

CARLE *v.* AVERY POWER MACHINERY COMPANY.

No. 4—2465.

Opinion delivered May 16, 1932.

1. SALES—WARRANTY.—A warranty in the sale of machinery conditioned on a test of the machinery and giving notice of any defects within a specified time if the machinery proves defective is binding, and a purchaser of machinery who fails to give notice of defects within the time specified will not be entitled to resist payment of the purchase money on account of the defects.

2. SALES—WAIVER OF NOTICE OF DEFECTS.—Evidence *held* insufficient to show a waiver by the seller of machinery of the notice of defects provided for in case machinery sold should prove defective.

Appeal from Arkansas Chancery Court, Northern District; *Harvey R. Lucas*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Avery Power Machinery Company brought this suit in equity against E. G. Carle to recover the balance due on the purchase price of one Avery steel separator and equipment and to foreclose a mortgage given on said property to secure said indebtedness. The defense there was a violation of the terms of a warranty in that the separator was defective, and did not operate according to the terms of the warranty.

On September 20, 1929, the Avery Power Machinery Company, manufacturer of rice separators, through its agent, the H. H. John Supply Company at Stuttgart, Arkansas, sold to E. G. Carle, a rice grower, one Avery steel separator with all equipment belonging thereto for \$1,374, of which \$675 was paid in cash and \$699, evidenced by a note due December 1, 1930. The contract was in writing and contained a warranty as follows:

“Warranties applicable only to new machinery manufactured by company: That said machinery is well made, of good material, and, if properly used and operated, will perform the work for which it is intended as well or better than any other make of machine of the same size, working under exactly the same conditions. All other warranties, express, implied or statutory, are hereby expressly negatived.”

“Conditions applicable to all machinery described herein: If within six (6) days from the first starting of said machinery, the purchaser is not satisfied that the said machinery can be made to operate and do work as above (or to comply with any warranty contained herein, or any warranty which might be deemed to exist notwithstanding the terms hereof), the purchaser shall notify the company by registered mail or telegram, addressed to the Avery Power Manufacturing Company, of

Peoria, Illinois, clearly specifying his complaint, and the purchaser shall forthwith discontinue the use thereof pending the remedying of such claimed defect or deficiency; the company shall have a reasonable time, not less than seven (7) days, to send a service man to remedy such defect or deficiency, if any exists, and the purchaser agrees to furnish a sufficient amount of good average grain without charge for testing purposes and render all necessary and friendly assistance to such service man in order that he may make tests of any and all parts claimed to be defective or deficient; if within six days (6) after such service man arrives (inclement weather preventing testing included), the particular machine attachment, or articles claimed to be deficient or defective, is not remedied, or made to comply with the warranties contained herein, (or such warranties as might exist notwithstanding the provisions of this contract), the particular machine or attachment, or article which is so defective or deficient must be returned by the purchaser in as good order as when received, except for ordinary wear, to the place from which it was received, and the purchaser shall thereupon immediately notify the company of such return by registered letter addressed to the Avery Power Machinery Company, Peoria, Illinois, and the company may thereupon, at its option, replace the same, and, in case any defective or deficient machine, attachment or article is returned by the purchaser and not replaced by the company, then the purchaser shall be entitled to receive from the seller the consideration received by the company therefor, or such *pro rata* part thereof as the present list price of such defective machine, attachment or article bears to the whole list price, and no further claim shall be made upon the company. If only a part or portion of said machinery is so returned, and the purchaser is otherwise indebted to the company, purchaser shall only be entitled to receive a credit upon such indebtedness. This remedy is hereby declared to be exclusive, and in full of all claims of every nature by the purchaser against the seller.”

The note and mortgage given by Carle to the machinery company was introduced in evidence.

According to the testimony of H. H. John, the separator was sold to Carle through one of his salesmen named Hunt who was dead at the time this suit was instituted. The machinery company, according to its custom, sent a man down in the fall of 1929 to inspect the machines which he had sold; and, among them, he inspected the Carle machine. No complaint was made by Carle that the machine did not operate properly or that it was defective in any manner. Late in the fall of 1929, Carle spoke to witness about the inspector of the company agreeing to furnish him with a no-choke chaffer. Witness explained to Carle that he would take it up with the company and see if they would furnish him one, that he had nothing to do with it. Nothing was said about the no-choke chaffer by Carle until he had finished threshing in the fall of 1929. Later on, witness took up with Carle the question of giving a mortgage on the rice crop to be raised in 1930, and Carle refused to execute such mortgage. Some forty or fifty machines, similar to the one sold Carle, were in operation in the rice territory and all proved satisfactory. In fact, the Avery Separator was generally regarded as the best in that territory. It had the largest sale of any separator in the rice territory in 1929 and 1930. A machine of this kind requires an experienced operator in order to keep the straw from going into the rice or the rice from going into the straw pile.

Other witnesses were introduced by plaintiff who testified that they had purchased Avery separator similar to the one purchased by the defendant, and that they had proved satisfactory in their operation.

According to the testimony of E. G. Carle, he was a rice grower, and Hunt came out day after day after he had sold the machine to him and tried to prevent the chaffer from stopping up with straws and stems. He made numerous trips to see the machine. Finally, a

factory man came out in the fall of 1929 and told witness that he would get him a no-choke chaffer. The chaffer continued to choke up and let the grain pass through it and that caused it to go into the straw stack. The chaffer divides the straw and rice as it passes over it. It separates the threshed grain from the straw and chaff. When the chaffer choked up, it would cause the stems and straw to pass out into the elevator and go into the threshed grain. A great deal of time was lost in stopping the machine to clean out the chaffer. Carle admitted that he operated the separator during the seasons of 1929 and 1930. About twenty per cent. of the grain was lost because of the defect in the machine when in ordinary cases only ten per cent. was lost.

Other witnesses were introduced by the defendant who corroborated his testimony. One of the witnesses, however, testified that the machine operated perfectly in the fall of 1929, and only became defective in the fall of 1930.

The court found the issues in favor of the plaintiff, and rendered judgment in its favor against the defendant for the balance of the indebtedness. The decree provided that, if the indebtedness was not paid within a stipulated time, there should be a foreclosure of the mortgage. The defendant has appealed.

*Leach & Elms*, for appellant.

*John W. Moncrief* and *A. G. Meehan*, for appellee.

HART, C. J., (after stating the facts). The warranty clause relied upon by the defendant is in writing and is set out in our statement of facts. It provides that, if within six days from the first starting of the machine, the purchaser is not satisfied that the machine can be made to operate and do work as well as any other machine of the same size, the purchaser shall notify the company by registered mail or telegram addressed to the Avery Power Manufacturing Company of Peoria, Illinois, clearly specifying his complaint, and the pur-

chaser shall forthwith discontinue the use thereof pending the remedying of such claimed defect.

Thus, it will be seen that the warranty was conditioned upon giving the notice of the defect within a specified length of time. The agreement of warranty, being in writing, is controlled by the language used. It has been held by this court that contracts of this sort are lawful and must be enforced as they have been made by the parties, and the test must be made within the time specified, and the notice given according to the terms of the agreement. The condition that notice of defects must be given within a specified time is imperative; and if the buyer does not show a compliance therewith, he cannot enforce it against the seller. Where a purchaser of machinery has agreed that, if it proves defective, he will give notice thereof to the seller within a specified time, he will not be entitled to resist payment of the purchase money on account of imperfections of it if he did not give notice. *Southern Engine & Boiler Works v. Globe Cooperage & Lumber Company*, 98 Ark. 482, 136 S. W. 928; *Heer Engine Company v. Papan*, 142 Ark. 171, 218 S. W. 202; and *Thomas v. Schaad*, 170 Ark. 797, 281 S. W. 10.

It is claimed by the defendant, however, that the agreement to give them notice was waived by the seller. Of course, it was within the power of the seller, under a contract containing warranties and conditions, to waive any or all the conditions, including a requirement that the purchaser give notice of defects within a stipulated time. We do not think, however, that this principle of law has any application under the facts of this case. The only thing to base it upon is the testimony of the defendant to the effect that Hunt, the salesman, came out to his place where the machinery was being operated day after day in an effort to adjust the machine and see that it would work properly. Hunt finally told him that he did not know what to do, and it then became the duty of the defendant to give the notice required by the con-

tract of warranty. He knew that Hunt was only endeavoring to see that the machine was installed properly, and there is nothing in the conduct of the parties to show that Hunt was endeavoring to remedy any defect in the machine or to do anything else but to properly install it. The defendant continued to use the machine during the remainder of the fall of 1929 and never even made any demand upon the dealer at Stuttgart through whom he purchased it to remedy the defect. He did not attempt to give notice at the factory as required by the contract of warranty. He continued to use the machine during the season of 1930. Under these circumstances, we do not think that there was any waiver of notice on the part of the seller, and the contract between the parties must be enforced according to its terms.

The parties were competent to contract and must be bound by the language used by them. There is nothing to show that the seller had any knowledge that Hunt was trying to remedy any defect in the machinery or that he was attempting to waive any of the conditions of the contract. It only appears that he was trying to properly install the machinery and get it ready to operate. It then became the duty of the defendant to give the notice as required by the contract, or he must be deemed to have accepted the machine.

Therefore we are of the opinion that the decree of the chancery court was correct, and it will be affirmed.

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