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Condition and Warranty in the American Law of Contracts

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THESIS

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By the early English law, the most important rights were those of the person. In the early times when the people were in the habit of traveling from one place to another and only stayed a little while in one place, their property was chiefly personal. These rights and their breach were the principal object of attention. Persons wished to transfer their property for the property of their neighbors, they wished such property for the looks , or for the apparent worth of the article; and here originated the idea of implied condition of the article or warranty which by the terms of the contract came to be of two kinds. First, express warranty, where there is an express guaranty to answer in damages for any defect of the article.

Second, A guaranty implied from the condition of the article sold, or from the special condition or statdard of the article sold or bargained to be sold from the circumstances of the case. The actions for breach of such conditions came from the action on the case which was an equitable action derived from the personal action of tres-

pass. The action on the case was held to lie at the suit of the party grieved though the action was new and unprecedented; for where the common law gives a right, or makes a thing an injury, the same law gives a remedy.

No particular phraseology is necessary to constitute a warranty, any distinct assertion of the quality of the goods made by the seller as an inducement to the purchaser and relied on by the buyer, may be ground for finding a warranty. 34 Barb. 549.

But to constitute a warranty, there must be some expression of the seller amounting to an unequivocal affirmation, relied on by the buyer, that the goods are of a certain quality. Mere expressions of opinion will not amount to a warranty. An affirmation in regard to an existing fact, distinct and positively made, in trade negotiations should be regarded as a contract, and enforced as a warranty.

A representation made by a vendor, upon a sale of flour in barrels, that it is in quality superfine, and worth a shilling a barrel more than common, coupled with the assurance to purchasers agent, that he may rely upon such representation, is a warranty of the quality of the flour.

Though in an action founded on a warranty of the soundness of a chattel by the vendorit is necessary to prove the warranty, yet it is not necessary for the plaintiff to show that the defendant madethe warranty in expressswords; but any representation of the state of the thing sold,by the defendant, or a direct and express affirmation by him, of its quality and condition, showing his intention to warrant, will be sufficient.

In olden times if the parties wished to be more sure of the w-rth of the article they would demand the extra assurance of what we call a warranty.

When one should require a warranty,- Each one in ordinary cases,judges for himself,and relies confidently upon the sufficiency of his own knowledge,skill and diligenc. The common law affords every one a reasonable protection against fraud in dealing;but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith

to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention to those particulars which may be supposed to be within his reach of observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting in attention to these points, where attention would have been sufficient to protect him from surprise or imposition, the maxim "caveat emptor" (Let the purchaser beware) ought to apply; and it has been decided that if the buyer have an opportunity of examining the article, the seller is not, answerable for any secret defect, unless there be fraud, or an express warranty, or such a direct statement as is tantamount to it.

The law requires the purchaser to attend, when he makes his contract, to the quality of the article he buys, which are supposed to be within the reach of his observation and judgment. If the seller is ignorant of any unsoundness or defect which the article sold may have, and a mere representation of soundness will not render him liable; and if it is intended to make him liable under such circumstances, he must require a warrantythat the thing is sound or free

from defect. This general warranty is therefore, frequently required on sales. And it extends to all defects, except such as are perfectly plain or known to the buyer; but against the defects of such apparent failings as are perfectly obvious to the senses, and do not require any kind of skill of pains to discover, this general warranty is no protection; though if the seller should say or do any thing whatever with an intention to divert the eye; or obscure the observation of the buyer, even to an open defect, he would be guilty of an act of fraud. A warranty is not a protection against a secret defect if the buyer be informed therof, even though the warranty be in writing and contain no exception, against the effect of a visible or known defect, the buyer should exact a special warranty, or he is wothout a remedy, even though he gives the price of a sound commodity. A general warranty is always in the present tense, that the article is sound or free from vice not that the article will be hereafter. Cowens Treatise, §42.

What constitutes a warranty,- A warranty of goods must be made upon the sale and not after, for then it is without consideration, so when upon a treaty for a sale and warranty made all is broken off, such a warranty will not extend to

a subsequent sale though it would be otherwise if I warrant a horse before sale, and another buyer buys him immediately, for the sale is upon the strength of the warranty. But if when the parties are in treaty respecting the sale, the owner offers to warrant the article, the warrant will be binding although the sale does not take place until some days afterwards. 11 Wen. 586.

No particular phraseology is necessary to constitute a warranty, any distinct assertion of the quality of the goods made by the seller as an inducement to the purchase and relied on by the buyer, may be ground for finding a warranty. 24 Barb. 549. In the relation to the construction of sale warranty is an express promise that the article shall answer an express purpose, or promise that the article shall answer a particular standard of quality, and that promise is a condition until the sale is executed.

A condition is a representation which if it cannot be shown to have had so materiala part in determining the consent as to have formedif not the basis of the contract, at any rate an integral part of its terms, then it receives the name of a warranty. Anson. Its truth does not affect the formation of the contract but gives to the injured party a right of action excontractu, for loss sustained by the

untruth of the statement. Benn. v. Burness 4M & W.
Some writers for the convenience of the illustration divide the implied warranty, into the different kinds according to the different kinds of actions that can be brough on them, or from the nature of the representation. As first;

1. A warranty of identity or genuineness.

11. Of the sale of, goods by description that the article is merchantable.

111. The implied warranty on the sale by sample that the goods correspond to the same.

1V. The implied warranty that the goods shall be fit to the buyers purpose.

v. Implied warranty of title.

V1. The implied warranty from custom.

The first of these warranties, that is a warranty as to the general character of the article sold, does not convey any other fact than that the article is of the kind which is contracted for or sold, and this does not apply to any defect that can be seen by the purchaser as if he should say that the article was pure sand in the wagon and he could have seen that there was more than one half of the load that was dirt or gravel by the mere

inspection of the load. Not withstanding the sale may be made with a written warranty; yet if there has been any wilful misrepresentation or concealment or fraud by the vendor either as to the kind, quality or other particular of the article sold, he may bring his action for damages for the fraud 3 Barn& Cress. 623.

If a person at the time of selling a horse says, " I never warrant, but he is sound as far as I know}" this is a qualified warranty, and the purchaser may maintain his action upon it, if he can show that the horse was unsound to the knowledge of the seller. 5 Man.& Ryl.124.

It has been held by our surpreme court, that the mere description of the article in a bill or parcle, as to the article calling it brazilletto wood, when it was peachum wood, and worth little or nothing, was not a warranty that it was of the kind described. It appears in that case that the defendant was the agent for a house in new Providence, from which he received the wood in question. It was invoiced as brazilletto; he advertised it as such, described it as such in the bill of parcels, and the plaintiffs agent selected it from other woods, supposing it to be the brazilletto, and both parties supposed that the wood was in fact the same as described. And so, under such similar circum-

stances, where the defendant sold to the plaintiffs paint for good Spanish b rown and white lead, which proved to be bad, and of no value, it was held that no action lay. So where the contract was to deliver cloth called blue Guineas , but the delivery was of a different kind of cloth, of an inferior quality; it was held that no action would lie for the damages, arising to the vendee. And so, where the article sold was described by the seller as barilla, but which turned out to be kelp, an article greatly resembling barilla, but of little or no value, it was held that no action would lie.1 Cow. 354.

What constitutes a warranty that the goods are merchant able ,- Nothing is more common than for merchants and others in selling goods, to recomend them highly to the purchaser , as of a superior quality, and as having cost so much, and as being worth so much more than the price at which they offer them for sale; and yet, if the fact should turn out to be otherwise, an action would not lie, unless fraud or warranty could be made out; for the goods are exposed to the examination of the buyer, and he should judge for himself, and if he places implicit confidence in the opinion of the seller, he does so at his peril; the " maxim Caveat emptor" applies with peculiar force to these cases and if

he wishes to be safe he must exact a warranty. 1 Cow. 137.

In Gallagher v. Waring, 9 Wend. 20. It was held that on a sale of cotton in bales, without a sample or examination, and when the inspection of the article was equally accessible, and its quality equally known to both parties, there was an implied warranty that the article was merchantable. So in the case of Hermon v. Wager, on a sale by a commission merchant, it was held, that as the defendant had an opportunity (The articles being in bales, and its intrinsic merits equally known to both parties) to examine the bulk of the article sold, he was entitled to expect a merchantable article; and that having bought it with the knowledge of the seller, the article for a particular purpose, he was entitled to an article which would answer to that purpose. These last cases go quite as far as any of the English cases and trench deeply upon the common law, maxim, of "Caveat emptor; and I cannot but think that the old rule, and the old decisions down to the time of Seixas v. Wood were the safestand wisest guides; and that the new doctrine carried to this extent, will lead to much difficulty and vexation". Note Kent 635.

In Howard V. Hoey, 23 Wend. 350. The supreme court of N.Y. strongly enforced the distinction between executed and executory contracts. It has declared, that in a contract of sale of an article of merchandise at a future day, where there is no selection or suggestion or setting apart at the time of the specific articles , so as to pass the property IN PRESENTI; merchantable quality, being the averag price, is intended. In the case of an executed sale an express warranty of quality is necessary to bind the vendor in the absence of fraud. But if the sale is executory, or to deliver an article not defined at the time, or a future day, there is an implied warranty that the article shall be at least of medium good quality or, merchantable. And it may be returned after the buyer has had a reasonable time to inspect the article.

What is necessaryto constitute a warranty where a sale is made by sample. In order to raise an implied warranty that the bulk of the article is of a quality equal to the same or the sample, it is necessary to show by the circumstances of the case, that the sale was intended by the parties to be by sample. It is not enough that a sample drawn from the

bulk is shown , for the purchaser in that case purchases at his peril. In a sale by sample of cotton, the law implies a warranty that the bulk of the article corresponds with the sample exhibited; where, therefore, cotton was sold in bales and the sample exhibitedwas of good quality, and on opening the bales it was found that they were packed in the interior with masses of damaged cotton, it was held that the purchaser was entitled to recover the damage sustained by him.

The mere exhibition of samples at the time of sale, is not of itself evidence of an agreement to sell by sample; it is for the jury to say from all circumstamces of the case whether the sale was intended by the parties as a sale by sample. Ther is unquestionably a very material difference betweent the rules of the civil law on the subject of implied warranties of sale, and the rules of the common law on the same subject; the latter is the law of this state. By the Civil law, if there was error either as to thesubstance of the thingwhich was intended to be sold or, purchased, or as to any of its essential qualities, without which it would not be the article for which it was soldthere would be no valid sale. But by the common law the sale would be binding in such a case, unlessthe article soldwas in such a situation that it could

not be seen and examined. By the parties . A sale by sample however does not come within the principles of the common law, that the purchaser must look out for himself, as every agreement to sell by sample does, from its very nature contain an impliedif not an express warranty, that the bulk of the article sold corresponds with such sample.

Warranties made upon the sale of chattels, are, with the following exceptions, express and not implied contracts, and must be made at the timeof the sale, or prospectively in view of it. If upon a treaty about buying certain goods the seller warrants them, the buyer takes time for a few days, and then gives the seller his price, though the warrant was made before the sale, yet this will be well, because the warrant was the ground of the treaty. 11 WeN. 586.

The vendor without any special contract, warrants his title to the goods sold, if they are in his possession ; otherwise not. In the sale from defendant to plaintiff there was no proof of any express warranty of title; nor was any such proof necessary. The fair and reasonable construction of the evidence is that the defendant had possession of the property and at the time of the sale and transferred it to the plaintiff on his

paying the purchase money. Possession of personal property implies title, and in every case of the sale of personal property in possession, there is an implied warranty of title in the vendor 40 N.Y. 285. Burt v. Dewy. But in all cases where the person does not profess to sell the goods as his own there is no warranty of title,for the person who buys the article,or from the person who owns the property. There is a warranty implied in he transfer of every negotiable instrument that is not forged. Herrick v. Whitney . 15 John. 240.

Custom is law established by long usage.An universal custom becomes common law. If usage be confined to a particular place it is a custom. What is a customary warranty of title ,-

It requires strong evidence of a settled or uniform usage, or a particular mode of dealing between the parties to establish it. No custom in this State,can be allowed to control the general rules of the common law;unless, indeed, a custom of such antiquity, that we cannot trace its origin; for then it is coeval with the common law itself;and in such a case it form s an exception to the general rule;because there is ground to presume that it is of equal authority, and that the same power, which

established the rule , also made the exception. 16 John. L.0.

A custom must be reasonable and not contrary to the general principles of the law. A usage of a particular trade may be proved with a view of raising the presumption that the parties contracted with the knowledge of it, so that it entered into and became part of the contract. In such a case it must be shown that the parties against whom the usage is set up had notice of it at the time of the contract,or must be shown to have so long continued,universal and notorious that the person may be presumed to have had notice of it 63 Barb. 500.

The rule of law requiring the protest of a foreign bill of exchange is wholly founded on the custom of merchants: and in an action against a notary for neglect to make presentment and demand,evidence that it is the common and universal usage at the place where the bill is paid or payable for notaries clerks to make such presentments and demand , and that the bill in question was presented and demand of payment by the clerk of the defendant,is proper and admissable. A knowledge on the part of the plaintiff of this usage is not necessary to its validity. 49 N.Y. 269. Commercial Bank of Kentucky v. Varnum.

The warranty of the place depends on the general custom as known and understood by the parties at the timeof making the contract and if the person is in the habit by custom of receiving such goods from the person or firm and it is a known custom that such goods are expected from him he will be bound to warrant the article to be such as is expected by the parties who are in the habit of ordering such goods.

Where an article has been sold with a warranty whether express or implied,and whether by sample or otherwise upon its breach an action for damages may be brought without offering to return the article or give notice of the defect.And the purchaser may recover his damages although he sells the articl 18 Wend. 425. supra.

In case of an executory contract,the parties at the time of receiving the goods may refuse to take them or within a reasonable time thereafter if there has been no acquiescence in, or exceptance of the goods by any act of the parties they may refuse to take the goods and tender them back and demand the payment of the purchase money for the goods. But if the contract is one called an executed contract then there is a different rule and the parties to the contract are limited to the amount of damages that they have sustained

by the loss of the article or the difference between the price of the article and the price of the article as it is at the time with its defects, as could be sold upon the market.

An action for damages for alledged breach of warranty upon a contract to sell and deliver to the plaintiffs, at a future day eight barrels of rock candy syrup. The contract of sale with warranty was proved,or sufficiently for the jury and the breach; but it also appeared in the proofs that the plaintiffs, after receiving the syrup, and discovering its failure to comply with the warranty, proceeded to use it in the business of wine manufacture, and neither returned or offered to return it.Upon this ground the plaintiffs , on defendants motion , were nonsuited at the circuit. It appeared that the plaintiffs required and desired to purchase for their business, in a western county, an article of rock candy syrup " That would not crystalize, or the sugar fall down", in its use. The question is did the plaintiffs claim for damages survive their acceptance and use of the syrup, or were they bound to return or offer to return the defective syrup as soon as its defects were discovered.

It is well settled that, upon a sale and delivery IN PRESENTI, of goods with expres warranty, if the goods upon trial or full examination turn out to be defective, and there is a breach of warranty, the vendee may retain and use the property, and may have his remedy upon the warranty without returning or offering to return. IN fact, it seems to be settled in theiS state, though, perhaps not necessarily determined in any case that he has no right to return the goods in such a case, unless there was fraud in the sale.

In a present sale with warranty it is expected, of course that the vendor incurs the peril of defects in the property warranted, after its delivery to the purchaser and he warrants against that. He does precisely the same in awarranty in an executory contract. Newman v. Frost. 52N.Y. 416.

What is the measure of damages on a breach of warranty,- The damages for which a party may recover for a breach of contract are such as ordinarily follow from the nonpreformance. They must be proximate and certain or capable of certainty, and not remote , speculative or contingent.
It is persumed that the parties contemplated the usual and natural consequences of a breach when the contract is made; and if the contract is made with refference to special

circumstances, fixing or affecting the amount of damages, such special circumstances are regarded within the contemplation of the parties, and damages may be assessed accordingly. For a breach of an executory contract to sell and deliver personal property the measure of damages are ordinarily the difference betwenn the contract price and the market value of the article at the time and place of delivery; but if the contract is made to enable the plaintiff to preform a sub contract, the terms of which defendant knows, he may be held liable for the difference betwen the sub contract price and the principle contract price, and this is upon the ground that the parties have impliedly fixed the measure of damages themselves, or, rather, made the contract upon the basis of a fixed rule by which they may be assessed.

Booth Vs. S.D. Rolling Mill Co. 60 N.Y. 487. Finis.