Marquette Law Review

Volume 27
Issue 2 *February 1943*

Article 10

Sales - Warranties by Express Representation

Philip W. Croen

court without reference in the opinion to the value of the goods sold. *Ex Parte Eaglesfield,* 180 F. 558 (D.C. E.D. Wis. 1910); *Monroe* v. *Endelman, supra.*

In determining what is reasonable and what is confiscatory, courts have tended to recognize a distinction between businesses regarded as legitimate and those regarded as illegal in tendency. While the city may be given the power to single out for taxation either pursuits which are a matter of natural right or those made possible only by virtue of statute, higher fees are generally sustainable in the latter case than in the former on the theory that there is a public policy in favor of suppressing the business or at least restricting the numbers which engage therein. *City of Seattle* v. *Rogers,* 106 P. (2d) 598, Wash. (1940).

WILLIAM SMITH MALLOY.

Sales—Warranties by Express Representation.—Defendant set up a defense of breach of warranty in an action on a note given in a sale of dairy cows. In making the sale the plaintiff made the statement that, "these cows would have to be as recommended, first class dairy milk cows and six gallons a day they would give." He also promised to take back any cow that went wrong. Within two to four weeks after the purchase of said cows they began falling ill, and the entire herd became diseased. The infection caused the milk of the cows to become ropey and stringy; and it soured before it could be sold. The defendant counterclaimed for damages to his own herd. In affirming the decision of the lower court allowing damages to the defendant the appellate court quoted the clause of the Uniform Sales Act which provides that, "any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon," and held that the statement concerning the production of the cows was an affirmation of fact by the seller relating to the goods within the meaning of the provision of the Act above set out and was therefore an express warranty and not a mere statement of value, or seller's opinion, as claimed by the plaintiff, *Teter* v. *Schultz,* 93 N.E. (2d) 802 (Ind. 1942).

Although the court is guided by the provision of the Sales Act defining an express warranty it is, nevertheless, confronted with the problem of interpretation when it is required to determine if a particular statement of a seller is an express warranty within the meaning of the Act. In arriving at the conclusion that a statement is a warranty, the courts have applied various tests.

All courts agree that to constitute a warranty the affirmation of fact must be of a material fact. Typical of the application of this rule is the case of *Lloyd et al.* v. *James,* 198 Ark. 255, 128 S.W. (2d) 1019 (1939), where the court instructed the jury that, "before expressions rise to the dignity of a warranty, they must amount to a specific, definite, and certain representation of a fact that is material, and, if you find from all the testimony in this case that the expression of the salesman who sold the defendant the truck in the controversy did not definitely and certainly point to some material quality of the truck on which the defendant might rely and did rely, your verdict should be for the plaintiff."

No special words of warranty are necessary. The word warranty or its precise equivalent need not be used. "It is enough," said the Minnesota court in *Skoog* v. *Mayer Bros. Co.,* 122 Minn. 209, 142 N.W. 193 (1913), "if the vendor definitely undertakes that the thing sold shall be of a certain kind or quality."

This same court held that the word "good," used to describe the condition of a second hand tent, was an express warranty, *Saunders* v. *Cowl, et al.,* 201 Minn. 574, 277 N.W. 12 (1938). The court based its holding on the fact that the word "good" related to the condition of the goods—a fact—and that this induced the buyer to purchase the tent. In *Detjen* v. *Moerschel Brewing Co.,* 157 Mo. 614, 138 S.W. 696 (1911), a mule was declared to be "straight and all right," by the seller. The mule died of a hidden disease soon after it was purchased. The court held this to be an express warranty, saying that, "Where the defect is not discoverable upon ordinary inspection representations of soundness made by the vendor, with the intent and purpose of inducing the vendee to rely on them, and their acceptance by the vendee will constitute a warranty. The seller is not permitted to take unfair advantage of his superior knowledge."

Where an article is of a character that might do the buyer harm if the statements that he relied on in purchasing were not true, the court will be stricter in construing words of the seller as a warranty than where the article is harmless. A used car lot owner in dealing with the plaintiff referring to all the cars on his lot stated that, "they were all in good condition and that they would be guaranteed for thirty days." The plaintiff drove the car and was injured when the wheel fell off. In awarding him damages for the breach of warranty the court said: "Where sellers are describing the conditions of chattels so likely, if defective, to occasion injury to life and limb, they should anticipate close scrutiny of their language by the courts. What might be considered mere "puffiing" of a perfectly harmless product must be held a distinct representation in case of an automobile," *Curby* v. *Mastenbrook,* 288 Mich. 676, 286 N.W. 123 (1939).

In dealing with intention to warrant the earlier cases emphasized the exact stipulation of the contract to show it. Thus in *Hawkins* v. *Pemberton,* 51 N.Y. 199 (1872), the court declared: "It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contain a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so if it be by parol, and the representation as to the character or quality of the article be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies on it and he is induced by it the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee." *Smith* v. *Justice,* 13 Wis. 671 (1861), is to the same effect.

However the later cases place more stress on the question—Did the seller intend to warrant? In 55 C.J. 673, it is stated, "To constitute an express warranty there must be an express undertaking to warrant in so many words, or, if representations are relied on to make out the warranty, they must be made in such manner and circumstances as to authorize the buyer to understand that the seller intended to be bound by them as a part of the contract for sale, and he must have purchased in reliance on them." This rule was followed in *Wallace et al* v. *McCampbell,* (Tenn.) 156 S.W. (2d) 442 (1941); *Naylor* v. *McSwegan,* 21 N.Y.S. 930, 50 N.Y. 339 (1893); *Giffert* v. *West,* 33 Wis. 617 (1873).

The warranty must be made before or at the time of the sale. In the case of *Beckett* v. *F. W. Woolworth Co.,* 376 Ill. 470, 34 N.E. (2d) 427 (1941), the plaintiff had been buying the same kind of mascara for ten years. In this in-

stance she picked up the tube, paid for it, and then asked if it was safe. The clerk answered, "It is on the tube, it says harmless." The buyer suffered serious eye injury but was denied recovery on breach of warranty. The Illinois court pointed out that all statements made by the clerk seemed to have been made after the sale was completed. "Manifestly, acts or statements of a retailer made after a sale do not support a claim that a regular customer was induced to buy merchandise in reliance upon such statements. In order to recover for a breach of warranty in this case it was thus incumbent upon the plaintiff to prove an affirmation of fact concerning the mascara by the defendant, the seller, having a natural tendency to induce her to buy, and an actual reliance upon the affirmation made."

"Mere silence implies no warranty, neither do remarks which should be construed as simple praise or condemnation; but any distinct assertion or affirmation of quality made by the owner during a negotiation for the sale of a chattel, which may be supposed was intended to cause the sale, and was operative in causing it, will be regarded as either implying or constituting a warranty," PARSONS, CONTRACTS, Vol. 1, p. 579 (7th ed., 1883).

A wrong statement of law on the part of the seller is not an express warranty. Thus, where a buyer sued a corporation for loss and damages suffered when he was assessed as owner of stock purchased from them, in spite of the agent's statement that "he would not be liable to assessment as the owner of the stock," the Michigan court declared, "the first statement was a statement of law and as such the speaker was mistaken and could not be held. He did not make a knowing representation of law or fact to the plaintiff," *Goodspeed* v. *MacNaughton, Greenwalt & Co.*, 288 Mich. 1, 284 N.W. 621 (1939). In describing what was not a warranty this court quotes with approval the following from WILLISTON, CONTRACTS (1936) Vol. IV, p. 2692, "if a statement falsely and fraudulently made will not sustain an action of deceit or afford ground for rescinding a contract it is still more clear that it cannot amount to a warranty."

As to the effect of a mistake of fact on the part of the seller the Michigan court has said there would be no warranty in such a case, *Goodspeed* v. *McNoughton, supra.* The Wisconsin court seems to stand on opposing ground. In *Hoffmand* v. *Dixon,* 105 Wis. 315, 81 N.W. 491 (1900), the plaintiff went into a store and asked the defendant if he had rape seed. The defendant said yes. The plaintiff asked for 25 pounds and the defendant took out a sack and weighed out that amount. Neither the plaintiff nor the defendant knew what rape seed looked like and each was wholly unaware of the ignorance of the other. The seeds turned out to be mustard seeds. The court awarded damages for breach of warranty and said, "An affirmation of fact as to the kind or quality of an article offered for sale, of which the vendee is ignorant, but upon which he relies in purchasing such article is as much a binding contract as a formal agreement using the plainest and most unequivocal language on the subject. * * * Knowledge on the part of the vendor is not essential either to actionable fraud or a contract of warranty."

Where the buyer's actual information is equal or superior to the seller's, reliance on the seller's statements is not justified. Under such circumstances the seller's statements are properly deemed mere statements of opinion and not warranties. The seller's statements of value, too, are readily seen to be matters of estimate or interested personal judgment so that without more appearing, they are regarded as not justifying reliance thereon. Similarly, general words of commendation, such as "good, high class, valuable" are regarded, without

more appearing, as mere seller's talk not to be relied upon. VOLD, SALES (1931) 447.

The following are illustrations of statements by the seller which were held not express warranties but merely seller's opinions, commonly termed puffing. A clerk's statement that the "cream is pure, beneficial and harmless, and that it would not harm the most tender skin" was held to be a recommendation of the cold cream and not a warranty in *Bel* v. *Adler,* 63 Ga. App. Rep. 473, 11 S.E. (2d) 495 (1940). A circular stating the merits of a particular seed corn in *Gray* v. *Gurney Seed and Nursery Co.,* 57 S.D. 280, 231 N.W. 940 (1930), said, "We claim that it will outyield any variety that will mature in the same time on the same ground." The court held this to be the seller's opinion. The defendant in the case of *De Zeeuw* v *.Fox Chemical Co.,* 189 Ia. 1195, 179 N.W. 605 (1920), attempted to make a sale by telling the plaintiff, "If he would feed the defendant's worm powder it would improve the growth and physical condition of his hogs." The hogs were poisoned by it, but the court said that the seller's statements were not warranties, but merely opinions. So, also, was the salesman's statement that, "you would make a saving of approximately $800 per year by automatic gas firing," declared to be an opinion in the sale of a gas boiler in *Snow Laundry and Dry Cleaning Co.* v. *Georgia Power Co.,* 61 Ga. App. Rep. 366, 6 S.E. (2d) 159 (1939). It was held not a warranty to say, "I have the best piece of cloth in the market," even though it had a hole in it in *Strauss* v. *Salzer,* 58 Misc. Rep. 573, 109 N.Y.S. 734 (1908). Nor did the court find a warranty in the words of the clerk who said of a fur coat that, "it would wear very good," in *Keenan* v. *Cherry and Webb,* 47 R.I. 125, 131 Atl. 309 (1925). Even though the seller was insistent in *Smith* v. *Bolster,* 70 Wash. 1, 125 Pac. 1022 (1912), the court said that his statements to the effect that the car was, "in first class condition, as good as any new car, and that he guaranteed the car to go eleven miles to a gallon of gasoline on the average," were opinion or seller's talk. There was no warranty when the seller said that, "The Jenkins stacker would stack hay from fifty cents to one dollar a ton cheaper than the "T" stacker," which the buyer was then using, *Carver-Shadbolt Co.* v. *Loch et ux.,* 87 Wash. 453, 151 Pac. 787 (1915). The use of words like, "prime elegant merchandise," in the case of shoes, *Rosenbush* v. *Learned,* 242 Mass. 297, 136 N.E. 341 (1922); "unsurpassed and unsurpassable," speaking of bicycle parts, *League Cycle Co.* v. *Abrahams,* 27 Misc. Rep. 548, 58 N.Y.S. 306 (1899); "they will sell like hot cakes," in the case of vapor stoves, *Detroit Vapor Stove Co.* v. *J. C. Leeter Lumber Co.,* 61 Utah 503, 215 Pac. 995 (1923), were all termed seller's talk by the courts. In the case of *Snow's Laundry and Dry Cleaning Co.* v. *Georgia Power Co., supra,* the court repeated in the form of a test the section of the Sales Act mentioned in the principle case: "the decisive test, in determining whether language used is a mere expression of opinion or a warranty, is whether it purports to state a fact upon which it may fairly be presumed the seller expected the buyer to rely and upon which a buyer would ordinarily rely."

In *Mantle Lamp Co.* v. *Rucker,* 202 Kan. 762, 261 S.W. 263 (1924), the test of whether a given representation is a warranty, or a mere expression of opinion or judgment, was said to be "whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment. In the one case it will be deemed a warranty and in the other a mere expression of opinion."

PHILIP W. CROEN.