

# Washington University Law Review

---

Volume 7 | Issue 1

---

January 1921

## Remedy for Breach of Warranty in Missouri

G. A. Buder Jr.

*Washington University School of Law*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_lawreview](https://openscholarship.wustl.edu/law_lawreview)



Part of the [Commercial Law Commons](#)

---

### Recommended Citation

G. A. Buder Jr., *Remedy for Breach of Warranty in Missouri*, 7 ST. LOUIS L. REV. 051 (1921).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol7/iss1/7](https://openscholarship.wustl.edu/law_lawreview/vol7/iss1/7)

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

## REMEDIES FOR BREACH OF WARRANTY IN MISSOURI

While the courts of the various States are more or less generally agreed upon the substantive law underlying the subject of warranties, they still remain at loggerheads upon the question of what remedies the vendee may pursue when the vendor's warranty is not complied with. The chief controversy is upon the subject of rescission for a breach of warranty, some courts holding that the buyer may rescind and others ruling that his only remedy is an action for damages for the breach. Moreover, in this connection, some tribunals distinguish between a sale of chattels generally and a sale of specific goods, while still others allow the purchaser to reject the goods when tendered, but deny him the right to rescind after he has once received the goods. Another point of contention is whether the vendee's right of recovery survives the acceptance of the goods after an opportunity for inspection; and with reference to this question, some cases draw distinctions between express and implied warranties and between present and executory sales. It will therefore be the purpose of this note to examine the law of our own State upon the subject and to give a brief digest of the decisions of the Missouri courts.

It has been continually and consistently held by the Appellate Courts of Missouri that when there is a breach of warranty the vendee may return the property and rescind the contract within a reasonable time, or he may retain it, and, when sued for the purchase money, plead a total or partial failure of consideration. In the leading case of *Branson v. Turner*,<sup>1</sup> upon the authority of which many of the later cases are decided, the Court said:

“If the cattle on trial and further investigation proved to be otherwise than as warranted, the vendee had two reme-

---

1. 77 Mo. 489.

ties. He could have returned the property to the vendor, provided he acted seasonably, and rescinded the contract; or he could have retained the same and when sued for the purchase money pleaded a total or partial failure of consideration."<sup>2</sup>

It should be noted, however, that worthlessness of the chattel for the desired purpose does not constitute a total failure of consideration, only worthlessness for any purpose whatsoever amounting to a total failure. The amount which the vendee is permitted to recoup is the difference between the contract price and the value of the chattel for any purpose in its actual condition.<sup>3</sup>

In this last case it is said at page 568 that "While in an action upon a promissory note given for the purchase price of a chattel bought for a particular purpose, whether upon an express or implied warranty, with or without fraud, it is not necessary that the purchaser should return the article or offer to return it, or to rescind the contract, or that such article should be wholly worthless, in order that he may avail himself of his plea of a failure of consideration. Yet, if he retains the article and does not offer to return it, and such article is not wholly worthless, such plea can avail him only so far as to defeat a recovery on the note to the extent of the difference between the value of the article, had it been such as it was represented to be, and its value such as it is shown really to be."

Likewise, if the purchase price has already been paid, the

---

2. The following cases, declare the law as above stated: *Werner v. O'Brien*, 40 Mo. App. 483; *Tower v. Pauly*, 51 Mo. App. 75; *Kerr v. Emerson*, 64 Mo. App. 159; *Tall v. Chapman*, 66 Mo. App. 581; *Little Rock Grain Co. v. Brubaker*, 89 Mo. App. 1; *Phares v. Jaynes*, 118 Mo. App. 546; *Laumeler v. Dolph*, 145 Mo. App. 78; *Monarch Metal Weatherstrip Co. v. Hanick*, 172 Mo. App. 680; *Excelsior Stove Mfg. Co. v. Million*, 174 Mo. App. 718; *El Paso Milling Co. v. Davis*, 194 Mo. App. 1.

3. *Thummell v. Dukey*, 82 Mo. App. 53; *Small v. Bartlett*, 96 Mo. App. 550; *Crenshaw v. Locker*, 185 Mo. 375, following the leading case of *Brown v. Weidon*, 99 Mo. 564.

purchaser may sue for damages for the breach or recover the purchase price if he has rescinded the contract.<sup>4</sup>

In *Laumeier v. Dolph*, *supra*, the Court says, at page 84:

“The law is that if a purchaser is persuaded by the seller to keep the chattel for a while to give it a proper trial, and he does so, and it nevertheless does not come up to the warranties, he may still return the same and recover the amount paid on account of the purchase price.”

Where there is no rescission, and the vendee merely seeks to recover damages for the breach, the law is that a warranty survives the acceptance of the goods and the vendee may retain the goods, rely on the warranty and recover the difference between the value of the goods actually delivered and those contracted for at the time of the sale. The case of *Fairbanks, Morse & Co. v. Baskett*,<sup>5</sup> contains the following excellent statement of the law on this point by Judge Goode at page 62:

“Acceptance and retention of an article sold with a warranty do not prevent the buyer from recovering any damage he may sustain on account of the article falling short of the warranty, at least if he makes timely objection. And the damage may be recovered either by an abatement from the agreed price when the buyer is sued or by an action if he has already paid in full. In the language of the books, the warranty survives the acceptance, and this rule is reasonable; for the purpose of a warranty is to make the purchaser whole if the article sold turns out after delivery to be of inferior merit.”

In reference to extension of payment as a waiver of the breach, the learned Judge further states at page 66:

“But the cases, with few exceptions, hold that failure of

---

4. *Johnson v. Whitman*, 20 Mo. App. 100; *Laumeier v. Dolph*, 145 Mo. App. 78.

5. 98 Mo. App. 52.

consideration or breach of warranty may be maintained notwithstanding there was an extension of payment by renewal or otherwise, unless an intention to waive the failure or breach is proven.”

In the *Atkins Brothers Co. v. Southern Grain Co.*,<sup>6</sup> the Court says at page 125:

“Stated in a different way, the instruction is grounded upon a view of the law that in executory contracts for the sale of personal property, a warranty, as a matter of law, does not survive an inspection or an opportunity to inspect by the buyer. There are authorities supporting that view, but we believe the weight of authority and the better reason is with the opposing statement, viz., the buyer does not rely on his warranty when sued for the contract price.”<sup>7</sup>

The law, as contained in the supporting cases, (see foot note) applies as to implied warranties only where the vendee accepts without knowledge of any defect in the property. When the vendee buys without an express warranty, or fraud, on the part of the seller, then his subsequent acceptance of the thing sold with a full knowledge of its defects, precludes him, in the absence of any previous objection or tender of a rescission, from recovering damages for defects in the article retained. *Huber Mfg. Co. v. Hunter.*<sup>8</sup>

But in order to rescind the contract for breach of warranty and defend when sued for the price or recover it if paid, the vendee must within a reasonable time return or tender back the chattel *in toto* so as to place the vendor in *statu quo*; when the vendee disables himself from so doing, he cannot rescind,

6. 119 Mo. App. 119.

7. Cases to the same effect: *Long Brothers v. The J. K. Armsby Co.*, 43 Mo. App. 253; *Compton v. Parsons*, 76 Mo. 455; *Voss v. McGuire*, 18 Mo. App. 477; *Martin v. Maxwell*, 18 Mo. App. 176; *Ross v. Barker*, 30 Mo. 385; *Osborne v. Henry*, 70 Mo. App. 19; *Triplett v. Montgomery*, 81 Mo. App. 141; *June v. Falkenburg*, 89 Mo. App. 563; *Alabama Steel & Wire Co.*, 110 Mo. App. 41; *Noble v. Nelson*, 154 Mo. App. 616; (Good statement; Page 618).

8. 87 Mo. App. 50.

unless the goods were of no value for any purpose whatsoever. In the leading case of *Tower v. Pauly*,<sup>9</sup> the defendant in the Autumn of 1889, pursuant to agreement, built in plaintiff's house a furnace which was warranted to heat to a certain temperature when the thermometer registered a specified temperature outside. The plaintiff did not move into the house until the Fall of 1890 and after using the furnace during the Winter of 1890-91, during which time it did not perform as warranted, he tendered it back in the Spring of 1891, seeking to rescind and recover the purchase price. The court decided in favor of the defendant, declaring the elapsed time unreasonable as a matter of law, and stating further that the plaintiff could not rescind since he had taken twenty-two hundred bricks which surrounded the furnace and used them in the installation of another heating plant, thus disabling himself from returning the property *in toto*.

In *McCormick Harvesting Mach. Co. v. Brady*,<sup>10</sup> it is said at page 294:

"It may be that the machine was not as warranted, was indeed worthless as a combined reaper and binder, the use contemplated in its purchase, and yet it may have been of some value as a reaper or for other purposes. Before the purchaser can be allowed to defeat the entire claim for the purchase price, he must not only allege and prove that the machine did not answer the demands of the warranty, but he must also show either that he returned or offered to return the machine, or that it was entirely worthless for any purpose whatever. The purpose of the law is to make the purchaser whole, nothing more."<sup>11</sup>

---

9. 61 Mo. App. 75.

10. 67 Mo. App. 292.

11. Cases supporting rule of rescission: *Walls v. Gates*, 4 Mo. App. 1; *Esterly v. Campbell*, 44 Mo. App. 621; *Heinman v. Hatcher*, 106 Mo. App. 438; *Phares v. Jaynes*, 118 Mo. App. 546; *Monarch Weatherstrip Co. v. Hanick*, 173 Mo. App. 680; *Sinnamon v. Moore*, 161 Mo. App. 168; *Ferguson Imp. Co. v. Farmer*, 128 Mo. App. 300; *Marth v. Wiskerchen*, 186 Mo. App. 516, 1. c. 523; *Brown v. Weldon*, *supra*.

What is a reasonable time within which to return or tender back the chattel is ordinarily a question of fact for the determination of the jury, but when the elapsed time is so short or so long that ordinary men could not differ as to its reasonableness, it may be held either sufficient or insufficient by the court as a matter of law as in *Tower v. Pauly*, *supra*.

In *Viertel v. Smith*,<sup>12</sup> it is said that:

“The rule of law is well understood that, while the vendee of a chattel may on the breach of the warranty thereof rescind the contract and recover back the purchase price, yet the vendee must act with reasonable expedition; must within a reasonable time test the article, offer to restore the property and demand back his money.

“As to what is a reasonable time is generally a question the jury, or the trier of the facts; but, as in many other cases, the time being so long, and the delay in offering to rescind may be so entirely without excuse or fair explanation, that the courts will as a matter of law declare the same unreasonable.”<sup>13</sup>

As an element of damage which the vendee is allowed to recover upon rescission for breach of warranty is included the reasonable expense which he incurs in caring for, reselling or otherwise managing the property for the vendor after the contract is rescinded.<sup>14</sup>

Before concluding, our attention is directed to the fact that our courts, in opposition to those of several other states, favor the vendee with every reasonable opportunity to make himself whole, and show a tendency to enlarge rather than restrict his remedies. In *Crouch v. Morgan*,<sup>15</sup> several parties purchased a stallion, with an express warranty, each giving

12. 55 Mo. App. 617.

13. *Johnson v. Whitman*, 20 Mo. App. 100; *Pierce v. Slegel*, 60 Mo. App. 148.

14. *Walls v. Gates*, 4 Mo. App. 1; *Phares v. Jaynes*, 118 Mo. App. 546.

15. 135 Mo. App. 611.

his note to the seller for his respective share in the horse. The animal failed to come up to the warranty and one of the purchasers offered to relinquish his interest in the horse to the seller, although the others did not. In a suit on the note it was held that this constituted a defense to the action, and that it was not necessary to prove that the horse was actually worthless.

Another case demonstrating this fact is *Morrison, McIntosh & Co. v. Leiser*,<sup>16</sup> in which it is declared that where a vendee purchases a certain quality of goods to be delivered in two installments, he will be allowed to revoke the order for the last installment when the goods delivered in the first installment are inferior in quality.<sup>17</sup>

In the case of *Gallais v. Trinidad Asphalt Mfg. Co.*, the defendant constructed a floor for the plaintiff which it warranted should be waterproof for a period of five years. The plaintiff sued for a breach of warranty, and as is said at page 345:

“Defendant offered to prove that it offered to repair the floor and make it waterproof but plaintiff refused to permit the repairs to be made. The court rejected the evidence. This ruling is assigned as error. Defendant’s guarantee was not that it would construct a waterproof floor and keep the same waterproof by repairs, as needed, for five years, but that it would construct a waterproof floor and guarantee it to remain waterproof for five years. Repairs were not provided for in the contract, hence defendant had no right to make them without plaintiff’s consent, and its offer to make them did not relieve it of its liability for a breach of warranty.”

In the *Eversole* case the defendant agreed to supply the plaintiff with pure milk for a given period of time. The former became delinquent by supplying impure milk which

---

16. 73 Mo. App. 95.

17. Exceptional cases evidencing the liberal tendency of courts in this direction: *Gallais v. Trinidad Asphalt Mfg. Co.*, 127 Mo. App. 338 and *Eversole & Eversole v. Hanna*, 184 Mo. App. 445.



the latter continued to receive and sell to its customers. In the suit for the breach, the court held that in a continuing contract no waiver of quality is implied from the retention of inferior goods and that the plaintiffs did not waive the breach by continuing to accept the impure milk.

This note sets forth the law in reference to the buyer's remedies for breach of warranty as it is applied in the State of Missouri, and we comprehend with much gratification that our courts have in general discarded the old hairline distinctions mentioned in the introduction, have departed from the law of England (which does not permit a rescission for breach of warranty), and have adopted the doctrine in force in Massachusetts and other of the more progressive American states, which permits both a rescission and the survival of the warranty after acceptance of the goods, and which Judge Hawley declared in *English vs. Spokane Commission Co.*,<sup>18</sup> to be "The great weight of authority, as well as reason."

G. A. BUDER, JR., '22.

---

18. 57 Fed. 456.