Insurance—Sales Guaranty as a Contract of Insurance—[Ohio].—A mass distributor of private brand auto tires presented to each tire purchaser a guaranty whereby the defendant agreed to repair or replace the tire should it fail within the specified replacement period, without limit as to cause of failure (except fire and theft). If replacement was made, the purchaser was charged a prorated share of the purchase price for the use of the old tire. In a *quo warranto* proceeding to oust the defendant from engaging in the business of insurance, *held*, judgment of ouster should issue. This was a contract substantially amounting to insurance and within provisions of the statute requiring insurance companies to comply with state laws regulating the business of insurance.[1] *State ex rel. Duffy v. Western Auto Supply Co.*[2]

Since the use of this blanket type of guaranty is widespread it seems probable that similar actions may be brought in other states.[3] Although the technical wording of the Ohio statute is broad enough to justify the court's conclusion that this is a contract substantially amounting to insurance, it seems very unlikely that the act was intended to be used in such a manner, *i.e.*, in effect, to control competitive merchandising practices.[4]

The business of insurance has been universally recognized as being impressed with a public use and as such subject to state regulation and supervision.[5] The ease with which policy holders might be defrauded by financially irresponsible or unreliable companies makes imperative the regulation of insurance by the state. Thus, there are statutes which provide for close supervision of the activities of insurance companies to assure the careful and proper handling and distribution of the premiums that have been paid into the fund from which the benefits must ultimately come. In the sales cases, the buyer has received his *quid pro quo* and the necessity of safeguarding a reserve is not so strong. These laws were primarily meant to discourage so-called benefit-associations which were engaging in the insurance business and seeking to escape state regulation.[6]

The defendant claimed that its agreement to indemnify the buyer was simply a warranty of quality which was adopted because it was found that this arrangement served as the most satisfactory, inexpensive and convenient method of adjusting customers' complaints, since the average motorist feels that every tire failure is due to an inherent defect.[7]

A warranty is an affirmation of fact or a promise by the seller concerning an article of sale, which is meant to induce the sale, and upon which the buyer has a right to rely.[8] Even the simplest warranty, which could not possibly be construed as an insurance contract, protects the vendee against risk of loss after title has passed, which

[1] Ohio Gen'l Code, § 665. [2] 16 N.E. (2d) 256 (Ohio 1938).

[3] The wording of the statutes is controlling, of course, and in many states may serve as a means of distinguishing the principle case as a precedent. For examples of statutory interpretations in analogous situations see: Pennsylvania v. Provident Bicycle Ass'n, 178 Pa. 636, 36 Atl. 197 (1897); Ollendorf Watch Co. v. Pink, 253 App. Div. 73, 300 N.Y. Supp. 1175 (1937).

[4] Tire manufacturers had a direct interest in the decision, since the use of this guaranty is said to have cost them $10,000,000 a year. Advertising Age, July 18, 1938, 8.

[5] Fidelity Mutual Life Ass'n v. Mettler, 185 U.S. 308 (1902).

[6] Vance, Insurance 29 (2d ed. 1930).

[7] See Advertising Age, July 18, 1938, 8, commenting on the principal case.

[8] Uniform Sales Act, § 12.

risk, without this protection, would have passed to the vendee. The Ohio insurance statute does not define insurance, but it is reasonable to suppose that it was never intended to prohibit vendors from warranting the goods which they sell.

The court apparently felt that this guaranty was not a warranty because, as it says, "A warranty promises indemnity against defects in the article sold, while insurance indemnifies against loss or damage resulting from perils outside of and unrelated to defects in the article itself."[9] No authorities are cited in support of this proposition.[10] In a similar case involving an agreement by the seller to indemnify the buyer against all losses caused by failure of the article sold (lightning rod), the court says, ". . . . so may one sell goods and agree that the purchaser will receive certain benefits. . . . . Such a contract would be a guaranty or warranty and not a contract of insurance."[11]

Various tests to determine whether particular agreements to indemnify are warranties or contracts of insurance have been suggested.[12] A number of cases state that in order to have a contract of insurance, the extent to which the insurer will be liable must be specific, *i.e.*, there must be an agreement to pay either a maximum or ascertainable sum on a specified contingency.[13] An often cited Pennsylvania opinion[14] says that an agreement to "repair or replace" is not the generally accepted practice of insurance, and although an insurance company could issue such a policy, it does not logically follow that every company which agrees to "repair or replace" its products if they fail is engaged in the insurance business as it is ordinarily regarded and carried on in practice. Still other cases[15] state that such warranties cannot be contracts of insurance since they lack an essential feature of that kind of contract, namely, a premium, and that where no premiums have been paid and no fund exists or is contemplated by the parties, there is no reason for regulation or supervision. There is no evidence in these cases that the warranties entailed an increase in price in consideration thereof.[16] Most likely they are a means of advertising so as to promote good will and increase sales for which the vendor receives no additional consideration.

Immunity from the operation of the insurance laws has been granted by the courts in cases where associations in return for annual premiums agree to repair and replace

[9] P. 259.

[10] But see General Motors Truck Co. v. Shepard Co., 47 R.I. 88, 97, 129 Atl. 825, 829 (1925) (agreement by seller of trucks to repair free of charge for one year held express warranty under the Uniform Sales Act); *contra*, Wall v. Britton Stevens Motors Co., 251 Mass. 517, 146 N.E. 693 (1925) (agreement to replace defective parts free of charge for ninety days held not a warranty). See also Bogert, Express Warranties in the Law of Sales, 33 Yale L.J. 14 (1923).

[11] Cole Bros. & Hart v. Haven, 7 N.W. 383 (Iowa 1880).

[12] See 3 U. of Pitt. L. Rev. 250 (1937).

[13] United States v. Home Title Ins. Co., 285 U.S. 191 (1932); Bankers' Health & Life Ins. Co. v. Knott, 41 Ga. App. 639, 154 S.E. 194 (1930).

[14] Pennsylvania v. Provident Bicycle Ass'n, 178 Pa. 636, 36 Atl. 197 (1897).

[15] Ollendorf Watch Co. v. Pink, 253 App. Div. 73, 300 N.Y. Supp. 1175 (1937); Evans & Tate v. Premier Refining Co., 31 Ga. App. 303, 120 S.E. 553 (1923). See Vance, *op. cit. supra* note 6, at p. 5.

[16] But see Chrysler Sales Corp. v. Smith, 9 F. (2d) 666 (D.C. Wis. 1925); Herbert v. Shanley Co., 242 U.S. 591 (1917). See also Vance, *op. cit. supra* note 15, at 60 ff.

plate glass windows,[17] or bicycles and bicycle tires stolen or damaged, regardless of cause,[18] or to defend physicians against malpractice suits for a specified period.[19]

The Ohio court in its solicitous attempt to protect the public from unregulated insurance practice, seems to have carried the intent of the insurance statutes beyond the bounds which the legislation was intended to cover. If unfair competition results from the use of unconditional guaranties, remedial acts may be passed by the legislature.[20]

Practice—Power of Municipal Court To Prescribe Service of Process—[Illinois].—Original summons and three alias summons were issued from the Municipal Court of Chicago against the defendant. All were returned "not found," an employee at the defendant's place of business reporting in each instance that the defendant was not in. The court then directed service by delivering the summons to an employee at the defendant's place of business, and by mailing a copy of the summons to the defendant. An Illinois statute[1] provides that a majority of the judges of the Municipal Court of Chicago shall have power to make rules regulating "practice" in that court. Rule 10A[2] of that court in turn provides that "in any case in which an officer is unable from any cause to make due service of summons, the court . . . . may direct such service to be made in such manner as the court shall deem proper." Judgment was taken against the defendant by default. The lower court overruled a motion to quash the summons and vacate the judgment. On appeal, *held*, reversed. The power to direct the manner of service of summons was not included in the power granted to make rules of practice. Moreover, the legislature had delegated to a majority of the judges power to make rules of practice, where as Rule 10A conferred that power upon a single judge. *Danoff v. Larson.*[3]

The case is an interesting one because, while Rule 10A was probably invalid, the grounds on which the decision is placed may foreclose future legitimate action by the Municipal Court. It has been held that the legislature may delegate to the courts power to make their own rules of practice.[4] The statute[5] granting to the Municipal Court power to make its own rules of practice would seem to have been passed with the object of giving that court power to deal adequately with its peculiar municipal problems.[6] On the other hand, it is unlikely that the legislature contemplated delegation to a single judge of unlimited discretionary powers as to what would be proper

[17] Moresh v. O'Regan, 120 N.J. Eq. 534, 187 Atl. 619 (1936).

[18] Pennsylvania v. Provident Bicycle Co., 178 Pa. 636, 36 Atl. 197 (1897).

[19] State v. Laylin, 73 Ohio St. 90, 76 N.E. 567 (1905).

[20] In interstate commerce the use of warranties which are in effect misrepresentations may be prevented by the Federal Trade Commission. 38 Stat. 717 (1914) § 5; 15 U.S.C.A. § 45 (1938).

[1] Ill. Rev. St., 1937, c. 37, § 375.

[2] Rule 10A, Revised Civil Practice Rules of the Municipal Court (1935).

[3] 15 N.E. (2d) 290 (Ill. 1938).

[4] Hopkins v. Levandowski, 250 Ill. 372, 95 N.E. 496 (1911).

[5] Ill. Rev. Stat., 1937, c. 37, § 375.

[6] The rules of practice of the Illinois Civil Practice Act do not apply to the Municipal Court. Ptacek v. Coleman, 364 Ill. 618, 5 N.E. (2d) 467 (1936); Barry v. Knight, 15 N.E. (2d) 999 (Ill. App. 1938).