

MEMORANDUM of Mr. GUTTERIDGE on "MERCHANTABILITY"
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One of the most difficult and delicate of the many problems which arise in connection with the law of sale, is that of the determination of the rights of the buyer, when the goods on delivery prove to possess defects which were not contemplated by him at the time when he purchased the goods. It is of course open to the parties when entering into the contract to prescribe a definite standard to which the goods must conform, or to provide that a bulk shall correspond to a sample; but if, as often happens, no such stipulations are found in the contract, the difficult task of defining the buyer's rights falls on the lawgiver.

A possible solution would be the enactment of a rule under which the buyer would be entitled to reject the goods if they possess any defect whatever, it may be either of quality or condition, which was not within the contemplation of the buyer at the time when he entered into the contract of sale. Juridically, this rule possesses certain advantages inasmuch as it avoids a great many difficult questions of fact, but commercially it appears to be open to grave objections. To entitle the buyer to reject the goods whenever there is any defect in them, however trivial that defect may be, would seem to be oppressive. It makes the buyer the judge in his own case, and would in a great many instances afford him an opportunity of escaping from his liabilities under the contract when he desires to be released from his bargain for some ulterior motive. Hence the English law has refused to accept this solution of the difficulty, and has evolved

a series of rules, in connection with which the conception of "merchantable" quality, or condition plays a prominent part.

The scheme of the Sale of Goods Act 1893 may be sketched in outline as follows: it is based on the implication of terms in the contract. Leaving the question of a sale by sample on one side, for the moment, because it is sui generis, the Act, first of all, provides that where the sale is one by description (i.e. where the selection of the goods to be delivered is left to the seller) the buyer is entitled to receive goods of that description. If he has bought gold, he cannot, as the civilians said, be required to take delivery of brass, or as an English Judge has said, to accept beans in lieu of peas. This rule has been interpreted by the English Courts in a very liberal spirit, with the object of protecting the buyer. Dates of shipment and methods of packing have, for example, been treated, in such cases, as part of the description (1).

Assuming that the goods correspond to description, two further questions may arise. In the first place the buyer may have purchased them for some particular purpose which he had in mind, and when he receives them, he discovers that they are not suitable for that purpose. Is he to be entitled to reject them? The English law answers this question, as a point of principle, in the negative. It is only where the seller is a person who is a dealer in goods of that description, and the circumstances are such that the buyer must be taken to have relied on the seller's skill and judgment that the right of rejection is granted to

the buyer (1).

A third situation may arise. The goods when delivered may be in accordance with the contractual description, and may be utilisable for the purpose contemplated by the buyer, but they may possess some defect which lessens their value to the buyer. This diminution in value may, according to circumstances, be either serious or merely trivial, and we thus get the situation in which the English doctrine of "merchantability" comes into operation. If the defect is such as to render goods unmerchantable, the buyer need not accept them, but if they are merchantable, he must take them without prejudice to any claim which he may have for any diminution in value due to the defect. One of the objects of this rule is to control the buyer's right of rejection in such a way as to prevent it from being exercised so as to be oppressive to the seller, though its primary object is to protect the buyer. This brings us to the consideration of the all important question - What is the meaning of "merchantable" condition or quality ?

It has been authoritatively defined as meaning that the article which is delivered is "of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again". (Bristol Tramways Co. v. Fiat Motors Ltd. (1910) 2 K.B. 831)

(1) There is an exception which is not material for present purposes in the case of an article sold exclusively under its patent or trade name.

For practical purposes we may say that goods are not merchantable unless they are immediately saleable in the market under the description contained in the contract. For instance in the case of Jackson v. Rotax Motor Co. (1910) 2 K. B. 937 the contract was for the sale of a number of brass motor horns. The goods when delivered were in accordance with the contractual description, but the buyer claimed to reject them because they were scratched. He was held to be within his rights, because, although the scratches could have been removed without difficulty and at a small expense, he could not have compelled a reasonable sub-purchaser to take delivery of the goods in the condition in which they then were.

So also where condensed milk was sold and the tins had affixed to them a label which was an infringement of a trade mark it was held that the goods were not merchantable because it was impossible to resell them in that condition. It was immaterial that the labels could have been removed before resale. Niblett v. Confectioners Co. (1921 3 K.B. 937).

The rules as to merchantable quality are not confined to wholesale dealings, but also apply to retail transactions including sales over the counter. They do not apply where the buyer has examined the goods and the defects which constitute "unmerchantability" are such that a reasonable examination ought to have revealed them (Sale of Goods Act 1893 Section 14). Thus where the buyer could easily have tested the goods thoroughly, but contented himself with a perfunctory examination he was not allowed to say that the goods were not merchantable. If he had exercised reasonable care in the examination he would have discovered the defects before purchasing the goods (Thornett & Fehr v. Beers (1919) 1 K.B. 486).

The rules as to merchantability also form an element in the rules relating to sales by sample (Sale of Goods Act 1893, Section 15). Where goods are sold by sample it is not only necessary that the bulk should correspond with the sample, but they must also be free from any latent defects i.e. from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

To sum up :- The test is objective. When it is said that goods are "merchantable" this does not mean that there are in fact sub-purchasers who would be willing to re-purchase the goods. All that it means is that the goods must be in such a condition that the average person dealing in the particular market for the goods would be satisfied to take delivery of them. As one of the English Judges once said, if you sell cloth to a Chinaman, the question is not whether the Chinese buyer would like the cloth when it was delivered to him. It will not be unmerchantable merely because he objects to the pattern of the cloth. It is necessary to go further and to show that no reasonable buyer would have accepted the goods. In other words an article is "merchantable" if regarded commercially, it is the article which was agreed to be sold.

There is however one point which must be emphasised. The notion of "merchantability" does not stand alone, but forms part of a complete code of rules relating to the right of a buyer to object to the quality or condition of the goods when delivered to him. It is so interwoven with them, that its

operation cannot be understood independently of the rules (which have already been mentioned) as to correspondence with description and fitness for a particular purpose and sale by sample (Sale of Goods Act 1893 Sections 13, 14 and 15).

Finally it should be mentioned that the rules as to "merchantability" are not altogether satisfactory when applied to perishable goods, because such goods may be merchantable when they are despatched, but not when they arrive. This is possibly a question which turns rather on questions of risk than on considerations of the quality or condition of the goods.