

1894

Implied Warranty of Quality in Sales

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THESIS.

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IMPLIED WARRANTY OF QUALITY IN SALES .

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BY

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CONTENTS .

I. Introduction.

II. History.

III. Unequal Relation of the Parties.

IV. Goods Fit for A Particular Purpose.

V. Goods Fit for A General Purpose.

VI. Sale of Provision.

VII. Sale by Sample.

TABLE OF CASES .

Bulwinkle v. Cramer, 27 S.C., 376,-----	3.
Jones v. Just, L.R. 3 Q.B., 207,-----	4.
Merchie v. Cornell, 155 Mass., 60,-----	4.
Shepherd v. Kain, 5 B. & A. 240,-----	6.
White v. Miller, 71 N.Y., 118,-----	6.
Chanelor v. Lopus, Cro.Jac. 4,-----	6.
Hawkins v. Pemberton, 51 N.Y., 198,-----	7.
Sexias v. Woods, 2 Caines, 48,-----	7.
Sweet v. Colgate, 20 J.R., 196,-----	7.
II. Kent's Commentaries, 479,-----	8.
Morse v. Union Stock Yard Co., 21 Oregon, 289,-----	9.
Hoe v. Sanborn, 21 N.Y., 555,-----	10.
Brown v. Sayles, 27 Vt., 227,-----	11.
Rogers v. Niles, 11 Ohio St., 48,-----	11.
Jones v. Bright, 5 Bing. 533,-----	12.
Bluett v. Osborne, 1 Starkie, 384,-----	13.
36 Central Law Journal,-----	14.
Randall v. Newson, 2 Q.B.D., 102,-----	14.
Blackstone, Vol. III., 165,-----	15.

VanBracklyn v. Fonda, 12 Johns. 468,-----	15.
Boyd v. Wilson, 83 Pa.St., 319,-----	18.
Parkinson v. Lee, 2 East, 314,-----	18.
Gould v. Stein, 147 Mass 570,-----	19.
Boyd v. Wilson, 83 Pa.St., 319,-----	19.
Merriman v. Chapman, 32 Conn., 146, -----	20.

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IMPLIED WARRANTY OF QUALITY IN SALES.

There is probably no portion of the law which is subject to more constant change and additions than that relating to sales of Personal Property. The continual increase in commerce gives birth to new questions and materially modifies established doctrines.

The doctrine of implied warranty of quality is one of the main branches of the law of sales. The quantity of an article bought and the price to be paid for it are points which are not usually misstated by the contracting parties; these are usually definite and certain, of the essence of the contract, easily and quickly expressed and seldom cause misunderstanding, but the other essentials of the contract of sale not so easily determined in itself which requires a certain knowledge and judgment and in some cases the highest degree of skill is the quality of the article.

Implied warranties in contracts of sale are divided into

two parts:

First, Implied warranty of title;

Second, Implied warranty of quality of the goods sold.

As the title indicates, what we have to say on this subject will be confined to the second division.

The common law rule of caveat emptor (let the buyer beware) probably owes its origin to the fact that in earlier times nearly all sales of goods took place in market overt and fairs where the bona fide purchaser without notice obtains the goods taking his own chances as to their quality but as to title, that was good against all the world, except the Crown.

The common law did not annex a warranty to any contract of sale. It seems that nothing short of a direct affirmation would be construed by the courts to be an express warranty and then it must be intended as such by the parties. Its policy has been defended on the ground that it tends to diminish litigation, but the tendency of modern courts is to limit its scope, in fact it has had so many exceptions piled upon it that it must surely be proved by this time, if except-

tions prove a rule.

Caveat emptor applied to all sales of personal property except where the vendor gave an express warranty. This is said to be such a commendation or affirmation, at the time of sale, as are supposed to induce the purchaser. No precise words are necessary; it is sufficient that if the intentions of the parties clearly appear. During the time of Lord Holt the doctrine was established, that to warrant no formal words were necessary, therefore a warranty might be implied from the nature and circumstances of the case. And one of the circumstances which was finally recognized, as pointing to the soundness of the article was the price paid for it, and the maxim that a sound price imports a sound article was introduced.

This doctrine is still adhered to in South Carolina, (Bulwinkle v. Cramer, 27 S.C., 376.) It was afterwards exploded by Lord Mansfield, since which time it has undergone some modifications in the English and American courts, tending in the former somewhat, and in some of the states of the Union to the rule of the civil law, which implies that the

goods sold must be merchantable and fit for the purpose for which they were bought. (Jones v. Just, L.R. 3 Q.B., 207). This doctrine is developed in a long line of cases upon this subject sufficiently illustrated by Merchie v. Cornell, (155 Mass. 60.) The contract was for the sale and delivery of a cargo of ice. The judge in writing the opinion says: "The inference is warranted that the thing to be furnished must be not only a thing of the name mentioned in the contract but something more. How much more may depend upon circumstances and at times the whole question may be for a jury. If a very vague generic word is used, like 'ice', which taken literally may be satisfied by a worthless article, and the contract is a commercial contract, the court may properly instruct the jury that the word means more than its bare definition in the dictionary, and calls for a merchantable article of that name. If that is not furnished the contract is not performed." This rule is now well settled in England as is shown by the case of Shepherd v. Kain, (5 B. & A., 240). This was an action for a breach of warranty, the vessel was advertised and sold as a copper fastened vessel, but sold as she

lay with all faults. It appeared that she was only partially copper-fastened, and not what is known to the trade as a copper-fastened vessel. It was held that with all faults must be understood all faults which a copper-fastened vessel may have and that the buyer was entitled to damages as it was not what the description called for. If the seller was ignorant of the fact the vessel was not a copper-fastened vessel by all reason and legal principle he should be held for damages as it did not fulfil the description, but if on the other hand it could be shown that he had knowledge of the fact his responsibility rests of the ground of fraud. In all these contracts the question is simply whether the seller has furnished substantially what the buyer bargained for. If the article does not in fact answer the description it does not do so more or less whether the defect could have been discovered or avoided or not. But there are cases in which the probability of knowledge on the part of the vendor is so strong that the court will presume that it existed without proof, and in these cases the vendor is held responsible on an implied warranty. As for example in the case of

White v. Miller, (71 N.Y., 118.) The plaintiff relied upon the seller's superior ability to know the cabbage seed which he was buying as " Large Bristol Cabbage" and was expected to produce cabbage of that variety, was free from any latent defects arising from the mode of cultivation.

The law places this extra obligation upon the seller from this very fact that he had a better opportunity of knowing and examining the quality of the goods than the buyer. The extent to which the vendor was formerly held liable on an implied warranty in a contract of sale is worthy of comparison with his present liability. In the earlier cases the most extreme rule was formulated in the endeavor to escape from the civil doctrine and it even went so far as to set aside implied warranty entirely. For ~~the~~ instance the famous case of Chandelor v. Lopus, decided in 1603, (Cro. Jac. 4), was an action on the case for selling a stone representing it to be a bezar stone when it was not. All the justices and barons (except Anderson C.J.) holding " that a bare affirmation that it was a bezar stone, without warranting to be so is no cause of action; and although the defend-

ant who was a gold-smith knew it to be no bezar stone, it is not material; for every one in selling his wares , said the judge will affirm that his wares are good, or thatt his horse is sound; yet, if he does not warrant them to be so there is no cause of action." This doctrine sounds as strangely to our ears as the modern doctrine of implied warranty would have sounded to the judges in the time of Jas.I.. And one of the first opinions which began to change the courts on this subject was written by Mr. Baron Parker in the case of Barr v. Gibson, decided in 1825, in which he says, " But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description." This is the doctrine now prevailing. It was adopted as the law of this State in the case of Hawkins v. Pemberton, in 1872, (51 N.Y., 198). And yet that ancient doctrine was the guiding star in both England and America until far into the present century.

The cases of Sexias v. Wood, (2 Caines, 48) decided as recently as 1825, and Sweet v. Colgate, (20 Jr. 196,) decided about the same time were based mainly upon the authority of

the case of Chandelor v. Lopus, are adverse to this view. But the case of Chandelor v. Lopus, has been overruled in England, and the cases in this State referred too have often been questioned, and Chancellor Kent who took part in deciding *Sélas v. Wood*, intimates in his commentaries a doubt ^ewh^hther the case was correctly decided. (2 Kent, 479). This modern doctrine as it appears to me is more reasonable and proceeds upon a ^just interpretation of the contract of sales. A dealer who sells an article, describing it by the name of an article of commerce, the identity of which is known to the purchaser must understand that the latter relies upon the description as ^arepresentation by the seller that it is the thing described.

We will now turn our attention to another division of our subject which relates to the sale of goods fit for a particular purpose. The subject is to be divided into two parts:

First, Where the seller is not the manufacturer .

Second, Where the seller is the manufacturer.

~~First,~~ The general law as it now stands is pretty cleanly

laid down on this point and aptly applied in an Oregon case, Morse v. Union Stock Yard Co., (21 Oregon, 289.). The plaintiff, who was a butcher, ordered of the defendants, who kept a stockyard, to " get two car-loads of good beef cattle". The cattle were not of the quality ordered , or fit for the purpose intended. Judge Lord in his opinion says: " When a dealer undertakes to supply goods or chattels in which he deals that are to be applied to a particular purpose, and the buyer necessarily trusts to the judgment of the dealer there is an implied warranty that they shall be reasonably fit for the purpose for which they were intended." This is more obvious when the seller is also a manufacturer, but it is equally true when he is only a merchant, provided always that the buyer in fact relied upon the seller's judgment and does not inspect for himself. As it is needless to cite more cases upon this subject we will notice the second division of our topic where we will examine some cases in which the seller manufactures goods for a general purpose as well as for a particular purpose. The question naturally presents itself, what warranty does the law imply in a manufacturers general

contract of sale where the buyer has no opportunity to choose or examine ? It stands to reason that there should be some indemnity against latent defects in the sales by the maker. Because he hold himself out as a manufacturer, this implies that he has reasonably competent skill and means , and particularly because the buyer must rely wholly upon the maker, aside from manifest defects. The question not settled is, whether the maker shall be partially or fully liable for latent defects which by care and skill he could have avoided. The two leading cases which bear upon this point are in direct conflict. New York per, the learned Judge Seldon, laid down the rule that a manufacturer is liable from any latent defects arising from the manner of making, ^{but} (for not) latent defects in materials which he is not shown and cannot be presumed to have known. The Ohio court ^{held} on the other hand by a bare majority, that a manufacturer impliedly agrees to produce articles fit for ordinary uses; but if he fails for even defects latent and undiscoverable his contract is broken. In Hoe.v. Sanborn, (21 N.Y., 555) the action was to enforce payment for saws, made on the defendant's general order. The

defendant contested on the grounds that the saws were so soft as to be utterly worthless. In Ohio the action was breach of an implied warranty; boilers made for the defendant's rolling mills proved so defective that they had to be thrown aside within a few months. The defendant claimed that the cause was the latent defect in the iron. The circumstances in these cases are substantially alike.

The cases previous to the New York case, seem to sustain the Ohio decision. Tracing backward from Hoe. Sanborn, the first case we notice is Brown v. Sayles, (27 Vt.227) which evidently was given much weight in Rogers v. Niles,(11 Ohio. St. 48). It was held in a contract to build, sell, and deliver a buggy, at a fixed price there was an implied warranty even against all secret and latent defects in the material of which it was constructed, although they could not be discovered under the most careful examination. This ruling is in line with earlier decisions that a maker impliedly warrants that his goods are of a fair, ordinary quality according to their appearance. But you will find cases reasoning for the principle of Hoe v. Sanborn also.

The leading case is Jones v. Bright, (5 Bing. 533.). decided in Common Pleas in 1829, is the foundation of the absolute liability rule. It was an action for a breach of warranty in the sale of copper by the maker. He had been told that it was wanted for a ship bottom, and had said before the plaintiff the one introducing the parties, " your friend may rely upon it, we will supply him well." The copper lasted only a few months. The verdict for the plaintiff found an intrinsic defect in the copper caused by the introduction of too much oxygen in the course of its manufacture. The judges in banco held it clear that the defendant had either expressly or tacitly undertaken, without qualification, that the copper furnished should be fit for sheathing the plaintiff's ship; he must therefore answer for any unfitness whatever. Although this case is the foundation of the absolute liability rule, some of the reasoning strongly favors the limited liability imposed in Hoe. v. Sanborn.

These cases of contracts for manufactured articles must be distinguished from contracts for natural objects, as a horse or timber etc.,. No prudence can guard against latent

defects in a horse or timber, but by providing proper material a merchant can guard against defects in a manufactured article, as he who manufactures copper may by due care prevent the introduction of too much oxygen. And this distinction explains the case of *Bluett v. Osborne*, (1 Starkie, 384) where the judge held the defendant who sold the bowsprit, was not responsible for a failure arising out of a latent defect in the timber.

The true principle summed up amounts to this: Given sound material, defects in making will not be excused, but undiscoverable defects in natural objects and materials (e.g. a horse or timber) cannot be guarded against and therefore to be excused.

As before stated the common law implies a warranty only where the buyer has no opportunity to decide for himself, or where there is superior knowledge actual or presumptive on the seller's part. How can this be reconciled with the view that on general sale the manufacturer impliedly warrants even against defects which human skill cannot detect or avoid? This rule substantially protects the manufacturer, whose

rights are disregarded by the Ohio view, without depriving the buyer of his protection afforded by the common law.(36 Cent.L.J. 192). It also holds the manufacturer liable for every defect in the course of making because he alone controls and can examine, except where the vendee chooses or dictates in the mode of construction he to that extent assumes the responsibility of the manufacturer.

In the manufacture and sale of articles for a special purpose the manufacturer's liability is absolute. When he contracts to manufacture for a particular purpose he warrants that the article shall be fit for that particular purpose. That particular purpose is the essence of the contract rather than a particular article.. It is not enough than to bring a contract into this class of cases by implication. There must be fair grounds to presume that the maker was contracting with the idea of fitness as the principle element.

The case of Randall v. Newson,(2 L.R.Q.B.D. 102), clearly comes under this heading. The plaintiff ordered and bought of the defendant who was a coach builder, a pole for his carriage. While the plaintiff was driving it, soon after, the

pole broke short off ^{to} the carriage. The horses in consequence became immanageable and were much injured. In an action for damages the jury found that the pole was not reasonably fit for the carriage, but that it had broken from an inherent defect in the material, and that the defendant was not negligent in not discovering the defect. Judgment was given the plaintiff on the ground that the pole was supplied for a particular purpose. Whether or not an article is supplied for a particular purpose is a question of fact; but if sold for such purpose the understanding is that it is fit for that particular purpose. Had the facts in the case shown that the defendant knew of the defects in the timber the decision would have been the same, but the action might have been brought on the ground of fraud.

We will now examine the law which relates to the sale of provision. The prevailing opinion in the earlier American cases seemed to be that there was always an implied warranty that the provisions were wholesome. Blackstone (Vol. III. page 165) is responsible for that doctrine, which is laid down in one of our earlier New York cases, (VanBracklyn v. Fonda,

12 Johns. 468) and is the most relied upon. But that upon examination was apparently an action for deceit in selling an unsound quarter of beef, and not an action upon the warranty, for the judge found that the vendor knew the animal was diseased, and did not communicate the fact to the vendee. The other cases which hold that way seem to be based upon the same element of deceit. But the later cases disregard the implied warranty in the sale of provision; indeed it now seems to be pretty well settled that only such implied warranties as applied to the ordinary sale of chattels between dealers applies to the sale of provision whether for retail or wholesale. In some jurisdictions however, there is still some slight confusion in regards to this point but I think the prevailing opinion is aptly stated in Benjamin on Sales in the following " It is at least doubtful whether there be any such warranty; even though provisions sold for immediate consumption by the buyer; unless when he trusts to the judgment or selection of the seller. If A. selects of a butcher a particular piece of beef, and orders that identical piece to be sent, it is not easy to see, in the absence of any cus-

tom or usage to make it good, why there should be an implied warranty as to the quality, any more than to any othersale. The buyer takes his risk, the same as in buying any other thing

But if he orders his dinner of his market-man, for him to select and send up, and which the buyer does not see until it comes to the table, there is good grounds for holding the vendor liable on an implied warranty that the article sent should be fit for the purpose for which it was ordered; but this is applying to the sale of provisions the same rule as is applied to the sale of other property, and probably the same rule governs in one case as in the other".

Another important division of our subject is the sale of goods by sample. This method is adopted very extensively by all great mercantile houses in carrying on their business and is adapted to nearly all branches of trade.

The office of the sample is to present to the senses the real meaning of the parties with regard to the subject matter of the contract. This is often difficult to describe in words but very simple by use of the sample. It does not need to be said, that if the goods themselves could be

examined previous to the purchase, that in most cases would be preferable to the sample, but in some cases that would be a highly impracticable thing to do-- for instance, goods stored in the hold of a ship, while in others it would be impossible to make an examination, as coal unmined, or sealed canned goods. (Boyd Wilson, 83 Pa.St. 319). The sample greatly facilitates ^{sales} ~~space~~. It speaks for itself. It says that the bulk shall correspond to the sample in quality and condition. But it does not reveal to the merchant more than he would be able to discover upon the examination of the goods themselves. It cannot be held to disclose any latent defects in the sample or in the bulk.

The English cases hold that if the seller is a merchant and not a manufacturer he is not responsible for latent defects which examination of sample fail to disclose. (Parkinson v. Lee 2 East, 314) .

The American decisions are in line on that point, but if the merchant himself is the manufacturer there is some question as to this holding. In fact I think the holding would be opposite to the line of cases which have been examined. The

merchant would have the full liability of the manufacturer.

But further there may be an express warranty in the quality of the goods sold by sample as well as in other cases; in such cases a breach of warranty of quality is actionable, although the goods might be equal to the sample.

In a recent Massachusetts case (*Goluld v. Stein*, 147 Mass, 570). The sale was of " one hundred and two bales of Cera scrap rubber, as per sample, of second quality," it was decided that the article was equal to sample, but was not of second quality. So what appeared to be a sale by sample was in fact a sale by express warranty.

In Pennsylvania, however there is no implied warranty that the goods sold by sample are equal in quality to the sample; but they hold that the sample is a guaranty only that the article to be delivered shall follow its kind and be merchantable, (*Boyd v. Wilson*, 83 Pa.St., 319) . That doctrine practically destroys the value of samples in making sales. If it is impossible to determine the quality of an article by sample, of what use is the sample, pray? If it simply guarantees that the article to be delivered shall fol-

low its kind and be merchantable, in selling canned corn for e.g. (as a case at bar) why bother with the sample, why not guarantee that the goods shall be canned corn instead of canned beans, and if they prove merchantable, however much or little that term may mean, the contract is fulfilled, --never mind the quality. This is not the general doctrine.

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. (Merriman v. Chapman, 32 Conn. 146).

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. (65 Ill. 512).

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.

It might be well to state what constitutes a sale by sample, for if it is not a sale by sample implied warranty may not exist.

The mere showing of the sample does not make the sale one 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 same as for the sale of an article for a special purpose.

The opportunity to inspect the goods is an important element in determining whether or not the parties intended it a sale by sample. If the buyer has no opportunity to inspect the goods and the 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.

