

Sales--Right of Recovery for Breach of Implied Warranty of Merchantable Quality of Food (Ryan v. Progressive Grocery Stores, 255 N.Y. 388 (1931))

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erty tax but a tax upon the privilege of exercising the corporate franchise.³ When title to personalty attached to realty remains in the lessee an unpaid tax on lessor's land cannot be declared a lien on lessee's personalty.⁴ Where a statute provides that a tax on personalty shall become a lien on realty only after the owner fails to pay in due time, a lien cannot be asserted on land transferred before the time for payment of the personalty tax.⁵ Taxes assessed on property occupied by a life tenant do not become a lien on property when it passes to the remainderman. Such a tax extends only to the estate of the life tenant.⁶ It appears that the state's position here is tenable only if the Glenbrook Company held legal title to the land. The only possible theory upon which the company could be deemed to possess legal title would seem to be as a trustee. We have seen that this theory is impossible because of statutory enactment.⁷

F. A. D.

SALES—RIGHT OF RECOVERY FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABLE QUALITY OF FOOD.—Plaintiff's wife, acting as his agent, asked for and purchased a loaf of Ward's bread at the defendant's grocery, which was delivered to her wrapped in a sealed package, as it had come from the baker. The loaf had concealed in it a pin which hurt the plaintiff's mouth and he seeks, in this action for breach of warranty, to recover for the injuries sustained. On appeal from a judgment for the plaintiff, *Held*, affirmed. Where merchandise is bought by description, though the choice be determined by the buyer, there is an implied warranty that the goods shall be of merchantable quality, and the breach of such warranty, in view of the special circumstances of the transaction, is sufficient basis for the recovery of consequential damages. *Ryan v. Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105 (1931).

This decision involves the construction of section 96, subdivisions 1, 2 and 4, of the Personal Property Law,¹ and its application

³ *People v. Knight*, 174 N. Y. 475, 67 N. E. 65 (1903); *People v. Miller*, 177 N. Y. 51, 69 N. E. 124 (1903).

⁴ *Armstrong v. Mission Independent School Dist.*, 195 S. W. 895 (1917), *rev'd* (on other grounds) 222 S. W. 201 (1920).

⁵ *McKennon v. Warnick*, 115 Ore. 163, 236 Pac. 1051 (1925).

⁶ *Commonwealth v. Wilson*, 141 Va. 116, 126 S. E. 220 (1925).

⁷ N. Y. Real Property Law, *supra* note 1.

¹ Added by L. 1911, Ch. 571.

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 grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

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

to the sale of food products in the original package as bought by the vendor from others. Under this section, the raising of an implied warranty of fitness depends upon whether or not the buyer informed the seller of the circumstances and conditions which necessitated his purchase of an article, and left it to the seller to select the particular kind or quality suitable for the buyer's use.² The fact that the article is described by a patent or trade name does not conclusively exclude the existence of the implied warranty, or even bring subdivision 4 into operation, the determining factor being whether the buyer relied upon the skill and judgment of the seller to select an article suitable for his needs.³ In applying this doctrine to the sale of food in sealed containers, it has been held that even under such circumstances an implied warranty ensues if the seller's judgment has been trusted for the selection of the brand or make.⁴ On the other hand, if the choice is made by the buyer, the fact that the seller knew of the particular use the buyer had for the article is not sufficient to remove the contract from the operation of subdivision 4 and bring it within the operation of subdivision 1.⁵ This, however, does not preclude an implied warranty of merchantability where the goods are bought by description from one who deals in goods of that description.⁶ The statute does away with the old distinction between sales by a manufacturer and sales by a jobber or dealer and affixes to every sale by description an implied warranty of merchantability.⁷ Recovery has heretofore been allowed in controversies between the dealer and maker,⁸ and the statute has

not), there is an implied warranty that the goods shall be of merchantable quality. * * *

4. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

² 1 Williston, Sales, (2nd ed. 1924), Sec. 242a. *Rinaldi v. Mohican Co.*, 225 N. Y. 70, 121 N. E. 471 (1918).

³ *Ibid.*, Secs. 242, 236a.

⁴ *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N. E. 225 (1918); *Ireland v. Liggett Co.*, 243 Mass. 243, 137 N. E. 371 (1922); *Lieberman v. Sheffield Farms*, 117 Misc. 531, 191 N. Y. Supp. 593 (1921).

⁵ *Supra* notes 2 and 3.

⁶ *Supra* note 1, Subd. 2; *Aron & Co. v. Sills*, 240 N. Y. 588, 148 N. E. 717 (1925), *aff'g* 221 App. Div. 21, 206 N. Y. Supp. 695 (1924); *Inter-State Grocer Co. v. Bentley Co.*, 214 Mass. 227, 101 N. E. 147 (1913); *Parker v. Shaghalian & Co.*, 244 Mass. 19, 138 N. E. 236 (1923); *McNeil & Higgins Co. v. Czarnikow-Rienda Co.*, 274 Fed. 397 (1921). "Subdivision 4 has clearly nothing to do with the question; it touches only the warranty of fitness defined in subdivision 1, and that, too, when the sale is of a 'specified' article. The warranty here is of merchantability, and the two are not to be confused." *McNeil case, supra* at p. 400.

⁷ 1 Williston, Sales, *supra* note 2, Sec. 233.

⁸ *Hargous v. Stone*, 5 N. Y. 73 (1851); *Hoe v. Sanborn*, 21 N. Y. 552 (1860); *Bartlett v. Hoppock*, 34 N. Y. 118 (1865); *Carleton v. Lombard, Ayres Co.*, 149 N. Y. 137 (1896); *Bierman v. City Mills Co.*, 151 N. Y. 482 (1897); *Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, 99 N. Y. Supp. 163 (4th Dept. 1906).

extended liability to all vendors regardless of whether or not they prepared the goods or knew of its contents.⁹ In the principal case, though the choice of merchandise was made by the buyer and was delivered to him in its original sealed package, recovery was allowed under subdivision 2. Responsibility was thus placed upon the party to the contract best able to protect himself against a wrong of this type and to recoup himself, in case of loss, against the manufacturer. Since from the nature of the transaction the dealer could readily foresee the injurious consequences for a breach of his obligation, the buyer is not limited to the recovery of the difference in value of a good loaf and a bad one but is entitled to consequential damages.¹⁰

R. L.

TRUSTS—REVOCATION UNDER SECTION 23 OF THE PERSONAL PROPERTY LAW.—Plaintiff, by deed of trust conveyed her personal property to the defendants. She directed them to pay the income arising therefrom to her for life and on her death to certain named beneficiaries. The settlor also provided that if the income was insufficient for her support the trustees had the power to apply as much of the principal as necessary for her well-being. *Held*, that such a trust was irrevocable under section 23 of the Personal Property Law notwithstanding the insertion of such a provision in the deed. *McKnight v. Bank of N. Y. and Trust Co.*, 254 N. Y. 417, 173 N. E. 568 (1930).

Under the present statute a trust of personalty is revocable by the creator thereof only upon the consent of all the persons beneficially interested therein.¹ Any interest which is alienable, descendable, or devisable is a beneficial interest.² A vested or contingent remainder is alienable.³ Hence, one possessing such a remainder is beneficially interested, and so it has been held.⁴ Where he is the sole beneficiary it is revocable, since there is no outstand-

⁹ *Supra* note 7.

¹⁰ N. Y. Personal Property Law, Sec. 150, Subds. 6 and 7; 2 Williston, Sales, *supra* note 2, Secs. 614, 614a; *Swain v. Schieffelin*, 134 N. Y. 471 (1892); *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696 (1887); *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785 (1916).

¹ Revocation of trusts upon consent of all persons interested. Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.

² *Robinson v. N. Y. Life Insurance Co.*, 75 Misc. 361, 133 N. Y. Supp. 257 (1911).

³ *New York Security v. Schoenberg*, 177 N. Y. 556, 69 N. E. 1128 (1904).

⁴ *Whittemore v. Equitable Trust Co.*, 250 N. Y. 298, 165 N. E. 454 (1929).