Boston College Law Review

Volume 5 | Issue 1 Article 11

10-1-1963

Article 2: Sales

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ARTICLE 2: SALES

SECTION 2-203. Seals Inoperative

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

CASES ANNOTATED UNDER OTHER SECTIONS

COMMONWEALTH BANK & TRUST CO. v. KEECH
— Pa. Super. —, 192 A.2d 133 (1963)
See the Annotation to Section 2-602(1), infra.

SECTION 2-314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from courses of dealing or usage of trade.

ANNOTATION

BENAVIDES v. STOP & SHOP, INC.
— Mass. —, 190 N.E.2d 894 (1963)

In 1959, the plaintiff buyer purchased from the defendant seller a bar of soap said on the label to be "99 44/100% pure." In an action for damages based on a breach of an implied warranty of merchantability, the buyer alleged that some of the soap got in her eye while washing and that an eye injury developed immediately thereafter. Buyer introduced evidence showing that her eye was, in fact, injured, and that she suffered pain and was treated by

an infirmary for this injury. She did not, however, offer any evidence which established that the soap was the probable cause of her injury. The seller appealed from a denial of its motion for a directed verdict.

On appeal, the court reversed and entered judgment for the seller, holding that although a buyer need not exclude all possible causes of his injury, he must prove that a warranty was breached and that the breach "proximately caused" his injury. This holding was based upon Section 2-314 and prior cases which require that one whose suit is for a breach of warranty must prove the breach was the probable cause of his injury in order to prevail.

COMMENT

Section 2-314 clearly outlines some of the criteria for merchantability. To prove these, a plaintiff must revert to the rules of evidence. Courts are reluctant to allow a recovery to one who merely establishes a sale and an injury; the Massachusetts Court strictly requires that he show that the item bought was the probable cause of the harm.

B.M.H.

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

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

ANNOTATION

WILSON v. AMERICAN CHAIN & CABLE CO., INC.
216 F. Supp. 32 (E.D. Pa. 1963)

The plaintiff's minor son was injured while riding a rotary power lawn mower manufactured by the defendant. The court denied a motion to strike the defense that there was no privity of contract and held that the plaintiff "may well be able to prove that the manufacturer either by means of national advertising, labels, manuals, or legend upon the container intended either an express or implied warranty to flow through the 'conduit of the contractual chain' to the sub-purchaser and his family under § 2-318." The court stated that while privity had seemed to have been abandoned in Pennsylvania by a series of cases, the recent Supreme Court case of *Hochgertel v. Canada Dry Co.* (annotated in 4 B.C. Ind. & Com. L. Rev. 612 (1963)) "injected new life into the privity defense." Thus, the plaintiff would have to bring himself carefully within the confines of that or other cases where privity had not been required.

COMMENT

The requirements which the Pennsylvania court seems to have established to avoid the privity defense are (1) that the party alleging the breach be a purchaser or subpurchaser and (2) that the warranty from the remote seller,

express or implied, form "part of the consideration for the purchase." The distributive chain through which the warranty must flow means a series of sales; such arrangements as bailments or leases at any point in the chain would break the conduit.

The court in the instant case indicates that if the *father* as *purchaser* can prove these requirements, the injured son then may recover by virtue of Section 2-318.

The Pennsylvania court has not only raised the old bogey that there must be a contractual relationship in the form of a sale, even though the warranty need not be from the immediate seller, but also has added a "consideration" requirement almost impossible to prove in an implied warranty situation since the very distinction between express and implied warranties is that express warranties form a "basis of the bargain" while implied warranties are imposed by law where the parties did not consider them at all. The "new life" which the Pennsylvania court has injected into the privity doctrine has created a monster as bad as the one which appears to have died.

R.I.D.

ANNOTATION

*SIMPSON V. POWERED PRODS., INC.
24 Conn. Supp. 409, 192 A.2d 555 (1963)

Plaintiff rented a powered golf cart from Gerardi, who had purchased the cart from a retailer-distributor, who in turn had purchased it from the manufacturer. Plaintiff was injured when the arm and back rests of the cart fell apart and brought an action for breach of "express and/or implied warranty" joining Gerardi, the retailer-distributor and the manufacturer as defendants. The retailer-distributor demurred to the complaint on the ground that there was neither privity of contract with, nor a sale to the plaintiff.

The court overruled the demurrer and held that the rental agreement was a contractual relationship, as was a sale, and since the golf cart was intended for use by the general public in the same manner in which plaintiff used it, it would be illogical to allow Gerardi to recover from the retailer and deny a similar right to plaintiff. In reaching this decision the court expanded the holding of *Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961), to include a lessee as well as a buyer to prevent the circuity of action discussed in that case. This result would be in line with decisions of other jurisdictions. The court noted that the Code, effective subsequent to the transaction, expanded a non-privity provision in Connecticut's Sales Act by including goods other than food and drink within the warranty obligation while contracting the extension of the warranty from those "for whom . . . intended" to the limited groups designated in Section 2-318.

COMMENT

On the basis of the prior Connecticut decision, the court established its own rule extending the warranty protection for all goods to those whom a seller intended to use them. In keeping with the *Digliani* rationale, the court went so far as to take judicial notice of the fact that golf carts are advertised

* Code construed but did not govern the case.

for use and used extensively upon a rental basis at golf courses. Thus, the seller's "intended use and users" were found automatically. The court rejected the artificiality of the requirement imposed by some courts that there be a sale, rather than some other contractual relationship, at every stage of the distributive chain before the warranty will be extended. In fact, in the circuity discussion, it was tacitly assumed that the lessor had undertaken warranty obligations to the lessee even though there had been no sale.

B.M.H.

SECTION 2-328. Sale by Auction

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

ANNOTATION

*DREW v. JOHN DEERE CO.

— App. Div. 2d —, 241 N.Y.S.2d 267 (1963)

The defendant advertised an auction sale at which a tractor repossessed from a defaulting vendee under a conditional sales contract would be sold to the highest bidder. The plaintiff bid at the sale, but the auctioneer struck down the property to the defendant who had bid the next higher amount. The bidder brought an action alleging that his highest bid, except for defendant's, resulted in a contract. Motions to strike the seller's answer and for summary judgment were denied by the lower court.

On appeal, the court in sustaining the lower court held that under the controlling Section 102(2) of the New York Personal Property Law (Uniform Sales Act, § 21) unless the bidder can prove that the auction was "without reserve", the seller may reject any bid at the sale. Subsection (4) of the same section provides that a sale is fraudulent only when a bid has been accepted at an auction at which the seller had bid without previously reserving the right to bid. Since plaintiff's bid had not been accepted by the auctioneer, there was no sale to him which could have been unlawful. The court indicated that the result would be the same under Section 2-328 of the Code.

COMMENT

The implication from this decision is that Subsection (4) of Section 2-328 can apply only if the auction was "without reserve" or if the bid was actually

* Code construed but did not govern the case.

accepted by the auctioneer. In short, it may not be used to establish a contract for sale, but only to avoid one which at some time came into existence.

R.I.D.

SECTION 2-401. Passing of Title; Reservation for Security; Limited Application of This Section

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

ANNOTATION

SEMPLE v. STATE FARM MUT. AUTO. INS. CO.
215 F. Supp. 645 (E.D. Pa. 1963)

Pursuant to an agreement to sell his car, seller parked his car late at night at the buyer's place of employment, gave the buyer the keys and a signed but unacknowledged Pennsylvania certificate of title and collected the balance of the purchase price. They agreed to meet the following business day to have the certificate notarized in accordance with local law, but before this could be done, the buyer drove the car and injured a third person who successfully brought an action against the buyer. The seller's insurer refused to defend that action or to pay the judgment. In the buyer's subsequent action against the insurer the court held that title had passed to the buyer when the car was finally and physically delivered by the seller under Section 2-401 which deprived the seller, as the "named insured" under the policy, of the power to give anyone "permission" to drive the car to effect his coverage by the policy's further definition of "insured."

The court, in awarding judgment to State Farm, also held that the fact that the certificate of title had not been notarized did not alter the result. Notarization was not essential to the completion of the sale according to Pennsylvania decisions.

COMMENT

This result would not necessarily obtain in other Code states having certificate of title laws. If compliance in all respects with such laws is considered by the courts to be essential to the transfer of ownership in the automobile, then the seller on the above facts would remain the owner and the buyer would be driving with his permission within the terms of the policy. See *Eggerding v. Bicknell*, 20 N.J. 106, 118 A.2d 820 (1955).

S.L.P.

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

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.

CASES ANNOTATED UNDER OTHER SECTIONS

CARTER, MOORE & CO. v. DONAHUE

— Mass. —, 189 N.E.2d 217 (1963)

See the Annotation to Section 2-709(2), infra.

SECTION 2-602. Manner and Effect of Rightful Rejection

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

ANNOTATION

COMMONWEALTH BANK & TRUST CO. v. KEECH

— Pa. Super. —, 192 A.2d 133 (1963)

The defendant buyer purchased an automobile from a dealer under a sealed installment sales contract which was assigned to a loan company and later reassigned to the plaintiff bank. Customers of the dealer were brought to a franchised agency by the dealer, and were sold cars upon which was the name of the agency. At the time of this sale, the dealer owed the agency for six other automobiles. The buyer, upon discovering that the agency retained title in the automobile, refused to pay on the note because of failure of consideration, and subsequently returned the automobile to the agency although the bank had asked that it be returned to them. The lower court, in refusing to open a judgment by confession against the buyer, held that the transfers of the automobile between the agency and the dealer, and the dealer and buyer were complete sales, and the buyer, upon learning he would not receive good title, failed to act promptly in rescinding.

On appeal, the court reversed and remanded, holding that if the fact-

finder determines that the dealer was an agent of the franchised agency as undisclosed principal, the dealer was a party to the contract even though it was under seal. Section 2-203 affords the seal no special significance. If this was so, any defense the buyer had against the seller would be valid against the assignee bank under the Pennsylvania Motor Vehicle Sales Financing Act. Although the court did not decide whether the unsuccessful attempts of the buyer to obtain a certificate of title from the dealer and the subsequent return of the automobile at the inducement of the dealer was a rejection within a reasonable time and effective under Section 2-602(1), it did hold that the dealer and its assignees were estopped from raising that question because of the dealer's acceptance of the automobile.

COMMENT

Section 2-602(1) provides the manner in which a buyer may rightfully reject goods tendered. The buyer must seasonably notify the seller of his rejection. Although this decision is a proper one, it should be noted that this court has introduced into Section 2-602(1) the concept of estoppel when the goods have been returned to and accepted by the seller, regardless of the buyer's failure to meet the requirement of seasonable notification. Under Section 1-103, the estoppel principle may still be applied in states using the Code, and Section 1-207 allows the reservation of rights by the accepting party in order to avoid such a result.

For clarity, however, once the buyer had accepted the automobile as his own, he could no longer "reject" it; instead, his remedy was revocation of acceptance under Section 2-608 which contains its own requirement of notification to the seller. The Code has purposely avoided the use of the word "rescission." This would not alter the result *in this case.*

R.I.D.

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

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

CASES ANNOTATED UNDER OTHER SECTIONS

COMMONWEALTH BANK & TRUST CO. v. KEECH
— Pa. Super. —, 192 A.2d 133 (1963)
See the Annotation to Section 2-602(1), supra.

SECTION 2-709. Action for the Price

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

ANNOTATION

CARTER, MOORE & CO. v. DONAHUE
— Mass. —, 189 N.E.2d 217 (1963)

On January 15, 1960, the plaintiff (seller) sold to the defendant (buyer) a quantity of wool which the buyer refused to accept because it was allegedly different from the selling sample. Pursuant to the sales contract, which contained a broad arbitration clause, and after the buyer refused the seller's offer to reimburse him for the alleged difference, an arbitrator was appointed who decided that the buyer must accept immediate delivery of and pay for the goods, and until then, the quality of the goods would not be considered. The arbitration clause stated that the decision of the arbitrator would be final and binding. The lower court upheld the decision of the arbitrators and denied a motion for a new trial based on proferred new evidence showing that the bales of wool had been subsequently resold by the seller.

On appeal, the court affirmed, upholding the decision of the arbitrator as well as the denial of a new trial. It reasoned that under Section 2-709(2), a seller may resell the goods so long as the proceeds are credited to the judgment against the buyer, and nothing to the contrary was here indicated.

COMMENT

The court, by following Section 2-709(2), correctly placed the burden of proving the misapplication of proceeds of a resale upon the buyer to invalidate the resale; whereas the prior law (Uniform Sales Act, Section 63) allowed a resale of the goods only upon the seller's showing that the goods could not later be resold. However, absent the arbitration clause where the parties had agreed to abide by this decision, the result probably would have been different. Section 2-601 allows a buyer to reject the whole order if any part of it fails to conform to the contract and recover damages without any obligation to first pay for the goods rightfully rejected.

R.I.D.

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

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods

accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

ANNOTATION

†KEYSTONE DIESEL ENGINE CO. v. IRWIN
— Pa. —, 191 A.2d 376 (1963)

The plaintiff Keystone sold the defendant a diesel engine which the defendant installed in a tractor. When the engine proved defective, the plaintiff undertook repairs, at first at its own expense, but later pursuant to an alleged oral contract calling for the payment of additional work. This payment not forthcoming, the plaintiff sued in assumpsit. The defendant counterclaimed, alleging breach of implied warranty of merchantability, and demanding consequential damages in the amount of the profits he had lost as a result of the engine failure. The lower court struck the counterclaim on the basis that the claim for loss of profits was too speculative to permit recovery.

Upon appeal, the court affirmed, holding that in the absence of the "special circumstances" mentioned in Section 2-714(2), consequential damages could not be awarded. Such "special circumstances," the court said, are shown to ". . . exist where the buyer has communicated to the seller at the time of entering into the contract sufficient facts to make it apparent that the damages subsequently claimed were within the reasonable contemplation of the parties."

COMMENT

The term "within the contemplation of the parties" is not used by the UCC. Section 2-715(2)(a) uses the test of "general *or* particular requirements and needs of which the seller at the time of contracting *had reason to know*. . . ." (Emphasis supplied.) This does not necessarily suggest "contemplation" and clearly does not require, as does the court, that the damages be at least impliedly "bargained for." The court would have been on more solid ground had it held that this was not a "proper case" for consequential damages, as required by Section 2-714(3). The "special circumstances" of Subsection (2) does not refer to consequential damages. Further, recovery of consequential damages has been qualified by the Code to the extent that a buyer cannot recover damages for those losses which could have been prevented by cover or otherwise.

The Supreme Court of Pennsylvania chose to construe the consequential damages provisions in the Code in the terminology of the common law. Defining new law in terms appropriate to the old tends to discourage close study of the new law, and the result of this could be that the intent of the draftsmen may not be wholly effected.

S.L.P.

SECTION 2-715. Buyer's Incidental and Consequential Damages

(2) Consequential damages resulting from the seller's breach include

† Based on 1953 Code.

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise;

CASES ANNOTATED UNDER OTHER SECTIONS

†KEYSTONE DIESEL ENGINE CO. v. IRWIN
— Pa. —, 191 A.2d 376 (1963)

See the annotation to Section 2-714(2), supra.

SECTION 2-725. Statute of Limitations in Contracts for Sale

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitations to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from a voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

ANNOTATION

†HARVEY v. EIMCO CORP.
32 F.R.D. 598 (E.D. Pa. 1963)

Harvey sustained personal injuries while operating a machine manufactured by defendant. An action was brought alleging breach of warranty and negligence. Two years after the complaint was filed, defendant moved to amend his answer to affirmatively assert the defense of the statute of limitation. Harvey contended that the statute of limitations defense was insubstantial and frivolous. The court, in allowing the amendment, held that "it did not believe that the statute of limitations argument is a frivolous one in light of the apparently clear wording of the controlling statute. See 12A P.S. § 2-725. . . ."

B.M.H.

† Based on 1953 Code.