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Sales

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of the State of Ohio for taxes, the State will then be subordinated to the federal lien, inasmuch as the state law must yield to the federal law where the two are in conflict on this subject.[18]

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SALES

Under the Uniform Sales Act[1] the buyer has three remedies for breach of warranty by the seller. He may recoup against the sales price, he may counterclaim or he may rescind.[2] These remedies are exclusive of each other.

Two noteworthy decisions of the Cuyahoga County Court of Appeals appeared in the period covered by this survey, *Schumacher, d.b.a. Perfection Heating and Engineering Co. v Iron Fireman Mfg. Co.*[3] and *Snap-Tite, Inc. v. Noll Equipment Co.*[4]

In the former case the court rested its decision on the failure of plaintiff's petition to state a cause of action, in that while it alleged that the defendant warranted a furnace sold by him to plaintiff, and installed by plaintiff in the home of a third person, it alleged no defect in the furnace which would constitute a breach of such warranty. Likewise, the damage was pleaded as being suffered by the home owner and not by the plaintiff.

Up to this point, the decision rested upon questions of pleading and is significant to a lawyer who is faced with the necessity of drawing a petition which will withstand a defendant's general demurrer. In the remainder of its opinion (which would appear to be dictum in view of its ruling for reversal on the plaintiff's failure to state a cause of action, and which would further appear to be unnecessary dictum in view of the fact that it did not remand for a new trial but rendered final judgment for defendant) the court discussed the elements of damages in a breach of warranty.

It held that the selling price of the furnace and the expenses incurred by the plaintiff contractor in installing the duct work in the owner's house were not proper elements of plaintiff's damages, if any, arising out of the breach. The evidence admitted by the trial court showed that the duct work had not been installed by defendant seller but by the plaintiff, so the defendant could not in any way be held responsible for them; likewise, it was shown that they were still in use at the time of

[18] Southern Ohio Savings Bank & Trust Co. v. Bolce, 165 Ohio St. 201, 135 N.E.2d 382 (1956)

trial, more than five years after the discovery of the allegedy defective part of the furnace.

Likewise, the *cost* of the furnace was not a proper element of damages. While special and consequential damages are recoverable on breach of warranty if properly pleaded and proved,[5] the measure of damages for breach of warranty is, in the absence of special damages, the difference between the *value* of the goods at the time of delivery and the *value* they would have had if they had answered to the warranty. Nor was a settlement privately made between owner and the plaintiff, as purchaser of the furnace from defendant seller, a proper measure of plaintiff's damages as against such seller.

In the *Snap-Tite* case the buyer sued the seller for rescission of the sale of a lathe, for return of the purchase price and for special damages incurred because of its allegedly unsatisfactory operation, causing loss in the operation of plaintiff's plant, and for return of freight paid by plaintiff.

The lathe was purchased on a written contract which provided that "if the above described reconditioned machine was not satisfactory mechanically, the purchaser could return it, freight prepaid, within thirty days and we will refund the purchase price in full."[6] It appears that the alleged defects became known to the purchaser well within the thirty days and that it notified the seller thereof. It did not, however, return it to the seller freight prepaid within that time, apparently because at the time machine tools were hard to find and purchaser was trying to make the machine work properly, rather than to send it back and search the market for another.

Usually such contracts for sale on approval or for sale with option require the seller to repurchase and allow the buyer a reasonable time after the trial period to return the goods or to exercise his option. This is, however, only presumptive or inferential, and may be rebutted by the parties either by express provisions in their contract or by the circumstances under which it was executed. The express provision in this contract that buyer was to return the lathe "freight prepaid, within thirty days," appears to justify the court's decision that buyer had not exercised properly his rights under the contract, in failing to return the article as required, and could not, therefore, rescind.

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[1] OHIO REV. CODE c. 1315.

[2] OHIO REV. CODE § 1315.70.

[3] 133 N.E.2d 801 (Ohio App. 1956)

[4] 134 N.E.2d 846 (Ohio App. 1956)

[5] OHIO REV. CODE § 1315.71.

[6] Snap-Tite, Inc. v. Noll Equipment Co., 134 N.E.2d 846, 847 (Ohio App. 1956)

The court likewise held that while the three remedies for breach of warranty — recoupment, counterclaim and rescission — are all available to the buyer, they are exclusive of each other. It intimated that while the terms of the contract did not necessarily limit the buyer to the remedy of rescission, since he had prayed for that remedy and failed to show his right to it, he could not in this case have either of the others.

The Statute of Frauds in Ohio applicable to the sale of goods[7] provides that a contract therefor must be in writing if the value is of $2,500.00 or upwards, but makes an exception if the buyer accepts part of the goods and actually receives them. In *Cedarville Lumber Co. v. Dement*[8] plaintiff sued defendant on a book account for building materials and supplies furnished to defendant. Defendant denied generally the allegations of plaintiff's petition and denied specially that the statement of account attached to plaintiff's petition was a correct statement of account between them.[9] He also cross-petitioned, alleging a contract between them whereby plaintiff for $4,500.00 had agreed to furnish defendant all lumber and materials, except masonry, needed in the construction by defendant of a barn on the premises of one Ross; that defendant had paid plaintiff the full amount, but that plaintiff had failed to supply defendant all that was promised, to the defendant's damage of $598.

The trial court, on plaintiff's motion during trial, dismissed defendant's cross-petition when it appeared that the contract was oral, and at the conclusion of all the evidence directed a verdict for plaintiff on his petition on the book account for $430. The court's reasoning was that since the contract between the two parties was oral, defendant could not sue plaintiff for a breach of it, but that since plaintiff was suing upon a book account he was not within the terms of the statute.

The Court of Appeals for Greene County properly held that the acceptance by defendant of part of the goods sold under the contract and actual receipt of them by him brought the contract within the exceptions to the statute, permitting him as buyer to sue the seller for breach by seller.

In *Kelling Nut Co. v. Barrow*[10] there was involved a question of the interpretation and application of section 1335.03 of the Revised Code, which provides in substance that goods and chattels which remain in the possession of a person to whom a "pretended loan" thereof has been

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[7] OHIO REV. CODE § 1315.05.

[8] 135 N.E.2d 783 (Ohio App. 1955).

[9] As the court incidentally pointed out, and as is correct, this was susceptible of proof under the general denial, and could have been stricken on motion by plaintiff.

[10] 98 Ohio App. 531, 130 N.E.2d 353 (1954)