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Contracts and Sales

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CONTRACTS AND SALES

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The case of principal interest for this survey period in both Contracts and Sales is *Joseph v. Sears Roebuck & Company.*[1] This circumstance, coupled with a paucity of other cases of significance in these two fields, suggests the appropriateness of giving a combined treatment, which is done. The plaintiff in the *Sears* case purchased a pressure cooker in January 1949 from Sears Roebuck & Company at its Greenville, South Carolina, store. She used this utensil regularly and with considerable culinary success until November 23, 1950. While cooking Thanksgiving dinner on that day, it exploded and as a result plaintiff was burned, her electric stove demolished and the house considerably damaged. Plaintiff sued for damages for breach of alleged oral warranty with respect to the safety of the pressure cooker made at the time of purchase, and the trial resulted in a verdict for the plaintiff in the sum of $2,500.00. The opinion of the appellate court contains a number of things of interest touching on the Statute of Frauds, on the one hand, and relating to warranty in connection with the sale of goods on the other.

Among the representations which plaintiff alleged were made to and relied upon by her at the time of the sale, were that Sears' saleslady stated that the pressure cooker was "safe in every respect" for use in cooking; "that there was no danger whatsoever" in using it; and that in view of the safety devices thereon, "no explosion was possible." In support of these allegations in the complaint, plaintiff testified that she had heard conflicting reports as to the safety of pressure cookers, and specifically inquired whether there was any danger of such utensil exploding; to which the saleslady replied: "There is no possible danger in these things exploding." She further testified that the saleslady told her that it was impossible for the cooker to "blow up" because Sears had a device

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1. 224 S.C. 105, 77 S.E. 2d 583 (1953).

on it that would go off at 35 lbs. pressure, that there was no way, shape or form for it to explode. She said that she was wholly unfamiliar with pressure cookers and relied on the foregoing representations and warranties in making the purchase.

It seems that Miss Fowler, from whom plaintiff made the purchase, was the head of Sears' pot department, and had been in the pressure cooker department for 10 to 12 years. She testified that she was unable to say whether she had sold the particular cooker in question to plaintiff, but that if she did, she didn't make any such representations concerning its safety; that she had never at any time made any verbal guarantee concerning any one of these cookers, although she had sold hundreds of them; that on the contrary she always handed each purchaser a booklet containing instructions on how to use the cooker and told them to carefully read the instructions in the book.

One of these instruction books was introduced in evidence and it contained a written guarantee which limited the obligation of Sears "to making good at our factory any defective part or parts thereof which shall, within three months after delivery of such cooker to the purchaser, be returned to us." The guarantee specifically stated that no person was authorized to make any other or different guarantee or assume any other liability in connection with the sale of the cooker.

In endeavoring to recover upon the alleged oral warranty as to the safety of the pressure cooker, plaintiff was faced with several formidable obstacles, to wit: (a) the printed, written warranty which purported to be exclusive; (b) the problem of whether the alleged oral warranty was invalid because it related to the sale of goods and was not in writing; and, (c) as more than a year had elapsed since the sale, was the oral warranty inadmissible under that section of the Statute of Frauds which requires to be in writing agreements not to be performed within one year of making?

(a) With respect to the guarantee in the printed book of instructions asserted by Sears to accompany each Sears pressure cooker, the trial court charged the jury that the limitation of liability against defects contained in the printed guarantee would not be binding upon the purchaser unless her attention had been called to it at the time of purchase, and that the purchase must have been made with the knowledge of such guarantee in order for the cooker to have been sold on a writ-

ten warranty. The Supreme Court upheld this charge. The jury, of course, resolved this point in favor of the plaintiff, thus finding that the written guarantee in the instruction book was not called to plaintiff's attention when she bought the cooker. Although plaintiff testified that she was not given the booklet at any time and never read it, defendant offered testimony to show that she was bound to have had the benefit of instructions contained in the booklet or she could not have operated the pressure cooker successfully over so long a period of time. All of this went merely to the credibility of the witness, for it would have made no difference if the plaintiff had seen the printed guarantee immediately upon reaching home, since the Court held that the printed guarantee did not preclude reliance upon the oral warranty unless called to the plaintiff's attention at the time of purchase.

(b) Actually, the question of whether a warranty made in connection with the sale of goods is so much an integral part of such sale as to be required to be in writing if the price be $50.00 or more, was not involved in this case since the plaintiff paid $16.95 cash for the pressure cooker. However, the Court considered the question on appeal and concluded that warranties in sale of personal property need not be in writing to be valid. II, MECHEM ON SALES, Sec. 1253, is quoted as follows:

> A warranty, as such, is not required to be in writing. Even though the value of the goods was such as might have brought the contract of sale within the scope of the Statute of Frauds, the oral warranty will suffice. The defendant, of course, may contend that there was no *sale* because the Statute was not complied with; but if there was a valid sale, as where, for example, there has been a delivery and acceptance sufficient to satisfy the Statute, it is not necessary for the warranty to be in writing.

Other authorities were quoted to like effect.

(c) Before addressing itself to the question of whether the oral warranty was within the fifth provision of the fourth section of the Statute of Frauds as being an agreement not to be performed within the space of one year from the making thereof, the Court first toyed with the question as to whether a warranty in connection with the sale of goods constitutes a *promise* of some *act* to be performed by the seller which is within contemplation of the Statute. "Or does such a war-

ranty," says the Court, "mean that the promisor is not to do any act upon the happening of the event warranted against, but upon such happening liability arises by law without any act to be performed on his part?" These are labeled as "interesting questions" which the Court did not undertake to decide, preferring to assume that the warranty involved in this case is an agreement of such a nature as to be within the contemplation of the Statute.

Consideration is then given to whether performance of the warranty might be called for within one year from the date of purchase, and thus a writing not be required. Sears' witnesses testified that in ordinary use the pressure cooker would have a life of from 10 to 15 years. Mr. Justice Oxner, who wrote the majority opinion, felt that since the seller might be called upon to make good under its warranty within less than one year from date of purchase, the warranty was not within the terms of the Statute. On the other hand, Mr. Chief Justice Baker, dissenting, felt that the contract of warranty does not terminate by reason of the happening of the accident, but continues in effect during the contemplated life of the cooker. Mr. Justice Oxner thought it "far fetched" to say that the parties contemplated that there might be repeated explosions and a series of injuries resulting therefrom. He thought it more reasonable to suppose that they thought an explosion would result in the destruction of the cooker, and if this happened within one year, that would end the warranty. He points out that the warranty is not one to keep the utensil in repair but to indemnify plaintiff against loss by explosion, and that if for any cause the cooker were damaged beyond repair, sold, or abandoned, the warranty would be at an end.

Both majority opinion and dissent faced the problem of what the intent or expectation of the parties is with respect to performance within a year or a greater period of time. The former says:

> If there is a possibility of performance within a year the agreement is not within the Statute. The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the scope of this clause.

Reference is then made to the well known cases in which performance ceases upon the death of a party and which are held not to be within the Statute. Distinguished are *Jones v. Mc-*

Michael[2] and *Roland & Sons, Inc. v. Bock*,[3] the Court saying that in these cases the parties "necessarily contemplated that performance would take more than a year." The facts seem to make the difference in cases of this sort, the rule being that even though the parties expect that performance will continue beyond a year, the contract is not within the Statute, if under any contingency performance may be completed within one year.

The opinion notes in passing that South Carolina follows the civil law rule that in the sale of goods a sound price warrants a sound article; but this implied warranty of quality was not involved in this case since the plaintiff elected to sue upon an oral express warranty. And this express warranty that the cooker "was safe in every respect" and "could not explode," relieved the plaintiff of the necessity of showing that some specific defect in the article brought about the explosion, or of excluding all other reasonably possible causes for the explosion not attributable to such defect, such as misuse, abuse, failure to properly maintain the utensil, etc. In other words, but for the oral express warranty that the cooker would not explode, the mere fact of the explosion would not make out a case of breach of implied warranty of quality since, as the Court points out, the doctrine of *res ipsa loquitur* does not apply in South Carolina.

It may come as something of a surprise to a housewife who, as in the case of Mrs. Joseph, purchases a pressure cooker which while in use explodes with such force as to completely demolish the electric range on which it is being cooked, greatly damage the kitchen and toss the hen and other contents of the cooker upon the person of the housewife—who is then told that these events do not prove that the pressure cooker has failed to live up to the implied warranty that a sound price warrants a sound article. If she doesn't want to have to prove that this incident occurred through a defect in manufacture, she had better take the precaution that Mrs. Joseph did and procure a warranty that the pressure cooker will not explode.

On the other hand, Mr. Chief Justice Baker, in his dissent, feels very strongly that the decision of the Court in this case puts the seller of manufactured goods wholly at the mercy of the buyer "by upholding verbal agreements that can so

2. 12 Richardson 176 (1859).
3. 150 S.C. 490, 148 S.E. 549 (1927).

readily be formulated out of thin air to accomplish the ends of a given suit." He states that for half a century or more, American industry has been producing household gadgets and other mechanisms of all sorts, which in at least a limited sense are dangerous instrumentalities and the use of which involves the taking of precaution on the part of the purchaser to avoid accidents and injuries. He believes that the Statute of Frauds should be interpreted so as to protect the manufacturer or seller in limiting his liability to the printed warranty.

The Chief Justice goes on to say that if the seller in this case did make any representations respecting the risks of an explosion in the utensil in question, common knowledge as to the risks of an explosion in such a utensil through neglect in the maintenance or operation of the same is such that no reasonable person should be held to have bought the utensil on the strength of the representations. "The seller's sales talk in such a case should be regarded as mere puffing, or the normal exaggeration of dealer's talk."

"People don't have to be learned in the law," quotes the Chief Justice, "to know that if they want more protection than my opinion would give them, they should ask for a written warranty. One was available in this case."

Leaving the *Sears* case, two cases of this period involved the perennial question of when punitive damages may be assessed in connection with the breach of a contract. South Carolina, as is generally known, does permit punitive damages where a breach of contract has been accompanied by a fraudulent act, as early held in the case of *Welborn v. Dixon.*[4] In *Collopy v. City Bank of Darlington,*[5] the complaint alleged that one Hall, acting as agent for plaintiff, deposited in defendant bank checks payable to International Raceways Programs, which funds were the property of plaintiff; that on July 24, 1950, plaintiff learned that his agent Hall was exceeding his authority and misusing the funds, whereupon the defendant informed the defendant bank that the funds deposited were his property and requested the bank to hold the remainder of the deposit for one hour in order that plaintiff should have time to prove the legality of his claim to the funds; it is then alleged, instead of granting the plaintiff this sixty minute grace period, the bank paid over the balance of the account, $550.23, to Hall, who immediately absconded with

4. 70 S.C. 108, 49 S.E. 232 (1904).
5. 223 S.C. 493, 77 S.E. 2d 215 (1953).

the money. After construing the complaint as being one in contract and not in tort, the Supreme Court held that all references to punitive damages should be stricken from the complaint. Mere wilful violation of a contract does not entail upon the obligor liability for punitive damages, said the Court, and it could find no fraudulent act accompanying the alleged breach of depositor's contract.

The above case is another illustration that it is seldom that we have punitive damages upheld in connection with a breach of contract, except in an insurance case. And *Yarborough v. Bankers Life & Casualty Co.*,[6] likewise decided this year, is another insurance case in which a fraudulent act was found to accompany breach of contract, though this writer is not entirely clear in his own mind as to just what the Court considered to be the fraudulent act.

A monthly hospital policy was renewable from month to month at the option of the Company, to be indicated by acceptance of premium for the succeeding month. After plaintiff's wife, who was included as an assured, suffered an illness necessitating hospital treatment, for a condition which apparently would recur in the future, the insurer attempted to have the insured accept a rider limiting the wife's coverage. Correspondence concerning this matter did not produce results satisfactory to either party, and the Company wrote the insured that his policy was cancelled. Certain premium payments were refunded, additional ones refunded after a lawyer was procured, and the Court found that still more should have been refunded—that is, $7.50. The Court reiterated the rule that punitive damages are not recoverable for a mere refusal to pay a debt, and admitted that if considered separately, some of the actions by the insurer might not be evidence of bad faith, but thought that "all the circumstances considered together reasonably warrant an inference of breach of contract accompanied by fraudulent acts." Since the failure to refund the premium cannot be a fraudulent act, the only other acts left in this series of events were: (1) the failure to send notice of premium due and (2) the acceptance of additional premium payments after the policy had been cancelled. Incidentally, the Supreme Court in this case upheld the jury's verdict for $1,000 punitive damages in connection with a mere $7.50 actual damages.

6. 81 S.E. 2d 359 (S.C. 1954).

In other random Contracts cases, the Supreme Court, in *State* ex rel. *Callison v. National Linen Service Corporation*,[7] held that the state statute avoiding all contracts or combinations that might affect full and free competition[8] does not apply to a case where only one corporation and its employees are concerned; otherwise, said the Court, two employees of a corporation, in giving thought to how they might reduce the price of its products, might be caught in the snares of the statute. In other words, it not only takes two to conspire, but the two must represent separate entities or individuals to violate the restraint of trade statutes.

Hinson v. Catawba Ins. Co.[9] is an insurance case decided upon the contract principle that where there is no meeting of the minds of insurer and insured as to the property to be covered in the policy, there is no contract. The insured lived in Laurens County and owned a cottage at Folly Beach, near Charleston, South Carolina. He wrote to an insurance agent in Charleston that he would like to insure his house at "507 W. Ashley Avenue." The agent wrote for additional information as to type of construction and occupancy and thereupon issued a policy insuring the building at the named street address in "Charleston, South Carolina" and not "Folly Beach . . . ." The first that the agent knew of the property's being located at Folly Beach was after the fire, and it was only when he got out his policy and read it on that occasion that the insured realized that the property was described as being in Charleston. The insured was awarded a refund of premium only.

A final case in the Contracts group relates to calculation of liquidated damages in a building contract. In *Austin-Griffith, Inc. v. Goldberg*,[10] the building contractor abandoned the job in September, the contract having required completion on or about July 15. The owners took possession on October 4 and proceeded to complete the job themselves by October 21. The contract provided for liquidated damages of $50.00 per day, but the contractor argued that a provision for liquidated damages applies only for delay in completing a job and does not have any application when the contractor abandons the job. The Court cites WILLISTON ON CONTRACTS[11] as approving such

7. 81 S.E. 2d 342 (S.C. 1954).
8. CODE OF LAWS OF S. C., 1952, § 66-51.
9. 224 S.C. 227, 78 S.E. 2d 235 (1953).
10. 224 S.C. 372, 79 S.E. 2d 447 (1953).
11. Rev. ed., Vol. 3, § 785.

a view, but adopts a contrary view, at least "where the contractor abandons his work after the date fixed in the contract for completion." This was in line with the majority decision in *National Loan and Exchange Bank of Greenwood v. Gustafson.*[12] The Court expressly declined to intimate what its opinion would be in a case where the contractor abandoned the job prior to the date due for completion. In other aspects of the case, the Court held that liquidated damages per day, as set forth in the contract, should be applied, not only to the days past the completion date up until the date the contractor abandons the job, but should also be applied for such additional days as required for owner to complete performance, with the restriction, of course, that the owner proceed with due dispatch. In another element of the case, involving a claim that the delay was due to the fault of the owners, the Court held that this defense was not available since the contract provided for an extension of time in the event delay was occasioned by fault of the owners, if written notice was given by the contractor that he needed such additional time on that account. No such written notice was given in this case and the Court held that requirement to be a condition precedent to taking advantage of that defense.

12. 157 S.C. 221, 154 S.E. 167 (1929).