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SMU Law Review

Volume 5
Issue 3 *Survey of Southwestern Law for 1950*

Article 4

January 1951

Contracts

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CONTRACTS

IMPLIED COVENANT—CONTRACT OF SALE

Texas. Moffit v. Hieby[1] dealt with a contract of sale of all the plaintiff seller's grapefruit on the trees. Defendant buyer had promised to pay $70 a ton for the fruit when picked and weighed. At the time of the contract the fruit had some months yet to mature. The contract stated that the buyer would not be liable for any damage done by act of God. Seller did not water the trees, though requested to do so by the buyer, and the fruit was injured. Seller and buyer later contracted to sell and buy the fruit at a price of $35 a ton. When the fruit matured, seller would not perform the second contract, and buyer would not take the fruit at the original price. Seller then sold to a third party and brought this action for the difference between what she received and what she would have received at $70 a ton. The trial court instructed a verdict for the seller. The judgment was reversed by the court of civil appeals.

The Texas Supreme Court, in reversing the court of civil appeals and reinstating the judgment for the seller, held that the second contract was invalid for lack of consideration, that the first contract was an executed contract and title passed to the buyer at the time of the contract, and that seller was not under an implied obligation to water the fruit. It is clear that the second contract was not binding because the reduction in obligation on the buyer had no consideration other than that given under the first contract.[2]

The law appears to be settled that passage of title in a sales transaction is wholly dependent upon the intent of the parties.[3] A primary factor in the contract was the express provision excusing the buyer from liability from damage done by an act of God.

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[1] ____Tex.____, 229 S. W. 2d 1005 (1950), Justice Hart dissenting, *rev'g* 225 S. W. 2d 441 (Tex. Civ. App. 1949).

[2] Davis v. Wynne, 190 S. W. 510 (Tex. Civ. App. 1916) *er. ref.*; 10 TEX. JUR., *Contracts*, § 67, p. 116.

[3] Hale v. Matteson, 107 Ark. 224, 154 S. W. 516 (1913); Kirkham v. Fullerton, 32 Okla. 461, 122 Pac. 652 (1912); L. H. Woods & Co. v. Half, Weigs & Co., 44 Tex. 633 (1876); Ed Maher, Inc. v. Morris, 67 S. W. 2d 340 (Tex. Civ. App. 1934); see Note, 4 Tex. L. Rev. 393 (1926).

Expressio unius est exclusio alterius. It would appear to place the risk of loss from other causes on the buyer. Another factor to be considered, though not conclusive,[4] is the language used in the contract, *i.e.*, "bought," "sold," *etc.* Thus, the parties manifestly intended that title would pass at the time of the contract. The fact that delivery had not been made is treated as a neutral factor in most jurisdictions today.[5]

Assuming that title did pass, however, was there no obligation on the seller's part to care for the fruit in a reasonable manner while still in her possession? If there was such a duty, sufficient evidence of breach was adduced to warrant a finding to that effect by a jury. The court held that there was no such duty:

> "Inasmuch as title to the grapefruit on the trees passed to the buyer as of the date of the contract, with a consequent delivery thereof made in the orchards, and there was nothing on the part of the seller that remained to be done in the matter, there was no implied obligation on the part of the seller to water the orchards or perform any other act with reference thereto."[6]

Further, if the parties had intended that the seller be obligated to water the fruit, they could easily have included a provision to that effect in their contract.

Thus, it appears that the decision is based upon two propositions: (1) since title passed, there could be no further obligation on the part of the seller; (2) the obligation of the seller to water the fruit was not intended by the parties as they could easily have provided for it in the contract.

The first proposition is contrary to the weight of authority.[7] Although it is true that, as a general rule, title does not pass when something remains to be done before the goods are delivered,[8] this is because the parties are presumed not to have intended title to

[4] Frazier v. Simmons, 139 Mass. 531, 2 N. E. 112 (1885); 2 WILLISTON, SALES (Rev. Ed. 1948) § 262.

[5] UNIFORM SALES ACT § 19, Rule 1; S. A. Stone & Co. v. Davis & Moore, 175 S. W. 772 (Tex. Civ. App. 1915).

[6] 229 S. W. 2d at 1008.

[7] UNIFORM SALES ACT § 19, Rule 2; McDermott v. Kimball Lumber Co., 102 Ark. 344, 144 S. W. 524 (1912); see 46 AM. JUR., *Sales*, § 420, p. 590.

[8] Cleveland v. Williams, 29 Tex. 204 (1867); see Note, 78 A.L.R. 1019 (1932).

pass.[9] The basic test as to whether title passes is not what obligations, if any, remain to be done,[10] but rather, what was the intent of the parties.[11] The majority of courts hold that there may be additional obligations after transfer of title, provided the parties so intended.[12] Here, however, it was held that as title passed, there could be no further obligation on the part of the seller. This assumes the critical point at issue.

The second proposition may be taken two ways: *i.e.*, there cannot be an implied covenant if the parties could easily have expressed it in the contract; or, by not expressing it in the contract, the parties did not intend to obligate the seller. Should the former meaning be the one intended, it is hard to conceive of a case in which a convenant could be implied. It has been held in Texas,[13] with ample support from other authorities,[14] that a covenant will be implied in fact when necessary to give effect to the actual intention of the parties as reflected by the contract in its entirety, the circumstances in which it was made, and the purposes sought to be accomplished. Should the narrow limitation laid down in the principal case be accepted, the area in which implied covenants can play a part would be greatly reduced.

If the second interpretation be the true one, the facts of the case should be reviewed to observe just what the parties intended. The contract itself made no mention of any obligation on the seller to care for the fruit before delivery. As previously stated, the contract did provide that the buyer would not be liable for damage to the fruit caused by an act of God, implying that the buyer would be liable for damage caused by other means. This implication does not carry over, however, to injury caused by the seller in breach of her obligation,[15] should such an obligation be found.

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[9] UNIFORM SALES ACT, § 19, Rule 1; VOLD, SALES (1931) § 53-56.

[10] Bethel Steam Mill Co. v. Brown, 57 Me. 9, 99 Am. Dec. 752 (1869).

[11] Farmers' Rice Milling Co. v. Standard Rice Co., 276 S. W. 904 (Tex. Comm. App. 1925); Ed Maher, Inc. v. Morris, 67 S. W. 2d 340 (Tex. Civ. App. 1934).

[12] Authorities cited *supra* note 8.

[13] Danciger Oil & Refining Co. of Texas v. Powell, 137 Tex. 484, 154 S. W. 2d 632 (1941).

[14] Note, 137 A.L.R. 408 (1942).

[15] 2 WILLISTON, SALES (Rev. Ed. 1948) § 306.

It should be noted that under the contract the only time the buyer was given the right to come on the seller's orchard was when he harvested and weighed the fruit. Apparently, if he had entered seller's property and watered the fruit, he would have been trespassing. As to the circumstances in which the contract was made, the evidence was that both parties were familiar with the business of growing grapefruit and that each knew that the fruit would need care (specifically, watering) during the growing period. There was testimony to the effect that buyer requested seller to water, but seller had refused. The evidence also showed that the seller knew that the buyer wanted top or good grade grapefruit to be used in his business and that inferior fruit would not be suitable. As the dissenting opinion states, the purpose of the contract would actually be defeated by denying the existence of the implied covenant. The dissent points out that the question of intent is generally held to be a question of fact, not a question of law. Nevertheless, the prevailing opinion upholds the instructed verdict for the seller.

The dissenting opinion cites a Kentucky case[16] which had similar facts to the principal case. There a contract of sale of 45 21/100 acres of hemp was involved. The seller was to deliver the hemp to a place designated by the buyer. There was no provision regarding the care of the hemp until delivered. The hemp was damaged by rain due to the seller's lack of care. It was held that though the contract did not expressly provide therefor, it was the duty of the seller to care for the hemp in a prudent manner. No other analogous case was found.

The basis of the Kentucky decision and of the dissenting opinion in the principal case is that the parties intended that the seller be obligated to exercise reasonable care. The duty arose, not as a matter of law, but out of the contract of sale. The prevailing opinion is based upon the *non sequitur* that the seller is relieved of all obligation after title has passed.

It should be observed in passing that there was basis for holding the seller liable on the theory of bailment. As there was a construc-

[16] Summers Fiber Co. v. Walker, 33 Ky. L. Rep. 153, 109 S. W. 883 (1908).