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# Breach of Warranty of Fitness as Failure of Consideration--Meyer v. Land

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weapon doctrine to the highest degree of murder would result in destroying the distinction between the two degrees, and thus, in effect, invalidate murder in the first degree.

DICK DOYLE

### BREACH OF WARRANTY OF FITNESS AS FAILURE OF CONSIDERATION—MEYER V. LAND

In determining whether a breach of warranty of fitness for purpose intended can also constitute failure of consideration, we must look first at the nature of the warranty and the instances in which it has been deemed part of the primary consideration.<sup>1</sup> Both at common law<sup>2</sup> and under the Uniform Sales Act<sup>3</sup> an implied warranty of fitness arises when goods are sold for a specific purpose. That is, when a buyer makes known to the seller the particular purpose for which he needs certain goods, and relies on the seller's judgment in procuring the goods, there is an implied warranty that the goods are suitable for that purpose.<sup>4</sup> It is found, however, that in certain instances this concept does not provide relief to a vendee who discovers that he has purchased an article which he cannot use.

In England no rescission is permitted for breach of warranty if the property in the goods has passed to the buyer.<sup>5</sup> Thus, if the vendee finds his purchases unsuitable for the purpose intended, he must seek recession under a different theory. This theory is failure of consideration. Having had its inception in the law of contracts rather than the law of sales, this familiar doctrine was placed in an unusual setting by the court in the leading case of *Young v. Cole*.<sup>6</sup> In that case certain bonds which the vendor held out to be marketable negotiable instruments were, in truth, worthless pieces of paper. Rescission could not

<sup>1</sup> By "primary consideration" the writer is referring to that consideration which must be present before a valid agreement can be effected under basic principles of contract law, as distinguished from secondary obligations such as warranties.

<sup>2</sup> MADDEN, UNIFORM SALES ACT 25 (1923); HILLIARD, SALES 254 (1860); 4 MECHEM, SALES 1160 (1901); see also *Griffin v. Williams*, 305 Ky. 18, 202 S.W. 2d 744 (1947).

<sup>3</sup> Uniform Sales Act, sec. 15(1).

<sup>4</sup> Thus, if the requisite reliance is present and the article fails to meet the particular use for which it was purchased, the buyer can recover damages on this type of warranty. For example, see *Brandenburg v. Samuel Stores*, 211 Iowa 1321, 235 N.W. 741 (1931) (wherein a fur coat, purchased from a retailer, was found to be unfit as an article of wearing apparel); also see 46 AM. JUR. 529 et seq. (1943); 2 BENJAMIN, SALES 867 (rev. ed. 1889).

<sup>5</sup> The leading English case is *Street v. Blay*, 109 Eng. Rep. 1212 (1831); *VOLD*, SALES 497 (1931); 3 WILLISTON, SALES 321 (rev. ed. 1948).

<sup>6</sup> 3 Bing. (N.C.) 724, 132 Eng. Rep. 589 (1837) and cases cited therein.

be given for breach of warranty, but the court held that the vendee was entitled to regain the money he had paid since the consideration for which it was given had completely failed. Thus, it would seem that in *Young v. Cole* and similar English cases,<sup>7</sup> the harsh effect resulting from a denial of rescission for breach of warranty when the sale is executed is circumvented by utilizing the concept of failure of consideration.

A situation in which no recovery is allowed for breach of warranty arises through express disclaimers of implied warranty.<sup>8</sup> That is, free to contract as they chose, the parties to an agreement often expressly exclude the right of recovery under any warranty implied by law.<sup>9</sup> Express disclaimers have received varying interpretations from different courts.<sup>10</sup> In many situations the disclaimers, couched in ambiguous and technical terms, are clearly prejudicial to the buyer due to his unequal bargaining power,<sup>11</sup> and his unfamiliarity with the legal points involved. Therefore, most jurisdictions have placed a strict construction upon such disclaimers.<sup>12</sup> In doing so, many courts have resorted to what amounts to judicial legislation,<sup>13</sup> while others have again called upon the failure of consideration concept.

A question of express disclaimer arose recently in a Kentucky case, *Mayer v. Land*.<sup>14</sup> There the plaintiffs had purchased from the defendant certain machinery with which they planned to manufacture merchantable concrete blocks. The contract of sale stipulated that "There are no understandings, agreements, representations or warranties express or implied, not specified herein respecting this order."<sup>15</sup> The only substantial warranties specified therein concerned defects of material and workmanship. However, the machinery was wholly in-

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<sup>7</sup> 3 WILLISTON, SALES 322, n. 18 (rev. ed. 1948).

<sup>8</sup> Uniform Sales Act, sec. 71; 46 AM. JUR. 515-516 (1943); see also VOLD, SALES 468, esp. n. 84 (1931); 1 WILLISTON, SALES 622-624 (rev. ed. 1948).

<sup>9</sup> Some courts have held that any express warranty in a contract of sale excludes any implied warranty [46 AM. JUR. 516 (1943); 77 C. J. S. 1161 (1952)]. See also, 1 WILLISTON, SALES 625, n. 16 (rev. ed. 1948). On the other hand, the Uniform Sales Act which has been adopted in the majority of states [VOLD, SALES 5 (1931); 46 AM. JUR. 198 (1943)] provides that "An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith" [Uniform Sales Act, sec. 15(6)]. The act does not, however, set forth any standards by which inconsistencies between express and implied warranties may be determined [Amram and Goodman, *Some Problems on the Law of Implied Warranty*, 3 SYRACUSE L. REV. 259, 260 (1951-52)]. See also annotation 164 A.L.R. 1321 (1946).

<sup>10</sup> Amram and Goodman, *Some Problems on the Law of Implied Warranty*, 3 SYRACUSE L. REV. 259, 260-263 (1951-52).

<sup>11</sup> Comment, 57 YALE L. J. 1389, 1400 (1947-48).

<sup>12</sup> VOLD, SALES 468 (1931).

<sup>13</sup> Note, 1 VANDERBILT L. R. 467, 469 (1947-48).

<sup>14</sup> 314 Ky. 514, 235 S.W. 2d 988 (1950).

<sup>15</sup> *Id.* at 517, 235 S.W. 2d at 990.

adequate for the purpose intended and, as found by a jury, would not manufacture merchantable concrete blocks at all. The plaintiff sued to recover the purchase price, and recovery was allowed, the court saying that in contracts of this kind limitation of liability must be plainly expressed; and since the disclaimer was in technical terms, within a long and formidable document prepared by the seller, the requisites had not been met. The court indicated that unless it appears that the inclusion of the express disclaimer was fairly procured, the stipulation will not be given effect.

The court was not disposed, however, to rest the decision on this reasoning alone, but applied the failure of consideration concept in a manner comparable to that of the English courts. In the language of the court,

. . . 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.<sup>16</sup>

The application of the concept of failure of consideration to sales transactions where the goods are not fit for the purpose intended, although unusual on its face and although infrequently used, seems to be accepted as sound practice today. It is stated by one authority that:

As a general rule there is an entire failure of consideration for a contract of sale, where the goods or property bought is entirely worthless to either party, or where, although of some value, it was bought for a particular purpose and is worthless for that purpose.<sup>17</sup>

However, only two cases have been found with facts similar to *Meyer v. Land* wherein the courts' decisions were substantially the same as that of the Kentucky court and, thus, in line with the rule as set out above. The first of these was also a Kentucky case.<sup>18</sup> Therein, the vendee bought an auto-wagon to use on a particular road, only to discover that the vehicle was unable to pull certain grades. The court, allowing the vendee to rescind despite the express disclaimer in his contract, said that the breach "was nonperformance of the contract of sale itself."<sup>19</sup>

In the second case, which arose in Michigan, the plaintiff sought to rescind his purchase of a second-hand automobile.<sup>20</sup> A recovery for breach of warranty was precluded since implied warranties do not

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<sup>16</sup> *Id.* at 519, 235 S.W. 2d at 991.

<sup>17</sup> 77 C. J. S. 626 (1952).

<sup>18</sup> *International Harvester Co. of America v. Bean*, 159 Ky. 842, 169 S.W. 549 (1914).

<sup>19</sup> *Id.* at 848, 169 S.W. at 551.

<sup>20</sup> *Bayer v. Winton Motor Car Co.*, 194 Mich. 222, 160 N.W. 642 (1916).

apply to the purchase of second-hand machinery.<sup>21</sup> However, the court held that the sale was voidable at the purchaser's option, and said that:

The claim of total failure of consideration necessarily goes with and relates to the claim of implied warranty that the article was reasonably fit and adapted to the purpose for which it was purchased—which was to use as an automobile.<sup>22</sup>

Rescission for failure of consideration has been considered by some courts to be a proper remedy when the goods were not suitable for the purpose intended, even where there was no impediment to a suit for breach of warranty.<sup>23</sup> Other cases, although admitting that rescission could be had if there were a total failure of consideration, have held that there was no total failure unless the equipment was not only worthless for the purpose intended but for "any" purpose;<sup>24</sup> and that consideration has not completely failed if the goods transferred have a junk value.<sup>25</sup> Moreover, a case has been found wherein the holding seems completely contradictory to the failure of consideration concept. There it was said that a breach of warranty does not constitute a failure of consideration,<sup>26</sup> but it is not clear from the opinion whether the court deciding that controversy meant that breach of warranty did not constitute a failure of consideration in that particular case, or could not in any event.

It has been asserted that failure of consideration, being nowhere accurately defined, is often interposed where a breach of implied warranty is the real remedy.<sup>27</sup> Admitting that this is true, it is suggested that such misapplication was not made in *Meyer v. Land*. A warranty is not the consideration for a contract, but a subsidiary obligation. There is oftentimes but a fine distinction between the two. For example, if a vendee bought "*a concrete block machine, that will make 600 blocks a day,*" it might be contended that the machine is the object purchased and the output merely a subsidiary warranty. But if he bought "*a concrete block machine that will make 600 blocks a day*", the machine with a certain output would be the consideration. Therefore, if the machine with the output were the primary consideration

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<sup>21</sup> MECHEM, SALES 1166 (1901).

<sup>22</sup> *Bayer v. Winton Motor Car Co.*, 194 Mich. 222 at ....., 160 N.W. 642 at 643 (1916).

<sup>23</sup> *Swift and Co. v. Redhead*, 147 Iowa 94, 122 N.W. 140 (1909); *Bank of Polk v. Wood*, 189 Mo. 92, 186 S.W. 1186 (1916); *Bewley-Darst Coal Co. v. Ennis*, 169 Ga. 849, 152 S.E. 257 (1930); *Holland Furnace Co. v. Gabriel*, 102 Pa. 578, 157 A. 373 (1931).

<sup>24</sup> *Laitner Plumbing and Heating Co. v. McThomas*, 61 S.W. 2d 270 (Mo. 1933).

<sup>25</sup> *L. D. Powell Co. v. Sturgeon*, (Tex. Civ. App.) 299 S.W. 274 (1927).

<sup>26</sup> *J. I. Case Threshing Mach. Co. v. Gidley*, 28 S.D. 101, 132 N.W. 711 (1911).

<sup>27</sup> MECHEM, SALES 691 (1901).

and the output was not sufficient, relief could be had either for failure of consideration, or breach of the warranty which, although a promise in itself, is a part of the primary consideration. Relief should be granted either for failure of consideration or breach of warranty when the consideration has a dual aspect, but unless the dual aspect is apparent, failure of consideration should not be used merely as a means of circumventing harsh express disclaimers. To do so would be to rewrite the contract in the courts.

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