ADVANCE-RUMELY THRESHER CO., INC., *v.* JACKSON.

APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA.

No. 33. Argued November 10, 1932.—Decided December 5, 1932.

1. In determining the validity of a legislative declaration that a contract is contrary to public policy, regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting and that it is only where enforcement conflicts with dominant public interests that one who has had the benefit of performance by the other party to a contract will be permitted to avoid his own promise. P. 288.
2. Upon the sale of a machine for cutting and threshing the buyer's grain in a single operation, there is an implied warranty under the Uniform Sales Act, adopted in North Dakota, that the machine is reasonably fit for that purpose. P. 288.
3. A North Dakota statute provides that the purchaser of harvesting or threshing machinery for his own use shall have a reasonable time after delivery for inspecting and testing it and that, if it does not prove to be reasonably fit for the purposes for which it was purchased, he may rescind. It further declares any agreement contrary to its provisions to be against public policy and void, thus preventing waiver of the warranty of fitness. In a case involving the sale of a harvesting and threshing machine it is *held*, in view of conditions in the State to which the statute was addressed, that it does not violate the due process or the equal protection clause of the Fourteenth Amendment. Pp. 289–292.

62 N. D. 143; 241 N. W. 722, affirmed.

APPEAL from a judgment affirming a judgment against the thresher company, entered upon demurrer to its answer, in a suit against it to cancel promissory notes following the rescission of a contract of sale.

Mr. Howard G. Fuller, with whom *Mr. Matthew W. Murphy* was on the brief, for appellant.

The effect of the Act is to burden the business of appellant with serious financial loss, impair the value of its commodities held or acquired for sale, and arbitrarily

deprive appellant of valuable rights of contract. It opens to controversy and to possible repudiation by the buyer the plain and unqualified terms of the sale, to which the parties agreed. What article is or is not fit for the purpose of the purchase is made a jury question. As North Dakota is exclusively agricultural, a jury there will naturally see the question of fitness from the standpoint of the buyer. There is no standard of law to go by. The question of fitness becomes a question whether the machine would harvest grain or thresh grain, under the peculiar physical conditions which the buyer had in mind. A single defective part could render the machine unfit for the purpose of purchase, in the view of a jury, though the part might, under reasonable contract, be replaced almost instantly and without any loss to the buyer.

The evil sought to be remedied was not the financial harm or loss caused by the sale of unfit commodities; it was the damage caused by fraudulent sales. A legislative declaration or implication that the fact of unfitness is conclusive evidence of fraudulent sale is unreasonable and unconstitutional where, as in this case, it would deprive the seller of a right to disprove fraud; or where the result is to convict and penalize a person for a wrong of which he is blameless. *Heiner* v. *Donnan,* 285 U. S. 312; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35.

This statute, as a remedy for the evil of fraud, is inappropriate, arbitrary and unreasonable. There is no attempt to regulate or supervise sales; nor to prohibit sales of unfit articles. The remedy given the buyer bears no relation whatever to the particular evil at which the statute is said by the state court to be aimed.

The purchaser here was a dealer in farm implements. It is a fair inference that he was in no position to be victimized. He contracted to waive all warranties and

remedies for their breach in express consideration of a reduction of the purchase price.

An act of the legislature which gives to a buyer of a commodity the full financial benefit of a procedural remedy for fraud, in the sale thereof, where there was no fraud—taking from the seller the cost of this financial gratuity to the buyer—violates the due process clause of the Fourteenth Amendment.

The discrimination of this law in favor of a certain part of the class of persons who buy the described commodities is unreasonable, and no state of facts can be conceived to sustain it. If, as explained by the court below, persons who negligently or unwisely sign contracts not for their best interests are the class intended to be benefited, there is no rational theory for limiting that class to those who buy these particular commodities; and no reasonable basis for expanding that class to all persons who buy any of these commodities. It is unreasonable and discriminatory to impose the burden of the Act on those only who sell such commodities to buyers who do not preserve their right of warranty.

It is true the court below refers to the need of testing harvesting machinery in harvesting time and threshing machinery in threshing season. But in so far as this statement alludes to a classification of persons affected by the Act, it fails to furnish any rational support for the classification actually made. This need of test within a limited space of time is related by the court only to harvesting and threshing machinery. The statement of the necessities of the buyer is not claimed to have reference to gas or oil-burning tractors or gas or steam engines.

The business of selling the commodities in question is not so charged with a public use or interest that the regulation in question is justified. *New State Ice Co.* v. *Liebmann,* 285 U. S. 262.

Mr. William Lemke for appellee.

It is merely a necessary regulation to prevent fraud and misrepresentation in the sale of that class of farm machinery enumerated in Chapter 238 of the Laws of 1919. It does not deprive appellant of property, but compels it to be honest with the purchaser and to sell him only that class of machinery which is reasonably fitted for the purpose for which it was purchased.

The Fourteenth Amendment has never been held a protector of fraud to the extent of permitting high-pressure salesmen to sell to farmers farm machinery not reasonably fitted for the purpose for which it was purchased. To prevent one from perpetrating a fraud is not to deprive him of property within the meaning of the Fourteenth Amendment. That Amendment does not guarantee to a citizen the right to contract, either by himself or agent, within his State, in violation of its laws. *Hooper* v. *California,* 155 U. S. 648. Nor does it give immunity from reasonable regulation to safeguard the people's interest. *Miller* v. *Wilson,* 236 U. S. 373; *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13. The regulation of trade, business or profession is within the domain of the police power; such regulation may more or less restrict liberty or impair the value of property, but if reasonably calculated to produce the end contemplated is constitutional. *Soon Hing* v. *Crowley,* 113 U. S. 703; *Gundling* v. *Chicago,* 177 U. S. 183; *Nutting* v. *Massachusetts,* 183 U. S. 553. A statute prohibiting a stipulation against liability for negligence in the delivery of an interstate message is not invalid as a deprivation of liberty to contract. *Western Union* v. *Commercial Milling Co.,* 218 U. S. 406.

Mr. Justice Butler delivered the opinion of the Court.

By this appeal we are called on to decide whether as construed below a statute of North Dakota, c. 238, Laws

1919, is repugnant to the due process or equal protection clause of the Fourteenth Amendment. It declares:

"Sec. 1. Reasonable Time to Discover Defects. Any person, firm or corporation purchasing any gas or oil burning tractor, gas or steam engine, harvesting or threshing machinery for their own use shall have a reasonable time after delivery for the inspection and testing of the same, and if it does not prove to be reasonably fit for the purpose for which it was purchased the purchaser may rescind the sale by giving notice within a reasonable time after delivery to the parties from whom any such machinery was purchased, or the agent who negotiated the sale or made delivery of such personal property or his successor, and placing same at the disposal of the seller.

"Sec. 2. Provisions Contrary to Preceding Section Void. Any provision in any written order or contract of sale, or other contract which is contrary to any of the provisions of this Act is hereby declared to be against public policy and void."

The complaint of appellee, plaintiff below, shows the following facts. August 13, 1928, defendant, in consideration of $1,360 to be paid by plaintiff according to his three promissory notes given therefor, sold and delivered to the latter a harvester-combine to be used for the cutting and threshing in a single operation of grain raised by him. Plaintiff undertook by means of the machine so to cut and thresh his crop, but upon a fair trial and test he found that it was defective and could not be used or made fit to operate for the purpose. September 5, he rescinded the sale in the manner prescribed by the statute. His notes remained wholly unpaid. He prayed judgment that defendant return them to him for cancellation. The answer, asserting that the statute is repugnant to the due process and equal protection clauses, does not deny the complaint but avers that plaintiff gave defendant a written order by which he waived all warranties, express,

implied or statutory, and unconditionally promised to pay the price represented by the notes. Plaintiff demurred. The trial court sustained the demurrer and, defendant having elected to stand on its answer, gave plaintiff judgment in accordance with the prayer of the complaint. The supreme court affirmed. 62 N. D. 143; 241 N. W. 722.

On the facts alleged in the complaint, § 15 (1) of the Uniform Sales Act, Laws 1917, c. 202, implied a warranty by defendant that the machine was reasonably fit in a single operation to cut and thresh plaintiff's grain. *Allis-Chalmers Mfg. Co.* v. *Frank,* 57 N. D. 295, 299; 221 N. W. 75. But it left plaintiff free to waive such warranty and to purchase on the terms referred to in the answer. § 71. *Minneapolis Threshing Mach. Co.* v. *Hocking,* 54 N. D. 559, 569; 209 N. W. 996.

The question is whether the challenged enactment of 1919 may prohibit such waivers as contrary to public policy and void, and so limit the right of seller and purchaser to contract. While that right is a part of the liberty protected by the due process clause, it is subject to such restraints as the State in the exertion of its police power reasonably may put upon it. But freedom of contract is the general rule and restraint the exception. The exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. *Adkins* v. *Children's Hospital,* 261 U. S. 525, 545, 546 and cases cited. In determining the validity of a legislative declaration that a contract is contrary to public policy, regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting and that it is only where enforcement conflicts with dominant public interests that one who has had the benefit of performance by the other party to a contract will be permitted to avoid his own promise. Cf. *Steele* v. *Drummond,* 275 U. S. 199, 205. *Twin City Co.* v. *Harding Glass Co.,* 283 U. S. 353, 356.

The object sought to be attained by the statute under consideration is to protect farmers in an agricultural State against losses from investments in important machines that are not fit for the purposes for which they are purchased and to guard against crop losses likely to result from reliance upon such machines. It applies only to sales made to purchasers requiring for their own use the relatively complicated and costly implements referred to in § 1. These are used on farms producing grain, and the raising of such crops is North Dakota's principal industry. Enormous quantities of farm machinery are required in that State, and expenditures therefor constitute a large part of the total investment in farm land and equipment. Most, if not all, of the tractors, engines, harvesters and threshers referred to are made outside North Dakota by a few manufacturers who, through their agents or dealers, sell them directly to farmers. Forms of sales contracts generally used are prepared by sellers and, as pointed out in the opinion of the state supreme court, the tendency has been to restrict the rights of purchasers and to lessen the liability of sellers. Such machines can properly be tested only during seasons in which they are used and, especially in the case of harvester and thresher combines, these periods are short. The machine sold to plaintiff is a gas and oil-burning harvester and thresher combine. Machines designed for such purposes are necessarily complex and even under favorable conditions their effective use requires skill, experience and resourcefulness on the part of operators. In determining whether they are reasonably suitable and fit for the purposes intended, there is involved a consideration of the kind and condition of the crops to be harvested, the periods during which they remain recoverable after becoming sufficiently ripe and dry to be contemporaneously cut and threshed, the amount and kind of weeds and other foreign vegetation growing with the grain, the topography of the fields, and the rainfall,

dew and humidity. Such combines have not been long known or much used in the grain-raising Northwest, and undoubtedly there are ample grounds for a legislative finding that the farmers of North Dakota as a class are not sufficiently familiar with them to be able, without actual test, to form an intelligent opinion as to their fitness to cut and thresh in a single operation or whether they safely may be regarded as dependable for use on their farms. If they were relied on generally in that State and should fail in the fields, the resulting losses would be of such magnitude and public concern as to warrant the adoption of measures calculated to guard against them.

The regulation imposed seems well calculated to effect the purposes sought to be attained. The evils aimed at do not necessarily result from misrepresentation or any fraud on the part of sellers, and at least one of the purposes of the legislation is to lessen losses resulting from purchasers' lack of capacity, without opportunity for inspection and trial, to decide whether the machines are suitable. The statute prevents waiver of the warranty of fitness implied by the state law. Such warranties tend to restrain manufacturers from selling unfit or defective machines and also from selling any—even those of appropriate design and construction for operation in some regions—for use in places or under conditions not permitting effective service. And the right of inspection, test and rescission that the statute assures to purchasers enables them, free from peril of serious mistakes, deliberately to consider whether such machines are reasonably suitable or fit for the purposes for which they want to use them. There is nothing in this case to suggest that, under the guise of permissible regulation, the State unreasonably deprives sellers of such machines of their right freely to contract or that in its practical operation the statute arbitrarily burdens their business. *Burns Baking Co.* v. *Bryan,* 264 U. S. 504. *Weaver* v. *Palmer Bros. Co.,* 270

U. S. 402. The State, in order to ameliorate the evils found incident to waivers of implied warranties of fitness, merely declares that such agreements in respect of the sale of the designated machines are contrary to public policy and holds the parties to the just and reasonable rule prescribed by § 15 (1) of the Sales Act. Upon the question of due process more need not be said.

The character of the machines, the need of tests to determine their fitness, the serious losses that ensue if in actual use they prove unfit, and the other considerations alluded to plainly warrant the classification and special regulation of sales prescribed by the statute.

We find no substantial support for the contention that the statute complained of violates the due process or equal protection clause of the Fourteenth Amendment. *Frisbie* v. *United States,* 157 U. S. 160, 165. *Orient Insurance Co.* v. *Daggs,* 172 U. S. 557, 563, *et seq. Patterson* v. *Bark Eudora,* 190 U. S. 169, 173. *Whitfield* v. *Aetna Ins. Co.,* 205 U. S. 489, 495. *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 564, *et seq. National Union Ins. Co.* v. *Wanberg,* 260 U. S. 71.

Judgment affirmed.

Mr. Justice Stone and Mr. Justice Cardozo concur in the result.

SUN OIL CO. *v.* DALZELL TOWING CO., INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 38. Argued November 16, 1932.—Decided December 5, 1932.

1. A towage company, in performing a contract to assist a vessel propelled by her own power and manned by her officers and crew, is neither common carrier nor bailee, and is not subject to the rule that prevents common carriers, and others under like duty to serve the public, from escaping by agreement liability for damage caused by their negligence. P. 294.