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WARRANTY IN VIRGINIA

ALLAN H. HARBERT

A warranty has been defined as an affirmation of quality by the seller at the time of the sale, relied on by the buyer;¹ but no affirmation, however strong, will constitute a warranty unless it was so intended,² and if the vendor expressly denies all warranties at the time of sale his denial will be given full effect.³

At common law the vendor of personal property was not answerable for the quality of goods sold unless he warranted their quality or made some false representation with regard to it or knowing of the defect, failed to disclose it.⁴ Where the buyer knows that the seller is not the manufacturer of the product insofar as latent defects are concerned, in the absence of express warranty or fraud, this is still the law.⁵

Warranties may be implied as well as express. An implied warranty arises because of the peculiar nature and circumstances of the sale.⁶ Formerly, where there was an express warranty in the sale of a chattel, there could be no implied warranty except as to title.⁷ However, the modern view is implied warranties can apply at the same time as express warranties as long as they are not inconsistent.⁸ When there is a conflict

¹ *Reese v. Bates*, 94 Va. 321, 26 S.E. 865 (1897).

² *Mason v. Chappell*, 15 Gratt. (56 Va.) 572 (1860).

³ *Jacob v. Grossman Seed & Supply Co.*, 115 Va. 90, 78 S.E. 646 (1913).

⁴ *Wilson v. Shackleford*, 4 Rand. (25 Va.) 5 (1826).

⁵ *Belcher v. Goff Bros.*, 145 Va. 448, 134 S.E. 588 (1926). (Sellers of kerosene which had been purchased from reliable dealer were not liable for latent defects when purchaser knew sellers were not manufacturers of the product).

⁶ *Rees v. Bates*, *supra* note 1; *Latham v. Powell*, 127 Va. 382, 103 S.E. 638 (1920).

⁷ *International Harvester Co. v. Smith*, 105 Va. 683, 54 S.E. 859 (1906).

⁸ *Greenland Development Corp. v. Allied Heating Prod. Co.*, 184 Va. 588, 35 S.E.2d 801 (1945); *E. I. Du Pont de Nemours & Co. v. Universal Moulded Products Corp.*, 191 Va. 525, 62 S.E.2d 233 (1950).

between express and implied warranties, the express warranties prevail.⁹ Where the warranty is written, it is presumed the writing contains everything that is intended to be warranted.¹⁰ Even then, warranty may be implied if peculiar circumstances of the case require it.¹¹

Where the vendee does not designate any specific articles but orders goods of a particular quality or for a particular purpose which is known to the vendor, the presumption is the vendee relies on the judgment of the seller, and a warranty is implied that the article will be reasonably fit for purpose to which it is to be applied.¹² This implied warranty extends to dealers as well as to manufacturers.¹³

Once the vendee accepts the goods, he cannot sue on the warranty since he has tacitly admitted that the goods are fit for his particular purpose.¹⁴ An offer to return warranted goods, which is rejected by the seller, is equivalent to a return of the goods.¹⁵ The buyer must return all the goods. If he keeps a portion of the goods and returns the rest, this will be deemed an acceptance.¹⁶ The acceptance will not be considered conclusive if the buyer by some act makes it clear to the vendor he is dissatisfied.¹⁷ A buyer by sample with the warranty that the goods shall correspond with the sample,

⁹ *Greenland Development Corp. v. Allied Heating Products Co.*, *supra* note 8 (dicta).

¹⁰ *Ford Motor Co. v. Switzer*, 140 Va. 383, 125 S.E. 209 (1924).

¹¹ *Standard Paint Co. v. E. K. Vietor & Co.*, 120 Va. 595, 91 S.E. 752 (1917). (Warranty that roofing would not leak and that repairs would be made in event that it did was implied because of previous transactions between buyer and seller despite fact that there was a written guaranty).

¹² *Gerst v. Jones & Co.*, 32 Gratt. (73 Va.) 518; *Latham v. Powell*, *supra* note 6; *Greenland Development Corp. v. Allied Heating Prod. Co.*, *supra*, note 8; *E. I. Du Pont de Nemours & Co. v. Universal Moulded Products Corp.*, *supra*, note 8; *Gleason v. International Harvester Co.*, 197 Va. 255, 88 S.E.2d 904 (1955).

¹³ *Universal Motor Co. v. Snow*, 149 Va. 690, 140 S.E. 653 (1927).

¹⁴ *Latham v. Powell*, *supra*, note 6; *Monroe & Monroe v. Cowne*, 133 Va. 181, 112 S.E. 348 (1922).

¹⁵ *Monroe & Monroe v. Cowne*, *supra*, note 14.

¹⁶ *Charles Syer & Co. v. Lester*, 116 Va. 541, 82 S.E. 122 (1914).

¹⁷ *Latham v. Powell*, *supra*, note 6.

who accepts the goods after opportunity for inspection, has been held not thereby prevented from recovering damages for breach of warranty though the retention and use of the goods without any complaint warrants a strong inference that they comply with the contract.¹⁸

If the warranty requires notice to seller of the defect in goods, the terms of the warranty must be complied with strictly, but this requirement may be waived by the conduct of the seller.¹⁹ The failure of the vendee to notify the vendor of defect before expiration of warranty bars the vendee from recovering thereon, unless the duration specified in warranty is waived.²⁰

At common law a suit for breach of warranty was essentially an action *ex contractu*. However, because of its nature, it is closely akin to the tort action of misrepresentation. The pleader must be careful not to join the two actions or the court will sustain a general demurrer to the declaration for a misjoinder of actions.²¹ However, the Supreme Court of Appeals of Virginia has said this does not always constitute a misjoinder of actions in the notice of motion,²² and case has been held a proper remedy for the breach of an express warranty.²³ The Court has said if the causes of action are of the same nature and the same judgment is to be given in all, the allegations of breach of contract and negligence may be joined in the same declaration.²⁴

¹⁸ *Jacot v. Grossman Seed & Supply Co.*, *supra*, note 3. (The fact that seeds were involved and their quality was unknown until they were planted and the flowers harvested may explain the seeming inconsistency in this case).

¹⁹ *Monroe & Monroe v. Cowne*, *supra*, note 14 (notice requirement waived by persistent efforts of seller to remedy defects).

²⁰ *Ford Motor Co. v. Switzer*, *supra*, note 10.

²¹ *Kroger Grocery and Baking Co. v. Dunn*, 181 Va. 390, 25 S.E.2d 254 (1943); BURKS, PLEADING AND PRACTICE, 4th ed., § 98 *Misjoinder of Tort and Assumpsit*.

²² *E. I. Du Pont de Nemours & Co. v. Universal Moulded Products Corp.*, *supra*, note 8.

²³ *Trice v. Cochran*, 8 Gratt. (49 Va.) 442 (1852); *Standard Paint Co. v. E. K. Viotor & Co.*, *supra*, note 11.

²⁴ *Fisher v. Seaboard Airline Railway Co.*, 102 Va. 363, 46 S.E. 331 (1904).

It should be remembered that the statute of limitations differs for a contract and a tort action.²⁵ In Virginia the statute of limitations for negligence is one year²⁶ and on breach of an oral contract it is three years.²⁷ Since punitive damages are recoverable in a tort action, the plaintiff would prefer to sue on that theory; but, in order to do so he must bring his suit within a year after the cause of action arose. If the statute of limitations has tolled on his tort action, he still may recover compensatory damages in contract,²⁸ provided the cause of action is brought within three years of the time when the cause of action arose. It is evident that the theory of the case is an important consideration for the pleader.

It has been held that a third party cannot recover for damages arising out of a breach of warranty.²⁹ This means that in the typical three party situation of manufacturer, dealer, and consumer, the consumer has no cause of action against the manufacturer for breach of warranty, since there is no privity of contract.³⁰

The dealer, on the other hand, as long as he warranted the product, is liable.³¹ The fact that he had no knowledge of the defect is immaterial;³² and he is held on an implied warranty for all defects which he could have discovered by a reasonable inspection.³³ However, if the purchaser had in fact examined the product and the defect was readily discoverable upon inspection, the dealer is not liable. The

²⁵ Cf. *Colonna v. Rosedale Dairy Co.*, 166 Va. 314, 186 S.E. 94 (1936).

²⁶ VA. CODE ANN. § 8-24 (1950) (Repl. Vol. 1957).

²⁷ VA. CODE ANN. § 8-13 (1950) (Repl. Vol., 1957).

²⁸ *Eastern Ice Co. v. King*, 86 Va. 97, 9 S.E. 506 (1889); *Latham v. Powell*, *supra*, note 6; *E. I. Du Pont de Nemours & Co. v. Universal Moulded Products Corp.*, *supra*, note 8; *Greenland Development Corp. v. Allied Heating Prod. Co.*, *supra*, note 8.

²⁹ *Colonna v. Rosedale Dairy Co.*, *supra*, note 25; *Harris v. Hampton Roads Tractor & Equipment Co.*, 202 Va. 958, 121 S.E.2d 471 (1961).

³⁰ *Gleason & Co. v. International Harvester Co.*, *supra*, note 12; *General Bronz Corp v. Kostopoulos*, 203 Va. 66, 122 S.E.2d 548 (1961).

³¹ *Trice v. Cochran*, *supra*, note 23; *Gerst v. Jones & Co.*, *supra*, note 12.

³² *Ibid.*

³³ *Gleason & Co. v. International Harvester Co.*, *supra*, note 12.

purchaser is not bound to examine it at all, for he has the right to rely on the judgment of the seller, and to take for granted that the latter has furnished an article answering the terms of the contract.³⁴ The question of whether the vendor has complied with the terms of his contract will depend upon the circumstances in each case,³⁵ and is a question for the jury.³⁶

The law of warranties must be qualified by the exception that has arisen with regard to the sale of food and beverages. It had been held that a dealer in comestibles for immediate consumption was liable to his vendee in a contract action, but not to third parties injured by the unhealthful product.³⁷ A tort action for negligence, however, was available to the third party and the dealer will be charged with knowledge of the purposes intended by the vendee for the comestible, when he makes regular sales of the items to the vendee.³⁸ In all these cases it must be remembered that the burden of proof is on the plaintiff to show his consumption of the alleged deleterious product was the direct cause of whatever harm he suffered.³⁹

The case of *Swift & Cox v. Wells*⁴⁰ has extended liability for a breach of warranty to the manufacturer. However, it is doubtful if the case would apply to all food and beverage manufacturers. In the Swift case the product, a defective ham, was packaged in a sealed container so that no impurities could have gotten into it, after it left the manufacturer's hands. The consumer was allowed to recover for his injuries caused by the eating of the ham, on a breach of an implied warranty of wholesomeness, by the manufacturer, despite the fact that he was not in privity with the manufacturer. Because of the

³⁴ *Gerst v. Jones & Co.*, *supra*, note 12.

³⁵ *Eastern Ice Co. v. King*, *supra*, note 28; *Reese v. Bates*, *supra*, note 1.

³⁶ *Monroe & Monroe v. Cowne*, *supra*, note 14.

³⁷ *Kroger Grocery & Baking Co. v. Dunn*, *supra*, note 21; *Colonna v. Rosedale Dairy Co.*, *supra*, note 25.

³⁸ *Colonna v. Rosedale Dairy Co.*, *supra*, note 25.

³⁹ *Blythe v. Camp Mfg. Co.*, 183 Va. 432, 32 S.E.2d 659 (1945).

⁴⁰ 201 Va. 213, 110 S.E.2d 203 (1959).

great weight placed on the fact that the ham was packaged in a sealed container, it would seem that the exception to the privity of contract requirement does not apply to the sale of all comestibles, but only those packaged in sealed containers by the manufacturer and handled properly by all middlemen until it reaches the hands of the consumer. This case seems to follow *Norfolk Coca-Cola Bottling Co. v. Krausse*,⁴¹ which similarly involved a product sealed in a container before it left the manufacturer's hands.

There are certain things that must be observed in any suit on a warranty. They may be summarized as follows: (1) whether the warranty is express or may be implied by the circumstances; (2) whether there has been an acceptance or act equivalent to an acceptance by the vendee; (3) whether proper notification has been made to the vendor of a breach; (4) whether a tort or contract action should be brought. This will depend on (a) the statute of limitations; (b) the damages sought; and, (c) the privity of contract requirements. Thus, it becomes evident that any action on a warranty must necessarily be prosecuted with great skill and care, if it is to reach a favorable conclusion.

⁴¹ 162 Va. 107, 173 S.E. 497 (1934).