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Amendment to the Personal Property Law Relative to Recovery of Damages Upon Rescission of Sale of Goods for Breach of Warranty

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After the amendment of 1940 with respect to motor vehicle accidents it was written that the amendment was "... a possible forerunner of a more general abandonment of the rule."¹⁹ It does not appear that the disqualification has been, or will be, ruthlessly abandoned but it does seem that a gradual enlargement of the exceptions to the statute may be prophesied. The trend is toward liberalization of the rule which suppresses essential testimony.

JOHN P. MAHON.

AMENDMENT TO THE PERSONAL PROPERTY LAW RELATIVE TO RECOVERY OF DAMAGES UPON RESCISSION OF SALE OF GOODS FOR BREACH OF WARRANTY.—On the recommendation of the Law Revision Commission, a bill to amend Section 150 of the New York Personal Property Law¹ passed the New York Legislature and was approved by the Governor March 21, 1948. This statute, "An Act to Amend the Personal Property Law, in Relation to Recovery of Damages Upon Rescission of a Sale of Goods for Breach of Warranty," becomes effective September 1, 1948.² It enables a buyer of goods rescinding for breach of warranty to recover damages for a breach not compensated by recovering the purchase price paid or by discharge of the obligation to pay.³

Section 150 of the Personal Property Law contains seven subdivisions which define the remedies of a buyer of goods, where there is a breach of warranty by the seller.⁴ Of these only subdivision 1, paragraph (d), has been affected by the new amendment to Section 150. The measure of damages for breach of warranty and the prerequisites for rescission remain unchanged.⁵ Section 151 of the Personal Property Law preserves the right, in an action for breach of warranty, to recover interest and special damages where they are otherwise recoverable.⁶

Subdivision 1, paragraph (d), of Section 150 of the New York Personal Property Law as it has been amended reads: "1. Where there is a breach of warranty by the seller, the buyer may, at his election, (d) Rescind the contract to sell or the sale and refuse to

¹⁹ Recent Statutes; 10 FORD. L. REV. 123, 124 (1941).

¹ N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. NO. 65(F) (1948).

² Laws of N. Y. 1948, c. 276.

³ N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. NO. 65(F) (1948).

⁴ N. Y. PERS. PROP. LAW § 150.

⁵ *Ibid.*

⁶ N. Y. PERS. PROP. LAW § 151.

receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid, *and damages recoverable in an action for breach of warranty to the extent that such damages are not compensated by recovery of the purchase price paid or discharge of the buyer's obligation to pay the same.*"⁷

At this point it is believed that a brief analysis of a few cases emanating from the common law, and continuing to the time of the enactment under discussion, concerning rescission of the sale of goods for breach of warranty, will enable the reader to more fully comprehend the significance of the change in Section 150 of the Personal Property Law.

In New York at common law, the buyer, after accepting the goods and taking title, could not return the goods to the seller and rescind the contract, but he was forced to rely on his right of action for damages.⁸ This oftentimes left the buyer without adequate relief, for there were many cases where the damages recovered did not nearly compensate the buyer for his injury. Then too there was the possibility that the buyer's right to an action for damages would be extinguished by his acceptance of the goods.

There were several cases where, because of the existence of special circumstances, the buyer was allowed to obtain complete relief. In 1896 a North Carolina case, *Kester Bros. v. Miller Bros.*,⁹ held that in addition to the purchase price, the purchaser was also entitled to the loss sustained by him in attempting to make the purchased property conform to the warranty, where he did so at the special instance and request of the seller. It is to be noted that the damages allowed the buyer were suffered by him at the specific request of the seller. In 1900 a New York court, in *Bruce v. Fiss*,¹⁰ held that where the purchaser rescinded the sale of a horse for breach of warranty, and reserved the right to sue the seller for consequential damages based upon the breach of his warranty that said horse was suitable as a carriage horse, the fact that the buyer returned the horse to the seller did not preclude the purchaser from recovering such consequential damages in addition to the purchase price. It is to be observed that the above recovery was based on the reservation made by the buyer. Shortly thereafter an Iowa court in 1904 rendered a favorable decision for the buyer allowing him to recover damages after rescission of the contract of sale.¹¹ These aforementioned cases indicated a possible trend toward liberalization of the common law rule. Evidently heed was taken of these signs, for the indication was

⁷ Italicized material added. Laws of N. Y. 1948, c. 276.

⁸ *Rust v. Eckler*, 41 N. Y. 488 (1869); *Voorhees v. Earle*, 2 Hill 288, 38 Am. Dec. 588 (N. Y. 1842); *see Muller v. Eno*, 14 N. Y. 597, 601 (1856).

⁹ 119 N. C. 475, 26 S. E. 115 (1896).

¹⁰ 47 App. Div. 273, 62 N. Y. Supp. 96 (2d Dep't 1900).

¹¹ *Berkey v. E. Lefebure & Sons*, 125 Iowa 76, 99 N. W. 710 (1904).

affirmed in New York when the work of progressive residents of the state culminated in the passage of Section 150 of the New York Personal Property Law under the Laws of 1911, Chapter 571.¹² This change in the law of sales in New York is considered one of the most noteworthy ever accomplished.

Under subdivision 1, Section 150, Personal Property Law, prior to amendment, the buyer, once he had accepted the goods, no longer had to rely on an action for damages as was the case at common law, but now was given an election. He could elect to keep the goods and recover damages for breach of warranty, or he could rescind and recover the purchase price paid.¹³ The new act was not to work as well as expected, however, for though it was a great improvement over the common law rule, the buyer in many cases continued to be unable to obtain adequate relief. In *Schmelzer v. Winegar*¹⁴ the court stated that the remedy afforded by paragraph (d) of subdivision 1 of Section 150 of the Personal Property Law for recovery of the purchase price was inconsistent with the remedy for breach of warranty afforded by paragraph (b) of subdivision 1 of said section and the buyer must elect which remedy he desires to pursue. As a result of this construction of the statute, purchasers in New York asking for damages and rescission of the sales contract have been precluded from obtaining complete relief where they have rescinded for breach of warranty, for the courts have maintained that the claims are mutually inconsistent.¹⁵

In illustrating the harm which has resulted to buyers because of an unsuccessful election of a remedy let us commence with a hypothetical case. *B1*, the original buyer, at the time he contracted with *S*, the seller, had previously contracted with *B2*, the resale buyer, to supply *B2* with the goods *B1* received from *S*. The goods *S* sent to *B1* failed to meet the proper specifications. *B1* elected to rescind the contract with *S* and requested in addition to recovery of the purchase price paid *S*, the consequential damages which *B1* had suffered in keeping his obligation to *B2*, which was \$1500 above the price contracted for with *S*. *B1* would only be able to recover the money which he paid to *S*. In *Bennett v. Piscitello*¹⁶ we find that buyers who elect under paragraph (d) of subdivision 1 are entitled only to recover such part of the purchase price as was paid, but are not entitled to damages resulting from the breach of warranty. Here the injustice done to the buyer is quite apparent for Section 150 prior

¹² Laws of N. Y. 1911, c. 571.

¹³ *Joannes Bros. Co. v. Lamborn*, 237 N. Y. 207, 142 N. E. 587 (1923).

¹⁴ 217 App. Div. 194, 216 N. Y. Supp. 507 (4th Dep't 1926).

¹⁵ *Johnson v. International Harvester Co.*, 237 App. Div. 778, 263 N. Y. Supp. 262 (3d Dep't 1933), *app. dismissed*, 263 N. Y. 667, 189 N. E. 748 (1934).

¹⁶ 170 Misc. 177, 9 N. Y. S. 2d 69 (City Ct. of Rochester 1938), *rev'd on other grounds*, 259 App. Div. 964, 19 N. Y. S. 2d 777 (4th Dep't 1940), *aff'd*, 285 N. Y. 584, 33 N. E. 2d 251 (1941).

to amendment protected the seller by limiting the seller's obligation. In another case, where the buyer rescinded and requested in addition to the purchase price paid, damages for removal of coal already delivered, it was stated by the court that the buyer was simply entitled to be paid the money which the buyer had paid to the seller.¹⁷

Some of the more important cases which set precedents for the enactment of the amendment under discussion are herein set forth. In the year 1913 a court in the State of Delaware instructed the jury in *Dietrich v. Badders*,¹⁸ that if they found a proper rescission by the buyer, he would be entitled to recoup in the vendor's action for the purchase price all the expenses of keeping a mare which was the subject of the sale and also all consequential damages suffered as a result of the breach of warranty. New Jersey in 1931 held in *National Sand and Gravel Co. v. R. H. Beaumont Co.*¹⁹ that the buyer of a gravel digging machine was entitled, where there was a breach of an express warranty, to rescind the contract and recover the price already paid, in view of subdivision 1(d).²⁰ The court allowed a further recovery by the buyer for moneys expended in supplying a bin and wiring, in order that the machine might be installed, such expenditure being made with the knowledge of the seller. This holding was somewhat unusual in that it seemed to allow a buyer to rescind a contract for breach of warranty and also to recover damages resulting from the breach. The federal district court in New York has allowed recovery of special damages in addition to restitution in rescission. In 1937 in the case of *Friedman v. Swift and Co.*,²¹ the court permitted recovery of special damages *after* a rescission of the contract for breach of warranty. There a sale of non-kosher meat to a kosher butcher was held to be negligence, for which the injured butcher was entitled to damages for loss of business resulting. This was based on the theory that an action for negligence, not being provided for in Section 69(1) of the Uniform Sales Act respecting remedies available to the buyer on breach of warranty by the seller, does not fall within the prohibition of Section 69(2) of the same Act which provides that when the buyer has been granted a remedy in any manner specified in Section 69(1), no additional remedy may thereafter be granted.

In 1939 on the recommendation of the Law Revision Commission, statutes were enacted abrogating specific application of the doctrine of election of remedies.²² These statutes were Sections 112-a

¹⁷ Kahn v. J. C. Management Corporation, — Misc. —, 59 N. Y. S. 2d 547 (Sup. Ct. 1944).

¹⁸ 27 Del. 499, 90 Atl. 47 (1913).

¹⁹ — N. J. L. —, 156 Atl. 441 (1931).

²⁰ UNIFORM SALES ACT § 69.

²¹ 18 F. Supp. 596 (S. D. N. Y. 1937).

²² N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. NO. 65(F) (1939).

to 112-d of the New York Civil Practice Act.²³ The commission was not to stop here but continued its good work when in 1941²⁴ on the further recommendation of the commission a different rule was enacted in New York in the case of a contract or other transaction rescinded because of fraud or misrepresentation in the inducement. Section 112-e of the Civil Practice Act²⁵ was added, which provides for rescission of the transaction and recovery of damages, and provides also that the claims should not be deemed inconsistent and that the aggrieved party shall be entitled to complete relief, including restitution of the benefits conferred by him as a result of the transaction, and damages to which he is entitled because of the fraud or misrepresentation provided that such relief shall not include duplication of items of recovery.

After the aforestated accomplishments the Law Revision Commission made studies of Section 150 of the Personal Property Law and recommended a change in subdivision 1 of said section. The recommendation was supported by excellent reasoning. The commission believed that the rule governing the buyer's remedy for a breach of warranty in the sale of goods should be harmonized with the principle of Section 112-e of the Civil Practice Act.²⁶ It did not think that the buyer of goods should be required to keep the goods if they did not conform to the seller's warranty, in order to recover the damages he has suffered.²⁷ The commission pointed out that the amendment would conform to the change of rule effected in the new Uniform Revised Sales Act promulgated in 1943. The original Uniform Act, Section 69²⁸ (New York Personal Property Law, Section 150), required the election of remedies as did the New York Act. The revised Act permits the buyer to "revoke acceptance" of the non-conforming goods after title has passed, and to recover damages in addition to the purchase price as if the goods had not been delivered.²⁹

Through the diligent efforts of progressive men and the willingness of a state to have its laws changed to conform to principles of justice, much has been done to alleviate the buyer's problem which has existed under the statute prior to amendment for approximately thirty-six years. It is believed that this amendment to Section 150 of the Personal Property Law will eliminate the many instances where the doctrine relating to election of remedies has been carried

²³ N. Y. CIV. PRAC. ACT §§ 112(a), 112(b), 112(c), 112(d).

²⁴ N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. NO. 65(1) (1941).

²⁵ N. Y. CIV. PRAC. ACT § 112(e).

²⁶ N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. NO. 65(F) (1948).

²⁷ *Ibid.*

²⁸ UNIFORM SALES ACT § 69.

²⁹ N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. NO. 65(F) (1948).

beyond the necessities of the situation and has resulted in substantial injustice to the buyer seeking relief for breach of warranty under a sales contract.

FRANKLIN W. MORTON.

NEW YORK GENERAL BUSINESS LAW—NON-RESIDENT DEALERS—DESIGNATION OF SECRETARY OF STATE AS AGENT FOR SERVICE OF PROCESS.—On February 25, 1948, the New York Legislature added Section 352b to Article 23a of the New York General Business Law.¹ This new section provides that every non-resident dealer under Article 23a, relating to fraudulent practices in respect to stocks, bonds and securities, shall be deemed to have designated the Secretary of State as his agent for the service of process in all proceedings brought by the Attorney General arising out of the affairs and business of such dealer. The provision applies to every person, partnership, corporation, company, trust or association engaged as a dealer in selling securities.

The purpose of Article 23a, popularly known as the Martin Act, is to prevent fraud in the sale of securities and defeat wildcat schemes in relation thereto through which the public might be fraudulently exploited.² The nature of the relief in an action under this article is equitable in character.³ The Martin Act permits the Attorney General to institute an investigation if he believes a fraudulent security transaction is being perpetrated.⁴ Through the medium of a subpoena he may require the production of papers, sworn statements and witnesses during the course of the investigation. If, as a result of the investigation, the Attorney General believes a fraudulent scheme is in operation, he may commence an action to enjoin the dealer from engaging in security transactions.⁵

An action for an injunction, however, must have *in personam* jurisdiction as its basis. If the dealer sought to be enjoined is physically outside the state the purpose of the prohibitory statute may be rendered nugatory unless some procedural method is available to bring the fraudulent dealer within its sanctions. Before the enactment of Section 352b, the Martin Act was deficient in this respect, but with the addition of the new provision for service of process, the statutory omission has now been remedied. The effectiveness of the Act is thus rendered more complete as the boundaries of the state are no longer a protection to unscrupulous non-resident dealers.

Since a non-resident individual may be involved, as well as cor-

¹ Laws of N. Y. 1948, c. 21.

² *People v. Federated Radio Corp.*, 244 N. Y. 33, 154 N. E. 655 (1926).

³ *People v. Riley*, 188 Misc. 969, 64 N. Y. S. 2d 348 (Sup. Ct. 1946).

⁴ N. Y. GEN. BUS. LAW § 352.

⁵ *Id.* at § 353.