

Sales - Implied Warranties in the Sale of Secondhand Goods

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damages of \$10.00 per day for delay in the completion of a building, the court said that if the purpose of the provision is merely to secure performance, and damages can be readily computed and the amount in excess of the damage is unreasonable, it is a penalty regardless of the language used. But a penalty is defined as a promise to pay a larger sum on default of a promise to pay a lesser sum, or, where the sum to be paid on default is greater than the defaulted sum or the entire debt.²⁰ Thus the result in *Schneider v. Allis-Chalmers Manufacturing Company*²¹ where the contract called for part payment and retention in case of default. After plaintiff paid \$24,400.00 on the contract price of \$89,600.00, he defaulted. Notwithstanding that defendant had no actual damages, plaintiff could not recover. The court said:

"We see no theory, however, upon which a written contract . . . can be set so aside and disregarded on behalf of one admittedly in default thereunder and such defaulting party nevertheless be permitted to assert an independent right to all or part of that which was paid under and pursuant to the terms of such contract, and especially so when such payment, as it was here distinctly and expressly agreed to by the parties, should be forfeited as liquidated damages in case of just such a default as it is here conceded existed."

It is the opinion of the writer that the court in that case stated the logical and reasonable rule that should be applied in these cases.

KENNETH H. HAYES

Sales-Implied Warranties in the Sale of Secondhand Goods — Plaintiff, a Delaware Corporation, entered into a contract to sell a cheese manufacturing plant including all equipment to the defendant, a Wisconsin cooperative. A used boiler was included as part of the equipment but conveyed on a separate bill of sale. In an action to recover the balance of the purchase price the defendant claimed a set-off for expenses incurred in repairing the boiler. Defendant alleged that the plaintiff's agent orally warranted the fitness of the boiler for the purposes to which the plaintiff knew it would be put. Prevented from showing any express warranty by the parol evidence rule, defendant sought to establish implied warranties on the basis that plaintiff knew the intended use of the boiler and the defendant relied on the plaintiff's skill and judgment as to its suitability for such use. *Held*: Secondhand goods are not excluded as a matter of law from the operation of the Uniform Sales Act. § 15 (1).¹ *Standard Brands v. Consolidated Badger*, 89 F.Supp. 5 (D.C., E.D., Wis. 1950).

¹⁹ 108 Wis. 365, 84 N.W. 490 (1900).

²⁰ *Minn Billiard Company v. Schwab*, 179 Wis. 129, 190 N.W. 836 (1922).

²¹ 196 Wis. 56, 219 N.W. 370 (1928).

¹ Wis. Stats., 121.15 (1949), "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the

The federal court for the eastern district of Wisconsin having decided in advance of the Wisconsin courts that secondhand goods are not excluded from the operation of the sales act, the question arises as to whether Wisconsin courts will decide similarly. In view of the evident sense of the statute,² the provision made for uniform interpretation,³ and the apparent uniformity of opinion in other states as to the construction of the sales act on this point,⁴ an affirmative answer seems indicated. In the event of such a decision, many questions will arise in the minds of both buyers and sellers of used goods; all of which can be resolved into the simple question, how will such a holding affect me?

In order to ascertain the effect of such a holding, the first problem to consider is, in what sales will the law imply this warranty of fitness for a particular purpose? An examination of the wording of the statute⁵ reveals that in order to establish implied warranties of fitness the purchaser must not only show that he made known to the seller the particular purpose for which the goods were required, but also that he relied on the seller's skill and judgment as to their suitability for such purpose. Thus where the purchaser makes the selection no warranty can be implied, for there can be no reliance on the seller's skill and judgment. Similarly, where the seller is not informed as to the particular purpose for which the goods are required by the buyer there can be no implied warranty. In sales of new and used goods, both requirements must be met before the law will imply this warranty. A seller of either new or used goods not wishing the sale to come under the act can refuse to make the selection; or, if he does make the selection, he can word the contract so as to negative any implied warranties.⁶

quality or fitness for any particular purpose of goods supplied under a contract to sell or sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

² Wis. Stats., 121.15 (1949), embraces "goods supplied under a contract to sell or sale." Wis. Stats., 121.76 (1949), defines goods as, "all chattels personal other than things in action or money." (There seems to be no exclusion of secondhand goods in the statutory definition of the property covered by the statute).

³ Wis. Stats., 121.74 (1949), "This act shall be so interpreted and construed, as as to effectuate its general purpose to make uniform the laws of those states which enact it."

⁴ 151 A.L.R. 463.

⁵ *Supra*, Note 1.

⁶ Wis. Stats., 121.71 (1949), "Where the right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negative or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or sale." But Wis. Stats., 121.15 (6) (1949) must be considered, "An express warranty or condition does not negative a warranty or condition implied

As to the transactions covered by the act, the law as applied to used goods will be the same as that applied to new goods.

Incumbent upon the purchaser, however, in addition to establishing the above two requirements, is the requirement that he show his reliance was justifiable.⁷ Reliance under the sales act is treated as a question of fact, with inspection and opportunity of inspection treated as important but not conclusive elements to be considered.⁸ In sales of secondhand goods the very fact that the article is secondhand might tend to show reliance unreasonable,⁹ but some cases have held that the fact that the seller previously used the article and was therefore familiar with its capabilities is an important element in showing justifiable reliance on the part of the purchaser.¹⁰ The seller's occupation is a further element to be considered, for although he is liable "whether he be a grower or manufacturer or not,"¹¹ his occupation has important bearing upon the reasonableness of the buyer's reliance.¹² The customs of the trade also bear upon the reasonableness of the reliance, and may serve to establish an implied warranty.¹³ The fact that the goods are used also has an important bearing on reasonableness of the buyer's reliance, and for this reason the law applied to sales of new goods cannot be applied without exception to sales of used goods.

Further divergence can be found with respect to the suitability of the goods to the particular purpose. The general view is that so long as the goods are reasonably fit, there is no breach.¹⁴ But the fitness of used goods to the particular purpose may not be the same as with new goods.¹⁵

Not only has the purchaser of a used article the burden of showing that the article was not reasonably suited for the particular purpose, but he also faces problems as to the duration of the warranty. In *Marmet v. People's Coal Co.*,¹⁶ involving implied warranties of fitness

Minn. 87, 216 N.W. 790 (1927) and cases discussed therein which show the extent to which courts have gone to find implied warranties.

under this act unless inconsistent therewith." See *Bekkevold v. Potts*, 173 7 151 A.L.R. 465; WILLISTON, SALES ACT § 234 (3d ed. 1948).

⁸ Wis. Stats., 121.15 (3) (1949), "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed;" WILLISTON, SALES ACT § 234 (3d ed. 1948).

⁹ 151 A.L.R. 465.

¹⁰ *Dremer Mining Co. v. Morris Ravine Mining Co.*, 33 Cal. App. (2d) 492, 92 P. (2d) 424 (1939).

¹¹ *Supra*, Note 1.

¹² WILLISTON, SALES ACT § 235 (3d ed. 1948).

¹³ Wis. Stats., 121.15 (5) (1949), "An implied warranty or condition as to quality of fitness for a particular purpose may be annexed by usage of the trade."

¹⁴ *Bastian-Blessing Co. v. Stroope*, 203 Ark. 116, 155 S.W. (2d) 892 (1941).

¹⁵ WILLISTON, SALES ACT § 232 (3d ed. 1948); *Cavanagh v. F. W. Woolworth Co.*, 308 Mass. 423, 32 N.E. (2d) 256 (1941).

¹⁶ 226 F. 646 (1915).

in the sale of used coal barges which sunk immediately after the sale, the court said:

“Such implied warranty of fitness would not be that they were equal in quality to new, and would not extend to the length of time they would last, but would be satisfied if they were presently seaworthy.”

Thus, the fitness for purpose and the duration of the warranty both depend upon the facts, and the fact that the article is used is important in determination of these questions. It does not seem that the inclusion of used goods within the coverage of the sales act will affect to any great extent the previous relations established in sales of used goods.

IRVING W. ZIRBEL

Torts — Scope of Employment Under the Federal Tort Claims Act — Plaintiffs, the husband and three children of the deceased, brought an action against the United States of America under the Federal Tort Claims Act to recover for the death of the deceased who was struck by an army truck driven by a soldier of the United States Army. The soldier had taken the truck under the authority of his Commanding Officer to convey other military personnel to town for entertainment. He then, contrary to instructions, used the vehicle for his own personal business. It was while he was in pursuit of his own affairs that the accident occurred. His negligence was conceded. The trial court held that the soldier was not acting within the scope of his employment and rendered a judgment for the defendant. *Held*: Judgment reversed. The military personnel were taken into town to improve their morale. The soldier involved here was in search of entertainment to improve his morale. Improvement of morale of a single soldier is as much military in character as improvement in morale of several. Therefore the use of the truck to improve his morale was within the scope of his employment. *Murphy et al v. United States*, 179 F. (2d) 743 (C.C.A. 9th, 1950).

The pertinent provisions of the Federal Tort Claims Act are: “. . . The district court . . . shall have . . . jurisdiction to . . . render judgment . . . against the United States . . . on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable . . . in accordance with the law of the place where the act or omission occurred.”¹

¹ 1948 Revised Judicial Code, 28 U.S.C.A. 1346.