

## THE IMPLIED WARRANTY OF MERCHANTABILITY QUALITY\*

Is there such a thing as a standard warranty of quality presumptively to be implied in every sale of goods made by a dealer? Otherwise stated, are there certain minimum requirements of quality in the thing sold which every purchaser from such a dealer is entitled to demand unless there is express agreement to the contrary, or circumstances are shown which indicate a contrary understanding?

Section 15 (2) of the Uniform Sales Act<sup>1</sup> reads as follows:

Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

This section, which has been enacted thus far in thirty-four states, as well as the District of Columbia, Alaska and Hawaii,<sup>2</sup> was copied almost verbatim from the first part of section 14 (2) of the English Sale of Goods Act<sup>3</sup> of 1894, which was itself a restatement and codification of the common law of England as it existed at that date.<sup>4</sup> As it is stated in the American Act, the section undoubtedly represents the more prevalent, and certainly the better, holdings of our courts at common law.<sup>5</sup> Along with the rest of the Uniform Sales Act, it is of persuasive authority in states where the Act has not yet been adopted,<sup>6</sup> and it has been recognized as merely declaratory of established common law rules.<sup>7</sup>

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<sup>1</sup> 2 Mason's 1927 Minn. Stat., sec. 8890 (2).

<sup>2</sup> 1 Uniform Laws Annotated, 1941, Supplement, p. 6.

<sup>3</sup> 56 & 57 Vict. ch. 71, sec. 14 (2) "Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

<sup>4</sup> Chalmers, Sale of Goods Act (8th ed. 1920), 42-47.

<sup>5</sup> Williston, Sales (2d ed. 1924), ch. IX.

<sup>6</sup> The Sales Act, as of 1941, had not yet been adopted in the following states: Florida, Georgia, Kansas, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Virginia, West Virginia.

<sup>7</sup> *McNabb v. Central Kentucky Natural Gas Co.*, (1938) 272 Ky. 112, 113 S.W. (2d) 470; *Hoback v. Coca Cola Bottling Works*, (1936) 20 Tenn. App. 280, 98 S.W. (2d) 113; *Child's Dining Hall v. Swingler*, (1938) 173 Md. 490, 197 Atl. 105.

If our standard warranty exists, it must be found in this section and the construction which has been placed upon it. Taking into account not only the decisions which have interpreted the section itself, but also those at common law which preceded it and those which have dealt with related questions, it is perhaps not surprising to find that there are nearly a thousand cases which bear upon the problem. The current draft of the proposed Revision of the Uniform Sales Act,<sup>8</sup> to conform to the proposed Federal Sales Act, has made important changes in the wording of the section—which, however, as will be seen, add little or nothing to the meaning which it is now given by the courts. It may therefore be of interest to review the existing state of the law with reference to the implied warranty of merchantable quality, when it arises, and what it means.

### HISTORY

In its inception, breach of warranty was a tort. The action was upon the case, for breach of an assumed duty, and the wrong was conceived to be a form of misrepresentation, in the nature of deceit and not at all clearly distinguished from deceit.<sup>9</sup> Even after Lord Holt's decisions made it clear that the action would lie for a mere affirmation of fact by the seller even though he made it innocently and without any knowledge of its falsity,<sup>10</sup> the action was still in tort; and as late as 1797 we find Lord Kenyon talking of breach of warranty as a form of "fraud."<sup>11</sup> Warranty has never entirely lost this tort character which it had in the beginning; and this may have important consequences at the present day. For one thing, it is generally agreed that a tort form of action, as on the case, may still be maintained for the breach,

<sup>8</sup> Proposed Report on and Draft of a Revised Uniform Sales Act for the Conference of Commissioners on Uniform State Laws, considered by the Conference at its Indianapolis meeting, September, 1941. At the time of writing, the Report and Second Draft published by the Conference, embodying the results of the Indianapolis discussion, has just come to hand. Section 15 (2) of this Draft reads as follows: "Where there is a contract to sell or a sale by a seller who [regularly] deals in goods of the kind or description concerned, there is an implied warranty that the goods shall be merchantable goods of that kind or description, i.e., of at least fair [average] quality, and such as by mercantile usage pass without objection in the market under the designation in the contract, and that they shall be reasonably fit for the ordinary and usual purposes for which such goods are used. A manufacturer who sells his product 'deals' therein, within the meaning of this Act." (The words enclosed in brackets are thus enclosed in the draft, and are subject to possible elimination.)

<sup>9</sup> Ames, History of Assumpsit, (1888) 2 Harv. L. Rev. 1, 8; 1 Williston, Sales (2d ed. 1924), 368-369.

<sup>10</sup> *Cross v. Gardner*, (1689) 1 Show. 8, Carthew 90, 3 Mod. Rep. 261; *Medina v. Stoughton*, (1700) 1 Ld. Raym. 593, 1 Salk. 210. Accord, *Williamson v. Allison*, (1802) 2 East 446.

<sup>11</sup> *Jendwine v. Slade*, (1797) 2 Esp. 572.

without any proof of either intentional misrepresentation or even negligence.<sup>12</sup> In addition, the tort element involved may permit damages not recoverable for mere breach of contract, such as wrongful death,<sup>13</sup> or the application of a different statute of limitations;<sup>14</sup> and it has served as a strong argument for those who seek to extend implied warranties of quality from the producer to the ultimate consumer, in the absence of any "privity" of contract between the two.<sup>15</sup> Furthermore, it has continued to color the substantive law of warranty itself, by introducing some idea of misrepresentation of fact, however innocent, and of reliance on the part of the buyer upon the seller's knowledge, skill or judgment, or some implied assertion concerning the character of the goods sold.

Shortly after 1750, an express warranty began to be recognized as a term of the contract of sale, and attorneys adopted the practice of declaring on the contract. In *Stuart v. Wilkins*,<sup>16</sup> in 1778, the practice was sanctioned by a decision that assumpsit would lie for a breach of warranty if it were expressed. In the course of argument with counsel there seems to have been a lively discussion, not reported in the case,<sup>17</sup> as to whether this might be true of an implied warranty also; and Lord Mansfield was of the opinion that that at least was still exclusively a matter of tort. Evidently the reference was to the implied warranty of title, the only one recognized at the time. By 1810, however, when implied warranties of quality were first established,<sup>18</sup> a whole generation of lawyers had been taught to regard any warranty as a contract, and the assumpsit action was accepted as a matter of course.

<sup>12</sup> *Shippen v. Bowen*, (1887) 122 U.S. 575, 7 Sup. Ct. 1283, 30 L. Ed. 1172; *Greenwood v. John R. Thompson Co.*, (1919) 213 Ill. App. 371; *Farrell v. Manhattan Market Co.*, (1908) 198 Mass. 271, 84 N.E. 481, 10 L.R.A. (N.S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076; *Standard Paint Co. v. Victor & Co.*, (1917) 120 Va. 595, 91 S.E. 752.

<sup>13</sup> *Greco v. S. S. Kresge Co.* (1938) 277 N.Y. 26, 12 N.E. (2d) 557, 115 A.L.R. 1020. Contra, *Howson v. Foster Beef Co.*, (1935) 87 N.H. 200, 177 Atl. 656. Cf. *Kennedy v. F. W. Woolworth Co.*, (1923) 205 App. Div. 648, 200 N.Y.S. 121; *Flessner v. Carstens Packing Co.*, (1916) 93 Wash. 48, 52, 56, 160 Pac. 14; *Davis v. Williams*, (1908) 58 Ga. App. 274, 278, 198 S.E. 357; *Challis v. Hartloff*, (1933) 136 Kan. 823, 18 P. (2d) 199.

<sup>14</sup> *Schlick v. New York Dugan Bros.*, (1940) 175 Misc. 182, 22 N.Y.S. (2d) 238.

<sup>15</sup> Note, (1933) 18 Corn. L.Q. 445; *Nock v. Coca Cola Bottling Works*, (1931) 102 Pa. Super. 515, 15 Atl. 537; *Challis v. Hartloff*, (1933) 136 Kan. 823, 18 P. (2d) 199; *Davis v. Van Camp Packing Co.*, (1920) 189 Iowa 775, 176 N.W. 382, 17 A.L.R. 649; *Mazetti v. Armour & Co.*, (1913) 75 Wash. 622, 135 Pac. 633, 48 L.R.A. (N.S.) 213, Ann. Cas. 1915C 140.

<sup>16</sup> (1778) 1 Douglas 18.

<sup>17</sup> See the reference to this discussion in *Parkinson v. Lee*, (1802) 2 East 314, 102 Eng. Rep. 389.

<sup>18</sup> *Holcombe v. Hewson*, (1810) 2 Camp. 391, 170 Eng. Rep. 1194; *Gardiner v. Gray*, (1815) 4 Camp. 144, 171 Eng. Rep. 46.

The leading case is *Gardiner v Gray*,<sup>19</sup> at nisi prius in 1815. The buyer declared on a contract for the sale of a quantity of "waste silk" imported from the continent. Neither buyer nor seller had seen the goods, although samples had been forwarded and shown by the seller to the buyer's agent. Lord Ellenborough stated the fundamental principle of the implied warranty of merchantable quality:

I am of opinion, however, that under such circumstances, [the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is, whether the commodity purchased by the plaintiff be of such quality as can be reasonably brought into the market to be sold as *waste silk*. The witnesses describe it as unfit for the purposes of waste silk, and of such a quality that it cannot be sold under that denomination.

Observe that here is no mention of misrepresentation, conscious or otherwise, or of any reliance by the buyer upon the seller's knowledge or judgment. The ground of the decision is merely that the seller has contracted to deliver one thing and has delivered another; effect is given to the "intention of both parties" as the contract they have made is interpreted; it is breach of contract, pure and simple.

A long line of later cases rounded out the picture. The seller's warranty, as a matter of contract was held to mean not only that the goods delivered must be genuine according to the name, kind or description specified,<sup>20</sup> but that they must be of a quality to pass in the market under that description,<sup>21</sup> and this in turn to mean that they must be reasonably fit for the ordinary uses to which such goods are put.<sup>22</sup> The warranty was recognized as a

<sup>19</sup> (1815) 4 Camp. 144, 171 Eng. Rep. 46 The decision was repeated in substance the same year, in *Laing v. Fidgeon*, (1815) 6 Taunt. 108, 4 Camp. 169, 128 Eng. Rep. 974.

<sup>20</sup> *Bridge v. Wain*, (1816) 1 Stark. 504, 171 Eng. Rep. 543; *Nichols v. Godts*, (1854) 10 Exch. 191, 2 C.L.R. 1468, 23 L.J. Ex. 314; *Allan v. Lake*, (1852) 18 Q.B. 560, 118 Eng. Rep. 212.

<sup>21</sup> *Wieler v. Schilizzi*, (1856) 17 C.B. 619, 25 L.J.C.P. 89, 189 Eng. Rep. 1219; *Josling v. Kingsford*, (1863) 13 C.B. (N.S.) 447, 32 L.J.C.P. 94, 143 Eng. Rep. 177.

<sup>22</sup> *Jones v. Bright*, (1829) 5 Bing. 533, 130 Eng. Rep. 1167; *Beer v. Walker*, (1877) 46 L.J.Q.B. 677, 37 L.T. 278.

dealer's warranty only,<sup>23</sup> and trade usage must be taken into account.<sup>24</sup> The implied warranty of fitness for the buyer's "particular" purpose developed, and was recognized as something separate and distinct from that of merchantable quality,<sup>25</sup> although the two might, and often did, overlap. Finally, in 1868, the whole matter was summed up in *Jones v. Just*<sup>26</sup> the famous case of the Manila hemp, which Jelf, rather over-enthusiastically listed as one of his "Fifteen Decisive Battles of the Law;"<sup>27</sup> and the warranty of merchantable quality was stated in terms which have passed, in substance, into the Sales Act section quoted above.

At about the same time, if not earlier,<sup>28</sup> the idea began to make its appearance that warranties arose by implication "of law" from what had been said and done, and were independent of any intent on the part of the seller to contract with regard to them, or to be bound by them. This idea, now generally accepted as to express warranties,<sup>29</sup> was carried over all the more readily into those "implied," where it became involved with the development of modern notions of policy, based upon the increasing practice of reputable sellers to assume responsibility for defective goods sold,<sup>30</sup> together with the feeling that such responsibility is best placed upon the seller as a cost of his business, which he may distribute to the public at large as a part of the price. As a result, it is often said that implied warranties of quality arise by operation of law and are independent of any intention to agree upon their terms as a matter of fact,<sup>31</sup> and there are many cases,

<sup>23</sup> *Burnby v. Bollett*, (1847) 16 M. & W. 644, 153 Eng. Rep. 1548. Foreshadowed by *La Neuville v. Nourse*, (1813) 3 Camp. 351, 170 Eng. Rep. 1407.

<sup>24</sup> *Shepherd v. Kain* (1821) 5 B. & Ald. 240, 106 Eng. Rep. 1180; *Frith v. Mitchell*, (1865) 4 F. & F. 464.

<sup>25</sup> *Jones v. Bright*, (1829) 5 Bing. 533, 130 Eng. Rep. 1167; *Randall v. Newson*, (1877) 2 Q.B.D. 102.

<sup>26</sup> (1868) L.R. 3 Q.B. 197, 9 B. & S. 141, 17 L.J.Q.B. 89.

<sup>27</sup> Jelf, *Fifteen Decisive Battles of the Law*, (2d ed. 1921), ch. XI.

<sup>28</sup> Williston, *Representation and Warranty in Sales*, (1913) 27 Harv. L. Rev. 1, contends that this was the law from Lord Holt's time onward. At least it became established by the dates of *Stucley v. Bailey*, (1862) 1 H. & C. 405, and *Cowdy v. Thomas*, (1877) 30 L.T. (N.S.) 22.

<sup>29</sup> *Kenner v. Harding*, (1877) 80 Ill. 264, 28 Am. Rep. 615; *McClintock v. Emick, Stoner & Co.*, (1888) 87 Ky. 160, 7 S.W. 903, 9 Ky. L. Rep. 995; *Fairbanks Canning Co. v. Metzger*, (1890) 118 N.Y. 260, 20 N.E. 372, 16 Am. St. Rep. 753; *Herron v. Dibrell*, (1891) 87 Va. 289, 12 S.E. 674; *Hobart v. Young*, (1891) 63 Vt. 363, 21 Atl. 612, 12 L.R.A. 693; *Ingraham v. Union R. Co.*, (1896) 19 R.I. 356, 33 Atl. 875.

<sup>30</sup> See Bogert and Fink, *Business Practices Regarding Warranties in the Sale of Goods*, (1931) 25 Ill. L. Rev. 400, 415.

<sup>31</sup> *Bekkevold v. Potts*, (1927) 103 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164; *Hoe v. Sanborn*, (1860) 21 N.Y. 552, 78 Am. Dec. 163; *Lee v. Cohrt*, (1930) 57 S.D. 387, 232 N.W. 900; *Linn v. Radio Center Delicatessen*, (1939) 169 Misc. 879, 9 N.Y.S. (2d) 110; *Little v. G. E. Van Syckle & Co.*, (1898) 115 Mich. 480, 73 N.W. 554; *Hooven & Allison Co. v. Wirtz Bros.*, (1906) 15 N.D. 477, 107 N.W. 1078.

at least, in which to hold that the warranty is a term of the contract is "to speak the language of pure fiction."<sup>32</sup>

### IMPLIED WARRANTY

When the ordinary lawyer, or court for that matter, says that a warranty is "implied," what seems to be meant is merely that it is not expressed. There has been surprisingly little discussion of just how, or why, the implication arises. Both as a matter of history and at the present day, however, there are three distinct theories to be discerned as the basis of implied warranties of quality.

1. The warranty is a misrepresentation of fact. The seller has asserted, whether expressly or by his conduct, that the goods are of a particular kind, quality or character, and the buyer has purchased in reliance upon that assertion. This is obviously a tort theory, closely allied to the cases of deceit; and it differs from deceit only in that it imposes strict liability for innocent misrepresentations, in the absence of any "scienter" in the form of knowledge of their falsity or lack of belief in their truth.<sup>33</sup> Logically, however, it does require reasonable reliance on the part of the buyer upon some supposed information of the seller concerning the truth of the assertion; and if the seller does not purport to have such information it should follow that the buyer does not reasonably rely upon it, and no implied warranty is to be found.<sup>34</sup> The implied warranty of fitness for the buyer's particular purpose, as it is stated in the Uniform Sales Act,<sup>35</sup> apparently stands on this footing; and in many cases where the seller obviously knows nothing about the goods, as in the case of a sale by a retailer of

<sup>32</sup> Williston, *Liability for Honest Misrepresentation*, (1911) 24 Harv. L. Rev. 415, 420; Smith, *Surviving Fictions*, (1917) 27 Yale L.J. 147, 317, 326.

<sup>33</sup> Compare the decisions in a few jurisdictions finding strict liability in an action of deceit for innocent misrepresentation, in contracts other than the sale of goods. *Holcomb v. Noble*, (1888) 69 Mich. 396, 37 N. W. 497; *Schlechter v. Felton*, (1916) 134 Minn. 143, 158 N. W. 813, L. R. A. 1917A 556; *Tischer v. Bardin*, (1923) 155 Minn. 361, 194 N. W. 3; *Trust Co. of Norfolk v. Fletcher*, (1929) 152 Va. 868, 148 S. E. 785, 73 A. L. R. 1111; *Jacquot v. Farmers' Straw Gas Producer Co.*, (1926) 140 Wash. 482, 249 Pac. 984.

<sup>34</sup> Compare, as to deceit, *Tucker v. White*, (1878) 125 Mass. 344; *Krause v. Cook*, (1906) 144 Mich. 365, 108 N.W. 81; *Harris v. Delco Products*, (1940) 305 Mass. 362, 25 N.E. (2d) 740. The rule that statements understood to be of opinion only are not actionable as warranties probably rests upon the same foundation. See *Mantle Lamp Co. v. Rucker*, (1924) 202 Ky. 777, 261 S.W. 263; *Seitz v. Brewer's Refrigerating Mach. Co.* (1891) 141 U.S. 510, 12 Sup. Ct. 46, 35 L.Ed. 837; *Van Horn v. Stautz*, (1921) 297 Ill. 530, 131 N.E. 153; *Boston Consol Gas Co. v. Folsom*, (1921) 237 Mass. 565, 130 N.E. 197; Uniform Sales Act, sec. 12, 2 Mason's 1927 Minn. Stats., sec. 8387.

<sup>35</sup> Sec. 15 (1), 2 Mason's 1927 Minn. Stats., sec. 8390 (1).

beans sealed in a can,<sup>36</sup> the courts have refused to imply a warranty for lack of such reliance.

2. The warranty has in fact been agreed upon by the parties as an unexpressed term of the contract of sale. The seller has contracted to deliver described goods, and it is understood that they are to have certain qualities; but that understanding has not been embodied in the agreement. Nevertheless the court, by interpreting the language used, the conduct of the parties and the circumstances of the case, finds that it is there. Such a contract term "implied in fact" differs from an express agreement only in that it is circumstantially proved.<sup>37</sup> Any difficulties arising from the parol evidence rule usually have been met by saying that the description of the goods appearing in the contract is open to interpretation or explanation in the light of the circumstances of the case.

Obviously this theory is pure contract. It arose only after warranties had been held to be enforceable in a contract action; and the first case in which it appeared<sup>38</sup> was one in which the seller did not know what the goods were, and the buyer knew that he did not know and never had seen them. It does not rest upon any belief on the part of the buyer that the seller has superior information, or any information at all about the goods; and the seller's innocence or ignorance or inability to deliver what he has contracted to deliver will no more excuse him than in any other breach of contract. Any "reliance" of the buyer upon the seller becomes important only in so far as it bears upon his actual understanding of what the latter has undertaken to deliver.

3. The warranty is imposed by the law. It is read into the contract by the law without regard to whether the parties intended it in fact; it arises merely because the goods have been sold at all. This theory is of course one of policy. The loss due to defective goods is placed upon the seller because he is best able to bear it and distribute it to the public, and because it is con-

<sup>36</sup> See for example *Noble v. Sears, Roebuck & Co.*, (W. D. Wash, 1935) 12 F. Supp. 181; *Davis v. Williams*, (1938) 50 Ga. App. 274, 198 S.E. 357; *Great A. & P. Tea Co. v. Walker*, (Tex. Civ. App. 1937) 104 S.W. (2d) 627; *Walden v. Wheeler*, (1913) 153 Ky. 181, 154 S.W. 1088, 44 L.R.A. (N.S.) 597; *Kroger Grocery Co. v. Lewelling*, (1933) 165 Miss. 71, 145 So. 726; *McMurray v. Vaughn's Seed Store*, (1927) 117 Ohio St. 236, 157 N.E. 567. A strong argument for this theory is set forth in Waite, *Retail Responsibility and Judicial Law-Making*, (1936) 34 Mich. L. Rev. 494; Waite, *Sales* (1938), 223 ff.

<sup>37</sup> *Lombard v. Rahilly*, (1914) 127 Minn. 449, 149 N.W. 950.

<sup>38</sup> *Gardiner v. Gray*, (1915) 4 Camp. 144, 171 Eng. Rep. 46. So likewise in *Jones v. Just*, (1868) L.R. 3 Q.B. 197, 9 B. & S. 141, 37 L.J.Q.B. 89 (Manila hemp sold in transit).

sidered that the buyer is entitled to protection at the seller's expense.<sup>39</sup> It is perhaps idle to inquire whether the basis of such a liability is contract or tort. It partakes of the nature of both, and in either case it is liability without fault. It is not often that "implication of law" is differentiated clearly from "implied in fact;" but the question of the policy involved is seldom absent from warranty cases, and there are a respectable number<sup>40</sup> in which it appears to have controlled the decision.

If it be asked which of these three theories is the basis of the law of implied warranties in general, it can only be answered: all three. It is seldom that it makes any difference which is adopted; but when the occasion arises, the courts have flitted cheerfully from one to another as the facts may demand, always tending to an increasing extent<sup>41</sup> to favor the buyer and find the warranty. When lack of "reliance" of the buyer upon the seller's information becomes an obstacle, the first is abandoned in favor of the second; when it is necessary to avoid the effect of disclaimers or the parol evidence rule, the second is forsaken for the third; and when it is desired to extend the warranty to one not in "privity of contract" with the seller, there is a return to the first. So far as the warranty of merchantable quality is concerned, however, the second theory, that of agreement "implied in fact" and actually understood but not expressed, has predominated from the beginning; and with few exceptions, it explains the decisions.

### MERCHANTABLE QUALITY

Before considering when the warranty arises, it is well to determine what it means when it does arise. Professor Llewellyn<sup>42</sup> has said that there is no more puzzling question than what "merchantable" means under the Sales Act. Certainly it has meant a variety of things; but an array of several hundred cases, reasonably consistent in their approach, will at least permit some general conclusions. When a seller undertakes, expressly<sup>43</sup> or by implica-

<sup>39</sup> A strong argument in favor of this theory appears in Brown, *The Liability of Retail Dealers for Defective Food Products*, (1939) 23 Minnesota Law Review 585.

<sup>40</sup> See *supra*, note 31; *infra*, notes 264, 266 and text.

<sup>41</sup> "The doctrine of implied warranty should be extended rather than restricted." Wilson C. J. in *Bekkevold v. Potts*, (1927) 173 Minn. 87, 89, 216 N.W. 790.

<sup>42</sup> Llewellyn, *Cases and Materials on the Law of Sales* (1930), 324.

<sup>43</sup> See for example *Tye v. Fynmore*, (1813) 3 Camp. 462, 170 Eng. Rep. 1446 ("fair merchantable sassafras wood"); *Raney & Hamon v. Hamilton & White*, (Tex. Civ. App. 1921) 234 S.W. 229 ("good and merchantable" cattle); *Kimball-Fowler Cereal Co. v. Chapman & Dewey Lbr. Co.*, (1907) 125 Mo. App. 326, 102 S.W. 625 ("guaranteed" construed to mean mer-



tion, to deliver merchantable goods, the extent of his obligation is at least as follows:

1. *Genuine according to name, kind and description.* Nothing is more elementary in all the law of contract than that an agreement to deliver a horse is not satisfied by delivery of a cow. Accordingly, it was held quite early that a contract calling for "scarlet cuttings,"<sup>44</sup> or "prime bacon,"<sup>45</sup> or "Skirving's Swedes seeds,"<sup>46</sup> or for that matter a foreign bill of exchange,<sup>47</sup> necessarily implied an agreement, or condition or warranty, that the thing sold should answer the name or kind described. Such a description is of course a matter of express language; and it has been held frequently enough that it amounts to an express warranty in itself.<sup>48</sup> The earlier cases, however, treated the understanding that the goods should conform to the description as an "inference" or implication of fact; and both the English Sales of Goods Act<sup>49</sup> and the Uniform Sales Act<sup>50</sup> contain a section, substantially identical in the two, which states the warranty as one "implied." Whether it is to be called express or implied is ordinarily of no importance; it appears to be both, and the courts have treated it more or less indiscriminately as one or the other.<sup>51</sup>

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chantable); *Simond v. Baddon*, (1857) 2 C.B. (N.S.) 324, 26 L.J.C.P. 198, 140 Eng. Rep. 441 ("fair average Nicranzi rice"); *Jones v. Clarke*, (1858) 2 H. & N. 725, 27 L.J. Ex., 165 ("fair average quality"); *Stephens v. Brill*, (1913) 159 Iowa 620, 140 N.W. 809 ("merchantable" horse).

<sup>44</sup> *Bridge v. Wain*, (1816) 1 Stark. 504, 171 Eng. Rep. 543.

<sup>45</sup> *Yeats v. Pim*, (1815) 2 J. J. Marsh. 141.

<sup>46</sup> *Allan v. Lake*, (1852) 18 Q.B. 560, 118 Eng. Rep. 212.

<sup>47</sup> *Gompertz v. Bartlett*, (1835) 2 E. & B. 849, 2 C.L.R. 395, 23 L.J.Q.B. 65, 118 Eng. Rep. 985.

<sup>48</sup> *Power v. Barham*, (1836) 4 Ad. & El. 473 (pictures by Canaletti); *Wolcott, Johnson & Co. v. Mount* (1873) 7 Vroom. (N.J.) 262 ("early strap-leaf red-top turnip seed"); *Parrish v. Kothhoff*, (1929) 128 Or. 529, 274 Pac. 1108; *Smith v. Zimbalist*, (1934) 2 Cal. App. (2d) 324, 38 P. (2d) 170 (Stradivarius and Guarnerius violins).

<sup>49</sup> Sec. 13: "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

<sup>50</sup> Sec. 14, 2 Mason's 1927 Minn. Stats., sec. 8389: "Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

<sup>51</sup> Thus disclaimers of warranties have been avoided by finding that the description is expressly warranted in the same instrument. *Williams v. McClain*, (1937) 180 Miss. 6, 176 So. 717; *Andrews Bros. Ltd. v. Singer & Co., Ltd.*, [1934] 1 K.B. 17, 103 L.J.K.B. 90, 150 L.T. 172, 50 T.L.R. 33 (disclaimer of implied warranties only). On the other hand, in *Wallis Son & Wells v. Pratt & Haynes*, [1910] 2 K.B. 1003, [1911] A.C. 394, a disclaimer of both express and implied warranties was avoided by finding that the description was an implied "condition."

The connection with merchantable quality arises from the fact that when goods are bought from a dealer the description obviously must be construed to call for the kind of goods usually sold by that name by such dealer, and the usages of the trade become part of the understanding of the parties.<sup>52</sup> It follows that what is sold as "waste silk" must be something known to the trade and capable of passing in the market as waste silk;<sup>53</sup> a "copper-fastened vessel" must have a sufficient amount of copper to conform to trade understanding of the term;<sup>54</sup> "oxalic acid" must be the oxalic acid of commerce;<sup>55</sup> "foreign refined rape oil"<sup>56</sup> and "Calcutta linseed"<sup>57</sup> must be pure enough to be accepted under that name by the trade; and "Manila hemp" must not be so wetted by sea-water that it can only be sold as defective goods.<sup>58</sup> Out of a very long list of decisions implying such a warranty of genuineness, there is space to mention only a few.<sup>59</sup>

2. *Salable in the market under the designation.* Upon this foundation of genuineness according to trade understanding was built the second requirement, that the goods must be capable of passing in the market under the name or description by which they are sold. It is not enough that they be merely something which can be called by the name; they must be of the kind or

<sup>52</sup> *Shepherd v. Kain*, (1821) 5 B. & Ald. 240, 106 Eng. Rep. 1180; *Frith v. Mitchell*, (1865) 4 F. & F. 464; *Snowden v. Warder*, (1831) 3 Rawle (Pa.) 101; *Sumner v. Tyson*, (1850) 20 N.H. 384.

<sup>53</sup> *Gardiner v. Gray*, (1815) 4 Camp. 144, 171 Eng. Rep. 46.

<sup>54</sup> *Shepherd v. Kain*, (1821) 5 B. & Ald. 240, 106 Eng. Rep. 1180.

<sup>55</sup> *Josling v. Kingsford*, (1863) 13 C.B. (N.S.) 447, 32 L.J.C.P. 14, 143 Eng. Rep. 177 (adulterated with 10 per cent Epsom salts).

<sup>56</sup> *Nichol v. Gods*, (1854) 10 Exch. 191, 2 C.L.R. 1468, 23 L.J. Ex. 314 (mixture of hemp oil and rape oil).

<sup>57</sup> *Wieler v. Schilizzi*, (1856) 17 C.B. 619, 25 L.J.C.P. 89, 189 Eng. Rep. 1219 (mixed with other inferior seeds).

<sup>58</sup> *Jones v. Just*, (1868) L.R. 3 Q.B. 197, 9 B. & S. 141, 37 L.J.Q.B. 89.

<sup>59</sup> *Davis v. Miller*, (1894) 10 T.L.R. 286 (Bass's Ale with poisonous ingredient); *Robert A. Munro & Co., v. Meyer*, [1930] 2 K.B. 312, 99 L.J.K.B. 703, 143 L.T. 565 (adulterated bone meal); *Kefauver v. Price*, (1918) 136 Ark. 342, 206 S.W. 664 ("Orange Sorghum seed"); *Brock v. Newmark Grain Co.*, (1923) 64 Cal. App. 517, 222 Pac. 195 (Sonora wheat); *Rocky Mountain Seed Co. v. Knorr*, (1933) 92 Colo. 320, 20 P. (2d) 394 (alfalfa seed); *Kansas Flour Mills Co. v. Moll*, (1920) 106 Kan. 827, 189 Pac. 940 (flour brand); *Denenberg v. Jurad*, (1938) 300 Mass. 488, 15 N.E. (2d) 660 ("new car of the year 1933"); *West Coast Lumber Co. v. Wernicke*, (1939) 137 Fla. 363, 188 So. 357 ("Texas Seed Ribbon Cane" seed); *Williams v. McClain*, (1937) 180 Miss. 6, 176 So. 717 (year model of Ford automobile); *Whittaker v. McCormick*, (1878) 6 Mo. App. 114 ("No. 2 white mixed corn"); *Operators Fuel Agency v. Eastern Fuel Co.*, (1924) 83 Pa. Super. 598 ("Classified Pool 60 Coal"); *White v. Miller*, (1877) 71 N.Y. 118 ("Bristol cabbage seed"); *Parrish v. Kotthoff*, (1929) 128 Or. 529, 274 Pac. 1108 ("Rosen rye" seed); *Northwestern Cordage Co. v. Rice*, (1896) 5 N.D. 432, 67 N.W. 298, 57 Am. St. Rep. 563 ("pure Manila twine"); *Springfield Shingle Co. v. Edgcomb Mill Co.*, (1909) 52 Wash. 620, 101 Pac. 233 ("Star A Star shingles"); *Foutty v. Chalmax Sales Co.*, (1925) 99 W. Va. 300, 128 S.E. 389 (car of particular model).

quality commonly sold in the market.<sup>60</sup> This involves two elements. The buyer—who in the earlier cases<sup>61</sup> was himself a dealer—must be assured the possibility of resale if he so desires; and here it seems clear that the warranty of merchantable quality overlaps its twin implied warranty of fitness for the buyer's particular purpose.<sup>62</sup> Or, if he buys for use, he is still assured that he is receiving what dealers customarily sell, and what he might buy elsewhere under the same name.<sup>63</sup>

It is not enough that the goods are capable of sale to somebody at some price; they must be acceptable generally on the market under the same name or description.<sup>64</sup> Nor, of course, is it enough

<sup>60</sup> "It appears to us that, in every contract to supply goods of a specified description which the buyer has no opportunity to inspect the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description." *Jones v. Just*, (1868) L.R. 3 Q.B. 197, 9 B. & S. 141, 37 L.J.Q.B. 89.

"Upon the sale of goods, by name or description, in the absence of some other controlling stipulation in the contract, a condition is implied that the goods shall be merchantable under that name. They must be goods known in the market and among those familiar with that kind of trade by that description, and of such quality as to have value. This is not a warranty of quality. It does not require any particular grade. It is a requirement of identity between the thing which is described as the subject of the trade and the thing proffered in performance of it. The buyer is entitled to receive goods fairly answerable to the description contained in his contract of sale. It does not matter whether the deleterious characteristic is latent or obvious, provided it goes to the extent of changing the nature of the goods, so that they have no value in the market under the designation contained in the contract of sale. . . Upon a sale even by a casual owner of sardines, he is bound to deliver something which answers that description in the trade. If he does not, he does not perform his contract." *Rugg, C.J., in Inter-State Grocery Co. v. Geo. W. Bentley Co.*, (1913) 214 Mass. 227, 231, 101 N.E.147.

<sup>61</sup> *Gardiner v. Gray*, (1815) 4 Camp. 144, 171 Eng. Rep. 46; *Laing v. Fidgeon*, (1815) 6 Taunt. 108, 4 Camp. 169, 128 Eng. Rep. 974; *Bridge v. Wain*, (1816) 1 Stark. 504, 171 Eng. Rep. 548; *Wieler v. Schilizzi*, (1856) 17 C.B. 619, 25 L.J.C.P. 89, 189 Eng. Rep. 1219; *Jones v. Just*, (1868) L.R. 3 Q.B. 197, 9 B. & S. 141, 37 L.J.Q.B. 89.

<sup>62</sup> *American Soda Fountain Co. v. Medford Grocery Co.*, (1928) 128 Or. 83, 262 Pac. 939; *Parker v. Shaghalian & Co.*, (1923) 244 Mass. 19, 138 N.E. 236; *Mones v. Imperial Bottling Works*, (1936) 14 N.J. Misc. 369, 185 Atl. 483; *Lexington Grocery Co. v. Vernoy*, (1914) 167 N.C. 427, 83 S.E. 567; *Berry v. Wadhams Oil Co.*, (1914) 156 Wis. 538, 146 N.W. 783.

<sup>63</sup> "The phrase [merchantable quality] is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again." *Bristol Tramways v. Fiat Motors, Ltd.*, [1910] 2 K.B. 831, 79 L.J.K.B. 1107, 103 L.T. 443. Accord: *International Business Machines Co. v. Scherban*, [1925] 1 Com. L.Rep. 864; *Frigorifico Wilson de la Argentina v. Weirton Steel Co.*, (C.C.A. 4th Cir. 1933) 62 F. (2d) 677; *Ganoung v. Daniel Reeves, Inc.*, (1933) 149 Misc. 515, 268 N.Y.S. 325; *Colt Co. v. Bridges*, (1926) 162 Ga. 154, 132 S.E. 889; *Keenan v. Cherry & Webb*, (1925) 47 R.I. 125, 131 Atl. 309; *Ryan v. Progressive Grocery Stores*, (1931) 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339.

<sup>64</sup> Thus in *Jones v. Just*, (1868) L.R. 3 Q.B. 197, 9 B. & S. 141, 37 L.J.Q.B. 89, the fact that the Manila hemp wetted by sea water was in fact resold at auction as "Manila hemp with all faults" at about 75 per cent of the

that they would pass in the first instance on their appearance, with their defects concealed; they must be marketable with their true character known,<sup>65</sup> and the fact that the buyer's customers return them to him after purchase is at least strong evidence that they are not of merchantable quality.<sup>66</sup> "Saleable" in the market means not only that the goods themselves are of passable quality, but also that they are not improperly packed<sup>67</sup> or labeled<sup>68</sup> so as to interfere with their resale under the same description; that they are not in dangerous containers;<sup>69</sup> that they have no unnecessary unpleasant odor;<sup>70</sup> that their sale or resale in the same market does not violate any applicable statute;<sup>71</sup> and even that the resale will not subject the buyer to liability for infringement of another's trade mark,<sup>72</sup> or require him to pay a licence tax not necessary for the goods as described.<sup>73</sup>

Apparently, so far as the warranty of merchantable quality is concerned, all that the buyer can demand is that the goods shall

original price, did not prevent the goods from being unmerchantable. Accord: *Niblett v. Confectioners' Materials Co.*, [1921] 3 K.B. 387 (resold with brand removed).

<sup>65</sup> "Merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination." *Grant v. Australian Knitting Mills*, [1936] A.C. 85, 105 L.J.P.C. 6, 154 L.T. 18, 52 T.L.R. 38. Accord: *Morelli v. Fitch & Gibbons*, [1928] 2 K.B. 636, 97 L.J.K.B. 812, 140 L.T. 21, 44 T.L.R. 737; *Young v. Great A. & P. Tea Co.*, (W.D. Pa. 1936) 15 F. Supp. 1018; *Ryan v. Progressive Grocery Stores*, (1931) 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339; *Dow Drug Co. v. Nieman*, (1936) 57 Ohio App. 190, 18 N.E. (2d) 130; *Inter-State Grocery Co. v. Geo. W. Benley Co.*, (1913) 214 Mass. 227, 101 N.E. 147.

<sup>66</sup> *Lexington Grocery Co. v. Vernoy*, (1914) 167 N.C. 427, 83 S.E. 567; *De Shoop Family Medicine Co. v. Davenport*, (1913) 163 N.C. 294, 79 S.E. 602; *Continental Jewelry Co. v. Stanfield*, (1922) 183 N.C. 10, 110 S.E. 585; *Kasler and Cohen, v. Slavovski*, [1928] 1 K.B. 78, 98 L.J.K.B. 850.

<sup>67</sup> *Moore & Co. Ltd., v. Landauer & Co.*, [1921] 2 K.B. 519, 90 L.J.K.B. 731 (wrong size tins).

<sup>68</sup> *Scaliaris v. E. Ofverberg & Co.*, (1921) 37 T.L.R. 307; *Gaston, Williams & Wigmore, Ltd., v. Scaliaris*, (1920) 2 Lloyds L.L.Rep. 275; *Sassoon & Co. v. Lindsay, Bendix & Co.*, (1922) 13 Lloyds L.L.Rep. 280 ("there was something in the term Pilsener which made it acceptable to the beer drinker, especially in Baghdad").

<sup>69</sup> *Morelli v. Fitch & Gibbons*, [1928] 2 K.B. 636, 97 L.J.K.B. 812, 140 L.T. 21, 44 T.L.R. 737; *Naumann v. Wehle Brewing Co.*, (1940) 127 Conn. 44, 15 A. (2d) 181.

<sup>70</sup> *Berry v. Wadhams Oil Co.*, (1914) 156 Wis. 588, 146 N.W. 783 (gasoline); *McNabb v. Central Kentucky Natural Gas Co.*, (1938) 272 Ky. 112, 113 S.W. (2d) 470 (natural gas).

<sup>71</sup> *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*, (1937) 93 Utah 414, 92 P. (2d) 1272 (United States Food and Drug Act); *Mones v. Imperial Bottling Works*, (1930) 14 N.J. Misc. 369, 185 Atl. 483 (New Jersey Food and Drugs Act); *Manning Mfg. Co. v. Hartol Products Corp.*, (C.C.A. 2d Cir. 1938) 99 F. (2d) 813 (kerosine igniting at less than statutory temperature); *Lash, Inc. v. A. C. Ogden Milk Co.*, (1907) 163 Misc. 407, 297 N.Y.S. 1008 (prohibited sale of flavor base).

<sup>72</sup> *Niblett v. Confectioners' Materials Co.*, [1921] 3 K.B. 387 (Sale of Goods Act covers package and brand).

<sup>73</sup> *Haynor Mfg. Co. v. Davis*, (1908) 147 N.C. 267, 61 S.E. 54, 17 L.R.A. (N.S.) 193 (alcoholic beverages sold as not alcoholic).

be saleable in the market in which he buys.<sup>74</sup> If he seeks an assurance that they can be sold elsewhere, he must exact an express warranty, or look to the implied warranty of fitness for his "particular" purpose.<sup>75</sup> Likewise the time as of which merchantable quality is to be invoked is that of the passage of title, and if goods are to be shipped there is ordinarily no implication that they will stand shipment, or continue merchantable for any period after sale.<sup>76</sup> Again, however, the "particular" purpose may require goods of a quality or condition to stand shipment when shipped,<sup>77</sup> and if title is to pass at destination, the goods must of course be merchantable when they arrive.<sup>78</sup>

3. *Fit for the ordinary uses and purposes of such goods.* It was recognized quite early that goods cannot be expected to pass on the market, and hence are not of merchantable quality, unless they are reasonably fit for the ordinary uses to which goods of that kind are put. "The purchaser cannot be supposed to buy goods to lay them on a dunghill;"<sup>79</sup> nor do dealers customarily offer useless goods to their trade. It follows that when a dealer contracts to sell a barge, he is understood to be selling something reasonably fit for ordinary use as a barge,<sup>80</sup> and the same is true

<sup>74</sup> *Sumner, Permain & Co. v. Webb & Co.*, [1922] 1 K.B. 55, 91 L.L.K.B. 228, 38 T.L.R. 45, 126 L.T. 294 (marketable in London where sold, prohibited by statute in Argentina where destined for resale; held to be of "merchantable quality").

<sup>75</sup> *Wilford Hall Laboratories v. Schoenfeld*, (1918) 182 App. Div. 504, 169 N.Y.S. 912 (for sale in Argentina); *Bencoe Exporting & Importing Co. v. Erie City Iron Works*, (C.C.A. 2d Cir. 1922) 280 Fed. 690 (boiler plates "for export" must be exportable); *Pease v. Sabin*, (1866) 38 Vt. 432, 97 Am. Dec. 364 (fitness for sale in foreign market).

<sup>76</sup> *English v. Spokane Commission Co.*, (C.C.A. 9th Cir. 1893) 57 Fed. 45 (eggs); *Leggat v. Sands Brewing Co.*, (1871) 60 Ill. 158 (ale); *Rinelli v. Rubino*, (1918) 68 Ind. App. 314, 120 N.E. 388 (apples); *Bull v. Robison*, (1854) 10 Ex. 342 (iron); cf. *Ryan v. Ulmer*, (1895) 108 Pa. 332, 56 Am. Rep. 210. It must be recognized, however, that merchantable quality at the time of sale may necessarily include the capacity to continue sound and saleable for a reasonable length of time. *Philip Olim & Co. v. C. A. Watson & Sons*, (1920) 204 Ala. 179, 85 So. 460.

<sup>77</sup> *Mann v. Everston*, (1869) 32 Ind. 355; *Lepold v. Van Kirk*, (1870) 20 Wis. 152; *Southern Produce Co. v. Oteri*, (1910) 94 Ark. 318, 120 S.W. 1065; *Truschel v. Dean*, (1906) 77 Ark. 546, 92 S.W. 781; *Stella v. Smith*, (1930) 109 Cal. App. 409, 293 Pac. 656; *Harp v. Haas-Philips Produce Co.*, (1921) 205 Ala. 573, 88 So. 740; *Mobile Fruit & Trading Co. v. McGuire*, (1900) 81 Minn. 232, 83 N.W. 833. These cases make it clear, however, that the seller does not warrant condition on arrival, but merely fitness for shipment when shipped.

<sup>78</sup> *Atkins Bros. Co. v. Southern Grain Co.*, (1906) 119 Mo. App. 119, 95 S.W. 949. Cf. *Harp v. Haas-Philips Produce Co.*, (1921) 205 Ala. 573, 88 So. 740; *Ashford v. Shrader Co.*, (1914) 167 N.C. 45, 83 S.E. 29.

<sup>79</sup> Lord Ellenborough, in *Gardiner v. Gray*, (1815) 4 Camp. 144, 145, 171 Eng. Rep. 46.

<sup>80</sup> *Shepherd v. Pjbus*, (1842) 3 Man. & G. 868, 42 E.C.L. 452, 111 L.J. C.P. 101, 133 Eng. Rep. 1390.

of an automobile,<sup>81</sup> a piano,<sup>82</sup> a hot water bottle,<sup>83</sup> milk,<sup>84</sup> fertilizer,<sup>85</sup> food,<sup>86</sup> clothing,<sup>87</sup> furniture,<sup>88</sup> or any other marketed commodity.<sup>89</sup> On this purely contractual basis of an understanding implied in fact, it has long been recognized that merchantable quality is reflected in use value as well as exchange value, and that the two are inseparably linked.<sup>90</sup> Goods are not merchantable if

<sup>81</sup> *Franklin Motor Car Co. v. Ratliff*, (1922) 207 Ala. 341, 92 So. 449; *Harvey v. Buick Motor Co.*, (Mo. App. 1915) 177 S.W. 774; *Meyer v. Packard Cleveland Motor Co.*, (1922) 106 Ohio St. 328, 140 N.E. 118, 28 A.L.R. 986 (truck); *G.M.C. Truck Co. v. Velley*, (1924) 105 Okla. 84, 231 Pac. 882 (truck); *Swartz v. Edwards Motor Car Co.*, (1927) 49 R.I. 18, 139 Atl. 466.

<sup>82</sup> *Snow v. Schomacker Mfg. Co.*, (1881) 61 Ala. 111, 44 Am. Rep. 509.

<sup>83</sup> *Preist v. Last*, [1903] 2 K.B. 148, 72 L.J.K.B. 657, 89 L.T. 33, 19 T.L.R. 527.

<sup>84</sup> *Frost v. Aylesbury Dairy Companies*, [1905] 1 K.B. 608, 74 L.J.K.B. 386, 92 L.T. 527, 21 T.L.R. 300.

<sup>85</sup> *Radcliff v. Gunby & Co.*, (1872) 46 Ga. 464; *Gammell v. R. B. Gunby & Co.*, (1874) 52 Ga. 504.

<sup>86</sup> *Beer v. Walker*, (1877) 46 L.J.K.B. 677, 37 L.T. 278 (rabbits); *Wallis v. Russell*, [1902] 2 Ir. Rep. 535 (crabs); *Kaull v. Blacker*, (1920) 107 Kan. 578, 193 Pac. 182 (flour); *Lexington Grocery Co. v. Vernoy*, (1914) 167 N.C. 427, 83 S.E. 567 (red marrow beans); *American Soda Fountain Co. v. Medford Grocery Co.*, (1928) 128 Or. 83, 262 Pac. 939 (fruit syrups); *Ward Co. v. Val Blatz Brewing Co.*, (1925) 112 Okla. 119, 240 Pac. 115 (beverage).

<sup>87</sup> *Mandel Bros. v. Mulvey*, (1923) 230 Ill. App. 588 (overcoat); *Brandenberg v. Samuel Stores* (1931) 211 Iowa 1321, 325 N.W. 741, 77 A.L.R. 1611 (fur coat); *Flynn v. Bedell Co.*, (1922) 242 Mass. 450, 136 N.E. 252, 27 A.L.R. 1504 (same); *Zirpola v. Adam Hat Stores*, (1939) 122 N.J.L. 21, 4 A. (2d) 73 (hat).

<sup>88</sup> *Cohan v. Markel*, (1926) 215 App. Div. 435, 213 N.Y.S. 681.

<sup>89</sup> *Grisinger v. Hubbard*, (1912) 21 Idaho 469, 122 Pac. 853, Ann. Cas. 1913E 87 (fruit trees); *American Tank Co. v. Revert Oil Co.*, (1921) 108 Kan. 690, 196 Pac. 111 (oil storage tank); *Ross v. Porteous, Mitchell & Braun*, (1939) 136 Me. 118, 3 A. (2d) 650 (dress shields); *Kansas City Bolt & Nut Co. v. Rodd*, (C.C.A. 6th Cir. 1915) 220 Fed. 750 (machine); *Parsons Band Cutter & Self Feeder Co. v. Mallinger*, (1904) 122 Iowa 703, 98 N.W. 580 (machine); *McNabb v. Central Kentucky Natural Gas Co.*, (1938) 272 Ky. 112, 113 S.W. (2d) 470 (natural gas); *Bianchi v. Denholm & McKay Co.*, (1939) 302 Mass. 469, 19 N.E. (2d) 697, 121 A.L.R. 460 (face powder); *Baumgartner v. Glasener*, (1927) 171 Minn. 289, 214 N.W. 27 (seed); *Colt Co. v. Bridges*, (1926) 162 Ga. 154, 132 S.E. 889 (light generator); *Plymouth Cordage Co. v. Phelps*, (1919) 104 Neb. 64, 175 N.W. 603 (binder twine); *McCaskey Register Co. v. W. J. Bradshaw & Co.*, (1917) 174 N.C. 414, 93 S.E. 898 (cash register); *Hall Furniture Co. v. Crane Mfg. Co.*, (1916) 169 N.C. 41, 85 S.E. 35 (hearse); *Standard Sewing Mach. Co. v. New State Shirt & Overall Mfg. Co.*, (1914) 42 Okla. 554, 141 Pac. 1111 (sewing machine); *Dalton Adding Machine Sales Co. v. Denton*, (1925) 109 Okla. 46, 234 Pac. 201 (adding machine); *Markle v. Stekoll*, (1925) 112 Okla. 287, 240 Pac. 1044 (oil well casing); *Trudgeon v. Patterson*, (1931) 149 Okla. 68, 299 Pac. 419 (bricklayers' cement); *Wayne Tank & Pump Co. v. Harper*, (1926) 118 Okla. 274, 247 Pac. 985 (gasoline pump); *Whitaker v. Columbia Weighing Machine Co.*, (1928) 131 Okla. 194, 268 Pac. 255 (weighing machine); *Appalachian Power Co. v. Tate*, (1922) 90 W. Va. 428, 111 S.E. 150 (refrigerating unit).

<sup>90</sup> "The term 'merchantable,' while frequently used as synonymous with 'salable,' may be given a broader connotation to include adaptability to the immediate use to which it is put. Its exchange value, in final analysis, of course will depend upon its utility value. But exchange value is not the sole test of merchantability under this subdivision." *Kelvinator Sales Corp. v. Quabbin Improvement Co.*, (1931) 234 App. Div. 96, 254 N.Y.S. 123 (refrigerator). Accord, *Stephens v. Brill*, (1913) 159 Iowa 620, 140 N.W. 809 (vicious horse does not conform to express warranty that it is merchantable).

they cannot be used; and merchantable quality necessarily includes some reasonable fitness for the ordinary purposes for which such goods are intended, designed and sold.<sup>91</sup>

At this point there enters the companion implied warranty of fitness for the buyer's "particular" purpose, to which casual reference has been made before. First appearing in 1829,<sup>92</sup> it developed along somewhat different lines from the warranty of merchantable quality, and was recognized as a related but different thing.<sup>93</sup> It is stated in rather careful terms in the Uniform Sales Act<sup>94</sup> as follows:

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

It should be observed first, that this warranty is not limited to sales made by dealers, although it obviously may include them. Second, it requires reliance of the buyer upon some "skill or judgment" of the seller, which the warranty of merchantable

Even where the goods are new to the market, so that their name or description has no accepted trade meaning, it has been held that there is at least a warranty that they are fit for the use for which they purport to be sold. *Kansas City Bolt & Nut Co. v. Rodd*, (C.C.A. 6th Cir. 1926) 12 F. (2d) 969; *Rowe Mfg. Co. v. Curtis-Straub Co.*, (1937) 223 Iowa 858, 273 N.W. 895; *American Mine Equipment Co. v. Butler Consolidated Coal Co.*, (C.C.A. 3d Cir. 1930) 41 F. (2d) 217.

<sup>91</sup> *Asfar & Co. v. Blundell*, [1896] 1 Q.B. 123, 1 Com. Cas. 185 (dates—insurance case); *Grant v. Australian Knitting Mills*, [1936] A.C. 85, 105 L.J.P.C. 6, 154 L.T. 18, 52 T.L.R. 38 (textiles); *Remsberg v. Hackney Mfg. Co.*, (1917) 174 Cal. 799, 164 Pac. 792 (plow); *Loxtercamp v. Lininger Implement Co.*, (1910) 147 Iowa 29, 125 N.W. 830 (definition); *Frigorifico Wilson de la Argentina v. Weirton Steel Co.*, (C.C.A. 4th Cir. 1933) 62 F. (2d) 677 (tin plate); *Giant Mfg. Co. v. Yates-American Mach. Co.*, (C.C.A. 8th Cir. 1940) 111 F. (2d) 360 (coils for cooling units); *Ganoung v. Daniel Reeves, Inc.*, (1933) 149 Mics. 515, 268 N.Y.S. 325 (dog food); *Wallace v. L. D. Clark & Son*, (1918) 72 Okla. 208, 174 Pac. 557, 21 A.L.R. 361 (sardines); *Leavitt v. Fiberloid Co.*, (1907) 196 Mass. 440, 82 N.E. 682, 15 L.R.A. (N.S.) 855 (combs); *Peerless Electric Co. v. Call*, (1923) 82 Pa. Super. 550 (fans); *J. Aron & Co. v. Sills*, (1925) 240 N.Y. 588, 148 N.E. 717 (condensed milk); *Lexington Grocery Co. v. Vernoy*, (1914) 167 N.C. 427, 83 S.E. 567 (beans which could not be cooked and remained so hard they "rattled in the pan"); *Swift v. Etheridge*, (1925) 190 N.C. 162, 129 S.E. 453 (fertilizer); *Keenan v. Cherry & Webb*, (1925) 47 R.I. 125, 131 Atl. 309 (fur coat).

"It would seem, therefore, that a watch that will not keep time, a pen that will not write, and tobacco which will not smoke, cannot be regarded as merchantable under such names." *Foley v. Liggett & Myers Tobacco Co.*, (1930) 136 Misc. 468, 241 N.Y.S. 233, aff'd (1931) 232 App. Div. 822, 249 N.Y.S. 924 (dead mouse in smoking tobacco).

<sup>92</sup> *Jones v. Bright*, (1829) 5 Bing. 533, 3 Moo. & P. 155, 130 Eng. Rep. 1167.

<sup>93</sup> See *Jones v. Just*, (1866) L.R. 3 Q.B. 197, 9 B. & S. 141, 37 L.J. Q.B. 89; *Randall v. Newson*, (1877) 2 Q.B.D. 102.

<sup>94</sup> Sec. 15 (1), 2 Mason's 1927 Minn. Stats., sec. 8390 (1). Taken, with minor changes in wording, from the Sale of Goods Act, sec. 14 (1).

quality does not. The buyer's purpose is made known to the seller, the thing ordered is "something to fit my purpose," and the seller undertakes the responsibility of supplying it. The typical case is that of an order to a carriage-builder to make a pole for the buyer's carriage.<sup>95</sup> In the beginning, this was put on the contractual basis of actual but unexpressed understanding. In the later cases, the continued emphasis upon the buyer's reliance and the seller's supposed superior judgment or information about the goods has led many courts to put it on the basis of misrepresentation, and treat it as a matter of tort. Whether it be called tort or contract is perhaps unimportant; no doubt it is both, and on either basis at least the element of reliance is essential. Finally, the warranty does not call for any standard goods of a kind commonly sold on the market, but rather for something to fit the use which the buyer is known to intend. His "particular" purpose may be something quite apart from the ordinary uses of the article. Goods may be merchantable and still be unfit for some unusual use intended;<sup>96</sup> they may even be unmerchantable and still fit, as where stale bread is sold for chicken feed.

Nevertheless, the two warranties are neither inconsistent nor mutually exclusive, and there are obviously many sales made by dealers in which they will co-exist, and amount to precisely the same thing. It is well settled that the "particular" purpose of the buyer means nothing more than the intended use of which the seller is informed, and that it need not be anything apart from the ordinary use to which such goods are put.<sup>97</sup> When a fur coat is sold to a customer by a department store, it is sold to wear, and is warranted fit to wear; and whether the warranty is called one of merchantable quality or fitness for the purpose is of small consequence.<sup>98</sup> The distinction becomes important only when

<sup>95</sup> *Randall v. Newson*, (1877) 2 Q.B.D. 102.

<sup>96</sup> *Jones v. Bright*, (1829) 5 Bing. 533, 3 Moo. & P. 155, 130 Eng. Rep. 1167; *Shepherd v. Pybus*, (1842) 3 Man. & G. 868, 42 E.C.L. 452, 11 L.J.C.P. 101, 133 Eng. Rep. 1390; *Remsburg v. Hackney Mfg. Co.*, (1917) 174 Cal. 799, 164 Pac. 792; *The E 270*, (D. Mass. 1927) 16 F. (2d) 1005; *Standard Rice Co. v. P. R. Warren Co.*, (1928) 262 Mass. 261, 159 N.E. 508.

<sup>97</sup> *Wallis v. Russell*, [1902] 2 Ir. Rep. 585; *Grant v. Australian Knitting Mills*, [1936] A.C. 85, 105 L.J.P.C. 6, 154 L.T. 18, T.L.R. 38; *American Tank Co. v. Revert Oil Co.*, (1921) 108 Kan. 690, 196 Pac. 1111; *Brandenberg v. Samuel Stores*, (1931) 211 Iowa 1821, 235 N.W. 741, 77 A.L.R. 1161; *Parsons Band Cutter & Self Feeder Co. v. Mallinger*, (1904) 122 Iowa 703, 98 N.W. 580; *Meyer v. Packard Cleveland Motor Co.*, (1922) 106 Ohio St. 328, 140 N.E. 118, 28 A.L.R. 986; *Minneapolis Steel & Machinery Co. v. Casey Land Agency*, (1924) 51 N.D. 832, 201 N.W. 172; cf. *American Soda Fountain Co. v. Medford Grocery Co.*, (1928) 128 Or. 83, 262 Pac. 939.

<sup>98</sup> *Keenan v. Cherry & Webb*, (1925) 47 R.I. 125, 131 Atl. 309. Accord: *Grant v. Australian Knitting Mills*, [1936] A.C. 85, 105 L.J.P.C. 6, 154 L.T. 18, 52 T.L.R. 38 (textiles); *Frigorifico Wilson de la Argentina v. Weir-*



some prescribed element of one is removed—in which case the other may remain in force.<sup>99</sup> In particular, when the reliance on the seller's supposed skill or judgment or superior information, necessary to the "particular purpose" warranty, is lacking, the contractual obligation to furnish goods of merchantable quality answering the description may still be found,<sup>100</sup>

"Fitness for the purpose" is an attractive phrase, and the courts have tended to use it in preference to "merchantable quality." In the great majority of dealer sales,<sup>101</sup> however, the use intended by the buyer is the ordinary, usual one, clearly lying within the merchantable quality called for by the implied contract; and merchantable quality seems to be what in reality is meant. Contrary to what is perhaps the current impression, that warranty appears to be the broader, stronger, and more powerful of the two.

The "fitness for the general purpose," as it is sometimes called, which is necessary to merchantable quality, presents troublesome questions where the goods delivered are suitable for some of the ordinary uses of those described but not for others. On the one hand, it is arguable that the buyer is entitled to fitness for all usual, customary purposes,<sup>102</sup> including even that of re-

*ton Steel Co.*, (C.C.A. 4th Cir. 1933) 62 F. (2d) 677 (tin plate); *Dunbar Bros. Co. v. Consolidated Iron-Steel Mfg. Co.*, (C.C.A. 2d Cir. 1928) 23 F. (2d) 416 (dictum); *Kelvinator Sales Corp. v. Quabbin Improvement Co.*, (1931) 234 App. Div. 96, 254 N.Y.S. 123 (refrigerator); *Foley v. Liggett & Myers Tobacco Co.*, (1930) 136 Misc. 468, 241 N.Y.S. 233, aff'd (1931) 232 App. Div. 822, 249 N.Y.S. 924 (smoking tobacco); *Ganoung v. Daniel Reeves, Inc.*, (1933) 149 Misc. 515, 268 N.Y.S. 325 (dog food); *Wallace v. L. D. Clark & Son*, (1918) 74 Okla. 208, 174 Pac. 557, 21 A.L.R. 361 (sardines); *Leavitt v. Fiberloid Co.*, (1907) 196 Mass. 440, 82 N.E. 682, 15 L.R.A. (N.S.) 855 (combs); *Colt Co. v. Bridges*, (1926) 162 Ga. 154, 132 S.E. 889 (light generator); *J. Aron & Co. v. Sills*, (1925) 240 N.Y. 588, 148 N.E. 717 (condensed milk).

<sup>99</sup> Thus: (a) if the sale is not made by a dealer, or if it is not made "by description," the warranty, if any, must be one of fitness for the particular purpose only; and (b) if the intended use is not made known to the seller, or if it does not appear that the buyer relies upon the seller's supposed skill or judgment, the warranty must be one of merchantable quality.

<sup>100</sup> *Bristol Tramways & Carriage Co. v. Fiat Motors*, [1910] 2 K.B. 831, 79 L.J.K.B. 1107, 103 L.T. 443, 26 T.L.R. 629; *Appalachian Power Co. v. Tate*, (1922) 90 W.Va. 428, 111 S.E. 150; *Remsberg v. Hackney Mfg. Co.*, (1917) 174 Cal. 799, 164 Pac. 792; *Gary Coast Agency v. Lawry*, (1921) 101 Or. 623, 201 Pac. 214; *G. M. C. Truck Co. v. Kelley*, (1924) 105 Okla. 84, 231 Pac. 882; *Colt Co. v. Bridges*, (1926) 162 Ga. 154, 132 S.E. 889; *Herbert v. W. C. Mahon Co.*, (1918) 211 Ill. App. 297; *Frigorifico Wilson de la Argentina v. Weirton Steel Co.*, (C.C.A. 4th Cir. 1933) 62 F. (2d) 677; *Daniels v. White & Sons, Ltd.*, [1938] 4 All Eng. Rep. 258; *Parker v. Shaghalian & Co.*, (1923) 244 Mass. 19, 138 N.E. 236; *Botti v. Venice Grocery Co.*, (1941) 309 Mass. 450, 35 N.E. (2d) 491; *Ryan v. Progressive Grocery Stores*, (1931) 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339.

<sup>101</sup> See the cases cited *supra*, notes 80-91.

<sup>102</sup> *Atkins Bros. Co. v. Southern Grain Co.*, (1906) 119 Mo. App. 119, 95 S.W. 949 (error to charge that corn must be merely fit for some purpose for which it is ordinarily used. The buyer has "a right to use the corn himself and therefore it should be reasonably fit for the ordinary purposes to which such corn is put . . . He likewise has a right to sell it and there-

sale;<sup>103</sup> on the other, that goods may find ready buyers under the name, and so be entirely marketable, even though they are known to be fit for only some of the usual uses.<sup>104</sup> The answer that seems to be found in the cases is that if the particular use is a predominant one, such as that of making cloth into clothing,<sup>105</sup> or flour into bread,<sup>106</sup> the goods are not to be called merchantable unless they meet it; but that if it is a relatively minor and infrequent one, such as feeding barley to pigs,<sup>107</sup> making liveries out of cloth,<sup>108</sup> or spraying fertilizer by drills,<sup>109</sup> the goods may still be merchantable, and the buyer must look instead to a warranty for the "particular purpose" based on his disclosure to the seller. If the use is considered an abnormal one, such as eating pork without proper cooking,<sup>110</sup> it does not fall within merchantable quality, and the seller may assume, in the absence of notice to the contrary, that it is not intended. Allergies and personal idiosyn-

fore it should be in such condition as to be merchantable"); *Swartz v. Edwards Motor Car Co.*, (1927) 49 R.I. 18, 139 Alt. 466; *Leavitt v. Fiberloid Co.*, (1907) 196 Mass. 440, 82 N.E. 682, 15 L.R.A. (N.S.) 855.

<sup>103</sup> *Geddlings v. Marsh*, [1920] 1 K.B. 668, 89 L.J.K.B. 526, 122 L.T. 775, 36 T.L.R. 337; *American Soda Fountain Co. v. Medford Grocery Co.*, (1928) 128 Or. 83, 262 Pac. 939; *Parker v. Shaghalian & Co.*, (1923) 244 Mass. 19, 138 N.E. 236; *Mones v. Imperial Bottling Works*, (1936) 14 N.J. Misc. 369, 185 Alt. 483; *Lexington Grocery Co. v. Vernoy*, (1914) 167 N.C. 427, 83 S.E. 567; *Berry v. Wadhams Oil Co.*, (1914) 156 Wis. 588, 146 N.W. 783; *Atkins Bros. Co. v. Southern Grain Co.*, (1906) 119 Mo. App. 119, 96 S.W. 949; *Wood v. Val Blatz Brewing Co.*, (1925) 112 Okla. 119, 240 Pac. 115.

<sup>104</sup> *Wright v. Hart*, (1837) 18 Wend. (N.Y.) 449, aff'g *Hart v. Wright*, (1837) 17 Wend. (N.Y.) 267. Flour fit for making crackers but not bread was held "marketable." On the facts, it may be doubted that the same decision would be reached today.

<sup>105</sup> *James Drummond & Sons v. E. H. Van Ingen & Co.*, (1887) 12 App. Cas. 284, 56 L.J.Q.B. 563, 3 T.L.R. 541; *Bierman v. City Mills Co.*, (1897) 151 N.Y. 482, 45 N.E. 856, 37 L.R.A. 799, 56 Am. St. Rep. 635.

<sup>106</sup> *Kaull v. Blacker*, (1920) 107 Kan. 578, 193 Pac. 182. Apparently the same is true if the use is an important one, representing a substantial percentage of the total, even though it does not predominate. Cf. *McNabb v. Central Kentucky Natural Gas Co.*, (1938) 272 Ky. 112, 113 S.W. (2d) 470 (domestic use of natural gas); *Leavitt v. Fiberloid Co.*, (1907) 196 Mass. 440, 82 N.E. 682, 15 L.R.A. (N.S.) 855 (use of comb material near fire).

<sup>107</sup> *Canada Atlantic Grain Export Co. v. Eilers*, (1929) 35 Com. Cas. 90.

<sup>108</sup> *Jones v. Padgett*, (1890) 24 Q.B.D. 650, 59 L.J.Q.B. 261.

<sup>109</sup> *Kaplan v. American Cotton Oil Co.*, (C.C.A. 5th Cir. 1926) 12 F. (2d) 969.

<sup>110</sup> *Cheli v. Cudahy Bros. Co.* (1934) 267 Mich. 690, 255 N.W. 414; *Holt v. Mann*, (1936) 294 Mass. 21, 200 N.E. 403; *Feinstein v. Daniel Reeves, Inc.* (D. N.Y. 1936) 14 F. Supp. 167. Accord: *Henry Porter & Co. v. Lacy*, (1937) 268 Ky. 666, 105 S.W. (2d) 818 (improper operation of refrigerating equipment); *The E 270*, (D. Mass. 1927) 16 F. (2d) 1005 (unusual use of engine); *Standard Rice Co. v. P. R. Warren Co.*, (1928) 262 Mass. 261, 159 N.E. 508 (cardboard boxes used in machine packing of rice); cf. *Smith-Booth-Usher Co. v. Los Angeles Ice & Cold Storage Co.*, (1917) 175 Cal. 136, 165 Pac. 430 (express warranty of fitness).

In *McSpedon v. Kunz*, (1936) 271 N.Y. 131, 2 N.E. (2d) 573, 105 A.L.R. 1497, the majority of the court considered that the probability of use of pork without proper cooking was sufficiently great to impose a warranty against trichinae.

crasies of the buyer usually have been regarded as abnormal and not covered;<sup>111</sup> but there are two cases involving allergies common to a substantial percentage of the population where a warranty of "fitness" has been implied.<sup>112</sup>

4. *Free from defects interfering with sale or ordinary use.* Frequently the warranty of merchantable quality is stated in terms of freedom from defects: the goods must "not have any remarkable defect,"<sup>113</sup> or any defect rendering them unmarketable. Obviously what is meant is any defect which would interfere with sale or ordinary use. "Remarkable" is too strong a word, since a very trivial defect, such as a broken glass over the dial of a \$294 computing scale, which might be repaired for 30 cents, may still prevent its sale.<sup>114</sup> It is of course not necessary that the defect be an obvious one, and any latent condition, such as a pin inside of a loaf of bread,<sup>115</sup> which would prevent the purchase if it were known, is enough. But trifling deficiencies, obviously of no consequence to anyone, such as the fact that a single screw or bolt in a machine is not new,<sup>116</sup> are not to be taken into account. The usages of the trade and the liberality of customers must of course be considered; and the precise percentage of sand which

<sup>111</sup> *Barrett v. S. S. Kresge Co.*, (1941) 144 Pa. Super. 516, 19 A. (2d) 502; *Stanton v. Sears, Roebuck & Co.*, (1942) 312 Ill. App. 496, 38 N.E. (2d) 801; *Zager v. F. W. Woolworth Co.*, (1939) 30 Cal. App. (2d) 324, 86 P. (2d) 389; *Ross v. Porteous, Mitchell & Braun Co.*, (1939) 136 Me. 118, 3 A. (2d) 650; *Flynn v. Bedell Co.*, (1922) 242 Mass. 450, 136 N.E. 252, 27 A.L.R. 1504; *Bradt v. Holloway*, (1922) 242 Mass. 446, 136 N.E. 254. See Barasch, *Allergies and the Law*, (1941) 10 Brooklyn L. Rev. 363; (1942) 26 MINNESOTA LAW REVIEW 668.

<sup>112</sup> *Bianchi v. Denholm & McKay Co.*, (1939) 302 Mass. 469, 19 N.E. (2d) 697 (class not specified); *Zirpola v. Adam Hat Stores*, (1939) 122 N.J.L. 21, 4 A. (2d) 73 (four to five per cent of population definitely allergic, all persons "somewhat sensitive"). Compare, as to express warranty of fitness: *Smith v. Denholm & McKay Co.*, (1934) 288 Mass. 234, 192 N.E. 631; *McLachlan v. Wilmington Dry Goods Co.*, (Del. 1941) 22 A. (2d) 851.

<sup>113</sup> *Fitch v. Archibald*, (1861) 29 N.J.L. 160; *Bierman v. City Mills Co.*, (1897) 151 N.Y. 482, 45 N.E. 856, 37 L.R.A. 799, 56 Am. St. Rep. 635; *McClung v. Kelley*, (1866) 21 Iowa 508.

<sup>114</sup> *International Business Machines Co. v. Shcherban*, [1925] 1 Dom. L. Rep. 864. Accord, *Jackson v. Rotax Motor & Cycle Co.*, [1910] 2 K.B. 937, 80 L.J.K.B. 38, 103 T.L.R. 411 (horns dented and badly polished). Cf. *Wren v. Holt*, [1903] 1 K.B. 610, 72 L.J.K.B. 340, 88 L.T. 282 (small quantity of arsenic in beer).

<sup>115</sup> *Ryan v. Progressive Grocery Stores*, (1931) 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339. Accord: *Morelli v. Fitch & Gibbons*, [1928] 2 K.B. 636, 97 L.J.K.B. 812, 140 L.T. 21, 44 T.L.R. 737 (defective ginger wine bottle); *Burkhardt v. Armour & Co.*, (1932) 115 Conn. 249 161 Atl. 389, 90 A.L.R. 1260 (piece of tin in can of meat); *Young v. Great A. & P. Tea Co.*, (W. D. Pa. 1936) 15 F. Supp. 1018 (dead mouse in raspberry jam); *Dow Drug Co. v. Nieman*, (1936) 57 Ohio App. 190, 13 N.E. (2d) 130 (exploding cigar); *Dryden v. Continental Baking Co.*, (Cal. 1937) 67 P. (2d) 686 (glass in bread); *Larson v. Farmers Warehouse Co.*, (1931) 161 Wash. 640, 297 Pac. 753 (arsenate of lead in alfalfa).

<sup>116</sup> *Everedy Mach. Co. v. Hazle Maid Bakers*, (1939) 334 Pa. St. 553, 6 A. (2d) 505.

the public will tolerate in its sugar,<sup>117</sup> the amount of checking it will accept in the finish of a piano,<sup>118</sup> or the quantity of alloy which will pass in a gold watch,<sup>119</sup> may very well be questions for the jury.

5. *Quality and price.* Obviously some minimum standard of quality is called for by a merchantable article. Sometimes this is expressed by saying that the seller warrants good materials and workmanship,<sup>120</sup> more often, merely that the goods must pass in the market and be suitable for ordinary use.<sup>121</sup> As to anything over and above this, unless the contract itself calls for a particular quality or grade,<sup>122</sup> it is well settled that the buyer has no right to expect it. The "medium quality" proposed in an early New York case<sup>123</sup> has been rejected, since obviously some goods will be merchantable that are less than the mean.<sup>124</sup> The "fair average" quality recommended by the draft of the Revised Uniform Sales Act<sup>125</sup> seems to set too lofty a standard, if "fair average" is construed, as it might conceivably be,<sup>126</sup> to mean the average of all that are made or sold. There are clearly goods of the name of so poor a quality that they cannot be sold readily on the market, and these the buyer is not required to accept; but above this merchantable minimum, unless he exacts an express warranty or relies on fitness for his particular purpose disclosed to the seller, he is not entitled to any particular grade or fineness.<sup>127</sup>

<sup>117</sup> *Gassler v. Eagle Sugar Refinery*, (1869) 103 Mass. 351.

<sup>118</sup> *Wilson v. Lawrence*, (1885) 139 Mass. 318.

<sup>119</sup> See *Swett v. Shumway*, (1869) 102 Mass. 365 ("horn chains" made partly of hoof).

<sup>120</sup> *Beers v. Williams*, (1854) 16 Ill. 69; *Goulds v. Brophy*, (1889) 42 Minn. 109, 43 N.W. 834, 6 L.R.A. 392; *Loxtercamp v. Lininger Implement Co.*, (1910) 147 Iowa 29, 125 N.W. 830, 33 L.R.A. (N.S.) 501; *Everedy Mach. Co. v. Hazle Maid Bakers*, (1939) 334 Pa. St. 553, 6 A. (2d) 505.

<sup>121</sup> *Campion v. Marston*, (1904) 99 Me. 410, 59 Atl. 548; *Murchie v. Cornell*, (1891) 155 Mass. 60; *McNeil & Higgins Co. v. Czarnikow-Rienda Co.*, (S.D.N.Y. 1921) 274 Fed. 397.

<sup>122</sup> *Gould v. Stein*, (1889) 149 Mass. 570, 22 N.E. 47, 5 L.R.A. 213, 14 Am. St. Rep. 455 ("of second quality"); *Brandenberg v. Samuel Stores*, (1931) 211 Iowa 1321, 235 N.W. 741, 87 A.L.R. 1161 ("A-No. 1 fur coat"); *Whittaker v. McCormick*, (1878) 6 Mo. App. 114 ("No. 2 white mixed corn"); *Operators Fuel Agency v. Eastern Fuel Co.*, (1924) 83 Pa. Super 598 ("Classified Pool 60 Coal"); *Springfield Shingle Co. v. Edgecomb Mill Co.*, (1909) 52 Wash. 620, 101 Pac. 233 ("Star A Star shingles").

<sup>123</sup> *Howard v. Hoey*, (1840) 23 Wend. (N.Y.) 350.

<sup>124</sup> *McNeil & Higgins Co. v. Czarnikow-Rienda Co.*, (S.D.N.Y. 1921) 274 Fed. 397; *Snelling v. Dine*, (1930) 270 Mass. 501, 170 N.E. 403.

<sup>125</sup> See *supra*, note 8.

<sup>126</sup> Cf. the meaning given to "fair average" in *Swift & Co. v. Board of Assessors*, (1905) 110 La. 321, 38 So. 1006, 1007.

<sup>127</sup> *Baer & Co. v. Mobile Cooperage & Box Mfg. Co.*, (1909) 159 Ala. 491, 49 So. 92; *Gallagher v. Waring*, (1832) 9 Wend. (N.Y.) 20; *Inter-State Grocery Co. v. Geo. W. Bentley Co.*, (1913) 214 Mass. 227, 101 N.E. 147; *Taylor v. Dalton*, (1862) 3 F. & F. 263 ("good or bad does not matter if the goods fill the description"); *Kenney v. Grogan*, (1911) 17 Cal. App. 527, 120 Pac. 433 (not warranted as good as average); *McNeil & Higgins Co. v.*

The price paid by the buyer has had little consideration in the cases. There was an old doctrine of French law, that "a sound price warrants a sound article," which has passed into the law of South Carolina and Louisiana.<sup>128</sup> Because of the doctrine that consideration need not be adequate, the English courts rejected it quite early,<sup>129</sup> and other American jurisdictions continue to repeat that it is not accepted.<sup>130</sup> Yet it is difficult to escape the conviction that the price cannot be left out of account. It has been held that a price materially below apparent value shows that the buyer understands that he is receiving low-grade or defective goods;<sup>131</sup> and if this is true, the converse would seem to follow. Certainly jewelry sold at Tiffany's is understood by both parties to be something better than that sold at Woolworth's, although both no doubt are merchantable as "jewelry." If there are ten grades of sardines on the market, a buyer who pays the market price of the first can scarcely be supposed to be contracting for the tenth; and the fact that off-grade goods circulate freely at a discount should not, in reason, affect the bargain in a sale by a reputable dealer at full price. There are a few rather vague indications<sup>132</sup> that the price paid bears upon what the seller undertakes in the way of merchantable quality; and when the issue is squarely presented, it may be expected that the buyer

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*Czarnikow-Rienda Co.*, (S.D.N.Y. 1921) 274 Fed. 397; *Wallace v. L.D. Clark & Son*, (1918) 74 Okla. 203, 174 Pac. 557, 21 A.L.R. 361 (not the best, not the poorest, such as generally sold on the market); *Warner v. Arctic Ice Co.*, (1883) 74 Me. 475 ("mediocrity, or something just above"); *Snelling v. Dine*, (1930) 270 Mass. 501, 170 N.E. 403; *Adolph Goldmark & Sons v. Simon Bros. Co.*, (1923) 110 Neb. 614, 194 N.W. 686.

<sup>128</sup> *Vaughn v. Campbell*, (1806) 2 Brev. (S.C.) 50; *Champneys v. Johnson*, (1809) 2 Brev. (S.C.) 268; *Sanders v. Landroth Seed Co.*, (1914) 100 S.C. 389, 84 S.E. 880; *Deweese v. Morgan*, (1807) 1 Mart. (La) 1; *Melancon v. Robichaux* (1841) 17 La. 97.

<sup>129</sup> *Stuart v. Wilkins*, (1778) 1 Douglas 18; *Parkinson v. Lee*, (1802) 2 East 314, 102 Eng. Rep. 389.

<sup>130</sup> *Dean v. Mason*, (1822) 4 Conn. 428, 10 Am. Dec. 162; *Moore v. McKinley*, (1855) 5 Cal. 71; *Rhynas v. Keck*, (1917) 179 Iowa 422, 161 N.W. 480; *Johnston v. Cope*, (1810) 3 Har. & J. (Md.) 89, 5 Am. Dec. 423; *Mixer v. Coburn*, (1846) 11 Met. (52 Mass.) 559, 45 Am. Dec. 230; *Weimer v. Clement*, (1860) 37 Pa. 147, 78 Am. Dec. 411; *Beninger v. Corwin*, (1654) 24 N.J.L. 257; *Hoe v. Sanborn*, (1860) 21 N.Y. 552, 78 Am. Dec. 163; *King v. Quidnick Co.*, (1883) 14 R.I. 131.

<sup>131</sup> *Fruit Dispatch Co. v. C. C. Taft Co.*, (1924) 197 Iowa 409, 197 N.W. 302; *Warner v. Arctic Ice Co.*, (1883) 74 Me. 475; *Hoe v. Sanborn*, (1860) 21 N.Y. 552, 78 Am. Dec. 163.

<sup>132</sup> *Boothby v. Scales*, (1871) 27 Wis. 626 (sale by a manufacturer at a fair price warrants reasonable fitness for the general purpose); *Adolph Goldmark & Sons v. Simon Bros. Co.*, (1923) 110 Neb. 614, 194 N.W. 686 ("vendible on the market in the ordinary course of business and at the average price [the market price paid?] of such article"). Cf. *Jones v. Just*, (1868) L.R. 3 Q.B. 197, 9 B. & S. 141, 37 L.J.Q.B. 89 (resale at 75 per cent of original price not enough).

will be held entitled, not to the value of his money, but at least to a grade not entirely and hopelessly out of line with what he has paid.

### SALE BY DESCRIPTION

Such being the warranty of merchantable quality, the question remains, when does it arise? It is limited by the Sales Act to goods "bought by description."<sup>133</sup> In the earliest case<sup>134</sup> from which the warranty sprang, there was an executory contract for the delivery of described goods which the buyer never had seen, and consequently the description in terms was the only identification of the subject-matter of the contract. From this merchantable quality according to the description was easily to be inferred. "Sale by description," then, includes at least those cases in which "the identification of the goods which are the subject matter of the bargain depends upon the description," and the description is therefore "necessary to fix the identity of the property sold."<sup>135</sup>

Such a description may be a very general one: "waste silk,"<sup>136</sup> "prime bacon,"<sup>137</sup> "ice,"<sup>138</sup> or "superfine flour."<sup>139</sup> The seller is then free to deliver any article of that name, provided only that it is of merchantable quality, and he has obviously a wide range of choice. But frequently the description is full, exact and detailed: the buyer, for example, may order and the seller undertake to supply a machine of definite size, model and capacity and of a particular make.<sup>140</sup> In such a case the seller's range of selection is so curtailed, and the buyer has expressed such ideas of his own, that usually<sup>141</sup> it cannot be said that he is relying upon the skill or judgment of the seller to furnish him something for his

<sup>133</sup> See *supra*, text at note 1.

<sup>134</sup> *Gardiner v. Gray*, (1810) 4 Camp. 144, 171 Eng. Rep. 46.

<sup>135</sup> 4 Williston, Contracts (Rev. ed. 1936) 2771.

<sup>136</sup> *Gardiner v. Gray*, (1815) 4 Camp. 144, 171 Eng. Rep. 46.

<sup>137</sup> *Yeats v. Pim*, (1815) 2 J. J. Marsh, 141.

<sup>138</sup> *Campion v. Marston*, (1904) 99 Me. 410, 59 Atl. 548.

<sup>139</sup> *Baird, Miller & Baldwin v. Matthews*, (1838) 6 Dana (30 Ky. 130):

<sup>140</sup> *Grand Ave. Hotel Co. v. Wharton*, (C.C.A. 8th Cir. 1897) 79 Fed. 43 ("Harrison safety boilers of 150 horse power each" with minute specifications of material and construction); *Hoit v. Sims*, (1905) 94 Minn. 157, 102 N.W. 386 ("No. 3 St. Paul boiler with rated capacity of 320 feet"); *Seitz v. Brewers' Refrigerating Co.*, (1891) 141 U. S. 510, 12 Sup. Ct. 46 35 L. Ed. 837 ("162 size refrigerating machine"); *Davis Calyx Drill Co. v. Mallory*, (C.C.A. 8th Cir. 1905) 137 Fed. 332 ("F-3 drill").

<sup>141</sup> Not always, particularly where the seller recommends the detailed description to the buyer as suitable for the purpose. *Williamson Daily News v. Linograph Co.*, (C.C.A. 4th Cir. 1931) 47 F. (2d) 523; *Truslow v. Diamond Bottling Corp.* (1930) 112 Conn. 181, 151 Atl. 492, 71 A.L.R. 1142; *London Guaranty Co. v. Strait Scale Co.*, (1929) 322 Mo. 502, 15 S.W. (2d) 706, 64 A.L.R. 936; *Wisdom v. Morris Hardware Co.*, (1929) 151 Wash. 86, 274 Pac. 1050.

purpose. Accordingly, it is commonly held that the "particular purpose" warranty does not arise.<sup>142</sup> There still remains, however, the obligation of the contract itself to deliver goods conforming to the description, which means, here as elsewhere, goods capable of sale on the market under the description, and reasonably fit for the general use for which such goods are made and sold. This is not a matter of reliance upon the seller's judgment; it is merely a definition implied and understood in the agreement made. Therefore it is generally agreed that even on the sale of a definitely described article there is an implied warranty of merchantable quality.<sup>143</sup>

One common form of description is a brand or trade name. Here again, if the buyer orders goods by such a name, it is usually apparent that he is not relying upon the skill or judgment of the seller, but upon his own experience, the reputation or advertising of the maker, or what he has been told by others, so that no warranty of fitness for the "particular purpose" is to be implied;<sup>144</sup> and the Sales Act, in a rather unhappily worded clause,<sup>145</sup> so provides. The courts have not looked with any great favor upon the provision, and have held, where the trade name has been mentioned only incidentally,<sup>146</sup> or the buyer has never heard of it before<sup>147</sup> or the initiative in selecting it is taken

<sup>142</sup> *Chanter v. Hopkins*, (1838) 4 M. & W. 399, 1 Horn & H. 377, 8 L.J. Ex. 14, 150 Eng. Rep. 1484; *R. B. Tyler Co. v. Hampton Cracker Co.*, (1936) 265 Ky. 236, 96 S.W. (2d) 593; *Kull v. Noble*, (1928) 178 Ark. 496, 10 S.W. (2d) 992; *Cosgrove v. Bennett*, (1884) 32 Minn. 371, 30 N.W. 359; *Appalachian Power Co. v. Tate*, (1922) 90 W. Va. 428, 111 S.E. 150; and see cases cited *supra*, note 140.

<sup>143</sup> *Seitz v. Brewers' Refrigerating Co.*, (1891) 141 U.S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; *Cosgrove v. Bennett*, (1884) 32 Minn. 371, 30 N.W. 359; *Flaherty v. Maine Motor Carriage Co.*, (1918) 117 Me. 376, 104 Atl. 627; *Leavitt v. Fiberloid Co.*, (1907) 196 Mass. 440, 82 N.E. 682, 15 L.R.A. (N.S.) 855; *Davis Calyx Drill Co. v. Mallory*, (C.C.A. 8th Cir. 1905) 137 Fed. 332; *Frigorifico Wilson de la Argentina v. Weirton Steel Co.*, (C.C.A. 4th Cir. 1933) 62 F. (2d) 677. See also, as to trade name, *infra*, note 150.

<sup>144</sup> *Daniels v. White & Sons, Ltd.*, [1938] 4 All Eng. Rep. 258; *Remberg v. Hackney Mfg. Co.*, (1917) 174 Cal. 799, 164 Pac. 792; *Botti v. Venice Grocery Co.*, (1941) 309 Mass. 450, 35 N.E. (2d) 491; *Ryan v. Progressive Grocery Stores*, (1931) 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339.

<sup>145</sup> Sec. 15 (4), 2 Mason's 1927 Minn. Stats., sec. 8390 (4): "In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

The Draft of the Revised Uniform Sales Act (see *supra*, note 8) would repeal this clause, providing in sec. 15 (4) that sale under a patent or trade name does not negative the implied warranties of fitness for the particular purpose or merchantable quality.

<sup>146</sup> *Hobart Mfg. Co. v. Rodiewicz*, (1936) 125 Pa. Super. 240; *Sperry Flour Co. v. De Moss*, (1933) 141 Or. 440, 18 P. (2d) 242, 90 A.L.R. 406; *Wisdom v. Morris Hardware Co.*, (1929) 151 Wash. 86, 274 Pac. 1050; *Baldry v. Marshall*, [1925] 1 K.B. 260, 94 L.J.K.B. 208, 132 L.T. 326.

<sup>147</sup> *Iron Fireman Coal Stoker Co. v. Brown*, (1931) 182 Minn. 399, 234 N.W. 685; *Ross v. Porteous, Mitchell & Braun Co.*, (1939) 136 Me. 512, 3 A. (2d) 650; *Barrett v. Panther Rubber Co.*, (C.C.A. 1st Cir. 1928) 24 F.

by the seller,<sup>148</sup> that there is no "sale under a trade name" within the statute, and a warranty of fitness may be implied. In any case, however, it stands undisputed that, regardless of all reliance upon his skill or judgment, the seller's contract obligation stands to deliver an article which is true to the name,<sup>149</sup> capable of sale under it, without serious defects, and fit for the ordinary uses for which the brand is made and sold—in short, a standard article of merchantable quality according to the description.<sup>150</sup>

There has been little discussion of the problem that arises where the entire line of goods identified with the trade name is of unmerchantable quality. In one English case,<sup>151</sup> the court

(2d) 329. Particularly if the name is not known to the trade. *Western Cabinet & Fixture Mfg. Co. v. Davis* (1915) 121 Ark. 370, 181 S.W. 273; *Rowe Mfg. Co. v. Curtis-Straub Co.*, (1937) 223 Iowa 858, 273 N.W. 895; *American Mine Equipment Co. v. Butler Consolidated Coal Co.*, (C.C.A. 3d Cir. 1930) 41 F. (2d) 217.

<sup>148</sup> *Davenport Ladder Co. v. Edward Hines Lbr. Co.*, (C.C.A. 8th Cir. 1930) 43 F. (2d) 63; *Ralston Purina Co. v. Novak*, (C.C.A. 8th Cir. 1940) 111 F. (2d) 631; *Drumar Mining Co. v. Morris Ravine Mining Co.*, (1939) 33 Cal. App. (2d) 492, 92 P. (2d) 424; *Ireland v. Louis K. Liggett Co.*, (1922) 243 Mass. 243, 137 N.E. 371.

<sup>149</sup> *McDaniel v. Davis* (1933) 186 Ark. 962, 56 S.W. (2d) 1022; *Kansas City Flour Mills v. Moll*, (1920) 106 Kan. 827, 189 Pac. 940. The seller's obligation is to deliver the brand as now manufactured, not as it may have been in the past. *Harris & Sons v. Plymouth Varnish & Colour Co., Ltd.*, (1933) 49 T.L.R. 521.

<sup>150</sup> *Bristol Tramways v. Fiat Motors, Ltd.*, [1910] 2 K.B. 831, 79 L.J.K.B. 1107, 103 L.T. 443; *Daniels v. White & Sons, Ltd.*, [1938] 4 All Eng. Rep. 258; *Morelli v. Fitch & Gibbons*, [1928] 2 K. B. 636, 97 L.J.K.B. 812, 140 L.T. 21, 44 T.L.R. 737; *Remsberg v. Hackney Mfg. Co.*, (1917) 174 Cal. 799, 164 Pac. 792; *Oil Well Supply Co. v. Watson*, (1907) 168 Ind. 603, 80 N.E. 157, 15 L.R.A. (N.S.) 868; *McNeil & Higgins Co. v. Czarnikow-Rienda Co.*, (S.D. N.Y. 1921) 274 Fed. 397; *Giant Mfgl Co. v. Yates-American Mach. Co.*, (C.C.A. 8th Cir. 1940) 111 F. (2d) 360; *Bencoe Exporting & Importing Co. v. McGetw Tire & Rubber Co.*, (1920) 215 App. Div. 136, 208 N.Y.S. 4; *Kelvinator Sales Corp. v. Quabbin Improvement Co.*, (1931) 234 App. Div. 96, 254 N.Y.S. 123; *Foley v. Liggett & Myers Tobacco Co.*, (1930) 136 Misc. 468, 241 N.Y.S. 233, and (1931) 232 App. Div. 822, 249 N.Y.S. 924; *Parker's v. Shaghalian & Co.*, (1923) 244 Mass. 19, 138 N.E. 236; *Botti v. Venice Grocery Co.*, (1941) 309 Mass. 450, 35 N.E. (2d) 491; *Patterson Foundry & Mach. Co. v. Detroit Stove Works*, (1925) 230 Mich. 518, 202 N.W. 957; *Ryan v. Progressive Grocery Stores*, (1931) 255 N.Y. 388, 175, N.E. 105, 74 A.L.R. 339; *Sperry Flour Co. v. De Moss*, (1933) 141 Or. 440, 18 P. (2d) 242, 90 A.L.R. 406; *Dow Drug Co. v. Nieman*, (1936) 57 Ohio App. 190, 13 N.E. (2d) 130.

See *Mechem, Implied and Oral Warranties in the Sale of Goods by Trade Name*, (1927) 11 MINNESOTA LAW REVIEW 485; *Brown, Implied Warranties of Quality in Sales of Articles Under Patent or Trade Names*, (1924) 2 Wis L. Rev. 385; *Note* (1931) 16 Corn. L.Q. 610.

<sup>151</sup> *Wren v. Holt*, [1903] 1 K.B. 610, 72 L.J.K.B. 340, 88 L.T. 282. So far as appears on the face of the opinions, the same may be true of *Kelvinator Sales Corp. v. Quabbin Improvement Co.*, (1931) 234 App. Div. 9, 254 N.Y.S. 123, and *Patterson Foundry & Mach. v. Detroit Stove Works*, (1925) 230 Mich. 518, 202 N.W. 957, where the sale was made by the manufacturer. In *McNeil & Higgins Co. v. Czarnikow-Rienda Co.*, (S.D. N.Y. 1921) 274 Fed. 397, it is said that there would be no warranty if the bread itself was inferior quality and the buyer knew it.

(Is it not asking a great deal to require the poor grocer to warrant that Limburger cheese is "fit for human consumption"? See *Zenkel v. Oneida County Creameries Co.*, (1918) 104 Misc. Rep. 251, 171 N.Y.S. 676).



seems to have been willing to impose the warranty upon a retailer where all of "Holden's Beer" contained arsenic, apparently on the theory that "Holden's Beer" at least meant "beer." But in such a case the buyer is given what he asks for, and the seller is not reasonably understood to agree to deliver something better than the brand. It is suggested that the Michigan case<sup>152</sup> reaching the contrary conclusion is to be preferred.

### SPECIFIC GOODS

More troublesome questions arise where the contract is for the sale of a specific, identified article. Professor Williston<sup>153</sup> and Professor Thompson<sup>154</sup> have lent their formidable authority to the view that a "sale by description"<sup>155</sup> under the Sales Act, and hence the warranty of merchantable quality, should be confined to cases where the description is essential to the identification of the goods sold, and they cannot be identified without it. It is a rash man who would disagree with these pre-eminent writers; and yet, with deference, it may be suggested that this position is not supported by the cases, and cannot be maintained.

In the first place, it is clear that a description, with the implication of merchantable quality which it carries, may form an essential part of a contract for the sale of a particular, otherwise identified thing. Even if the description be treated merely as an express warranty,<sup>156</sup> the question of its meaning in the light of market understanding remains. Two leading English cases, from which the language of the statute sprang, both involved the sale of known, identified cargoes in transit, and the description as "waste silk"<sup>157</sup> or "manila hemp"<sup>158</sup> was held to warrant merchantable quality. There are many other cases to the same effect.<sup>159</sup>

When the goods are in the presence of the buyer at the time he agrees to buy, no-difference in principle is to be observed. To put an extreme case, suppose that a customer enters a hardware

<sup>152</sup> *Outhwaite v. A. B. Knowlson Co.*, (1932) 259 Mich. 224, 242 N.W. 895; "Breach of warranty was not shown by proof that the product was of poor quality without going further and showing that ordinary *Elastica* as generally sold was different."

<sup>153</sup> 1 Williston, Sales (2d ed. 1924), sec. 224.

<sup>154</sup> 4 Williston, Contracts (Rev. ed. 1936), sec. 1008.

<sup>155</sup> The phrase has been omitted in the draft of the Revised Uniform Sales Act. See *supra*, note 8.

<sup>156</sup> Recommended in 1 Williston, Sales (2d ed. 1924), sec. 224; 4 Williston, Contracts (Rev. ed. 1936), sec. 1108.

<sup>157</sup> *Gardiner v. Gray*, (1815) 4 Camp. 144, 171 Eng. Rep. 46.

<sup>158</sup> *Jones v. Just*, (1868) L.R. 3 Q.B. 197, 9 B. & S. 141, 37 L.J.Q.B. 89.

<sup>159</sup> *Varley v. Whipp*, [1900] 1 Q.B. 513; *Campion v. Marston*, (1904) 99 Me. 410, 59 Atl. 548; *Murchie v. Cornell*, (1891) 155 Mass. 60, 29 N.E. 207, 14 L.R.A. 492, 31 Am. St. Rep. 526; *Hood v. Bloch*, (1886) 29 W.Va. 244, 11 S.E. 910.

store to ask for a hammer, and the seller hands him something wrapped in a package. Here is a sale of a specific article; but is there any doubt that the contract of sale implies an undertaking of the seller that the thing in the package is a hammer, the kind of thing commonly sold in hardware stores as a hammer, and reasonably fit for ordinary uses to which hammers are put? And if the object inside is a saw, or, equally, a hammer with a loose head, is it to be disputed that the seller has broken his contract? And does not precisely this situation arise when beans are sold sealed in a can?<sup>160</sup>

If the buyer has examined the specific goods before purchase, it is of course clear that as to all visible defects he cannot expect any such undertaking.<sup>161</sup> The seller has said to him, in effect, "I propose to sell you what you see," and if he buys on such an offer, he cannot afterwards complain. But where the defect is a latent one, any accompanying description, whether it be "a barge,"<sup>162</sup> "Ward's bread,"<sup>163</sup> "an A-No. 1 fur coat,"<sup>164</sup> "underwear,"<sup>165</sup> "pork chops,"<sup>166</sup> "salami,"<sup>167</sup> or anything else,<sup>168</sup> carries

<sup>160</sup> *Ward v. Great A. & P. Tea Co.*, (1918) 231 Mass. 90, 120 N.E.225, 5 A.L.R. 242. Accord: *Gussner v. Miller*, (1920) 44 N.D. 487, 176 N.W. 359 (hay in stack); *Merriam v. Field*, (1876) 39 Wis. 578 (logs in raft); *Sloan v. F. W. Woolworth Co.*, (1915) 193 Ill. App. 620 (canned fish); *Young v. Great A. & P. Tea Co.*, (W. D. Pa. 1936) 15 F. Supp. 1018 (jar of raspberry preserves); *Foley v. Liggett & Myers Tobacco Co.*, (1930) 136 Misc. Rep. 468, 241 N.Y.S. 238, aff'd (1931) 232 App. Div. 822, 249 N.Y.S. 924 (can of tobacco); *J. Aron & Co. v. Sills*, (1925) 240 N.Y. 588, 148 N.E. 717 (condensed milk); *Gimenez v. Great A. & P. Tea Co.*, (1934) 264 N.Y. 390, 191 N.E. 27 (canned crab meat); *Botti v. Venice Grocery Co.*, (1941) 309 Mass. 450, 35 N.E. (2d) 491 (macaroni); *Ireland v. Louis K. Liggett Co.*, (1922) 243 Mass. 243, 137 N.E. 371 (face cream; fitness for use); *Naumann v. Wehle Brewing Co.*, (1940) 127 Conn. 44, 15 A. (2d) 181.

<sup>161</sup> See *infra*, note 210.

<sup>162</sup> *Shepherd v. Pybus*, (1842) 3 Man. & G. 868, 42 E.C.L. 452, 11 L.J.C.P. 101, 133 Eng. Rep. 1390.

<sup>163</sup> *Ryan v. Progressive Grocery Stores*, (1931) 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339; *Dryden v. Continental Baking Co.*, (Cal. 1937) 67 P. (2d) 686 ("bread").

<sup>164</sup> *Bradenberg v. Samuel Stores*, (1931) 211 Iowa 1321, 235 N.W. 741 77 A.L.R. 1161; *Keenan v. Cherry & Webb*, (1925) 47 R.I. 125, 131 Alt. 309 ("fur coat").

<sup>165</sup> *Grant v. Australian Knitting Mills*, [1936] A.C. 85, 105 L.J.P.C. 6, 154 L.T. 18, 52 T.L.R. 38.

<sup>166</sup> *Hazelton v. First Nat. Stores*, ((1937) 88 N.H. 409, 190 Alt. 280; *Wiedeman v. Keller*, (1898) 171 Ill. 93, 49 N.E. 210 (meat); *Rinaldi v. Mohican Co.*, (1918) 225 N.Y. 70, 121 N.E. 471 (loin of pork); *Great A. & P. Tea Co. v. Eisenman*, (1935) 259 Ky. 103, 81 S.W. (2d) 900 (chicken).

<sup>167</sup> *Gandraux v. Maurice Mercantile Co.*, (1935) 4 Cal. (2d) 206, 47 P. (2d) 708; *Rabb v. Covington*, (1939) 215 N.C. 572, 2 S.E. (2d) 705 ("sausage").

<sup>168</sup> *Wren v. Holt*, [1903] 1 K.B. 610, 72 L.J.K.B. 340, 88 L.T. 282 ("Holden's Beer"); *Morelli v. Fitch & Gibbons*, (1928) 2 K.B. 636, 97 L.J. K.B. 812, 140 L.T. 21, 44 T.L.R. 737 ("Stone's ginger wine"); *Naumann v. Wehle Brewing Co.*, (1940) 127 Conn. 44, 15 A. (2d) 181 (bottle of ale); *Dow Drug Co. v. Nieman*, (1936) 57 Ohio App. 190, 13 N.E. (2d) 130 (cigar in cellophane wrapper); *Swartz v. Edwards Motor Car Co.*, (1927) 49 R.I. 18, 139 Alt. 166 (automobile); *Walters v. United Grocery Co.*, (1918) 51 Utah 565, 172 Pac. 473, L.R.A. 1918E 519 (potato salad); *Larson v. Farmers Ware-*

the understanding that the goods are what they appear to be, and merchantable according to their appearance and the description together. Since dealer sales are almost non-existent in which words of description do not appear,<sup>169</sup> it would seem that the proper statement is not that the warranty cannot exist on specific sales, but that when such sales are made by a dealer it is the normal accompaniment.

There are of course cases<sup>170</sup> in which a description is not understood to be an essential term of the contract at all, but merely a designation for convenience because the goods must be called something, equivalent to "Lot No. 10;" and in such a case of course, no warranty even of genuineness according to description is to be implied. There are many decisions particularly in the earlier American reports, which have said that merchantable quality is not implied in sales of specific goods, or, what is evidently intended to mean the same thing, in "executed" sales.<sup>171</sup> But when these cases are examined, it will be found that they involved either obvious defects in the face of inspection by the buyer,<sup>172</sup> an implied disclaimer,<sup>173</sup> or a limitation upon the liability of dealers which has long since been repudiated by the Sales Act.<sup>174</sup>

### DEALERS

In England, merchantable quality was from the beginning a dealer's warranty, arising even in the case of a dealer who was not the manufacturer and never had seen the goods at the time of sale.<sup>175</sup> This was written into the English Sale of Goods Act, and passed from it into the American Act.<sup>176</sup> It was recognized quite early that the basis for the warranty did not exist in the case of an individual sale by one not a dealer, since the buyer had

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*house Co.*, (1931) 161 Wash. 640, 29 Pac. 653 (alfalfa); *Flessner v. Carstens Packing Co.*, (1916) 93 Wash. 118, 160 Pac. 14 (dried beef); *Stewart v. Voll & Sons*, (1911) 81 N.J.L. 323, 79 Atl. 1041 (potatoes); *West Coast Lbr. Co. v. Wernicke*, (1939) 137 Fla. 363, 188 So. 357 (seed).

<sup>169</sup> Even where the customer merely points to something on a counter and says "Give me that," is not "that" a description? And does not the dealer, merely by offering the goods for sale without a disclaimer, undertake that "that" is what it appears to be, and a merchantable article of the kind?

<sup>170</sup> Cf. *St. Anthony & Dakota Elevator Co. v. Princeton Roller Mill Co.*, (1908) 104 Minn. 401, 116 N.W. 935.

<sup>171</sup> *Deming v. Foster* (1860) 42 N.H. 165; *Fogel v. Brubaker*, (1892) 122 Pa. St. 7, 15 Atl. 692; *Kinsley v. Gruppe*, (C.C.A. 3d Cir. 1917) 241 Fed. 466; *Timken Carriage Co. v. Smith*, (1904) 123 Iowa 554, 99 N.W. 183.

<sup>172</sup> See *infra*, note 210.

<sup>173</sup> As in *Gage v. Carpenter*, (C.C.A. 1st Cir. 1901) 107 Fed. 886.

<sup>174</sup> See *infra*, note 180 ff.

<sup>175</sup> *Gardiner v. Gray*, (1815) 4 Camp 144, 171 Eng. Rep. 46; *Jones v. Just*, (1868) L.R. 3 Q.B. 197, 9 B.&S. 141, 37 L.J.Q.B. 89.

<sup>176</sup> See *supra*, note 3, and text at note 1.

no reason to understand from the mere fact of sale that he was receiving the kind of goods customarily sold on the market under the name, where he bought from one who was not in the business.<sup>177</sup> The statement often made that there is no implied warranty in the sale of a second-hand article<sup>178</sup> obviously has reference to such cases; and if a used car is sold by a dealer the buyer may expect a warranty, not that it is a new car or as good as new, but that it is still merchantable as a used one and reasonably fit to drive.<sup>179</sup>

The American courts accepted the warranty readily enough as to manufacturers dealing in their own products; but many of them were surprisingly reluctant to acknowledge it in the case of a dealer who was not the maker.<sup>180</sup> The reason for this seems to have been a certain confusion of the warranty of merchantable quality with that of fitness for the buyer's "particular purpose." The reliance upon the seller's skill or judgment necessary to the

<sup>177</sup> *Burnby v. Bollett*, (1847) 16 M.&W. 644, 153 Eng. Rep. 1548; *Flood v. Senger*, (1910) 140 App. Div. 140, 124 N.Y.S. 1013; *Sockman v. Keim*, (1909) 19 N.D. 317, 124 N.W. 64. Cf. *Turner v. Mucklow*, (1874) 6 T.L.R. (N.S.) 690; *Jackson v. Harrison*, (1862) 2 F.&F. 782; *La Neuville v. Nourse*, (1813) 3 Camp. 351, 170 Eng. Rep. 1407; *Blumberg v. Romer*, (1938) 168 Misc. Rep. 169, 5 N.Y.S. (2d) 352; *Zielinski v. Potter*, (1917) 195 Mich. 90, 161 N.W. 851, L.R.A. 1917D 822; *Wart v. Hoose*, (1909) 65 Misc. Rep. 462, 119 N.Y.S. 1107.

<sup>178</sup> *Johnson v. Carden*, (1914) 187 Ala. 142, 65 So. 813; *Brierton v. Anderson*, (1929) 180 Ark. 12, 20 S.W. (2d) 313; *Lamb v. Otto*, (1921) 51 Cal. App. 433, 197 Pac. 147; *Ramming v. Caldwell*, (1891) 43 Ill. App. 175; *Colchord Machinery Co. v. Loy-Wilson Foundry & Mach. Co.*, (1908) 131 Mo. App. 540, 110 S.W. 630; *Jones v. Armstrong*, (1915) 50 Mont. 168, 145 Pac. 949; *Durbin v. Denham*, (1922) 106 Or. 34, 210 Pac. 29 A.L.R. 1227; *Tibbets & Pleasant v. Town of Fairfax*, (1930) 145 Okla. 211, 292 Pac. 9.

<sup>179</sup> *Hall Furniture Co. v. Crane Mfg. Co.*, (1915) 169 N.C. 41, 85 S.E. 35, L.R.A. 1915E 428 (second-hand hearse); *Guyandotte Coal Co. v. Virginian Elec. & Mach. Works*, (1923) 94 W.Va. 300, 118 S.E. 512. Accord as to "fitness for the purpose": *Bouchet v. Oregon Motor Car Co.*, (1915) 78 Or. 230, 152 Pac. 888; *New Birdsall Co. v. Keys*, (1903) 99 Mo. App. 458, 74 S.W. 12; *Little Co. v. Fynboh*, (1922) 120 Wash. 595, 207 Pac. 1064; *Stracener v. Nunally Bros. Motor Co.*, (1929) 11 La. App. 541, 123 So. 911 (under Code); *Crawford v. Abbott Automobile Co.*, (1924) 117 La. 59, 101 So. 871 (under Code); *Dyer & Bros. v. Bauer*, (1921) 48 N.D. 396, 184 N.W. 809; *E. Edelman & Co. v. Queen Stone Works*, (1939) 205 Minn. 7, 284 N.W. 838. It should be noted that the Uniform Sales Act makes no exception as to second-hand goods.

<sup>180</sup> *Thompson v. Ashton*, (1817) 14 Johns. (N.Y. 316; *Julian v. Laubenberg*, (1896) 16 Misc. 646, 38 N.U.S. 1052; *Chicago Packing & Provision Co. v. Tilton*, (1877) 87 Ind. 547; *Ehram v. Brown*, (1907) 76 Kan. 206, 91 Pac. 179, 15 L.R.A. (N.S.) 877; *White v. Oakes*, (1896) 88 Me. 367, 34 Atl. 175, 32 L.R.A. 592; *Bigelow v. Maine Central R. Co.*, (1912) 110 Me. 105, 85 Atl. 396; *West v. Emanuel*, (1901) 198 Pa. St. 180, 47 Atl. 965; *Hoyt v. Hainsworth Motor Co.*, (1920) 112 Wash. 440, 192 Pac. 918; *Scruggins v. Jones*, (1925) 207 Ky. 636, 269 S.W. 743.

Equally curious is the occasional holding that there is no warranty in a sale to a dealer, because he buys only for resale, or is in an equal position to judge. *Cole v. Branch & O'Neal*, (1926) 171 Ark. 611, 235 S.W. 353; *Amos v. Walter N. Kelley Co.*, (1927) 240 Mich. 257, 215 N.W. 397; *Tomlinson v. Armour & Co.*, (1907) 74 N.J.L. 274, 65 Atl. 883, reversed on other grounds, (1908) 75 N.J.L. 748, 70 Atl. 314, 19 L.R.A. (N.S.) 923.

latter was carried over into the former. It was considered that both warranties must rest upon some assumed superior knowledge of the seller concerning the qualities of the goods;<sup>181</sup> and since the buyer must know that a dealer who was not the maker could have no such knowledge, it was held that there could be no "reliance," and no warranty could be implied. Possibly the majority of the American courts adopted this position prior to the passage of the Uniform Sales Act.<sup>182</sup> That statute, with its adoption of the English rule, made an abrupt change in the law of these states,<sup>183</sup> imposing the warranty upon every dealer, "whether he be the grower or manufacturer or not."<sup>184</sup> There are today only a scant handful of jurisdictions in which, without the Sales Act, the common law does not recognize the dealer's warranty.<sup>185</sup>

Nevertheless, even under the Sales Act, there are a few courts which continue to hold that the retailer does not warrant that the goods he sells are fit for use.<sup>186</sup> Their number is diminishing rapidly.<sup>187</sup> With few exceptions,<sup>188</sup> the cases have involved the sale of goods in sealed containers, which the buyer must know that

<sup>181</sup> See *Hoe v. Sanborn*, (1860) 21 N.Y. 552, 78 Am. Dec. 163.

<sup>182</sup> 1 Williston, Sales (2d ed. 1924), sec. 233.

<sup>183</sup> See for example *Young v. Great A. & P. Tea Co.*, (W.D. Pa. 1936) 15 F. Supp. 1018; *Great A. & P. Tea Co. v. Eiseman*, (1935) 259 Ky. 103, 81 S.W. (2) 900; *Ryan v. Progressive Grocery Stores*, (1931) 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339; *Griffin v. James Butler Grocery Co.*, (1931) 103 N.J.L. 92, 156 Atl. 636; *Keenan v. Cherry & Webb*, (1925) 47 R.I. 125, 131 Atl. 109; *Larson v. Farmers Warehouse Co.*, (1901) 161 Wash., 640 297 Pac. 753.

<sup>184</sup> Uniform Sales Act, sec. 15 (2), 2 Mason's 1927 Minn. Stats., sec. 8390 (2).

<sup>185</sup> Georgia, Mississippi and West Virginia are the only states found that clearly cling to the old rule under the common law. *Bel v. Adler*, (1940) 63 Ga. App. 473, 11 S.E. (2d) 495; *Kroger Grocery Co. v. Lewelling*, (1933) 165 Miss. 71, 145 So. 726; *Pennington v. Cranberry Fuel Co.*, (1936) 117 W.Va. 680, 186 S.E. 610.

To the contrary, in common law states, may be listed: *Walker v. Great A. & P. Tea Co.*, (Tex. 1938) 112 S.W. (2d) 170; *Degouveia v. H. D. Lee Merc. Co.*, (Mo. App. 1936) 100 S.W. (2d) 336; *Colonna v. Rosedale Dairy Co.*, (1936) 166 Va. 314, 186 S.E. 94; *Swengel v. F. & E. Wholesale Grocery Co.*, (1938) 147 Kan. 555, 77 P. (2d) 930; and cf. *West Coast Lbr. Co. v. Wernicke*, (1939) 137 Fla. 363, 188 So. 357.

<sup>186</sup> *Bigelow v. Maine Central R. Co.*, (1912) 110 Me. 105, 85 Atl. 396 (not overruled since the Sales Act); see *Pelletier v. Dupont*, (1925) 124 Me. 269, 128 Atl. 186; *Coca Cola Bottling Co. v. Rowland*, (1934) 17 Tenn. App. 433, 76 S.W. (2d) 65; *Kirkland v. Great A. & P. Tea Co.*, (1937) 233 Ala. 404, 171 So. 735; *Harrington v. Montgomery Drug Co.*, (Mont. 1941) 111 P. (2d) 808; *Green v. Wilson*, (1937) 194 Ark. 165, 105 S.W. (2d) 1074.

<sup>187</sup> Recent decisions holding the dealer liable are: *Dow Drug Co. v. Nieman*, (1936) 37 Ohio App. 190, 13 N.E. (2d) 130; *Sicard v. Kremer*, (1938) 133 Ohio St. 291, 13 N.E. (2d) 250; *Gindraux v. Maurice Merc. Co.*, (1935) 4 Cal. (2d) 206, 47 P. (2d) 708; and see cases cited *supra*, note 183; *infra*, note 195.

<sup>188</sup> Particularly *F. W. Woolworth Co. v. Wilson*, (C.C.A. 5th Cir. 1934) 74 F. (2d) 439; *Noble v. Sears, Roebuck & Co.*, (W.D. Wash. 1935) 12 F. Supp. 181.

the seller had not examined, and concerning the qualities of which he could not reasonably be supposed to have any definite knowledge. The argument has been that the buyer therefore does not rely upon the "skill or judgment" of the seller, and hence that there cannot be, under the Sales Act, a warranty of fitness for the particular purpose.<sup>189</sup>

Even on this basis, and on the assumption that the buyer is aware that the seller does not know what is in the can, it is at least arguable that reliance upon the seller's "skill or judgment," as distinct from his information, may be found. Certainly the buyer is relying upon something when he buys; he cannot be thought willing to buy a pig in a poke and accept the can with whatever is in it, for better or for worse. Certainly he is not relying upon any information of his own as to its contents. The "reliance" required in a cause of action for any form of misrepresentation need not be sole reliance, or the only inducement to act; it is enough that it plays a natural part in the inducement. The plaintiff may rely upon two or more elements making up the sum total.<sup>190</sup> This is true of warranties.<sup>191</sup> When the buyer goes to a dealer, he knows that the man is in the business of selling goods of the kind to be purchased; that he has selected the particular goods and is offering them to his trade for the uses for which they are made; that he buys from manufacturers and wholesalers and has information as to which of them are reliable; and that he has had past experience with similar goods; and usually with the particular brand. Is not this both "skill" and "judgment" within the Sales Act? And is there not enough, in the usual case, to permit a jury to find that reliance upon it has played some important part in inducing the purchase? How many women buy of one corner grocer rather than another, without the belief that he is a competent grocer?

All this, however, appears to be beside the point. It is addressed to the implied warranty of fitness for the particular pur-

<sup>189</sup> Well stated in Waite, *Retail Responsibility and Judicial Law Making*, (1936) 34 Mich. L. Rev. 494.

<sup>190</sup> Thus, where deceit is in question, the plaintiff may be found to have relied upon what was told him by two liars, *Addington v. Allen*, (1833) 11 Wend. (N.Y.) 374; *Strong v. Strong*, (1886) 102 N.Y. 69, 5 N.E. 799; *Safford v. Grout*, (1876) 120 Mass. 20; *Shaw v. Gilbert*, (1901) 111 Wis. 165, 86 N.W. 138. Or he may rely in part on the defendant's statement, in part on his own investigation. *Schmidt v. Thompson*, (1918) 140 Minn. 180, 167 N.W. 543; *Tooker v. Alston*, (C.C.A. 8th Cir. 1907) 159 Fed. 599, 16 L.R.A. (N.S.) 818; *Nichols v. Lane*, (1919) 93 Vt. 87, 106 Alt. 592; *Jones v. Elliott*, (1920) 111 Wash. 138, 189 Pac. 1007; *Smith v. Werkheiser* (1908) 152 Mich. 177, 115 N.W. 964, 15 L.R.A. (N.S.) 1092, 125 Am. St. Rep. 406.

<sup>191</sup> *Medway Oil & Storage Co. v. Silica Gel Corp.*, (1928) 33 Com. Cas. 195; *Cammell, Laird & Co. v. Manganese Bronze & Brass Co.*, [1934] A.C. 402.

pose. If it be conceded that this is out of the case, there remains the warranty of merchantable quality. From the beginning,<sup>192</sup> that warranty has not required reliance upon any skill or judgment or information of the seller. It has not rested upon misrepresentation, with its tort theories, but upon contract. The question is one of what the buyer has ordered and the seller has undertaken to deliver. The seller's knowledge of the qualities of the goods is not assumed; he may never have seen them. Any "reliance" that may enter the warranty is reliance merely upon his undertaking, and does not differ from the reliance to be found in any other contract.

What, then, does the seller agree to deliver on a retail sale? When the customer orders a can of beans, what is the meaning of a "can of beans?" What does the buyer expect, and the seller understand him to expect, to receive? Is it a can labeled "Beans" but containing sauerkraut or fish? Or beans accompanied by pebbles or ptomaines? Or something unidentified in a tin which the seller hopes and believes, but does not undertake, to be beans and fit to eat? Or is it a standard, merchantable can of beans, of the kind customarily sold by such dealers, free from unusual defects, and fit for human consumption? What customer would buy on any other basis, any more than he would hire a mechanic to make him a machine?<sup>193</sup> Is there not at least enough, in the ordinary case, to call for submission of these matters to a jury? Such questions seem to carry their own reply.

The very interesting and valuable argument between Professor Waite and Professor Brown<sup>194</sup> has dealt at length with the questions of policy involved in the imposition of a warranty upon the

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<sup>192</sup> *Gardiner v. Gray*, (1815) 4 Camp. 144, 171 Eng. Rep. 46; *Jones v. Just*, (1868) L.R. 3 Q.B. 197, 9 B.&S. 141, 37 L.J.Q.B. 89.

<sup>193</sup> "The principle is a familiar one, and enters in to the every day business of men. If I engage a mechanic to manufacture an article in his line of business, without any stipulation, the law implies the obligation to make it in a skilful and workmanlike manner. So if I contract with a merchant to furnish me with a quantity of wheat at a future day for a certain price without any other stipulation, the law implies that it shall be of a good and merchantable quality and condition. Common honesty is exacted of all, in their dealings with one another, without any stipulation for it. . . . Under such circumstances, it would be as absurd to permit a vendor to fulfil his contract by delivering an article of the kind contracted for of no value, as it would be to permit him to fulfil it by delivering an article of a totally different kind, as oakum instead of cotton." *Gallagher v. Waring*, (1832) 9 Wend. (N.Y.) 20.

"Hood, the seller, could not on any other supposition than that the cheese was merchantable have expected or believed that Bloch Bros. would buy it." *Hood v. Bloch*, (1886) 29 W.Va. 244, 111 S.E. 910.

<sup>194</sup> Waite, Retail Responsibility and Judicial Law Making, (1936) 34 Mich.L.Rev. 494; Robert C. Brown, The Liability of Retail Dealers for Defective Food Products, (1939) 23 MINNESOTA LAW REVIEW 585; Waite, Retail Responsibility—A Reply, (1939) 23 MINNESOTA LAW REVIEW 612.

retail dealer. It is not the purpose of this article to add anything to what has been said so well and so completely on both sides. All that is contended is that the warranty is justified under the Sales Act, which explicitly does not except the retailer, and says no word of reliance on his skill or judgment, as to merchantable quality. In fact the battle is nearly over. The overwhelming majority of the courts now hold that the dealer warrants his goods to be saleable and fit for ordinary use, even when they are sold in sealed containers,<sup>195</sup> and of course all the more so when they are open to his examination.<sup>196</sup> Sometimes the warranty is stated as one of merchantable quality, sometimes as one of "fitness for the purpose;" but since the purpose is the ordinary one for which such goods are sold, and there is often little discussion of "reliance," there is at least a strong suspicion that in all of the cases merchantable quality is what is really meant. Sometimes there is a statement of a deliberate policy in placing the loss upon the seller; but more often the reason given is merely that goods fit for use are what he has contracted to supply.

The controversy over the liability of restaurant keepers<sup>197</sup> has turned upon a different point. There are still courts<sup>198</sup> which

<sup>195</sup> *Jackson v. Watson & Sons*, [1909] 2 K.B. 193, 78 L.J.K.B. 587, 100 L.T. 799, 25 T.L.R. 454; *Gindrau v. Maurice Merc Co.*, (1935) 4 Cal. (2d) 206, 47 P. (2d) 708; *Burkhardt v. Armour & Co.*, (1932) 115 Conn. 249, 161 Atl. 385, 90 A.L.R. 1260; *Sloan v. F. W. Woolworth Co.*, (1915) 193 Ill. App. 620; *Swengel v. F. & E. Wholesale Grocery Co.*, (1938) 147 Kan. 555, 77 P. (2d) 930 (wholesaler); *Botti v. Venice Grocery Co.*, (1941) 309 Mass. 450, 35 N.E. (2d) 491; *Hertzler v. Manshum*, (1924) 288 Mich. 416, 200 N.W. 155; *Degouveia v. H. D. Lee Merc. Co.*, (Mo. App. 1936) 100 S.W. (2d) 336; *Griffin v. James Buller Co.*, (1931) 108 N.J.L. 72, 156 Atl. 636; *Gimenez v. Great A. & P. Tea Co.*, (1934) 264 N.Y. 390, 191 N.E. 27; *Rabb v. Covington*, (1939) 215 N.C. 572, 2 S.E. (2d) 705 (sausage in casing); *Sicard v. Kremer*, (1938) 133 Ohio St. 291, 13 N.E. (2d) 250; *G. M. C. Truck Co. v. Kelley*, (1924) 105 Okla. 84, 231 Pac. 882; *Young v. Great A. & P. Tea Co.*, (W.D. Pa. 1936) 15 F. Supp. 1018; *Walker v. Great A. & P. Tea Co.*, (Tex. 1938) 112 S.W. (2d) 170; *Walters v. United Grocery Co.*, (1918) 51 Utah 565, 172 Pac. 473; *Colonna v. Rosedale Dairy Co.*, (1936) 166 Va. 314, 186 S.E. 94; *Larson v. Farmers Warehouse Co.*, (1931) 161 Wash. 640, 297 Pac. 753; *Cushing v. Rodman*, (1936) 65 App. D.C. 258, 82 F. (2d) 864. Cf. *Hise v. Romeo Stores Co.*, (1921) 70 Colo. 249, 199 Pac. 483 (genuineness); *West Coast Lbr. Co. v. Wernicke*, (1939) 137 Fla. 363, 188 So. 357 (genuineness).

<sup>196</sup> *Wiedeman v. Keller*, (1897) 171 Ill. 93, N.E. 210; *Rinaldi v. Mohican Co.*, (1918) 225 N.Y. 70, 121 N.E. 471; *Hazelton v. First Nat. Stores*, (1937) 88 N.H. 409, 190 Atl. 280; *Burgess v. Sanitary Meat Market*, (1939) 121 W.Va. 605, 5 S.E. (2d) 785; *Keenan v. Cherry & Webb*, (1925) 47 R.I. 13, 139 Atl. 166; *Naumann v. Wehle Brewing Co.*, (1940) 127 Conn. 44, 15 A. (2d) 181 (exploding bottle); *Great A. & P. Tea Co. v. Eiseman*, (1935) 259 Ky. 103, 81 S.W. (2d) 900.

<sup>197</sup> See Notes, (1936) 20 MINNESOTA LAW REVIEW 527; (1937) 10 So. Cal. L. Rev. 188.

<sup>198</sup> *McCarley v. Wood Drugs*, (1934) 228 Ala. 226, 153 So. 446; *Lynch v. Hotel Bond Co.*, (1933) 117 Conn. 128, 167 Atl. 99; *Rowe v. Louisville & N. R. Co.*, (1922) 29 Ga. App. 151, 113 S.E. 823; *Bigelow v. Maine Central R. Co.*, (1912) 110 Me. 105, 85 Atl. 395, 48 L.R.A. (N.S.) 627;



maintain that food eaten in a restaurant is not the subject of a sale at all, but merely of a "service." This rather astonishing notion is derived from the early days of innkeepers,<sup>199</sup> when the guest paid a lump sum for lodging, meals and a stable for his horse, and was permitted to eat his way from east to west across a table spread before him until he gave out, but acquired title to nothing he did not eat.<sup>200</sup> In short, what is now mistakenly called the American plan. It should be obvious that such a theory is entirely unsuited to modern restaurants, with "orders" of definite quantity served at fixed prices, where the understanding certainly is that the guest owns the food and must pay for it from the moment it reaches his table, and is free to wrap it up in a newspaper and carry it away if he likes. Accordingly, a clear majority of the courts now find a sale, and apply the warranties of the Sales Act.<sup>201</sup>

Granted, however, that there is no sale, but only a "service," why should that negative the warranty? Implied warranties are

*Childs Dining Hall Co. v. Swingler*, (1938) 173 Md. 490, 197 Atl. 105; *Kenney v. Wong Len*, (1925) 81 N.H. 427, 128 Atl. 343; *Nisky v. Childs Co.*, (1927) 103 N.J.L. 464, 135 Atl. 805, 50 A.L.R. 227; *Valeri v. Pullman Co.*, (D.C. N.Y. 1914) 218 Fed. 519; *F. W. Woolworth Co. v. Wilson*, (C.C.A. 5th Cir. 1934) 74 F. (2d) 439 (the law in both New York and Texas has subsequently changed); see *Roseberry v. Wachter*, (1925) 33 Del. 253, 255, 138 Atl. 273; *Prinsen v. Russos*, (1927) 194 Wis. 142, 215 N.W. 905.

<sup>199</sup> The early cases relied upon dealt with other questions, such as the interpretation of insolvency laws. *Crisp v. Pratt*, (1639) Cro. Car. 549; *Newton v. Trigg*, (1691) 3 Mod. 327, 1 Show. 268, 1 Salk. 109, 3 Lev. 309, Comb. 181, Carth. 149; *Parker v. Flint*, (1699) 12 Mod. 254, Holt K.B. 366 (quartering soldiers). From these cases Beale, *Innkeepers* (1906) 118, derived the statement that the innkeeper does not sell food, but "utters" it.

<sup>200</sup> In *Merrill v. Hodson*, (1914) 88 Conn. 314, 91 Atl. 533, L.R.A. 1915B 481, Ann. Cas. 1916D 917, the court had great trouble with the idea that title does not pass until the customer has eaten the food, and after that there is nothing for him to own.

<sup>201</sup> *Lockett v. Charles, Ltd.* [1938] 4 All Eng. Rep. 170, 159 L.T. 547, 55 T.L.R. 22; *Cushing v. Rodman*, (1936) 65 App. D.C. 258, 82 F. (2d) 864, 104 A.L.R. 1023 (a beautiful opinion, which seems to leave nothing to be said); *Lewis v. Roescher*, (1936) 193 Ark. 161, 98 S.W. (2d) 956; *Greenwood v. John R. Thompson Co.*, (1920) 213 Ill. App. 371, approved in *Brevoort Hotel Co. v. Ames*, (1935) 360 Ill. 485, 196 N.E. 461; *Goetten v. Owl Drug Co.*, (1936) 6 Cal. (2d) 683, 59 P. (2d) 142; *Heise v. Gillette*, (1925) 83 Ind. App. 551, 149 N.E. 182; *Stanfield v. F. W. Woolworth Co.*, (1936) 143 Kan. 117, 53 P. (2d) 878; *Doyle v. Fuerst & Kraemer*, (1911) 129 La. 838, 56 So. 906, 40 L.R.A. (N.S.) 480, Ann. Cas. 1913B 1100; *Friend v. Childs Dining Hall Co.*, (1918) 231 Mass. 65, 120 N.E. 407, 5 A.L.R. 1100; *Bark v. Dixon*, (1911) 115 Minn. 172, 131 N.W. 1078, Ann. Cas. 1912D 775 (a weak case); *Bell v. S. S. Kresge Co.*, (Mo. App. 1932) 129 S.W. (2d) 932; *Temple v. Keeler*, (1924) 238 N.Y. 44, 144 N.E. 635, 35 A.L.R. 920; *Williams v. Elson*, (1940) 218 N.C. 157, 10 S.E. (2d) 668 (food taken out); *Yochem v. Gloria*, (1938) 134 Ohio St. 427, 17 N.E. (2d) 731; *Koplin v. Louis K. Liggett Co.*, (1935) 119 Pa. Super. 375; 181 Atl. 381; *Ford v. Waldorf System*, (1936) 57 R.I. 131, 188 Atl. 633; *S. H. Kress & Co. v. Ferguson*, (Tex. Civ. App. 1933) 60 S.W. (2d) 817; *Kenower v. Hotels Statler Co.*, (C.C.A. 6th Cir. 1942) 124 F. (2d) 658.

by no means limited to contracts for the sale of goods; they have been found in bailments,<sup>202</sup> shipments over a carrier,<sup>203</sup> and the leasing of a furnished apartment.<sup>204</sup> If there is no sale, the question remains, what kind of food does the buyer ask for and the restaurant undertake to serve? On terms of simple contract, there can be only one answer under any standards that the public now demands: it is food of the kind commonly sold in restaurants, and reasonably fit to eat—or in other words, food of merchantable quality.<sup>205</sup>

The conclusion is, then, that this warranty may exist in any sale made by the dealer in which a description of the goods sold is, in the understanding of the parties, an essential term of the contract. The warranty is not narrow, but broad: it is a standard dealers' warranty, requiring that all goods marketed shall be of merchantable quality, unless it is understood that the buyer is to accept those which are not.

### INSPECTION

Among the circumstances which may prevent or limit the implied warranty of merchantable quality, the buyer's inspection of the particular goods before the contract<sup>206</sup> is perhaps the most important. Even where there is an express warranty of quality, if the buyer has examined the goods and their defects are discovered, or so obvious that he could avoid discovery only by shutting his eyes to what was evident,<sup>207</sup> the warranty is in-

<sup>202</sup> *Hoisting Engine Sales Co. v. Hart*, (1923) 237 N.Y. 30, 142 N.E. 342, 31 A.L.R. 536; *Hartford Battery Sales Corp. v. Price*, (1935) 119 Pa. Super. 165, 181 Atl. 95; *Thomson Spot Welder Co. v. Dickelman Mfg. Co.*, (1921) 15 Ohio App. 270; *Hilton v. Wagner*, (1928) 10 Tenn. App. 173; *Matter of Casulaty Co. of America*, (1929) 250 N.Y. 410, 165 N.E. 829; *Gedding v. Marsh*, [1920] 1 K.B. 688, 46 L.J.K.B. 259. See (1933) 17 MINNESOTA LAW REVIEW 10.

<sup>203</sup> *Bamfeld v. Goole & Sheffield Transport Co.*, [1910] 2 K.B. 94, 79 L.J.K.B. 1070.

<sup>204</sup> *Ingalls v. Hobbs*, (1892) 156 Mass. 348, 31 N.E. 286, 16 L.R.A. 51, 32 Am. St. Rep. 460; *Morgenthau v. Ehrlich*, (1912) 77 Misc. Rep. 139, 136 N.Y.S. 140.

<sup>205</sup> See *Stanfield v. F. W. Woolworth Co.*, (1936) 143 Kan. 117, 53 P. (2d) 878, 882; *Cushing v. Rodman*, (1936) 65 App. D.C. 258, 82 F. (2d) 864, 104 A.L.R. 1023; 4 Williston, Contracts (Rev. ed. 1936) 2748; Notes (1936) 20 MINNESOTA LAW REVIEW 527; (1937) 10 So. Cal. L. Rev. 188; *Vold, Sales* (1931), 477.

<sup>206</sup> Inspection after the contract and before passage of title will not affect the warranty. In such a case, under section 49 of the Uniform Sales Act, 2 Mason's 1927 Minn. Stats., sec. 8423, the buyer may accept the goods with knowledge of their defects and maintain an action against the seller for breach of warranty, provided that he gives notice of the breach within a reasonable time after he knows or ought to know of it.

<sup>207</sup> Otherwise if the defect could only be discovered by careful and expert examination. 1 Williston, Sales (2d ed. 1924), 399, 401; *W. T. Adams Mach. Co. v. Turner*, (1909) 162 Ala. 351, 50 So. 308.

effective. The reason is that he must understand that the seller is offering for sale what is before him, as it appears to be; and even express language, at least in any form other than an explicit reference to the defect itself,<sup>208</sup> will not entitle him to expect anything different. This rule is of course carried over all the more readily into warranties which are merely implied. As to all known<sup>209</sup> or obvious<sup>210</sup> deficiencies in goods which the buyer has inspected, no description on the part of the seller and no standards common to the market can override his "I offer you what you see;" and when the buyer accepts that offer, he agrees to buy the goods according to the appearance they present. The Uniform Sales Act<sup>211</sup> contains a provision to that effect.

Latent defects,<sup>212</sup> however, are another matter. The offer to sell "what you see" cannot charge the buyer with acceptance of what is not visible; and the question becomes one of whether the understanding that goods of merchantable quality are to be sold is destroyed merely by the fact that the buyer has inspected at all. In reason, much should depend upon the circumstances under which the inspection is made. It is quite possible that the seller may say to the buyer, in effect, "Here are goods; look them over, take them or leave them; you are to buy on your own judgment, and I undertake nothing except to sell you these specific goods." In other words, an implied disclaimer of warranty.<sup>213</sup> If this is the understanding, it necessarily follows that there can be no implication of any warranty, whether of merchantable quality or of

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<sup>208</sup> Thus the seller may expressly warrant against the extent or consequences of even known defects. *Fitzgerald v. Evans*, (1892) 49 Minn. 541, 52 N.W. 143; *Norris v. Parker*, (1896) 15 Tex. Civ. App. 117, S.W. 259; *Watson v. Roode*, (1890) 30 Neb. 264, 271, 46 N.W. 491, aff'd (1893) 43 Neb. 348, 61 N.W. 625.

<sup>209</sup> *Wavra v. Karr*, (1919) 142 Minn., 248, 172 N.W. 118; *Anderson v. Van Doren*, (1919) 142 Minn. 237, 172 N.W. 117; *Brooks v. Kamak*, (1908) 130 Ga. 213, 50 S.E. 456.

<sup>210</sup> *Rosenbush v. Learned*, (1922) 242 Mass. 297, 136 N.E. 341; *Colitz & Co. v. Davis*, (1936) 177 Okla. 607, 62 P. (2d) 67; *American Waste Co. v. St. Mary*, (1924) 210 App. Div. 383, 206 N.Y. S. 316; *Lowry Coffee Co. v. Andresen-Ryan Co.*, (1922) 153 Minn. 498, 190 N.W. 985; *Carleton v. Jenks*, (C.C.A. 6th Cir. 1897) 80 Fed. 937; *Colchord Machinery Co. v. Loy-Wilson Foundry & Mach. Co.*, (1908) 131 Mo. App. 540, 110 S.W. 630.

<sup>211</sup> Sec. 15 (3), 2 Mason's 1927 Minn. Stats., sec. 8390 (3) "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

<sup>212</sup> See Note, (1939) MINNESOTA LAW REVIEW 941. "The difference between patent and latent is that one is open to observation by ordinary inspection and the other is not." *Miller & Co. v. Moore, Sims & Co.*, (1889) 84 Ga. 684, 692, 10 S.E. 360, 6 L.R.A. 374, 20 Am St. Rep. 329.

<sup>213</sup> This was certainly the case in *Barnard v. Kellogg*, (1870) 10 Wall. (U.S.) 383, 19 L. Ed. 987, often cited as the leading case on inspection. The seller refused to sell unless the buyer first inspected for himself.

fitness for the particular purpose.<sup>214</sup> It makes no difference whether the buyer inspects thoroughly, or casually and partially,<sup>215</sup> or that inspection is difficult or inconvenient,<sup>216</sup> or even that he decides to take his chances and not to inspect at all.<sup>217</sup>

It does not follow, however, that the offer of an opportunity to inspect always carries such a disclaimer. It is entirely possible that the seller may say, in effect, "Here are merchantable goods, of the kind and quality sold on the market; if you have doubts, you are free to examine them." and after examination the buyer may say, in return, "They look all right; I will take them for what they appear to be, but for the rest I will rely upon your undertaking as to quality." Under such conditions, the warranty may of course still be implied, even where the buyer has made the fullest examination open to him,<sup>218</sup> and certainly all the more readily where his inspection is only a hasty or partial one,<sup>219</sup> or where he declines the opportunity and does not inspect at all.<sup>220</sup>

It cannot be said that the one type of transaction is more likely than the other in any dealer sale; and which one is involved

<sup>214</sup> *Barnard v. Kellogg*, (1870) 10 Wall. (U.S.) 383, 19 L. Ed. 987; *Farrell v. Manhattan Market Co.*, (1908) 198 Mass. 271, 84 N.E. 481, 15 L.R.A. (N.S.) 884, 15 Ann. Cas. 1076, 126 Am. St. Rep. 436 (chicken on bargain counter).

<sup>215</sup> *Barnard v. Kellogg*, (1870) 10 Wall. (U.S.) 383, 19 L. Ed. 987; *Thornett & Fehr v. Beers & Son*, [1919] 1 K.B. 486, 88 L.J.K.B. 684, 120 L.T. 570.

<sup>216</sup> *Cudahy Packing Co. v. Narzisenfeld*, (C.C.A. 2d Cir. 1924) 3 F. (2d) 567; *Byrne v. Jansen*, (1875) 50 Cal. 624; *Hyatt v. Boyle*, (1833) 5 Gill & J. (Md. 110, 25 Am. Dec. 276; *Hyde Construction Co. v. Stevenson*, (1937) 181 Okla. 8, 72 P. (2d) 354.

<sup>217</sup> *Moore v. McKinlay & Garrioch*, (1855) 5 Cal. 471; *Byrne v. Jansen*, (1875) 50 Cal. 624; *Lamb v. Otto*, (1921) 51 Cal. App. 433, 197 Pac. 147; *Alexander v. Stone*, (1916) 29 Cal. App. 488, 156 Pac. 998; *Weber Iron & Steel Co. v. Wright*, (1932) 14 Tenn. App. 451.

<sup>218</sup> *Gilpatrick v. Downie*, (1927) 143 Wash. 671, 255 Pac. 1028, 52 A.L.R. 1533; *Rocky Mountain Seed Co. v. Knorr*, (1933) 92 Colo. 320, 20 P. (2d) 304; *West Coast Lumber Co. v. Wernicke*, (1939) 137 Fla. 363, 188 So. 357; *Flynn v. Bedell Co.*, (1922) 242 Mass. 450, 136 N.E. 252, 27 A.L.R. 1504; *Keenan v. Cherry & Webb*, (1925) 47 R.I. 125, 131 Atl. 309; *Rinaldi v. Mohican Co.*, (1918) 225 N.Y. 70, 121 N.E. 471; *John Service Inc., v. Goodnow-Pearson Co.*, (1922) 242 Mass. 594, 136 N.E. 623; *South Brooklyn Paper & Rag Co. v. Marquart*, (1920) 180 N.Y.S. 28; *Stroock & Co., v. Lichtenthal* (1928) 224 App. Div. 19, 229 N.Y.S. 371; *Hise v. Romeo Stores Co.*, (1921) 70 Colo. 249, 199 Pac. 483; *Brandenberg v. Samuel Stores*, (1931) 211 Iowa 1321, 235 N.W. 741, 77 A.L.R. 1161; *Great A. & P. Tea Co. v. Eiseman*, (1935) 259 Ky. 103, 81 S.W. (2d) 900; *Rabb v. Covington* (1939) 215 N.C. 572, 2 S.E. (2d) 705.

<sup>219</sup> *Kellogg Bridge Co. v. Hamilton*, (1884) 110 U.S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86; *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*, (1937) 93 Utah 414, 73 P. (2d) 1272; *Swartz v. Edwards Motor Car Co.*, (1927) 49 R.I. 18, 139 Atl. 466; *Stewart v. Voll & Sons*, (1911) 81 N.J.L. 323, 79 Atl. 1041.

<sup>220</sup> This seems obviously to follow from the holdings as to partial inspection, *supra*, note 219; and see 1 Williston, Sales (2d ed. 1924); Vold Sales (1931), 455, note 45; Llewellyn, On Warranty of Quality and Society II, (1937) 37 Col. L. Rev. 341, 382.

in the particular case is a matter of the probable understanding of the parties in the light of their conversation and the circumstances, which is a question of fact, frequently to be decided by the jury. Before the Sales Act there were many cases<sup>221</sup> which seemed to say, as a matter of law, that no warranty could be implied where the buyer had had full opportunity to inspect the goods. Concerning these cases it is to be said, either that the buyer had been told in effect that he must rely solely upon his own examination, or that in looking to the "reliance upon the seller's skill or judgment" necessary to a warranty of fitness for the particular purpose the courts assumed that where the buyer relied on his own judgment to any extent at all he could not also rely upon the seller's. This last is certainly not true, since as to latent defects it is well settled that the buyer may rely both upon his own inspection and upon the seller's undertaking expressed in the contract.<sup>222</sup> Since the passage of the Sales Act, the emphasis has been shifted to the actual understanding of the parties, with the result that there has been a strong tendency<sup>223</sup> to find a warranty as to latent defects even in the face of inspection. This has proved to be all the more necessary as goods have become more highly specialized, marketing processes more complex, and buyers more helpless to form any intelligent estimate of the character of the goods on the basis of their own examination or tests. The statute,<sup>224</sup> declaring that inspection negatives the warranty as to defects which it ought to have revealed, is silent as to latent ones. The inference is sufficiently evident, and the conclusion would appear to be that in a dealer's sale merchantable quality is warranted unless the inspection, or offer of an opportunity to inspect, amounts under the circumstances to a disclaimer.

This is borne out by the law regarding sales by sample. A sample, of course, involves both a description ("goods like this") and an inspection. If there are obvious defects in the sample when

<sup>221</sup> *Barnard v. Kellogg*, (1870) 10 Wall. (U.S.) 383, 19 L. Ed. 987; *Ketchum v. Stetson & Post Mill Co.*, (1903) 33 Wash. 92, 73 Pac. 1127; *Woods v. Nicholas & Parker*, (1914) 92 Kan. 258, 140 Pac. 862; *Martin & Co. v. Roehm*, (1900) 92 Ill. App. 87; *Dorsey v. Watkins*, (C.C. Mo. 1907) 151 Fed. 340; *McQuaid v. Ross*, (1893) 85 Wis. 492, 55 N.W. 705, 22 L.R.A. 187, 39 Am. St. Rep. 864; *Carleton v. Jenks*, (C.C.A. 6th Cir. 1897) 80 Fed. 937; *Dunn v. Vaughan*, (1926) 120 Okla. 240 251 Pac. 472; *Dishman v. Griffiths*, (1918) 16 Ala. 381, 77 So. 961; *Browning v. McNear*, (1904) 145 Cal. 272, 178 Pac. 722; *Becker v. Brewner*, (1885) 18 Ill. App. 39; *Hight v. Bacon*, (1878) 126 Mass. 10, 30 Am. Rep. 639; *White v. Oakes*, (1896) 88 Me. 367, 34 Atl. 175, 32 L.R.A. 592.

<sup>222</sup> *Keely v. Turbeville*, (1883) 11 Lea (Tenn.) 339; cf. *Morrow v. Bonebrake*, (1911) 84 Kan. 724, 115 Pac. 585, 34 L.R.A. (N.S.) 1147; *Brown v. Andrews*, (1911) 116 Minn. 150, 133 N.W. 568; Bogert, Express Warranties in Sales of Goods, (1923) 33 Yale L.J. 14, 29.

<sup>223</sup> See cases cited *supra*, notes 218, 219.

<sup>224</sup> See *supra*, note 211.

the buyer inspects it, he has of course no right to demand that the goods shall be merchantable when the sample is not.<sup>225</sup> Even if there are latent defects, if he is told in effect that he must examine the sample for himself and buy on his own judgment, there is still no warranty to be implied.<sup>226</sup> But if the sample is accompanied by a description, a term of the contract designating what is to be sold, it has been well established since 1854<sup>227</sup> that it is not enough that the goods delivered correspond to the sample with its latent deficiencies. They must also correspond with the description, and if the seller is a dealer they must be of merchantable quality according to the description.<sup>228</sup> The seller's undertaking is then not merely to deliver goods "like this;" it is to deliver goods such as the sample appears and is described to be; and on the part of a dealer that means merchantable goods. As there is no reason to believe that the Sales Act<sup>229</sup> intends to distinguish between inspection of a sample and any other inspection, the conclusion stated above would seem to follow.

#### DISCLAIMERS

A disclaimer is a refusal of the seller to warrant. Since warranty is a matter subject to contract, it was held at common law,<sup>230</sup>

<sup>225</sup> *Mody v. Gregson*, (1868) L.R. 4 Ex. 49, 38 L.J. Ex. 12, 19 L.T. 458; *Meyer Bros. Drug Co. v. Puckett*, (1904) 139 Ala. 331, 35 So. 1019, *Worcester Mfg. Co. v. Waterbury Brass Co.*, (1901) 73 Conn. 554, 48 Atl. 422; *Chicago House Wrecking Co. v. Durand*, (1902) 105 Ill. App. 175; *Dorman v. Thorpe*, (1933) 217 Iowa 91, 250 N.W. 902; *Remy, Schmidt & Pleissner v. Healy*, (1910) 161 Mich. 266, 126 N.W. 202.

<sup>226</sup> *Dunbar Bros. Co. v. Consolidated Iron-Steel Mfg. Co.*, (C.C.A. 2d Cir. 1928) 23 F. (2d) 416; *Navarette v. Travis-ziegler Co.*, (1922) 194 N.Y.S. 832; *L. A. Lockwood, Jr. v. E. Gross & Co.*, (1923) 99 Conn. 206, 122 Atl. 59. Cf. *People v. Western Picture Frame Co.*, (1938) 368 Ill. 336, 13 N.E. (2d) 958 (partial inspection).

<sup>227</sup> *Nichols v. Godts*, (1854) 10 Each. 191, 2 C.L.R. 1468, 23 L.J. Ex. 314.

<sup>228</sup> *Mody v. Gregson*, (1868) L.R. 4 Ex. 49, 38 L.J. Ex. 12, 19 L.T. 458; *James Drummond & Sons v. E. H. Van Ingen & Co.*, (1887) 12 App. Cas. 284, 56 L.J.Q.B. 563, 3 T.L.R. 541; *Laggett v. Young*, (1888) 29 N.B. 675; *Laganas Shoe Mfg. Co. v. Sharood*, (1928) 173 Minn. 535, 217 N.W. 241; *Gould v. Stein*, (1889) 149 Mass. 570, 22 N.E. 47, 5 L.R.A. 213, 14 Am. St. Rep. 455; *Steering Wheel Co. v. Fae Electric Car Co.*, (1913) 174 Mich. 512, 140 N.W. 1016; *Ungerer & Co., v. Louis Maull Cheese & Fish Co.*, (1911) 155 Mo. App. 95, 134 S.W. 56; *Stewart v. Voll & Son*, (1911) 81 N.J.L. 323, 79 Atl. 1041; *Nixa Canning Co.*, (1905) 70 Kan. 664, 79 Pac. 141, 70 L.R.A. 653; *Bierman v. City Mills Co.*, (1897) 151 N.Y. 482, 45 N.E. 856, 37 L.R.A. 799, 56 Am. St. Rep. 636; *Greenwood Cotton Mills v. Tolbert*, (1916) 105 S.C. 273, 89 S.E. 653.

<sup>229</sup> Section 16, 2 Mason's 1927 Minn. Stats., sec. 8391: "In the case of a contract to sell or a sale by sample . . . (c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample."

<sup>230</sup> *Baglehole v. Walters*, (1811) 3 Camp. 154, 170 Eng. Rep. 1338; *Shepherd v. Kain*, (1821) 5 B. & Ald. 240, 106 Eng. Rep. 1180; *Dowagiac Mfg. Co. v. Mahon & Robinson*, (1904) 13 N.D. 516, 101 N.W. 903; *J. I. Case Threshing Mach. Co. v. McClamrock* (1910) 152 N.C. 405, 67 S.E. 991.

and is recognized by the Uniform Sales Act,<sup>231</sup> that the parties are entirely free to make their own agreement, and to dispense with a warranty that would otherwise exist. If when he enters into the contract to purchase the buyer understands that the seller is not willing to undertake responsibility for the character or quality of the goods, he cannot claim that there is any warranty obligation. Such a disclaimer may be, and usually is, expressed in words,<sup>232</sup> but it may be implied from the conduct of the parties, or the circumstances of the sale. In either case, it must be fairly brought home to the buyer before the contract is concluded,<sup>233</sup> and there are cases holding, on ordinary contract principles, that a disclaimer in fine print,<sup>234</sup> or in an obscure place,<sup>235</sup> which the buyer excusably does not read, will not avoid liability.

An express disclaimer may be a total one, denying all responsibility, and requiring the buyer to accept goods delivered without recourse against the seller. Such, for example, is an agreement that the buyer is to take the goods "as is,"<sup>236</sup> or "with all faults, defects or errors,"<sup>237</sup> or a provision, varying according to the

<sup>231</sup> Section 71, 2 Mason's 1927 Minn. Stats., sec. 8445: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealings between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

As to disclaimers under the Sales Act, see the exhaustive discussion in Note, (1939) 23 MINNESOTA LAW REVIEW 784; also Note (1921) 21 Col. L. Rev. 1325.

<sup>232</sup> A common form of disclaimer is that found in *Minneapolis Threshing Mach. Co. v. Hocking*, (1926) 54 N.D. 559, 209 N.W. 996: "There are no representations, agreements, obligations or conditions express or implied, statutory or otherwise, relating to the subject matter hereof, other than herein contained; and . . . this agreement is the sole contract and comprises all agreements between the parties hereto with reference to said machinery."

<sup>233</sup> Thus a disclaimer on an invoice sent with the goods after the contract is made is ineffective. *Ward v. Valke*, (1920) 44 N.D. 598, 176 N.W. 129; *Edgar v. Breck & Sons Corp.*, (1899) 172 Mass. 581, 52 N.E. 1083; *Amzi Godden Seed Co. v. Smith*, (1913) 185 Ala. 296, 64 So. 100; see *Moorhead v. Minneapolis Seed Co.*, (1917), 139 Minn. 117, 165 N.W. 484, L.R.A. 1918C, 391, Ann. Cas. 1918E 481; *Longino v. Thompson*, (Tex. Civ. App. 1919) 209 S.W. 202, 205.

<sup>234</sup> *Woodworth v. Rice Bros. Co.*, (1920) 110 Misc. Rep. 153, 179 N.Y. S. 722, aff'd (1920) 193 App. Div. 971, 184 N.Y.S. 953; cf. *Federal Motor Truck Sales Corp. v. Shanus*, (1933) 190 Minn. 5, 10, 250 N.W. 713.

<sup>235</sup> *Black v. B. B. Kirkland Seed Co.*, (1930) 153 S.C. 112, 155 S.E. 268 (disclaimer in sale of seed, in seller's catalogue, on its invoices, and on cards in seed bags); *Linn, v. Radio Center Delicatessen*, (1939) 169 Misc. Rep. 879, 9 N.Y.S. (2d) 110 (on back of invoice). In *Angerona v. White & Co.*, (1936) 243 App. Div. 425, 290 N.Y.S. 204, aff'd (1937) 275 N.Y. 524, 11 N.E. (2d) 325, the court, in its anxiety to avoid the effect of the disclaimer, carried this principle to an extreme that seems unjustifiable.

<sup>236</sup> Held effective in *Alexander v. Sola*, (1921) 185 N.Y.S. 869; *Union Trust Co. v. Detroit River Transit Co.*, (1910) 162 Mich. 670, 127 N.W. 780; *R. E. Brooks Co. v. Storr*, (1933) Ill N.J.L. 316, 168 Atl. 382; *Kimball-Clark Co. v. Crosby*, (1921) 175 Wis. 337, 185 N.W. 172.

<sup>237</sup> Held effective in *Taylor v. Bullen*, (1850) 5 Exch. 779, 20 L.J. Ex. 21, 16 L.T.O.S. 154, 155 Eng. Rep. 341, even though the ship was not "teak-built" as described.

fancy or ingenuity of the seller's draftsman, that he does not warrant them in any respect whatsoever.<sup>238</sup> Where, as has frequently been the case, such disclaimers are held completely effective,<sup>239</sup> a dangerous power is placed in the hands of the seller. Taken literally, the language used would permit him to deliver anything he likes, supplying scrap iron to a buyer who expects to receive onions, or worthless junk instead of an article for which a fair price has been paid, and yet escape all liability. There are, as a matter of fact, some sales in which even this would not be an unreasonable agreement, as where goods are sold at auction,<sup>240</sup> or they are understood to be off-grade<sup>241</sup> or second-hand,<sup>242</sup> or they are at a distance and the seller makes it clear that he knows nothing about them;<sup>243</sup> or where, by reason of the nature of the goods and the business, the seller cannot know what he is delivering, and makes it clear that he is willing to sell only upon the condition that the buyer will hold him to no responsibility.<sup>244</sup> A disclaimer is not at all a pernicious thing in any case where it appears that the buyer really is willing to take his chances.

In the usual dealer sale, however, it cannot reasonably be thought that the buyer is willing to pay good money for whatever the seller will give him, and remain completely at the seller's mercy. While he is notified that the thing delivered may have its faults and defects, he at least understands that it is an article of the kind described in the contract, and that what purports to be glassware is not in reality pickled fish or toy balloons. The seller could not reasonably suppose that he would buy upon any other

<sup>238</sup> Held effective in *Minneapolis Threshing Mach. Co. v. Hocking*, (1926) 54 N.D. 559, 209 N.W.996 (see *supra*, note 232); *Burntisland Shipbuilding Co. v. Barde Steel Products Corp.* (D. Del. 1922) 278 Fed. 552 ("Quantity, quality or description not guaranteed"); *Morgan v. Williams*, (1933) 46 Ga. App. 774, 169 S.E. 211; *Kolodczak v. Peerless Motor Co.*, (1931) 255 Mich. 47, 237 N.W. 41; and see cases cited *infra*, notes 240-244, 268-270.

<sup>239</sup> See cases cited *supra*, notes 236-238; *infra*, notes 240-244, 268-270.

<sup>240</sup> *Hirsch v. Duval Co.*, (1906) 101 N.Y.S. 35 ("examine before buying, descriptoin on package not guaranteed; goods sold as they are at time of sale"); *United States v. Atlantic Wrecking Co.*, (N.D. Ga. 1925) 8 F. (2d) 542; *Seligman v. Underwriters' Salvage Co.*, (1916) 158 N.Y.S. 874.

<sup>241</sup> *Industrial Rayon Corp. v. Clifton Mills*, (1933) 310 Pa. St. 322, 165 Atl. 385.

<sup>242</sup> *Rogers v. Hale*, (1928) 205 Iowa 557, 218 N.W. 264; *W. F. Dollen & Sons v. Carl R. Miller Tractor Co.*, (1932) 214 Iowa 774, 241 N.W. 307; *J. I. Case Threshing Mach. Co. v. McClamrock*, (1910) 152 N.C. 405, 67 S.E. 991.

<sup>243</sup> *Gage v. Carpenter*, (C.C.A. 1st Cir. 1901) 107 Fed. 886, *Cf. Pottash v. Herman Reach & Co.*, (C.C.A. 3d Cir. 1921) 272 Fed. 658 (war-time contract).

<sup>244</sup> *Lumbrazo v. Woodruff*, (1931) 256 N.Y. 92, 175 N.E. 525, 75 A.L.R. 1017 (seed); *Hoover v. Utah Nursery Co.*, (1932) 79 Utah 12, 7 P. (2d) 270 (seed); *Ross v. Northrup King & Co.*, (1914) 156 Wis. 327, 144 N.W. 124 (seed). The custom of the seed trade that the seller does not warrant has played a considerable part in these decisions.

Even in cases such as those cited in notes 240-244, it seems clear that the seller will not be free to substitute other goods for specific goods sold. *Ward v. Walker*, (1920) 44 N.D. 598, 176 N.W. 129.



basis. Any general language of the disclaimer, no matter how comprehensive it may be, is contradicted to some extent in such a case by the description of the goods to be sold. Accordingly, the courts, whenever possible, and particularly where the disclaimer is drawn by the seller and the buyer merely adheres to it,<sup>245</sup> have construed the description and the disclaimer together, and have held that the goods are at least warranted genuine according to the description. A "copper fastened vessel, to be taken with all faults"<sup>246</sup> means only those faults consistent with a copper fastened vessel as the term is understood in the trade; "foreign refined rape oil, warranted only equal to samples"<sup>247</sup> must be foreign refined rape oil, of the commercial kind, even though the samples are not; "sweet clover seed"<sup>248</sup> must not be alfalfa, and "grapes"<sup>249</sup> must not be sawdust. From this it is a short step to construe the description as calling for goods of the kind sold on the market, merchantable under the description, and to hold that a disclaimer in general terms does not exclude the minimum warranty of merchantable quality. Courts eager to protect the buyer against the disclaimer, and to give him what they believe he really had in mind, have adopted this construction.<sup>250</sup>

<sup>245</sup> Following the principle that the language of an agreement is to be interpreted most strongly against the party using it. 3 Williston, Contracts (Rev. ed. 1936), 1788; Restatement of Contracts, sec. 236 (d); *Hansmann v. Pollard*, (1911) 113 Minn. 429, 129 N.W. 848.

<sup>246</sup> *Shepherd v. Kain*, (1821) 5 B. & Ald. 240, 106 Eng. Rep. 1180.

<sup>247</sup> *Nichols v. Godts*, (1854) 10 Exch. 191, 2 C.L.R. 1468, 23 L.J. Ex. 314.

<sup>248</sup> *Smith v. Oscar H. Will & Co.*, (1924) 51 N.D. 357, 199 N.W. 861. Accord: *Ward v. Valke*, (1920) 44 N.D. 598, 176 N.W. 129 (wrong kind of seed); *Williams v. McClain*, (1937) 180 Miss. 6, 176 So. 717 (1933 model Ford hearse "as is"); *Downey v. Price Chemical Co.*, (1924) 204 Ky. 98, 263 S.W. 690 ("No warranty of any kind" does not exclude kind and character); *Robert A. Munroe & Co. v. Meyer*, [1930] 2 K.B. 312, 99 L.J.K.B. 703 ("with all faults and defects" does not exclude correspondence with the description, an "overriding warranty"); see *Rockwood & Co. v. Parrott & Co.*, (1933) 142 Or. 261, 19 P. (2d) 423 ("No warranties of any kind" does not exclude genuineness).

<sup>249</sup> *Lewitus v. Independent Fruit Auction Corp.*, (1926) 128 Misc. Rep. 384, 219 N.Y.S. 5.

<sup>250</sup> *Main v. Dearing*, (1905) 73 Ark. 470, 84 S.W. 640; *Main v. El Dorado Dry Goods Co.*, (1907) 83 Ark. 15, 102 S.W. 681; *Meyer v. Packard; Cleveland Motor Co.*, (1922) 106 Ohio St. 323, 140 N.E. 118 ("waiver" of all agreements not specified does not exclude the "essence of the contract," fitness for use as a truck); *United Fig & Date Co. v. Falkenberg*, (1934) 176 Wash. 122, 28 P. (2d) 287 ("Rejection by buyer, if accepted by seller, constitutes delivery" does not apply where unmerchantable goods tendered, since not called for by the contract); *Hall Furniture Co. v. Crane Mfg. Co.*, (1915) 169 N.C. 41, 85 S.E. 35 (disclaimer as to "condition" does not exclude warranty that it can at least be used as a hearse).

Merchantable quality seems to be implicit in the "genuineness" demanded in many of the cases cited above, particularly *Shepherd v. Kain*, (1821) 5 B. & Ald. 240, 106 Eng. Rep. 1180; *Nichols v. Godts*, (1854) 10 Exch. 191, 2 C.L.R. 1468, 23 L.J. Ex. 314; *Downey v. Price Chemical Co.*, (1924) 204 Ky. 98, 263 S.W. 690 ("commercial kind or character").

Undoubtedly a clever draftsman can go far toward avoiding such a result. But the courts have been no less adroit in discovering loopholes. The English courts, in the past,<sup>251</sup> set up a highly artificial distinction between a warranty and a "condition," and proceeded to hold that where the difference between the goods contracted for and those delivered was so great that it could be considered one of kind rather than of degree,<sup>252</sup> there was a breach of a "condition" of the contract, to which a disclaimer of warranties could have no application. Even after the distinction was obliterated in part by statute,<sup>253</sup> they have continued to apply it,<sup>254</sup> and there are even decisions reaching such remarkable conclusions as that a defective tractor is not a tractor,<sup>255</sup> and that a sterile bull is not a bull at all.<sup>256</sup> The distinction, which in the first instance does not commend itself to common sense, is at least partially destroyed by the provision of the American Sales Act<sup>257</sup> permitting the buyer to treat any condition which the seller has promised to perform as a warranty; but it might perhaps still be available where goods of the wrong kind are delivered, since the Act says that the buyer "may treat," and not that he must.<sup>258</sup> The few decisions which have considered the question have held, however, that the distinction no longer exists.<sup>259</sup>

<sup>251</sup> See Benjamin, *Sale of Personal Property* (7th.ed. 1931) 634, 686.

<sup>252</sup> Stated in *Harrison v. Knowles & Foster*, [1917] 2 K.B. 606, 610, by Bailhache, J.

<sup>253</sup> The English rule exposed the buyer to the alternative of breaking his contract by non-acceptance if it should be held that there was a breach of warranty, or waiving the breach by acceptance if it turned out to be a condition. The second possibility was taken care of by 56 & 57 Victoria, ch. 71, sec. 11 (a), providing that the buyer may elect to treat a breach of condition as a breach of warranty.

<sup>254</sup> *Wallis Son & Wells v. Pratt & Haynes*, [1910] 2 K.B. 1003, 79 L.J.K.B. 1013, 103 L.T. 118, 26 T.L.R. 572. See the discussion of the further development of the British Empire law in (1938) 7 *Fortnightly L.J.* 280; (1936) 1 *Res Judicatae* 146.

<sup>255</sup> *Massey-Harris Co. v. Skelding*, [1934] 3 Dom. L. Rep. 193, [1934] S.C. Rep. 431.

<sup>256</sup> *Cotter v. Luckie*, [1918] N.Z.L. Rep. 811.

<sup>257</sup> Section 11 (1), 2 Mason's 1927 Minn. Stats., sec. 8386 (1): "Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the non-performance of the condition as a breach of warranty."

<sup>258</sup> The language of the American section does not differ essentially from that of the English statute constructed in *Wallis Son & Wells v. Pratt & Haynes*, [1910] 2 K.B. 1003, 79 L.J.K.B. 1013, 103 L.T. 118, 26 T.L.R. 572, where the distinction was preserved.

<sup>259</sup> *Lumbrazo v. Woodruff*, (1931) 256 N.Y. 92, 175 N.E. 525, 75 A.L.R. 1017, reversing (1930) 229 App. Div. 407, 242 N.Y.S. 335; *Hoover v. Utah Nursery Co.*, (1932) 79 Utah 12, 7 P. (2d) 270; *Crandell Engineering Co. v. Winslow Marine Ry. & Shipbuilding Co.*, (1936) 188 Wash. 1, 61 P. (2d) 136, 106 A.L.R. 1357.

Some half-dozen American courts have accomplished much the same result by holding that there is not merely a breach of warranty, but a "breach of contract"<sup>260</sup> or a "failure of consideration"<sup>261</sup> when the seller delivers goods of the wrong kind. This seems to be something of a subterfuge, since unless the goods delivered are entirely without value<sup>262</sup> either breach of contract or failure of consideration can consist only in the fact that they are not what was contracted for, or in other words not as warranted.

A third piece of judicial ingenuity has been to construe the disclaimer as applicable to express warranties only.<sup>263</sup> Thus a provision that "No warranties have been made . . . by the seller to the buyer unless expressly written hereon" was held by the Minnesota court<sup>264</sup> to have no reference to warranties which were implied, since the latter were not "made" by the parties, but imposed by the law—a clear adoption of the third theory of the nature of implied warranties referred to above.<sup>265</sup> The justification for the evasion, if such it be, must lie in the rule that the disclaimer is to be construed heavily against the seller who drew it. There are similar decisions in other jurisdictions.<sup>266</sup> Obviously, however, any tyro of a draftsman can still provide that no war-

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<sup>260</sup> *International Harvester Co. of America v. Bean*, (1914) 159 Ky. 842, 109 S.W. 549; *Rocky Mountain Seed Co. v. Knorr*, (1933) 92 Colo. 320, 20 P. (2d) 304; *Smith v. Oscar H. Will & Co.*, (1924) 51 N.D. 357, 199 N.W. 861 (under Sales Act, but no mention of it).

<sup>261</sup> *Swift & Co. v. Aydlott*, (1920) 192 N.C. 330, 135 S.E. 141; *Lewitus v. Independent Fruit Auction Co.*, (1926) 128 Misc. Rep. 384, 219 N.Y.S. 5; see *Latimer Plumbing & Heating Co., v. McThomas* (Mo. App. 1933) 61 S.W. (2d) 270, 271.

<sup>262</sup> Thus in *L. D. Powell Co v. Sturgeon*, (Tex. Civ. App. 1927) 299 S.W. 274, it was held that there was no failure of consideration where the goods delivered had at least junk value.

<sup>263</sup> By way of comparison, the disclaimer in *Andrews Bros. v. Singer & Co.*, [1934] 1 K.B.17, 103 L.J.K.B.90, 150 L.T. 172, 50 T.L.R. 33, was construed to exclude implied warranties only, and conformity with the description was held to be a matter of express warranty.

<sup>264</sup> *Bekkevold v. Potts*, (1927) 173 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164.

<sup>265</sup> See *supra*, text at note 39.

<sup>266</sup> *Hooven & Allison Co. v. Wirtz Bros.*, (1900) 15 N.D. 477, 107 N.W. 1078; *Main v. Dearing*, (1905) 73 Ark. 470, 84 S.W. 640; *Hardy v. General Motors Acceptance Corp.*, (1928) 38 Ga. App. 463, 144 S.E. 327; *Little v. G. E. Van Syckle & Co.*, (1898) 115 Mich. 480, 73 N.W. 554; *National Equipment Co. v. Moore*, (1933) 189 Minn. 630, 250 N.W. 677; *Lutz v. Hill-Diesel Engine Co.*, (1931) 255 Mich. 98, 237 N.W.546; *Hobart Mfg. Co. v. Rodziewicz*, (1937) 125 Pa. Super. 240, 189 Atl. 586; *Liquid Carbonic Co. v. Coclin*, (1931) 161 S.C.40, 159 S.E. 461; *Corey v. Wilensky & Son*, (1937) 55 Ga. App. 857, 191 S.E. 879; *Hughes v. National Equipment Corp.* (1935) 216 Iowa 1000, 250 N.W. 154. Cf. *J. A. Campbell Co. v. Corley*, (1932) 140 Or. 462, 13 P. (2d) 610, 14 P. (2d) 455 ("No verbal warranties valid").

warranties are to be implied.<sup>267</sup> Other courts have rejected the opening, and have given such clauses as "We give no warranties,"<sup>268</sup> or "No warranties have been made,"<sup>269</sup> or "There are no understandings or agreements relative to the contract other than those expressed herein"<sup>270</sup> the meaning obviously intended.

An express disclaimer may be partial, excluding only warranties against certain defects, or all warranties except one expressly given.<sup>271</sup> More commonly, partial disclaimers take the form of a limitation of the buyer's remedies in case of breach. It may be provided, for example, that his only remedy shall be repair or replacement by the seller,<sup>272</sup> or rescission,<sup>273</sup> or certain conditions may be attached to any remedy, such as discovery of the defects<sup>274</sup> or notice to the seller<sup>275</sup> within a specified time. If the language used is not mandatory, such provisions often are construed as merely permissive;<sup>276</sup> but if it is clear that a limitation is intended, it is given effect.<sup>277</sup> Here again, however, the courts

<sup>267</sup> Thus, after the North Dakota decision cited in note 263, it was held in *Minneapolis Threshing Mach. Co. v. Hocking*, (1926) 54 N.D. 559, 209 N.W. 996, that a disclaimer of all warranties "express or implied" was effective.

<sup>268</sup> *Larson v. Inland Seed Co.*, (1927) 143 Wash. 557, 255 Pac. 919, 62 A.L.R. 444; *Kibbs v. Woodruff*, (1920) 94 Conn. 443, 109 Atl. 169; *Leonard Seed Co. v. Crary Canning Co.*, (1911) 147 Wis. 166, 132 N.W. 902, 37 L.R.A. (N.S.) 79, Ann. Cas. 1912D 1077; *Landreth Seed Co. v. Kerbee Seed Co.*, (1930) 12 La. App. 506, 126 So. 400.

<sup>269</sup> *Getzoff v. Von Lengerke Buick Co.*, (1936) 14 N.L.J. Misc. 750, 187 Atl. 539; see *Oldfield v. International Motor Co.*, (1921) 138 Md. 35, 45, 113 Atl. 632.

<sup>270</sup> *S. F. Bowser & Co. v. Independent Dye House*, (1931) 276 Mass. 289, 177 N.E. 268; *Sterling Midland Coal Co. v. Great Lakes Coal & Coke Co.*, (1929) 334 Ill. 281, 165 N.E. 793; *Heller v. Franklin Butler Motors*, (1930) 259 Ill. App. 358; *McCabe v. Standard Motor Construction Co.*, (1929) 106 N.J.L. 227, 147 Atl. 466; *Vandiver v. B. B. Wilson & Co.*, (1932) 244 Ky. 601, 51 S.W. (2d) 899.

<sup>271</sup> Thus *Dowagiac Mfg. Co. v. Mahon & Robinson* (1904) 14 N.D. Mo. 101 N.W. 903 (warranted "only against breakage").

<sup>272</sup> *Sharpless Separator Co. v. Domestic Electric Refrigerator Corp.*, (C.C.A. 3d Cir. 1932) 61 F. (2d) 499; *Lee v. Pauly Motor Truck Co.*, (1922) 179 Wash. 139, 190 N.W. 819; *Long v. Ideal Elec. & Mfg. Co.*, (1926) 120 Okla. 63, 250 Pac. 504.

<sup>273</sup> *Helvetia Copper Co. v. Hart-Parr Co.*, (1919) 142 Minn. 74, 171 N.W. 272, 767; *Advance-Rumely Thresher Co. v. Wharton*, (1930) 211 Iowa 264, 233 N.W. 673, 77 A.L.R. 1153; *Holden v. Advance-Rumely Thresher Co.*, (1931) 61 N.D. 584, 239 N.W. 479.

<sup>274</sup> *Dayton Oakland Co. v. Livesay*, (1929) 34 Ohio App. 302, 170 N.E. 880 (ninety days.)

<sup>275</sup> *Marshall Milling Co. v. Hintz-Cameron Co.*, (1923) 156 Minn. 301 194 N.W. 772 (thirty days); *Oliver Farm Equipment Sales Co. v. Neely*, (1934) 50 Ga. App. 231, 177 S.E. 606 (five days); *J. J. Case Threshing Mach. Co. v. Rose*, (1921) 191 Ky. 433, 230 S.W. 545 (notice to seller after six days and opportunity to repair; if not repaired, return to seller).

<sup>276</sup> *Mandel v. Butties*, (1875) 21 Minn. 391; *Ebbert v. Philadelphia Electric Co.*, (1937) 126 Pa. Super. 351, 191 Atl. 384; cf. *Remington Arms U. M. C. Co. v. Gaynor Mfg. Co.*, (1923) 98 Conn. 721, 120 Atl. 572.

<sup>277</sup> *Pottash v. Herman Reach & Co.*, (C.C.A. 3d Cir. 1921) 272 Fed. 658 (allowance for defects); *Black Motor Co. v. Foure*, (1936) 275 Mich. 607, 276 N.W. 748; *Clark Implement Co. v. Priebe*, (1928) 52 S.D. 606,

occasionally have gone to some pains to assist the buyer, holding that the limitation does not apply because the seller has delivered the wrong goods and so has not performed his contract at all,<sup>278</sup> or that he has "waived" conditions as to time by making efforts to repair the goods, and so encouraging the buyer to keep them.<sup>279</sup>

It may be gathered that the courts have looked with rather a jaundiced eye upon disclaimers; and certainly this coincides with the public view of them.<sup>280</sup> One lower New York court<sup>281</sup> has declared that they will not be tolerated in the retail sale of food, because the public health is involved, and "it is against natural justice and good morals to permit an individual or corporation to manufacture food containing dangerous foreign substances and to escape the consequences of his acts by a disclaimer." In North Dakota, the struggle between the farmer demanding something fit to use for his money and the maker of agricultural implements seeking to eliminate the buyer who purchases just before harvest and blithely returns the goods with a claim of defects immediately his crop is in, has culminated in a statute<sup>282</sup> declaring that the buyer may rescind if the implement is not reasonably fit for the purpose, and that any contractual provision to the contrary is void as against public policy. Doubtless we shall see more of such legislation. The current draft of the proposed Revised Uniform Sales Act<sup>283</sup> provides that the implied warranties shall not be negated or modified by any general disclaimer "if the circumstances indicate that a reasonable person in the position of the buyer would, despite such general language, be in fact relying on the merchantable quality of the goods or their fitness

219 N.W. 475. Even in the absence of an express declaration, the remedy has been found to be intended to be exclusive. *Long v. Ideal Elec. & Mfg. Co.*, (1926) 120 Okla. 63, 250 Pac. 504; *Morris & Co. v. Power Mfg. Co.*, (C.C.A. 6th Cir. 1927) 17 F. (2d) 689; *Graves Ice Cream Co. v. Rudolph W. Wurlitzer Co.*, (1937) 267 Ky. 1, 100 S.W. (2d) 819.

<sup>278</sup> *Austin Co. v. Tillman Co.*, (1922) 104 Or. 541, 209 Pac. 131, 30 A.L.R. 293.

<sup>279</sup> *Detwiler v. Downes*, (1912) 119 Minn. 44, 137 N.W. 422, 50 L.R.A. (N.S.) 753; *Williams v. Bullock Tractor Co.*, (1921) 186 Cal. 32, 198 Pac. 780; *Minneapolis-Moline Power Implement Co. v. Parent*, (1932) 93 Mont. 207, 17 P. (2d) 1088. Cf. *Ford Motor Co. v. Cullum*, (C.C.A. 5th Cir. 1938) 96 F. (2d) 1 (ineffective replacements).

<sup>280</sup> See Bogert and Fink, Business Practices Regarding Warranties in the Sale of Goods, (1931) 25 Ill. L. Rev. 400.

<sup>281</sup> *Linn v. Radio Centr. Delicatessen*, (1939) 169 Misc. Rep. 879, 9 N.Y.S. (2d) 110. Cf. *American Hoist & Derrick Co. v. Frey*, (1910) 127 La. 183, 186, 53 So. 486.

<sup>282</sup> N. D. Com. Laws, 1913 Supp., secs. 5991a, 5993a. Held constitutional in *Brathberg v. Advance-Rumely Thresher Co.*, (1931) 61 N.D. 452, 238 N.W. 552, 78 A.L.R. 1338; *Advance-Rumely Thresher Co. v. Jackson*, (1932) 287 U.S. 283, 53 Sup. Ct. 133, 77 L. Ed. 306, 87 A.L.R. 285.

<sup>283</sup> Second Draft (1941), sec. 15 (6).

for a particular purpose." This seems to be an excellent statement of a desirable rule.

Implied disclaimers arise where the buyer is given to understand, by the conduct of the seller or the circumstances surrounding the sale, that he is not receiving a warranty. One obvious illustration is a notice given him by the seller that the goods are defective; if he buys thereafter, he cannot be heard to say that he understood the contrary.<sup>284</sup> As has been seen, an offer of the opportunity to inspect the goods, made in such a manner as to notify the buyer that he must rely solely upon his own judgment, may amount to the same thing. The custom of a particular trade not to warrant,<sup>285</sup> or to limit the buyer's remedy for any breach in a particular manner,<sup>286</sup> has been held to carry an implied disclaimer into the contract; and this has the sanction of the Uniform Sales Act.<sup>287</sup> Undoubtedly the same may be true of any past course of dealing between the parties.<sup>288</sup> There are cases in which the character of the goods themselves precludes any idea that they are to be of merchantable quality, as where they consist of a waste product from the seller's plant, known to be uncertain and variable and sold for what it will bring.<sup>289</sup> By the same token, of course, any second-hand article cannot be supposed to be as good as new.<sup>290</sup> Likewise any new and untried invention understood to be still in the experimental stage,<sup>291</sup> or machine constructed specially according to the buyer's specifications,<sup>292</sup> cannot be expected to be of any standard marketable quality.

<sup>284</sup> *Anderson v. Van Doren*, (1919) 142 Minn. 237, 172 N.W. 117.

<sup>285</sup> *Blizzard Bros. v. Growers' Canning Co.*, (1911) 152 Iowa 257, 132 N.W. 66; *Miller v. Germain Seed & Plant Co.*, (1924) 193 Cal. 62, 222 Pac. 817, 32 A.L.R. 1215 (custom binding even if unknown to the buyer, if it is of general and universal application); *De Stefano v. Associated Fruit Co.*, (1925) 318 Ill. 345, 149 N.E. 284; cf. *Hoover v. Utah Nursery Co.*, (1932) 79 Utah 12, 7 P. (2d) 270; *Ross v. Northrup King & Co.*, (1914) 156 Wis. 327, 144 N.W. 1124.

<sup>286</sup> *Agoos Kid Co. v. Blumenthal Import Corp.*, (1933) 282 Mass. 1, 184 N.E. 279; see *Herbrand Co. v. Lackawanna Steel Co.*, (C.C.A. 6th Cir. 1922) 280 Fed. 11.

<sup>287</sup> Section 71, 2 Mason's 1927 Minn. Stats., sec. 8445. See *supra*, note 231.

<sup>288</sup> Section 71, Uniform Sales Act; 2 Mason's 1927 Minn. Stats., sec. 8445; *Matthes v. Benn*, (1919) 107 Misc. Rep. 633, 176 N.Y.S. 770; cf. *Moore v. American Molasses Co.*, (1919) 106 Misc. Rep. 263, 174 N.Y.S. 440.

<sup>289</sup> *Listman Mill Co. v. Miller*, (1907) 131 Wis. 393, 111 N.W. 496 (mill screenings); *Holden v. Clancy*, (1871) 58 Barb. (N.Y.) 590 ("slops from their distillery"). Cf. *Best Mercantile Co. v. Brewer*, (1875) 50 Cal. 455, 115 Pac. 726 (no warranty "May eggs" sold in December are fresh).

<sup>290</sup> *Morley v. Consolidated Mfg. Co.*, (1907) 196 Mass., 257, 81 N.E. 993. There may still, however, be a warranty that the goods are merchantable as second-hand goods. See *supra*, note 179.

<sup>291</sup> *Thielman v. Reinsch*, (1912) 103 Ark. 307, 146 S.W. 525.

<sup>292</sup> *Curwen v. Quill*, (1896) 165 Mass. 373, 43 N.E. 203. Cf. *Dunbar Bros. v. Consolidated Iron-Steel Mfg. Co.*, (C.C.A. 2d Cir. 1928) 23 F. (2d) 416.

Before the passage of the Uniform Sales Act, it was held in some jurisdictions<sup>293</sup> that the statement of an express warranty in the contract necessarily disclaimed by implication the existence of any other warranties that might be implied. Occasionally this was put upon the basis of the parol evidence rule, but more often it was said that the expression of one warranty must be intended by the parties to exclude all others not expressed. Where any inconsistency is to be found between the express warranty and what is to be implied, this conclusion is of course sound,<sup>294</sup> but even in the absence of the Sales Act it has been recognized that where there is no such inconsistency the fact that the parties have chosen to declare one warranty of special importance does not mean that they have abandoned others which would not normally be expressed at all.<sup>295</sup> The Act<sup>296</sup> has provided that an express warranty does not exclude an implied one unless the two are inconsistent. Under this provision, an inconsistency has sometimes been found,<sup>297</sup> but more frequently it is held that the two warranties are not necessarily contradictory, and that the one does not exclude the other.<sup>298</sup>

### CONCLUSION

From the simple proposition, first announced by Lord Ellenborough in 1815, that a dealer who contracts to sell goods of a particular description is understood to agree that he will deliver

<sup>293</sup> *Slinger v. Totten*, (1917) 38 S.D. 249, 160 N.W. 1008, L.R.A. 1917C 839; *Reeves & Co. v. Byers*, (1900) 155 Ind. 535, 58 N.E. 713; *Ford Motor Co. v. Switzer*, (1924) 140 Va. 383, 394, 125 S.E. 209; *De Witt v. Berry*, (1890) 134 U.S. 306, 10 Sup. Ct. 536, 33 L.Ed. 896.

<sup>294</sup> Thus in *Thomas v. Thomas*, (1906) 146 Ala. 533, 41 So. 141; *Hall v. Duplex-Power Co.*, (1912) 168 Mich. 643, 135 N.W. 118; *Gaar, Scott & Co. v. Hodges*, (Ky. 1906) 90 S.W. 580.

<sup>295</sup> *J. B. Colt Co. v. Gavin*, (1927) 33 N.M. 169, 262 Pac. 529; *Smith v. Russ Mfg. Co.*, (1932) 167 S.C. 464, 166 S.E. 607; *Illinois Zinc Co. v. Semple*, (1927) 123 Kan. 368, 255 Pac. 78; *Loxtercamp v. Lininger Implement Co.*, (1910) 147 Iowa 29, 125 N.W. 830; *Boulware v. Victor Automobile Mfg. Co.*, (1911) 152 Mo. App. 567, 134 S.W. 7; *J.I. Case Plow Works v. Niles & S. Co.*, (1895) 90 Wis. 590, 63 N.W. 1013.

<sup>296</sup> Sec. 15 (6), 2 Mason's 1927 Minn. Stats., sec. 8390 (6): "An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

<sup>297</sup> *Lee v. Cohrt*, (1930) 57 S.D. 387, 232 N.W. 900; *Tucker v. Traylor Engineering Co.*, (C.C.A. 10th Cir. 1931) 48 F. (2d) 783. In *Bekkevold v. Potts*, (1927) 173 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164, it was said that if the express warranty is inconsistent with only part of the matters covered by the implied warranty, the buyer may avail himself of what is not inconsistent.

<sup>298</sup> *Kitowski v. Thompson Yards, Inc.*, (1921) 150 Minn. 436, 185 N.W. 504; *Petersen v. Dreher*, (1923) 196 Iowa 178, 194 N.W. 53; *Flynn v. Bedell Co.*, (1922) 242 Mass. 450, 136 N.E. 252, 27 A.L.R. 1504; *Klinge v. Farris*, (1929) 128 Or. 142, 273 Pac. 854, 268 Pac. 748; *Burkett v. Oilomatic Heating Corp.* (1928) 241 Mich. 634, 217 N.W. 897; *Wise v. Central Iowa Motors Co.*, (1929) 207 Iowa 939, 233 N.W. 862; *Day Pulveriser Co. v. Rutledge*, (1931) 238 Ky. 817, 38 S.W. (2d) 949; *J. B. Colt Co. v. Asher*, (1931) 239 Ky. 235, 39 S.W. (2d) 263. See Mechem, Implied and Oral Warranties and the Parol Evidence Rule, (1928) 12 MINNESOTA LAW REVIEW 209.

what is commonly sold in the market under that description, the courts have developed the implied warranty of merchantable quality. It has grown, by degrees, to include not only genuineness according to the description and saleability in the market, but also fitness for the ordinary uses and purposes for which such goods are made and sold, and freedom from all defects which will interfere with sale or use. The time may yet come when it will be extended to include a grade or quality not totally inconsistent with the price. It has grown to include all dealers, even the retailer and the restaurant keeper, and to cover specific goods which are in the presence of the buyer and under his inspection when he agrees to buy. On all three fronts, although there are decisions which still lag behind, the battle is now virtually won for the buyer. The warranty includes all dealer sales in which the buyer is given to understand that he is to receive goods of a particular description, which means all but a negligible few. In short, it has become a standard dealer's warranty, presumed to exist, in practice and effect if not technically in law, in every sale made by one who deals in goods of the kind and description required by the contract, and defeated only by words or circumstances amounting to an express or implied disclaimer.

The implied warranty of merchantable quality is the most powerful weapon at the buyer's command. It has lain under the double shadow of the ancient tort origin of warranty, with its emphasis upon misrepresentation of a fact which the seller purports to know, and of the companion warranty of fitness for the particular purpose. Both have led many courts, in the past, to insist upon some reliance upon the seller's skill, or judgment, or supposed information. The warranty of merchantable quality does not rest, and from the beginning did not rest, upon any such basis. It is a matter of contract, of interpretation of the language used in the light of the fact that the seller is a dealer, and dealers deal in merchantable goods. The only "reliance" which it involves is reliance upon the seller's undertaking, as it is reasonably understood by the buyer. The pleasant sound of "fitness for the purpose" should not be allowed to divert attention from one warranty to the other, or to obscure the fact that goods are merchantable only if they are fit for ordinary use. The implied warranty of merchantable quality is in fact the more important of the two.

The recognition of the warranty in such terms in the Revised Uniform Sales Act<sup>299</sup> is merely a restatement of what the courts have done.

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<sup>299</sup> See *supra*, note 8.