3 Phil. 285

[G.R. No. 1300. February 03, 1904]

E.C. McCULLOUGH, PLAINTIFF AND APPELLEE, vs. R. AENLLE & CO., DEFENDANTS AND APPELLANTS.

D E C I S I O N

WILLARD, J.:

On August 27, 1901, the parties to this action made a written contract which contained among other things the following clause:

"For the purpose of carrying into effect the said contract of sale entered into with the other party hereto, said Francisco Gonzalez y de la Fuente and Don Antonio la Puente y Arce, in the name and on behalf of the mercantile partnership denominated R. Aenlle & Co., by virtue of the powers conferred upon them and in compliance with the instructions given them by Don Matias Saenz de Vizmanos y Lecaroz, the manager of the said partnership, solemnly declare that they sell, absolutely and in fee simple, to E. C. McCullough, the tobacco and cigarette factory known as 'La Maria Cristina,' located at No. 36 Calle Echague, Plaza de Goiti, Santa Cruz district, this city, said sale including the trade-mark 'La. Maria Cristina,' which has been duly registered, the stock of tobacco in leaf and manufactured, machinery, labels, wrappers, furniture, fixtures, and everything else belonging to the said factory, as shown in the inventory to be drawn up for the purpose of making formal delivery of the said property; all of the same for the following sums:

> "(*a*) For the transfer of the ownership of the trade-mark 'La Maria Cristina,' 20,000 pesos;
>
> "*(b*) For the machinery installed in the factory, together with tools and other equipment and cost of installation, approximately 30,000 pesos;

"(*c*) For the furniture, approximately, 4,500 pesos;

"(*d*) For the leaf tobacco on hand, approximately, 71,000 pesos;

"(*e*) For the boxes on hand, approximately, 1,500 pesos;

"(*f*) For the manufactured tobacco on hand, approximately, 12,500 pesos;

"(*g*) For cigar and cigarette wrappers and labels at present on hand, 10,000 pesos;

"(*h*) And for the stock of cigarette paper on hand, approximately, 4,000 pesos; which said sums make in all 153,500 pesos.

"This sum is subject to modification, in accordance with the result shown by the inventory to be drawn up. In this inventory the value of each individual piece of furniture will be fixed at 10 per cent below the price shown in the partnership inventory. The machinery and cost of installing the same will also be fixed at 10 per cent below its invoice price. The value of the tobacco, both in leaf and in process of manufacture, boxes, labels, wrappers, cigars, cigarettes, and paper mouthpieces for cigarettes will be fixed at the invoice price. The value of the tobacco made up into cigars will be fixed in accordance with the price list of the partnership, less 20 per cent discount. The cigars will be inventoried at the prices in the same list, less a discount of 35 per cent. The $20,000 mentioned as the value of the trade-mark will, however, remain
unchanged."

The inventory mentioned in this contract was afterwards made by the defendant and delivered to the plaintiff, who, prior to September 2% through an expert selected by him, examined bales of the tobacco selected ,by the defendant and which its agents said were sample bales of the different lots of tobacco mentioned in the inventory. These sample bales corresponded as to quality with the lots described in the inventory, and on September 26 the parties executed a second instrument, which in addition to a recital of substance of the contract

of August 27, contained the following clauses :

> "Second. That the parties hereto have completed the beforementioned inventory of machinery, furniture, stock of tobacco in leaf and manufactured, boxes, labels, wrappers, and the other appurtenances of the said tobacco factory, representing a total and effective value of 131,000 pesos, after deducting the discount agreed upon for each article, and including the value of the trade-mark, which as stated, was fixed at 20,000 pesos; and that E. C. McCullough, the purchaser, remained in possession of the above-mentioned tobacco factory, and of all its appurtenances and the stock on hand to his entire and complete satisfaction.
>
> "Third. That by virtue of the conditions set forth, the parties hereto fix the selling price of the above-mentioned tobacco factory called 'La Maria Cristina' together with its trade-mark of the same name, and all its appurtenances, at the said sum of f 131,000, on account of which the vendee, Mr. McCullough, authorizes the vendors, Don Francisco Gonzalez y de la Fuente and Don Antonio la Puente y Arce, to collect and receive the 20,000 pesos deposited in the Spanish-Philippine Bank for that purpose and binds himself to pay the said vendees the $111,000 remaining for the complete and total payment of the said purchase price by the 30th day of September, instant, on which date said sum must be paid, and in case said payment shall not be made by Mr. McCullough
> on said date, the said contract of sale of the said factory will be rescinded, the said sum of 20,000 pesos before mentioned accruing to the benefit of the representatives of R. Aenlle & Co."

On September 30 they executed a third contract, in which the defendant acknowledged the receipt at that time of the full purchase price of the sale.

Among other items of leaf tobacco in the inventory were the two following:

"1. Y. P. I. 4.ª S.—Angadanan—99—221 bales, net weight qqs. 571.35 at 40. $22,854.

"2. Isabela, 99 loose leaves. 1.ª 2.ª 3.ª 76 bales re-baled, net weight, qqs. 130.32 at 42. $5,473.44."

It is admitted that the first item means that the 221 bales were of the fourth-class superior, from Angadanan and of the crop of 1899, and that the 76 bales in the second item were from Isabela of the crop of 1899 and of the first, second, and third class.

In December, 1901, the plaintiff, with others, organized a company, to which the plaintiff sold all the tobacco bought by him from the defendant. The purchaser, the new company, on examining these two lots, rejected them because the tobacco was not of the quality indicated in the inventory. Thereupon the plaintiff, claiming that the tobacco in these two lots was worthless, brought this action against the defendant to recover what he paid there for, namely, the two sums of $22,854 and $5,473.44.

The court below found that the first lot was worth at the time of the sale only 8 pesos a quintal instead of 40, the price paid by the plaintiff; that the second lot was worth 11 pesos instead of 42, and ordered judgment against the defendant for the difference, which amounted to 24,109.24 pesos. The defendant excepted to the judgment, moved for a new trial on the ground that the evidence was insufficient to support the judgment, and excepted to the order denying this motion.

It was proved by the defendant at the trial, by means of the original invoices, that the prices stated in the inventory were the prices which it paid for the tobacco, and the plaintiff makes no claim to the contrary.

At the time in question the plaintiff was the owner of a printing establishment and he testified that he desired to move it to the building in which the defendant had its cigar factory; that it was impossible for him to get the building without buying the tobacco factory, and for that reason he bought it, intending to sell it as soon as he could without loss. The said contract of August 27 contained provisions for the leasing and ultimate purchase of the

building by the plaintiff.

The document of August 27 was a completed contract of sale. (Art. 1450, Civil Code.) The articles which were the subject of the sale were definitely and finally agreed upon. The appellee agreed to buy, among other things, all of the leaf tobacco then in the factory. This was sufficient description of the thing sold. The price for each article was fixed. It is true that the price of this tobacco, for example, was not stated in dollars and cents in the contract. But by its terms the appellee agreed to pay therefor the amount named in the invoices then in existence. The price could be made certain by a mere reference to those invoices. In this respect the contract is covered by article 1447 of the Civil Code. By the instrument of August 27 the contract was perfected and thereafter each party could compel the other to fulfill it. (Art. 1258, Civil Code.) By its terms the appellee was bound to take all the leaf tobacco then belonging to the factory and to pay therefor the prices named in the invoices. This obligation was absolute and did not depend at all upon the quality of the tobacco or its value. The appellee did not, in this contract, reserve the right to reject the tobacco if it were not of a specified crop. He did not buy tobacco of a particular kind, class, or quality. He bought- all the tobacco which the appellant owned and agreed to pay for it what the defendant had paid for it. The plaintiff testified that this was the express agreement (p. 16).

There is nothing in this contract to show that he bought 221 bales of fourth-class superior Angadanan of the crop of 1899. The fact that in the inventory subsequently made that particular lot of tobacco is mentioned can not in any respect change the rights of the parties which had already been fixed by the contract. The purpose of this inventory was not to make a new contract for the parties. It could not add anything to nor take anything from the rights and obligations of the parties already stated in the existing contract. Its sole purpose was to ascertain what the total purchase price was. If it correctly gave the number of bales and the price paid therefor by the appellant, according to the invoices, it was a sufficient compliance with the contract. The fact that the tobacco was described as of one class instead of another would be unimportant. The appellee did not purchase by class or quality, but by quantity.

There was evidence tending to show that the first lot instead of being

fourth-class superior of 1899 was fourth-class inferior of 1898; and the second lot instead of being of the first, second, and third class of 1899 was "particular" of 1898. The case is perhaps made more plain by supposing that when the inventory was presented to the plaintiff these two lots were described as "Y. P. I. fourth-class inferior Angadanan, 1898" and as "Isabela *hojas sueltas particular* 1898." It seems clear that if the inventory had been so written the plaintiff could not have maintained this action. And, of course, if he could not have maintained the action under those circumstances he can not under the existing circumstances.

There is no evidence to show that any representations as to the quality of the tobacco were made to the plaintiff by the defendant prior to the contract of August 27, nor that there was any agreement prior to that time as to an exhibition of samples nor that the plaintiff prior to that time made any examination or inquiry as to the quality of the tobacco. The fact is that the plaintiff in order to get the building had to buy the factory and everything that went with it. He saw himself obliged to take all the tobacco which the defendant had, no matter what its quality was. The defendant was not willing to sell him the building and the good tobacco which it had on hand, retaining itself that of poorer quality. He had to take it all or not get the building. He probably thought that he was safe in agreeing to pay no more than the defendant had paid. But, however this may be and whatever may have been his reasons therefor, it is certain that the plaintiff bound himself by the contract of August 27 to take all the tobacco which the defendant then had and pay therefor the prices that the company had paid. He could relieve himself from this obligation only by showing either that the tobacco in the inventory was not owned by the defendant on August 27 or that the prices stated therein were not the prices which the defendant paid for it. He undertook to do neither of these things, and his action must fail. The right to rescind a contract for lesion when the value is less than half of the purchase price, given by Law 56, title 5, partida 5, has been expressly taken away by article 1293 of the Civil Code. Article 1474 of the Civil Code has no application in this case. The fact that an article is of one grade or quality instead of another does not constitute a hidden defect within the meaning of that article.

It is claimed by the plaintiff, the appellee, that the motion for a new trial below should have specified more in detail the grounds of the motion. This

contention can not be sustained. There is nothing in sections 145, 146, or 497 which requires the party to state at length and in detail his reasons for thinking that he is entitled to a new trial.

In view of the result thus arrived at it is not necessary to consider the other questions argued by the parties.

By section 497, Code of Civil Procedure, we are authorized in cases of this kind to find the facts from the evidence and "render such final judgment as justice and equity require." (Benedicto *vs.* De la Rama, December 8,1903[1])

The judgment below is reversed. We find the facts to be as hereinbefore stated and upon such facts we hold as a conclusion of law that the plaintiff can not recover. Judgment will be entered that the plaintiff take nothing by the action and that the defendant recover the costs of both instances, and after the expiration of twenty days the cause shall be returned to the lower court for execution.

Arellano, C. J., Torres and *Mapa, JJ.,* concur.

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[1] Page 34, supra.

DISSENTING

McDONOUGH, *J.*:

The plaintiff and defendant entered into an agreement August 27,1901, for the purchase by the plaintiff and sale by the defendant of certain real property (a tobacco factory) and a stock of tobacco, cigars, cigarettes, furniture, etc., contained in the factory.

By this contract it was agreed, among other things, that the defendant sold to the plaintiff the tobacco and cigarette factory known as " 'Maria Cristina' * * * the stock of tobacco in leaf and manufactured * * * " *as shown* in the inventory to be drawn up for the purpose of making formal delivery of the

said property.

The contract contains estimates or proximate sums to be paid for the several items of property, including an item marked “d,” as follows: “For leaf tobacco on hand, approximately, 71,000 pesos.”

It was further set forth that the various proximate sums, including the 20,000 pesos for the good will, “make in all 153,500 pesos,” which “sum is subject to modification in accordance with the result shown by the inventory to be drawn up, and in which inventory the value of the tobacco in leaf and in process of manufacture * * * will be fixed at the invoice price.” In a second agreement made September 26, after the inventory had been made, the value of the personal property and good will was agreed to be 131,000 pesos.

By the eighth paragraph of the contract the plaintiff is obligated to pay the balance of the purchase price (he had deposited in bank 20,000 pesos to bind the bargain) “as soon as the inventory * * * shall have been completed and it shall be possible to fix the exactness of the amount thereof.” It was agreed that the defendant was to have until the 30th day of September, or before if possible, to complete the inventory; and the plaintiff was to have possession of the property on the payment of the purchase price.

This inventory was subsequently made and delivered and contained not only a description of each item of tobacco sold but also the exact price thereof.

The plaintiff contends that the leaf tobacco which he purchased was to be such “as shown in the inventory” and that its value was to be such as shown in the invoice, the former referring to articles, the flatter to their price, because the parties referred not only to an inventory but to an invoice.

This action of the parties shows that when they provided for an “inventory” they knew the meaning of the word, and that they did not intend by it a mere statement of prices. An inventory is a list or schedule or enumeration in writing, containing, article by article, the goods and chattels of a person. (17 Am. and Eng. Enc. of Law, 419.) To the same effect is the definition of Escriche, in his dictionary, under the title “Inventory,” viz: “The instrument in which is set down the property of a person or firm because it contains a list, article by article, of the belongings of a person or firm. * * * The

making of an inventory is a preservative act, the purpose of which is to show the condition * * * of the effects of a merchant or commercial partnership * * * to the end that the rights of the interested party * * * may be fully protected."

The inventory provided for in this contract is an essential part of the contract, and, though not made and delivered until a subsequent day, it is to be read and weighed as if it were annexed to the contract, for when made it retroacted to the date of the contract. (Civil Code, 1420.) This is not only a rule of the civil law (Civil Code, 1285), but also of the common law, where it is held that if there be two instruments embodying a contract between the parties they must be construed together, although they bear different dates. (Dorthy *vs.* Stranchen, 20 App. Div. N. Y., 89.)

It follows, therefore, that this contract is to be construed as if the goods were sold "as shown" in an inventory or schedule annexed to the contract and made part of the contract.

In this inventory the bales of tobacco in question were described by certain marks, letters, words, and figures, known to the trade, and which, it was agreed, meant this: "221 bales of fourth-class superior leaf tobacco, from Angadanan, of the crop of 1899" and "76 bales of leaf tobacco of the first, second, and third class, from Isabela, of, the crop of 1899."

The price of the former lot was set down at $40 per quintal, amounting to $22,854, and the price of the latter at $42 per quintal, amounting to $5,473.44. When the plaintiff received the inventory, he requested that an expert, to be selected by him, be permitted to examine the tobacco. The defendant consented, and, through its agents, selected what they represented to be *samples of all the tobacco.* The expert examined these *samples* and found that they corresponded with the tobacco mentioned in the inventory. The plaintiff thereupon, and on the 30th day of September, paid to the defendant the balance of the purchase price, and on the 1st day of October, 1901, the defendant delivered to the plaintiff the property purchased by him.

After such delivery the plaintiff discovered that the two lots of tobacco above mentioned were faulty and defective, in that the tobacco was bad, was not

of the quality described in the inventory, was not of the crop of 1899, but rather of 1898, and did not correspond with the samples shown to plaintiff by the defendant. He therefore sued the defendant for damages and recovered judgment for the sum of 24,109.29 pesos. From this judgment the defend ant appealed and it is now contended that this judgment should be reversed because there was no warranty of the quality of the tobacco, express or implied. It is claimed that the plaintiff bought all the tobacco in the factory, no matter what its condition or quality was, and that he must pay full price for it even if a large part of it turned out, as it did, to be worthless, even though it did not correspond with the samples and even though it was not of the crop or quality described in the inventory.

The construction of the contract which would lead to this conclusion means that the plaintiff intended, when he executed the document dated August 27, to shut his eyes, to accept tobacco costing thousands of dollars without warranty, without examination, and without giving any weight or effect to the inventory to be made; and that the defendant intended that the plaintiff would do all this, notwithstanding the fact that the parties themselves, by their own acts, showed that neither of them had any such intention, for the plaintiff, long after August 27, desired to examine the tobacco, and the defendant not only consented but furnished sample bales to plaintiff for that purpose, which were examined.

In order to judge of the intention of parties to a contract, attention must principally be paid to their acts contemporaneous and subsequent to the contract. (Art. 1282, Civil Code.) And if it be contended that the contract does not clearly show that the parties intended by the words “as shown in the inventory” to refer to the quality or kind of tobacco to be described, the answer is that those words if obscure or ambiguous must be construed against the seller most strongly. (Corwin *vs.* Hawkins, 42 App. Div. N. Y., 571; art. 1288, Civil Code.)

At the trial the plaintiff testified (pp. 16 and 17) that the defendants told him that all the tobacco in the factory was good tobacco; that he had heard that the ’98 tobacco was not considered good by buyers and was told not to buy any of it; that he mentioned this fact to the defendant, and was told by the defendant that it was all ’99 tobacco.

He further testified that after the inventory was completed and checked off to his satisfaction he went to the place where the tobacco was to confirm the inventory and to see if the tobacco was as represented. He got an expert to examine the tobacco and when they arrived the vendors had prepared samples of all the tobacco, as mentioned in the inventory, and these samples were opened and examined. While this was being done the plaintiff examined the inventory and compared the marks to see if the tobacco was that mentioned in the inventory. The expert told the plaintiff that everything was all right and in accordance with the inventory.

The expert who examined these samples for the plaintiff testified that the examination was made at the lower warehouse, that he compared the marks on the bales with those which appeared on the inventory, and that he examined the samples of the tobacco and was satisfied that it was a good, useful leaf.

Relying on the inventory and samples of the tobacco exhibited to him by the defendants, the plaintiff completed the transaction by accepting the property and paying the purchase price.

Subsequently and some time in December, 1901, the plaintiff engaged to sell this same tobacco to another company, and that company rejected the two lots of tobacco in question, as hereinbefore mentioned, because they were not of the quality indicated in the inventory. It was proved by experts who examined this tobacco that it was of little or no value. Mr. Grazewell, the expert who examined the samples when the plaintiff took over the tobacco from the defendant, testified that he examined this tobacco and did not find it equal to the samples he had seen; that it was a different class of tobacco, which was worthless for manufacturing purposes; that he examined the fourth-class superior Angadanan tobacco and the first, second, and third class Isabela tobacco and opened at least 20 bales, and found that it was of different grades of the worst class; that it was absolutely worthless for manufacturing purposes; that in his opinion the tobacco was ’98 tobacco, with a slight mixture of ’99 tobacco, and that the two lots in question did not in any degree correspond to the samples which he had formerly examined.

Other expert witnesses corroborated the testimony of Mr, Grazewell regarding the quality of the tobacco, testifying that it was musty, in bad order, unfit

for cigars, the greater part of it being of the crop of 1898 and only a mixture of the crop of 1899; that it was not fourth-class superior but fourth-class very inferior; that as to 77 bales marked first, second, and third class rebaled, it was found the bales did not contain any of the classes mentioned, but only broken leaves such as are sent back from cigar makers' shops as unfit for making cigars. It was also shown that the tobacco crop of 1898 had been injured by excessive rain, and that it brought very low prices. This proof shows clearly a breach of warranty on the part of the defendant, whether the sale be considered as a sale by sample or by the description in the inventory or under the legal warranty against hidden faults or defects.

The sale was not completed until delivery. (Cullom *vs.* Guillot, 18 La. Ann., 608.)

First. As to sale by sample: The defendant, before the delivery of the tobacco and on completion of the inventory, produced for the plaintiff samples of all bales of tobacco for examination, and stated that these samples represented the quality of the tobacco; and these samples were examined and found to be satisfactory, but the tobacco in question was not equal to the quality of the samples.

The plaintiff relied upon these representations and upon the samples produced, and was entitled to receive tobacco equal in quality to these samples. He did not examine the remainder of the bales of tobacco on account of this representation of the defendant.

If a sale be made by samples, it amounts to an undertaking on the part of the seller that all the goods shall correspond in kind, character, and quality with those exhibited. And the liability of the seller is the same whether he knew or did not know that the samples differed from the bulk. (15 Am. and Eng. Enc. of Law, 1226; Whittaker *vs.* Hueske, 29 Tex., 355; Barnard *vs.* Kellog, 10 Wallace, 383; Gould *vs.* Stein, 149 Mass., 570; Benjamin on Sales, sec. 969; Campbell on Sales, 305.)

Second. There was a warranty that the tobacco in question was to correspond with its description in the inventory.

A warranty in a sale of personal property is an express or implied statement

of something which a party under takes shall be a part of a contract, and, though part of the contract, collateral to the express object of it. (Benjamin on Sales, sec. 600; 60 N. Y. Court of Appeals, 450.[1])

Where an article is sold by a particular description, as was the tobacco in this case, by which description it is known to the trade, it is a condition precedent to the vendor's right of recovery that the article delivered should answer such description, such words of description being part of the contract (Carleton *vs.* Lombard, etc., 19 App. Div. (N. Y.), 297.)

The word "warranty" or any particular form of words is not necessary to constitute an express warranty. All agree that any positive affirmation of a material fact as a fact intended by the vendor as and for a warranty and relied upon as such is sufficient, as some hold the actual intent to warrant unnecessary. (Benjamin on Sales, sec. 664; Shippen *vs.* Bower, 122 U. S., 575.)

It is enough if the words used import an undertaking on the part of the owner that the chattel is what it is represented to be, or an equivalent to such undertaking. (1 Parsons on Contracts, 580, 8th ed.)

Thus it has been held that where the description on a sale was "winter-pressed oil," it imported and warranted not only that the article was "sperm oil," but also that it was "winter pressed" and not summer pressed, the words "winter pressed" denoting a quality of oil. (Osgood *vs.* Lewis, 2 Harr. & Gill, 495.[1]) This is an authority for holding that the description of the crop of '99 calls for tobacco of that year and not of the crop of '98.

So where the contract called for boxes of "Kingan's Cumberland cut bacon" and boxes of "Thallmer's staf. for middles," all to be of choice quality, and the required quantity of "Taylor's Cumberland cut bacon, Indianapolis," and of "Empire Packing House Stafford Middles" were sent, it was held to be a breach of warranty. (Walker *vs.* Gooch, 48 Fed. Rep., 656.)

In Hastings *vs.* Lovering (2 Pick. Mass., 214) the sale note read " 2,000 gallons prime quality winter oil." *Held,* a warranty not only that the article was winter oil but it was prime quality. The court stated that a

description of an article inserted in a bill of parcels in a sale note ought to be considered evidence that the thing sold was agreed to be such as represented.

In Winsor *vs.* Lombard (18 Pick., 57) it was said that upon a sale of goods by written memorandum or bill of parcels (inventory) the vendor undertakes, in the nature of a warranty, that the thing sold and delivered is that which is described, and that this rule applies whether the description be more or less particular and exact in enumerating the qualities of the goods sold.

In Gould *vs.* Stein (149 Mass., 570) the sales note described "bales of Ceara scrap rubber as per sample of second quality." *Held,* a two-fold warranty of conformity to sample and to quality, which was broken by failure to deliver rubber of sound quality, irrespective of whether it was equal to the samples, Chief Justice Allen holding that a sale of goods by a particular description imports a warranty that the goods are of that description.

As again affecting the question of crop or age of the tobacco, the case of Millaudon *vs.* Price (3 La. Ann., 4) may be cited. There salt in bags had been purchased and it was represented that it had been stored only five or six months, when in fact it had been stored fifteen to eighteen months. *Held,* that the representations affected a material point, and that the purchaser was not bound to examine the salt, as salt in bags was not susceptible of inspection and examination without much trouble and inconvenience.

In Trading Company *vs.* Farquar (8 Blachf., Ind., 89) it was held that where wool was sold in sacks and the sacks marked by the seller and described in the *invoice* as being of a certain quality, that amounted to an express warranty that it was of such quality.

So where the articles sold were described as "58 bales of prime singed bacon," it was held that this amounted to a warranty that the bacon was "prime singed." (Yates *vs.* Pym, 6 Taunt, 446.)

The English rule is laid down by Campbell in his work on sales as follows:

> "Where there is a sale of goods by description—that, is to say, where the goods in general are sold under certain description or where the sale is of specific goods whose character is presumably only known to the buyer by the description under which they are sold to him—e. g., *bales of goods specified by marks in a bill of lading,* and described in the contract as being of a certain kind—it is of the essence of the contract that the goods furnished shall agree with the description." (Campbell on Sales, 300, ed. of 1881.)

In view of these decisions and of the fact that the two lots of tobacco in question did not correspond in quality or in the year of the crop with the description on the bales, it follows that there was a breach of warranty on the part of the defendant which justified the judgment of the court below.

Third. There was a breach of the warranty which the law creates. By article 1461 of the Civil Code a vendor is bound to deliver and warrant the thing which is the object of the sale.

Article 1474 of this Code provides that by virtue of this warranty the vendor shall warrant the vendee not only as to the legal title but also that there are no hidden *faults* or *defects* therein.

Article 1484 of the Civil Code provides that the vendor is bound to give a warranty against hidden defects which the things sold may have, should they render it unfit for the use to which it was destined or if they should diminish said use in such manner that had the vendee had knowledge thereof he would not have acquired it or would have given a lower price for it; but said vendor shall not be liable for the patent defects or those which may be visible, neither for those which are not visible if the vendee should be an expert and by reason of his trade or profession should easily perceive them.

Article 1485 of the Civil Code provides that the vendor is liable to the vendee for the warranty against faults or hidden defects in the thing sold, even when they should be unknown to him. This shall not obtain if the contrary should have been stipulated and the vendor should not have been aware of said faults or hidden defects.

By article 1486 of this code it is provided that in the case of the two

preceding articles the vendee may choose between withdrawing from the contract, the expense of which he may have incurred being returned to him, or demand a proportional reduction of the price, according to judgment of experts.

The plaintiff in this case followed the latter course.

There can be no doubt in this case but that there were hidden faults or defects in the bales of tobacco in question.

Baled tobacco that is ” musty and of bad odor; ” that is ” almost worthless; ” that, as witnesses testified, is ” only fit to be thrown into the river;” that is ” not fit for the manufacture of cigars;” that consists of “broken leaves sent back as useless;” that was ” in bad condition and smelt bad;” that the greater part of it was of an inferior crop of a year earlier than was represented by the marks on the bales, and that it was broken tobacco mixed with the tobacco of another year; that cost the plaintiff $40 and $42 a quintal, when in fact the highest estimate of its value was from nothing to |6 to $8 per quintal—such tobacco must surely be considered as having faults or defects.

Apparent defects are those apparent to the senses with out opening packages to discover them, and are not those which are concealed without such examination; so the unsoundness of potatoes in barrels is not an apparent defect but a hidden one. (Richards vs. Burke, 7 La. Ann., 243.)

Were these hidden faults or defects? Undoubtedly they were, because the tobacco was in bales, which could not be *“easily examined”* (Civil Code, art. 1484), and therefore, even if the plaintiff were an expert dealer and examiner of tobacco, which he is not, the law did not require him to open these bales and make the examination. This is demonstrated by the provisions of article 336 of the Code of Commerce, which provides that “a purchaser who, at the time of receiving the merchandise, *fully* examines the same shall not have a right of action against the vendor alleging a defect in the *quality* or quantity of the merchandise.

“A purchaser shall have a right of action against a vendor for defects in the quantity or quality of merchandise received in bales or packages, provided he bring his action within four days following its receipt (this time was extended by the Code of Civil Procedure) and the loss is not due to accident or to the

nature of the merchandise or to fraud.

“In such cases the purchaser may choose between rescission of the contract or its fulfillment, * * * but always with the payment of the damages he may have suffered by reason of the defects or faults.

“The vendor may avoid this liability by demanding when making the delivery that the merchandise be examined fully by the purchaser with regard to the quantity and quality”.

Thus the vendor, if he saw fit to protect himself against this action, could have demanded that the plaintiff examine *all* the tobacco instead of the good samples of tobacco produced for examination by the defendant. He had a right to protect himself, but he not only failed to do so, but misled the plaintiff by the samples he produced and which did not correspond with the remainder of the tobacco in these lots.

The provisions of the civil code of Louisiana, regarding sales and warranties, are very like those of the Philippine Civil Code, and in construing the sections of the former code the courts of that State have frequently passed upon questions involving hidden faults or defects, and have in variably held that where merchandise was packed in bales, barrels, or boxes the purchaser was not bound to examine the property, and that if the vendor desired to protect himself he should take from the purchaser a warranty of exclusion of liability.

Thus it was held that salt in bags was not susceptible of examination and inspection without much trouble and inconvenience, and so the purchaser was not bound to examine it. (See Millaudon case, 3 La. Ann., 4.)

In the case of Fuller *vs.* Cowell (8 La. Ann., 136) cotton in bales was sold. It was sound on the outside of the bales but bad in the interior, though the vendor was not aware of the hidden defects. *Held,* that he was liable to pay the difference between the actual value of the bales and what they would have been worth had they corresponded with the outside. (See also Peterkin *vs.* Martin, 30 La. Ann., 894; Bulkley *vs.* Honold, 19 How. (U. S.),390.)

The common law doctrine of *caveat emptor* has been greatly modified by the courts within half a century. The harshness of the rule, which formerly had many exceptions and has more now, requiring the purchaser to take a warranty if he desired to be protected against faults seems not to prevail in the civil law. That law rightfully places obligations on the vendor to deal fairly and justly with the vendee, and requires the vendor to expose the quality of the goods sold, when the faults or defects are hidden, so that the vendee may inspect and examine them, and if the vendor fails to do this or fails to obtain from the purchaser a warranty of exclusion he must pay the damages.

This law seems so just and so much in favor of fair and honest dealing among merchants that the courts of Louisiana have held that even in certain cases where the vendor had a warranty of exclusion he was still liable for damages.

Thus in the case of Lanata *vs.* O'Brien (13 La. Ann.,229) barrels of potatoes and onions were sold. There was a warranty of exclusion, except as to the number of barrels to be taken, good or bad, at a certain price. On arrival at destination almost all of the onions were found to be decomposed and only a few of them sound in each barrel. *Held,* that the sale could not be enforced, notwithstanding the warranty of exclusion, inasmuch as the onions were so bad that they could hardly be called onions.

Under the contention in behalf of the defendant, in the case at bar, the plaintiff would be bound to accept rotten and broken tobacco instead of leaf tobacco or possibly tobacco dust, but the civil law does not favor such unfair dealing.

This doctrine is further illustrated by the decision in the case of Melancon vs. Robichaux (17 La. Rep., 97). It was held that where the thing sold turns out to be so defective that had the defects been made known to the purchaser he would not have bought, the sale will be rescinded. Even if the warranty be excluded, the seller is bound to disclose the defects or vices of the thing sold.

It has been held that the payment of a sound price entitles the purchaser to a sound article. (Hosmer *vs.* Baer, 5 La. Ann., 35.) This is the rule of the civil law. (Dig. 21, 2; 1, Bouvier's Law Dictionary, title "Warranty;" 1 La.

Ann., 27.[1])

The conclusion follows that the plaintiff is entitled to recover his damages whether under the warranty created by the samples given for examination, the description and quality of the tobacco mentioned in the inventory, or the warranty which the civil law required for his protection. The judgment below should be affirmed.

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[1]Osborn *vs.* Gantz., 60 N.Y. Apps., 540.

[1]18 Am. Dec, 317.

DISSENTING

COOPER, *J.*:

The agreement entered into between the plaintiff and the defendant on the 27th day of August, 1901, was a perfected contract of sale of the tobacco in question.

By the provisions of article 1450 of the Civil Code: "The sale shall be perfected between the vendor and the vendee, and shall be binding upon both of them if they have agreed upon the thing, object of the contract, and as to the price, even when neither one nor the other has been delivered."

The thing, the object of the contract, was "the stock of tobacco in leaf * * * belonging to the said factory." The price was "fixed at the invoice price" at which the defendant had previously purchased the tobacco.

That the transaction was an absolute sale is also clearly expressed in the contract itself. It states that R. Aenlle & Co. "sell absolutely and in fee simple to E. C. Mc-Cullough, the tobacco and cigarette factory known as 'La Maria Cristina' located at No. 36 Calle Echague, Plaza de Goiti, Santa Cruz * * * as shown in inventory to be drawn up for the purpose of making formal delivery

of the said property."

It is further stated in the contract that "the value of the tobacco, both in leaf and in process of manufacture, * * * will be fixed at the invoice price."

The inventory which was to be drawn up was for the purpose of ascertaining with exactness (among other property conveyed) the amount of the tobacco in leaf and the invoice price at which the plaintiffs had purchased it.

It was the intention of the defendants to sell and the plaintiffs to buy the leaf tobacco on hand in the factory known as "La Maria Cristina" without reference to its description or kind. It is true that the inventory afterwards made out contained a description of the tobacco, and that the kind delivered was not in accordance with this description. If the contract was doubtful in its terms the act of the parties in making the inventory as placing this construction upon that part relating to the inventory might be important, but the contract is too plain in this particular to invoke rules of construction.

To this extent my views are in accord with those expressed in the majority opinion, but I can not concur in the view that the provisions relating to warranty, contained in the Civil Code, articles 1461, 1474, and 1484, are not applicable to this case. Article 1461 reads as follows:

"A vendor is bound to deliver and warrant the thing which is the object of the sale."

Article 1474 reads as follows:

"By virtue of the warranty referred to in article 1461, the vendor shall warrant to the vendee—

> "1. The legal and peaceful possession of the thing sold.
>
> "2. That there are no hidden faults or defects therein."

Article 1484 reads as follows:

The vendor is bound to give a warranty against hidden defects which the thing sold may have should they render it unfit for the use to which it was intended, or if they should diminish said use in such manner that had the vendee had knowledge thereof he would not have acquired it or would have given a lower price for it; but said vendor shall not be liable for the patent defects or those which may be visible, neither for those which are not visible if the vendee should be an expert and who by reason of his trade or profession should easily perceive them."

I think these articles are directly applicable to the case, and furnish the law for its determination.

There was no stipulation in the contract on the part of the vendor by way of exclusion of warranty, and it is only "when the contrary has been stipulated and the vendor was not aware of such vices or hidden defects" that such warranty shall not exist. (Article 1485, Civil Code.)

It may be admitted, as before stated, that by the contract of sale no particular description or kind of tobacco was conveyed; yet the plaintiff should recover, under the provisions of the Civil Code above cited, if the tobacco, the object of the sale, was defective in quality, and this defect was a hidden defect; and if such hidden defect rendered it unfit for the use for which it was intended, or diminished the use in such a way that had the vendee known of it he would not have purchased or would have given a lower price for it.

The proof shows that the tobacco purchased was of such an inferior quality and so badly damaged that instead of it being" worth the sum of $40 to f 42 per quintal, the price paid by the plaintiff, it was only worth $6 to $8 per quintal. It is clear that if the plaintiff would have purchased at all, he would have given a lower price for the tobacco.

The remaining question to be determined is whether such defects in the quality of the tobacco were hidden defects.

According to the testimony, the defects were not of such a nature as to be visible. Nor was the plaintiff, McCullough, an expert, so that, by reason of his profession he ought easily to have perceived them. The tobacco was in bales and it was only after the bales had been opened up could the hidden defects be

discovered.

It has been held by the supreme court of the State of Louisiana, the laws of which State are based upon the civil law, and in whose code there are to be found like provisions to those contained in our Civil Code with reference to warranties, that potatoes, in barrels, of bad quality, the character of which could not be discovered except by opening the barrels, come within the definition of hidden defects. (Richards *vs.* Burke, 7 La. Ann., 243.)

It has also been held by the same court that cotton in bales of a defective quality, the character of which could not be discovered except by opening the bales, must be regarded as a hidden defect. (Fuller *vs.* Cowell, 8 La.Ann., 136.)

The vendor is responsible to the vendee for the warranty against vices or hidden defects in the thing sold, even when the same were unknown to him, unless the contrary has been stipulated and the vendor was not aware of such vices or hidden defects. (Civil Code, art. 1485.)

And the vendee may elect either to withdraw from the contract, the expenses which he incurred being returned to him, or to demand a proportionate reduction of the price, according to the judgment of experts. (Civil Code, art. 1486.)

The conclusions which I reach in this case are:

First. That there was a perfected contract of sale made by the defendants to the plaintiff on the 27th day of August, 1901, of all of the tobacco belonging to the company “La Maria Cristina” and contained in its factory, and in which contract of sale no particular kind or description of tobacco was sold; nor was there any sample of the tobacco shown the plaintiff at or before the purchase.

Second. That the tobacco sold had defects which diminished its value in such a way that had the plaintiff known of them he would not have given the price which he paid, but would have given a lower price for it.

Third. That the defects in said tobacco, by reason of the tobacco being

contained in bales, were hidden defects.

Fourth. There being no sample of the tobacco exhibited by the defendants at or before the sale, and no description of the kind of tobacco contained in the contract of sale, the plaintiff was entitled to receive the tobacco contained in the factory of “La Maria Cristina” free from hidden defects; and the measure of his damages is the difference between the value of the tobacco, had it been free from hidden defects, and the value of the tobacco delivered as reduced in value by the hidden defects.

The proof in the lower court should have been directed to this difference and not to the question of the difference between the tobacco as delivered and the kind of tobacco as described in the inventory; the plaintiff is entitled to a judgment for the former sum and not the latter.

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[1] Fuentes *vs.* Caballero.

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