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RESCISSION FOR BREACH OF SELLER'S WARRANTY

In the case of *American Sugar Refining Company v. Martin-Nelly Grocery Company*[1] it was held that the buyer of goods could not rescind an executed sale for breach of the seller's warranty. Approximately eight months later the same court rendered a contrary decision in the case of *Kemble v. Wiltison*,[2] without overruling, distinguishing or even mentioning the first case. The present status of the West Virginia law on this point is therefore doubtful. It is the purpose of this note to discuss these and other cases in an effort to reconcile them and to state the correct governing principles.

Sales cases commonly fall into two broad classes: (1) contracts for the sale of unascertained goods and (2) sales of specific goods.

1 90 W. Va. 730, 111 S. E. 759 (1922). See Comment (1931) 29 MICH. L. REV. 794.
2 92 W. Va. 32, 114 S. E. 369 (1922).

In the latter case there may or may not be a previous executory contract of sale. In cases of this type, in the absence of evidence of a contrary intention, the title to the specific goods passes to the buyer at the moment the bargain is made, without reference to the time of delivery or payment of the purchase price. For example, *A* says to *B*, "I offer to sell you this book for $10.00." *B* replies, "I accept." The title to the book is, at that moment, vested in *B*. In cases of type (1) the title cannot pass to the buyer until that which is unascertained becomes definite, by mutual assent of the parties. *A* agrees to sell a carload of wheat to *B* and *B* agrees to take and pay for it. Title to any specific carload of wheat cannot pass to *B* until *A* "appropriates" a specific carload to the performance of the contract. The title to the wheat becomes vested in *B* from the moment of *A*'s act of appropriation, if the wheat is of the kind and quality agreed upon. On the contrary, if the goods do not conform to the contract, the title cannot pass unless and until *B* "accepts" the goods tendered by *A*. "Acceptance", in this connection, means simply that the buyer consents to become the owner of the specific goods offered by the seller in performance of the pre-existing contract. Unless otherwise agreed, the seller must permit the buyer to inspect the goods. The buyer must either accept or reject them, and their retention for an unreasonable length of time without objection, constitutes an acceptance.[3]

In a word, the concept of acceptance by the buyer necessarily embodies the principle that having consented to become the owner of the tendered goods, he cannot thereafter reverse the transaction and revest the title in the seller unless the defect is latent. On the other hand, if the buyer merely "receives" the goods, as distinguished from "accepting" them, he may return them.[4]

Where the defect is latent, *i.e.*, the failure of the goods to conform to the warranty, express or implied, cannot be ascertained by ordinary inspection, it is probably inaccurate to state that the title does not pass to the buyer in the interval between his receipt of the goods and the time when the defect is discovered. In such cases, the warranty should be treated as a condition subsequent, breach of which permits the buyer to revest the title in the seller. On the other hand, if the defect is readily discoverable, then appro-

[3] These common-law principles are codified in the Uniform Sales Act §§ 47 & 48.

[4] This distinction in terminology is made by the Uniform Sales Act, § 69(1)(d). After acceptance of the goods, "the right of rescission is gone." Gerli & Co. v. Mistletoe Silk Mills, 80 N. J. L. 128, 76 Atl. 335 (1910).

priation by the seller of goods conforming to the warranty is generally treated as a condition precedent to the passage of title.

Where the sale is of specific goods, the buyer may or may not previously have examined them, or the defect may be one which could not readily be discovered by examination. He should have the right to compel the seller to take back the title because he consented to become the owner upon the mistaken assumption that the specific goods were of a certain character. This reason fails to apply to the case of unspecified goods, except where the defect is latent, because the buyer is not deemed to have "accepted" them unless and until he has had a reasonable opportunity to examine and test them for the purpose of ascertaining whether they are in conformity with the contract, and therefore to determine whether he will become their owner.

Rescission must therefore be considered in two aspects. (1) If the buyer does not accept defective goods tendered in performance of a pre-existing contract for the sale of unspecified goods, he may rescind the *contract.* No question of rescission of the *sale (i.e.,* the passing of the property interest in the goods) is involved. If he does accept them, unless the defect is latent, he cannot rescind either the sale or the contract, but may recover damages for breach of warranty either in an independent action or by way of recoupment. (2) If the case involves the sale of specific goods, the buyer may rescind both the sale and the contract provided he does so promptly and does not waive the right in some manner. The right of rejection in the case of unspecified goods corresponds to the right of rescission in the case of specific goods.

Little distinction is made, and none should be made, between cases of express warranties and implied warranties. If the sale is by description, there is an implied warranty that the goods shall conform to it; if by sample, that the goods shall conform to the sample; if sold for a particular purpose, that the goods shall be fit for that purpose.[5]

Returning now to the two West Virginia cases mentioned, it will be noted that in the *American Sugar* case[6] there was a contract for the sale of unspecified goods, *viz.,* extra fine granulated sugar. The sugar was received by defendant buyer on September 21, 1920. On September 30, defendant accepted three drafts for

[5] The warranties paraphrased above are set forth in detail in the Uniform Sales Act §§ 14 & 15.
[6] 90 W. Va. 730, 111 S. E. 759 (1922).

the purchase price. On October 5th, defendant discovered that the sugar did not conform to the contract and immediately notified plaintiff seller of its rejection. However, on October 30th, defendant paid the first draft, believing that plaintiff would "adjust" the matter. In an action by plaintiff to recover on the remaining drafts, defendant pleaded failure of consideration, offered to return all the sugar, sought to cancel the drafts and to recover the amount paid on the first one.

The court denied the right to rescind, stating: "We seem to be committed to the principle followed by the English courts, that an executed sale cannot be rescinded for a breach of warranty, unaccompanied by fraud, or an agreement to rescind. . . . It is well settled in this State that where the contract is executed, and warranty is relied upon, rescission can not be had."

In support of these statements, the court cited *Ellison v. Flat Top Grocery Company*[7] and *Eagle Glass & Manufacturing Company v. Pipe Company*.[8]

The holding in the *Ellison* case was really based on other grounds. There, the plaintiff contracted in writing to sell to defendant 200 carloads of hay of a certain quality. From September 10, 1907, to June, 1908, plaintiff shipped 123 carloads, for which defendant paid, adjustment having been made for nine cars containing defective hay. Thereafter, defendant refused to accept two other carloads containing defective hay, and "cancelled" the contract. The court permitted plaintiff to recover damages for breach of the contract, upon the ground that the tender of only two defective carloads was an immaterial breach not justifying defendant in refusing to continue with its own performance.[9] As an alternative ground of decision, it was held that a contract must be rescinded *in toto,* and that was impossible since defendant could not return the hay previously accepted.

In the second case cited,[10] plaintiff bought from defendant 16,000 feet of casing, expressly warranted to be in good condition and to stand not less than 100 pounds pressure. Upon its arrival plaintiff rejected part of the pipe and used the remainder in laying a pipe line, paying in full for the part used. The line proved

[7] 69 W. Va. 380, 71 S. E. 391 (1911).
[8] 74 W. Va. 228, 81 S. E. 976 (1914).
[9] *Cf.* McMullar Coal Co. v. Champion, *etc.* Co., 103 W. Va. 637, 138 S. E. 755 (1929); contract for the sale of 100,000 tons of coal. The buyer, having accepted 46,164 tons, was denied the right to cancel the contract.
[10] 74 W. Va. 228, 81 S. E. 976 (1914).

to be defective and plaintiff took it up and returned it to the railroad station where it had been received. The court denied the right to rescind and recover the purchase price, saying:

> "It is true that in some of the American states a vendee may rescind an executed sale because of the breach of a warranty, and claim as damages what he paid and expended. But such is not the principle of the English law, nor of many American jurisdictions. [Citing authorities.] . . . . Nor have we ever understood that with us an executed sale could be rescinded because of a mere breach of warranty unaccompanied by fraud or an agreement to rescind [citing *Ellison* case]. If the warranty is broken, the executed sale nevertheless stands. The breach of warranty can not in principle operate to revest in the seller the title that passed to the buyer. The purchaser must retain the property, but he may have damages for the breach of warranty made to him about it."

The case is probably correct, since the facts seem to show that the plaintiff failed to rescind promptly after discovery of the breach of warranty.

It is submitted that these cases were all correctly decided: the *American Sugar* case upon the ground of acceptance of the goods by failure to return them and by payment of the purchase price; the *Manufacturing Company* case, because of loss of the right of rescission after discovery of a latent defect; and the *Ellison* case because the question there was only of the right to rescind the contract, not the executed sale. If the facts in these cases are considered, there is little to justify the broad statement of the rule denying the right to rescind an executed sale.

On the other hand, we have *Kemble v. Wiltison.*[11] In that case, there was a sale of specific goods. Plaintiff sold to defendant a second-hand automobile, warranting it to be in first-class condition. Defendant executed a promissory note for the purchase price. Within a few days after receiving the car, defendant tested it, found it was not in such condition, offered to return it, and demanded surrender of his note. In an action by plaintiff upon the note, the court held for the defendant. It seems desirable to quote at length from the opinion:

> "Plaintiff insists that inasmuch as this was an executed sale, the defendant Wiltison did not have any right to rescind it and return the property, but that if there was a breach of the warranty he must keep the property and sue for dam-

[11] 92 W. Va. 32, 114 S. E. 369 (1922).

ages on the warranty, or, in case he was sued for the purchase price, recoup such damages. There is no doubt but that he could do this, but is he bound to resort to that remedy? There was formerly considerable contrariety of opinion among the courts as to whether or not the purchaser of personal property could return the same upon discovering that it did not meet the requirements of a warranty, or whether he must keep the property and sue for damages for the breach of the warranty. The Massachusetts Supreme Judicial Court announced the rule that where the title to the property had passed to the purchaser, and there was an express warranty, the purchaser had the right to inspect or test the property to see whether it compiled with the warranty, and if it was found that it did not so comply, he might return it to the seller and rescind the contract. This rule, known as the Massachusetts Rule, was followed by many of the courts in this country. The New York Court of Appeals, on the other hand announced the rule that where the title to the property had passed, the purchaser could not return the property, upon discovering that it did not comply with the seller's warranty, but must retain it and sue for damages for breach of the warranty. This rule, known as the New York Rule, was followed by a considerable number of other states. The Uniform Sales Act recognizes the Massachusetts Rule as the correct one, and this Act has been adopted by a considerable majority of the American states, in fact by all of the great commercial states. Professor Williston in his work on Sales, while presenting both views, also takes the view that the Massachusetts Rule is the correct one. . . . . We think it may be laid down as the law controlling in a case like this, that where the seller of personal property has expressly warranted it, the buyer, upon delivery of the property to him, even though the title has passed and vested in him, may rescind the contract upon discovering that the warranty has been broken, provided he acts promptly and does not so use the property as to indicate that he has unequivocally accepted it in satisfaction of the contract."

The court then distinguished *Manufacturing Company v. Pipe Company*[12] and *Ohio,* etc. *Co. v. Smith*[13] upon the ground that in those cases the buyers had lost the right of rescission by failure to exercise it promptly. In the latter case, there was an executed sale of steel piling, part of which the buyer had used and could not return. For this reason, rescission was properly denied.

We thus have a definite holding in the *Kemble* case, that there may be rescission of an executed sale of specific goods for breach

[12] 74 W. Va. 228, 81 S. E. 976 (1914).
[13] 76 W. Va. 503, 85 S. E. 671 (1915).

of an express warranty. We have the *American Sugar* case, which may be viewed as holding that the buyer cannot rescind where he has "accepted" goods tendered by the seller in performance of a pre-existing contract for the sale of unspecified goods, the defect being such as could reasonably be discovered by inspection. In *Gibson v. Adams,*[14] it was held that the right of rescission must be exercised within a reasonable time after its discovery, otherwise it will be lost.

Where the contract contemplates instalment deliveries, as in *Norman Lumber Company v. Keystone Manufacturing Company,*[15] or is severable,[16] as in *Regent Waist Company v. Morrison Department Store*[17] it was held that the buyer may refuse to accept goods not conforming to the contract and keep those which do conform.

It seems, therefore, that the statement in an authoritative text[18] placing West Virginia in that group of states which deny the right of rescission of an executed sale, is not an accurate one.

The basic idea of the right is that the buyer ought to get the thing he agreed to pay for — not something of less value plus a right of action for the difference. He ought not to have a title forced upon him which he had no proper opportunity to reject.

R. T. D.

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[14] 98 W. Va. 671, 127 S. E. 514 (1925).
[15] 100 W. Va. 515, 131 S. E. 12 (1925).
[16] It is a question of some difficulty to determine when the contract is severable. See Hartland Colliery Co. v. Burns, *etc.* Co., 112 W. Va. 44, 163 S. E. 714 (1932).
[17] 88 W. Va. 303, 106 S. E. 712 (1921).
[18] WILLISTON, SALES (2d ed. 1924) § 608a.