North Dakota Law Review

Volume 31 | Number 2 Article 12

1955

Sales - Remedies of Buyer - Election of Remedies

Roy A. Olson

ing opinion pointed out that the ordinary meaning of the word "accident" may include many injuries and any number of collisions. To illustrate this, the following report from the New York Times was cited: "Two persons were killed, seven persons were injured and twenty-seven vehicles, including a bus and three trucks, were damaged today in four accidents on a fog-shrouded, half-mile section of the New Jersey Turnpike. The four accidents occurred within twenty minutes. . . ."[9]

For years insurance companies have used the words "one accident" or "each accident" to limit liability. The standard automobile liability policy limits coverage to a fixed amount for bodily injuries to "each person", a larger amount for all bodily injuries resulting from "each accident" and a fixed amount for property damage resulting from "each accident".[10] Obviously, when used with reference to bodily injury, the phrase, "each accident" must necessarily contemplate the inclusion of injuries to more than one individual since, if the injury to each person were viewed as a separate accident, the higher limit would become meaningless. It is submitted that the intention of the parties, when using the word "accident", is to include injury or damage to as many individuals as may be involved in one general catastrophe or mishap, so long as the injuries flow from a common act of negligence, provided a substantial amount of time has not intervened between injuries. It is the ordinary meaning of the word that must control in seeking the intention of the parties.[11] Given an ordinary interpretation, then, a single *accident* will include the damage to two vehicles when they collide although the property of two individuals is damaged. The press and radio, with their great influence on the language, have accorded such a meaning to the word and there is little apparent reason for attaching a different meaning when it is used in an insurance policy.

JON N. VOGEL

SALES — REMEDIES OF BUYER — ELECTION OF REMEDIES. — Plaintiff, a candy manufacturer, purchased pecans from defendant and used some of them in candy. The defective condition of the pecans was discovered after some candy had been returned by customers. Plaintiff, upon suggestion of Defendant, returned the unused pecans in exchange for enough usable pecans to make up the deficiency. Plaintiff then sued for damages for the loss of the value of the candy in which the defective pecans were used and for the loss of prospective profits and good will resulting from sale of the candy containing the defective pecans. Defendant contended Plaintiff had

9. Instant case at 589 (dissenting opinion).

10. 4 Richards, Law of Insurance 2083, 2084 (5th ed. 1952) (A reprint of the Standard Automobile Policy Garage Liability).

11. Instant case at 590 (dissenting opinion) "Since 1891 the word 'accident', certainly in relation to highway disasters, has acquired a very definite meaning in the United States."; Perkins v. Fireman's Fund Indemnity Co., 44 Cal. App. 2d 427, 112 P.2d 670, 672 (1941) "Obviously, the words 'one person' refer to the injured person, and the words 'one accident' to the inury of several persons, regardless of how many may suffer loss by reason thereof."; Wilderman v. Watters, 149 Neb. 102, 30 N.W.2d 301, 303, 304 (1948) "The cardinal rule in the interpretation of a contract is to ascertain the intention of the parties, and to give effect to such intention if it can be done consisently with legal principles. In construing contracts the court's sole duty is to ascertain what was meant by the language of the instrument."

elected one remedy accorded by statute for breach of warranty and was therefore barred from claiming another remedy. The Minnesota statute provided, "when the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted".[1] The district court granted defendant's motion for summary judgment. On appeal it was *held* that the return of the unusable pecans in exchange for salable pecans did not show, as a matter of law, an election of remedies and an intended recission of the purchase contract which would preclude an action for damages. There was a genuine issue of material fact which precluded summary judgment. *Abdallah v. Martin*, 65 N.W.2d 641 (Minn. 1954).

As a conceptual and practical matter this decision seems sound. North Dakota, under the Uniform Sales Act, has a statute similar to that cited in the instant case.[2] It provides that the buyer upon a breach of warranty may "at his election" keep the goods and deduct compensation for the defect from the contract price, sue for damages for breach of warranty, reject the goods if title has not passed and sue for damages or rescind the contract of sale and recover what has been paid. It similarly provides that claiming one remedy precludes resort to any other. This type of statute has been criticized on the ground that it embodies the principle that rescission as to the passage of title also constitutes a rescission of the purchase contract, thus making it impossible for a buyer to recover consequential damages for the breach of that contract.[3]

Although authorities are not in agreement as to what acts will constitute an election,[4] it is stated that any decisive act of a party with knowledge of his rights and the facts, indicating an intent to pursue one remedy rather than another, constitutes an election.[5] However, the act itself must not be equivocal or ambiguous in nature.[6]

A parallel problem arose in Maryland where a buyer of defective hair lacquer pads was allowed to maintain an action for damages, notwithstanding the return of the unused portion of the goods for which credit was given.[7] It was aptly stated in the concurring opinion that, "rescission of a Roebuck & Co., 24 N.J. Super. 295, 94 A.2d 348, 352 (1952).
contract, like making a contract, is a matter of intention. . . ." In another case involving a buyer who had rejected a final shipment of defective boots it was held there was not necessarily a rescission of the purchase contract precluding recovery of consequential damages directly resulting from breach of warranty.[8] Where a buyer had returned defective jellies, claiming only damages for breach of warranty and indicating no intention to rescind, it was held there had been no election to rescind which prevented recovery of con-

1. Minn. Stat. §512.69(2) (1953).
2. N. D. Rev. Code §51-0170 (1943).
3. See Llewellyn, *On Warranty of Quality and Society*, 37 Col.L.Rev. 341, 390 (1937); Rogge, *Damages Upon Rescission for Breach of Warranty*, 28 Mich.L.Rev. 26, 40 (1929); 43 Harv.L.Rev. 328 (1929).
4. Armour & Co. v. Lambdin, 154 Fla. 86, 16 So.2d 805, 810 (1944).
5. Strong v. Reeves, 280 App. Div. 301, 114 N.Y.S.2d 97 (Sup.Ct. 1952); Lumber Mut. Cas. Ins. Co. of New York v. Friedman, 176 Misc. 703, 28 N.Y.S.2d 506, 509 (Sup.Ct. 1941).
6. Barry v. Cronin, 272 Mass. 477, 172 N.E. 595 (1930) (intention to rescind not displayed in unequivocal and unqualified manner); Walter-Wallingford Coal Co. v. A. Himes Coal Co., 223 Mich. 576, 194 N.W. 493 (1923).
7. Russo v. Hochschild Kohn & Co., 41 A.2d 600 (Md. 1945); *cf.* Marko v. Sears,
8. Gotham Nat. Bank of New York v. Sharood Co., 23 F.2d 567 (2nd Cir. 1928).

sequential damages.[9] The opposite view is characterized by a Nebraska case holding that "when plaintiff returned shoes and received payment for the purchase price, it was an irrevocable election to rescind, and her statement that she would see the defendants later about her injuries was ineffectual to modify or disaffirm her election to rescind." [10]

The doctrine of election of remedies has been said to rest upon the principle "he who seeks equity must do equity".[11] In a United States Supreme Court decision it was stated that the doctrine of election of remedies was a harsh and largely obsolete rule, the scope of which should not be extended.[12] In the Uniform Commercial Code there is no mention of "election" of any sort.

Section 2-608 of the Uniform Commercial Code eliminates the requirement that the buyer must elect between rescission and recovery of damages for breach of warranty. The remedy under this section is simply referred to as "revocation of acceptance".[13] Under this principle the buyer may not only revoke passage of title but may also recover damages for non-delivery.[14] The measure of damages for non-delivery is "the difference between" the market price "at the time the buyer learned of the breach and the contract price together with incidental and consequential damages".[15] Incidental damages includes expenses incurred in the "handling of rejected goods" and consequential damages include "injury to person or property proximately resulting from any breach of warranty".[16] This would include the damages asked in the instant case.

In view of the materials discussed it appears that the mere return of defective goods purchased does not raise a conclusive presumption of an intended rescission which would prevent an action for damages.

ROY A. OLSON

WORKMEN'S COMPENSATION — ACCIDENTS "ARISING OUT OF EMPLOYMENT" — IDIOPATHIC FALLS. — Plaintiff, who suffered from epilepsy, was going about his customary duties in defendant's factory when he experienced a seizure which caused him to fall and strike his head on the concrete floor, thus incurring a cerebral concussion. The Division of Workmen's Compensation granted an award in favor of the claimant. On final appeal to the Supreme Court it was *held,* three justices dissenting, that the award be set aside. The concrete floor of the plant did not consti-

9. Bagwell v. Susman, 165 F.2d 412 (6th Cir. 1947).
10. Henry v. Rudge & Guenzel Co., 118 Neb. 260, 224 N.W. 294, 296 (1929).
11. Peters v. Bain, 133 U.S. 670, 695 (1889).
12. Friederichsen v. Renard, 247 U.S. 207 (1918).
13. U.C.C. §2-608(1) (1952) "The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it."
14. *Id.* at §2-711(1) "Where . . . the buyer rightfully rejects or justifiably revokes acceptance . . . the buyer may . . . (b) recover damages for non-delivery . . ."
15. *Id.* at §2-713(1).
16. *Id.* at §2-715(1) "Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any damages from delay or otherwise resulting from the breach. (2) Consequential damages include (a) any loss resulting from general or particular requirements and needs of which the seller . . . had reason to know . . . (b) injury to person or property proximately resulting from any breach of warranty".