

## Sales: Consummation of Sales in Self-Service Stores

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are sufficient to rule out collateral estoppel, and the case goes even further than past cases, and says that an intervening clarification of the law may be sufficient ground on which to base a reconsideration of matters found in a prior case.

Another matter that has caused some trouble has been the finding based on mixed fact and law. It has been held that while *res judicata* (presumably meaning collateral estoppel) does not apply to a strict question of law, where a fact, question or right is found by an erroneous application of the law, that finding is binding in a subsequent suit between the same parties.<sup>16</sup> However, this would seem to be cleared up by the *Sunnen* case, as all income transferor tax liability cases would seem to involve mixed findings of fact and law. The injustice that would be done by holding the parties to a finding based upon an erroneous application of the law, or upon law which is later changed or clarified by decision, is not hard to imagine, especially in income tax cases.

While authority is abundant that changes in the law, statutory and decisional, would throw out the plea of *res judicata* or collateral estoppel in a later suit,<sup>17</sup> the liberal rule of the *Sunnen* case, that mere clarification of the law is sufficient to create a change in the "legal atmosphere", does not seem to have the same support in the cases, but it is a rule that should prevent much injustice. The American Law Institute would apparently go as far, however.<sup>18</sup> The *res judicata* and collateral estoppel doctrines are based on a public policy, only, which attempts to settle matters once litigated. A public policy as this will not be allowed to prevent justice, by causing the perpetuation of an error in later suits involving different claims.<sup>19</sup>

JAMES KIRSCHLING

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Sales — Consummation of Sales in Self-Service Stores — Plaintiffs entered the self-service store of the Great Atlantic & Pacific Tea Company. The husband selected two bottles of ginger ale and proceeded to place them in his merchandise cart when one bottle exploded. A piece of glass therefrom struck his wife in the leg causing her serious injury. Defendants were engaged in the business of manufacturing and bottling the ginger ale. This product was sold and delivered to the Great Atlantic & Pacific Tea Company for resale in its stores. Plaintiffs based their action on *assumpsit* for breach of implied warranty of fit-

<sup>16</sup> *U.S. v. Moser*, 266 U.S. 236, 45 S. Ct. 66, 69 L.Ed. 263 (1924). See also, Griswold, "Res Judicate in Federal Tax Cases," 56 Yale L.J. 1320, at pp. 1333, 1334, 1355, 1356, but see p. 1335 for cases *contra* (1937).

<sup>17</sup> *State Farm Mutual Auto Insurance Co. v. Duel*, 324 U.S. 154, 65 S. Ct. 573, 89 L.Ed. 812 (1945), and see fns. 5, 10, 11 and 14, *supra*.

<sup>18</sup> American Law Institute, *Restatement of the Law of Judgments*, sec. 70 (1942).

<sup>19</sup> See fn. 18, *supra*, and also *Henricksen v. Seward*, 135 F.(2d) 986, 150 A.L.R. 1 (C.C.A. 9th, 1943).

ness and merchantability. *Held*: no recovery in assumpsit against bottler on ground of breach of implied warranty that the ginger ale and bottle were fit and safe for storage and handling by store and store's employees and customers, since there was neither a sale nor an executory contract of sale. *Loch et ux. v. Confair et ux.*, 63 A. 2d 24, (*Pennsylvania* 1949).

The liability of a seller of goods, whether he is manufacturer or producer of such goods, or is a retailer or other seller dealing in or selling goods manufactured or produced by another, for personal injuries sustained by the buyer by reason of defect in or the condition of the article sold may rest upon fraud in misrepresenting the character of the goods sold, upon express or implied warranty of their quality or condition, or upon negligence.<sup>1</sup>

The fraud in misrepresenting the character of the goods sold to be actionable must consist, first, of a statement or fact which is untrue; second, that it was made with intent to defraud and for the purpose of inducing the other party to act upon it; third, that he did in fact rely on it and was induced thereby to act to his injury or damage.<sup>2</sup>

Ordinarily the mere happening of an accident is not evidence of negligence. Where a purchaser took a bottle of "Coca Cola" from an icing container and the bottle exploded in his hand, it was held that he could not recover for negligence without showing a greater likelihood that the mishap was occasioned by some act of negligence of the bottler for which it was responsible rather than by a cause for which the manufacturer was not liable.<sup>3</sup> The court said there was no evidence that would warrant a finding that the bottle was not properly constructed or that it was not an appropriate vessel for the purpose for which it was used. Evidence to sustain a cause of action based upon negligent conduct is often difficult to obtain.

Recovery in the principal case was predicated on assumpsit for breach of implied warranty. To assert a right based on breach of warranty the required elements of a contract must be present.<sup>4</sup> It has been held that in self-service stores the store does nothing more than make an offer to sell for cash at the prices marked on the goods.<sup>5</sup> Until there is an acceptance of this offer by the buyer no contractual relation arises between the parties. The offer cannot be considered as accepted before the goods reach the cashier and the store, before that time, has not assumed any contractual obligation with the buyer.

<sup>1</sup> 46 Am. Jur. 926, Sales, sec. 800.

<sup>2</sup> *International Milling Co. v. Priem*, 179 Wis. 622, 192 N.W. 68 (1923).

<sup>3</sup> *Ruffin v. Coca Cola Co.*, 311 Mass. 514, 42 N.E.(2d) 259 (1942).

<sup>4</sup> *Prinsen v. Russos*, 194 Wis. 142, 215 N.W. 905 (1927).

<sup>5</sup> *Lasky v. Economy Grocery Stores*, 319 Mass. 224, 65 N.E.(2d) 305, 163 A.L.R. 235 (1946).

It is undisputed that the merchandise in a self-service store is the property of the store until paid for by a customer at the checking counter.<sup>6</sup>

An offer to sell imposes no obligation until it is accepted according to its terms.<sup>7</sup> Acceptance must be identical with the terms of the proposal in order to complete the sale.<sup>8</sup> Where the sale is a cash transaction, parties generally contemplate passage of title and right to possession simultaneously with payment.<sup>9</sup> Even though the buyer has obtained possession of the goods, where it is a cash sale, there must be payment in order to pass title as between the parties.<sup>10</sup> The seller may, however, waive any or all of these conditions and a valid sale will result.

Plaintiffs, in the principal case, challenged the holding of the court that the title to the bottles of ginger ale had not been transferred to them at the time of the explosion. It was argued that title passed to them immediately upon their having selected the bottles from the retailers shelves, subject to being revested in the retailer if restored to the shelf by them prior to taking them to the cashier. Uniform Sales Act, Section 19, rule 3 (1) was relied upon in support of this contention.<sup>11</sup> But the court said this section must be read in conjunction with Section 42 to derive its full application.<sup>12</sup>

Similarly, the proposed Uniform Revised Sales Act seems to support the court's construction that these sections must be applied together: "A sale on approval is a contract for sale under which the goods delivered notwithstanding, such use by the buyer as is consistent with their testing or trying out, are to remain the sellers until acceptance by the buyer. . . ."<sup>13</sup> "Under a sale on approval unless otherwise agreed the goods are appropriated to the contract when identified but the risk of loss and the title do not pass to the buyer until acceptance. . . ."<sup>14</sup>

<sup>6</sup> *Gargaro v. Kroger Grocery & Baking Co.*, 22 Tenn. App. 70, 118 S.W.(2d) 561 (1938).

<sup>7</sup> *California and Hawaiian Sugar Refining Corp. v. Mason By-Products Co.*, 23 F.(2d) 436 (C.C.A. 9th 1928).

<sup>8</sup> *Atlas Torpedo Co. v. U.S. Torpedo Co.*, 15 S.W.(2d) 150 (1929).

<sup>9</sup> *Calcara v. United States*, 83 F.(2d) 767 (C.C.A. 8th 1931).

<sup>10</sup> *Long v. Dye*, 42 Ga. App. 726, 157 S.E. 359 (1931).

<sup>11</sup> Uniform Sales Act. sec. 19, rule 3 (1).

"When goods are delivered to the buyer 'on sale or return,' or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time."

<sup>12</sup> *Ibid.*, sec. 42.

"Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

<sup>13</sup> Proposed Uniform Revised Sales Act sec. 50(1).

<sup>14</sup> *Ibid.*, sec. 5(1) (a).

"Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. When duly made, tender entitles the seller to acceptance and to payment according to the contract."<sup>15</sup> "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due."<sup>16</sup>

The other leading case on self-service stores corroborates this contention quite succinctly:

"It is true that customers were invited to take possession of the goods that they intended to purchase and, if such possession may be considered the equivalent of delivery of the bottle, such delivery was conditional and was made only for the purpose of permitting the customer to take it to the cashier. Possession alone was not in these circumstances sufficient to pass title."<sup>17</sup>

The question of privity of warranty was not raised in the principal case. There is authority to the effect that manufacturers and bottlers of beverages may be held liable to consumers who purchased from intermediate dealers.<sup>18</sup>

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**Torts — Duty of Municipality to Erect Warning Signs at Curve in Highway** — Plaintiff passenger in a car driven by one Schreck was proceeding eastward at 3:30 A.M. on a July morning over a street on which residences were within five hundred feet of one another. It was foggy and the car proceeded at between twenty and thirty-five miles per hour. The eighteen foot wide macadam street with one and one half foot gravel shoulders made a right angle turn to the North; a series of twelve three foot white topped guard posts five feet apart marked the outside of the curve. At the curve the travelled way, i.e. the macadam and gravel shoulders, increased to a twenty-two foot width. Schreck, when he perceived the white topped posts in front of him, applied his brakes and after skidding fifty-one feet around the curve collided with a tree at a point twenty-three inches east of the traveled way. The tree was fourteen inches in diameter and over twenty feet high. Plaintiff alleged liability under section 81.15 of the statutes for an insufficiency and want of repair of a public highway due to an absence of warning signs to indicate existence of the curve and the proximity of the tree to the traveled way. There was no allegation of insufficiency in construction or repair of the macadam surface. *Held:*

<sup>15</sup> *Ibid*, sec. 76(1).

<sup>16</sup> *Ibid*, sec. 76(2).

<sup>17</sup> *Supra*, note 5.

<sup>18</sup> 17 A.L.R. 696.