STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For The Calendar Years

1963 - 1964

November 8, 1963

To: Ernest H. Johnson, State Tax Assessor

Re: R. S., c. 17, s. 2, definition "sale price" — "allowance . . . pursuant to warranty."

Facts:

An assessment against Richard D. Gilman, Sr., Reg. #78012, is presently pending reconsideration. The assessment is based upon the purchase of a tractor by Gilman from Chadwick-BaRoss. The tractor apparently proved unsatisfactory, as a result of which we understand the manufacturer, through Chadwick-BaRoss, agreed to take back the machine; but while certain credit was given on the return, the full purchase price was not refunded.

Mr. Gilman's attorney, contends that the credits in question were given "pursuant to warranty"; and that even if it cannot be shown that there was an express written warranty, nevertheless the implied warranty referred to in section 15 of chapter 158 (the Uniform Sales Act) applies.

Question:

Whether the language in the definition of "sale price" in section 2 of Chapter 17 — " 'sale price' shall not include allowances in cash or by credit made upon the return of merchandise pursuant to warranty" — refers as well to the implied warranty set forth in section 15 of the Uniform Sales Act as it does to an express warranty.

Answer:

Yes.

Reasons:

Warranty defined:

> "Warranty is an engagement or undertaking, *express or implied*, that a certain fact regarding the subject of a contract is or shall be as it is expressly or impliedly declared or promised to be." *Christian v. City of Eugene*, 89 Pac. 419. Citing Webster's International Dictionary. 44 A Words and Phrases, p. 598. (Emphasis supplied).

It is well established that no particular words are required to constitute a warranty.

> "To constitute a warranty words 'warranty' or 'guarantee' need not be used." *44 A Words and Phrases, p. 642.*

This is true of an implied warranty as it is of an express warranty.

Under the Uniform Sales Act as found in the Maine Revised Statutes, Volume 4, Chapter 185, sections 13 through 16, there are several forms of implied warranties, briefly, in section 13 there is a provision for implied warranty of title, in section 14 an implied warranty in sale by description; an implied warranty of quality in section 15 and an implied warranty in sale by sample as enumerated in section 16.

Section 15 which is of importance here provides:

> "Subject to the provisions of this chapter and to any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell of a sale, *except* as follows: (Emphasis supplied.)

I. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

The case of *Ross v. Diamond Match Co.*, 149 Me. 360 decided under the above section lays down what a claimant must prove to support recovery. 1. That he made known to the seller the particular purpose for which the goods were required; 2. that he relied upon the seller's skill or judgment; 3. that he used the goods purchased for the particular purpose which he made known to the seller; 4. that the goods were not reasonably fit for the purpose disclosed to the seller; and 5. that he suffered damage by breach of the implied warranty.

Sec. 15 continued.

"II. When the goods are bought by description from the seller who deals in goods of description, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality.

"III. When the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

"IV. In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

(However, it does not follow that if an article purchased has a trade name and that it is bought thereunder, the buyer does not rely on the skill or judgment of the seller. See *Ross v. Porteous, Mitchell & Braun Co.*, 136 Me. 118).

"V. An implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade.

"VI. An expressed warranty or condition does not negative a warranty or condition implied under the provisions of this chapter unless inconsistent therewith."

I assume the instances will be many where the vendor or vendee or both rely upon a situation wherein there is a return of goods pursuant to an implied warranty under sec. 15 and particularly subsection I. Since the decision as to whether or not there is an implied warranty is largely a factual one and is usually made as between the parties to a transaction, that is, the vendor and vendee, I would suggest that administrative guide lines be laid down providing that certain facts be established before there will be a finding by the Bureau of Taxation that an implied warranty exists.

I would recommend that the guide lines laid down in *Ross v. Diamond Match* above cited be utilized in establishing an administrative rule, with the addition thereto of the elements of allowance and return.

It would therefore seem that the definition of warranty as contained in Chapter 17, section 2 includes implied warranties. However, there must be a factual situation such as would give rise to an implied warranty under

the Uniform Sales Act — that is, a situation under section 15 or any other appropriate section wherein the vendee has placed reliance in the vendor as to the quality or the fitness of the goods and the vendee furnishes the goods which are later found to be defective and are returned because of the defect to the original vendor.

JON R. DOYLE
Assistant Attorney General

November 8, 1963

To: Paul A. MacDonald, Secretary of State

Re: Pin Ball Machine

Facts:

You have had some correspondence concerning a game known as "Japanese Pachinko." The game is non-coin operated and works by battery power. The player purchases 10 balls for 10 cents. A ball is inserted into the game and spun into action. There are 7 win and 1 lost pocket. There are 6 spin wheels and metal nails placed around the game area. When a ball drops in a win pocket additional balls drop out. The more balls a player obtains in this manner the better prize he wins.

Question:

Is this game a pin ball machine?

Answer:

No.

Opinion:

R. S. 1954, chapter 100, sections 68-A to 68-J provide for the licensing of pin ball machines by the clerk of the municipality where located.

> Section 68-B defines a pin ball machine as — " . . . only those machines nominally denominated as such which, upon the insertion of a coin, slug token, plate or disc, may be operated by the public generally for use as game, entertainment or amusement, whether or not registering a score, and which is operated for amusement only and does not dispense any form of pay off, prize or reward except free replays."

As pointed out by the inquirer the game of "Japanese Pachinko" is non-coin operated. The player inserts only the playing balls. Also the machine can be said to dispense a "form of pay-off, prize or reward" in the form of extra balls which may be converted into prizes.

We agree, therefore, with the inquirer that "Japanese Pachinko" is not a pin ball machine which must be licensed in the municipality where located.

This conclusion does not assist the inquirer. However, it must be pointed out that the pin ball machine licensing law is an exception to the laws forbidding gambling. Any device similar to a pin ball machine but not coming within its definition is a gambling device and illegal.

Our court in *State v. Livingston*, 135 Maine 323 and 324, has quite simply stated the nature of one type of gambling device.