Mercer Law Review

Volume 3 | Number 1 Article 21

12-1951

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By far the greatest number of sales cases of interest were those involving warranties. Two of the cases show that treating an action for breach of warranty as a contract action rather than as a tort has important consequences. In *C. M. Miller Co. v. Ramey*,[1] plaintiff's action on an open account was met by a set-off arising from defendant's expenditures in obtaining the release from condemnation of flour plaintiff had represented had no government action pending or contemplated against it. Plaintiff urged that defendant's demand sounded in tort (fraud and deceit) and could not be set off against plaintiff's contract claim. At the trial, evidence of each party was substantially undisputed, but judgment was rendered for the full amount of plaintiff's claim. On appeal, the court held that the set-off was based upon plaintiff's warranty of his right to sell the goods and the implied warranty that the goods were reasonably suited for the purpose of which sold, and therefore was in contract. As a consequence, defendant's claim could be set off, and a verdict based upon the difference between the two claims should have been directed.

In *Hardy v. Leonard*,[2] plaintiff sued both the automobile manufacturer and the sales agent from whom the vehicle was purchased for breach of the implied warranty of merchantability and fitness for use set forth in Code Section 96-301(2). Defendant manufacturer's demurrer for misjoinder of parties was sustained, and the trial court's action was affirmed on appeal on the ground that principal and agent could not be joined in this action in contract. Plaintiff's contention that the action was one for tort arising out of breach of contract was rejected, the court pointing out that the action was for the difference between the value of the truck as it was and the value it would have had if it had been as warranted.

The Court of Appeals in *Yeo v. Pig & Whistle Sandwich Shops*[3] said an action against a restaurateur for injuries resulting from unwholesome food is one in tort. The Code provision relating to such a wrong, Section 105-1101, bases it upon negligence, and therefore there is no liability based upon breach of implied warranty in such a case.

The buyer's responsibility for looking out for himself and not relying too heavily upon an implied warranty is illustrated by *Love v. Nixon*,[4] in which a directed verdict for the seller in an action for the purchase price of grape vines was upheld despite defendant's allegations that the goods failed to live up to his expectations. The court found defendant was negligent in not determining for himself what the grape vines would produce, how the products could be sold, etc., instead of relying upon representa-

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1. 82 Ga. App. 807, 62 S.E.2d 768 (1950).
2. 82 Ga. App. 764, 62 S.E.2d 437 (1950).
3. 83 Ga. App. 91, 62 S.E.2d 668 (1950).
4. 82 Ga. App. 445, 61 S.E.2d 423 (1950).

tions of the seller. The buyer therefore could not annul the sale on the ground of fraud under Code Section 96-202.[5] He was further denied the benefit of any implied warranty of fitness for use. Such a warranty refers to the use for which the goods are commonly intended rather than to the use intended by the buyer, and here the purchase was of specifically named varieties of grape vines.

The seller can of course more clearly avoid the effect of any implied warranty by expressly making provision in the contract against warranties. *Seigler v. Barrow*[6] held that the buyer signing such a contract has waived the benefit of any warranties that might be implied by virtue of the statute.

A case of possibly far-reaching importance was *Studebaker Corp. v. Nail*,[7] which held that the purchaser of an automobile from a dealer who was an independent contractor may recover from the manufacturer for breach of an express warranty. Plaintiff was the ultimate purchaser of a new automobile. On buying the car from the dealer, he received an instrument which on its face was a "Dealer Service Policy" signed by the dealer and which contained on the reverse side a "Standard Factory Warranty" with the manufacturer's name at the end. The buyer became dissatisfied with the car, refused to make payments, and, when it was repossessed, sued for the down payment. Although the Court of Appeals reversed a money judgment for plaintiff on the ground that there was no evidence of the actual value of the car, the court held the manufacturer would be bound by the express warranty. The question that most seriously concerned the court was connecting the manufacturer and consumer, that is, finding privity of contract. The court pointed out that warranties of personal property do not run with the chattel, but held the manufacturer and consumer could enter into a direct warranty, the consideration for the manufacturer's warranty being the purchase itself. Although it might be hard to fit this result into traditional concepts of contract law, especially in view of the absence of a finding that the consumer knew of the manufacturer's warranty and was at least in part induced to purchase in reliance on it, the decision seems to reach a just and logical result.

The Bulk Sales Law[8] was before the Court of Appeals in *Mitchell v. Waller*,[9] where a seller instead of complying with the statute in regard to notice to creditors, etc., under the terms of the statute, deposited a sum of money in a bank to be checked out by the buyer and the buyer's attorney for paying the seller's debts on the business. The court held this was not compliance with the Bulk Sales Law, and the transfer could therefore be treated as void as to an unpaid creditor of the seller.

One case[10] directly concerned the remedies of a seller when the buyer has repudiated a contract. The seller failed to recover because he failed to show compliance with Code Section 96-113, which gives alternative rem-

5. See also Holmes v. Walker, 207 Ga. 582, 63 S.E.2d 359 (1951) for another example of a buyer being unable to obtain relief when he failed to avail himself of a full opportunity to find the facts for himself instead of relying upon the seller's representations.
6. 83 Ga. App. 406, 63 S.E.2d 708 (1951).
7. 82 Ga. App. 779, 62 S.E.2d 198 (1950).
8. GA. CODE §§ 28-205 *et seq.* (1933).
9. 83 Ga. App. 7, 62 S.E.2d 383 (1950).
10. Local Trademarks, Inc. v. Chupp, 82 Ga. App. 613, 61 S.E.2d 842 (1950).

edies to a seller whose buyer refuses to take and pay for goods bought. The action was not to recover the difference between the contract price and market price or between the contract price and price on resale, as permitted by the first two provisions of Section 96-113. The court held that the plaintiff had not satisfied the third provision, which permits the seller to store the property for the buyer and recover the purchase price, since the evidence did not show that the exact goods contracted for were in fact stored for the benefit of the buyer.