Buffalo Law Review

Volume 5 | Number 2 Article 64

1-1-1956

Sales—Breach of Warranty

James Lindsay

The dissent maintained the statute clearly makes a tax deed conclusive evidence of the regularity of all proceedings. Also, it raised the policy consideration of the desirability of immunity of tax deeds from attack.

In most jurisdictions, if a tax sale is void because the taxes were in fact paid, the original owner can attack the deed after the period of the statute of limitations.[54] Due and reasonable notice of the sale of property for a delinquent tax is necessary for the validity of such a sale.[55] Without actual notice, there should be such provisions for constructive notice as to meet requirements of due process.[56] Since the original owner paid all his taxes and so had no reason to suspect a threat to his title, a mere recording of a tax deed would not appear to be sufficient notice to start the statute of limitations running. Therefore, the distinction drawn by the Court between jurisdictional and procedural defects seems to be a valid one.

SALES

Breach of Warranty

Under Personal Property Law § 130, notice of a breach of a warranty must be given within a reasonable time after discovery of the breach by the buyer.[1] It is, of course, axiomatic that if a seller accepts the return of goods, even after the lapse of a reasonable period of time, it constitutes a rescission at least to the extent of the merchandise which has been taken back.[2] If only a part of the goods are returned, it amounts to a kind of novation; part of the goods are received back, whether early or late, by consent of both parties, and by mutual agreement the sale is cancelled *pro tanto* and confirmed regarding the rest.[3] If the goods are all received back, then by mutual consent the sale is cancelled *in toto*.[4]

Keller Tailors Trim. Co. v. Burke Rugby, Inc.[5] was an action by the buyer for breach of warranty of quality in the sale of linen cloth. The court below found[6] that timely notice had not been given to the seller and therefore the seller

54. See Annot., 26 A. L. R. 640 (1923).
55. *Marx v. Hawthorn*, 148 U. S. 172 (1893).
56. *Matter of City of N. Y.*, 212 N. Y. 538, 106 N. E. 631 (1914).

1. N. Y. PERSONAL PROPERTY LAW § 130: ". . . if after acceptance of goods, buyer fails to give notice to seller of a breach of any promise or warranty within a reasonable time after the buyer knows or ought to know of such a breach, the seller shall not be liable therefore."
2. *Portfolio v. Rubin*, 196 App. Div. 316, 187 N. Y. Supp. 302 (1st Dep't 1921), *aff'd* 233 N. Y. 439, 135 N. E. 843 (1922).
3. *Ibid.*
4. *Ibid.*
5. 308 N. Y. 441, 126 N. E. 2d 551 (1955).
6. 283 App. Div. 930, 130 N. Y. S. 2d 789 (1st Dep't 1954).

could not be held liable for the breach.[7] The question before the Court of Appeals was whether the seller had waived the defense of lack of timely notice by offering to replace the goods which were claimed to be defective. Thus, the buyer was attempting to extend the *Portfolio* case[8] to the point where the mere offer to exchange would be treated the same as an actual return of the goods.

In rejecting this extension, the Court said that waiver is the voluntary relinquishment of a known right.[9] The seller is deemed to have waived its rights only to the extent that relinquishment is made manifest by what it said or did. Under the facts of the instant case, the utmost concession which the seller made was the expression of a willingness to substitute good merchandise for so much of the delivery as had turned out to be bad. This was offered even though the buyer had lost its rights due to delay in giving notice. Waiver, under these circumstances, "is essentially a matter of intention . . . The evidence must have probative force sufficient to prove that there was in fact an intention to waive the right or benefit—a voluntary choice not to claim it. The acts and language of the party must be given, as evidence, their natural and logical effect under the circumstances of the case.[10]

Waiver is a term that is generally used in referring to the eliminating of a condition not yet broken, or a defense which has not yet arisen.[11] It would be more appropriately applied if the seller had diverted the buyer from giving early notice by earlier assurances that all would be made good.[12] But here no complaint was made by the buyer and no assurances were given by the seller until recourse by the buyer had been barred by the Personal Property Law. There was no "new promise," express or implied, of which the buyer could take advantage.[13]

At the time of the seller's offer, he had been freed from legal liability because of the buyer's failure to give notice within a reasonable time. Obviously, the buyer could not have relied on this offer as the basis for his failure to give notice of the breach. Since the buyer had failed to give notice within a reasonable time, and no waiver of notice had been given by the seller during this period, nor had the seller accepted the return of any of the goods after the period, there could be no basis for a recovery by the buyer for a breach of warranty of quality.

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7. Note 1, *supra.*
8. Note 2, *supra.*
9. *Davison v. Klaess,* 280 N. Y. 252, 20 N. E. 2d 744 (1939).
10. *Alsen's American Portland Cement Works v. Degnon Contracting Co.,* 222 N. Y. 34, 37-38, 118 N. E. 210, 212 (1917).
11. 3 WILLISTON, CONTRACTS § 689 (rev. ed. 1936).
12. *Oliver Farm Equipment Sales Co. v. Patch,* 134 Kan. 314, 5 P. 2d 795 (1931); *Baker v. Nichols & Shepard Co.,* 10 Okl. 685, 65 P. 100 (1901); *Baker v. Nichols & Shepard Co.,* 10 Okl. 685, 65 P. 100 (1901); *J. A. Fay & Egan Co. v. Louis Cohn & Bros.,* 158 Miss. 733, 130 So. 290 (1930).
13. *Cf.* analogy of extending the statute of limitation as discussed in *Brooklyn Bank v. Barnaby,* 197 N. Y. 210, 90 N. E. 834 (1910).