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MERCHANTS, THE LAW MERCHANT, AND RECENT MISSOURI SALES CASES: SOME REFLECTIONS

WILLIAM C. JONES†

A character in a recent novel remarks, "[Trade]'s so fascinating . . . The furs and amber from the Baltic, the great Volga route. Yes, even in the darkest times, the persistence of trade. Think of Sutton Hoo! the homage of the barbarians to civilization, that great Byzantine dish!"¹ Who can help agreeing with her? One has only to think of perhaps the most famous trader, Marco Polo, or his native city, Venice, that once did "hold the gorgeous East in fee," to be removed into the realm of pure romance.

For those whose interests are legal, there is a certain piquancy added to this contemplation of trade by thinking of the law the ancient traders developed. The very name that their special courts had in England—Piepowder—is sharply evocative of a way of life that must seem to us to be colorful in the extreme. This is reinforced by the view Pirenne gives of them:

The sources permit us to form a pretty clear picture of the troops of merchants, who were to be met with in greater and greater numbers in Western Europe from the tenth century onwards. Their members, armed with bows and swords, surrounded the packhorses and the wagons loaded with sacks, bales, cases and casks. At the head marched the standard-bearer (*schildrake*), and a leader, the *Hansgraf* or the *Doyen*, exercised his authority over the company, which was composed of "brothers" bound together by an oath of fidelity. . . . From the beginning of the twelfth century the men of Dinant were going as far as the mines of Goslar to get supplies of copper, the merchants of Cologne, Huy, Flanders and Rouen frequented the port of London, and numbers of Italians were already to be seen at the Ypres fair. Except in winter, the enterprising merchant was continually on the road, and it was with good reason that he bore in England the picturesque name of "dusty-foot" (*pedes pulverosi, piepowders*).²

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1. WILSON, *ANGLO-SAXON ATTITUDES* 13 (1956).

2. PIRENNE, *ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE* 93, 94 (Harvest Book ed.).

Even the way that the law these courts developed came to be assimilated into the common law is far more colorful than the usual tale of the development of legal doctrines. For it was under the aegis of one of the greatest English judges and one of the most fascinating—Lord Mansfield—that it was principally accomplished. The intimate of Pope in his youth, the rival of Pitt in mid-career, admired even by Jeremy Bentham when the latter was at Lincoln's Inn, possessor, at his death, of one of the "stately homes of England" and a vast fortune, Mansfield brought a truly creative mind to the problems of the common law, on many branches of which his many years on the bench made a lasting impression.³ In the field of commercial law he scored his most signal triumph by completing the incorporation into the common law of the law merchant. One of his chief means of accomplishing this was to use a special jury of merchants primarily for the purpose of ascertaining mercantile custom.⁴ Fittingly enough, a pleasant filip was added to the conclusion of the story of the law merchant by Lord Campbell who, in encasing Mansfield in his collection of Chief Justices, recalled: "Several of these gentlemen survived when I began to attend Guildhall as a student, and were designated and honoured as 'Lord Mansfield's jurymen.' One in particular I remember Mr. Edward Vaux, who always wore a cocked hat, and had almost as much authority as the Lord Chief Justice himself."⁵

Thus the history of the law merchant, as a separate institution at any rate, came (as all history should) to a full stop,⁶ though a faint trace remains in such places as Article 73 of the Uniform Sales Act. This provides: "In any case not provided for in this act, the rules of law and equity, including the law merchant . . . shall continue to apply to contracts to sell and to sales of goods."

Over one-hundred-fifty years after the happy conclusion of Mansfield's work, it may be of some interest to inquire into the question of what has happened to what used to be the law merchant after he got through assimilating it into the common law. In the United States we have, as indicated in the Uniform Sales Act, followed the English lead in absorbing the law merchant into the common law. Furthermore, we have, of course, taken over England's commercial pre-eminence in the world. Therefore, it should be interesting to see how those branches of the law that used to be part of the law merchant, the law of sales for example, are developing at the present time, say since World War II. A good state to pick for this purpose is Missouri, for

3. FIFOOT, LORD MANSFIELD 27-51 & *passim* (1936).

4. *Id.* at 82-117. See also Scrutton, *General Survey of the Law Merchant*, in 3 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 7 (1909); 12 HOLDSWORTH, A HISTORY OF ENGLISH LAW 526 (1938).

5. 3 CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 304 n.2 (1873).

6. SELLAR & YEATMAN, 1066 AND ALL THAT (1931).

there the adaptive genius of the common law operates, in the field of sales at least, unfettered by a restrictive statute.⁷ And, surely, it is an apt time and place to study merchants and their sales, for here are merchants in abundance, and they seem to be, at the present time anyway, thriving.

Thus retail sales in Missouri were as follows: 1948, \$3,526,086,000 by 47,960 establishments; 1954, \$4,525,308,000 by 47,262 establishments.⁸

The figures for wholesale transactions in 1954 were \$8,209,588,000 by 7,604 establishments; in 1948 they were \$6,908,475,000 by 6,919 establishments.⁹ The sales may be divided as follows:

	ESTABLISHMENTS		SALES	
	1948	1954	1948	1954
Merchant				
Wholesalers	3,695	4,377	\$2,745,913,000	\$3,248,245,000
Manufacturer's Sales				
Branches	971	918	2,019,328,000	2,752,205,000
Petroleum Bulk				
Stations	1,106	1,135	257,087,000	369,056,000
Agents and				
Brokers	733	827	1,591,511,000	1,595,275,000
Assemblers	414	347	294,636,000	244,807,000

Figures for the value of the manufactured product shipped, less cost of materials, supplies, fuel, and contract work are available for several years during this period. They are: for 1947, \$1,623,145,000; for 1950, \$2,045,318,000; for 1952, \$2,422,709,000; and for 1953, \$2,786,829,000.¹⁰

In addition, mineral production in Missouri went from \$74,347,000 in 1945 to \$140,977,000 in 1952.¹¹ In 1954 cash income from farm marketing was \$1,036,398,000.¹² Construction contracts awarded totaled \$368,465,000 in 1950, and increased to \$688,081,000 in 1955.¹³

7. A roundabout way of saying the Uniform Sales Act has not been enacted in Missouri. Cardozo, at least, felt that the law of negotiable instruments was prevented from evolutionary growth by the Negotiable Instruments Law. *Manhattan Co. v. Morgan*, 242 N.Y. 38, 52, 150 N.E. 594, 599 (1926). Of course the principal reason Missouri was picked was that it is the state in which the writer resides.

8. U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, CENSUS OF BUSINESS: 1954, BULL. NO. R-1-25, RETAIL TRADE 25-5 (1956).

9. U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, CENSUS OF BUSINESS: 1954, BULL. NO. W-1-25, WHOLESALE TRADE 25-4,-16 (1956).

10. U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 804-05 (1956).

11. *Id.* at 726.

12. THE ECONOMIC ALMANAC 45 (Jones ed. 1956).

13. U.S. DEPT OF COMMERCE, *op. cit. supra* note 10, at 764.

Nor was this selling all carried on by small concerns. In St. Louis alone for example, Anheuser-Busch had sales in 1949 of \$135,304,255 which had increased by 1955 to \$201,718,743 (a decline from 1953's \$237,003,969); Monsanto Chemical went from \$165,924,700 in 1949 to \$522,349,097 in 1955; Ralston-Purina from \$243,810,370 to \$385,529,967 (down from 1952's \$417,820,201); Bemis Brothers Bag Company dropped from \$141,506,424 in 1951 to \$121,816,542 in 1955; International Shoe Company went from \$190,003,486 to \$262,413,803; Brown Shoe Company from \$80,377,978 to \$159,480,879; McDonnell Aircraft Corporation from \$32,659,384 to \$154,588,816; Wagner Electric from \$65,940,766 to \$92,288,563.¹⁴ It should be noted that this list is simply illustrative, and not by any means exhaustive even for St. Louis, to say nothing of the remainder of the state.

Thus the period since World War II would seem to have been of the kind most likely to produce a healthy crop of sales litigation. There was great activity with truly gigantic quantities of goods being bought and sold so that the chances of collision and dispute were inevitably increased. In addition, there have been during this time violent price fluctuations and sudden shortages, the Korean War—all incidents likely to breed litigation. One turns, in consequence, with considerable interest to the reports of the cases to see how the Missouri courts have dealt with the difficult problems that must have faced them. How well, one wonders, have they learned Mansfield's lesson of fully taking into consideration commercial necessity and custom, while remembering always that the judge has a higher standpoint and a different duty than merely to reflect this mercantile custom. He must decide the case not only in justice to the litigants but in the light of the legal system as a whole, and in the interest both of the public (or the crown) and of future litigants. Indeed, he may be able, to a degree at least, to mold the custom which he respects since it is probably in a somewhat inchoate state.¹⁵

These would seem to be interesting questions to consider, but it is very difficult to answer them with reference to the courts of Missouri, for their chief single function in the field of sales since 1945 has been to aid or prevent the repossession of recently sold used motor vehicles subject to conflicting claims of ownership.

Such at any rate seems the only possible conclusion that can be reached after reading the reports of cases that have been decided by the Missouri courts since 1945. In the South Western Reporter there are reports of seventy-five cases decided in Missouri courts that the

14. The source for all the information in this paragraph is MOODY'S INDUSTRIAL MANUAL (1956).

15. FIFOOT, LORD MANSFIELD 105-17 (1936); 12 HOLDSWORTH, A HISTORY OF ENGLISH LAW 524-42 (1938).

editors have indexed under the heading "Sales."¹⁶ Conceivably, of course, an investigation of such headings as warranty, contracts, food, evidence, automobiles, etc., would reveal a few more cases that should have been so categorized.¹⁷ Still, this heading unquestionably gets most of them (and some rather strange items besides).

The cases involved sales of the following items:

New automobiles (all sales of single cars, save 1)	9 ¹⁸
Used automobiles (all sales of single cars)	10 ¹⁹
New trucks	2 ²⁰
Used trucks	3 ²¹
Going businesses	9 ²²
Food for consumption	3 ²³
Commodities	6 ²⁴
Farm machinery	4 ²⁵
Construction equipment	3 ²⁶
Construction materials	3 ²⁷
Miscellaneous	23 ²⁸
	—
Total	75

16. For the purposes of this study volumes 186-282 of South Western Reporter, second series, were checked for all cases included under "Sales" that arose in Missouri. This series should include all reported opinions of the Supreme Court of Missouri as well as the courts of appeal—Kansas City, St. Louis, and Springfield—including those not found in the official reports.

17. See, e.g., *Pearl v. Interstate Securities Co.*, 206 S.W.2d 975 (Mo. 1947). This case was a *replevin* action by a seller of a used automobile against the mortgagee of the buyer. The transfers to the seller and between seller and buyer were void because of failure to comply with the Missouri statute on assignment of certificates of title (Mo. REV. STAT. § 301.210(4) (1949)), and the question was whether the seller had a sufficient interest in the automobile to bring the action. (It was held he did.) Similar issues are raised in cases indexed under "Sales." See, e.g., *Riss & Co. v. Wallace*, 239 Mo. App. 979, 195 S.W.2d 881 (1946).

18. *Goodman v. Nichols*, 238 Mo. App. 802, 188 S.W.2d 666 (1945); *Commercial Credit Co. v. Interstate Securities Co.*, 197 S.W.2d 1000 (Mo. App. 1946); *Shearer Motor Co. v. Burmeister*, 216 S.W.2d 955 (Mo. App. 1949); *Boeving v. Vandover*, 240 Mo. App. 117, 218 S.W.2d 175 (1949); *Detmer v. Miller*, 220 S.W.2d 739 (Mo. App. 1949); *Dubinsky v. Lindburg Cadillac Co.*, 250 S.W.2d 830 (Mo. App. 1952); *Universal C.I.T. Credit Corp. v. Taylor*, 256 S.W.2d 303 (Mo. App. 1953); *Hickerson v. Con Frazier Buick Co.*, 264 S.W.2d 29 (Mo. App. 1953); *Mallory Motor Co. v. Overall*, 279 S.W.2d 532 (Mo. App. 1955).

19. *Mound City Finance Co. v. Frank*, 239 Mo. App. 807, 199 S.W.2d 902

(1947); *Fowler v. Golden*, 240 Mo. App. 627, 212 S.W.2d 93 (1948); *Southern Ill. Finance Corp. v. Strubel*, 228 S.W.2d 374 (Mo. App. 1950); *Ruler v. M. & M. Motor Co.*, 231 S.W.2d 277 (Mo. App. 1950); *Robinson v. Poole*, 232 S.W.2d 807 (Mo. App. 1950); *Winscott v. Frazier*, 236 S.W.2d 382 (Mo. App. 1951); *Kansas City Automobile Auction Co. v. Overall*, 241 Mo. App. 280, 238 S.W.2d 446 (1951); *Howard Nat'l Bank & Trust Co. v. Jones*, 243 S.W.2d 305 (Mo. 1951); *Cantrell v. Sheppard*, 247 S.W.2d 872 (Mo. App. 1952); *General Motors Acceptance Corp. v. Vanausdall*, 241 Mo. App. 499, 249 S.W.2d 1003 (1952).

20. *Riss & Co. v. Wallace*, 239 Mo. App. 979, 195 S.W.2d 881 (1946); *Memphis Bank & Trust Co. v. West*, 260 S.W.2d 866 (Mo. App. 1953).

21. *Marquis v. Pettyjohn*, 212 S.W.2d 100 (Mo. App. 1948); *Pheffer v. Kleb*, 241 S.W.2d 91 (Mo. App. 1951); *Goss v. Suburban Motors, Inc.*, 282 S.W.2d 864 (Mo. App. 1955).

22. *Hoback v. Allen*, 216 S.W.2d 148 (Mo. App. 1948); *Johnson v. Dur-Est, Inc.*, 224 S.W.2d 611 (Mo. App. 1949); *Huegel v. Kimber*, 359 Mo. 938, 224 S.W.2d 959 (1949); *Martin v. Ficklin*, 240 Mo. App. 1225, 227 S.W.2d 69 (1950); *West v. Nichols*, 227 S.W.2d 760 (Mo. App. 1950); *Strafer v. Bodney*, 247 S.W.2d 630 (Mo. 1952); *Schroeder v. Zykan*, 255 S.W.2d 105 (Mo. App. 1953); *Goodrich v. Rhodes*, 261 S.W.2d 391 (Mo. App. 1953); *Walters v. Larson*, 270 S.W.2d 112 (Mo. App. 1954).

23. *Foley v. Coca-Cola Bottling Co.*, 215 S.W.2d 314 (Mo. App. 1948); *Duley v. Coca-Cola Bottling Co.*, 232 S.W.2d 801 (Mo. App. 1950); *Strawn v. Coca-Cola Bottling Co.*, 234 S.W.2d 223 (Mo. App. 1950).

24. *White v. Foster*, 194 S.W.2d 723 (Mo. App. 1946); *Ellis Gray Milling Co. v. Sheppard*, 359 Mo. 505, 222 S.W.2d 742 (1949); *Silvey v. Herndon*, 234 S.W.2d 335 (Mo. App. 1950); *Altenderfer v. Harkins*, 243 S.W.2d 558 (Mo. App. 1951); *Amos-James Grocery Co. v. Cannery Exchange, Inc.*, 256 S.W.2d 803 (Mo. 1953); *Willibald Schaefer Co. v. Blanton Co.*, 264 S.W.2d 920 (Mo. App. 1954).

25. *Stone v. Kies*, 227 S.W.2d 85 (Mo. App. 1950); *Dugan v. Trout*, 271 S.W.2d 593 (Mo. App. 1954); *Lewis v. Willingham*, 274 S.W.2d 814 (Mo. App. 1955); *Heuer v. Ulmer*, 281 S.W.2d 320 (Mo. App. 1955).

26. *Nickerson v. Whalen*, 253 S.W.2d 502 (Mo. App. 1952); *Witte v. Cooke Tractor Co.*, 261 S.W.2d 651 (Mo. App. 1953); *Grand River Tp., De Kalb County v. Cooke Sales & Service, Inc.*, 267 S.W.2d 322 (Mo. 1954).

27. *R. J. Hurley Lumber Co. v. Cummings*, 264 S.W.2d 379 (Mo. App. 1954); *Smith v. Githens*, 271 S.W.2d 374 (Mo. App. 1954); *Young v. Hall*, 280 S.W.2d 679 (Mo. App. 1955).

28. *Turner v. Central Hardware Co.*, 353 Mo. 1182, 186 S.W.2d 603 (1945) (stepladder); *Russell v. Union Elec. Co.*, 191 S.W.2d 278 (Mo. App. 1945); *Brandtjen & Kluge, Inc. v. Burd & Fletcher Co.*, 239 Mo. 268, 192 S.W.2d 651 (1946) (printing machine); *A. A. Elec. Mach. Co. v. Block*, 193 S.W.2d 631 (Mo. App. 1946) (theatre equipment); *Hall v. Watson*, 201 S.W.2d 277 (Mo. 1947) (shares of stock); *Oldham v. Siegfried*, 202 S.W.2d 132 (Mo. App. 1947) (lien dispute over office furniture); *Alvey Conveyor Mfg. Co. v. Kansas City Terminal Ry.*, 356 Mo. 770, 203 S.W.2d 606 (1947) (conveyor belts); *Koelling v. Bank of Sullivan*, 220 S.W.2d 794 (Mo. App. 1949) (stock in trade of a general store); *Counts v. Metzger*, 228 S.W.2d 395 (Mo. App. 1950) (home-made trailers); *Zimmerman v. Jones*, 241 Mo. App. 207, 236 S.W.2d 401 (1950) (aeroplane); *Davies v. Motor Radio Co.*, 236 S.W.2d 409 (Mo. App. 1951) (walk-in ice box); *Merit Specialties Co. v. Gilbert Brass Foundry Co.*, 362 Mo. 325, 241 S.W.2d 718 (1951) (hardware—bushings, unions, plugs, etc.); *McCaskey Register Co. v. Link*, 242 S.W.2d 281 (Mo. App. 1951) (cash register); *E. F. Drew & Co. v. Brooks Supply Co.*, 243 S.W.2d 621 (Mo. App. 1951) (detergent); *Worley v. Proctor & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (1952) (detergent); *Stone v. Farmington Aviation Corp.*, 363 Mo. 803, 253 S.W.2d 810 (1953) (aeroplane); *Nichols v. Wirts*, 270 S.W.2d 801 (Mo. 1954) (sale of farm including animals and equipment); *Lerner v. Yeghishian*, 271 S.W.2d 588 (Mo. App. 1954) (carpeting); *Housden v. Berns*, 241 Mo. App. 1163, 273 S.W.2d 794 (1954) (house trailer); *De Winter v. Lashley*, 274 S.W.2d 40 (Mo. App. 1954) (tires); *Sidney Smith, Inc. v. Steinberg*, 280 S.W.2d 696 (Mo. App. 1955) (cigarettes in bulk); *In re Oberman's Estate*, 281 S.W.2d 549 (Mo. App. 1955) (house and farm goods); *Machtinger v. Grenzbech*, 282 S.W.2d 200 (Mo. App. 1955) (electronic devices).

Of these cases 55 per cent arose out of sales to private consumers.²⁹ The 12 per cent represented by sales of businesses were not, of course, sales of "goods" at all, except incidentally to the sale of a business.³⁰ Approximately 33 per cent involved sales between professionals,³¹ that is, people or concerns in business either for resale or use in the business and not for personal use. However, less than half of these

29. *Turner v. Central Hardware Co.*, 353 Mo. 1182, 186 S.W.2d 603 (1945); *Russell v. Union Elec. Co.*, 191 S.W.2d 278 (Mo. App. 1945); *White v. Foster*, 194 S.W.2d 723 (Mo. App. 1946); *Mound City Finance Co. v. Frank*, 239 Mo. App. 807, 199 S.W.2d 902 (1947); *Oldham v. Siegfried*, 202 S.W.2d 132 (Mo. App. 1947); *Marquis v. Pettyjohn*, 212 S.W.2d 100 (Mo. App. 1948); *Foley v. Coca-Cola Bottling Co.*, 215 S.W.2d 314 (Mo. App. 1948); *Shearer Motor Co. v. Burmeister*, 216 S.W.2d 955 (Mo. App. 1949); *Boeving v. Vandover*, 240 Mo. App. 117, 218 S.W.2d 175 (1949); *Detmer v. Miller*, 220 S.W.2d 739 (Mo. App. 1949); *Stone v. Kies*, 227 S.W.2d 85 (Mo. App. 1950); *Counts v. Metzger*, 228 S.W.2d 395 (Mo. App. 1950); *Southern Ill. Finance Corp. v. Strubel*, 228 S.W.2d 374 (Mo. App. 1950); *Ruler v. M. & M. Motor Co.*, 231 S.W.2d 277 (Mo. App. 1950); *Duley v. Coca-Cola Bottling Co.*, 232 S.W.2d 801 (Mo. App. 1950); *Robinson v. Poole*, 232 S.W.2d 807 (Mo. App. 1950); *Strawn v. Coca-Cola Bottling Co.*, 234 S.W.2d 223 (Mo. App. 1950); *Silvey v. Herndon*, 234 S.W.2d 335 (Mo. App. 1950); *Zimmerman v. Jones*, 241 Mo. App. 207, 236 S.W.2d 401 (1950); *Winscott v. Frazier*, 236 S.W.2d 382 (Mo. App. 1951); *Davies v. Motor Radio Co.*, 236 S.W.2d 409 (Mo. App. 1951); *Pheffer v. Kleb*, 241 S.W.2d 91 (Mo. App. 1951); *McCaskey Register Co. v. Link*, 242 S.W.2d 281 (Mo. App. 1951); *Howard Nat'l Bank & Trust Co. v. Jones*, 243 S.W.2d 305 (Mo. App. 1951); *Cantrell v. Sheppard*, 247 S.W.2d 872 (Mo. App. 1952); *General Motors Acceptance Corp. v. Vanausdall*, 241 Mo. App. 499, 249 S.W.2d 1003 (1952); *Dubinsky v. Lindburg Cadillac Co.*, 250 S.W.2d 830 (Mo. App. 1952); *Worley v. Proctor & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (1952); *Stone v. Farmington Aviation Corp.*, 363 Mo. 803, 253 S.W.2d 810 (1953); *Universal C.I.T. Credit Corp. v. Taylor*, 256 S.W.2d 303 (Mo. App. 1953); *Memphis Bank & Trust Co. v. West*, 260 S.W.2d 866 (Mo. App. 1953); *Hickerson v. Con Frazier Buick Co.*, 264 S.W.2d 29 (Mo. App. 1953); *Nichols v. Wirts*, 270 S.W.2d 801 (Mo. App. 1954); *Lerner v. Yeghishian*, 271 S.W.2d 583 (Mo. App. 1954); *Dugan v. Trout*, 271 S.W.2d 593 (Mo. App. 1954); *Housden v. Berns*, 241 Mo. App. 1163, 273 S.W.2d 794 (1954); *Lewis v. Willingham*, 274 S.W.2d 814 (Mo. App. 1955); *Heuer v. Ulmer*, 281 S.W.2d 320 (Mo. App. 1955); *In re Oberman's Estate*, 281 S.W.2d 549 (Mo. App. 1955); *Goss v. Suburban Motors, Inc.*, 282 S.W.2d 864 (Mo. App. 1955).

30. See note 22 *supra*.

31. *Goodman v. Nichols*, 238 Mo. App. 802, 188 S.W.2d 666 (1945); *Brandtjen & Kluge, Inc. v. Burd & Fletcher Co.*, 239 Mo. App. 268, 192 S.W.2d 651 (1946); *A. A. Elec. Mach. Co. v. Block*, 193 S.W.2d 631 (Mo. App. 1946); *Riss & Co. v. Wallace*, 239 Mo. App. 979, 195 S.W.2d 881 (1946); *Commercial Credit Co. v. Interstate Securities Co.*, 197 S.W.2d 1000 (Mo. App. 1946); *Alvey Conveyor Mfg. Co. v. Kansas City Terminal Ry.*, 356 Mo. 770, 203 S.W.2d 606 (1947); *Fowler v. Golden*, 240 Mo. App. 627, 212 S.W.2d 93 (1948); *Ellis Gray Milling Co. v. Sheppard*, 359 Mo. 505, 222 S.W.2d 742 (1949); *Kansas City Automobile Auction Co. v. Overall*, 241 Mo. App. 280, 238 S.W.2d 446 (1951); *Merit Specialties Co. v. Gilbert Brass Foundry Co.*, 362 Mo. 325, 241 S.W.2d 718 (1951); *Altenderfer v. Harkins*, 243 S.W.2d 558 (Mo. App. 1951); *E. F. Drew & Co. v. Brooks Supply Co.*, 243 S.W.2d 621 (Mo. App. 1951); *Nickerson v. Whalen*, 253 S.W.2d 502 (Mo. App. 1952); *Amos-James Grocery Co. v. Cannors Exchange, Inc.*, 256 S.W.2d 803 (Mo. App. 1953); *Witte v. Cooke Tractor Co.*, 261 S.W.2d 651 (Mo. App. 1953); *R. J. Hurley Lumber Co. v. Cummings*, 264 S.W.2d 379 (Mo. App. 1954); *Willibald Schaefer Co. v. Blanton Co.*, 264 S.W.2d 920 (Mo. App. 1954); *Grand River Tp., De Kalb County v. Cooke Sales & Service, Inc.*, 267 S.W.2d 322 (Mo. App. 1954); *Smith v. Githens*, 271 S.W.2d 374 (Mo. App. 1954); *De Winter v. Lashley*, 274 S.W.2d 40 (Mo. App. 1954); *Mallory Motor Co. v. Overall*, 279 S.W.2d 532 (Mo. App. 1955); *Sidney Smith, Inc. v. Steinberg*, 280 S.W.2d 696 (Mo. App. 1955); *Young v. Hall*, 280 S.W.2d 679 (Mo. App. 1955); *Machtinger v. Grenzebach*, 282 S.W.2d 200 (Mo. App. 1955).

sales to professionals (or 13 per cent of the total) were sales for resale, in other words, sales to merchants if the latter are defined as persons who deal regularly in goods of the kind. These were sales of five automobiles (one transaction),³² fourteen carloads of corn (\$3,453.66),³³ one used automobile,³⁴ three used automobiles,³⁵ detergent (\$1,760.18),³⁶ 2,200 cases of #2 water pack blackberries (\$3,229.03),³⁷ ten tank cars of coconut oil (\$7,110.00),³⁸ tires (\$689.00),³⁹ two new automobiles (\$4,370.00),⁴⁰ and seventy-four cases of cigarettes.⁴¹ Of the other cases which involved sales between professionals only 4 involved large transactions.⁴² The remainder involved a single used automobile (\$945.00),⁴³ a printing machine (\$1,764.37),⁴⁴ hogs (\$1,350.70),⁴⁵ a used grading tractor (\$4,466.58),⁴⁶ a movable crane (\$5,916.32),⁴⁷ lumber and construction materials (\$2,323.62),⁴⁸ building materials (\$3,999.01),⁴⁹ and electronic devices (type unspecified, amount involved under \$500.00).⁵⁰

As might be expected, in view of the number of sales involving automobiles, 20 per cent of the cases are disputes involving liens.⁵¹

32. *Commercial Credit Co. v. Interstate Securities Co.*, 197 S.W.2d 1000 (Mo. App. 1946).

33. *Ellis Gray Milling Co. v. Sheppard*, 359 Mo. 505, 222 S.W.2d 742 (1949). The figures in parentheses in the text refer to the amount involved in the case.

34. *Fowler v. Golden*, 240 Mo. App. 627, 212 S.W.2d 93 (1948).

35. *Kansas City Automobile Auction Co. v. Overall*, 241 Mo. App. 280, 238 S.W.2d 446 (1951).

36. *E. F. Drew & Co. v. Brooks Supply Co.*, 243 S.W.2d 621 (Mo. App. 1951).

37. *Amos-James Grocery Co. v. Cannery Exchange, Inc.*, 256 S.W.2d 803 (Mo. 1953).

38. *Willibald Schaefer Co. v. Blanton Co.*, 264 S.W.2d 920 (Mo. App. 1954).

39. *De Winter v. Lashley*, 274 S.W.2d 40 (Mo. App. 1954).

40. *Mallory Motor Co. v. Overall*, 279 S.W.2d 532 (Mo. App. 1955).

41. *Sidney Smith, Inc. v. Steinberg*, 280 S.W.2d 696 (Mo. App. 1955).

42. *Riss & Co. v. Wallace*, 239 Mo. App. 979, 195 S.W.2d 881 (1946) (tractors, \$23,750); *Alvey Conveyor Mfg. Co. v. Kansas City Terminal Ry.*, 356 Mo. 770, 203 S.W.2d 606 (1947) (conveyor belts, \$25,681.39); *Merit Specialties Co. v. Gilbert Brass Foundry Co.*, 362 Mo. 325, 241 S.W.2d 718 (1951) (hardware—bushings, unions, plugs, etc., \$153,503.30); *Smith v. Githens*, 271 S.W.2d 374 (Mo. App. 1954) (asphalt concrete, \$7000).

43. *Goodman v. Nichols*, 238 Mo. App. 802, 188 S.W.2d 666 (1945).

44. *Brandtjen & Kluge, Inc. v. Burd & Fletcher Co.*, 239 Mo. App. 268, 192 S.W.2d 651 (1946).

45. *Altenderfer v. Harkins*, 243 S.W.2d 558 (Mo. App. 1951).

46. *Nickerson v. Whalen*, 253 S.W.2d 502 (Mo. App. 1952).

47. *Witte v. Cooke Tractor Co.*, 261 S.W.2d 651 (Mo. App. 1953).

48. *R. J. Hurley Lumber Co. v. Cummings*, 264 S.W.2d 379 (Mo. App. 1954).

49. *Young v. Hall*, 280 S.W.2d 679 (Mo. App. 1955).

50. *Machtinger v. Grenzabach*, 282 S.W.2d 200 (Mo. App. 1955).

51. *Goodman v. Nichols*, 238 Mo. App. 802, 188 S.W.2d 666 (1945); *Commercial Credit Co. v. Interstate Securities Co.*, 197 S.W.2d 1000 (Mo. App. 1946); *Mound City Finance Co. v. Frank*, 239 Mo. App. 807, 199 S.W.2d 902 (1947); *Oldham v. Siegfried*, 202 S.W.2d 132 (Mo. App. 1947); *Counts v. Metzger*, 228 S.W.2d 395 (Mo. App. 1950); *Southern Ill. Finance Corp. v. Strubel*, 228 S.W.2d 374 (Mo. App. 1950); *Robinson v. Poole*, 232 S.W.2d 807 (Mo. App. 1950); *Pheffer v. Kleb*, 241 S.W.2d 91 (Mo. App. 1951); *Howard Nat'l Bank & Trust Co. v. Jones*, 243 S.W.2d 305 (Mo. 1951); *General Motors Acceptance Corp. v. Vanauddall*, 241 Mo. App. 499, 249 S.W.2d 1003 (1952); *Universal C.I.T. Credit Corp. v. Taylor*, 256 S.W.2d 303 (Mo. App. 1953); *Memphis Bank & Trust Co. v. West*,

For example, disputes resulting from double financing, either by fraud or arising out of a sale of an automobile with an outstanding lien to a bona fide purchaser who then refinances.⁵² Nineteen per cent involve breach of warranty⁵³ (all of quality save one arising out of an automobile auction that involved title⁵⁴). The only other legal issue involved in a large number of the cases was rescission for fraud, mistake, or duress (11 per cent).⁵⁵ The remainder of the cases involve a great variety of legal issues.⁵⁶

260 S.W.2d 866 (Mo. App. 1953); *Goodrich v. Rhodes*, 261 S.W.2d 391 (Mo. App. 1953); *Lewis v. Willingham*, 274 S.W.2d 814 (Mo. App. 1955); *Sidney Smith, Inc. v. Steinberg*, 280 S.W.2d 696 (Mo. App. 1955).

52. See, *ag.*, *Commercial Credit Co. v. Interstate Securities Co.*, 197 S.W.2d 1000 (Mo. App. 1946). This was an action by the entruster under a trust receipt arrangement to replevy cars that had been entrusted to an automobile dealer who, giving chattel mortgages, borrowed money on the cars from the defendant. The plaintiff's interest prevailed.

53. *Turner v. Central Hardware Co.*, 353 Mo. 1182, 186 S.W.2d 603 (1945); *Foley v. Coca-Cola Bottling Co.*, 215 S.W.2d 314 (Mo. App. 1948); *Duley v. Coca-Cola Bottling Co.*, 232 S.W.2d 801 (Mo. App. 1950); *Strawn v. Coca-Cola Bottling Co.*, 234 S.W.2d 223 (Mo. App. 1950); *Davies v. Motor Radio Co.*, 236 S.W.2d 409 (Mo. App. 1951); *Kansas City Automobile Auction Co. v. Overall*, 241 Mo. App. 280, 238 S.W.2d 446 (1951); *McCaskey Register Co. v. Link*, 242 S.W.2d 281 (Mo. App. 1951); *Dubinsky v. Lindburg Cadillac Co.*, 250 S.W.2d 830 (Mo. App. 1952); *Worley v. Proctor & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (1952); *Stone v. Farmington Aviation Corp.*, 363 Mo. 803, 253 S.W.2d 810 (1953); *Amos-James Grocery Co. v. Cannery Exchange, Inc.*, 256 S.W.2d 803 (Mo. 1953); *Lerner v. Yeghishian*, 271 S.W.2d 588 (Mo. App. 1954); *De Winter v. Lashley*, 274 S.W.2d 40 (Mo. App. 1954); *Heuer v. Ulmer*, 281 S.W.2d 320 (Mo. App. 1955).

54. *Kansas City Automobile Auction Co. v. Overall*, 241 Mo. App. 280, 238 S.W.2d 446 (1951).

55. *Hoback v. Allen*, 216 S.W.2d 148 (Mo. App. 1948) (question of repudiation by seller justifying rescission by buyer); *Huegel v. Kimber*, 359 Mo. 938, 224 S.W.2d 959 (1949) (fraud); *Stone v. Kies*, 227 S.W.2d 85 (Mo. App. 1950) (mistake); *Ruler v. M. & M. Motor Co.*, 231 S.W.2d 277 (Mo. App. 1950) (fraud); *Strafer v. Bodney*, 247 S.W.2d 630 (Mo. 1952) (fraud); *Schroeder v. Zykan*, 255 S.W.2d 105 (Mo. App. 1953) (fraud); *Nichols v. Wirts*, 270 S.W.2d 801 (Mo. 1954) (duress); *Housden v. Berns*, 241 Mo. App. 1163, 273 S.W.2d 794 (1954) (mistake).

56. A question of agency (authority to bind principal) was involved in three: *A. A. Elec. Mach. Co. v. Block*, 193 S.W.2d 631 (Mo. App. 1946); *Silvey v. Herndon*, 234 S.W.2d 335 (Mo. App. 1950); *R. J. Hurley Lumber Co. v. Cummings*, 264 S.W.2d 379 (Mo. App. 1954). Three involved sales that were "fraudulent and void" as the result of a failure to comply with the extremely stringent provisions of the Missouri statute on the assignment of the certificate of title of motor vehicles (MO. REV. STAT. § 301.210(4) (1949)): *Riss & Co. v. Wallace*, 239 Mo. App. 979, 195 S.W.2d 831 (1946); *Fowler v. Golden*, 240 Mo. App. 627, 212 S.W.2d 93 (1948); *Winscott v. Frazier*, 236 S.W.2d 382 (Mo. App. 1951). Three involved the question of whether title had passed (and did not involve the Missouri statute): *Shearer Motor Co. v. Burmeister*, 216 S.W.2d 955 (Mo. App. 1949); *Boeving v. Vandover*, 240 Mo. App. 117, 218 S.W.2d 175 (1949); *Hickerson v. Con Frazier Buick Co.*, 264 S.W.2d 29 (Mo. App. 1953). Two involved the problem of risk of loss: *Mallory Motor Co. v. Overall*, 279 S.W.2d 532 (Mo. App. 1955); *Goss v. Suburban Motors, Inc.*, 282 S.W.2d 864 (Mo. App. 1955). Otherwise they are quite miscellaneous: *Russell v. Union Elec. Co.*, 191 S.W.2d 278 (Mo. App. 1945) (negligent installation of stove; question if seller could escape liability because work done by independent contractor); *Brandtjen & Kluge, Inc. v. Burd & Fletcher Co.*, 239 Mo. App. 268, 192 S.W.2d 651 (1946) (question of waiver of breach of warranty); *White v. Foster*, 194 S.W.2d 723 (Mo. App. 1946) (quantity dispute); *Hall v. Watson*, 201 S.W.2d 277 (Mo. 1947)

The chief thing to be said about these cases is, surely, that they are distinctly non-mercantile. Only 10 cases involve transactions in which both parties are "merchants" as the term is defined above. Even these cases involve relatively small amounts of money. In any event 10 (or, if one includes the 4 large transactions which, though not involving sales for resale, may perhaps be described as mercantile—14) cases are not very many for an eleven year period in which wholesale transactions exceeded \$7,000,000,000 a year.⁵⁷ For that matter, 61 cases do not seem many to have arisen in eleven years out of retail sales which exceeded \$4,000,000,000 per year,⁵⁸ especially when 24, or 39 per cent, of these involved autos and trucks whereas these accounted for only 18 per cent of the total retail sales in 1954⁵⁹ (the percentage was somewhat over 16 per cent in 1948⁶⁰).

What then do the merchants do with their cases? Surely they must have more than are indicated here. One cannot believe that nearly every sale of goods by merchant to merchant in Missouri is accompanied by a rosy glow of satisfaction on both sides and no cause for things to be otherwise. There must be disputes over quality, delivery, price, packing, risk of loss, variation in order, etc., and hence something must be done about them. Someone must be dissatisfied besides consumers of soft drinks and purchasers of automobiles and their

(open price term); *Alvey Conveyor Mfg. Co. v. Kansas City Terminal Ry.*, 356 Mo. 770, 203 S.W.2d 606 (1947) (open price term); *Marquis v. Pettyjohn*, 212 S.W.2d 100 (Mo. App. 1948) (fraud); *Detmer v. Miller*, 220 S.W.2d 739 (Mo. App. 1949) (question if buyer had performed); *Koelling v. Bank of Sullivan*, 220 S.W.2d 794 (Mo. App. 1949) (liquidated damages); *Ellis Gray Milling Co. v. Sheppard*, 359 Mo. 505, 222 S.W.2d 742 (1949) (price dispute); *Johnson v. Dur-Est, Inc.*, 224 S.W.2d 611 (Mo. App. 1949) (fraud); *Martin v. Ficklin*, 240 Mo. App. 1225, 227 S.W.2d 69 (1950) (rights of one party on repudiation of contract by other); *West v. Nichols*, 227 S.W.2d 760 (Mo. App. 1950) (construction of contract terms); *Zimmerman v. Jones*, 241 Mo. App. 207, 236 S.W.2d 401 (1950) (construction of contract terms); *Merit Specialties Co. v. Gilbert Brass Foundry Co.*, 362 Mo. 325, 241 S.W.2d 718 (1951) (question of mutual rescission); *Altenderfer v. Harkins*, 243 S.W.2d 558 (Mo. App. 1951) (statutory liability for selling hogs with cholera); *E. F. Drew & Co. v. Brooks Supply Co.*, 243 S.W.2d 621 (Mo. App. 1951) (construction of contract); *Cantrell v. Sheppard*, 247 S.W.2d 872 (Mo. App. 1952) (right of buyer to repudiate on seller's breach); *Nickerson v. Whalen*, 253 S.W.2d 502 (Mo. App. 1952) (failure to repair according to contract); *Stone v. Farmington Aviation Corp.*, 363 Mo. 803, 253 S.W.2d 810 (1953) (breach of warranty of quality in a bailment); *Willibald Schaefer Co. v. Blanton Co.*, 264 S.W.2d 920 (Mo. App. 1954) (priority restrictions justifying seller's failure to ship); *Grand River Tp., De Kalb County v. Cooke Sales & Service, Inc.*, 267 S.W.2d 322 (Mo. 1954) (ultra vires contract); *Walters v. Larson*, 270 S.W.2d 112 (Mo. App. 1954) (fraud); *Smith v. Githens*, 271 S.W.2d 374 (Mo. App. 1954) (contract reformation); *Dugan v. Trout*, 271 S.W.2d 593 (Mo. App. 1954) (compliance with conditions of warranty); *Young v. Hall*, 280 S.W.2d 679 (Mo. App. 1955) (question whether recovery was to be on contract or in quantum meruit); *In re Oberman's Estate*, 281 S.W.2d 549 (Mo. App. 1955) (question if transfer a sale or gift); *Machttinger v. Grenzbach*, 282 S.W.2d 200 (Mo. App. 1955) (question if payment made).

57. See note 9 *supra*.

58. See note 8 *supra*.

59. *Ibid.*

60. *Ibid.*

financers. These disputes must be settled in some way since commerce goes on, indeed burgeons.

One thing that is obviously done is to bring them into the federal courts. The reports of cases indexed by West under "Sales" in the Federal Reporter and Federal Supplement⁶¹ show 20 cases which arose in Missouri and were decided during the period—8 in the Court of Appeals for the Eighth Circuit, and 12 in the district courts of Missouri. Further, an analysis of these cases gives different results than the analysis of those decided in the Missouri state courts.

They cannot be satisfactorily categorized according to the subject matter of the dispute since there is only one classification in which more than two cases can be grouped. This consists of "commodities" which were the subject matter of 6 cases or 30 per cent of the total. These were: feed,⁶² corn,⁶³ soybean oil meal,⁶⁴ rice,⁶⁵ molasses,⁶⁶ and potatoes.⁶⁷ There were two cases involving the warranty of a manufacturer of foodstuffs to the ultimate consumer,⁶⁸ and similar ones involving tires,⁶⁹ and an automobile.⁷⁰ The others involved pressing machines,⁷¹ shares of stock,⁷² a bull for breeding,⁷³ oil and gas storage tanks,⁷⁴ steel,⁷⁵ paint,⁷⁶ candy wrappers,⁷⁷ a used refrigerator,⁷⁸ and a going business.⁷⁹

As indicated, only 4 cases, or 20 per cent, were of sales to con-

61 Vols. 58-136 of the Federal Supplement, and 146-228 of the Federal Reporter, second series, were consulted. (Actually there were twenty-one if *Buder v. Becker*, 185 F.2d 311 (8th Cir. 1950) is included. However, it arose out of the same cause of action as *Becker v. Buder*, 88 F. Supp. 609 (1949), *motions for new trial denied*, 88 F. Supp. 616 (E.D. Mo. 1950).)

62. *Farmers Elevator Serv. Co. v. Hogan*, 85 F. Supp. 844 (W.D. Mo. 1949).

63. *Good v. Green*, 90 F. Supp. 316 (W.D. Mo. 1950).

64. *Hogan v. Barnett & Co.*, 179 F.2d 836 (8th Cir. 1950).

65. *Miravalle Supply Co. v. El Campo Rice Milling Co.*, 181 F.2d 679 (8th Cir. 1950).

66. *National Molasses Co. v. Herring*, 221 F.2d 256 (8th Cir. 1955).

67. *J. R. Simplot Co. v. L. Yukon & Son Produce Co.*, 227 F.2d 67 (8th Cir. 1955).

68. *Williams v. Campbell Soup Co.*, 80 F. Supp. 865 (W.D. Mo. 1948); *McIntyre v. Kansas City Coca Cola Bottling Co.*, 85 F. Supp. 708 (W.D. Mo. 1949).

69. *Wessley v. Seiberling Rubber Co.*, 90 F. Supp. 709 (W.D. Mo. 1950).

70. *Dennis v. Willys-Overland Motors, Inc.*, 111 F. Supp. 875 (W.D. Mo. 1953).

71. *United States Hoffman Mach. Corp. v. Larchli*, 150 F.2d 301 (8th Cir. 1945).

72. *Becker v. Buder*, 88 F. Supp. 609 (1949), *motions for new trial denied*, 88 F. Supp. 616 (E.D. Mo.), *aff'd*, 185 F.2d 311 (8th Cir. 1950).

73. *Miller v. Penney*, 77 F. Supp. 887 (W.D. Mo. 1948).

74. *Black, Sivalls & Bryson, Inc. v. Shondell*, 174 F.2d 587 (8th Cir. 1949); *J. B. Beaird Co. v. Consumers Cooperative Ass'n*, 102 F. Supp. 193 (W.D. Mo. 1951).

75. *Durasteel Co. v. Great Lakes Steel Corp.*, 205 F.2d 438 (8th Cir. 1953).

76. *Froedtert Grain & Malting Co. v. Steelcote Mfg. Co.*, 110 F. Supp. 757 (E.D. Mo. 1953).

77. *Milprint, Inc. v. Donaldson Chocolate Co.*, 222 F.2d 898 (8th Cir. 1955).

78. *Bankers Indemnity Ins. Co. v. Frigidaire Sales Corp.*, 113 F. Supp. 405 (E.D. Mo. 1953).

79. *In re Venie*, 80 F. Supp. 250 (W.D. Mo. 1948).

sumers⁸⁰ (unless one includes the case of *Bankers Indemnity Ins. Co. v. Frigidaire Sales Corp.*,⁸¹ which arose out of a consumer sale, though the immediate dispute was between the retailer's insurance company which paid off the claim, and the manufacturer). Six of the cases,⁸² or 30 per cent, involved sales to professionals not for resale. Seven,⁸³ or 35 per cent, involved sales to merchants for resale.⁸⁴

Breach of warranty was the issue involved more often than any other.⁸⁵ Otherwise, the existence of mutual rescission or repudiation by one party justifying the other's failure to perform were the principal issues.⁸⁶ In addition, the cases involved questions of when delivery has been made,⁸⁷ conflicting forms (order and invoice),⁸⁸ the Perishable Agricultural Commodities Act,⁸⁹ uncertainty making the

80. *Williams v. Campbell Soup Co.*, 80 F. Supp. 865 (W.D. Mo. 1948); *McIntyre v. Kansas City Coca Cola Bottling Co.*, 85 F. Supp. 708 (W.D. Mo. 1949); *Wessley v. Seiberling Rubber Co.*, 90 F. Supp. 709 (W.D. Mo. 1950); *Dennis v. Willys-Overland Motors, Inc.*, 111 F. Supp. 875 (W.D. Mo. 1953).

81. 113 F. Supp. 405 (E.D. Mo. 1953).

82. *United States Hoffman Mach. Corp. v. Larchli*, 150 F.2d 301 (8th Cir. 1945); *Miller v. Penney*, 77 F. Supp. 887 (W.D. Mo. 1948); *Black, Sivalls & Bryson, Inc. v. Shondell*, 174 F.2d 587 (8th Cir. 1949); *J. B. Beard Co. v. Consumers Cooperative Ass'n*, 102 F. Supp. 193 (W.D. Mo. 1951); *Durasteel Co. v. Great Lakes Steel Corp.*, 205 F.2d 438 (8th Cir. 1953); *Milprint, Inc. v. Donaldson Chocolate Co.*, 222 F.2d 898 (8th Cir. 1955).

83. *Farmers Elevator Serv. Co. v. Hogan*, 85 F. Supp. 844 (W.D. Mo. 1949) (\$12,086.00); *Good v. Green*, 90 F. Supp. 316 (W.D. Mo. 1950) (\$28,673.03—judgment was for \$123.03); *Hogan v. Barnett & Co.*, 179 F.2d 836 (8th Cir. 1950) (\$6,740.00); *Miravalle Supply Co. v. El Campo Rice Milling Co.*, 181 F.2d 679 (8th Cir. 1950) (\$11,958.15); *Froedtert Grain & Malting Co. v. Steelcote Mfg. Co.*, 110 F. Supp. 757 (E.D. Mo. 1953) (\$3,701.48); *National Molasses Co. v. Herring*, 221 F.2d 256 (8th Cir. 1955) (amount unknown—difference between contract price for eleven tank cars of molasses and market price); *J. R. Simplot Co. v. L. Yukon & Son Produce Co.*, 227 F.2d 67 (8th Cir. 1955) (under \$500.00).

84. The remainder of the federal cases—*In re Venie*, 80 F. Supp. 250 (W.D. Mo. 1948), and the *Buder* cases (see note 72 *supra*)—are, of course, rather special since the former involved the sale of a business, and the latter a probate matter.

85. *Miller v. Penney*, 77 F. Supp. 887 (W.D. Mo. 1948); *Williams v. Campbell Soup Co.*, 80 F. Supp. 865 (W.D. Mo. 1948); *McIntyre v. Kansas City Coca Cola Bottling Co.*, 85 F. Supp. 708 (W.D. Mo. 1949); *Wessley v. Seiberling Rubber Co.*, 90 F. Supp. 709 (W.D. Mo. 1950); *Froedtert Grain & Malting Co. v. Steelcote Mfg. Co.*, 110 F. Supp. 757 (E.D. Mo. 1953); *Bankers Indemnity Ins. Co. v. Frigidaire Sales Corp.*, 113 F. Supp. 405 (E.D. Mo. 1953); *Milprint, Inc. v. Donaldson Chocolate Co.*, 222 F.2d 898 (8th Cir. 1955).

86. *Farmers Elevator Serv. Co. v. Hogan*, 85 F. Supp. 844 (W.D. Mo. 1949) (mutual rescission); *Good v. Green*, 90 F. Supp. 316 (W.D. Mo. 1950) (delay in delivery justifying buyer's repudiation); *Hogan v. Barnett & Co.*, 179 F.2d 836 (8th Cir. 1950) (buyer's repudiation justifying seller's failure to ship); *Durasteel Co. v. Great Lakes Steel Corp.*, 205 F.2d 438 (8th Cir. 1953) (mutual rescission).

87. *United States Hoffman Mach. Corp. v. Larchli*, 150 F.2d 301 (8th Cir. 1945) (\$4,337.36). This case was a reorganization proceeding and the dispute was between the holder of chattel mortgages on the machines and the trustee in bankruptcy.

88. *National Molasses Co. v. Herring*, 221 F.2d 256 (8th Cir. 1955).

89. *J. R. Simplot Co. v. L. Yukon & Son Produce Co.*, 227 F.2d 67 (8th Cir. 1955).

contract unenforceable,⁹⁰ uncertainty of the price set by contract,⁹¹ and cash sale (passage of title).⁹²

The "Sales" cases that are decided in the federal courts are, thus, predominantly mercantile. The majority of them are disputes between merchants. They involve the sale of substantial (though not much in excess of the amount necessary to get into the federal court)⁹³ quantities of goods, for resale. But one could scarcely say the federal courts in Missouri are thronged with quarrelling merchants. There are only 20 cases in all. Twenty cases in eleven years, or less than 2 per year, does not seem many considering the gigantic volume of sales. Furthermore, though they constitute the majority, only 13 of these cases were mercantile—*i.e.*, involved something more than the sale of goods to consumers at retail. Coupled with the 24 similar cases in the state courts, this makes 37 mercantile cases in all, or slightly over 3 per year. Or, if one includes only sales to "merchants," 17 cases in all, or less than 2 per year.⁹⁴

What do all of these figures mean for the law merchant in Missouri? First, that there has not been any substantial law merchant developed in the courts of Missouri in the years since World War II. Insofar as there have been any judicial developments within the state they must

90. *J. E. Beaird Co. v. Consumers Cooperative Ass'n*, 102 F. Supp. 193 (W.D. Mo. 1951).

91. *Miravalle Supply Co. v. El Campo Rice Milling Co.*, 181 F.2d 256 (8th Cir. 1950).

92. *In re Venie*, 80 F. Supp. 250 (W.D. Mo. 1948).

93. The amounts involved are indicated in parentheses after the citations in note 83 *supra*.

94. The legal issues in the Missouri mercantile cases were as follows (these cases are listed above in the appropriate categories, but it is believed that it may be convenient to have them listed together): *Commercial Credit Co. v. Interstate Securities Co.*, 197 S.W.2d 1000 (Mo. App. 1946) (dispute between conflicting lien holders); *Ellis Gray Milling Co. v. Sheppard*, 359 Mo. 505, 222 S.W.2d 742 (1949) (price dispute); *Kansas City Automobile Auction Co. v. Overall*, 241 Mo. App. 280, 238 S.W.2d 446 (1951) (breach of warranty of title); *E. F. Drew & Co. v. Brooks Supply Co.*, 243 S.W.2d 621 (Mo. App. 1951) (construction of contract: question if certain additional provisions had been added, and, if so, whether complied with); *Amos-James Grocery Co. v. Cannors Exchange, Inc.*, 256 S.W.2d 803 (Mo. 1953) (breach of warranty); *Willibald Schaefer Co. v. Blanton Co.*, 264 S.W.2d 920 (Mo. App. 1954) (priority restriction justifying failure to ship); *De Winter v. Lashley*, 274 S.W.2d 40 (Mo. App. 1954) (breach of warranty); *Mallory Motor Co. v. Overall*, 279 S.W.2d 532 (Mo. App. 1955) (risk of loss—question of title passing—cash sale); *Sidney Smith, Inc. v. Steinberg*, 280 S.W.2d 696 (Mo. App. 1955) (rights of bona fide purchaser against lien holder). The Federal cases are: *United States Hoffman Mach. Corp. v. Larchli*, 150 F.2d 301 (8th Cir. 1945) (validity of chattel mortgages against trustee in bankruptcy); *Farmers Elevator Serv. Co. v. Hogan*, 85 F. Supp. 844 (W.D. Mo. 1949) (question of mutual rescission); *Good v. Green*, 90 F. Supp. 316 (W.D. Mo. 1950) (failure of delivery justifying repudiation by buyer); *Hogan v. Barnett & Co.*, 179 F.2d 836 (8th Cir. 1950) (question of repudiation); *Miravalle Supply Co. v. El Campo Rice Milling Co.*, 181 F.2d 679 (8th Cir. 1950) (dispute over price due under contract); *Froedtert Grain & Malting Co. v. Steelcote Mfg. Co.*, 110 F. Supp. 757 (E.D. Mo. 1953) (breach of express warranty); *National Molasses Co. v. Herring*, 221 F.2d 256 (8th Cir. 1955) (conflicting forms—purchase orders versus confirmation); *J. R. Simplot Co. v. L. Yukon & Son Produce Co.*, 227 F.2d 67 (8th Cir. 1955) (action under Perishable Agricultural Commodities Act).

have come as much if not more in the federal courts operating on the fiction that they were applying Missouri law when in fact, as has been seen, there was almost no Missouri law—at least not active, during the period.⁹⁵

95. It can be urged that it does not take more than one case to establish a rule of law, and once a rule is established, counsel on both sides will simply refer to it, and litigation will be unnecessary: thus a lack of cases simply indicates a condition of legal certainty. In answer to this, it is perhaps enough to say that probably most cases turn on disputed questions of fact rather than law, hence certainty as to law does not prevent litigation. Furthermore, rules of law are, after all, just conditional statements of fact, hypothetical or actual; if A is true then B will follow; if the defendant negligently struck plaintiff with his automobile, then the plaintiff can recover. Rarely will the protasis exactly agree with the facts in the particular case, hence, under the impact of new cases or fact situations, it will be necessary to complicate it—if the defendant struck the plaintiff with his automobile, and was negligent, and the plaintiff was not also negligent, and the plaintiff suffered injury, the plaintiff may recover, etc. One may eventually change the apodosis (the plaintiff may not recover, or may recover to the extent that he was not negligent), or, if one does not, the rule of law will still be changed or at least modified, since so many qualifications will have been added. For an instance, see Davis, *A Re-examination of the Doctrine of MacPherson v. Buick and its Application and Extension in the State of New York*, 24 *FORDHAM L. REV.* 204 (1955). See also, in the same connection, LEACH, *FUTURE INTERESTS* 736-803, especially 736-38, 752-55 (2d ed. 1940), where the development of the Rule Against Perpetuities from the Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682), is traced and its gradual shaping under changing fact situations shown. So here, in the one sector of this field in which there is much litigation—suits for breach of implied warranty by consumers against manufacturers—the principal disputes are over facts, and the rules of law are gradually changing.

It is apparently well-settled in Missouri that there is manufacturer's liability in the case of food, beverages, and drugs sold for human consumption, yet there were during the period of this study three cases decided by the courts of appeals involving suits against Coca-Cola bottling companies for impurities of various types discovered in Coca-Cola bottles. There have been two additional cases during the past year. In the first case, *Foley v. Coca-Cola Bottling Co.*, 215 S.W.2d 314 (Mo. App., St. Louis 1948), little was said in the opinion about liability for breach of warranty, though it was mentioned in passing (*id.* at 316). The disputed questions were whether plaintiff's injuries were caused by the tacks in the Coca-Cola bottle, whether the foreign matter could have got into the bottle after leaving defendant's hands, and whether it was improper to permit cross-examination of defendant's manager on whether new machinery had been installed after this occurrence (on this point, there was a reversal of the trial court's judgment for plaintiff). In *Duley v. Coca-Cola Bottling Co.*, 232 S.W.2d 801 (Mo. App., St. Louis 1950), it was conceded that plaintiff might recover on breach of implied warranty, but defendant contended that plaintiff's evidence did not show that her illness resulted from the safety pin, etc., in the bottle or that her injury was substantial. In *Strawn v. Coca-Cola Bottling Co.*, 234 S.W.2d 223 (Mo. App. 1950), decided two months later by the Kansas City Court of Appeals, the question of liability for breach of warranty was not mentioned, the disputed questions were whether the evidence was sufficient to permit the jury to find that impurities (cigar butts, etc.) were in the bottle when delivered by the manufacturer to the seller, and whether they caused the plaintiff's illness. In *Williams v. Coca-Cola Bottling Co.*, 285 S.W.2d 53 (Mo. App., St. Louis 1955), the defendant urged that the court overrule previous decisions and hold that suits for breach of implied warranty against the manufacturer may not be maintained. This the court declined to do. It did, however, reverse a decision for the plaintiff on the ground of failure of proof that defendant manufactured and sold the particular bottle of Coca-Cola, that foreign matter was present when it was delivered to the shop, and that the foreign matter was dangerous and impure and injured plaintiff's health. In *Leathers v. Sikeston Coca-Cola Bottling Co.*, 286 S.W.2d 393 (Mo. App., Springfield 1956) the issue of liability was not mentioned. The questions were whether

Of course, in theory the "law" is always *there*—"a brooding omnipresence"—and when a mercantile case comes before a Missouri court, it can apply this "law" which will then be revealed for all to see. As a practical matter this is not too far of the mark since with the riches of the West reporting system it is unlikely that a case will come before a Missouri court for which there is not, somewhere within the United States, an at least apparent analogue, though it be an Ohio *nisi prius* report.⁹⁶ And, if one can cite a case, one is not, of course, *making* law, but simply declaring what is.

But it may be wondered if, though possibly the law merchant, this is really merchants' law. Without making any effort to arrive at a general definition of law, it does seem that the law relating to a particular human activity, such as marriage, or to particular types of men, such as merchants, should consist of the rules by which disputes in this area or among these men are settled. And this does not seem to be true of this sales law in Missouri, or at any rate, not in the usual sense. For there are, it will be remembered, only 95 reported cases for both state and federal courts for eleven years: years in which the

defendant sold the Coca-Cola in question (it contained photographic film) and whether plaintiff suffered any injury. There were also some evidentiary points. In *Worley v. Proctor & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (St. Louis 1952), the question of liability for breach of warranty (the plaintiff allegedly suffered skin injuries from using defendant's soap powder, Tide—"new washing miracle," "and of course Tide is kind to hands, too") was discussed at length. The Coca-Cola cases were cited, and a detergent was put in the category of food, beverages, and drugs and hence "plaintiff's case does not fail for failure to allege and prove privity between the parties." *Id.* at 1122, 253 S.W.2d at 537. However, it did fail for failure to prove that Tide caused the injury.

In the federal courts there have been three cases. The first involved a bottle of Coca-Cola, but was an instance of injury resulting from the bottle exploding rather than impurities in the beverage. This was *McIntyre v. Kansas City Coca Cola Bottling Co.*, 85 F. Supp. 708 (W.D. Mo. 1949). The district judge said that it was clear, at least under the decisions of the Missouri courts of appeals (there was some doubt about the supreme court which has not often dealt with the problem) that there is, in Missouri, an implied warranty of fitness of food and drink sold for human consumption; that there is liability of the manufacturer where goods are bought and sold for a particular purpose (wearing a blouse on the stage under bright lights as opposed to merely wearing a blouse, perhaps); and that there is no implied warranty of merchantability. Accordingly plaintiff could recover, if at all, only on a tort theory for negligence. There are two subsequent cases, both in the western district of Missouri, though only one before the judge who wrote the *McIntyre* opinion. In both *Wessley v. Seiberling Rubber Co.*, 90 F. Supp. 709 (W.D. Mo. 1950), in an action by a consumer purchaser of tires against the manufacturer, and *Dennis v. Willys-Overland Motors, Inc.*, 111 F. Supp. 875 (W.D. Mo. 1953), a suit by the purchaser of an automobile against the manufacturer, recovery was denied on the ground of lack of privity.

Thus a clear rule of law with some refinements did not prevent extensive litigation. Further, so far as the *Coca-Cola* cases are concerned (and other food and beverage cases, presumably, if they should arise), some rather refined rules are developing on the problem of proving that the impurity could not have entered the bottle after it left the bottler's hands and before being drunk by the plaintiff.

96. To be sure, of course, Ohio *nisi prius* cases are not currently included in the North Eastern Reporter but must be sought afield in Ohio Opinions Annotated. West does publish the same type of thing in the New York Supplement, but I have always liked the name Ohio *nisi prius* for some reason.

annual wholesale (sales between merchants) sales figure exceeded \$7,000,000,000 per year, and the value of the annual manufactured product was over \$1,000,000,000. And the cases that there were involved situations that would seem apt to occur with some frequency: a contract for "washed" potatoes and those delivered allegedly caked with mud;⁹⁷ whether the contract (evidenced by conflicting forms) provided 1st September or 30th September as the cut-off date for deliveries;⁹⁸ whether specially ordered candy wrappers were defective when delivered or deteriorated through the buyer's delay in using them⁹⁹ (the three Missouri sales cases decided by the Court of Appeals for the Eighth Circuit during 1955). Were there no other similar cases, and if there were, why were they not reported? To be sure, the fact that they were not reported would not prove that no action was brought since even in the federal courts a minority of decisions of courts at nisi prius are reported, and in the state courts (in Missouri, as in most states) none at all. Further, of course, a minority of cases tried are appealed.¹⁰⁰ Still the number tried, especially the mercantile cases, seems certain to be less than one would imagine. (If there should be a vast number of cases tried and almost none appealed this would be a subject for investigation in itself. It seems unlikely.) Apparently, it may be added, this is nothing new. It has been asserted that there were only 13 cases decided by the Supreme Court of Missouri involving implied warranties in the 124 years prior to 1945 and only 89 by the courts of appeal in the 69 years before 1945.¹⁰¹ One may consequently well ask what happened to the cases that did not get into the courts?

Obviously we do not know, and cannot know, without an exhaustive survey of the practices of Missouri merchants. Commercial arbitration is, of course, a possibility, but there is no evidence that it exists in large quantity and the evidence elsewhere tends to show that it is most used in fairly tightly organized exchanges and trade associations.¹⁰² It is probable that many disputes are settled by agreements between the parties, frequently with advice of counsel. When this happens—when counsel is called in—then clearly court decisions are very influen-

97. *J. R. Simplot Co. v. L. Yukon & Son Produce Co.*, 227 F.2d 67 (8th Cir. 1955).

98. *National Molasses Co. v. Herring*, 221 F.2d 256 (8th Cir. 1955).

99. *Milprint, Inc. v. Donaldson Chocolate Co.*, 222 F.2d 898 (8th Cir. 1955).

100. The figure for the federal courts in the country at large is approximately four cases tried for one appealed. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 145-46 (1955). However, this figure includes criminal cases in which the percentage of appeals is undoubtedly higher than in sales cases as it doubtless is in patent and some other cases.

101. Overstreet, *Some Aspects of Implied Warranties in the Supreme Court of Missouri*, 10 MO. L. REV. 147, 186 (1945).

102. This observation is based primarily on an examination by the writer of the records of the commercial cases arbitrated under the auspices of the American Arbitration Association.

tial, for counsel's advice will doubtless be based on, or at least start from, a memorandum on the "law," which must include cases from other states as well as Missouri. One wonders, though, if there are not other—perhaps more—cases where counsel are not called in, and yet serious disputes arise and are settled. On what basis? Is there a pattern of conduct in these settlements, or do the parties simply dicker back and forth in an aimless fashion, with the final settlement being the result of chance? Even if counsel is called in, is the result always foreordained according to what his memorandum shows the law to be? Is there not a tendency for memoranda to show the law in such a state as to permit the client to do the thing he is determined to do with some chance of winning if he should be challenged in court? A sort of brief in advance of the law suit in other words? Obviously, anything one says in this regard must be surmise, but I would suggest that the probability is that merchants have, ordinarily, no intention of having a law suit, and that their negotiations are carried on with this premise in mind. Further, it is obvious that the relative economic position of buyer and seller is extremely influential in the way settlements are reached. In other words, if a large buyer, say a chain of department stores, receives an order of blouses from a small manufacturer which it regards as not up to the standard which it ordered (perhaps because of the type of cloth used), the buyer will expect, and will probably receive, either a price allowance, or a full right of return, depending on its desires and the custom of the trade. If, on the other hand, the buyer is a small manufacturer, and the seller is, say, a large manufacturer of steel for which there is a heavy demand and short supply, the seller may well be able to refuse to accept returns or, at any rate, offer a smaller price allowance than in the former case. There may be similar customs in connection with disputes over the time, place, and manner of delivery: a certain leeway as to the percentage of spoilage permitted in the sale of perishables, for example.

Probably there are few who would dispute this, and yet many might wonder if it is not simply laboring the obvious (displaying the temper of the novelist who defined a sociologist as one who spends \$40,000 to find a brothel¹⁰³). Everyone knows, after all, that most disputes, whether in the commercial field or out of it, are settled without recourse to the courts. Courts deal with the unusual, the pathological situation in all areas. Conceivably these observations may be valid ones. Perhaps the percentage of commercial disputes that reach the courts is not appreciably different than, say, that of personal injury cases, disputes arising out of employment disputes (though, of course, in the latter area, if there is a collective bargaining agreement, there

103. Quoted, though not by name, in Homans, *Giving a Dog a Bad Name*, 66 THE LISTENER 232, 233 (1956).

will be an elaborate extrajudicial grievance procedure in all probability), land transaction disputes, etc. Even if this is true, however, one still wants to know why this case and not that one—what are the criteria that the merchant uses to decide when to litigate and when not? Furthermore, and more importantly, what happens to the cases that do *not* get into court? How are *they* settled? Are there rules, patterns of results (articulated and conscious—known to the parties—or otherwise)?

The answers to these questions are, it is believed, quite important to our understanding of sales law. When we say the law of sales, we ordinarily mean the cases decided by the courts of a particular jurisdiction (or the majority of states if we are speaking nationally) in the fields of warranty, delivery, passage of title, risk of loss, etc. From these one can induct rules of law, or predictions as to what the courts will do in similar situations.¹⁰⁴ This is supposedly a help both in preparing for litigation and in advising a client on what course of action to take to avoid litigation. They are presumably the guides for action of the mercantile community even though no criminal sanctions attach for their violation—just as the rules of probate and conveyancing law guide men in preparing wills and transferring realty. If, however, it is most unlikely that a case will get into court, then what the court will do if it should get the case may very well not be of much importance or influence. Other considerations will determine men's actions. If there is any law, it is derived from other sources. My guess would be that there is a fair degree of certainty or standardization in the practice of merchants, but that it is based on tacitly held, inarticulated, norms of conduct.

Or, one might say, that a modern businessman or merchant has a pretty good idea of what proper business behavior is in the sense that in a situation in which he is at the moment involved he has a strong feeling as to what is the right thing to do. When he is involved in disputes with another, though he may well strive for the greatest possible advantage from the situation, he will not attempt to push his opponent too far, nor refuse to give way himself. There is room for adjustment, but limits beyond which the reasonable prudent businessman will not go. If he does, he acquires a bad reputation. And he does not, except under extreme circumstances (of which intense personal irritation is doubtless one and financial emergency another). Presumably the norms differ from industry to industry and from trade to trade. What would be sharp practice in one line may be typical behavior in another.

104. There is some doubt as to whether there is such a thing as "induction" in this sense, and it has been asserted, "that what passes as induction is either disguised deduction or more or less methodical guesswork." COHEN, A PREFACE TO LOGIC 33 (Meridian ed. 1956).

The type of behavior suggested would fit the pattern of the development of the law merchant. For this law was truly merchants' law: it was created by merchants. It is well known that it was created by mercantile, and not by the common-law courts.¹⁰⁵ But it may not be realized that these mercantile courts were not courts with lawyers and judges in our sense. Rather, they were fora at which a dispute between merchants could be submitted promptly to other merchants to decide what the custom of merchants was in regard to it (without the delays attendant on actions in the common-law courts).¹⁰⁶ The essential features that differentiated the law merchant from the common law were not regarded (at the time at least) as being of substance but rather of procedure.¹⁰⁷ Obviously then, changing trade practices and methods of doing business would be quickly reflected in the decisions of the courts. One can conceive of the merchants discussing unusual cases or situations as they went from fair to fair or talked in the evenings after the day's transactions were complete. They may also have talked of new ways of doing business that someone had heard of, probably from the Italians, and considered the possibility of adopting them, and, at any rate, discussed their merits and demerits.¹⁰⁸ It was not the courts that influenced or shaped mercantile

105. See 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 538-39 (7th ed. 1956); 5 *id.* 60-129 (3d ed. 1945). For Europe generally, see HUVELIN, ESSAI HISTORIQUE SUR LE DROIT DES MARCHÉS ET DES FOIRES 211-39 (1897).

106. See note 105 *supra*. See also 1 SELDON SOCIETY, SELECT CASES CONCERNING THE LAW MERCHANT xxii-xxvi (Gross ed. 1908). These references are to the fair courts, but a similar procedure was employed by the courts of the staple (*id.* at xxvii). Merchants also used the borough courts (*id.* at xx-xxii). See also 1 SELDON SOCIETY, BOROUGH CUSTOMS 183-92 (Bateson ed. 1904) (instances of merchant and fair law in courts of London, Bristol, Ipswich, Waterford, Cork, Dublin, Kilkenny, Norwich, Torksey, and Rye).

107. See note 106 *supra*. See also, 1 THE LITTLE RED BOOK OF BRISTOL 57 (Bickley ed. 1900). This book—a reprint of a manuscript record book of the city of Bristol—contains the only contemporary medieval English treatise on the law merchant. It dates probably from the 14th century. The anonymous author lists three principal ways in which the common law differs from the law merchant. Unfortunately, he lists them in Latin which Mr. Bickley failed to translate. Apparently (on the basis of my own very unconfident translation): "The law of the market [*lex mercati*, the paragraph heading is *lex mercatoria*, the law merchant] differs from the common law of the kingdom in three ways: first because the decision is speedier. Second, because he who pledges to make answer to the trespass . . . pledges for the whole debt including damages and costs And the third way in which it differs is that under it no one is permitted to wage his law [to introduce proof perhaps] on the negative side, but always, according to this law, it is for the plaintiff to prove his case whether by *secta* [confirming witnesses] or by the deed [*factum*] or both, and not for the defendant." All, obviously, are procedural matters. It should be added that one can say that medieval law of all sorts was primarily concerned with procedure, and hence it would naturally be in the procedural area that a contemporary writer would look for possible differences between the two bodies of law. It is, in any event, clear that merchants created their own law.

108. It has been said that "in 1500 there was a lag of perhaps two centuries between the commercial and financial methods of the Hanseatic merchants and those of the Italians." 2 CAMBRIDGE, ECONOMIC HISTORY OF EUROPE 291 (1952). English practice would, of course, have advanced no farther, if as far, as that of the Germans.

practice, but the contrary. We shall probably never know exactly how the various branches of law that we associate with the traditional law merchant—agency, insurance, partnership, negotiable instruments, sales, etc.—developed since the records of merchants and their courts are quite fragmentary.¹⁰⁹ But it does seem clear that they were the gradual creation of the merchants themselves.

There is no reason to suppose that the process has stopped. On the other hand, quite the reverse seems to be the case as is seen in the rules of clearing houses, exchanges, and trade associations. Bankers, in addition, have recently been making a very conscious effort to change the liabilities of parties under letters of credit without resort to court or legislature.¹¹⁰ There are business school texts that are quite explicit in their instructions as to the proper policies to be followed on returns of merchandise. One text contains the following advice:

Adjustment Policy. . . . It is always advisable to proceed on the assumption that the customer is right and to investigate claims carefully before they are refused. In fact, it may even be expedient to allow all claims that are honestly made as a means of paving the way for future business and good-will. In any case, the customer should be treated fairly, although it may sometimes be advisable not to yield weakly to every request for allowance, particularly when dealing with business men. . . . If adjustments are made in a grouchy and begrudging manner, sufficient goodwill is lost so that they might as well not have been made at all.

Returned Goods Privilege. . . . Although wholesalers seldom have to accept returned merchandise in excess of 3% of sales, the problem is sufficiently important to require the adoption of a definite policy with regard to the liberality with which returned goods shall be accepted. . . . [R]eturns may be made because of merchandising errors on the part of the vendor many of which can be removed through careful analysis, or because of the customer's lack of responsibility and appreciation of business ethics. . . . A policy must therefore be adopted that will take cognizance of such possibilities and that will govern the extent to which returned goods shall be accepted where the seller is not at fault. A limit on the time within which returns must be made will also help considerably in this connection.¹¹¹

It seems quite probable that the development of the law merchant by merchants continues outside the courts.

109. See, e.g., 1 SELDEN SOCIETY, SELECT CASES CONCERNING THE LAW MERCHANT xiv-xv (Gross ed. 1908); LOPEZ & RAYMOND, MEDIEVAL TRADE IN THE MEDITERRANEAN WORLD 6 (1955).

110. See the discussion of the "Uniform Customs, and Practices for Commercial Documentary Credits fixed by the Thirteenth Congress of the International Chamber of Commerce" in Mentschikoff, *Letters of Credit: The Need for Uniform Legislation*, 23 U. CHI. L. REV. 571, 572-81 (1956).

111. MAYNARD & BECKMAN, PRINCIPLES OF MARKETING 564-66 (4th ed. 1946). See also FREY, MANUFACTURERS' PRODUCT PACKAGE AND PRICE POLICIES 79-86 (1940), where repair, installation, and inspection services are dealt with.

If this is true, just how it is developing, just what processes are at work to create new rules and enforce old ones, we do not know. Nor can we, without fairly exhaustive examination of the actual practices of businessmen. It is to be hoped that such an examination may sometime be made, for it would produce information that would be extremely useful even for the practicing lawyer since currently one of his most difficult tasks is to get enough of a feel for the operating reality of his client's situation to be able to give him useful advice (as opposed to that which is merely "correct" legally). For that matter, courts are frequently responsive to evidence of business practice.¹¹²

Most of all, however, such information should be of immense interest to the sociologist particularly when defined as one who tries to find out what are basic phenomena and relationships of society in all its aspects: political, legal, literary, artistic, economic, etc.; what are the relationships between these various aspects of social life, and in what ways do they interact upon each other. . . . He tries to find out what there is in common in all those social activities which constitute the subject-matter of the specialized sciences, how they influence and interact upon each other, in our society as well as in societies of other cultures, past and present, developed or primitive. Understood in this sense, sociology is basic for all social and natural sciences, its aim being the discovery of those ultimate units of society which might, in a sense, be called the atoms of the social structure, the type-patterns according to which the boundless manifold of social phenomena may be taxonomically classified, and, lastly, to find out what regularities, if any, one might find in the coincidence or sequence of social phenomena.¹¹³

For such a person there are few more fruitful aspects of society to investigate than the way it forms and enforces its laws. This is clearly recognized in the case of primitive societies whose law-ways receive the closest attention by the anthropologist.¹¹⁴ In this country, however, the study of law, except in a few isolated areas such as constitutional law and international law, is left to lawyers, and they study it primarily as developed in the opinions of appellate courts, although the majority of lawyers probably do almost no trial, to say nothing of appellate, work.

112. See, e.g., *Dixon Irmaos & Cia. Ltda. v. Chase Nat'l Bank*, 144 F.2d 759 (2d Cir. 1944), *cert. denied*, 324 U.S. 850 (1945), where evidence of a custom of bankers, exporters, and importers in New York to accept a guaranty in lieu of a missing bill of lading was held to justify the seller's failure to present a full set of bills of lading in presenting a draft for payment under a letter of credit calling for "full set bills of lading."

113. WEBER, *LAW IN ECONOMY AND SOCIETY* xxvii (Rheinstein ed. 1954).

114. For a recent book that deals with several bodies of primitive law and shows its possible relations and significance for "law" in general, see HOEBEL, *THE LAW OF PRIMITIVE MAN* (1954). For examples of more detailed studies of particular bodies of primitive law with the same emphasis, see HOEBEL & LLEWELLYN, *THE CHEYENNE WAY* (1941); GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955).

But perhaps it is all of little concern to the merchant, who will simply do as he knows he should since, as Defoe wrote in 1727:

1. He understands himself better than to be continually embarrassing himself in Suits at Law; falling upon his Fellow-Tradesmen with Heat and Passion, making Quarrels for the sake of them, and pursuing Advantages as if he liv'd by them; 'tis quite out of his Way; he does not relish Strife.
2. He understands Trade better than to push every Debtor to Extremity, and tear Men to Pieces just when he knows they cannot answer his Demand; when he knows that by Patience, and a little Forbearance, the Debt may be got in, that by Violence would be at least in Danger of being lost.
3. He knows the Value of his Money better than to throw it away in Prosecutions at Law for Trifles; in which he knows he that gets the Victory, always is a Loser: He works too hard for his Money, and gets it with too much Care and Application, to make *Ducks and Drakes* of it when he has done, and throw it away in Gratification of his common Resentment: He'll never go to Law for the Pack'Cloth 'till he spends the Parcel, or sell his Customer for an empty Box.¹¹⁵

115. 2 DEFOE, *THE COMPLEAT ENGLISH TRADESMAN* 272-73 (2d ed. 1727). Defoe felt rather strongly that tradesmen should be very easy on their debtors (*id.* at 296), perhaps because he became insolvent once himself.