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BUSINESS PRACTICE REGARDING WARRANTIES IN THE SALE OF GOODS

By GEORGE G. BOGERT and ELI E. FINK

THE PROBLEM CONSIDERED

What warranties of quality are present-day buyers of goods actually receiving? What is the business practice among manufacturers, wholesalers, retailers, and consumers with regard to guarantees of the performance of merchandise sold? How does modern warranty law operate in American commercial life?

It was questions of this type which caused the writers to attempt a small laboratory investigation in this field. Members of the class studying the law of Sales of Personal Property in the University of Chicago Law School in 1929-30 were required to make a written report regarding business practice in the law of warranties of quality. Each student selected a particular kind of goods and a special type of sale of those goods to which to apply himself. Thus, one examined sales of automobiles by distributors to users, another sales of automobiles by manufacturers to distributors, a third sales of pianos by manufacturers to users. Each student was directed to interview, personally or by mail, at least six different sellers in the chosen class of business. It was deemed impracticable to require interviews with buyers. Some investigators, however, did obtain information from jobbers and retailers with regard to their purchases. The students were asked to secure answers to the following questions:

1. To what extent are express warranties given?
2. What are the terms of such warranties?
3. To what extent are warranties which would normally be implied under Uniform Sales Act
   a. tacitly left in effect?
   b. made express?
   c. excluded expressly or by reason of an inconsistent express warranty?
4. To what extent are the remedies for breach of warranty which would be available under the Uniform Sales Act
   a. left in effect without mention?

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b. made express?
c. broadened by the giving of a supplementary remedy?
d. expressly excluded by the substitution of another remedy?

Copies of sales contracts in actual use were to be attached to the reports when possible.

The principal purposes of the instructor in requiring these investigations were: (1) to stimulate an intensive study of the common and statute law of warranties. The students could not intelligently talk with or write to business men about their practices and correlate the information obtained without a reasonable familiarity with the controlling principles of case and statute law in the field of express and implied warranties; (2) to prevent students from getting the impression that rights of buyer and duties of seller in the field of warranties rest entirely on the common law rules restated in sections 12 to 14 of the Uniform Sales Act, and to impress them with the powers of control which interparty agreements, trade association understandings, and standard forms of sales contracts possess. The more naive disciple of the law, at least, is prone to believe, for example, that every sale by description by a dealer in goods of the kind sold involves an implied warranty of merchantability and no other obligation; (3) to test the popularity of existing warranty law among sellers and buyers. Assuming freedom of contract (perhaps a large assumption), the exclusion or inclusion of Sales Act warranties and remedies in typical sales contracts ought to afford some evidence of the adaptation of the Sales Act to present business conditions.

DIGEST OF THE REPORTS

The following lists indicate the topics covered by the eighty reports received:

Machinery and Mechanical Devices

Incinerators (mfr. to user); cash registers (mfr. to user); automatic weighing scales (mfr. to user); adding machines (mfr. to user); floor surfacing machinery (mfr. to user); water heaters (mfr. to user); vacuum cleaners (mfr. to user); oil burners (mfr. to user); mechanical refrigerators (mfr. to user); washing machines (dealer to user); water softeners (mfr. to user); dry cleaning tumblers (mfr. to user); steam pumps (mfr. to user); electric toy trains (mfr. to dealer and user); motion picture machines (mfr. to user); radios (mfr. to dealer and user); radios (dealer to user); pianos (mfr. to user); radio loud speakers (mfr. to user); auto-
mobiles (mfr. to distributor and distributor to user; two reports); automobile bodies (mfr. to user); automobile tires (dealer to user); storage batteries (mfr. to dealer and user, and dealer to user; two reports); airplanes (mfr. to user); typewriters (mfr. to user).

Mineral Products
Monuments (quarrier and mfr. to user); coal (jobber to retailer and retailer to user; two reports).

Sporting Goods
Ivory billiard balls (mfr. to retailer); sporting firearms (mfr. and dealer to user); sporting and athletic goods (dealer to user).

Prescription Goods
Optical lenses (retailer to user); drugs (retailer to user).

Jeweler’s Goods
Watches (mfr. to retailer and user); plated silverware (mfr. to user).

Household Furnishings
Domestic rugs (mfr. to retailer); oriental rugs (dealer to user); furniture (mfr. to retailer; two reports); furniture (dealer to user).

Food and Drink
Meat (packer to dealer; two reports); fresh fruit and vegetables (wholesaler to retailer; two reports); canned fruit and vegetables (canner to broker); milk (distributor to retailer); animal feed (mfr. to user); coffee (wholesaler to retailer); candy (mfr. to jobber); near beer (mfr. to retailer and user); flavoring extracts (mfr. to user).

Wearing Apparel and Personal Articles
Smoking pipes (jobber to retailer); furs (mfr. to retailer and retailer to user; two reports); dresses (wholesaler to retailer); raincoats (mfr. to retailer); hair goods (mfr. to retailer); ladies’ hosiery (wholesaler to retailer); sweaters (mfr. to retailer); shoes (mfr. to retailer).

Building Materials
Wall paper (mfr. to jobber); roofing (mfr. to dealer); plumbing and heating fixtures (mfr. to contractor or user; two reports); flat glass (wholesaler to retailer); paints and varnishes (mfr. to retailer and retailer to user; two reports); brick (mfr. to user);
furnaces (retailer to user); boilers (mfr. to user); electric renewable fuses (mfr. to jobber and jobber to user).

**Miscellaneous**

Dies (mfr. to user); printer's ink (mfr. to user); advertising specialties (jobber to user); envelopes (mfr. to user); fountain pens (mfr. to user); starch (mfr. to wholesaler).

**Cases of No Express Warranty.** In twenty-two of the eighty reports a total or partial absence of any express warranty was found. In some cases the exceedingly low grade or quality of the article explained the failure to warrant, as in the case of klinker brick and the cheaper brands of sporting firearms and smoking pipes. In auction sales of oriental rugs the buyer is put on his guard and no guaranty is made. In the following cases the sale is customarily by description or sample and the implied warranty thus arising obviates the necessity of any express warranty: envelopes, ladies' hose, automobile bodies, coal, starch, fresh fruit and vegetables, milk, meat, optical lenses, drug prescriptions, and sweaters. In other instances the absence of an express warranty is wholly or partly explained by the delicate or perishable nature of the goods and the ease with which the buyer could injure or destroy them by abuse. In this class fall the sales of ladies' hose, furs, sporting goods, fresh fruits and vegetables, meat and printer's ink. In sales of furs, fire brick, face brick, flat glass, and oriental rugs it is said that the peculiar character of the goods makes it particularly hazardous for the seller to forecast the performance or the specific grade of the goods. Where the buyer is skilled and the goods are open to inspection (as in the case of the sale of fruits, vegetables, and meat at wholesale), it is natural that there should be no express warranty. And so, if the goods are to receive especially hard usage, as when silverware is sold for use in hotels and other public places, the lack of a warranty is reasonable. In many cases the reports allege that although there is no express warranty, the sellers are in fact very liberal in making adjustments to reliable customers. This latter fact was especially mentioned in the reports on sporting goods, automobile bodies, oriental rugs, and sweaters.

**Typical Express Warranties.** In the great majority of cases one or more express warranties were given. These warranties, while possessing many slight variances, may be classed into nine groups, as follows:

1. **Absolute satisfaction.** This warranty was comparatively rare but was found in the sale of hair goods, furnaces (two cases),
paints and varnishes (mfr. to retailer), plated silverware (five out of six cases), oil burners (one case), floor surfacing machinery (three out of six cases), and incinerators (two out of six cases).

(2) Freedom from defects in materials or workmanship. This was found to be a very common form of guaranty, appearing in at least thirty-two of the eighty reports, and being especially common in the case of the sale by a manufacturer of machinery or other mechanical appliances. It was reported to be given in the case of the sale of cash registers, incinerators, scales, adding machines, electric fuses, floor surfacing machinery, water heaters, vacuum cleaners, oil burners, mechanical refrigerators, washing machines, water softeners, dry cleaning tumblers, steam pumps, electric toy trains, motion picture machines, watches, radios, pianos, radio loud speakers, furniture (retailer to user, five out of seven), automobiles, automobile tires, storage batteries, airplanes, better grades of sporting firearms, plumbing and heating fixtures, furnaces, boilers, dresses, shoes, typewriters. The warranty is limited in time, dependent on the character of the article and the period deemed necessary to bring out weaknesses in ordinary use.

(3) Particular detailed performance or capacity. In a few cases it was reported that the seller guaranteed that the goods would possess certain named qualities (as, for example, be waterproof in the cases of roofing), or perform a certain named amount of work or type of work, or last for a specific period. Examples of this type of warranty were found in sales of floor surfacing machinery (four out of six cases), water heaters, oil burners (three out of six cases), water softeners, especially good tires, storage batteries, standard sporting firearms, furnaces (four out of six cases), paint, and raincoats.

(4) Warranty against particular harmful or disadvantageous results. In a few cases statements as to performance were made in a negative form, and guarantees made against harmful traits. Thus, in the case of hair goods it is usual to warrant against harmful effects to the person; in the case of smoking pipes against burning out or cracking; in rare cases in the sale of fruits and vegetables against rotting or freezing; in sales of radio loud speakers against rattles under certain conditions; in sales of monuments against splitting or cracking under weather; and in some cases of floor surfacing machinery against dust in operation.

(5) Compliance with statutory requirements. Where goods have been subjected to inspection or regulation under statute, it is common to find the seller warranting that the goods meet the statu-
tory demands. The best case of this type discovered was that of the federal Pure Food and Drug Act, compliance with which was guaranteed in the case of sales of meat, canned fruit and vegetables, coffee, candy, and flavoring extracts.

(6) Compliance with trade association specifications. Occasionally a trade association lays down standards and the seller agrees that his product meets these requirements. This is true with boilers (code of American Society of Mechanical Engineers), wallpaper (standards of Wallpaper Association of the United States), and electric fuses (standards of National Board of Fire Underwriters).

(7) Goods tested before shipment. Occasionally, as in the case of two scales manufacturers, a seller warrants that the goods were inspected before being shipped by him.

(8) In good condition when shipped. Closely akin to the last named warranty is the assurance sometimes given that the goods were not damaged or broken when shipped. This applies naturally to goods especially liable to injury in shipment. Examples are found in sales of electric toy trains, monuments, advertising specialties, billiard balls, and candy.

(9) Against patent infringement. Occasionally the seller of a patented machine warrants against patent infringement. This was true in the case of one manufacturer of floor surfacing machinery and one manufacturer of water softeners. If not so treated, the point would seem to be covered by the implied warranty of good right to sell.

Special Treatment of Accessories. In some cases where the seller is a manufacturer but buys parts of the machine from others and merely attaches or assembles the parts furnished by others and those made by himself, the manufacturer has made a special statement in his sales contract regarding the accessory parts. In most cases the seller of the completed product excludes any warranty on his part as to the accessories. This is true with airplanes, automobiles, radios, washing machines, and in one case with water heaters. But in sales of steam pumps and in two cases of water heaters, the seller of the completed machine limits his warranty of the accessories to the same terms as that of the warranty of the manufacturer of the accessory parts.

Implied Warranties. In no case was it reported that an implied warranty arising under the Sales Act was expressly stated by the seller in the language of the act. The cases in which the express warranties given in effect partly or entirely corresponded
In a number of instances, however, one or more remedies for breach of warranty were expressly provided for in the contract. The Sales Act remedy of rescission (or return of the goods with money refunded) was expressly mentioned by sellers of shoes, hair goods, rain coats, dresses, furs, and in three cases of floor surfacing machinery. The Sales Act remedies of recoupment, counterclaim, and action for damages naturally were not expressly named, since no seller would care to picture litigation to a prospective buyer.

In many cases sellers provided for remedies not named in the Sales Act. Typical cases are those of repair (typewriters, fountain pens, dresses, boilers, roofing, electric toy trains, oil burners, adding machines, scales, and cash registers), replacement (raincoats, dresses, furs, paint, brick, plumbing fixtures, heating fixtures, wall paper, smoking pipes, plated silverware, pianos, monuments, washing machines, oil burners in one case, vacuum cleaners, floor surfacing machinery in two cases, electric fuses, scales in three cases, and incinerators), repair or replacement at the seller’s option (furnaces, roofing in one case, storage batteries in three cases, automobile tires, radio loud speakers, radios, watches, advertising specialities, dry cleaning tumblers, water softeners, mechanical refrigerators in one case, oil burners in one case, dies, water heaters, scales in two cases), repair or adjustment in the accounts of the parties (storage batteries in three cases), and replacement or adjustment in the mutual accounts (flavoring extracts, near beer, candy, animal feed, vegetables and fruit in the rare cases of warranty, furniture at retail, furniture in sales by manufacturer, and domestic rugs). It is understood, of course, that where a single part of a machine proves defective the remedy of repair or replacement refers to the defective part or parts only.

In a few cases (water heaters (3), oil burners (1), mechanical refrigerators (2), water softeners (3), steam pumps (4), automobiles, and airplanes) repair or replacement was clearly stipulated to be the exclusive remedy available to the buyer in case of breach of warranty. It is probable that many other sellers feel that the mere mention of a remedy for breach of warranty amounts to an implied exclusion of all other remedies, but the cases tend to treat an expressly named remedy as supplementary to the common law or statutory remedies, unless expressly made exclusive.

Trade Associations. The following trade associations are reported to have great influence in deciding what warranties shall

1. Eyers v. Hadden (1895) 70 Fed. 648; Inner Shoe Tire Co. v. Tondro (Calif. 1927) 257 Pac. 211 (manufacturer’s standard warranty).

The standard automobile warranty is as follows:

"WARRANT each new motor vehicle manufactured by us, whether passenger car or commercial vehicle, to be free from defects in material and workmanship under normal use and service, our obligation under this warranty being limited to making good at our factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser, be returned to us with transportation charges prepaid, and which our examination shall, disclose to our satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied and of all other obligations or liabilities on our part, and we neither assume nor authorize any other person to assume for us any other liability in connection with the sale of our vehicles.

"This warranty shall not apply to any vehicle which shall have been repaired or altered outside of our factory in any way so as, in our judgment, to affect its stability, or reliability, nor which has been subject to misuse, negligence or accident, nor to any commercial vehicle made by us which shall have been operated at a speed exceeding the factory rated speed, or loaded beyond the factory rated load capacity.

"We make no warranty whatever in respect to tires, rims, ignition apparatus, horns or other signaling devices, starting devices, generators, batteries, speedometers or other trade accessories inasmuch as they are usually warranted separately by their respective manufacturers."

The standard tire warranty is as follows:

"Every pneumatic tire of our manufacture bearing our name and serial number is warranted by us against defects in material and workmanship during the life of the tire to the extent that if any tire fails because of such defect, we will either repair the tire or make reasonable allowance on the purchase of a new tire."

The standard radio warranty is as follows:

"We guarantee this radio receiver against all defects in workmanship or material for ninety days after date of sale to original purchaser, provided that our inspection reveals no tampering with or repairing outside of our own factory."

The standard passenger car battery warranty is as follows:

"The manufacturer guarantees to repair or replace at its option f.o.b. factory or any authorized service station, without charge to the user, except transportation, any battery of its manufacture which fails
the fact that the institution may have originated historically in the
application of some familiar notion to a new purpose (as in the
case of the marriage ceremony). 73

Maine speaks of adoption as being one of the most important
and helpful of fictions, without telling us what is fictitious about
adoption. 74 The social and legal institution of adoption is not a
fiction in any ordinary sense. If there is any fiction involved in
the idea of adoption it is in one of the following notions. (1) It
is convenient to describe the institution by saying that the adopted
child is treated as if he were a natural child. But this is a mere
convenience of linguistic expression. (2) In primitive society, be-
cause of the extreme tenacity of the intellectual concepts of the
primitive mind, adoption as a social institution probably would not
have been possible without some pretense of blood relationship.
This is illustrated in the ceremonies which accompany adoption
in primitive society, as where the child is dropped through the
clothing of the adopting parent in imitation of birth. 75 (3) The
original invention of the notion of adoption involved, probably, an
imaginative flight, an exercise of ingenuity, similar to that which
attends the birth of a legal fiction. But none of these facts means
that adoption, as a social institution existing in present-day society,
is a fiction.

One should also guard against the converse sort of error, that
of supposing that because there is a social reality back of a fictitious
statement, the statement itself is therefore non-fictitious. Professor
Sturm protests that the quasi-contract is not a fiction because it re-
resents a social institution, that in such-and-such cases recovery may
be had in the courts. 76 But this does not keep the term quasi-con-

73. Upon a somewhat deeper level of discourse, a social or legal insti-
tution may be regarded as a fiction in the philosophic sense in which the
word “fiction” is used by Vaihinger. In fact (or at least “in fact” if one
does not penetrate to a still deeper plane of discourse) we have only an
enormous number of individual acts by individual human beings, never taking
quite the same form and never having quite the same purpose. To intro-
duce simplicity into this chaos of individual actions, we postulate certain
“institutions,” we group together certain recurring acts which show a thread
of similarity into a conceptual entity which we call an institution. A later
age may classify our actions upon an entirely different basis than that we
are accustomed to, may see in our conduct an entirely different set of “insti-
tutions.” Conversely, our classification of our own actions into “institu-
tions” may seem as arbitrary and unreal to a later age, as the concept of
“seisin” seems arbitrary and unreal to the modern student of law.
74. “Ancient Law” ch. II.
75. P. J. Hamilton-Grierson “An Example of Legal Make-Believe”
(1908) 20 Juridical Rev. 32 and (1909) 21 id. 17. Strangely enough, the
ceremony of dropping the child through the clothing is performed even
when the adopting person is a man.
76. Sturm “Fiktion und Vergleich in der Rechtswissenschaft” p. 47.
to give satisfactory service within a period of 90 days from date of
sale to the user.

"ADJUSTMENT WARRANTY: The manufacturer further
agrees after expiration of the 90 days' guarantee period to replace
with a new battery, on a pro rata basis, any battery which fails in
normal passenger service.

"Normal passenger car service is considered not over 1,000 miles
per month.

"The adjustment period to be established by the manufacturer based
on the quality of the battery, but in no case to exceed 18 months.

"All adjustments are to be based on the current list price plus
transportation charges.

"Example: A battery carrying 12 months' adjustment warranty
listing at $12.00, fails in service in 9 months from date of purchase.
The user receives a new battery of the same type for 9/12 of $12.00,
or $9.00, plus transportation charges.

Consequential Damages Excluded. In a few instances reports
show that sellers stipulate that all or certain consequential damages
apt to flow from a breach of warranty are not recoverable against
the seller. The buyer is obliged to bear the risk of loss from such
consequential or "contingent" damages in some cases in the sale
of dies, water heaters, oil burners, steam pumps, roofing, and
plumbing and heating fixtures.

Manufacturer's Direct Liability Recognized. In nine cases the
warranty of the manufacturer is made in terms direct to the con-
sumer or user, ignoring the dealer or retailer, and the practice
is that the manufacturer makes good to the ultimate user for de-
fects in the goods either by direct dealing or through the agency
of the dealer who acts as an intermediary for transmitting com-
plaints. These cases are the sales of typewriters, fountain pens,
boilers, paints, sporting firearms, storage batteries, automobiles,
radios, and watches. The manufacturers of these articles thus
recognize the fairness of responsibility by them to the remote user
of their goods and the impolicy of asserting the legalistic notion
of privity of contract which would compel the user to seek a remedy
against the dealer and the dealer against the manufacturer. Ob-
viously under the dangerous instrumentality theory in torts it is
possible that the manufacturers of boilers, firearms, and automobiles
might be liable to users for serious defects.

Comment on the Reports: the Manufacturer's Standard
Warranty

Perhaps the most interesting feature of sales contracts no-
ticed by the reports is the standard manufacturer's warranty
clause. As previously shown, it is a guaranty for a limited period against defects in the materials or workmanship of the goods sold by the manufacturer, the sole or a supplemental remedy for breach usually being repair or replacement of the defective part on certain conditions.

Prior to the Sales Act the common law generally placed on the manufacturing seller an implied obligation that his goods were fit for the purpose for which the buyer stated he desired to use them, if the buyer relied on the seller to select such goods. The English view was that this liability was absolute and not avoided by proof on the part of the manufacturer that he had used reasonable care in selecting materials and employing workmen. The New York view was that the manufacturing seller discharged his duty by using reasonable care with regard to raw materials and workmanship, thus making the standard one of negligence. The Sales Act restated the English common law rule. At common law the manufacturing seller was said to be relieved of this warranty if the buyer had ordered a “known, described, specific” article, provided that the thing furnished answered the description of the known, described, specific thing, no matter whether it fitted the buyer's purpose or not. The Sales Act has perpetuated something like this exception in different language by providing that there shall be no implied warranty of fitness for purpose when the sale is “under a patent or trade name.”

Thus, for many years, in most American jurisdictions, the manufacturing seller has, in the absence of express stipulation to the contrary, been under a rather heavy burden of insurance of the performance of his goods. The buyer's purpose in ordering the goods is nearly always expressly stated to the seller, or is impliedly made known to him from the nature of the goods and the buyer's business. If a shoe manufacturer orders shoe manufacturing machinery, his intent to apply the goods in making shoes does not have to be spelled out in capital letters in order to inform the seller, nor is reliance on the seller's skill to manufacture machinery adequate to the purpose a fact hard to find. As shown above, in the case of the sale of large numbers of manufactured products of moderate cost, the modern tendency has been strong to exclude

4. Sec. 15.
6. Sec. 15.
this guaranty of desired performance of the article as a unit, and to limit the warranty of the manufacturer to an assurance that none of the parts of the manufactured product will prove within a limited time to be of defective material or workmanship. The emphasis is being changed from an absolute assurance of satisfactory performance of the article as a whole to an absolute guaranty of the strength and processing of the parts. The new substituted express warranty does not seek to restrict the manufacturer's liability to negligence only.

It is interesting to observe the express warranty cases noted in the American digest system as arising prior to 1896. They are predominantly concerned with warranties of horses, cattle, agricultural products, raw materials, and only occasionally with machinery. In the few cases where the subject-matter of the sale was machinery or other manufactured product, the seller usually guaranteed that the article would perform detailed work in a certain manner and would operate as well as any other machine of the same kind. The manufacturing seller thus assumed a burden as great or greater than that which the law would have placed upon him by implication. But with the tremendous development in the manufacture of machinery and other mechanical appliances which has come about in the last three decades, with the increasing complexity of such machines, and with the organization of the sellers into associations has come a strong tendency to reduce to a minimum the warranties of specified performance and place emphasis solely on mechanical perfection.

The terms of the manufacturer's warranty at first sight may seem somewhat unduly favorable to the seller. The defect which constitutes a breach must appear in normal use within a short period after delivery of the goods. The burden is on the buyer to prove normal use. The seller is the judge of the buyer's case and of the remedy to be applied. If the buyer keeps the article without use for a long period after delivery, he may find that the guaranty period has expired before he has given the goods a real test.

 Apparently the warranty gives the buyer no assurance that the design of the article is safe or appropriate to any particular purpose. Thus, probably a washing machine would comply with this

guaranty, if each part was of strong wood or metal and well formed, although in use the machine might launder clothes only with danger or damage. The demonstration usually given with manufactured products of this type would doubtless disclose any serious defect in design.

The frequent limitation of liability under this warranty with regard to accessories made by others is noteworthy. This clause applies to automobile horns and lamps, and radio tubes, for example. The attitude of the manufacturer of the completed article with regard to accessories is doubtless based on the grounds that the accessory manufacturers warrant such article so that no warranty by the main manufacturer is needed, and also that it is not fair to expect a warranty of the accessory from the principal manufacturer since he merely buys and attaches the accessory and knows nothing of its materials or construction. But both of these reasons seem fallacious. The purchaser of the complete automobile, for example, has no contractual relation with the manufacturer of the bodies, tires, horns, lamps, and other separate parts. He could not hold such manufacturers of parts on assurances they might make to automobile manufacturers under the generally prevailing theory of warranty law, which requires privity of contract between warrantor and warrantee. Even though sellers of accessories voluntarily make replacement or repairs in favor of drivers of cars, the latter ought not to be obliged to take up with distant parties, strangers in law to them, adjustments regarding defective parts. The user contracted for a unit, not for a group of parts. Secondly, the ignorance of the automobile manufacturer regarding the business of the accessory manufacturer is not important, since the automobile manufacturer obviously sold the automobile and all its parts, and warranty law is founded on sale coupled with reliance by the buyer, and not upon any theory of care or negligence by the seller.

The standard warranty usually provides repair or replacement as the sole or as a supplementary remedy. The buyer is almost always required to bear the expense of returning the machine or its parts to the seller. The seller stands the expense of repair or replacement. The remedy is conditioned on absence of a previous attempt by the buyer to have the goods repaired by himself or by a third party, if such other repair or alteration has in the opinion of the seller injuriously affected the goods. Consequential damages are sometimes excluded. Repair or replacement is apparently limited to one occasion. If the part repaired or replaced should give trouble, apparently the buyer is to have no recourse against the seller. Thus,
to put an extreme case, if one purchases an automobile under the standard warranty, and while driving it in a normal way within ninety days after delivery, an axle breaks and the buyer is killed, his representative may be limited to a return of the broken axle to the factory at his own expense and the obtaining of a new axle. There can be no recovery for the destruction of the remainder of the car or for the death of the buyer, although both were obviously proximately caused by the breach of warranty that the axle was of sound materials and good workmanship.

If it be admitted that some or all of these manufacturers' warranty clauses are unfair to the buyer, it may be urged that the buyers are at fault in accepting such inadequate protection and deserve no sympathy. This argument, however, ignores a certain limitation on freedom of contract in such cases. Many manufacturers, as previously noted, have formed trade organizations and agreed to the universal use of these limited warranty clauses. Many buyers have no choice. If they desire to purchase an automobile, a radio, or a storage battery, they must accept the standard, uniform contract.

If this condition of seller's control over the contract develops and continues, the most direct and practical relief may be an amendment to the Uniform Sales Act, inserting the manufacturer's warranty of materials and workmanship into the act as an implied warranty, broadening it to meet the possible objections to it named above, and making waivers by the buyer of such a warranty and the remedies thereunder void. The constitutionality of such a statute might, of course, be questioned, but it is believed that the positions of seller and buyer of manufactured articles, when trade associations and standard contracts are in effect, may become so unequal that the legislatures may be justified in applying in such cases a rule similar to those laid down in the chattel mortgage cases where there is an attempt to waive the right of redemption, 8 conditional sales contracts which seek to stipulate for a waiver of the buyer's rights regarding his equity, 9 and carriage and employment contracts which purport to relieve the carrier or employer from liability for his own negligence. Clauses of this type have been declared void as against public policy. If the modern seller achieves such a superiority of position over the modern buyer, 10

through patents, combinations, trade associations, and uniform contracts forced on the buyer, why should not the legislatures step in and insist on the recognition of certain minimum rights and remedies on the part of the buying public?

Some argument for the addition of such a suggested implied warranty to the Sales Act list may be found in certain weaknesses in the implied warranties of merchantability and fitness for purpose. The former is vague in its nature. The courts and learned authors disagree on its meaning. The latter is excluded by a sale under a patent or trade name and many manufactured products are now sold by such names.

In *Snelling v. Dine* the defendant, a retailer, contracted to buy from the plaintiff, a manufacturer, fifty Socold refrigerators. When sued for breach of contract in refusing to take more than ten refrigerators, the defendant sought to reduce the recovery by way of recoupment on the ground that some of the ten refrigerators furnished by the plaintiff and resold by the defendant did not operate efficiently in the hands of the purchasers from the defendant. The court held that the sale was under a trade name and therefore there was no warranty implied that the refrigerators would be fit for any particular purpose; and that the refrigerators were merchantable because salable in the market as Socold refrigerators, although they were not so efficient as the defendant expected. There was no express warranty in the contract, although refrigerator manufacturers in the Chicago area, according to the reports here discussed, include the standard manufacturer's warranty against defects in materials or workmanship. Thus, the defendant had to pay the full damages, a result which seems an obvious injustice. An implied warranty of the standard manufacturers' type would have aided the buyer in this case and would have worked justice.

It would seem that the law should imply those warranties which honest and fair minded sellers and buyers, acting freely, customarily make as the elementary bases of their contracts. The implied warranties of the Sales Act are doubtless based on the business prac-


14. (Mass. 1930) 170 N. E. 403; for similar cases see *Wilson v. Lawrence* (Mass. 1855) 1 N. E. 278; *Gossler v. Eagle Sugar Refinery* (1869) 103 Mass. 331; *Harris v. Waite* (1879) 51 Vt. 481.
WARRANTIES IN SALES

Warranties in sales. They were codified in England in 1893 and taken over with little change in America in 1906. At the time of the formation of these rules machinery and other similar mechanical products as articles of commerce were much less common and complex than nowadays. It may well be that the rapid development of machinery and mechanical devices and the growth of an accepted business practice among sellers and buyers of such articles justifies the addition to the act of a separate classification of sales and a separate implied warranty thereunder. The wide spread of the standard manufacturers' warranty creates a presumption that some term of this type is needed in contracts for the sale of machinery. If the standard warranty is found liberal enough toward the buyer, the matter may well be left to express contract; but if the seller's position enables him unduly to limit the warranty, the legislatures may properly extend and amplify the warranty and the remedies thereunder somewhat, so as to include the features which honest and fair minded parties would provide if they were on an equal basis and contracting freely.

The above criticisms of the manufacturers' standard warranty undoubtedly have some weight, but it should be borne in mind that in a majority of cases the manufacturer has not made the standard warranty his sole obligation with regard to the quality of the goods, and that other practical factors improve the buyer's position. In the great majority of sales of machinery and mechanical devices the sale is by sample, description, or trade name, and the buyer thus obtains one or more of the warranties of correspondence with sample, description or trade name, or the warranty of merchantability. If, for example, one buys a "Majestic Radio, Model 211," there is usually an order for the goods under that description and a demonstration through the use and exhibition of another machine, so that the buyer generally obtains an implied warranty that the machine furnished is of the trade name description and like the sample shown. The demonstration enables the buyer to discover any patent unfitness for his purpose. These implied warranties, coupled with the standard express warranty, probably in most cases give the buyer adequate protection.

In addition, the ordinary buyer gets the benefit of the common maxim—"the buyer is always right." The reports contain strong evidence that the modern seller will go to great lengths to please his customers. In practice he does not stop at his legal obligations,
but takes any reasonable steps to retain good will. The strict letter of the law is enforced by the seller only against buyers who are exceedingly unreasonable or are strongly suspected of fraudulent practices.

As previously shown, the practice among manufacturers and dealers with regard to the operation of the manufacturer's warranty against defects in material and workmanship is that the complaints are satisfied either by the manufacturer directly or through the agency of the dealer. The manufacturer assumes that he is directly liable to the user. If the complaint goes through the dealer, it is for convenience's sake. The dealer does not regard himself as having any personal responsibility. All parties regard him as a conduit or intermediary for adjustment purposes, even though he has himself warranted the goods and sold them as his own. These facts manifest a practical repudiation by the manufacturers and dealers of the legalistic notion that warranties of personal property should be effective only between parties in privity of contract. Business practice in this regard is in accord with the minority of the American courts, and may, if supported by other commercial usage, justify an overthrow of the majority privity of contract theory. Such a result would be another praiseworthy assimilation of the law of real and personal property.

Certain other fundamental tendencies in the manufacturers' and dealers' contracts and practices are noticeable. The first is a recognition of the economy of separability. At common law and under the act, without express provision to the contrary, a defect in a part of a machine which constituted a breach of warranty would justify the buyer in rejecting the whole contract, or recovering damages for breach of the contract as a whole. The result of such a unit treatment might well be that the seller would have on his hands a rejected or returned article which he would have to sell at a sacrifice, or that the buyer would allow the machine to deteriorate or become ruined, depending for protection on the breach

15. The president of a wall paper company stated: "If one of our customers puts our paper on the wall, and then decides he doesn't like it for any reason whatsoever, we take it back, regardless of whether there is a defect or not, and the factory will cooperate with us."


of warranty. Thus, there might be an economic waste. Under the standard contract the seller is given an opportunity to repair his defective performance and the machine is saved for immediate effective use by one who needs it, instead of being thrown back on the seller or left idle.

The second tendency observable is the desire to avoid litigation. The delays, expenses, and uncertainties of lawsuits have in other contracts induced parties to provide for arbitration of disputes. In these standard manufacturers' agreements the seller, who has drawn the contract, is in substance made arbitrator of any dispute between himself and the buyer. The seller decides whether there is a defect which occurred in normal use, whether the buyer has prejudicially affected the article by a previous effort to repair it, and whether, if the buyer's complaint is justified, there shall be repair or replacement. The seller insists that there shall be no litigation. If the seller refused to live up to his agreement, to repair or replace, doubtless the buyer could get damages based on the cost of securing repair or replacement elsewhere, or in case of unique articles or parts (as in the case of patents) might secure specific performance of the contract to repair or replace; but these possibilities of litigation which the standard clause leaves open are rather remote. Doubtless it is felt that the manufacturer's desire to obtain and retain good will under the highly competitive conditions of modern business is a sufficient assurance that the manufacturing seller will be liberal and reasonable in satisfying complaints about defective parts.