Kentucky Law Journal

Volume 30 | Issue 1 Article 6

1941

Warranties at a Judicial Sale

Paul J. Durbin
University of Kentucky

whether a student should be charged a resident or non-resident fee, rather than the interpretation of arbitrary rules passed by a Board of Trustees, which cannot affect the law of domicil.

The only justification for the position of the University is that even if in fact the student is a citizen of the state then the so-called discrimination is a reasonable classification of citizens and therefore not unconstitutional. There would be excellent precedent for holding the University's rules as reasonable classification if all it did was require the student to reside one year in Kentucky, before he could gain a resident status for entrance requirements in the State University. The Supreme Court of California declared in *Bryan* v. *Regents of University of California*[6] that the requirement of a tuition fee from citizens who have not resided in the state is a reasonable classification on the grounds that, ". . . the requirement that a student shall maintain a residence in the state of California during one taxation period (one year) as an evidence of the bona fides of his intention to remain a permanent resident of the state and that he is not temporarily residing within the state for the mere purpose of securing the advantages of the University, cannot be held to be an unreasonable exercise of discretion by the legislature or by the respondent." But the rule of the University of Kentucky provides that the one year's residence must be *before* he enters the University; which creates a classification that it is contended is far from reasonable, as, taken in conjunction with the other rule makes it impossible, during his college life, for the student in the case set out to become a resident or a citizen for purposes of sharing equal educational rights with other citizens in the matter of fees at the State University; which he has a right to do.[7]

In conclusion it would appear that *merely a one year's residence in the state* is probably a reasonable classification of citizens for resident entrance requirements to any state University and as a basis for a non-resident fee. But that the rules of the University of Kentucky, as they now stand, make the acquisition of a legal residence by the student after he gets to college impossible, which prevents him from enjoying the privileges of his citizenship in the state, based on his domicil in the state. For this reason, it is contended the rules are unconstitutional and unreasonable in their effect upon the classification of citizens of Kentucky, and should be abrogated; and all fees collected thereunder, being wrongfully collected, should be returned to the student.

ROBERT L. HENRY

---

[6] 188 Cal. 559, 205 Pac. 1071 (1922).

[7] The question of the protest of fees paid by the student at the time of payment will not be taken up here, but generally, where a state authority has wrongfully collected fees, it has been held to be coercion, and protest has not been held necessary. See, Woodward, The Law of Quasi Contracts (1913) sec. 219; Niedermeyer v. Curators of the University of Missouri, 61 Mo. App. 654 (1895).

WARRANTIES AT A JUDICIAL SALE

Caveat emptor—"Let the purchaser take care," finds it fullest application at the judicial sale.

Kentucky Statutes 2651b-13 states that in a contract to sell or a sale, unless a contrary intention appears, there is: (1) an implied warranty that the seller has the right to sell the goods, (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods, and (3) an implied warranty that the goods shall be free at the time of the sale from any charge or incumbrance in favor of any third person not declared or known to the buyer before or at the time of the sale.

From these implied warranties designated by the statute as present in a sale, the ordinary buyer is protected from unknown defects in the title he seeks to purchase. But these implied warranties affect the purchaser in the ordinary sale and contract to sell. We are here concerned with the warranty received by the purchaser at the judicial sale—where he purchases property put on sale by court order. If the ordinary purchaser is to be protected from all hidden defects and assurance given to him of his future quiet possession, surely the purchaser of goods sold under order of the court is in at least as good position.

Reading further in Kentucky Statute 2651b-13, we discover "this section shall not, however, render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority of law."

Where the buyer would expect to find his best guaranty of a good title—he gets nothing more than the title passed by the one whose interest was sold. The purchaser discovers that the judicial sales are made without warranty and that it is the duty of a purchaser at such sales to investigate the title before the sale is confirmed, and if he fails to do so he must bear the consequences.

It may be said that in the judicial sale there is neither a warranty of title nor of quality. The purchaser gets virtually nothing except the quitclaim deed of the debtor defendant. The sale by the sheriff excludes all warranties, the purchaser takes all the risks, buying on his own knowledge and judgment. Caveat emptor applies with all its force to sales made by virtue of an execution. Any warranties made by the sheriff, commissioner or other person making the sale, are of no avail unless to bind him personally.

But why should such a distinction be made? The ordinary purchaser obtaining implied warranties of title, quality, and quiet possession while the purchaser from the judicial sale—a sale sanctioned and approved by the courts—takes his chance on the title he may acquire. An early Kentucky case[1] gives a clue to his rule, "There is no warranty of title or quality at a judicial sale. Such are sales by the Court and there is no one to go back on if the buyer takes

[1] Williams v. Glenn's Administrator, 87 Ky. 87, 7 S. W. 610 (1888).

nothing." The sale is by the court, no one warrants the title. The court undertakes to sell and can only sell the right, title and interest of the parties to the action, and the purchaser being charged with knowledge of this fact—then the logic of the application of caveat emptor to the judicial sale becomes apparent. There is no warranty in law because there is no one to fall back on.

"If caveat emptor was not the law of judicial sales, an execution, which is the end of the law, would only be the commencement of a new controversy—the creditor kept at bay during a series of suits before he could reap the fruits of his judgment and execution."[2] This explanation offered by an early Pennsylvania court has been frequently quoted and offers a real basis for the rule.

If however, before confirmation of the sale by the court, the title is discovered by the purchaser to be defective, or that there is no title to be conveyed to him, he may except to the report of the sale and be excused from payment of the purchase money.[3] The purchaser is merely a bidder for the property until his bid is accepted and the sale confirmed, and court will not compel him to take the property if the title is defective—the bidder not being required to ascertain defects in the title until after making his bid.[4] Such is borne out in the opinion of another Kentucky case[5] "Judicial sales of real estate are made without warranty and it is the duty of the purchaser at such sales to investigate the title before the sale is confirmed, and when he fails to do so and it turns our out that unpaid taxes are due he must bear the consequences." Even though the court held the purchaser bound by the sale, it recognized that had he discovered the defect in the title previous to confirmation of the sale—then the sale would have been set aside.

There is no doubt as to the application of caveat emptor to judicial sales generally and while courts have said it applies "after confirmation" and no relief can then be granted the unfortunate purchaser, it has been held in Kentucky[6] that if the facts authorizing a setting aside of the sale are called to the attention of the chancellor by exceptions or otherwise during the term at which the sale is reported and at a time when it is within his right to correct any injustice, the chancellor has the right, the power, and the duty to consider such exceptions and pass upon them and, if necessary, set aside an order of confirmation already made.

The rule of caveat emptor is limited, relaxed in cases of deficiencies of land sold by the acre at a judicial sale. Numerous Kentucky cases have allowed the purchaser at a judicial sale to receive

[2] This basis for the application of caveat emptor to judicial sales found in Smith v. Painter, 5 Sergeant and Rawles Reports (Penn.) 223 (1819).

[3] Taylor v. City of LaGrange, 262 Ky. 383, 90 S. W. (2d) 357 (1936).

[4] Whalen v. Hopper's Guardian, 152 Ky. 727, 154 S. W. 40 (1913).

[5] Wehrley v. Courtney, 8 Ky. Op. 523 (1875).

[6] Farmers Bank v. Peter, 13 Bush 591 (Ky. 1878); Sullivan v. Wright, 201 Ky. 22, 255 S. W. 848 (1923).

an abatement in the purchase price where a smaller number of acres was received than was bargained for.[7] It is difficult to see why this distinction should be allowed and the pro rata reduction in prices made. If the purchaser bought a certain number of acres, his bid being determined in his own mind by the number of acres in the tract, then it seems that it should be his duty to see before confirmation that the tract contained the quantity estimated.

Fraud or misrepresentation prevents application of the doctrine of caveat emptor to judicial sales.[8] Where the rule is cited or quoted, it is accompanied by the suffix "in absence of fraud." The rule of caveat emptor is based on the assumption that the purchaser is supposed to know what he is buying and does so at his own risk. This presumption can be overcome by actual evidence of fraud or it may be shown that the purchaser knew little or nothing of the thing purchased and bought solely on the faith of the representations made by those who by their peculiar relations to the subject were supposed to be thoroughly acquainted with it.

The duty is on those who conduct judicial sales to act in good faith and as far as possible to avoid any misdescription or misrepresentation as to quality or quantity of the property offered for sale.[9] If misrepresentation is made by the person selling and relied on by the person buying, to the injury of the buyer, the sale will be set aside.[10]

The policy of the law is to sustain judicial sales, and to encourage bidding by all parties..[11] The interest of the owner of the property, of the judgment holder, and of the law itself, is at stake. What better way to promote bidding and purchasing at a judicial sale than to guarantee the purchaser something for his money?

The state of the warranty at a judicial sale in Kentucky may be summed as follows: The rule of caveat emptor applies in full force with three exceptions. (1) If there is a deficiency of the number of units, where the bid is made by the unit, a proportionate rebate from the purchase price will be allowed. (2) If there is a defect discovered before confirmation of the sale, then the purchaser may petition to have the sale set aside. This has been extended to cases where after confirmation of the sale the chancellor still has power to set the confirmation aside. (3) Where there is fraud or misrepresentation the sale may be set aside.

PAUL J. DURBIN

[7] Cooper v. Hargis, Admr., 20 Ky. L. Rep. 41, 45 S. W. 112 (1898); Dawson v. Goodwin, 15 B. Monroe 439 (Ky. 1854); Elder v. Lucas, 2 Ky. L. Rep. 229 (1881); Trigg v. Jones, Admr., 102 Ky. 44, 42 S. W. 848 (1897).

[8] Sullivan v. Wright, 201 Ky. 22, 255 S. W. 848 (1923); Williams v. Glenn's Admr., 87 Ky. 87, 7 S. W. 610 (1888); Wofford v. Phelps, 2 J. J. Marsh. 31 (Ky. 1829).

[9] Sullivan v. Wright, 201 Ky. 22, 255 S. W. 848 (1923).

[10] Williams v. Glenn's Admr., 87 Ky. 87, 7 S. W. 610 (1888).

[11] Kidd v. Stephens, 174 Ky. 381, 192 S. W. 44 (1917); Scott's Exr. v. Scott, 85 Ky. 385, 3 S. W. 558 (1887); Thornton v. McGrath, 62 Ky. 350 (1864); Benningfield v. Reed, 47 Ky. 102 (1847).