December 1936

Sales–Implied Warranty of Canned Food

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from the defendant, but merely his bailee or agent."

Unless the court had knowledge of circumstances not brought out in the answer set forth in the opinion, it is difficult to reconcile this position with the facts as given. The fact that $S$ required a note secured by deed of trust from $M$ before advancing the money to pay up the judgment would seem to lead to the conclusion that there was no intention that an agency relationship should exist.

J. G. McC.

SALES — IMPLIED WARRANTY OF CANNED FOOD. — In a recent West Virginia case, $P$ sued $D$ to recover damages sustained as a result of drinking cocoa made from the contents of a can containing a putrefied mouse. The cocoa had been packed and sealed by a reputable manufacturer, and was purchased by $P$ from $D$, a grocer. Judgment for plaintiff. On appeal, reversed. Held, that the retailer who sells food stuffs in sealed containers packed by a reputable manufacturer does not impliedly warrant that they are fit for human consumption. *Pennington v. Cranberry Fuel Co.*

The decisions are by no means in accord on the question of the retailer's implied warranty of the wholesomeness of canned foods. In cases decided under the Uniform Sales Act, the warranty is commonly implied, while in other cases it is generally denied. Liability under the Sales Act is predicated upon the fact that there is a "reliance upon the seller's skill or judgment". Accordingly,

185 S. E. 688, 689 (W. Va. 1936).

1 186 S. E. 610 (W. Va. 1936).
2 Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385 (1932), 90 A. L. R. 1260 (1934); Griffin v. James Butler Grocery Co., 108 N. J. L. 92, 156 Atl. 636 (1931); Gimenez v. A. & P. Co., 264 N. Y. 390, 191 N. E. 27 (1934); Ward v. A. & P. Co., 231 Mass. 90, 120 N. E. 225 (1918), 5 A. L. R. 242 (1920). It is interesting to note that the annotation to this case states that canned foods is an exception to the rule of implied warranty of food. An annotation and collection of cases in (1934) 90 A. L. R. 1269 shows what a profound effect this case has had on the law. When that annotation was written in 1934, the tendency was toward implying the warranty.
3 Linker v. Quaker Oats Co., 11 F. Supp. 794 (N. D. Okla. 1935); Scruggins v. Jones, 207 Ky. 636, 269 S. W. 743 (1925); Trafton v. Davis, 110 Me. 318, 325, 88 Atl. 179 (1913); Kroger Grocery Co. v. Levelling, 165 Miss. 71, 145 So. 726 (1933). An exception is the Illinois court. Although the Sales Act is in force in Illinois, the court does not apply it, placing the liability on the ground of protecting the public health.
4 Section 15(1) of the Act reads, "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."
the decisions hold that such a reliance may be shown by the mere fact that the purchaser accepted the seller's selection of the brand.\textsuperscript{5} Conversely, the courts have said that if the customer asks for the food by trade name, there is no reliance upon the seller's skill or judgment.\textsuperscript{6} Other courts have placed liability on the broader ground of protecting the public health.\textsuperscript{7} A further practical consideration has influenced the decisions of the courts which adhere to the rule that the retailer is liable. There is a great deal of expense and inconvenience attached to suing the manufacturer, which is usually a corporation located in another state. This fact tends to influence the courts to permit a suit against the retailer who is located in the consumer's community and who has a right, and supposedly the means, to recoup from the manufacturer.\textsuperscript{8}

The instant case is one of first impression in West Virginia and the rationale adopted by the court in denying recovery appeals to one's sense of logic. A purchaser of a sealed can does not in fact rely upon the skill of the seller in selecting the can, because he knows that the seller knows no more of its contents than he.\textsuperscript{9} The court ignores the distinction centering about request by trade name. In reality when the seller selects the brand, all he warrants, even if he expressly warrants, is that the food in the can supplied is of a good brand packed by a reputable packer.\textsuperscript{10} But the court overlooks the practical consideration that it is often impossible for the consumer to take advantage of his cause of action against the manufacturer. It is, therefore, submitted that however logical the decision may be, it does not adequately protect the interests of the consumer.

\textsuperscript{5} Supra n. 2.

\textsuperscript{6} Section 15(4) of the Sales Act: "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." See Ward v. A. & P. Co., 231 Mass. 90, 93, 120 N. E. 225, 226 (1918). Also see Bryan v. Progressive Grocery, 255 N. Y. 388, 175 N. E. 105, 106 (1931) which case refuses recovery on basis of reliance but allows it under 15(2) of the Sales Act which provides for an implied warranty of merchantability of goods bought by description. See Brown, \textit{Implied Warranties of Quality in Sales of Articles under Patent or Trade Names} (1924) 2 Wis. L. Rev. 385, 395 which points out the distinction between fitness for a purpose and merchantability.


\textsuperscript{9} Supra n. 3.

\textsuperscript{10} Scruggins v. Jones, 207 Ky. 636, 269 S. W. 743 (1925).