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Sales--Failure of Consideration as Basis of Recision

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SALES—FAILURE OF CONSIDERATION AS BASIS OF REJECTION—The Culligan Soft Water Service of Lexington, Inc., purchased a new Chevrolet truck from the L. R. Cooke Chevrolet Company of Lexington, Kentucky. The vehicle was used in the buyer's business from August 28, 1952 until September 12, 1952 at which time the truck was damaged in an accident. Several days later the buyer sought to return the damaged truck to the seller and demanded the return of the purchase price. Upon the seller's refusal, the buyer brought this action for damages for breach of an implied warranty claiming that the truck was not reasonably suited for the purpose for which it was intended because of mechanical defects. Upon trial the buyer recovered $2414.17, which was the full purchase price of the truck.

On appeal to the Kentucky Court of Appeals the seller urged that it was entitled to a directed verdict as the possibility of any recovery upon an implied warranty was precluded by a written agreement between the parties which excluded all warranties other than those stated therein.\(^1\) Held: Judgment reversed with directions to enter judgment for the seller. L. R. Cooke Chevrolet Company v. Culligan Soft Water Service of Lexington, Inc., 282 S.W. 2d 849 (Ky. 1955).

The buyer relied upon the language in Kentucky Revised Statutes sec. 361.150\(^2\) to raise its claim of an implied warranty as to quality or fitness for a particular purpose and further evidently contended that despite the expressed provision in the contract of sale disclaiming any implied warranty it was nevertheless entitled to recover the full purchase price of the truck on the theory of failure of consideration. The buyer sought to bring its case within the ruling of Myers v. Land\(^3\) where the Court said:

\(^1\) The pertinent part reads—[I]t is expressly agreed that there are no warranties, expressed or implied, made by either the dealer or manufacturer on the Chevrolet Motor vehicles, chassis or parts furnished hereunder, except the manufacturer's warranty against defective materials or workmanship. . . . [Herein follows the traditional manufacturer's 90 days or 4000 miles, parts warranty] This warranty being expressly in lieu of all other warranties, expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other liability in connection with the sale of its [manufacturer's] vehicle. 282 SW 2d at 350.

\(^2\) Ky. Rev. Stat. \(^*\) sec. 361.150, Uniform Sales Act, sec. 15, provides that "there is no implied warranty or condition as to quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) 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 upon the seller's skill or judgment . . . there is an implied warranty that the goods shall be reasonably fit for such purpose." Cited in 282 SW 2d 349 at 349-350 (Ky. 1955).

\(^*\) Hereinafter cited as KRS.

\(^3\) 314 Ky. 514, 295 SW 2d 988 (1950); noted in 42 Ky. L. J. 286 (1953-1954).
To sell a man a machine for manufacturing a merchantable product that will not accomplish that purpose at all is a breach of the contract itself rather than a mere breach of warranty. . . . If the machine is worthless for the purpose for which it was sold, there is a failure of consideration.\(^4\)

Before the enactment of the Uniform Sales Act in Kentucky in 1928, the Court recognized that it was proper for the parties to a sales contract to stipulate, either expressly or by implication,\(^5\) against implied warranties and to confine the obligations to the specific language of the contract. Today under the Uniform Sales Act, which has been adopted in a majority of states, the recognized rule is that an implied warranty exists unless it is excluded by express language or by necessary implication.\(^6\) The Act also provides that the seller may limit his liability by a disclaimer.\(^7\)

Since, in Kentucky, implied warranties are deemed imposed by law\(^8\) for the protection of the buyer and to improve market conditions, any disclaimer of such warranty obligations will be strictly construed.\(^9\) Therefore, while the Kentucky Court recognizes the right of the seller to limit his liability, such limitations must be plainly expressed. In at least one decision, before adoption of the Uniform Sales Act, *International Harvester Company of America v. Bean,\(^10\)* the Court indicated a rather hostile and suspicious attitude toward disclaimers that were couched with hidden implications and which sought to relieve the seller of duties imposed by law. Speaking of such disclaimers, the Court said:\(^11\)

\[\text{[IT] will be conclusively presumed to have been inserted in the contract . . . for the sole benefit of the manufacturer . . . and effect will not be given to such stipulation unless its inclusion was fairly procured. (Emphasis added)}\]

\(^{4}\) Id. at 235 SW 2d at 991.


\(^{6}\) KRS sec. 361.150(6), Uniform Sales Act, sec. 15. Also Frick Co. v. Wiley, 290 Ky. 665, 162 SW 2d 190 (1942).

\(^{7}\) KRS sec. 361.710, Uniform Sales Act, sec. 71 provides:

> "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law it may negatived or varied by express agreement or by course of dealing between the parties, if the custom be such as to bind both parties to the contract or sale?"

\(^{8}\) There appear to be two bases for implied warranties:

1. those which arise from the intention of the parties,
2. those which arise by operation of law.

As used in this paper implied warranties are of the latter type. 2 Vanderbilt Law Review 467 at 468 (1947-48).

\(^{9}\) Vold, Sales, 465 (1931).

\(^{10}\) 159 Ky. 842, 169 SW 549 (1914).

\(^{11}\) Id. at 846, 169 SW at 551.
The Court in that case found the language of the stipulation to be extremely technical and “its meaning is clear to but few persons.”

However, more recent decisions have apparently repudiated the critical attitude of the Bean case. In Sears, Roebuck & Co. v. Lea\textsuperscript{12} the federal court stated the settled rule in Kentucky to be “that one who signs a contract is presumed to know its content . . . unless he is misled as to the nature of the writing which he signs or his signature has been obtained by fraud.”\textsuperscript{13}

While there was no question raised in the Culligan case as to the bona fides of the sales transaction, nor was there any evidence to indicate that the buyer did not understand the terms of the agreement, the tone of the opinion seems to be in line with recent cases regarding expressed disclaimers of implied warranties. The rule in Kentucky concerning such disclaimers appears to be that the parties will be bound by a disclaimer clause, there being no circumstances to vitiate the force and effect of the agreement.\textsuperscript{14}

In seeking to bring its case within the rule laid down in the Myers case, the Culligan Company argued that defective wheel arrangement made the truck absolutely worthless. Therefore, since it had not received the consideration bargained for, it was entitled to renounce the contract and recover the purchase price invoking the orthodox remedy of rescission of the transaction and restitution of the amount paid.

The Court rejected the buyer’s contention, and, while acknowledging that the Myers case was a proper application of the law to the facts and circumstances of that case, ruled that in the Culligan case “the equities of the situation do not justify a rescission of the contract.”\textsuperscript{15} The key problem therefore evolves into a determination of the “equities” the Court alluded to in its opinion.

The opinion itself contains little to enlighten as to the motivating factors behind the ultimate decision. However, the Court did refer to the fact that the buyer was aware of the “shimmy” in the front wheels several days before the accident and that it continued to use the truck in its business without giving the seller an opportunity to remedy the condition as required by the sales contract.

The law is established that before a buyer can rescind a sale he must notify the seller within a reasonable time of his election to do so, and, in addition, take steps to restore the status quo ante.\textsuperscript{16} There are

\textsuperscript{12}198 F. 2d 1012 (CCA 6, 1952).
\textsuperscript{13}Id. at 1015. See also White Sewing Machine Co. v. Smith, 188 Ky. 407, 222 SW 81 (1920); Bernard Manufacturing Co. v. Jones, 207 Ky. 566, 269 SW 722 (1925); Williston, Sales, Vol. 1, sec. 239(c) at 631 (1948).
\textsuperscript{14}See 42 Ky. L. J. 286 at 287 (1953-54).
\textsuperscript{15}282 SW 2d 349 at 351 (Ky. 1955).
a number of decisions by the Court indicating the necessity of a reasonably prompt rescission which are cited at the end of the principal case. It is extremely doubtful, however, that the failure of the buyer to seek to rescind immediately upon discovery of the defect, per se, was decisive in the Culligan case. The buyer operated the truck a total of fifteen days from the time of delivery to the time of the accident and under the circumstances it does not seem that this length of time was unreasonable.

Assuming the duration of time alone to be indecisive, what then is the factor which formed the basis for distinguishing the Culligan case from the Myers case? In the Myers case the machine was purchased to make merchantable concrete bricks; it was found to be completely worthless for the purpose for which it was purchased. In the Culligan case the truck was not completely worthless when received, since even after the alleged defect was discovered the buyer continued to use it in its business. Even granting that it may have been defective to the extent claimed, there was a remedy for such defects expressed in the original written warranty.

No offer was made to return the truck to the seller for repairs or for replacement of defective parts as provided in the written warranty. Nor was there any offer made to rescind the contract until after the truck had been wrecked. Thus, the Court may have logically felt that the truck was merely defective and not absolutely worthless for its intended purpose and that under the terms of the written warranty Culligan's remedy was not rescission for failure of consideration—there being no total failure of consideration—but, was instead, the remedy provided for within the written warranty. Considering the defective condition of the truck with the fact that Culligan kept the truck, drove the truck and, further, did not utilize the remedy he bargained for in the written warranty, the Court apparently reasoned that it would have been inequitable to allow the buyer now to come forward and rescind the contract after it had wrecked the truck. In the realm of rank speculation, there is room for considerable conjecture as to the outcome of the case if the buyer had first exhausted the remedy granted to it under the written warranty and then rescinded on the theory of failure of consideration.


18 Note the following language in the original warranty at 282 SW 2d at 350 [I]ts obligation under this warranty being limited to making good at its factory any part or parts.
Furthermore, would the absence of subsequent use after the discovery of the defect have been sufficient to induce the Court to take the position that the alleged defect was of such a nature as to make the vehicle absolutely useless for its intended purpose?

While it is perhaps too early to measure the scope of the rule handed down in the Myers case, when that case is viewed in the light of the Culligan case, the Court appears desirous of limiting the Myers case to its facts. What will constitute a complete failure of consideration sufficient to allow the buyer to rescind the contract is obviously more than a breach of an implied warranty of fitness for a particular purpose. Before an article will be considered to be completely worthless, the Court will require that there must be convincing proof that the article will not do what it was intended to do. Apparently, the Court's philosophy decidedly favors a strict construction of the term, "absolutely worthless".

Whether the decision in the Culligan case is a wise one depends largely upon one's views as to the degree of liability which should be borne by dealers. Recent cases have considerably enlarged the tort liability of automobile dealers. If the Court should give wide application to the Myers doctrine, the result would be a serious infringement upon any attempt by sellers to limit their liability on warranties and might eventually lead to such dealers becoming insurers. The Culligan case however, is not a step in that direction.

Melvin Scott

Torts—Fraud—Misrepresentation by Nondisclosure—The purchaser of a $7100 house and lot sued his vendor in an action for deceit because the vendor failed to disclose a hidden defect in the realty. The defect consisted of abandoned drain tile which underran the property, causing it to be flooded at certain periods. The vendor knew of the existence of the tile but the vendee was ignorant of its presence. The plaintiff failed to prove that the defendant made any affirmative representations with regard to adequate drainage. After a verdict for the plaintiff, the lower court sustained the defendant's motion for summary judgment.


1 The plaintiff alleged in his complaint that the defendant stated affirmatively that the "natural surface drainage" was similar to surrounding lots. Transcript of Record, p. 3. This allegation was specifically denied in the defendant's answer. Transcript of Record, p. 7. There was no proof or mention of this statement during the trial. Transcript of Evidence, pp. 16, 21, 49, 84, 85, 128, 114. Hence, the fraud alleged in this case is based entirely on the vendor's silence.