

June 1940

Sales--Implied Warranty of Food Sold in Bulk by Retail Dealer-- Liability to the Purchaser

V. K. K.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Consumer Protection Law Commons](#), and the [Torts Commons](#)

Recommended Citation

V. K. K., *Sales--Implied Warranty of Food Sold in Bulk by Retail Dealer--Liability to the Purchaser*, 46 W. Va. L. Rev. (1940).

Available at: <https://researchrepository.wvu.edu/wvlr/vol46/iss4/10>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

yet all the covenants of such a lease, either expressed or implied,⁷ including the free gas covenant have been held to run with the land so that the lessor's grantee is entitled to free gas and the lessee's assignee is under a duty to furnish it.⁸ Where a suit for damages occasioned by a continuing breach of a covenant in an oil and gas lease, will not give adequate relief, a suit for specific performance may be maintained by the injured party — as, for instance, by the lessor.⁹ In West Virginia, as in no other state, it has been held that a covenant of the lessee to furnish free gas will be specifically performed.¹⁰

In the principal case the court says definitely for the first time that a "free gas clause" exists as long as the lease is in effect. Here the lessee was trying to retain the lease without furnishing free gas, and if free gas is considered as part of the royalty, then the lessee was trying to retain the lease without paying the full royalty, and the court was right in its decision.

J. L. G., Jr.

SALES — IMPLIED WARRANTY OF FOOD SOLD IN BULK BY RETAIL DEALER — LIABILITY TO THE PURCHASER. — *P* purchased meat to be used as food from *D*, a retail dealer. Part of the meat was already sliced and the rest was sliced from a loaf lying on the counter. Soon after eating the meat *P* became very ill. *P* claims that the food was unfit for human consumption and that *D* is liable on the basis either of negligence or implied warranty. The case was tried on the theory of an implied warranty, and *P* appeals from a directed verdict for *D*. *Held*, that where food is purchased in bulk

⁷ *Curry v. Texas Co.*, 8 S. W. (2d) 206 (Tex. Civ. App. 1928) (duty to pay oil and gas royalties, gas well rentals and additional royalties passes to the assignee of the lease); *Steel v. American Oil Development Co.*, 80 W. Va. 206, 92 S. E. 410, L. R. A. 1917E 975 (1917) (covenants to drill, reasonably develop the premises, and to protect land from drainage run with the land); *Standard Oil Co. v. Slye*, 164 Cal. 435, 129 Pac. 589 (1913) (right to renew lease runs with the land); *Henry v. Gulf Ref'g Co.*, 176 Ark. 133, 2 S. W. (2d) 687 (1927) (covenant of lessor giving lessee right to possession runs with the land).

⁸ 3 SUMMERS, OIL & GAS (Perm. ed. 1938) § 553, p. 302; *Indiana Natural Gas & Oil Co. v. Hinton*, 159 Ind. 398, 64 N. E. 224 (1902); *Indiana Natural Gas & Oil Co. v. Harper*, 50 Ind. App. 555, 98 N. E. 743 (1912); *Harbert v. Hope Natural Gas Co.*, 76 W. Va. 207, 84 S. E. 770, L. R. A. 1915E 570 (1915) (stands for the proposition that not only does the covenant for free gas run with the land but where the parties so construe the covenant the gas may be used off of the leased premises if no extra burden is put on the lessee).

⁹ *Lockwood v. Carter Oil Co.*, 75 W. Va. 175, 80 S. E. 814 (1914).

¹⁰ *Bassell v. W. Va. Central Gas Co.*, 86 W. Va. 198, 103 S. E. 116, 12 A. L. R. 1398 (1920); *Harbert v. Hope Natural Gas Co.*, 76 W. Va. 207, 84 S. E. 770 (1915); *Hall v. Philadelphia Co.*, 72 W. Va. 573, 78 S. E. 755 (1913).

from a retail dealer for immediate consumption, there is generally an implied warranty to the purchaser that the article sold is fit for human consumption. *Burgess v. Sanitary Meat Market*.¹

Blackstone said that in contracts for provisions it is always implied that they are wholesome.² Hence, the principle adopted by the instant case had an early beginning, although novel to this jurisdiction. Authorities elsewhere are numerous, and in arriving at the result of the present case, West Virginia joined the decided weight of authority.³

The rule of the present case is sound, and under modern conditions highly desirable, although it might be onerous in some cases. It has its ethical basis in the reasonable presumption that the dealer has a means of knowledge of the character of the food he sells and opportunities for inspection which the buyer does not have.⁴ It finds further justification in the protection afforded to public health,⁵ and the fact that generally the dealer is better able to protect himself against the original wrong, and recoup himself in case of loss, since he will know the manufacturer.⁶

As noted by this decision, this rule is not unfettered in its application. The purchaser must rely on the seller's skill and judgment to raise an implied warranty, but the mere fact that the purchase is for immediate consumption is sufficient evidence to establish such reliance. This finds support among the authorities.⁷ Where it is clear that the seller's judgment is superseded and the choice determined by the buyer this essential is absent, and consequently there is no warranty.⁸ It should also be noted that in West Virginia this principle is not applicable to a sale of canned or sealed

¹ 5 S. E. (2d) 785 (W. Va. 1939).

² 3 BL. COMM. ¶165.

³ See *Heinemann v. Barfield*, 136 Ark. 500, 207 S. W. 62 (1918).

⁴ *Race v. Krum*, 222 N. Y. 410, 118 N. E. 853, L. R. A. 1918F 1172 (1918); *Flessner v. Carsten's Packing Co.*, 93 Wash. 48, 160 Pac. 14 (1916); *Rinaldi v. Mohican Co.*, 225 N. Y. 70, 121 N. E. 471 (1918); *Ward v. Great A. & P. Tea Co.*, 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 242 (1918).

⁵ *Race v. Krum*, 222 N. Y. 410, 415, 118 N. E. 853; 55 C. J., Sales § 733.

⁶ *Ward v. Great A. & P. Tea Co.*, 231 Mass. 90, 120 N. E. 225 (1918).

⁷ See *Grindraux v. Maurice Mercantile Co.*, 4 Cal. (2d) 206, 47 P. (2d) 708 (1935); *Rinaldi v. Mohican Co.*, 225 N. Y. 70, 121 N. E. 471 (1918); *Notes* 55 C. J., Sales § 733; (1918) 5 A. L. R. 242; (1934) 90 A. L. R. 1269; *Ryan v. Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105 (1931) holds, under the sales act, where the sale is made under the patent or trade name of the article, there is no implied warranty of fitness, as there is no reliance on the seller's judgment, but that there is an implied warranty of merchantability.

⁸ *Farrel v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 126 Am. St. Rep. 436, 15 L. R. A. (N. S.) 884, 15 Ann. Cas. 1076 (1908).

goods.⁹ A majority of cases decided under the sales act refuse to made this distinction.¹⁰ These cases base their result on the logical assumption that the dealer is in a better position to know the reliability of the manufacturer, and by implication there is reliance on the dealer's skill and judgment. Most of the jurisdictions where the sales act is not in force, or where the cases preceded the act, are in accord with West Virginia on this question.¹¹ Supporters of this exception contend that there is a lack of reliance on the seller in selecting the food.

Aside from the primary discussion in the present case, dicta present other propositions worthy of mention. There is an affirmation of an early rule of the Virginias that a party injured by a false warranty may sue either in assumpsit or in trespass on the case to recover resultant damages. The two remedies are treated as concurrent, and hence the aggrieved party may elect. In both forms of action, the gravamen is the breach of the warranty, which in the latter is treated as a tort, but a scienter or knowledge of the unfitness by the seller is immaterial.¹² It would seem that whether the action be considered *ex contractu* or *ex delicto*, it would amount to the same thing, since the modern trend as to measure of damages is toward proximate cause rules in both cases.¹³

The present case, by dictum, approves the obsolescent doctrine that the benefits of the seller's implied warranty extend no further than the purchaser.¹⁴ This principle has been so strictly applied that it has been held that a child who is injured by some injurious substance in food bought by its mother, cannot recover against the dealer on the theory of implied warranty because there is no privity

⁹ *Pennington v. Cranberry Fuel Co.*, 117 W. Va. 680, 186 S. E. 610 (1936); *Comment* (1936) 43 W. VA. L. Q. 84.

¹⁰ *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932); *Ward v. Great A. & P. Tea Co.*, 231 Mass. 90, 120 N. E. 225 (1918); *Grindraux v. Maurice Mercantile Co.*, 4 Cal. (2d) 206, 208, 47 P. (2d) 708 (1935).

¹¹ *Scruggins v. Jones*, 207 Ky. 636, 269 S. W. 743 (1925); *Kroger Grocery Co. v. Lewelling*, 165 Miss. 71, 145 So. 726 (1933); *Julian v. Laubenborger*, 16 Misc. 646, 39 N. Y. Supp. 1052 (1896); *Aronowitz v. F. W. Woolworth Co.*, 134 Misc. 272, 236 N. Y. Supp. 133 (1929).

¹² *Trice v. Cockran*, 8 Gratt. 442, 56 Am. Dec. 151 (Va. 1852). *Accord*: *Johnson & Grimes v. McDaniel*, 15 Ark. 109 (1854); *Tyre v. Causey*, 4 Harr. 425 (Del. 1846); *Wallace v. Tanner*, 118 Ill. App. 639 (1905); *Hellman v. Wilcox*, 30 Me. 170 (1849).

¹³ *Uniform Sales Act* § 69 (6); *Richmond v. Cretens*, 175 Wis. 297, 185 N. W. 247 (1921).

¹⁴ *Chysky v. Drake Bros. Co.*, 235 N. Y. 468, 139 N. E. 576, 27 A. L. R. 1533 (1923); *Aron v. Sills*, 240 N. Y. 588, 143 N. E. 717 (1925); *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785, L. R. A. 1916D 1006 (1916).

of contract between the parties.¹⁵ It has been generally held that the implied warranty is in the nature of a contract of personal indemnity and does not "run with the goods". This theory of extent of liability is not universally approved, especially in the late cases.¹⁶ It is also intimated by some authorities that the seller's liability should not rest so much upon privity of contract as upon a violation of a duty voluntarily assumed, arising as an implication of the common law.¹⁷ One very recent case holds that under the sales act it was not the legislative intent that strict "privity of contract" be essential to the bringing of an action by an ultimate consumer.¹⁸ It would seem safe to say that there is a definite trend, at the present, toward an extension of the dealer's liability to include consumers other than the immediate purchaser. This would seem desirable in view of the increased dependence of the public on the dealer for food supply.

Note also, that the present case, by reference to prior decisions, distinguishes the theory of liability of the packer or manufacturer of articles intended for human consumption from that of the dealer. The West Virginia court places the liability of the latter on implied warranty, while liability of the former is definitely based on negligence in the preparation of its product.¹⁹ A separate concurring opinion convincingly disapproves of this distinction as an anomaly. In effect the dealer is an insurer while the packer's responsibility is based on negligence. If a distinction is to be made it would seem more justifiable under modern conditions to place a higher duty on the manufacturer than on the dealer. It is submitted that the same responsibility should be placed on both.

V. K. K.

SPECIFIC PERFORMANCE — RIGHT OF DEFENDANT TO SHOW
DURESS WITHOUT OFFERING TO RESCIND ENTIRE CONTRACT. — *A* and
B conducted an automobile repair business at *X* city for a number
of years, first as a partnership and then as a corporation, of which

¹⁵ *Redmond v. Borden's Farm Products Co.*, 245 N. Y. 512, 157 N. E. 838 (1927).

¹⁶ See *Timmins v. F. N. Joslin Co.*, 22 N. E. (2d) 76, 123 A. L. R. 591 (Mass. 1939); *Klein v. Duchess Sandwich Co.*, 93 P. (2d) 799 (Cal. 1939), superseding 86 P. (2d) 858 (Cal. 1939); *Jensen v. Berris*, 31 Cal. App. (2d) 537, 88 P. (2d) 220 (1939).

¹⁷ *Flessner v. Carsten's Packing Co.*, 93 Wash. 48, 52, 160 Pac. 14 (1916).

¹⁸ *Klein v. Duchess Sandwich Co.*, 93 P. (2d) 799 (Cal. 1939).

¹⁹ *Webb v. Brown & Williamson Tobacco Co.*, 2 S. E. (2d) 898 (W. Va. 1939); *Parr v. Coca-Cola Bottling Works*, 3 S. E. (2d) 499 (W. Va. 1939); *Blevins v. Raleigh Coca-Cola Bottling Works*, 3 S. E. (2d) 627 (W. Va. 1939); *Note* (1939) 46 W. VA. L. Q. 82.