1978

Mallory Engineering, Inc v. Ted R. Brown & Associates, Inc and Valad Electric Heating Corp : Brief of Respondent and Appellant, Ted R. Brown & Associates, Inc.

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

MALLORY ENGINEERING, INC.,

Plaintiff and Respondent,

vs.

TED R. BROWN & ASSOCIATES, INC.,

Defendant, Counterclaimant, Crossclaimant, Respondent, and Appellant,

and

VALAD ELECTRIC HEATING CORP.,

Defendant, Cross-Defendant, Counterclaimant and Appellant.

Supreme Court No. 15530

BRIEF OF RESPONDENT AND APPELLANT, TED R. BROWN & ASSOCIATES, INC.

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, the Honorable G. Hal Taylor, Judge

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DESIGNATION OF PARTIES

In view of the multiple parties and the roles which they play in this action, it is not deemed feasible to recognize the parties as plaintiff, defendant, crossclaimant, etc. Accordingly, throughout this brief, the parties will be recognized by name. The plaintiff, Mallory Engineering, Inc., will be designated throughout this brief as "Mallory"; the defendant, Ted R. Brown & Associates, Inc., as "Brown"; the defendant, Valad Electric Heating Corp., as "Valad".

STATEMENT OF THE NATURE OF THE CASE

This action arises out of an order for the manufacture of certain heaters, to conform to the requirements of Mallory, and guaranteed and certified by the manufacturer, Valad, to meet these requirements; which in fact, upon delivery, did not meet these requirements, giving rise to a claim for damages by Mallory, which Mallory asserts against both Brown and Valad, Brown having placed the order for the heaters with Valad.

DISPOSITION IN LOWER COURT

Trial to the Court sitting without a jury took place January 19, 1976, to and including January 29, 1976. The Court awarded judgment in favor of the plaintiff Mallory against defendants Brown, and against the defendant Valad; and awarded judgment in favor of the defendant Brown against the defendant Valad for the full amount of judgment awarded by the Court to

Mallory against Brown, together with the amount of loss suffered by Brown by reason of Valad's failure to manufacture and deliver the heaters to Mallory as required. The Court denied the counterclaim and crossclaim of Valad and the same was dismissed upon its merits. (R. 696) The judgment reserved issues on the counterclaim and amended counterclaim between Brown and Mallory for future trial by the Court. (R. 678, 679)

Upon motion to the Court, the Court amended the judgment and added to the judgment a provision limiting the total liability of Valad under the judgment awarded to Mallory and the judgment awarded to Brown, to the amount of the loss suffered by Mallory plus the loss suffered by Brown. (R. 695, 696) The parties filed with the Court objections to the findings of fact, conclusions of law, and the proposed judgment, portions of which resulted in some amendments to the judgment. These amendments were incorporated in the judgment as entered. The Court, however, elected to consider the objections to the findings of fact, conclusions of law, and judgment as a motion for new trial. It made and entered its order denying the motion for new trial. (R. 680, 681)

The appeals basically are taken from the judgment as amended (R. 695, 696), and the order of the Court denying the motion for new trial. (R. 680, 681)

RELIEF SOUGHT ON APPEAL

Brown seeks reversal of the judgment granted by the lower Court to Mallory against Brown, and affirmance of the judgment awarded to Brown against Valad for the loss suffered by Brown

as a result of Valad's failure of performance.

STATEMENT OF FACTS

The theatrical and argumentatively characterized statement of facts contained in Valad's brief fails to accurately set forth the fundamental and factual details essential for consideration by this Court. Accordingly, Brown elects to make its own statement of facts.

Mallory had a contract with the United States Government to build certain environmental test chambers. (T. 4, Ex. 1, 2, 3) It was in need of electric heaters to perform certain functions in connection with the government contract. (T. 10) Roy Mallory, president of Mallory, asked Brown, through its representative Nyman, if it had a source from which such heaters could be obtained. (T. 311) Carl Nyman, a sales representative of Brown, made inquiry and located literature and catalog data indicating Valad Electric Heating Corp. as a possible fabricator, and submitted this sales and catalog data and information on the company to Mr. Roy Mallory, President of Mallory. (T. 99, 311, 312) (Ex. 42, 43, 44, 45) Mr. Nyman made clear to Mallory that it had not had previous experience with Valad as a manufacturer. (T. 100, 311) It appeared that Valad had the potential to make the heaters. (T. 97, 98, 311, 312) Mr. Roy Mallory, President of Mallory, advised Mr. Nyman that he might be able to use heaters manufactured by Valad and that he would consider them. (T. 312) Some two months after the original presentation to Roy Mallory,

Mallory contacted Brown through Nyman and asked Brown to obtain a quotation on some heaters to be utilized in these government test chambers. (T. 313) Mr. Mallory furnished to Nyman of Brown the electrical kilowatt capacity required of the heater, the voltage required, the size capabilities and limitations, and the airflow, as well as the sheath temperature requirements. (T. 313) Nyman of Brown submitted this information by telephone to Valad through Peter Cecchini, its office manager. (T. 314, 315) The quotations on the original criteria did not give rise to orders. (T. 318-321) Subsequently, Mallory supplied to Brown new specific performance criteria on the size, type and limitations of the heaters and asked for a new quotation. (T. 321-323) Nyman of Brown submitted this information by telephone to Valad in December of 1972; and Peter Cecchini, speaking for Valad, affirmed that Valad could make the heaters and furnished to Nyman by telephone the dimensional and electrical data, as well as a price quote which was furnished by Nyman to Mallory. (T. 584) The quote was accepted by Mallory and a purchase order issued for the first of a series of heaters. This order was number 4016. (Ex. 9) Brown issued its purchase order transmitting the Mallory purchase order, Brown's purchase order being number 6730. (Ex. 10) The purchase order issued by Mallory to Brown and transmitted by Brown to Valad contained this language:

> "Fabricator shall also submit written certification that sheath temperature will not exceed plus 250° F. when operating at continuous full voltage with a 5 F.P.S. air volocity and the maximum air temperature of plus 160° F." (Ex. 9)

Certain drawings were submitted by Valad to Mallory direct. (Ex. 17, 18) (T. 106) After review of the drawings by Mr. Farber of Mallory with Mr. Nyman of Brown, clearance was given for manufacture. (Ex. 11, 20) (T. 139) The shop drawings submitted did not give the details necessary for Nyman or Mallory to evaluate the heater performance characteristics, but was limited solely to dimension and configuration. (T. 279)

The heaters were not delivered in accordance with the schedule set forth on the purchase orders and by subsequent correspondence. Mallory dealt directly with Valad in connection with the matter of delay in delivery. (T. 345, 346) When the 15- and 21-watt kilowatt heaters were received, they did not conform to the requirements of the purchase order and the certification and guarantee which had been issued directly by Valad to Mallory. (T. 36, 75, 86, 105) (Ex. 22, 23)

When received and tested, the heaters did not perform and were found to be deficient in capacity and have excessive sheath temperatures. (T. 127, 128) Mallory was required to obtain substitute heaters from other sources as Valad refused to take any steps to correct the situation. (T. 75) Regan Engineering made replacement heaters. (R. 91)

The foregoing is a statement of the essential facts involved in this action. The factual situation is relatively simple. The complexities arise from the effort of Valad to shift to either Brown or Mallory the responsibility for its

incompetence and failure to manufacture in accordance with requirements. Additional facts will be set forth in the argument as may be requisite to the presentation thereof.

ARGUMENT

Point I

THE UTAH COURT DOES HAVE PERSONAL JURISDICTION OVER THE DEFENDANT VALAD: A. UNDER THE "LONG-ARM STATUTE", UTAH CODE ANNOTATED (1953), SEC. 78-27-22, ET SEQ., AND PARTICULARLY SEC. 78-27-24(2)(3). B. THE DEFENDANT APPEARED AND SUBMITTED ITSELF TO THE JURISDICTION OF THE COURT.

In support of part "A" of this point, we submit Utah Code Annotated (1953) (as amended), Sec. 78-27-22, carries a statement of the legislative policy established by the legislature in enacting the "Long-Arm Statute". It specifically sets forth the fact that the "Long-Arm Statute" should be applied to assert jurisdiction over non-resident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

> "It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. This legislative action is deemed necessary because of technological progress which has substantially increased the flow of commerce between the several states, resulting in increased interaction between persons of this state and persons of other states.
>
> The provisions of this act, to ensure maximum protection to citizens of this state, should

be applied so as to assert jurisdiction over non-resident defendant to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution."

The Code sets forth in Sec. 24 certain specific conduct or acts which may give rise to a claim by a Utah resident against a non-resident wherein a non-resident will be subjected to the jurisdiction of the Utah Court.

> "Any person, notwithstanding Sec. 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:
>
> (1) The transaction of any business within this state;
>
> (2) Contracting to supply services or goods in this state;
>
> (3) The causing of any injury within this state whether tortious or by breach of warranty; . . ."
>
> (Emphasis ours) 78-27-24 UCA (1953)(as amended)

There is no dispute that Valad Electric Heating Corp. contracted to supply heaters in the State of Utah. Since the heaters did not function properly, and in an effort to avoid the responsibility for this failure, much effort has been expended by Valad in analyzing the relationship between the respective parties, Mallory Engineering, Inc., and Ted R. Brown & Associates, Inc., as to whether the contract ran from Valad to Brown or from Valad to Mallory; but there has not been any denial at any time that there was indeed a contract and that heaters were manufactured and were shipped by Valad directly to Mallory in

the State of Utah for use in Mallory's business in this state in producing an environmental test chamber. In addition, defendant Valad issued a direct certificate of guarantee or warranty of performance to Mallory Engineering, Inc. This certification was required as a condition to the contract. (R. 104, 105) (Ex. 22, 23)

In the recent case of Abbott GM Diesel, Inc. vs. Piper Aircraft decided April 14, 1978, 578 P.2d 850, this Court has clearly established that where a party does one of the acts establishing jurisdiction under the "Long-Arm Statute", it subjects itself to the jurisdiction of the State of Utah. Valad contracted to supply heaters built by it for a specific function and which it warranted would meet the requirements of the Utah consumer, namely Mallory Engineering, Inc. The action of Valad was voluntary in contracting to supply the heaters in Utah. It desired the business, it must therefore accept the responsibility entailed, and the jurisdiction over Valad is established by the act cited. We respectfully submit that the Utah case above cited is dispositive of the arguments advanced by the defendant Valad wherein it seeks to avoid the jurisdiction of the Utah Court under the "Long-Arm Statute".

Secondly, in support of part "B" of this point, there can be no question but that Valad waived any jurisdictional question and entered a general appearance in this action. The attempt by counsel in the brief submitted on this issue to lump all of the actions of Valad in the District Court under one

blanket cannot be successful. Counsel claims in its brief that Valad did not enter a general appearance, basing its claim on the specious argument that the documents filed with the District Court consisted solely of one document, and that this document raised at the first opportunity the jurisdictional question with or without special appearance. An examination of the document clearly shows that this is not the fact. We refer the Court to the record, pages 23 through 34. While counsel for Valad elected to bind in a single blue cover two separate documents, this does not make these documents one document or act before the Court. They are distinct and separate items. The first document accessible upon examination is an answer, counterclaim and cross-complaint to the pleading of Ted R. Brown & Associates, Inc. The second document is an answer to Mallory's complaint. It is true that in the so-called "answer" the defense of jurisdiction over the defendant Valad is raised; but even in that document, it is not, as has been traditionally required, raised as the initial defense before responding to the remainder of the pleading. Instead, the answer responds directly by specific answer and denial or admission to the allegations of the plaintiff's complaint. (R. 24) It then seeks to raise the jurisdictional question.

While we recognize that the Court has liberalized greatly the rules relating to "special appearance", and has under the Utah rule permitted the jurisdictional matter to be raised other than by special pleading and as a part of the

general answer, it has, nevertheless, insisted upon the presentation of this defense in a manner which alerts both the Court and parties to the claimed defect in jurisdiction. Rather than raise and stand upon the defense of lack of jurisdiction in any manner, the defendant has submitted to the jurisdiction and answered to a cross-complaint. The complaint in this action was filed September 20, 1973. (R. 2) The answer, counterclaim and cross-complaint of Brown was not filed until October 15, 1973. The complaint and summons were served by the Sheriff in New York upon the defendant Valad. (R. 442) The pleading by Brown was served by Certified Mail, Return Receipt Requested, upon Valad Electric Heating Corp., at 71 Courtland Street, Terry Town, New York, 10591. (R. 19) No confusion could exist as to the fact that these were two separate documents, two separate pleadings filed by two separate parties, and called for distinct and separate responses. The requirement of response to Brown's pleading was conditioned upon the jurisdiction of the Court established through the service of the summons and the complaint; for the method elected by Brown to serve the cross-complaint was pursuant to the Rules of Civil Procedure of Utah. If the defendant Valad asserted and intended to rely upon the assertion of lack of jurisdiction, no necessity arose for response to the pleading of Brown. By recognizing the validity of this pleading and responding thereto without raising any jurisdictional question in such responsive pleading, and by asserting therein an affirmative defense; and setting

forth by title a crossclaim and counterclaim and seeking general relief thereon, the defendant clearly waived the issue of jurisdiction and appeared in the Utah Court. The fact that the two separate documents were enclosed in one blue-cover binding cannot be said to make them one pleading. The pleading to Brown's cross-complaint waived the jurisdictional defense.

It should be further noted that from the inception of the case until the case was ready to be set for trial, no further objection to jurisdiction of the Court was made by Valad. Valad consistently subjected itself to the jurisdiction of the Utah Court by responding to interrogatories, requests for admission, and other pleadings. The sole basis for responding to these pleadings is the requirement of the Utah Rules of Civil Procedure. Counsel in his brief claims that the response to discovery and the filing of other pleadings does not subject Valad to the personal jurisdiction of the Court. Yet, in the same brief at page 13, he states:

> "All of these discovery responses were filed pursuant to the mandatory rules requiring responses to lawful discovery requests."

Response under the Rules can only be enforced where the Court has jurisdiction over the defendant. Failing jurisdiction, no duty to respond exists.

Some effort is made in Valad's brief to assert that by reason of the fact that the corporation was appearing pro se, that no appearance could be established. This argument is

tenuous at best, but clearly disposed of by the fact that the further blue-backed responses made by Valad carried the name of counsel. We respectfully call the Court's attention to p. 74 of the record, and p. 107 of the record, both of which are on a printed form of Godfrey P. Schmidt, Attorney at Law, and both of which carry the statement that he is the attorney for Valad. Likewise, they carry the identification of the contents just above the name of the attorney. It has been repeatedly held that a corporation which appears improperly through an agent other than its attorney may not avoid the results of a proceeding by alleging the impropriety of its own appearance. 19 ALR 3d, 1073 at 1087. In the annotation above cited, the annotating authority states:

> "The filing of an appearance through the president of the defendant corporation, who was an attorney, was termed an 'obvious impropriety' in American Sand & Gravel, Inc. vs. Clark & Fray Construction Company, 2 Conn. Cir. 284, 198(a) 2d 68; but the Court, in rendering a judgment for the plaintiff for an amount due on a purchase by the defendant, stated that the defendant had been afforded an opportunity to have its case fully and thoroughly heard."

Officers of the corporation were held to have entered a voluntary appearance even though not represented by attorneys in other cases cited in the annotation. Under the circumstances here, the fact that the attorney did not sign the pleading which he enclosed in his printed cover bearing his name and filed with the Court, should offer no protection to the corporate

defendant. The District Court ruled that Valad had appeared and that it must obtain local counsel or it would be considered in default. (R. 128, 129) Valad recognized the order and did promptly appear through counsel. (R. 135, 136) The appearance entered purported to be a special appearance. It is submitted that this was manifestly untimely, and the effort to raise the question of jurisdiction by pleadings, which the Court interpreted as a motion to quash service of summons, was promptly dealt with by the District Court, after due hearing by an order of the Honorable Stewart M. Hanson, Jr., Judge, denying the motion to quash service of summons. This order was made and entered the 28th day of April, 1975. (R. 170) An appeal from the order was taken but dismissed by the Supreme Court, which by its remittitur simply provided that:

> "Issue of jurisdiction may be reserved as issue on ultimate appeal, if taken."

We respectfully submit to this Court that for the reasons set forth herein, the jurisdiction of the Utah Court over Valad is firmly established.

Point II

TED R. BROWN & ASSOCIATES, INC., SERVED ONLY IN THE CAPACITY OF INTERMEDIARY IN PLACING MALLORY'S ORDER FOR HEATERS WITH VALAD FOR MANUFACTURE AND SHOULD NOT BE RESPONSIBLE FOR THE INCOMPETENCE OF VALAD WHICH RESULTED IN DEFECTIVE MANUFACTURE OF THE HEATERS.

Had Valad syntactically diagramed the sentence structure of the purchase orders of Mallory and Brown and applied the law

cited by counsel relating to the formation of contracts as diligently as has counsel in trying to relieve Valad from the consequences of its own incompetence, this case would not now be before the Court. See the syntactical diagram. (R. 572) There is a maxim of law frequently applied by the Court that the Court will look to the substance, not form, in evaluating a relationship between parties to litigation. Illustrative of this principal is the situation wherein the parties intending to create security for a loan will use a Warranty Deed in place of a mortgage. The Courts have repeatedly held that while on its face and by its form the transaction appears to be an outright conveyance, the true relationship of the parties will be determined from the intent and action of the parties; and the Warranty Deed is treated as a mortgage.

There is abundant Utah case law supporting the principal that the meaning and affect to be given a contract depend upon the intent of the parties, and that is to be ascertained by looking at the entire contract and all of its parts in their relationship to each other. See Thomas J. Peck & Sons vs. Lee Rock Products, Inc., 30 Utah 2d 187, 515 P.2d 446. In the case of Harding, Inc. vs. Eimco Corporation, 266 p.2d 494, the Court recognized that in interpretation of a contract the interpretation given by the parties themselves, as shown by their acts, will be adopted by the Court. Use of the conduct of the parties themselves as a basis for determination of a contractual relationship is recognized statutorally

in the Uniform Commercial Code. 70(A)-2-207(3), UCA (1953) (as amended), relating to the subject of sales, states:

> "Conduct by both parties which recognizes the existence of a contract, is sufficient to establish a contract for sale, although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act."

Brown does not dispute the contention of Mallory that the heaters supplied by Valad were defective and were not manufactured in accordance with the mandate of the purchase order of Mallory as transmitted by Brown to Valad; and that the heaters did not conform to the warranty or certification issued by Valad directly to Mallory. The contention between Brown and Mallory is Mallory's effort to make Brown responsible for the default of Valad. We submit that a reasonable interpretation of the documents and the actions of the parties will not support Mallory's claim against Brown; and the lower Court erred when it granted Mallory judgment against Brown, and also against Valad. From the beginning, Mallory knew that Brown was simply attempting to locate a source of supply to provide heaters to Mallory with the dual hope that by so doing they would accommodate an established customer, and secondly, earn a small commission or fee for their efforts.

Lee Farber, president and general manager of Mallory, testified with regard to Brown as follows:

"Question: Now, in making that requirement that you set up through your exhibit - through Exhibit no. 4, your criteria, you knew that Ted R. Brown & Associates could not, from their own facilities, provide that equipment, didn't you?
Answer: Yes.
Question: And so you knew that they were going to get these from Valad Manufacturing Company, the agency that is represented by those documents Exhibits 42-45(b)?
Answer: It was indicated that if we gave Ted R. Brown the purchase order for the heaters, that Valad would be the manufacturer of those heaters." (T. 102, lines 10-20)

Again, this same witness, at transcript 104, line 2, answered the question as follows:

"Question: You required in that purchase order that the performance of these heaters be certified not by Brown, but by the manufacturer, did you not?
Answer: Yes.
Question: So that you were not looking to Brown to certify or to pass upon the quality or the performance of this heater? You were expecting the manufacturer to warrant to you the performance characteristics of this heater?
Answer: This purchase order 4016 is strictly a performance purchase order. There is no design data in here upon which I can build a heater. The heater manufacturer has to look at the performance criteria, and from this criteria, based upon his specific way of doing business, he has to design. He has to make the proper application. And our purchase order says we are looking, as part of our contract with Brown, that whoever builds that heater, will certify that it will be constructed to meet the requirements, the performance requirements that we stipulated.
Question: And in this case, that would be directed to Valad?
Answer: If Valad was manufacturer, that was where the certification should be issued from.
Question: And you knew that's where the manufacture was going to be?

Answer: Yes. It was indicated. We didn't have any contract to enforce that upon Brown, however." (T. 104, lines 2-26)

Mr. Nyman of Ted R. Brown explained the procedure at Ted R. Brown & Associates in handling of an order such as the order placed by Mallory with Brown for heaters. In response to the question asked as to what was done with the order received from Mallory, Mr. Nyman testified:

"After receiving the particular purchase order from Mallory, we did, as we normally do, and always do, type up our covering purchase order, send on to Valad our order referring to the requirements of Mallory's order for these particular heaters.
Question: Now do you type up a purchase order of your own? Excuse me. Why do you type up a purchase order of Ted R. Brown & Associates?
Answer: We do this with all of our orders. It allows us a basic numerical bookkeeping system by which we can keep track of all orders, and we do set up this as a standard procedure, and all orders that come through Ted R. Brown & Associates from a buyer to a manufacturer are set up on one of our purchase orders." (T. 323, lines 13-27)

Thus, while the form of the transaction characterized by the issuance of purchase orders by Brown to Valad for the heaters to be supplied Mallory would seem to indicate a purchase by Brown and a resale to Mallory, the actual treatment of this transaction by the parties reflected that all concerned knew that, in fact, Brown was not purchasing the heaters and reselling them, but was simply serving as an intermediary, having referred the purchase order of Mallory to Valad for manufacture and sale. The purchase orders themselves required that the product

be shipped directly to Mallory. (Ex. 9, 10, 11, 12, 13, 14, 15) The method of obtaining approval as to manufacturing details resulted in Valad submitting the drawings directly to Mallory, not to Brown. (T. 32) When problems developed, either in connection with the delivery data, or in connection with the ultimate function of the heaters after shipment, the contacts were between Mallory and Valad. (T. 45) Even after Valad failed to make correction, Mallory made demand on Valad for performance and did not give to Brown a copy or a demand of any nature. (T. 80-84 inc.) Peter Cecchini, the general manager for Valad, in his testimony, when asked why he had dealt directly with Mallory rather than with his claimed purchaser, Brown, stated:

> "Question: And in all of the calls that you made, and sometimes Mr. McCarron was on the line, too?
> Answer: That is correct.
> Question: You made those to Mr. Farber? Why weren't you making them to your customer, Mr. Brown?
> Answer: Because the trouble was at Mallory Engineering, and Mr. Farber had the trouble."
> (T. 472)

It is interesting to note that none of the heaters which were actually manufactured by Valad for Mallory were made correctly. Even the heaters which were replaced and eventually used, the 12-kilowatt heaters were originally made wrong and came out to Mallory as only 2-kilowatt heaters, rather than 12-kilowatt heaters. (T. 456) A review of the testimony of Peter Cecchini discloses the total incompetence of this man. Throughout, if the questioning began to appear to Mr. Cecchini

to indicate that there was some responsibility at Valad for the unsatisfactory results, he became evasive and hid behind the shield that he had no technical knowledge of electricity. (T. 459, lines 12-14) While having answered interrogatories to the effect that he had a degree in industrial engineering, (R. 87, Int. No. 16) when questioned on the stand, he claimed that his only area of expertise lay in the business field; and that the industrial engineering degree which he possessed did not make him qualified in any sense in the field of electrical engineering, but only indicated that he had a knowledge of plant layouts and things of that nature. (T. 499,500) Throughout his testimony, Mr. Cecchini was evasive; and in one instance it became manifest that while he attempted to place the blame on Ted R. Brown & Associates for the errors made in manufacture claiming that the information furnished by Brown was inaccurate, he finally had to admit that the error, at least in connection with the 12-kilowatt heater, were errors in his own plant. (T. 456) The effort expended by Valad to evade responsibility for its own incompetence is unbelievable. Pages and pages of the transcript of record in this case deal with such items as the general custom of Valad in regard to its manufacturing process being broken down into three categories, namely A, B, and C. The first class, according to Mr. Cecchini, was stock items which they made and held in stock to fill customer's orders. The second item was a modified version of the first class wherein the customer approaches Valad with something of

his own invention, supplies all the design and manufacture parameters, and the company then manufactures the heaters from these design parameters. The class C, or third type, is where the customer comes and states that he wants an end result, and pays a special fee for design by Valad. In such cases, Valad always makes a prototype, according to Mr. Cecchini; and if this is satisfactory and the tests prove the heater satisfactory, then the production is commenced, but the customer pays for all costs in such case. (T. 425, 426)

Almost in the same breath, Mr. Cecchini admitted that the error in the manufacture of the 12-kilowatt heaters resulted from the company's not following the instructions received for the heater's manufacture as a part of the purchase order of Mallory which required the 12-kilowatt output. And while having testified at length that the production department never proceeded with the manufacture of an item until it had received an approved drawing, when confronted with the approved drawing which red-lined or showed clearly that the company's attention had been drawn by Mallory to the error, and that the heater should be a 12-kilowatt heater instead of a 2-kilowatt heater, Mr. Cecchini was unable to offer any explanation for this mistake. (T. 456)

Initially, Mr. Cecchini, when taken on direct examination by his own counsel, attempted to testify with regard to telephone conversations with Mr. Nyman of Brown, claiming that he had

notes of the telephone conversations. He proved totally incapable of so testifying. (T. 359-368 inc.) As is so frequently the case, he was saved by Court recess (T. 368); and upon return to the stand, he had been adequately informed by counsel as to what he should be testifying to. Unfortunately, however, even with the help of the recess to rearrange his testimony, Mr. Cecchini was unable to keep things straight.

To review the testimony of Mr. Cecchini is to become thoroughly aware of the total incompetence of this man. He did not know anything about electrical heaters, and yet he proudly claimed that he was the one that made the interpretations and made the sketches that set the thing up for manufacture; and yet when questioned as to any technical aspects of the matter in question, he retreated behind his own lack of ability and claimed that he was not capable in the area of electrical engineering. (T. 454-467)

The principal defect which was the reason that the heaters had to be rejected by Mallory was that the 15-kilowatt heaters and the 21-kilowatt heaters which, by the terms of the purchase order from Mallory as forwarded by Brown, were required to meet this requirement did not do so:

> "Fabricator to specify required depth. Heater to be designed for a maximum sheath temperature of plus 250° F. when operating at continuous full voltage with a 5 F.P.S. air velocity, and a maximum air temperature of plus 160° F." (Ex. 4)

Similar requirements were made for the 21KW heater to that of the 15 KWheater, the air temperature, however, being slightly higher. The heaters furnished by Valad did not meet this requirement. (T. 39) Much time was expended in trial in the effort by Valad to show that the heaters as manufactured by them relied upon thermostats which turned the power on and off in order to control Sheath temperature. According to Valad, this was a satisfactory means of compliance with the language quoted. Valad tried to show that by virtue of approval of certain drawings by Mallory the use of thermostats for this purpose had been approved. This was denied by both Mallory and Brown. It was shown that the drawings did not give the detail which would permit the party to whom the drawings were submitted for approval to evaluate the heaters from a performance standpoint.

The only expert who was totally independent and had the requisite engineering qualifications, Mr. Thomas, a graduate Professional Electrical Engineer produced by Mallory as a witness, set at rest the effort by Valad to justify the use of thermostats to interrupt the flow of current as a means of control of sheath temperature as being compliant with the express terms of Mallory's purchase order.

> "..... in other words, I would assume that this thermostat is being used to control the heater down to the swing between 250 and 200 degrees.
> Q. Is this a proper use of a thermostat, Mr. Thomas?
> A. It could be a proper use. In this case, with the specifications as I read them, it calls for 15 KW at continuous full voltage.
> Q. So, when you were reading it in connection with these specifications in this purchase order which says continuous full voltage, would that be in compliance with this purchase order?
> A. No, sir. I would say that in my interpretation

of these specifications are that I am to have the use of a 15KW heaters all the time, and they will maintain a sheath temperature of 250 degrees. I don't see here where the 15 KW should be cut off to comply with the 250 degrees. " (T.599-600)

Again, in further examination Mr. Thomas specifically states that, in his opinion, any other interpretation of the purchase orders than to require the maintenance of the temperatures at continuous full voltage, would be in error. (T. 611 L 5-18)

Ultimately in the testimony of Mr. McCarron, the factory superintendent for Valad, upon interrogation by Judge Taylor, he admitted that Valad could have manufactured a heater in accordance with the specifications. It simply did not. (T.561)

It is thus established that the cause of the problem is that Valad misinterpreted the requirements submitted to it. Merely because Brown used the device of issuing its own purchase order to Valad for the heaters in order to enable it to obtain a price differential by way of a commission, since it was not a sales representative of Valad, should not make Brown the guarantor of performance by Valad. Despite the effort expended it was never shown that Brown ever did anything actually wrong which caused the problem, or was responsible for the deficiency in performance by Valad.

Even looking upon Brown as Valad insists be done, as the Vendee of Valad as Vendor, there is substantial authority to the effect that performance may be excused under the Uniform Commercial Code as enacted in Utah. In discussing this subject, Am. Jur. 2d, Vol. 67, SALES at Sec. 362 Pg. 513, states:-

> "The Uniform Commercial Code does not catalog the various contingencies that might excuse delay or non-delivery, with the exception of referring to that arising from governmental regulations. However, it follows pre-code concepts by excusing a seller from the timely delivery of goods contracted for where his performance has become commercially impracticable because of unforseen supervening circumstances not within the contemplation of the parties at the time of the contracting. In addition, circumstances that might excuse performance include a marked increase in costs because of unforseen circumstances, and an unanticipated failure of the source of supply, where the contract contemplates the use of only a particular source, such as the failure of a crop under a contract to sell the crop growing on a designated land. ..." (emphasis ours)

There is no dispute that all of the parties contemplated that the manufacturer was to be Valad. It was the source of the heaters. Its failure to manufacture in accordance with the requirements and its commitments certainly excuse the failure to perform by Brown, who was nothing more than an intermediary in transmitting the order to the manufacturer. The same authority at Sec. 365, Pg. 516, states:

> "It has been held that where a seller undertakes to sell particular goods which he is obtaining under a specified contract from a third person, the unjustified refusal of such third person to make such goods available to the seller, excuses the seller from his own contract."

Valad's refusal to make proper heaters to conform to the order placed with it by Brown is proved in the record. No justification was ever proved by Valad for its failure. It simply relied on its contention that it manufactured what the specifications called for. The refusal to recognize its own error and make the corrections called for on the 15KW and the 21 KW heaters

and to manufacture the 36KW and the 50KW heaters as ordered is clearly an unjustified refusal to perform its contract and it should excuse Brown under the law cited.

POINT III

THE LAW RECOGNIZES THIRD PARTY BENEFICIARY CONTRACTS AND SANCTIONS DIRECT DEALING BETWEEN THE PARTIES WITHOUT INVOLVEMENT OF THE INTERMEDIARY.

In support of a motion by Brown to dismiss the Plaintiff Mallory's complaint as to Brown, Brown presented an argument and authorities to the Court supporting Brown's contention that Brown should not be involved in the controversy which basically involves only Mallory and Valad. At the conclusion of the argument the Court indicated that its persuasion then was,

> "I suppose the purpose, really, and I am sufficiently in doubt as to Mr. Tibbals' client, Brown's position, that I think probably the burden of persuasion would be on the Plaintiff to persuade me that they were something more than an intermediary, and probably simultaneously the briefs can be prepared on that issue. . . . ." (T. 632)

No justification appears in the record for the Court to have changed its position and award judgment to Mallory against Brown, nor does such justification exist in fact. As shown in the argument under Point II of this brief the parties throughout have treated Brown as a mediator or intermediary. Webster defines and Intermediary as follows:

> "One who or that which is intermediate; hence a mediator; an interagent; a go-between. "

In a case arising in the State of Washington the Court was confronted with an almost factually paralell situation. In the case of KADIAK FISHERIES COMPANY vs. MURPHY DIESEL COMPANY, 422 P2d 496; 70 Wash. 2d 153; the case involved a fishing vessel owned by Kadiak. It needed a new motor. The President of Kadiak discussed the matter with Alaska Pacific Supply Company, the western Washington sales agent for the Murphy Diesel Company. The discussion resulted in Kadiak's desires and needs being communicated to Murphy Diesel through Alaska Pacific as well as through a regional sales representative of Murphy and an acceptance of an order by Murphy for a 325 horsepower, dry manifold, marine diesel motor, expecially constructed to fit the bed of the Kadiak vessel, the Jaguar. The motor proved unsatisfactory and Kadiak sued both the Alaska and the Murphy Diesel companies. The Court states,

> "Throughout the trial it was Kadiak's theory that privity of contract was established and existed because (a) Alaska Pacific was an agent of Murphy Diesel, or (b) Alaska Pacific was the agent of Kadiak in the transaction, or (c) Kadiak was the third party beneficiary of a sales contract between Alaska Pacific and Murphy Diesel. Murphy Diesel denied privity, asserting that the relationship between it and Alaska Pacific was that of vendor and vendee, with Kadiak the remote purchaser from Alaska Pacific. " P2d Pg 503

The trial court permitted the case to go to the jury on the issue of Murphy Diesel's responsibility for the damage and refused further instructions to insulate it from the plaintiff's claim based on the Murphy Diesel contention that its vendee was Alaska Pacific. The Supreme Court found no error in the action of the trial court and said:

"We find no prejudicial error flowing to Murphy Diesel from the action of the trial court. We reach this conclusion because, accepting Murphy Diesel's thesis that its relationship with Alaska Pacific was that of vendor and vendee, we are convinced from our view of the statement of facts that the evidence conclusively established Kadiak as the third party beneficiary of the sale of the motor in question by Murphy Diesel. Jeffery v. Hanson 39 Wash 2d 855, 239 P2d 346 (1952)

"Murphy Diesel knew the identity, the purpose, and requirements of Alaska Pacific's customer -- Kadiak. It engineered and constructed the motor to meet certain specifications, e. g. the bed of the Jaguar, furnished to it not only by Alaska Pacific but by one of its own regional sales representatives. Although it invoiced the motor through Alaska Pacific, it shipped the motor direct to Kadiak. Some communications were carried on directly between Kadiak and the factory before and after shipment. An official of the company the regional sales representative, and a factory service man visited the Jaguar on various occasions before and during installation of the motor, and the service man participated in adjustments and corrections for the final trial run. After the fire and after further mechanical troubles developed Murphy Diesel furnished new parts and dispatched factory service men to correct the situation, at the behest of Alaska Pacific as well as Kadiak. Under these circumstances it is beyond dispute that Alaska Pacific's purchase of the motor from Murphy Diesel was upon the consideration that a merchantable motor, fit and suitable for the marine purposes of Kadiak, would be supplied. Kadiak thus became the beneficiary of the contract with Alaska Pacific as the conduit through which the duty of ordinary care and the implied warranties of merchantability and fitness flowed. * * "

The case of Freeman v. Navarre, another Washington case 289 P2d 1015 is likewise in point and supports the same theory under a somewhat different factual situation, but recognized that one serving as a conduit is not liable for the mal-performance or non-performance of the third party contractor. We submit that the Court should have recognized the principals enunciated in these cases and dismissed Brown from the law suit and granted Mallory relief solely against Valad who defaulted in performance.

POINT IV.

NEITHER THE LAW EMBODIED IN THE UTAH UNIFORM COMMERCIAL CODE APPLICABLE TO THIS CASE, NOR THE RECORD, SUPPORT THE COURTS AWARD OF DAMAGES TO MALLORY AGAINST TED R. BROWN AND ASSOCIATES, INC.

In the brief of Valad, Point VII discusses the award of damages granted by the Court. Brown concurs in the argument there presented. The C ourt did not adhere to the correct measure of damages applicable to this case. The Court allowed the introduction by Mallory of a purported statement of overhead embodying items which could not, under any reasonable application of the law of damages be related to any loss suffered by Mallory for which it is entitled to redress against either Valad or Brown. (Ex 99, 101, 102)

The 12 KW heaters were reconstructed by Valad and accepted by Mallory. The 15 KW and 21 KW heaters were never satisfactorily completed. Valad because of the difficulties encountered over the 15 and 21 KW heaters refused to provide the 36 KW and the 50 KW heaters.

It was conceded at the trial that the cost of securing replacement heaters and the incidental costs to reconstruct the test chamber to fit the new heaters, the cost of removal of the defective heaters and the installation of the new heaters were direct costs and under the Utah Uniform Commercial Code were allowable items of damage to be awarded to Mallory against Valad and if the Court refused to accept Brown's theory of the case, against Brown. The remainder of the so-called consequential damages which Mallory claimed and which the court allowed are not permissible damages under any theory. These damages encompa-

all of the overhead items of Mallory operation as taken from the unaudited operating statement of Mallory which the court admitted into evidence over the objection of both Valad and Brown. (Ex. 99) The basis upon which the counsel for Mallory claimed this could be done was called the "contract completed method of accounting" which may have validity before the IRS but hopefully will not be applied to the determination of damages in a simple case of non-performance of a sales contract. The damages thus claimed comprise items of which neither Valad or Brown could have had any awareness at the time of making the contract with Mallory to supply heaters, and which most assuredly could never have been within their contemplation at that time.

The Utah Uniform Commercial Code specifically sets forth the damages for which a buyer may recover against a defaulting seller at Sections 70A-2-711, 713 and 715, UCA 1953 as amended. We set these sections forth in full in the appendix to this brief and submit that they are controlling. No reasonable construction of the language of these sections could possibly encompass the "consequential" damages claimed by Mallory.

CONCLUSION

The realities of the relationship between Mallory, Brown and Valad are such that no justification exists, nor support in the record, for the court's having awarded judgment to Mallory against Brown for the loss it claimed to have suffered by reason of Valad's failure to perform its contract. Brown was not at any time a guarantor of performance by the manufacturer Valad. The only primary failure of performance shown in the exhaustive trial was the failure by Valad to manufacture heaters

as required by the Order placed with it. This failure resulted in Brown's inability to deliver the ordered heaters, but Brown had done nothing to contribute to or cause the failure.

The Judgment awarded to Mallory against Brown should be reversed. The judgment awarded to Brown against Valad for the loss suffered by Brown should be affirmed.

RESPECTFULLY SUBMITTED,

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ACKNOWLEDGEMENT OF SERVICE

Receipt of two copies of the above and foregoing brief of Ted R. Brown and Associates, Inc., this ____day of September, 1978 is hereby acknowledged

_____
Attorney for Valad Electric Heating Co.

_____
Attorney for Mallory Engineering

MAILING CERTIFICATE

Two copies of the brief of Ted R. Brown & Associates, Inc., were deposited in the United States Mails postage prepaid directed to GODFREY P. SCHMIDT, 654 Madison Ave., New York, New York 10021 this 18th day of September, 1978.

_____

APPENDIX

payment on the check the next day, the parties failed to complete a contract since there was no definite meeting of the minds. J. Golden Barton Motor Co. v. [illegible] (2d) 210, 341 P. 2d 423.

70A-2-205. Firm offers.—An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

History: L. 1965, ch. 154, § 2-205.

Cross-References.

Formal requirements, statute of frauds, 70A-2-201.

Rules of construction, [illegible] agreement, 70A-1-102.

Unconscionable contract [illegible] 2-302.

70A-2-206. Offer and acceptance in formation of contract.—(1) Unless [illegible] otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

History: L. 1965, ch. 154, § 2-206.

Collateral References.

Sales ⟹ 1-15, 22, 23.

77 C.J.S. Sales §§ 1, 5, 24 et seq.

[illegible] A. L. R. [illegible]

Acknowledging [illegible] of order of goods [illegible] acceptance completing the contract [illegible] A. L. R. [illegible]

Acting on order for goods as an acceptance thereof, 29 A. L. R. [illegible]

70A-2-207. Additional terms in acceptance or confirmation.—(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

History: L. 1965, ch. 154, § 2-207.

Cross-References.

Acceptance of goods by buyer, effect, 70A-2-607.
Adequate assurance of performance, 70A-2-609.
Contractual modification or limitation of remedy, 70A-2-719.
Excuse by failure of presupposed conditions, 70A-2-615.
Legal procedure on notice claiming breach, 70A-2-607.
Rejection of goods, buyer's right to, 70A-2-513.
Installment contracts, 70A-2-612.
Liquidation or limitation of damages, 70A-2-718.
Rightful rejection of goods, manner and effect of, 70A-2-602.
Rules of construction, variation by agreement, 70A-1-102.
Substituted performance, 70A-2-614.
Transactions between merchants, 70A-2-104.
Unconscionable contract or clause, 70A-2-302.

Collateral References.

Sales⇨1, 22-1, 23-4.
77 C.J.S. Sales §§ 1, 5, 29.

Law Review.

Uniform Commercial Code section 2-207 and the "counter offer"; acceptance unaccepted, 77 Nw. U. L. Rev. 677.

70A-2-208. Course of performance or practical construction.—(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (section 70A-1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

History: L. 1965, ch. 154, § 2-208.

Cross-References.

Acceptance of goods, effect, 70A-2-607.
"Agreement" defined, 70A-1-201, 70A-2-106.
Buyer's rights on improper delivery, 70A-2-601.
Modification, rescission and waiver, 70A-2-209.
Parol or extrinsic evidence, 70A-2-202.
Waiver of buyer's objections, 70A-2-605.

Collateral References.

Sales⇨54 et seq.
77 C.J.S. Sales § 71 et seq.

70A-2-209. Modification, rescission and waiver.—(1) An agreement modifying a contract within this chapter needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but

Employee stock purchase plan.

Plaintiff upon becoming employee purchased stock of hotel corporation subject to repurchase agreement at agreed price if employee left employment or was discharged, upon discharge title to stock passed to corporation, and upon corporation's refusal to accept and pay for stock when tendered, employee could maintain action for agreed price. Davies v. Semloh Hotel, Inc., 86 U. 318, 44 P. 2d 689.

Measure of damages.

The measure of damages, in action by seller to recover price of goods sold, is a matter of general law. Holland-Cook Mfg. Co. v. Consolidated Wagon & Machine Co., 49 U. 43, 161 P. 922.

Waiver and estoppel.

In action by seller of harvesting machine to recover purchase price, wherein defendant contended that machine did not fulfill terms of warranty, seller having refused to receive machine back upon any conditions, and in constantly claiming full benefit of sale and delivery of harvester and insisting upon payment of full purchase price, waived return of machine. Consolidated Wagon & Machine Co. v. Wright, 56 U. 382, 190 P. 937, distinguished in 75 U. 124, 283 P. 731.

In action by seller of harvesting machine to recover purchase price, wherein defendant contended that machine did not fulfill terms of warranty, signing of satisfaction card by defendant without reading its contents, on representation of seller's agent that it only contained statement that agent was present, did not estop defendant from denying statement of satisfaction in card. Consolidated Wagon & Machine Co. v. Wright, 56 U. 382, 190 P. 937, distinguished in 75 U. 124, 283 P. 731.

70A-2-710. Seller's incidental damages.—Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

History: L. 1965, ch. 154, § 2-710.

Collateral References.

Sales⇐370, 384, 391(3).
78 C.J.S. Sales § 477 et seq.

70A-2-711. Buyer's remedies in general—Buyer's security interest in rejected goods.—(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (section 70A-2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for nondelivery as provided in this chapter (section 70A-2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this chapter (section 70A-2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this chapter (section 70A-2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold

such goods and resell them in like manner as an aggrieved seller (section 70A-2-706).

History: L. 1965, ch. 154, § 2-711.

Cross-References.

Buyer's damages for breach in regard to accepted goods, 70A-2-714.

Buyer's rights on improper delivery, 70A-2-601.

Cure by seller of improper tender or delivery, 70A-2-508.

Installment contract, 70A-2-612.

Remedies liberally administered, 70A-1-106.

Resale by seller, 70A-2-706.

Revocation of acceptance [illegible] part, 70A-2-608.

Collateral References.

Sales⟹113, 390 et seq.

77 C.J.S. Sales § 94; 78 C.J.S. Sales [illegible] et seq.

Right of action for breach of [illegible] which expressly leaves open for [illegible] agreement or negotiation the terms of [illegible] ment for the property, 68 A. L. R. [illegible] 1229.

Law Review.

Remedies for Breach of Contracts [illegible] ing to the Sale of Goods under the Uniform Commercial Code [illegible] A. Roa[illegible] Vet[illegible] Tw[illegible] [illegible], 72 [illegible] 199.

DECISIONS UNDER FORMER LAW

Answer and counterclaim of buyer

Fact that, in seller's action for balance of purchase price due under contract of sale, buyer went to trial and was awarded judgment on basis of rescission of contract by him, although he had not pleaded rescission thereof, held not to have defeated his right, on new trial ordered by Supreme Court on its reversal of judgment, to amend his answer and counterclaim so as to ask damages for contract's violation. Detroit Heating & Lighting Co. v. Stevens, 20 U. 241, 58 P. 193.

Buyer, instead of bringing independent action for breach of warranty, may interpose counterclaim in action by seller for purchase price. Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co., 61 U. 503, 215 P. 995, 29 A. L. R. 659; Detroit Vapor Stove Co. v. Farmers' Cash Union, 61 U. 567, 216 P. 1075.

Choice of remedies.

Instead of suing for breach of either an express or implied warranty [illegible] buyer may bring action for damages for the tort or wrong. Wright v. Howe, 46 U. 588, 150 P. 956, L. R. A. 1916B, 1104.

Though on breach of warranty of [illegible] automobile the buyer might have sued for the difference between the value of the car in the condition warranted and its value in the condition in which it was sold, he might rescind instead and recover back the purchase price. Studebaker Bros. Co. v. Anderson, 50 U. 319, 167 P. 663.

Purchaser of automobile on installment contract involving trading in of old car, if defrauded, may elect to affirm contract and sue for damages or he may repudiate or rescind contract and sue to recover old car or what he had paid out on contract, but he cannot do [illegible] remedies [illegible] alternate and inconsistent [illegible] commencement of action, with knowledge of facts [illegible] conclusive of election, notwithstanding remedy chosen may prove unsatisfactory. Cook v. Covey B[illegible] Motor Co., 69 U. 161, 253 P. 196.

Defense of breach of warranty.

It is elementary that stipulations [illegible] ranties are conditions precedent to [illegible] upon breach in action by seller [illegible] chase price. Stipulations [illegible] turn of article must be [illegible] Consolidated Wagon & Machine Co. v. Barber, 46 U. 277, 150 P. 9[illegible] [illegible] in 93 U. 414, 73 P. 2d 12[illegible].

Substantial [illegible] change [illegible] to breach of warranty [illegible] pro tanto, defense to action by [illegible] for rescission of contract [illegible] purchase price. Stum[illegible] v. [illegible] & Machine Co., 53 U. 320, 178 P. 916.

In action by seller of harvesting machine to recover purchase price [illegible] tion that defendant gave [illegible] than five days' trial, and for [illegible] breached terms of warranty, was [illegible] able, where it appeared that harvester not operated after seller's employees left defendant's ranch, and if [illegible] harvester was continued for more than [illegible] ing period of five days, it was through seller's own efforts and by its consent. Consolidated Wagon & Machine Co. v. Wright, 56 U. 382, 190 P. 937.

Lien of buyer.

Buyer has no lien on goods for amount of purchase price paid thereon unless there has been a breach of warranty (express [illegible]

Ernest E. Fadler Co. v. Hesser, 166 F. 2d 904, citing cases from other jurisdictions as well as Williston, Sales, Vol. 2, 2d Ed., § 497, p. 1296.

Where buyer, upon inspection of vegetables at Salt Lake City shipped from Louisiana, promptly notified seller that he rejected vegetables because of their unmerchantable condition and requested instructions from seller as to their disposition, and seller instructed buyer to dispose of vegetables at best price obtainable and, after resale in accordance therewith, accepted net proceeds therefrom without qualification, seller assented to proposed rescission and discharge of original sale, so that judgment setting aside reparation order in proceeding under Federal Perishable Agricultural Commodities Act of 1930 was affirmed on appeal. Ernest E. Fadler Co. v. Hesser, 166 F. 2d 904.

Waiver.

A buyer did not waive his right to rescind the purchase of an automobile for breach of warranty that it would run repeatedly taking it back for adjustments and repairs, where nothing more was intended than to offer the seller ample opportunity to put the car in condition so it would run. Studebaker Corp. of America v. Anderson, 50 U. 319, 167 P.

Buyer may waive [illegible] by conduct inconsistent [illegible] such right. Advance [illegible] Inc. v. Stohl, 75 U. 124, [illegible] quished in 93 U. 414, [illegible]

70A-2-712. "Cover"—Buyer's procurement of substitute goods. After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (section 70A-2-715) but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

History: L. 1965, ch. 154, § 2-712.

Cross-References.

Buyer's damages for nondelivery or repudiation, 70A-2-713.

Buyer's incidental and consequential damages, 70A-2-715.

Buyer's right to specific performance or replevin, 70A-2-716.

Obligation of good faith, 70A-1-203.

Reasonable time, 70A-1-204.

Resale by seller, 70A-2-706.

Collateral References.

Sales⇨418(7).

78 C.J.S. Sales § 548.

70A-2-713. Buyer's damages for nondelivery or repudiation. Subject to the provisions of this chapter with respect to proof of market price (section 70A-2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this chapter (section 70A-2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

History: L. 1965, ch. 154, § 2-713.

Cross-References.

Buyer's procurement of substitute goods, 70A-2-712.

Buyer's right to specific performance or replevin, 70A-2-716.

Proof of market price, time and place, 70A-2-723.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

History: L. 1965, ch. 154, § 2-714.

Cross-References.

Burden of establishing breach after acceptance, 70A-2-607.

Buyer's damages for nondelivery or repudiation, 70A-2-713.

Buyer's incidental and consequential damages, 70A-2-715.

Buyer's remedies in general, 70A-2-711.

Deduction of damages from the price, 70A-2-717.

Goods or conduct "conforming" to contract, 70A-2-106 (2).

Revocation of acceptance in whole or in part, 70A-2-608.

Collateral References.

Sales⊃418, 427.

78 C.J.S. Sales §§ 520, 540 et seq.

Barred claim of breach of warranty as subject of setoff, counterclaim, or cross action, 1 A. L. R. 2d 671, 684.

Breach of warranty as to title as within statutory provision requiring notice of breach of warranty on sale of goods, 114 A. L. R. 707.

Buyer's return of subject of sale and acceptance of return of or credit for the purchase price as affecting right to recover special damages for breach of warranty, 137 A. L. R. 1077.

Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty, 53 A. L. R. 2d 270.

Measure in elements of recovery of buyer rescinding sale of domestic animals for seller's breach of warranty, 35 A. L. R. 1273.

Measure of damages in action for breach of warranty of title to personal property as the value of the property or the price plus interest, 13 A. L. R. 2d 1372.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty, 33 A. L. R. 2d 511.

Right of dealer against his vendor in case of breach of warranty as to articles, 22 A. L. R. 133 and 64 A. L. R. 883.

Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty, 41 A. L. R. 812.

Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract, 77 A. L. R. 1165, 41 A. L. R. 1153.

70A-2-715. Buyer's incidental and consequential damages.—(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

History: L. 1965, ch. 154, § 2-715.

Cross-References.

Contractual modification or limitation of remedy, 70A-2-719.

Excuse by failure of presupposed conditions, 70A-2-615.

Obligation of good faith, 70A-1-203.

Remedies liberally administered, 70A-1-106.