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## Implied Warranties in West Virginia

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## IMPLIED WARRANTIES IN WEST VIRGINIA

“A warranty is ‘implied’ where, from the circumstances surrounding the parties at the time of the sale or from the nature of the thing sold, the law assumes it to be just that the buyer should be protected, in addition to the contract of sale, by a further implied contract or guaranty on the part of the vendor, and so raises by implication a warranty on the seller’s part.”<sup>1</sup> These implied warranties fall into two general classes, those of quality and those of title. The implied warranties of quality are of comparatively recent origin<sup>2</sup> in the common law and have been the subject of much uncertainty. A majority of the states<sup>3</sup> have gone far toward remedying this situation by adoption of the Uniform Sales Act. West Virginia has not yet adopted the Act, thereby leaving our law in a state of doubt. Since it is well-settled in the law that there is an implied warranty of title in sales of chattels,<sup>4</sup> this note will be confined to a consideration of the implied warranties of quality as they seem to exist in this state.

Much of the misunderstanding has been the result of the decision in the case of *Lambert v. Armentrout*.<sup>5</sup> This was an action by A, as endorsee, on a promissory note given by B to S in payment for a horse; B defended on the ground of breach of implied warranty of soundness; the court held that the rule of *caveat emptor* here applied and that there was no implied warranty of quality. The court laid down the rule that there is an implied warranty of title in a sale of chattels, but not of quality; there must be a fraudulent representation. The court cites only three cases as sustaining this view. The first of these, a Virginia case decided in 1860,<sup>6</sup> holds merely that there is no implied warranty of fitness for a particular purpose in the sale of a specific chattel; the second, a West Virginia case,<sup>7</sup> supports the *Lambert* decision only by way of dictum; and the third, a case also in this state,<sup>8</sup> supports that holding only as to the implied warranty of title. The

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<sup>1</sup> Haines v. Neece, 116 Mo. App. 499, 92 S. W. 919 (1906).

<sup>2</sup> WILLISTON, SALES (2d ed. 1924) § 228.

<sup>3</sup> In 1936 the Uniform Sales Act had been adopted by thirty-three states and Hawaii.

<sup>4</sup> Eichholz v. Bannister, 17 C. B. (N. S.) 708 (1864); Byrnside v. Burdett, 15 W. Va. 702 (1879); Gould v. Bourgeois, 51 N. J. L. 361, 18 Atl. 64 (1889); UNIFORM SALES ACT § 13.

<sup>5</sup> 65 W. Va. 375, 64 S. E. 260, 22 L. R. A. (N. S.) 556 (1909).

<sup>6</sup> Mason v. Chappell, 15 Gratt. 572, 56 Va. Rep. 962 (1860).

<sup>7</sup> Jarrett v. Goodnow, 39 W. Va. 602, 20 S. E. 575 (1894).

<sup>8</sup> Byrnside v. Burdett, 15 W. Va. 702 (1879).

weakness of the case is further demonstrated by the fact that it has never been cited by our court in any subsequent case involving implied warranties.

Other West Virginia cases support views more in line with those of the Uniform Sales Act, which divides the implied warranties of quality into three categories: (1) merchantability;<sup>9</sup> (2) fitness for a particular purpose;<sup>10</sup> and (3) conformity to description or sample.<sup>11</sup>

(1) Even before the *Lambert* case, our court had applied the rule of implied warranty of merchantability in the case of *Hood v. Bloch*.<sup>12</sup> There, *S* sold to *B* all the cheese in his cellar at a definite price; *B* refused to accept on delivery; in an action for the purchase price, *B* raised the defense of breach of warranty, and the court sustained this contention, holding that in such a sale there is an implied warranty of merchantability. In so holding, the court follows the fifth rule<sup>13</sup> of the famous English case of *Jones v. Just*,<sup>14</sup> which has been frequently cited by our court. "Merchantability means that the article sold shall be of the general kind described and reasonably fit for the general purpose for which it shall have been sold."<sup>15</sup> This proposition is affirmed by West Virginia cases<sup>16</sup> subsequent to the *Lambert* case, showing clearly the tendency of our court away from the holding of that case and toward a view in accord with the Sales Act.<sup>17</sup>

(2) In *Hood v. Bloch*, in quoting rules three and four<sup>18</sup> of *Jones v. Just*, by way of dicta, the court evidences its approval of

<sup>9</sup> UNIFORM SALES ACT § 15 (2).

<sup>10</sup> UNIFORM SALES ACT § 15 (1).

<sup>11</sup> UNIFORM SALES ACT § 14.

<sup>12</sup> 29 W. Va. 244, 11 S. E. 910 (1886).

<sup>13</sup> "Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article."

<sup>14</sup> L. E. 3 Q. B. 197 (1868).

<sup>15</sup> *Keenan v. Cherry*, 47 R. I. 125, 131 Atl. 309 (1925).

<sup>16</sup> *Gorby v. Bridgeman*, 83 W. Va. 727, 99 S. E. 88 (1919); *Appalachian Power Co. v. Tate*, 90 W. Va. 428, 111 S. E. 150 (1922); *Guyandotte Coal Co. v. Virginian Elec. & Machine Works*, 94 W. Va. 300, 118 S. E. 512 (1923).

<sup>17</sup> UNIFORM SALES ACT § 15 (2): "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

<sup>18</sup> Rule 3. "Where a known, described, and defined chattel is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined things be actually sup-

the implied warranty of fitness for a particular purpose. Rule three, which states that there is no implied warranty of fitness for a particular purpose where there is a sale of a "known, described, and defined" chattel, even though the particular purpose for which it is intended to be used is disclosed to the seller, was followed in substance in the case of *Erie City Iron Works v. Miller Supply Co.*<sup>19</sup> In that case there was a sale of a boiler which was described by its trade name supplemented by specifications for alteration, and was inspected by *B* before the alterations were made. In holding that there was no implied warranty of fitness for a particular purpose, the court gave great weight to the argument that where goods are bought by description and that description is satisfied, there is no reliance by the buyer on the skill or judgment of the seller, and that thus the underlying reason for this implied warranty does not obtain. This reason also forms the basis for the trade name exception to this warranty, as laid down in the Sales Act,<sup>20</sup> that no implied warranty arises where the buyer asks for a chattel by its trade name. *Appalachian Power Co. v. Tate*<sup>21</sup> seems to apply the trade name exception, but other West Virginia cases<sup>22</sup> which might have applied it reach a similar result by finding that the chattel was specifically described, thus coming under the third rule in *Jones v. Just*.

Rule four of *Jones v. Just*, which states that where a seller knows the particular purpose to which an article is to be put, so that the buyer relies upon the skill or judgment of the seller, there is an implied warranty that it shall be reasonably fit for that purpose, has not been applied in West Virginia, other than in dicta, because in each case in which the rule was discussed there was present one of the following elements: (a) purchase by a trade

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plied, there is no warranty that it shall answer the particular purpose intended by the buyer."

Rule 4. "Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied."

<sup>19</sup> 68 W. Va. 519, 70 S. E. 125 (1911).

<sup>20</sup> UNIFORM SALES ACT § 15 (4). "In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

<sup>21</sup> 90 W. Va. 428, 111 S. E. 150 (1922).

<sup>22</sup> *Shaffner v. National Supply Co.*, 80 W. Va. 111, 92 S. E. 580 (1917); *Erie City Iron Works v. Miller Supply Co.*, 68 W. Va. 519, 70 S. E. 125 (1911).

name;<sup>23</sup> (b) purchase by specific description;<sup>24</sup> (c) failure on part of buyer to communicate the particular purpose to the seller;<sup>25</sup> or (d) sale of food in a sealed container.<sup>26</sup>

In spite of the fact that there is no West Virginia case directly supporting the existence of this warranty, it seems clear that if facts permitting its application were presented to the court it would be applied.

(3) West Virginia likewise follows the Sales Act in applying the implied warranty of conformity to a description.<sup>27</sup> The rule was first enunciated in *Wilson v. Wiggins*<sup>28</sup> and was later followed by the leading case of *Shaffner v. National Supply Co.*<sup>29</sup> This case involved the purchase of oil well tubing; *B* described the desired tubing as to quality and size, and *S* agreed to supply the same; the tubing failed to correspond to the description, proved unsatisfactory, and *B* was finally forced to abandon the well in which it was used. The court here, after discussing at length the warranty of fitness for a particular purpose and the trade name exception, held that there was an implied warranty that the tubing supplied would conform to the description given. The willingness of the court to apply this warranty, together with the two considered above, leaves little doubt as to the tendency in West Virginia toward a liberal view definitely opposed to that expressed in the *Lambert* case.

The West Virginia cases dealing with the subject of implied warranty have given rise to some exceptions to the application of the three warranties above set forth, which exceptions fall into four

<sup>23</sup> *Appalachian Power Co. v. Tate*, 90 W. Va. 428, 111 S. E. 150 (1922).

<sup>24</sup> Cases cited in note 22, *supra*.

<sup>25</sup> *Buffalo Collieries Co. v. Indian Run Coal Co.*, 73 W. Va. 665, 81 S. E. 1055 (1914).

<sup>26</sup> *Pennington v. Cranberry Fuel Co.*, 117 W. Va. 680, 186 S. E. 610 (1936). In this case *B* purchased a box of cocoa from *S*, a retailer; *B* became ill from drinking the cocoa due to the presence of a putrified mouse in the box; *B* sued *S* for damages resulting from breach of warranty and was denied recovery. See Comment (1937) 43 W. VA. L. Q. 84.

<sup>27</sup> UNIFORM SALES ACT § 14. "Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

<sup>28</sup> 73 W. Va. 560, 81 S. E. 342 (1914). A similar holding on similar facts is *Norman Lumber Co. v. Keystone Mfg. Co.*, 100 W. Va. 515, 131 S. E. 12 (1925).

<sup>29</sup> 80 W. Va. 111, 92 S. E. 580 (1917).

groups. The first is the trade name exception which has been previously considered in this note.

The second exception should be limited to the facts of the particular case in which it is laid down or to facts similar thereto. It deals with the nonexistence of a warranty of capacity for procreation in the purchase of an animal for the purpose of breeding. In this case, *Griffin v. Runnion*,<sup>30</sup> there was an action for breach of the implied warranty of fitness for the particular purpose of foal-getting in the purchase of a stallion. The court held that no such warranty existed because the continuance of virility is highly conjectural, being subject to numerous contingencies of life and nature beyond the control of buyer or seller. Cases deciding this question in other states hold both with<sup>31</sup> and against<sup>32</sup> our decision.

The third exception involves situations in which the buyer has inspected the chattel prior to<sup>33</sup> the time at which the implied warranty would ordinarily have arisen, that time usually being at passage of title.<sup>34</sup> Inasmuch as "the basis of implied warranty is the justifiable reliance of the buyer upon the seller's judgment",<sup>35</sup> the underlying reason for this exception is that when the buyer has inspected the chattel before the purchase he does not so rely, at least as to defects which such inspection should reveal. The tendency is to hold that opportunity on the part of the buyer to inspect has the same effect as actual inspection. This is true even in states following the Sales Act,<sup>36</sup> which provides that "If the buyer has examined the goods, there is no implied warranty as

<sup>30</sup> 74 W. Va. 641, 82 S. E. 686 (1914).

<sup>31</sup> *McQuaid v. Ross*, 85 Wis. 492, 55 N. W. 705, 39 Am. St. Rep. 864 (1893); *Frederickson v. Hackney*, 159 Minn. 234, 198 N. W. 806 (1924) (under Uniform Sales Act).

<sup>32</sup> *Green v. Ryan*, 242 Ill. App. 466 (1926) (under Uniform Sales Act); *Trousdale v. Burkhardt*, 207 Iowa 1133, 224 N. W. 93 (1929) (under Uniform Sales Act).

<sup>33</sup> Inspection as it relates to precluding a warranty from arising deals generally with such inspection as is made by a buyer before title passes, whereas inspection made after passage of title has to do with rescission for or action on breach of warranty and acceptance under the contract. See Note (1937) 43 W. VA. L. Q. 134.

<sup>34</sup> Implied warranties may arise before passage of title under a conditional sales contract. *Peuser v. Marsh*, 218 N. Y. 505, 113 N. E. 494, Ann. Cas. 1918B 913 (1916). See UNIFORM CONDITIONAL SALES ACT § 2, in accord. The same should be true before title has passed in the technical cash sale.

<sup>35</sup> WILLISTON, SALES § 234.

<sup>36</sup> *Hennig v. Iron Ridge Canning Co.*, 186 Wis. 499, 202 N. W. 466 (1925); *Horn v. Elgin Warehouse Co.*, 96 Ore. 403, 190 Pac. 151 (1920) (no reference to Uniform Sales Act).

regards defects which such examination ought to have revealed."<sup>37</sup> This trend was followed in West Virginia in the case of *Showalter v. Chambers*.<sup>38</sup> Here there was delivery of hay to *B* which did not satisfy the terms of the contract; after partial inspection of the hay and rejection, *B* made a counteroffer for its purchase; *S* accepted. In an action for the purchase price, *B* pleaded breach of implied warranty of merchantability. The court held that since *B* had an opportunity to inspect the whole, no implied warranty arose. Holdings to this effect are predicated upon the theory that good faith on the part of the buyer requires that he inspect the goods and discover all reasonably apparent defects, and thus not unjustifiably rely on the seller.<sup>39</sup>

Rule one<sup>40</sup> of *Jones v. Just*, cited by our court, indicates that inspection prevents the existence of an implied warranty where the defect is latent as well as patent, at least where seller is neither manufacturer nor grower. The case of *Watkins v. Angotti*<sup>41</sup> purports to follow rule two<sup>42</sup> of *Jones v. Just*, which provides that in a sale of a specific, described chattel there is no warranty as to patent defects, but in effect it seems to follow rule one, since evidence introduced at the trial all tended to show that the defect was latent. The sale was of a factory and machinery for the manufacture of ice cream and it seemed evident that the defects in the machinery would not be apparent to *B* until operation. The section of the Sales Act last above quoted, to the effect that there is no warranty as regards defects "which . . . examination ought to have revealed", implying that there is a warranty where the defect is latent, is clearly contrary to the seeming holding in *Watkins v. Angotti*.

A final possible exception to the rules of implied warranty is found in the class of cases represented by *Pennington v. Cran-*

<sup>37</sup> UNIFORM SALES ACT § 15 (3).

<sup>38</sup> 77 W. Va. 720, 88 S. E. 1072 (1916).

<sup>39</sup> See WILLISTON, SALES § 234.

<sup>40</sup> "Where goods are in *esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim, *caveat emptor*, applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer."

<sup>41</sup> 65 W. Va. 193, 63 S. E. 969 (1909). *Cf.* dictum in the Shaffner case, 80 W. Va. 111, at 124, 92 S. E. 580, which says there is an implied warranty of conformity to a description where there has been no inspection or where if there were inspection the nonconformity would not be thereby disclosed.

<sup>42</sup> "Where the sale is of a definite, existing chattel, specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty."

*berry Fuel Co.*,<sup>43</sup> previously considered. Rule one of *Jones v. Just* distinguishes between sales by manufacturers or growers and those by mere dealers. The *Pennington* case follows this distinction, holding that no warranty existed in a sale by a retail dealer as to quality of food in sealed containers. The distinction is based on the principle that the manufacturer or grower is in better position to know of and prevent defects, than the retailer who deals in them.<sup>44</sup> The Sales Act expressly abolishes this distinction as to the implied warranties of merchantability and fitness for a particular purpose.

After a full consideration of our cases it appears that the holding of *Lambert v. Armentrout* is no longer the law in West Virginia and that the trend is toward the more desirable view expressed in the Uniform Sales Act. There seems to be good reason for believing that this trend will continue, particularly in light of the decision in the case of *Kemble v. Wiltison*,<sup>45</sup> which cites the Act as persuasive authority, the court saying that the "Uniform Sales Act has been adopted by a considerable majority of American states, in fact by all the great commercial states", thus indicating the favorable attitude assumed by our court toward the Act. Dean Pound heartily commends this practice of applying legislative principles in common law decisions, especially as our legislation improves in thoroughness and quality.<sup>46</sup> It is hoped that until West Virginia is fortunate enough to have the Uniform Sales Act as a part of its own statutory law, the attitude on the part of our supreme court to place weight on and receive guidance from the provisions of the Act will continue.

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<sup>43</sup> 117 W. Va. 680, 186 S. E. 610 (1936).

<sup>44</sup> *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 116, 3 S. Ct. 537, 28 L. Ed. 86 (1883).

<sup>45</sup> 92 W. Va. 32, 114 S. E. 369 (1922).

<sup>46</sup> Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383.