SALES - IMPLIED WARRANTY - EXPLOSIVE IN CIGAR

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SALES — IMPLIED WARRANTY — EXPLOSIVE IN CIGAR — Plaintiff purchased cigars from a retail merchant. The cigars were sold under a trade name and when purchased from a wholesaler by the retailer were wrapped in cellophane, and were sold to the plaintiff while still in the original wrapper. One of the cigars contained a firecracker, which exploded when plaintiff lighted the cigar, causing substantial injury. Held, that the plaintiff can recover from the retailer. Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N. E. (2d) 130 (1936).

If the term "implied warranty" is to be taken in its literal meaning, it would seem that it should be necessary to find some facts in the transaction from which it can reasonably be inferred that the seller actually asserted a fact, by actions if not by words, as to the quality of the goods.1 Under the facts of the principal case, it is extremely difficult to see how such an inference could be

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drawn when it does not appear that the retailer could possibly have known of the defective condition of the cigar. If the retailer should have known of the defect, even if no actual knowledge existed, the buyer, it would seem, would be justified in inferring a warranty from the circumstances of the sale. Here, however, since the cellophane wrappers effectively prevented inspection, it cannot be said that the retailer should have known of the defect. We have, then, a liability completely divorced from any factual basis—one created by law. Under the Sales Act, in the absence of factors showing justifiable reliance by the buyer upon the seller's skill or judgment, a blameless retailer is generally held not liable for defective quality of the goods sold. A different result has been reached, however, in the sale of food for human consumption. Before the Sales Act, the cases were divided as to whether there was an implied warranty by a retail dealer that food sold in sealed containers was fit for human consumption. The reason given by courts holding the retailer not liable was that the retail seller was in no better position to inspect the goods than the buyer, and that the necessary lack of fault on his part should protect him. The

2 Jones v. George, 56 Tex. 149 (1882); Kansas City Bolt & Nut Co. v. Rodd, (C. A. 6th, 1915) 220 F. 750.
4 A different result has been reached, however, in the sale of food for human consumption. The reason given by courts holding the retailer not liable was that the retail seller was in no better position to inspect the goods than the buyer, and that the necessary lack of fault on his part should protect him. The

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2 "No inspection of the contents can be made without opening the can, and the public generally has learned to rely upon the character and standing of the packer and the quality of certain brands. Neither seller nor purchaser can otherwise judge of its condition, and in this respect both stand upon equal footing. So that the rules of
courts imposing liability apparently did so on the basis of a rather vague public policy, refusing to distinguish between a sale of food in a sealed container and a sale where the retailer may inspect. The Sales Act did little to clear up the situation. Most courts have, however, held the retailer liable under section 15 (1)\(^8\) as a case of a sale for a particular purpose,\(^9\) but the rule has been limited to cases where the buyer actually relies on the seller's skill or judgment.\(^10\) Although it is not clear, it would seem that the reliance must be reasonable, which would not seem to be true in the principal case.\(^11\) The court, however,

the common law relating to foods have been modified to meet the changed conditions, and it is now generally recognized that where the article is one of general use and put up by a reputable manufacturer or packer in a sealed can, the exterior of which is in good condition, the retailer is not responsible to his customer for the defective or unwholesome condition of the contents unless and except at the time of the sale he expressly warrants the same to be free from defects.\(^7\) Scruggins v. Jones, 207 Ky. 636 at 638-639, 269 S. W. 743 (1925).

\(^7\) "There appears to us to be no sound reason for ingrafting an exception on the general rule, because the subject of the sale is canned goods, not open to the immediate inspection of the dealer, who is not the manufacturer, any more than of the buyer. It doubtless still remains true that the dealer is in a better position to know and ascertain the reliability and responsibility of the manufacturer than is the retail purchaser. . . . Simply because it [the rule holding a retailer liable] may work apparent hardship in certain instances is no reason to change it to fit particular cases. It is a salutary principle. It has become wrought into the fabric of the law as the result of long experience. It may be assumed that the affairs of mankind have become adjusted to it." Ward v. Great Atlantic & Pacific Tea Co., 231 Mass. 90 at 94, 120 N. E. 225 (1918).

\(^8\) "(1) 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 the purpose." Uniform Sales Act, § 15(1); \(^1\) Uniform Laws Annotated 103 (1932).


\(^10\) Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471 (1918). The court held that reliance was present in the facts of the case, but said (225 N. Y. at 73): 

"[u]nder the act] there is no longer an implied warranty of fitness . . . unless it appears that the buyer relies upon the seller's skill and judgment . . . The burden of showing that he has made known his purpose and that he has relied upon the seller is on him who claims the existence of an implied warranty." See, also, Minneapolis Steel & Machinery Co. v. Casey Land Agency, 51 N. D. 323, 201 N. W. 172 (1924); Keenan v. Cherry & Webb, 47 R. I. 125, 131 A. 309 (1925).

\(^11\) "The plaintiff knew, or should be charged with knowledge, that the defendant could have no possible information concerning the contents of the can of which she did not have. We know of no rule of law, which will imply a warranty of that, of which it is impossible for a defendant to know by the exercise of any skill, knowledge or investigation, however great. In other words, neither law nor reason require impossibilities. . . ." Pelletier v. Dupont, 124 Me. 269, 128 A. 186 (1925).
rested its decision on section 15 (2). The wording of this section seems to indicate an imposed liability, rather than one growing out of a reasonable inference from a given set of facts, although such an interpretation is out of line with the statements that the section codifies the common law. However, the section has generally been interpreted as providing for retail liability in the case of a sale of food, even in a sealed container. It might be urged that section 15 (4), providing that as to articles sold under a trade name there shall be no implied warranties, should apply; but it has been held that the provision does not apply to sales of food, the decisions again being based on a public policy which the cases do not adequately discuss. It would seem, then, that if tobacco is regarded in the same light as food intended for human consumption, a reasonable position in view of the injurious effects of defective quality, the principal case can be supported on authority, although it adds nothing to the validity of the premise upon which such authority is based. It should be realized, however, that it is an imposed liability, growing out of a somewhat dubious and inarticulately expressed public policy, which is being enforced.

James W. Mehaffy.

12 "(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." Uniform Sales Act, § 15 (2); 1 Uniform Laws Annotated 103 (1932).