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Article 2: Sales

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states that "course of dealing" refers solely to a sequence of conduct under contracts prior to the one in issue. It does not refer to conduct under the present contract. Moreover, Section 1-205(4) clearly provides that when a "course of dealing" hopelessly conflicts with an express term in the contract, the latter controls. Thus, in asserting that the parties' conduct under the present agreement had established a "course of dealing" and that this "course of dealing" could be relevant to show a waiver of his obligation to pay forthwith for the cars he had sold, the plaintiff simply drew from an erroneous assumption an erroneous conclusion.

Nor did the delayed payments constitute a "course of performance" under Section 2-208(1). While a "course of performance" *does* refer to a pattern of action under the contract in issue and *is* relevant to demonstrate the waiver of an inconsistent contractual provision, a "course of performance," as contemplated by the Code, relates solely to contracts for the sale of goods. Sections 2-102 and 2-208(1) make this clear. However, the contract in question is not for the sale of goods; it is a security arrangement.

This does not mean that the Code ignores or fails to recognize the common law doctrine of waiver in commercial contracts other than those for the sale of goods but simply that the plaintiff was hanging his hat on the wrong sections of the Code. Instead of relying on Sections 1-205(1) and 2-208(1), he should have relied, as the circuit court cryptically suggested, on Section 1-103 which sweepingly states that, unless otherwise provided, the principles of law and equity, including estoppel, shall supplement the Code.

2. The district court refused to award the defendant its deficiency because of its failure to give the plaintiff notice of resale. On the propriety of this action, see the casenote to the lower court's decision in 5 B.C. Ind. & Com. L. Rev. 580 (1964), from which most of this annotation is drawn.

S.L.P.

ARTICLE 2: SALES

SECTION 2-316. Exclusion or Modification of Warranties

Berk v. Gordon Johnson Co.
232 F. Supp. 682 (E.D. Mich., S.D. 1964)

The plaintiff is a butcher and merchandiser of Kosher poultry. Wishing to expand the size of his business, he negotiated with the defendant for the purchase and sale of automated equipment. Before he ordered the equipment, however, he was shown by the defendant a drawing which depicted how the equipment would fit into his premises. In the lower right hand corner of the drawing appeared the handwritten words, "Kosher operation." Later, the plaintiff signed a purchase order prepared by the defendant. On the reverse side of the order there was a clause in small print which disclaimed all warranties, express or implied, except for a promise to repair or replace defective parts within ninety days. When the equipment proved unsuitable for the plaintiff's ritual purposes, he sued, *inter alia*, for breach of warranty, alleging that the drawing constituted part of the contract and that the legend

on the bottom, "Kosher operation," amounted to an express warranty. The defendant moved for summary judgment. The court denied the motion, holding that it could not be said as a matter of law that the drawing was not a part of the contract, or that the words "Kosher operation" did not amount to an express warranty, or that the disclaimer excluded the warranty if it did exist. Whether the claimed warranty "contributed more essentially to the contract and its main purpose" than did the disclaimer and was thus controlling was a question which could not appropriately be answered on motion for summary judgment. In arriving at its determination that the disclaimer did not as a matter of law exclude an express warranty contained in the same contract, the court made reference to the 1952 and 1958 versions of Section 2-316(1) of the Uniform Commercial Code. At the time of the decision, the 1958 version had been adopted in Michigan but was not yet in effect.

COMMENT

If the Code were controlling and the warranty existed, no doubt the defendant's disclaimer would have been ineffective. Under Section 2-316 of the 1958 Code, when an express warranty is accompanied by a limitation on it, the warranty and limitation are to "be construed wherever reasonable as consistent with each other." But if this is not possible, then, subject to the parol evidence rule, the "negation or limitation is inoperative." The express warranty prevails.

S.L.P.

SECTION 2-318. Third Party Beneficiary of Warranties Express or Implied

SUVADA v. WHITE MOTOR CO.
51 Ill. App. 2d 318, 201 N.E.2d 313 (1964)

In 1957, the plaintiff milk distributor purchased a used motor tractor from the defendant White Motor Co. During pre-sale reconditioning, White had installed a brake system manufactured by the defendant Bendix-Westinghouse Automotive Air Brake Co. In 1960, when the plaintiff was driving the tractor in a tractor-trailer unit, it collided with a bus, allegedly as a result of brake failure. The plaintiff then sought recovery of property damages to the tractor-trailer unit and indemnification of the expenses which he had incurred in the settlement, investigation and defense of claims which arose out of the collision. The trial court dismissed, *inter alia,* the count which sought to hold Bendix liable for breach of warranty. On appeal, reversed and remanded with directions to reinstate the dismissed count. In an action between the user of a product and its manufacturer, where it could not be said that the user was beyond the immediate distributive chain, the user's allegation that the product is inherently dangerous or defectively made constitutes under Illinois law an exception to the requirement of privity. The court went on to say that Section 2-318 neither superseded nor modified the evolving local exceptions that appear to be relaxing the privity rule.

S.E.S. II

SECTION 2-601. Buyer's Rights on Improper Delivery

HUDSPETH MOTORS, INC. v. WILKINSON
382 S.W.2d 191 (Ark. 1964)
Annotated under Section 9-504, infra.

SECTION 2-602. Manner and Effect of Rightful Rejection

HUDSPETH MOTORS, INC. v. WILKINSON
382 S.W.2d 191 (Ark. 1964)
Annotated under Section 9-504, infra.

SECTION 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over

BABCOCK POULTRY FARM, INC. v. SHOOK
204 Pa. Super. 141, 203 A.2d 399 (1964)
Annotated under Section 2-714, infra.

SECTION 2-608. Revocation of Acceptance in Whole or in Part

HUDSPETH MOTORS, INC. v. WILKINSON
382 S.W.2d 191 (Ark. 1964)
Annotated under Section 9-504, infra.

SECTION 2-714. Buyer's Damages for Breach in Regard to Accepted Goods

BABCOCK POULTRY FARM, INC. v. SHOOK
204 Pa. Super. 141, 203 A.2d 399 (1964)

The plaintiff, a wholesaler of baby chicks, and the defendant, an experienced poultry farmer, entered into a written agreement by the terms of which the former sold the latter 2200 experimental chicks. The latter, for his part, was to keep records of the chicks' egg production and submit them to the seller at regular intervals. Later, when the buyer discovered that the chicks did not produce as well as others, he tried to abandon the testing program. The plaintiff, however, allegedly induced him to remain in the program by orally warranting that a new flock of chicks would produce "as good or better" than certain other chicks. The defendant was to continue to submit records of the experimental chicks' egg production, and in fact he did so.

When the buyer failed to pay for the experimental chicks, the seller sued in assumpsit for the purchase price. The buyer counterclaimed for breach of express warranty, alleging in part that he had been forced to buy eggs at public auction in order to supply his larger customers. He asked as damages his production losses. The jury returned a verdict for the plaintiff on its claim and for the defendant on his. The plaintiff then moved for judgment n.o.v. or for a new trial in respect of the counterclaim. This was refused. On appeal, it argued, *inter alia*, that the defendant had failed to notify it of the

breach within a reasonable time as Section 2-607(3) required, and also that there was insufficient evidence for the jury to determine the proper amount of damages. The measure of damages, it argued, should not have been the defendant's production losses but the difference between the value of the experimental chicks at the time and place of acceptance and the value they would have had if they had been as warranted, under Section 2-714(2). In affirming the refusal of the lower court to grant either motion, the court held, first, that the jury could have inferred that the plaintiff had received timely notice of the breach through the periodic reports submitted to it, and, second, that the nature of the warranty being what it was, that the experimental chicks would produce "as good or better" than certain others, the measure of damages was correct.

COMMENT

Under Section 2-714(2), the usual measure of damages for breach of warranty is the difference between the value of the goods at the time and place of acceptance and the value that they would have had if they had been as warranted. However, when "special circumstances" show damages in a different amount, such damages may be recovered. While it could be argued that the production losses suffered by the defendant in the present case should merely go to the value of the experimental chicks, there would seem to be nothing to commend this view. The court did not specifically allude to the "special circumstances" proviso of Section 2-714(2) but the holding is certainly explainable in terms of it.

S.L.P.

ARTICLE 3: COMMERCIAL PAPER

SECTION 3-114. Date, Antedating, Postdating

PAZOL v. CITIZENS NAT'L BANK
138 S.E.2d 442 (Ga. Ct. App. 1964)
Annotated under Section 3-301, infra.

SECTION 3-301. Rights of a Holder

PAZOL v. CITIZENS NAT'L BANK
138 S.E.2d 442 (Ga. Ct. App. 1964)

The payee of a check drawn by the defendant deposited the check in his account at the plaintiff-bank and was allowed to withdraw the full amount. When the check was later dishonored, the plaintiff brought the present action on the instrument, in its own name. The petition alleged, *inter alia*, that the check was executed, delivered and dated January 4, 1964; however, the attached copy of the check showed that it was actually dated January 4, 1963. The lower court overruled the defendant's general demurrer and the defendant appealed.

The defendant argued, first, that since the payee's indorsement had been supplied by the plaintiff, the plaintiff could not be a "holder" as defined by Section 1-201(20) and consequently could not enforce payment in its own