the intention was different from the action. It has been said by Holt J.C. and has been uniformly adopted "That an affirmation at the time of sale is a warranty if it appears to have been so intended".

Warranties are interpreted like other contracts, but one point that seems of great importance is that a mere expression of opinion can never be construed as a warranty, and as most cases arise under this misconception, I will cite the leading ones in a note#.

Often in the absence of express warranties the law raises a presumption in favor of the buyer, and upon these presumptions rests the law of implied warranties which will occupy our attention during the remaining pages.

1. Thompson v. McNight, 75 Ill. 89; Hankins v. Pemberton, 51 N.Y. 198; Weiner v. Clement, 37 Penn state 117.

Implied warranties are divided into two parts; First, implied warranty of title; Second, implied warranty as to quality of the goods sold.

The early English rule did not recognize any implied warranty of title, the rule of caveat emptor applied. Coke[1] says "The mere act of selling does not bring with it the responsibility of giving a good title". Baron Parke finds that this may be accounted for on the ground that in older days the question of title did not enter into mens minds or intentions because the sales were commonly made in market overt where the title obtained by the buyer was good against all save the sovereign.

The doctrine is fully sustained in the case of Morley v. Attenborough[2] where it was held "That a pawnbroker in selling wares does not warrant the title in absence of express warranty".

The doctrine does no longer exist in England or America, and it is now settled that there are implied warranties in the sale of personal property, but the authorities are still unsettled as to what facts must exist

1. Coke Lit. 102.
2. 2 Ex. 500.

in order that such a warranty can be implied.

Benjamin, in his work on Sales, considers the doctrine settled in the following cases: First, in an executory contract of sale, the vendor, by implication, warrants his title in the goods; Secondly, if he affirms that the chattels are his own, he warrants the title. And no implied warranty can arise First, where the vendor expressly refuses to assert his own title. The cases are all agreed on this proposition and hold that the vendor's position to the goods is inconsistent with an inference of title#.

And in regard to judicial sales, it is held that the doctrine of warranty of title never exists and that caveat emptor always applies#.

Our courts have held in some few cases that an implied warranty exists in every case where the seller fails to disclose the effects of the title, but this seemingly is too harsh a rule and the general rule in this country as well as in England is that when the seller has actual or potential possession of the goods, that there is an implied

1. Bu--v. Maxey, 15 Ill.--; Hicks v. Skinner, 71 N.C. 539;
2. McManus v. Keath, 49 Ill. 388; McGuire v. Faber, 25 Penn. state 436.

warranty#.

These decisions arise out of the presumption that "every seller undertakes that the commodity which he sells is his own"#. Nicholz v. Bannister settles the rule in England and adopts the following "That one on the sale of a chattel implies an affirmation by the vendor that it is his, unless the seller shows by evidence that his intention was not to assert ownership, but simply to dispose of his interest".

Special attention is to be paid to the fact that it is not required of the seller to have actual possession of the goods. All that is required is that possession be obtained when necessary. A warranty of title may be on principle implied from any unequivocal act of ownership; when one undertakes to sell goods, he asserts his dominion over the property and exercises the power of an absolute owner for no one else but the true owner can give a good title, except in the few cases noted before, therefore the reason-

1. Peoples Bank v. Kuatz, 99 Penn. state, 344; Carlylev. Hanks, 22 Wis. 74; Morris v. Thompson, 85 Ill. 16; Wallach v. Gree, 104 Mass. 42;
2. Blackstone Com. 451.

able presumption is, that one who undertakes to sell goods without saying anything to the contrary, is the owner and is selling his own goods. And this warranty of title extends even to bonds, stocks and to other incorporeal personalty[4].

The general rule so far as the quality of the artile sold is concerned is caveat emptor; there being no warranty of quality unless one is expressly demanded or given. This is followed in all states save South Carolina and Louisiana, and has been spoken of in a different connection. Benjamin says in his admirable work on Sales "The rule in such cases is caveat emptor, by which is meant that when the buyer, has no warranty he takes the quality upon himself".

In Vesy v. Dayton# Metcalf J. says: "The plaintiff has not to rely upon the representation of value as facts, or to place any confidence in it. Such representation, however exaggerated, false and deceptive, is not actionable, if the subject be open to inspection, he is bound to examine

1. 99 Penn. State.
2. Benjamin on Sales Chap. 840
3. 3 Allen 380.

for himself or take a warranty."

In Benninger v. Thompson# the suit was for the price of a horse, and the defense concealing that the horse was diseased. Ogden J. says: "It cannot be concealed that K got a great advantage in trade and put upon C a defective and windbroken horse, yet the question arises whether a legal defense was established. No warranty appears to have been given and none can be inferred. This is the rule in England# and in the United States#.

This rule is simply the outcome of the rule by the courts of not interfering in matters where by personal vigilance and due exercise of care a person could protect himself. In no case do the courts aid a person for the lack of care in his own behalf, the idea being to foster self-reliance; but in a case where fraud has been perpetrated with a ready hand to aid in replacing the wrong.

The rule of caveat emptor also applies where the person has inspected the goods carelessly as the courts

1. 24 Albany Law Journal, 257.
2. Jones v. Just, L.R. 3 Q.B. 197; Hopkins v. Tanqueray, 15 C.B. 20; Kent, 478.
Bowman v. Cleeves, 50 ind. 10; Richardson v. Bond, 42 Iowa 185; Day v. Pool, 52 N.Y. 416; Kimberg v. Taylor, 29 Maine, 508;

will not the person to take advantage of his own carelessness and some authorities even refuse to relax the rule when a buyer has special confidence in the seller's honesty. Such as in a case where there was a false representation as to the market value by a seller who knows to a purchaser who does not. The purchaser had confidence in these statements, but the court held, that as the article was one of general commerce and no particular knowledge was necessary to ascertain the price, that if one party wished to act under such circumstances, he cannot thereafter repudiate the contract. This seems to be very poor law and has few adherents, for if we are not allowed to place confidence in persons whom we trust our social and business life would soon be rotten with meanness and deceit.

As the courts look to justice in most cases, they have applied the doctrine of caveat emptor upon the buyer after he has had ample opportunity to inspect the goods and thus been placed in a position to find any defects, which existed, and it is no more than just that if he has not been placed in this position it is no more then just to imply a warranty in his favor. Some courts hold that the goods

purchased under such circumstances should be merchantable#.

The foregoing proposition as to the rule of applying caveat emptor are subject to certain exceptions, and we will now consider these.

The first exception to the general rule is found in the case where goods are bought by sample.

So great is the use of sample in the sale of goods that all large mercantile houses carry on their business in this manner, thus simplifying it greatly. Such being the usual manner of carrying on these transactions, there must of course be some provisions made which will give to the buyer some security, thus the courts have provided, that is a sale by sample there is always an implied warranty that the bulk will equal the sample in quality#. In Bradley v. Thompson it is said: "Where goods are sold by sample there is an implied warranty that the bulk of the goods so delivered shall correspond with the sample exhibited#. In Hansen v. Burke# an implied warranty exists that the bulk equals the sample exhibited.

1. 10 Wallace, 388; 49 Ill. 275.
2. 22 Texas 270.
3. 45 Ill. 499.

These cases are followed in all the states, for it is plainly to be seen if such were not the rule, the sale by sample would have no meaning, and it appears to me to be nothing more than the doctrine that the seller must deliver that which he has agreed to sell. The identity of the goods seems to be the essence of the contract, and when the goods sold do not agree with the sample there seems to be no performance of the contract.

The burden of proof in such cases is upon the vendor to prove that the bulk was equal to the sample.

In Penn. however, there is no implied warranty that the goods sold by sample are equal to the sample in quality and likewise that there is no implied warranty against latent defects which exist in the goods and which appear in the sample. This, however, is the rule in most states#.

In case the bulk does not agree with the sample, the vendee of course need not take the goods, and has a reasonable time to come to a decision#.

1. Boyd v. Wilson, 83 Penn. State 319.
2. 32 Conn. 146.

In a case in 2 Barn and Adolf the name of which I have forgotten we find the following: "If the goods do not agree with the sample when delivered, the vendee is not merely justified in not receiving them, but he may receive and examine, and if found to be wanting in quality or description, he may return it to the vendor in a reasonable time.

It is held in Illinois not only that the goods may be rejected, but if the vendee accepts he may recover the difference in value, between the sample and the goods sent#.

In England, if the goods are sold by sample and they are delivered and accepted by the purchaser he cannot return them; but if he does not completely accept them, that is, if he has taken the delivery conditionally, he has a right to give them a fair trial, and if they are found not to correspond with the sample he may return them. In Scotland. if they do not agree, he can return them at any time

It will be seen that this is an important subject so that it will be necessary at first to find out just what

1. 65 Ill. 512; 79 Ill. 131.

constitutes a sale by sample for if it is not by sample no implied warranty will exist.

The mere showing of the sample does not necessarily make the sale one by sample. The mere exhibition of a sample on a sale amounts only to a representation that the sample has been taken from the bulk of the commodity offered for sale.

In Hargous v. Stone# it is said by Paige J. : "Every exhibition of a sample does not per se make the sale by sample. There must be an agreement to sell by sample or at least an understanding that the sale is to be by sample".

The opportunity to inspect the goods is an important element in determining whether or not the parties intended to make it a sale by sample. If the buyer has no opportunity to inspect the goods and a sample is exhibited at sale and offered him for examination, the courts would presume that it was a sale by sample and would recognize a warranty of correspondence of the sample with the goods.#

1. 5 N.Y. 75. Atwater v. Clancy, 107 Mass. 369.
2. 2 Tiedeman18-- Day v. Raquet, 14 Minn. 282

Suppose a person enters a store and simply describes the goods, having no sample no sample with him, the buyer purchasing simply by description. In such cases there is an implied contract that the goods will be equal to the description upon which the sale was made.

Ordinarily the courts will not hold a mere description to amount to a warranty unles it is made in very definite terms. If goods are sold under a trademark the goods delivered must be such as appear under the trademark represented, and such as are known by that name.

Our attention will next be occupied, in considering in what cases and implied warrant exists on the sale of provisions. The subject is to be divided into two parts.

First, where the provisions are sold for immediate use in the family. Second, where they are sold as merchandise in the regular course of business.

First then, if a person expressly sells meat or provisions for family use, he is usually held to give a warranty that they are wholesome and fit for family use.

The cases in the United States are well settled on

this point and the decisions are probably based on the principle of public policy. For it is for the advantage of the public as regards their health, and unprincipled dealers will always take every possible advantage that they can get over the buyer.

Mr. Story says: "That as to the sale of provisions for immediate domestic use and consumption, such a warranty (speaking of implied warranty) is necessary for the preservation and life#.

So in the case of Babcock v. Tyler, it was held that when corn was sold for family use there was an implied warranty that it was wholesome But there seems to be another phase to such cases, and the courts have given much weight to the position of the seller in such sales; presuming that a vendor of an article of food from the nature of his calling knows whether they are wholesome or not. Thus much misconception arises between the action of deceit# and implied warranty.

1 Story on Sales, 373. Morehouse v. Comstock, 42 Wis.626. Hoover v. Peters, 13 Mich. 51.
2 Howard v. Emerson, 110 Mass, 321.

Although an early English case which Mr. Schouler refers to says "If a man sells victuals which is corrupt without a warranty an action lies because it is against the commonwealth", and Blackstone says in his Commentaries "That on the sale of provisions there is always an implied warranty of wholesomeness", still as the latter cites no authority, and the citation to the first is unknown, and as the later cases are contrary to this doctrine we think that we can conclude that they rest upon statutes. For Lord Tenderton says "That if a man buys provisions and wishes to trust his own knowledge, the law should not interfere". So also in the case of Burby v. Bollett# it was held that a person who sold a pig was not liable under implied warranty because none of the authorities suggested a warranty except in the case of victualers, butchers and other common dealers.

As before stated, this arises from no contract of warranty but as a liability imposed by statute.

Such statutes are the 51st Hen.III and the Merchandise Act of 1862, 25 &26 Vict. 88.

1 16 Meeson and Walby given in Benjamin, para.624.

But if the goods are sold as mere merchandise by dealer to dealer no such a warranty is implied, for the goods are considered as other articles of commerce and unles there is an express warranty, the courts will not raise one. No warranty arises because the subject matter is ultimately to be used as food and Mr. Tiedeman says that the case is parallel with that of the vendor of razors, not original with him, who on being remonstrated with by one of his purchasers, claimed exemption from liability for the worthlessness of the razor as a razor on the ground that razors were made to sell and not to shave with.

While the law in the sale by description is that the article shall correspond to the description, the law goes a step further in the case of a manufacturer of goods. Much of our goods are either manufactured for us or are bought for a specific purpose, and as an implied warranty is raised in some of these cases, we will consider them and endeavor to learn when caveat emptor applies.

First, the case when a person purchases from a manufacturer. Here there is always an implied warranty that they shall be merchantable, but in order that this

can be the case, the buyer must rely on the manufacturer's skill, for if he relies on his own judgment caveat emptor rules. "A contract of sale made with a manufacturer of goods, carries with it an obligation that the goods shall be merchantable".# So in Gardner v. Gray it is said "No person can insist that the goods be of a particular fineness unless he has a warranty, but that they are merchantable should be held". In the case of selling spool silk, Lord Ellenborough considered the law settled that without any particular warranty, there is an implied warranty that the goods are salable. But this implied merchantability is limited, only for so long as they are in the seller's possession and in order that a warranty exist for any length of time after they leave the seller's control and during transit an express warranty should be given#.

In the case of goods ordered and supplied for a particular purpose, there is it appears an implied warranty that they are reasonably fit and proper for the purpose for

1 Hargus v. Stone, 1 Seld. 73; Gayard v. Allen 53 N.Y. 515.
McClung v. Kelly, 21 Iowa, 508.
Gardner v. Gray, 4 Camp. 144.

which they were purchased. The purpose is the essential element of the contract in such cases. In a case where copper sheathing was to be used on a barge and proved defective, the defendant had knowledge of the purpose for which it was to be used and the court held that he was liable upon an implied warranty, that it was fit for the purpose for which it was purchased.※ So in a Pennsylvania case "If a thing is ordered of the manufacturer for a special purpose there is an implied warranty that it is fit for that purpose. This principle has been carried very far, it must however, be limited to cases where a thing is ordered for a special purpose, not applied to those where a special thing is ordered although it is intended to be used for a special purpose.#

The law rests upon the trust placed in the manufacturer and in his skill in his particular branch and by implying a warranty they simply enforce a rule that a man ought to be fit to do the work that he contracts for, especially if it requires particular skill.

1 Jones v. Boyle 1 Stark, 384.
2 P. C. I. Company v. Groves 68 Penn State 149.
Jackson v. Weatherill 7 S.&R. 482.

But in such cases the buyer must let the seller know the use the thing is to be put to, for as Mr. Schouler says he is not expected to know without being told. While the case of Jones v. Just adds several other heads, in which the doctrine either applies or does not, we think we hav have absorbed all the possible cases under other heads.

One is apt to conclude that the exceptions are so ~~a~~ numerous as to overthrow the general rule and that caveat ~~empe~~ emptor is burdened with too many. This, however, seems to me to be a hasty and uncalled-for criticism, for in every case where the rule is departedfrom, it would be contrary to the principle of caveat emptor, to allow the sale to stand for the buyer would be under such disability that to allow the rule would be contrary to all justice, and it is hardly necessary for me to say that the courts do strive to do justice, although the average person's idea varies greatly from that of a lawyer's.

A rule such as this can only be of great value, for by exercising its functions it encourages trade and prevents innumerable suits. For if the buyer does not beware he has no remedy and if the ru e were set aside one can

easily see how the commencement of one suit would at once give rise to another.

The one principle is not to raise obligations unless actually made between the parties, and by its operation the seller is placed in a secure position, and the buyer has himself to blame if he was not cautious. But where fraud has been committed the doctrine cannot be enforced, for although the buyer may beware, he cannot guard against the viciousness of the seller and the courts take it upon themselves to protect him.

And in ending our subject we have but two words which we wish to impress upon the minds of the readers "Caveat Emptor".