Buffalo Law Review

Volume 5 | Number 2 Article 66

1-1-1956

Sales—Implied Warranties

Eileen Tomaka

the goods subsequently shipped actually matched the sample exhibited.[21] If the seller fails to prove that fact he can not insist upon acceptance by the buyer.[22]

Since the defendant did not meet the burden of proof the judgment for him was reversed and a new trial ordered. For another reason for reversal and a new trial, the dissent in the Appellate Division[23] makes interesting reading, especially as to the facts which provoked the following statement: "Here, because of the well-intended but unfortunate remarks of the trial court, the jury took the easy way out and to avoid buying their dinners and being kept late in the evening, produced a verdict. The plaintiff, in effect, was deprived of his day in court."[24]

Implied Warranties

Plaintiff became ill with jaundice after receiving a transfusion of contaminated blood as a part of her treatment while a patient at the defendant hospital, and for which she paid sixty dollars. The complaint alleged a breach of implied warranties of fitness of purpose and merchantability. The Appellate Division affirmed the trial court's denial of a motion to dismiss the complaint for failure to state a cause of action.[25] The Court of Appeals reversed on the ground that the transaction did not constitute a sale to which warranties could attach.[26]

Section 96 of the Personal Property Law provides for implied warranties of quality on a contract to sell[27] or a sale of goods.[28] Whether a transaction involving personal services in which there has been a transfer of title in goods is or can be considered a contract to sell, within the meaning of this section for purposes of a warranty in all cases, had not been directly answered before this case; with the exception of the above mentioned statute, the Sales Act contains no criterion which can be applied in deciding whether a contract is for a sale or for services, although a statutory test is provided in Statute of Frauds cases for a

21. *Frankel v. Foreman & Clark,* 33 F. 2d 83 (2d Cir. 1929), applying the law of New York; 1 WILLISTON, SALES § 255 at 677 (rev. ed. 1948).
22. *A. & S. Henry & Co. v. Talcott,* 175 N. Y. 385, 67 N. E. 617 (1903); 4 WILLISTON, CONTRACTS § 1002 at 2762 (rev. ed. 1936).
23. 284 App. Div. 954, 135 N. Y. S. 2d 52 (1st Dep't 1954).
24. *Id.* at 956, 135 N. Y. S. 2d at 56.
25. 283 App. Div. 789, 129 N. Y. S. 2d 232 (1st Dep't 1954).
26. 308 N. Y. 100, 123 N. E. 2d 792 (1955).
27. *Haag v. Klee,* 162 Misc. 250, 293 N. Y. Supp. 266 (1936), held that there must be a contract to sell before implied warranties can arise.
28. N. Y. PERSONAL PROPERTY LAW § 82: "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." "A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price."

similar distinction.[29] Prior to the instant case, the courts encountered the problem most frequently in restaurant cases, where the serving of food was held to constitute a "qualified sale" despite the existence of personal services.[30] One case held an action in breach of warranty could lie where the transaction called for the installation of a heating system, although admitting the importance of the personal services involved.[31] It would appear that the courts used a case by case approach in finding a sale for purposes of warranty wherever possible, without the use of any specific criteria.

The majority in the instant case found that the transaction was not a sale within the meaning of section 96, since the contract between the hospital and the patient essentially called for the rendition of services, and a transfer of title in goods does not result in an automatic sale where it is wholly incidental to the main object of the contract. New York restaurant cases are distinguishable on the ground that the customer's primary object is the purchase of food.[32] The Court supported its position by citing numerous cases from other jurisdictions, where a similar distinction between a contract to sell and one to perform services was made in deciding a warranty. The cases are of questionable authority, however, since the applicability of a sale to a warranty was not in issue.[33] The New York decision relied on by the Court, which held that a contract to paint a portrait was one for services although title to the painting passed, also arose in a different context.[34] It is to be pointed out that the Court was most anxious to find a sale, since any other result would render the hospital an insurer under these circumstances.

The dissenters contended that the decision disregarded prevailing rules of

29. N. Y. PERSONAL PROPERTY LAW § 85 (2); for purposes of the Statute of Frauds, a contract to sell or a sale of goods not yet in existence is considered to be a sale, but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale in the ordinary course of the seller's business, the contract is for services.

30. *Temple v. Keeler,* 238 N. Y. 344, 144 N. E. 635 (1924).

31. *Miller v. Winters,* 144 N. Y. Supp. 351 (1913).

32. *Temple v. Keeler, supra* note 30.

33. In *Babcock v. Nudelman,* 367 Ill. 626, 12 N. E. 2d 635 (1937), the transaction was held to be a contract for services rather than a contract of sale, for purposes of imposing an occupational tax. *Town of Saugus v. B. Perini & Sons Inc.,* 305 Mass. 403, 26 N. E. 2d 1 (1940), was an action brought to enjoin a defendant from removing gravel in violation of an ordinance prohibiting such removal for purposes of a sale. The Court held that the defendant was removing the gravel under a contract for services, thus making the ordinance inapplicable. See *Crystal Recreation Inc. v. Seattle Ass'n of Credit Men,* 34 Wash. 553, 209 P. 2d 358 (1949) (a distinction between a contract for services and one for sale to determine a question of title).

34. *Racklin Fagin Construction Corp. v. Villar,* 156 Misc. 220, 281 N. Y. Supp. 426 (1935); where paintings were completed and held by the tenant at the disposal of the plaintiff landlord, the former was entitled to be paid the full price, in accordance with the contract, by being credited with payment of 10 months rent as it became due.

pleading in dismissing the complaint, since the plaintiff alleged as a separate transaction the sale of blood to her by the hospital for a price, and should have been entitled to prove the existence of the sale at the trial if such allegations were to be accepted as true, the usual method of testing the sufficiency of a complaint.

At common law,[35] a transaction in which personal services predominated did not preclude a warranty from attaching if title in goods had passed for a price. However, the Court in the instant case has interpreted the Uniform Sales Act, adopted in New York,[36] to require a technical contract of sale for purposes of finding an implied warranty. Although the decision, in adopting an "essence" test to find the required contract of sale, restricts the operation of warranties, the restriction would seem justified in view of the plain import of the words of the statute, and if found to run counter to legislative policy underlying warranties may be removed by proper amendment. It should also be noted that this decision may have been promoted largely by the particular facts of the case (the potential liability of the hospital as an insurer); therefore the distinction between a contract of sale and a contract for services, and the adoption of the "essence" test may be restricted to similar cases.

TAXES

New York Sales Tax—Sales for Resale

The New York City Retail Sales Tax applies to receipts from every sale of tangible personal property sold to any person for any purpose other than for resale in the form of tangible personal property.[1] In *Colgate-Palmolive Peet Co. v. Joseph*,[2] petitioner sold certain products, mostly soaps and toilet articles, encased in corrugated cardboard cartons, to various retail grocers and druggists in the City of New York. Whether petitioner is subject to the retail sales tax upon these cartons, which as a general rule are not resold, was the principal issue; the Court held, that he was. The cartons are not "inseparable from their contents" and are not sold "for the sole purpose of resale." The order of the Appellate Division[3] annulling the determination of the comptroller assessing such tax on petitioner was reversed.

The rule that containers of articles are separable from their contents for the

35. *Samuel v. Davis*, [1943] 1 K. B. 526 (contract to make dentures).
36. N. Y. PERSONAL PROPERTY LAW § 82-158.

1. Administrative Code of the City of New York, Sec. N 41-2.0, subd. a, par. 1; Sec. N 41-1.0, subd. 7.
2. 308 N. Y. 333, 125 N. E. 2d 857 (1955).
3. *Colgate-Palmolive-Peet Co. v. Joseph*, 283 App. Div. 55, 126 N. Y. S. 2d 9 (1st Dep't 1953).