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Sales - Warranties

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case did not fall into the area where the burden shifts to the relator. Thus, it was his opinion that the burden should have remained with the prosecution to show that the waiver was knowingly and understandingly made, and that it was not on the relator to prove otherwise.

It is the opinion of this writer that considerable difficulty would be alleviated if a form were to be prepared and given to arresting officers as well as trial judges that would clearly explain not only the right of an accused, but would also explain with no chance of error that free counsel would be provided if the accused could not afford his own.[18] This would not eliminate all problems, for if the accused still wished to waive his rights, the issue of whether he knew what he was doing would still be present, but the factors presently used to determine this particular issue could still be used. Most importantly, however, there would be no differences in a court's questions to an accused regarding counsel, and the issue of whether the accused was aware of the availability of no-cost court-appointed counsel could be eliminated from all appeals.

Michael J. Aranson

SALES—WARRANTIES—Conforming tender by adjustment or minor repair—Under the Uniform Commercial Code, where the seller was denied access and a reasonable opportunity to conform a defective tender by adjustment or minor repair rather than by substituting new merchandise, the buyer failed to show a breach of warranty entitling him to either new merchandise or rescission.

Wilson v. Scampoli, 228 A.2d 848 (D.C. Ct. App. 1967).

Plaintiff Scampoli brought an action to rescind a sales contract for a color television set with a malfunctioning color control. Plaintiff had demanded a new set, but defendant Wilson TV Service only proffered to repair the color malfunction. However, defendant was denied access to the set.

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with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present . . . . [O]nly with effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

18. The Pittsburgh Police *Superintendent's Memo No. 18-66*, which outlines police investigation procedures, has the following instruction: "He must also be told that he has the right to consult with an attorney before or during police questioning, *and if he does not have the money to hire a lawyer*, a lawyer will be appointed . . . ." [Emphasis added.]

Plaintiff maintained that delivery of such a set is a breach of both the implied warranty of merchantability[1] and the implied warranty of fitness for a particular purpose[2] and as such is a basis for the right to rescind the sale. Defendant contended that he could make minor repairs on the set in order to provide a conforming tender.[3] The trial court granted rescission and directed the return of the purchase price plus interest and costs.

On appeal the District of Columbia Court of Appeals reversed the lower court's decision and held that the seller (appellant Wilson) had a right to conform his defective tender by adjustment or minor repair rather than by substituting new merchandise.[4] Thus, since the buyer (appellee Scampoli) had denied the seller an opportunity to repair he could not allege a breach of either warranty entitling him to rescission or a new set.[5]

The history of the remedy of rescission is marked by doubt and indecision on the part of courts.[6] By far the greatest doubt arose in cases involving a buyer's right to rescind on the ground of breach of implied warranty.[7] In England at common law, rescission of a contract of sale for breach of implied warranty[8] was not available to a buyer. The English courts reasoned that a warranty was an express or implied statement of something which the seller undertakes with respect to the article sold, yet collateral to the express object of the sale,[9] therefore, the sales contract served merely to pass title to the goods sold and consequently the question of warranties was collateral to this main purpose. However, in

1. D.C. CODE ANN. § 28:2-314 (Supp. V, 1966). Under section 2-314 of the Code, an implied warranty of merchantability arises in all sales in which the seller is a merchant in goods of that kind. "Merchant" is defined in U.C.C. Sec. 2-104. The warranty extends beyond the manufacturer to include the seller who is principally a conduit in the marketing system. See Comment 2 to U.C.C. Sec. 2-314.

2. D.C. CODE ANN. § 28:2-315 (Supp. V, 1966). Section 2-315 of the Code sets forth the implied warranty of fitness for a particular purpose. It provides that where the buyer gives the seller reason to know a particular purpose for which the goods are to be used, and that the buyer is relying upon the seller's skill or judgment to select or furnish satisfactory goods, an implied warranty will arise that the goods are fit for such purpose. Comment 2 to U.C.C. Sec. 2-315 makes it clear that the buyer's particular purpose must differ from the ordinary purpose for which such goods are used. If the purpose is only an ordinary one the warranty of merchantability will apply. See Comment 4 to U.C.C. Sec. 2-315.

3. D.C. CODE ANN. § 28:2-508 (Supp. V, 1966).

4. 228 A.2d at 850.

5. 228 A.2d at 850.

6. See Hermann, *Reformation and Rescission*, 1960 U. ILL. L.F. 1.

7. See Comment, *Award of Damages in Addition to Rescission In Sale of Goods*, 14 ST. JOHN'S L. REV. 124 (1939).

8. Street v. Blay, 109 Eng. Rep. 1212 (1831); Parson v. Sexton, 136 Eng. Rep. 763 (1847).

9. For a review of the origin and development of the implied warranties of merchantability and fitness for a particular purpose from English common law to the present, see Lauer, *Sales Warranties Under the Uniform Commercial Code*, 30 MO. L. REV. 259 (1965).

this country at common law several jurisdictions allowed rescission of an executed sale for breach of either an implied or express warranty.[10]

Moreover, the early Civil Law gave the buyer no remedy for defects of quality in the goods sold, its maxim being in effect, *caveat emptor*.[11] The development away from *caveat emptor* occurred in the Civil Law with the Aedilician Edict, "the policy of which was to permit the buyer to set aside the contract and recover the purchase price if paid should the seller fail to supply a thing for effective use."[12]

Codification of the common law concepts of sales occurred in this country with the drafting in 1906 of the Uniform Sales Act[13] which was to serve as a statutory guide to the law of the marketplace. The Uniform Sales Act, moreover, permitted rescission for any breach of warranty.[14] Thus

10. Authorities are compiled at length in 3 S. WILLISTON, SALES § 608a (rev. ed. 1948). Pennsylvania was among those jurisdictions that at common law denied rescission for breach of warranty. See Kase v. John, 10 Watts (Pa.) 107, 36 Am. Dec. 148 (1840); Eshleman v. Lightner, 169 Pa. 46, 32A. 63 (1895). Even in jurisdictions that denied rescission for breach of warranty, if the basis of the breach of warranty was fraud, a remedy was granted. See Owens v. Sturges, 67 Ill. 366 (1873); Nelson v. Martin, 105 Pa. 229 (1884); Freyman v. Knecht, 78 Pa. 141 (1875).

11. For a discussion of buyer's rights under early Civil Law, see Gow, *A Comment On the Warranty In Sale Against Latent Defects*, 10 MCGILL L.J. 248 (1965).

12. *Id.* at 249.

13. The Uniform Sales Act (hereinafter cited as U.S.A.) was drafted in 1906 and was largely the work of Professor Samuel Williston. The Sales Act followed closely the English Sale of Goods Act, 1893. See, FARNSWORTH & HONNOLD, COMMERCIAL LAW 5 (1965).

14. U.S.A. § 69(1) provides:

> (1) Where there is a breach of warranty by the seller, the buyer may, at his election-
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> (a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price.
>
> (b) Accept or keep the goods and maintain an action against the seller for damages for breach of warranty.
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> (c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for breach of warranty.
>
> (d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

This all inclusive rescission provision was criticized by Professor Llewellyn:

> . . . rejection or rescission for non-troubling defects will be bad policy . . . the Sales Act requirement of exact compliance, coupled not only with rejection but with rescission, cuts like an Arctic blast. It is an invitation to throw back the risk of any dropping market upon a seller who has performed as a reasonable seller should perform.

Llewellyn, *On Warranty of Quality, and Society:* II, 37 COLUM. L. REV. 341, 389 (1937).

The English Sale of Goods Act, made correspondence to description an implied condition of the contract, which permitted rejection for breach of condition, but still refused to allow rescission for breach of warranty since warranties were considered as being collateral to the main purpose of the contract. See Note, *Rescission-Rescinding Buyer's Right to Damages for Breach of Warranty*, 33 MINN. L. REV. 409 (1949). See also Lauer, *Sales Warranties Under the Uniform Commercial Code*, 30 Mo. L. REV. 259, 260 (1965).

the Sales Act required the adoption of an inflexible rule of rescission by the courts that in effect failed to accommodate the interests of both buyer and seller in the commercial marketplace.[15]

Therefore, in *Waldman Produce, Inc. v. Frigidaire Corp.*[16] the buyer was permitted to rescind and recover the purchase price in addition to damages[17] for a refrigerator with a defective temperature control even though the seller was not afforded an opportunity to repair the defective control or to substitute a new refrigerator.

The remedies given the buyer under the Uniform Commercial Code[18] also parallel those of the Uniform Sales Act, although rescission under the Code is called "revocation of acceptance."[19]

Despite substantive and procedural similarities,[20] decisions like *Waldman Produce, Inc. v. Frigidaire Corp.*[21] which abuse the remedy of rescission and result in over protection of the buyer are rejected by the Uniform Commercial Code. The rejection is based on the concept of "cure," Section 2-508 of the Uniform Commercial Code[22] affording the seller an opportunity to cure a defective tender. Section 2-508(2) is of significance since it states that even after the time for performance has passed, a seller who has made a defective tender can still, upon seasonable notification to the buyer, have a further reasonable time to substitute a conforming tender.[23] Subsection (2), therefore, seeks to avoid injustice to the seller by reason of surprise rejection by the buyer.[24]

15. For a discussion of the seller's dilemma under the U.S.A. see Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457 (1949).

16. 284 N.Y.S. 167 (App. T. 1935).

17. U.S.A. §§ 69, 70, 73.

18. Pennsylvania became the first state to adopt the Uniform Commercial Code (hereinafter cited as U.C.C.) by enacting the 1952 draft, PA. STAT. ANN. tit. 12A, §§ 1-101 to 10-104 (1954), which was subsequently amended to conform with the 1962 draft of the U.C.C. The U.C.C. became effective in the District of Columbia on Jan. 1, 1965, D.C. CODE ANN. §§ 28:1-101 to 28:9-507 (Supp. V, 1966).

19. U.C.C. § 2-608 (1962).

20. For a comparison of rights and remedies under the U.S.A. and the U.C.C., see Note, *A Comparison of the Rights and Remedies of Buyers and Sellers Under the Uniform Commercial Code and the Uniform Sales Act*, 49 KY. L.J. 270 (1960).

21. 284 N.Y.S. 167 (App. T. 1935). See text accompanying note 13, *supra*.

22. U.C.C. § 2-508 (1962): Cure by Seller of Improper Tender or Delivery; Replacement.

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

23. To the extent to which subsection (2) modified existing law in Pennsylvania see the Pennsylvania Bar Association Notes to U.C.C. § 2-508, PA. STAT. ANN. tit. 12A, § 2-508.

24. Comment 2 to U.C.C. § 2-508 (1962).

The question arises, therefore, as to what constitutes a conforming tender by the seller after the contract date has passed. There can be little doubt that replacement with new merchandise would serve to satisfy the conforming tender provision of subsection (2). The novel decision by the District of Columbia Court of Appeals extends the concept of cure, which had been proposed as a means for curing defective tenders of title[25], to include minor repairs and adjustments by the seller in "quality" cases in order to substitute a conforming tender.

In the instant case the court noted that a dealer would certainly expect and have reasonable grounds to believe that the buyer would accept merchandise such as a new color television set delivered as crated at the factory and that if it proved defective would afford the seller an opportunity to substitute conforming tender.[26]

The opinion, written by Judge Myers,[27] concluded that prior case law provided no mandate requiring the buyer to accept substantially repaired articles as conforming tender in lieu of new goods. Judge Myers decided, however, that prior cases indicated that minor repairs and reasonable adjustments are contemplated as remedies under implied warranties.[28] Specifically, Judge Myers referred to *L.&N. Sales Co. v. Little Brown Jug Inc.*[29] where after the seller was unable to cure his non-conforming tender by minor repairs and later refused to accept return of the articles, he was held to have breached the warranties of merchantability and fitness for a particular purpose, and *Hall v. Everett Motor, Inc.*[30] where "several references were made in the ruling to the seller's unsuccessful attempts at repairs."[31]

Judge Myers took a flexible approach to the doctrine of cure, holding that it should include the right of the seller to repair minor defects in his tender before the buyer triggers the action of rescission, especially where such repair is of no great burden or inconvenience to the buyer.[32] Therefore, the court stated that it was not necessary to determine whether the actions of the seller constituted a breach of the implied warranty of merchantability or the implied warranty of fitness for a particular pur-

25. See Hawkland, *Curing an Improper Tender of Title to Chattels: Past, Present, and Commercial Code*, 46 MINN. L. REV. 697, (1962).

26. 228 A.2d at 850.

27. With whom Hood, C. J., and Quinn, J., concur.

28. 228 A.2d at 849.

29. 12 Pa. D. & C.2d 469 (1957).

30. 340 Mass. 430, 165 N.E.2d 107 (1960).

31. 228 A.2d at 850.

32. To this effect the court in *Wilson* (at 850 of 228 A.2d) quoted from Hawkland, *Curing an Improper Tender of Title to Chattels: Past, Present and Commercial Code*, 46 MINN. L. REV. 697, 724 (1962): "The seller, then, should be able to cure the defect under subsection 2-508(2) in those cases in which he can do so without subjecting the buyer to any great inconvenience, risk or loss."

pose as breach becomes moot unless an opportunity to cure is afforded the seller.[33]

Decisions like that of the instant case serve to give the Uniform Commercial Code a desirable and commercially expedient flexibility by accommodating the interests of both buyer and seller in the commercial marketplace.

Daniel W. Cooper

WILLS—GENERAL POWERS OF APPOINTMENT—Exercise of a power by a general bequest or devise in a will—The Pennsylvania Supreme Court in applying Section 14(14) of the Wills Act of 1947 has clarified the law by holding that extrinsic evidence is inadmissible to prove a contrary intent.

Jaekel Estate, 424 Pa. 433, 227 A.2d 851 (1967).*

The donor, through the provisions in his will gave the donee a legal life estate in all his property and provided that the donee was to have a general testamentary power of appointment over such property. There was a gift over in default of appointment to a specifically named child of the donor and donee. Subsequently, the donee died and her will provided that the child was to receive the residue of the estate.

At distribution questions arose as to the assessment of the Federal Estate tax liability and whether the Federal Estate Tax attached to the property subject to the power of appointment.[1] These questions were dependent upon whether or not the donee by will had exercised the power of appointment. Under the provisions of Section 2041(a) of the Internal Revenue Code of 1954 if the donee of a general power of appointment exercises the power, the value of the appointive property is included in determining the value of the donee's estate for the purpose of computing the Federal Estate Tax. If the power of appointment was not exercised by the donee then the portion of the tax that would be computed on the value of the appointive property would be avoided.[2] The Orphans Court

33. 228 A.2d at 849.

* Case research was aided by the electronic legal information retrieval techniques of the Health Law Center, University of Pittsburgh.

1. INT. REV. CODE of 1954, § 2041(a).

2. INT. REV. CODE of 1954, § 2041(a).

§ 2041. Powers of appointment

a. In general—the value of the gross estate shall include the value of all property.

1. Powers of appointment . . .—to the extent of any property with respect to which a general power of appointment . . . is exercised by the decedent—

(A) by will . . .