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Sales-Canned Foods-Implied Warranty

SALES—CANNED FOODS—IMPLIED WARRANTY.—Plaintiff's wife purchased at one of the retail stores of the defendant, a jar of preserves. Plaintiff was eating the preserves when he bit into something soft and gummy which, upon examination, proved to be part of a mouse. He thereupon became nauseated and vomited several times. This continued for some time thereafter and he was wholly disabled from doing any work for a time and partly disabled for some time thereafter. Plaintiff sued in assumpsit based on an implied warranty of merchantability. Held, defendant is not liable because the injury suffered by plaintiff was the result of mental shock and the physical consequences thereof, and he was not injured physically from the preserves or any foreign substance contained therein. Lower court verdict for $400 damages reversed, and judgment entered for defendant.[1]

As the court points out in this case, when a wife buys necessaries for her family and her husband, a primary presumption arises that the wife is acting as agent for her husband, as the duty to pay for the necessaries rests on him. The wife's separate estate will not be bound for debts contracted by her while acting as such agent or messenger unless the evidence convinces the jury that the wife was acting in her own right independent of her husband, but the husband will be bound.[2] Thus, plaintiff has the right to sue on the warranty.

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[10] Root v. Beck (1886), 109 Ind. 472, 9 N. E. 698, Cravens v. Cravens (1914), 181 Ind. 553, 103 N. E. 333, Logsdon v. Dingg (1904), 32 Ind. App. 158, 69 N. E. 409; Bowman v. Guiblis (1866), 26 Ind. 419; Hargis v. Congressional Twp. (1867), 29 Ind. 70; Stole v. Portsmouth (1885), 106 Ind. 435, 7 N. E. 379; May v. Dobbins (1906), 166 Ind. 331, 77 N. E. 353.

[11] Cleveland, etc., Co. v. Obenchain (1886), 107 Ind. 591, 9 N. E. 624, Riggs v. Riley (1887), 113 Ind. 208, 15 N. E. 253, Davis v. Waggoner (1908), 42 Ind. App. 115, 83 N. E. 381, Fatic v. Myer (1904), 163 Ind. 401, 72 N. E. 142; Rosenmeier v. Mahrenhold (1912), 179 Ind. 467, 101 N. E. 721, Wood v. Kuper (1898), 150 Ind. 622, 50 N. E. 755, Helton v. Fastnow (1904), 33 Ind. App. 288, 71 N. E. 230; Spacy v. Evans (1898), 152 Ind. 431, 52 N. E. 605.

[1] Young v. Great Atlantic & Pacific Tea Co. (1936), 15 F Supp. 1018.

[2] Dublino v. Natale (1935), 118 Pa. Super Ct. 301, 304, 179 A. 821, 822.

Also see Guarenire et ux. v. Bessemer Lumber Co. (1935), 214 Ala. 8, 106 So. 49 (Husband's liability under wife's contract to pay for building materials); Woodruff v. Perrotti et ux. (1923), 99 Conn. 639, 122 A. 452 (Wife employed atty. to defend husband), Vaughan v. Mansfield (1918), 229 Mass. 352, 118 N. E. 652 (Wife pledged husband's credit for medical services), B. Altman & Co. v. Rosenfeld (1917), 162 N. Y. S. 678, 98 Misc. Rep. 236 (Wife bought coat on husband's credit), Stevens v. Hush (1919), 176 N. Y. S. 602, 107 Misc. Rep. 353 (Wife contracted for room and board at hotel), Evenson v. Nelson (1918), 39 N. D. 523, 168 N. W 36 (Wife left to manage farm and pledged husband's credit), Gore et al. v. Whiteville Lumber Co. (1918), 110 S. C. 478, 96 S. E. 683 (Where husband leaves wife in possession of land she can

A warranty is an express or implied statement of something which a party undertake to be part of a contract, and, though part of the contract, collateral to the express object of it.[3]

When there is a sale of goods, and an examination of them is impractical, a warranty will be implied by law that they are merchantable.[4] A warranty is "implied" when under the rules of law it is considered to have been made without express words to that effect. A warranty is an undertaking collateral to the contract of sale and gives rise to the same liability whether express or implied.[5]

Under the early common law a breach of warranty was considered as having more the aspect of a tort than breach of contract. Today a breach of warranty is an act or omission which lies between a breach of contract and a tort. Plaintiff can sue in tort[6] or in contract, basing his suit on the contract, although the measure of damage may be different in each action. If plaintiff has bought goods from a retailer and desires to sue the manufacturer for defects therein, he must sue in tort in most jurisdictions, as it is held that a warranty from a manufacturer to a retailer will not run to customers of the retailer, but only to the retailer himself.[7] The manufacturer is under a tort liability to the retailer's customers if they are injured due to a defect in the article manufactured, and the manufacturer should have foreseen that the article would have been inherently dangerous if improperly constructed, due to latent defects. The manufacturer is under an affirmative duty to use due care.[8] The decided weight of American authority permits a consumer to recover against the manufacturer for the negligent manufacturing or preparation of foods, irrespective of any contractual relation between the parties.[9]

At early common law no warranties were implied, and there was no express warranty unless the "magic word" warranty was used in the contract.[10] The

bring action of trespass, as agent of the husband), Davenport v. Rutledge (1916), 187 S. W 988, Texas Court of Civil App. (Wife called doctor to attend child); Milhollin et al. v. Milhollin (1919), 71 Ind. App. 477, 126 N. E. 36 (Rules of agency between husband and wife are same as other rules of agency).

3 Bouvier's Law Dictionary (Baldwin's Student Ed.).

4 Carleton v. Lombard, Ayres & Co. (1893), 25 N. Y. S. 570, 43 N. E. 422. The term merchantability does not require that the article sold shall be of the first quality, but in the ordinary course of business be vendible on the market and at the average price of such article referred to in the contract. Adolph Goldmark and Sons v. Simon Bros. Co. (1923), 110 Neb. 614, 194 N. W 686.

Apples being perishable, there is no implied warranty by the seller that they will continue sound or merchantable for a definite period or for any period after delivery—Rinelli v. Rubino (1918), 69 Ind. App. 314, 120 N. E. 388, McNeil & Higgins Co. v. Czarnikow-Rienda Co. (1921), 274 F 397, Philip Olim & Co. v. C. A. Watson & Sons (1920), 204 Ala. 179, 85 So. 460.

5 Hausken v. Hodson-Feenaughty Co. (1920), 109 Wash. 606, 187 P 319.

6 For a good discussion of the tort aspect of this subject see Mitchell v. Rochester R. R. Co. (1896), 151 N. Y. 107, 45 N. E. 354.

7 Nelson v. Armour Packing Co. (1905), 76 Ark. 352, 90 S. W 288.

8 MacPherson v. Buick Motor Co. (1916), 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916 F., 696, Ann. Cas. 1916 C., 440.

9 Doyle v. Continental Baking Co. (1928), 262 Mass. 516, 160 N. E. 325, Ketterer v. Armour & Co. (1912), 200 F 322; Salmon v. Libby (1906), 219 Ill. 421, 76 N. E. 573. See cases collected in 63 A. L. R. 343.

10 Chandelor v. Lopus (1625), Cro. Jac. 4, 79 Eng. Rep. 3.

courts began to imply a warranty of fitness for purpose where the buyer, expressly or by implication, made known to the seller the particular purpose for which the goods were required, and it appeared that the buyer relied on the seller's skill or judgment in the selection of the goods. The common law on this point was affirmed and codified by sec. 15, par. 1, of the Sales Act.[11] In par. 2, sec. 15, the act provides for an implied warranty of merchantability where the goods are bought by description from a dealer dealing in goods of that description. The above provisions are in force in Pennsylvania.[12] Under sec 15, par. 4, of the act, there is no warranty of fitness for purpose when goods are sold under a patent or trade name, the theory being that the buyer does not rely on the seller's judgment when such goods are bought.[13] There is, however, a warranty of merchantability.[14]

Thus it appears that no warranty of fitness for purpose will arise unless the buyer expressly or by implication relies on the seller's judgment in the selection of the goods.[15] By the weight of authority it appears that, both at common law and under the Sales Act, a retailer is liable on an implied warranty of fitness for purpose if proximate injury results from a sale of canned goods which are not fit for human consumption. The result reached by the case is hard to justify as a matter of logic, and Maine[16] and Kentucky[17] refuse to follow the general rule. The retailer has no supervision over the canning of the food and has no knowledge or means of knowledge concerning the presence of any foreign substance in the can. The buyer knows that the seller has bought the food from another, in sealed cans, and that he has no knowledge of the contents thereof.

The decision, however, is justifiable. Where canned food is purchased it is a necessary inference that the food is to be eaten. The cans on the retailers shelves are all sealed and identically labeled, and from the nature of things neither party can inspect the goods before the sale. The dealer, however, is in a better position to ascertain and determine the responsibility and character of the manufacturer than is the purchaser. The majority view seems best as it places the responsibility on him who is best able to protect himself and recoup losses, namely, the dealer. He may sue the retailer, who in turn has his remedy over against the manufacturer. The retailer has a more intimate contact with

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[11] Cook v. Darling (1910), 160 Mich. 475, 481, 125 N. W 411.

[12] (Act of May 19, 1915, P L. 543, Sec. 15, Par. 2, 69 P. S. Pa. Sec. 124, Par. 2).

[13] Acorn Silk Co. v. Herscovitz (1925), 250 Mass. 553, 146 N. E. 35; Ireland v. Louis K. Liggett (1922), 243 Mass. 243, 137 N. E. 371, Iron Fireman Coal Stoker Co. v. Brown et ux. (1931), 182 Minn. 399, 234 N. W. 685.

[14] Ryan v. Progressive Grocery Stores, Inc. (1931), 255 N. Y. 388, 175 N. E. 105.

[15] Perry v. Johnson (1877), 59 Ala. 648, Farrel v. Manhattan Market (1908), 233 Ill. 430, 84 N. E. 481, Glucose Sugar Refining Co. v. Climax Coffee & Baking Powder Co. (1907), 40 Ind. App. 182, 81 N. E. 589; Katherine Gearing v. John Berkson (1916), 223 Mass. 257, 111 N. E. 785; Eversole v. Hanna (1914), 171 S. W 25, Kansas City Missouri Court of App; Kinch v. Haynes (1908), 111 N. Y. S. 618, 58 Misc. Rep. 499; Bartlett v. Hoppock (1865), 34 N. Y. 118, 88 Am. Dec. 428, Hargous v. Stone (1851), 5 N. Y. 73.

Also see Uniform Sales Act sec 15, par. 1.

[16] Bigelow v. Maine Central R. R. (1912), 110 Maine 105, 110, 85 A. 396.

Also see dissenting opinion in Ward v. Great Atlantic & Pacific Tea Co. (1918), 231 Mass. 90, 120 N. E. 225.

[17] Walden v. Wheeler (1913), 153 Ky. 181, 154 S. W 1088.

the manufacturer; he is the one who has dealt with him, and thus the burden is placed on him who is in the best position to prevent the injury. The courts should, as many do, presume that the buyer relies on the seller in the selection of canned foods.[18]

The suit was filed on the theory of breach of warranty of merchantability under sec. 15, par. 2, of the act, and not on a warranty of fitness for purpose, the intention of the pleader probably being the avoidance of the requirement of sec. 15, par. 1, of the act, which makes a reliance on the seller's judgment a condition precedent to recovery on a breach of warranty for fitness for purpose. Thus recovery may be had under par. 2 when the action would fail if brought under par. 1 because the purchaser bought under a trade name,[19] or for some other reason.

At common law warranties of merchantability were limited to sales by manufacturers or growers.[20] This rule has been changed by the Uniform Sales Act,[21] so that a warranty is implied when the goods are bought by description from one who deals in goods of that description.

In the principal case the controlling question under discussion was the measure of damages. It seems that the court clearly follows authority in holding the defendant not liable. Special damages can be recovered only in exceptional cases[22] where the damages suffered are within the contemplation of the parties at the time the contract is made, or the proximate result of the breach of warranty, and can be ascertained with a reasonable degree of accuracy.[23] The injury to plaintiff was purely mental; the injury was caused by an emotional disturbance;[24] he was not poisoned or injured physically. Defendant could not have foreseen such a reaction on the part of the plaintiff when he discovered

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[18] Anna Sloan v. F W Woolworth (1915), 193 Ill. App. 620; Leahy v. Essex Co. (1914), 148 N. Y. S. 1063, Wren v. Holt (1903), 1 K. B. 610.

[19] Ryan v. Progressive Grocery Stores, Inc. (1931), 255 N. Y. 388, 175 N. E. 105.

[20] Ryan v. Progressive Grocery Stores, Inc. (1931), 255 N. Y. 388, 175 N. E. 105; Bierman v. City Mills Co. (1897), 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 635.

[21] Williston, Sales (1924), vol. 1, sec. 232, 233. See Uniform Sales Act sec. 15, par. 2.

[22] Kime v. Riddle (1917), 174 N. C. 442, 93 S. E. 946.

[23] Hodges v. Smith (1912), 159 N. C. 525 75 S. E. 726, Mullerleile et ux. v. Brandt et ux. (1911), 64 Wash. 280, 116 P 868, Columbia Motors Co. v. Williams (1923), 209 Ala. 640, 96 So. 900; Peppers et al. v. Metzler (1922), 71 Colo. 234, 205 P 945; People's State Bank of Butterfield v. Randby (1924), 158 Minn. 305, 197 N. W 265, Hope Engineering & Supply Co. v. D. N. Lightfoot & Sons (1917), 193 S. W 624; Hausken v. Hodson-Feenaughty Co. (1920), 109 Wash. 606, 187 P 319; Hoffman v. Hockfield Bros. (1921), 75 Pa. Super. Ct. 595, Feneff v. N. Y. C. & H. R. R. (1909), 203 Mass. 278, 89 N. E. 436.

See Uniform Sales Act sec. 69, par. 6.

Also see Bolger v. Boston Elevated R. R. Co. (1910), 205 Mass. 420, 91 N. E. 389; Whitcomb v. N. Y., N. H. & H. R. R. (1913), 215 Mass. 442, 102 N. E. 663. See (1916) 16 Columbia L. Rev. 122; Dill v. O'Ferrell (1880), 69 Ind. 500 (The question of the amount of damages for breach of warranty is peculiarly for the determination of the jury).

For a valuable discussion see Sachter v. Gulf Refining Co. (1923), 209 N. Y. App. Div. 391, 203 N. Y. S. 769; General Motors Truck Co. v. Shepard Co. (1925), 47 R. I. 153, 130 A. 593.

[24] Ewing v. P. C. & St. L. Ry. Co. (1892), 147 Pa. 40, 23 A. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; Howarth v. Adams Express Co. (1921), 269 Pa. 280,

the mouse in the preserves. To allow recovery under the circumstances of this case would open the door wide to fraud, as there is no standard by which damages could be measured.

N. C. B.

CONSTITUTIONAL LAW—CONVICT MADE GOODS—INTERSTATE COMMERCE

Plaintiff asked for mandamus to compel defendant railroad to carry unbranded, convict made horse collars, harness, and strap goods in interstate commerce. Defendant refused the tendered shipments because of the Ashurst-Sumners Act,[1] a federal statute, which, (1) prohibited the interstate transportation of goods made by convict labor "where such goods are intended . . . to be received or in any manner used, either in the original package or otherwise" in states, etc. contrary to their laws, (2) directed that all packages containing such goods be properly marked, including "the name and location of the penal or reformatory institution." Three classes of shipments were involved: (1) Those to states whose laws prohibited the sale of convict made goods. (2) Those to states whose laws did not prohibit such sale, but required that the goods be marked to show that convicts had made them. (3) Those to states which imposed no restriction upon sale or possession. Held. Both provisions are constitutional, and the labeling provision is valid no matter what the law of the state of destination. Mandamus denied.[2]

The case is significant because it upholds the power of Congress to prohibit the movement of harmless, useful goods in interstate commerce. Previous prohibitions had been confined to goods inherently harmful[3] or goods whose evil lay in the purpose of the transportation[4] or to giving effect to policies of Congress in relation to instrumentalities of interstate commerce.[5]

The Ashurst-Sumners Act seemed to stand midway between two opposing lines of cases—those upholding federal regulation of interstate shipment of such things as diseased livestock,[6] lottery tickets,[7] women for immoral purposes,[8] and intoxicating liquor[9] on the one side, and the Child Labor decision[10] on the other. The Act had its prototype in the Webb-Kenyon Act,[11] but liquor was recognized as inherently harmful to health and morals. The Supreme Court chose the approach of the liquor case,[12] and bridged the gap between

112 A. 536, Houston v. Freemansburg Borough (1905), 212 Pa. 548, 61 A. 1022, 3 L. R. A. (N. S.) 149; Linn v. Duquesne Borough (1903), 204 Pa. 551, 54 A. 341, 93 Am. St. Rep. 800.

1 49 Stat. 494, 49 U. S. C. A. sec. 61-64.

2 Kentucky Whip and Collar Co. v. Illinois Central R. Co. (1937), 57 S. Ct. 277

3 Hipolite Egg Co. v. U. S. (1911), 220 U. S. 45, 31 S. Ct. 364. (Bad eggs).

4 Champion v. Ames (1903), 188 U. S. 321, 23 S. Ct. 321. (Lottery Tickets). Hoke v. U. S. (1913), 227 U. S. 308, 33 S. Ct. 281. (Women for immoral purposes).

5 U. S. v. Delaware and Hudson Co. (1908), 213 U. S. 366, 29 S. Ct. 527.

6 Reid v. Colorado (1902), 187 U. S. 137, 23 S. Ct. 92.

7 Champion v. Ames (1903), 188 U. S. 321, 23 S. Ct. 321.

8 Hoke v. U. S. (1913), 227 U. S. 308, 33 S. Ct. 281.

9 Clark Distilling Co. v. Western Maryland R. Co. (1917), 242 U. S. 311, 37 S. Ct. 180.

10 Hammer v. Dagenhart (1917), 247 U. S. 251, 38 S. Ct. 529.

11 37 Stat. 699; 27 U. S. C. A. sec. 122.

12 Clark Distilling Co. v. Western Maryland R. Co. (1917), 242 U. S. 311, 37 S. Ct. 180.