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NOTES

PARALLEL TRENDS IN THE DEVELOPMENT OF
SALES AND QUASI-CONTRACT

By

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The cornerstone of the Law of Sales under the common law was the doctrine of *caveat emptor*. I say "was" because the doctrine has been constantly whittled down in Anglo-American jurisprudence. The watering down of the doctrine has been accomplished by both judicial decisions and legislation such as sections 13-16 of the Uniform Sales Act dealing with implied warranties. *Caveat emptor* in Sales is analogous to assumption of risk in Delict. What the Uniform Sales Act has done to the doctrine of *caveat emptor* is analogous to what the Workmen's Compensation Acts have done to the doctrine of assumption of risk. The substitution of much of *caveat emptor* with implied warranties and of assumption of risk with Workmen's Compensation is analogous to the superseding of the common law contract rule that a gaming contract is void as against public policy with the concept of insurance.

The cornerstone of the Law of Sales under the Civil Law is the doctrine of *lesion*. The principal difference between *caveat emptor* and *lesion* is that the former is the commercial ramification of *laissez faire* while the latter is the commercial representation of a governmentally-regimented society. The practical result of this difference in the Law of Sales is that under the common law buyer and seller deal at arm's length while under the Civil Law the parties occupy an artificial fiduciary relationship toward each other. Consequently, common law sales is more conducive to expeditions trading than its Civil Law counterpart. This individualistic tendency of the common law and socialistic tendency of the Civil Law is also illustrated by the treatment the two systems accord the Law of Wills. Under the common law a man has complete power of disposition by will even though should he exclude his wife and children in the terms of his will there is the rebuttable presumption of captation and suggestion, aberration of intellect, etc. However, the doctrine of forced heirship prevails under the Civil Law.

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Some of the leading cases cutting down *caveat emptor* might well be mentioned. Lord Chief Justice Holt of the Court of King's Bench in *Medina v. Stoughton*¹ annexed a warranty of title to a sale by a vendor who was in possession. Chief Justice Abbott of the Court of King's Bench in *Gray v. Cox*² annexed an implied warranty that goods are reasonably adapted to the purpose for which they are purchased.

Judge Finley of the Court of Civil Appeals of Texas in *Norris v. Parker* in 1896 made the following significant statement: ". . . wherever it can be shown that the buyer relied absolutely upon his warranty and made no attempt to exercise his own judgment in the determination of the value and quality of the goods, the warranty will cover obvious, as well as hidden defects."³ Mr. Justice Hooker of the Supreme Court of Oklahoma in *Wallace v. L. D. Clark and Son* in 1918 quoted with approval from 35 Cyc. 214 the following statements: "Although, in the absence of a definite agreement as to quality, no particular quality will be implied, and the seller is not bound to furnish goods of the best quality, yet he cannot fulfill his contract by furnishing articles of the poorest quality, but must at least furnish articles of a fair average quality, and such as are merchantable. The mere fact that the value of the goods is not equal to the price paid is immaterial."⁴ Mr. Chief Justice Wilson of Minnesota stated in *Bekkevold v. Potts* in 1927 that: "The doctrine of implied warranty should be extended rather than restricted."⁵ The same jurist declared in *Iron Fireman Coal Stoker Company v. Brown* in 1931 that: "The doctrine of implied warranty is to be liberally construed."⁶ And Judge Hale of the United States Court of Appeals for the First Circuit in *Barrett Company v. Panther Rubber Manufacturing Company* in 1928 held that: ". . . where there is a sale of a known, described, and defined article, and if that article is in fact supplied, there is no implied warranty of fitness for a particular purpose. We think the rule applies only to goods known in the market and among those familiar with that kind of trade by that description."⁷

Analogous to both *caveat emptor* and assumption of risk is the quasi-contract rule that one may not recover money paid under a mistake of law, first announced by Lord Chief Justice Ellenborough of the Court of King's Bench in *Bilbie v. Lumley*.⁸ But just as *caveat emptor* and assumption of risk both have been whittled down so too has Lord Ellenborough's rule in the United States by judicial decision in Connecticut and Kentucky and by statute in California,⁹ Montana,¹⁰ North

¹ 1 Salk. 210, 1 Ld. Raym. 593.

² 4 Barn. & C. 108, 115.

³ 15 Tex. Civ. App. 117, 38 S. W. 259 (1896).

⁴ 74 Okl. 208, 174 P. 557, 21 A. L. R. 361 (1918).

⁵ 173 Minn. 87, 216 N. W. 790, 39 A. L. R. 1164 (1927).

⁶ 182 Minn. 399, 234 N. W. 685 (1931).

⁷ 24 F. 2d 329 (1928).

⁸ 2 East 469.

⁹ DEERING'S CAL. CIV. CODE, div. 3, part 2, tit. 1, chap. 3, §§ 1567, 1576, 1578 (1949).

¹⁰ MONT. REV. CODES ANN., vol. 2, tit. 13, chap. 3, §§ 3, 12, 14 (1947).

Dakota,¹¹ Oklahoma,¹² and South Dakota.¹³ In 1849 Mr. Chief Justice Church of Connecticut stated in *Northrop's Executors v. Graves*: "That a party may not urge his ignorance of the law as an excuse or palliation of a crime, or even of a fault, we may admit; that he may not, by reason of such ignorance, or mistake, obtain any right or advantage over another, we may admit; but we do not admit, that such other may obtain or secure an unjust advantage over him, by reason of his ignorance or mistake, even of the law. We agree, that men should not complain of the consequences of their deliberate and voluntary acts; but we do not agree, that acts performed under the influence of essential and controlling mistakes, are voluntary, within the meaning of the maxim referred to (*Volenti non fit injuria*). And we say, that neither maxims of law (*Ignorantia legis non excusat*), nor fictions of law, should be so applied, as to work manifest injustice."¹⁴

In 1886 Mr. Justice Holt of the Court of Appeals of Kentucky declared in *McMurtry v. Kentucky Central Railroad Company* that: ". . . in the case now before us no question was raised at the time as to the right of the claimant to interest; and if, in fact, he was not entitled to it, then it is manifest that it was paid under a mistake of law, and without consideration; and not being due either in law or conscience, the law will not allow him to retain it. This rule is so well settled in this State that it is no longer a question whether a recovery can be had where money has been paid, without consideration, either under a mistake of law or fact, and which was not owing in law or conscience, nor the result of compromise."¹⁵

A case involving the application of the Montana statute was *Hicks v. Stillwater County* in 1928, in which Mr. Justice Matthews of the Supreme Court of Montana held as follows: "Chapter 8, Part V (Civ. Code) Revised Codes of 1921, deals with 'consent' as an element of contract, and among other requirements, declares that the consent of the parties must be 'free' (§ 7473); it being not free if obtained through mistake (§ 7475), which may be either of fact or law (§ 7484). 'Mistake of law constitutes a mistake, within the meaning of this chapter, only when it arises from: 1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law.' (§ 7486). The allegations of the complaint bring this case squarely within these provisions, which warrant a rescission of the contract for mutual mistake and should justify recovery herein."¹⁶

A case involving the application of the North Dakota statute was *Gjerstandengen v. Hartzell*¹⁷ in 1900. Another case involving the application of the North

11 N. D. REV. CODE, vol. 1, chap. 9, §§ 3, 12, 14, chap. 10, § 5 (1943).

12 OKL. STAT. ANN., tit. 15, chap. 1, §§ 53, 62, 64 (1937).

13 S. D. CODE, vol. 1, tit. 10, chap. 10, §§ 3, 11, 13 (1939).

14 19 Conn. 548, 560 (1849).

15 84 Ky. 462, 465, 1 S. W. 815 (1886).

16 84 Mont. 38, 49, 50, 274 P. 296, 300, 301 (1928).

17 9 N. D. 268, 83 N. W. 230 (1900).

Dakota statute was *City of Bismarck v. Burleigh County* in 1922, in which Mr. Justice Robinson of the Supreme Court of North Dakota ruled as follows: "However, the claim was presented in good faith and it was paid under a mistake of the law, each party believing that the city was liable for the same. The payment was made under a misapprehension of the law by all parties, all supposing that they knew and understood it and all making substantially the same mistake as to the law. Hence, under the statute it was not a free and voluntary payment. Section 5855. The city was under no legal or moral obligation to make the payment and its officers had no legal or moral right to donate or give away the money of the city."¹⁸

In the words of Sir William R. Anson, "Quasi-contract is the very field where, as Lord Mansfield saw, the law is most rapidly expanding to include new moral obligations as soon as they become settled in the mores of society."¹⁹ Thus, in all probability additional states will reject the *Bilbie v. Lumley* rule in accordance with the precedent first established by Connecticut one hundred and one years ago.

¹⁸ 49 N. D. 205, 206, 207, 190 N. W. 811, 812 (1922).

¹⁹ ANSON ON CONTRACT, N. Y., 1930, Oxford Univ. Press, p. 596.