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Implied Warranty of Quality under the Uniform Sales Act

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IMPLIED WARRANTY OF QUALITY UNDER THE UNIFORM SALES ACT

Generally

The Uniform Sales Act was adopted by the legislature of the state of Washington in the extraordinary session of 1925. This act, patterned after similar legislation previously enacted in England, is designed to bring the law of the different states into conformity To effect this purpose the draughtsmen of the act largely codified the common law, but even where such a course was followed it is inevitable that the pre-existing law of some jurisdictions must be overruled. It is the purpose of the present discussion to consider the provisions of the Sales Act relative to implied warranty of quality in order to determine the proper interpretation to be given thereto, and then in the light of such principles to note the effect on the Washington law as previously announced by the Supreme Court of this state. Resort must be had for purposes of construction to the English and American cases construing the respective acts, since as yet no case involving this portion of the act has been decided in the state of Washington and the cases decided previously are in numerous instances valueless as authority under the Sales Act.

The law of implied warranty of quality, applicable to sales other than those by sample, is set forth in sec. 15 of the Uniform Sales Act as follows.

> Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
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> (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.
>
> (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an

implied warranty that the goods shall be of merchantable quality

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5) An implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade.

(6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

It is apparent that the act purports to apply to all "goods" without discrimination as to kind, that such is its scope was early decided in the English case of *Walls v. Russell.*[1] Also, by the language of the introductory paragraph, it extends to "goods supplied under a contract to sell or a sale," and this language has been held broad enough to support a warranty of quality of bottles, which contained mineral water sold to the plaintiff, although the bottles were returnable and not actually a part of the subject matter of the sale.[2]

Likewise, this section extends to all persons selling goods, except that the second subsection is limited to dealers in the goods sold. The first subsection of the English act is not so broad as the corresponding subsection of the American act, it requires that the article be one which it is "the seller's business to supply "[3] Both acts definitely wipe out any distinction that may previously have existed between sales by manufacturers and sales by dealers.

Warranties existing under this section find their source, in the final analysis, in the factor of justifiable reliance by the buyer on the seller. The necessity of reliance is expressly stated in the first subsection, and the other subsections clearly owe their existence to the same principle. The importance of keeping this in mind cannot be over-emphasized.

Warranties can be implied only under subsections 1, 2 and 5. Subsections 3 and 4 state certain cases in which no warranty

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[1] 2 Ir. K. B. 585 C. A. (1902)

[2] *Geddling v. Marsh*, 1 K. B. 668, 89 L. J. K. B. 526, 36 T. L. R. 337 (1920).

[3] Ch. 71 of 56 and 57 Victoria.

shall be implied, and subsection 6 merely recognizes that an implied warranty may exist along with an express warranty, providing that the two are not inconsistent. Subsections 2, 3, 5 and 6 furnish but little difficulty of construction. The other subsections, 1 and 4, have proved the most fruitful sources of litigation, chiefly by reason of the use of the words "particular purpose." To these two subsections must go the major portion of consideration in this article.

With the foregoing principles in mind, there remains to be determined the all-important question—in what cases does the act raise a warranty and in what ones does the rule of *caveat emptor* apply? To the end of answering this question, each subsection will be considered separately

Fitness for Known Purpose

The first subsection provides in substance that the goods are warranted reasonably fit for the particular purpose for which they are required, where such purpose is made known to the seller and the buyer relies on the seller's skill or judgment. The construction of the words "particular purpose" affords the chief difficulty under this subsection. If they are to be so strictly construed as to mean some purpose of the buyer, different from the ordinary or general use of the article, the scope of the act is greatly restricted. This subsection is the only one under which it is possible to find a warranty of a specific article. Consequently, if a strict interpretation be given to the words quoted, those who purchase such articles as automobiles, clothing or food merely for purposes for which such goods are ordinarily used will be without remedy should the goods prove defective. Such buyers would be compelled to further particularize their intended purpose in order to raise any warranty, and the warranty so raised would necessarily be one of limited scope. In brief, such a view would entirely exclude the common law warranty of merchantable quality in the sale of a *specific* article. Where the sale is by description, the right to such a warranty is, of course, assured by subsection 2.

Happily, the words "particular purpose" in this subsection have received a broader construction than suggested above, both from the English and the American courts.[4] According to these cases,

[4] Great Britain: *Wallis v. Russell*, Note 1, *supra*, *Preist v. Last*, 2 K. B. 148 -C. A. (1903) *Drummond v. Van Ingen*, 12 A. C. 284 (1887) (prior to Sale of Goods Act) *Thompson v Sears & Co.*, Sc. L. T. 221 (1926). United States: *Minneapolis Steel etc. Co. v. Casey Land Agency*, 51 N. D. 832, 201 N. W 172 (1924) *Keenan v. Cherry & Webb*, 47 R. I.

a particular purpose means any purpose, communicated to the seller, for which the buyer desires the goods.[5] So where an article has by its very nature but a single common use, the buyer need not particularize his needs in order to raise a warranty of fitness for such use.[6] In such a case the common use is the "particular purpose", and the warranty for this purpose incidentally happens to be identical with the common law warranty of merchantability

Where, however, the article sold may be put to a variety of uses, the buyer must, expressly or by implication, inform the seller of his special purpose if he wishes to have the benefit of an implied warranty of fitness for that purpose. The rules announced in this and the preceding paragraph are brought out most aptly in the English case of *Priest v. Last*[7] in the opinion of Collins, M. R., who said

> There are many goods which have in themselves no special or peculiar efficacy for any one particular purpose, but are capable of general use for a multitude of purposes. In case of a purchase of goods of that kind, in order to give rise to the implication of warranty, it is necessary to show that though the article sold was capable of general use for many purposes, in the particular case it was sold with reference to a particular purpose. But in a case where the discussion begins with the fact that the description of the goods, by which they are sold, points to one particular purpose only, it seems to me that the first requirement of the subsection is satisfied, namely that the particular purpose for which the goods are sold is made known to the seller.

Illustrative of cases of the first type referred to by this judge would be the sale of goods of such general character as steel and lumber. Unless the buyer particularizes the use to which he in-

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125, 131 Atl. 309 (1925). To the same effect without a detailed consideration of the question are: Great Britain: *Sproule v. Triumph Cycle Co.*, N. Ir. 83 C. A. (Ir.) (1927) United States: *Linen Thread Co. v. Shaw.* 9 F (2d) 17 (1925) *Mandel Bros. v. Mulvey*, 230 Ill. App. 588 (1923) *Flynn v. Bedell Co.*, 242 Mass. 450, 136 N. E. 252 (1922) *Ward v. Great Atlantic Tea Co.*, 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 342 (1918) *Parker v. Shaghalian*, 244 Mass. 19, 138 N. E. 236 (1923) *Ward v. Valker* 44 N. D. 598, 176 N. W 129 (1920) *Sharpsville Boiler Works v. Petroleum Co.*, 23 Ohio App. 319, 156 N. E. 149 (1927) *Lampman Werts Corp. v. Olneyville Co.*, 140 Atl. 6 (R. I.) (1928) Suggesting the stricter view are: *Bonwit v. Kinlen*, 150 N. Y. S. 966 (1914) *Meyer v. Cleveland Packard Motor Co.*, 106 Ohio St. 328, 140 N. E. 118 (1922).

[5] *Wallis v. Russell*, note 1. *supra.*

[6] Note 4, *supra.*

[7] Note 4, *supra.*

tends to put such goods, no warranty, it seems, could arise under this subsection. Because of the very nature of such goods, in all but the rarest cases the sale will be by description, and a warranty of merchantable quality implied under the second subsection. The second class of cases mentioned in the above quotation is illustrated by sales of wearing apparel,[8] food,[9] motor vehicles, [10] and like articles, in all of which cases it has been held that a warranty of fitness for purposes of common use was to be implied under the first subsection. It is of course possible that the buyer may wish to use such articles as these for some special purpose of his own, for instance, he may desire an article of food suitable for cooking in a certain way If he informs the seller of this purpose, and relies on his judgment in the matter, a warranty of fitness for the latter purpose arises, at the same time the other warranty (that is, that the article is a proper item of food) remains unaffected thereby

An examination of the decided cases leads merely to this: That where the dealings and circumstances inform the seller of any purpose of the buyer in purchasing the goods, there is an implied warranty of fitness for such purpose under this subsection, and that where the seller is entirely uninformed as to any purpose of the buyer, the doctrine of caveat emptor applies, subject always, of course, to the qualification that in sales by description by dealers there is an implied warranty of merchantability under subsection 2. The principles announced in these cases have the approval of the foremost text writers in this country and in England,[11] and seem to express a common sense interpretation of the scope of the words "particular purpose" as used in the first subsection.

It is not to be inferred from what has been said that a general warranty of merchantable quality as such arises under subsection 1, although statements to that effect are occasionally found. The only warranty possible under this subsection is one for a "particular purpose." As has already been pointed out, the particular purpose of the buyer *may* be the same as the general purpose for which the goods are designed, where this is true, the warranty of fitness for the particular purpose does not differ in practical

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[8] *Thompson v. Sears & Co.*, note 4, *supra*, *Keenan v. Cherry*, note 4, *supra*, *Mandel Bros. v. Mulvey*, note 4, *supra*, *Flynn v. Bedell Co.*, note 4, *supra*.

[9] *Wallis v. Russell*, note 1, *supra*.

[10] *Sproule v. Triumph Cycle Co.*, note 4, *supra*.

[11] BENJAMIN ON SALES, (6th ed.), pp. 715, 716; WILLISTON ON SALES, (2d ed.) pp. 500, 501.

effect from a general warranty of merchantable quality, but technically it remains a warranty of the former class.

Reference has already been made to the fact that the seller must be informed of the buyer's purpose to bring a case within this subsection. Such information may be conveyed expressly or by implication, whether it has been conveyed is only a question of fact in any case. Where the buyer relies on express words, his problem is simply one of proof. As to the implication of knowledge on the part of the seller, all facts surrounding the transaction are to be considered as a basis for the finding,[12] and the fact that there is a formal written contract is immaterial if an implied warranty is not thereby expressly excluded.[13]

Next it is necessary that the buyer show reliance on the seller's skill or judgment under this subsection. This again is a question of fact, the determination of which depends on such circumstances as the opportunity for inspection, the nature of the defect (whether latent or patent) and the comparative skill of the parties. The latent character of the defect does not relieve the seller if the buyer was entitled for other reasons to rely on him.[14]

In concluding the discussion of this subsection, it is to be noted that the goods need not be of the highest quality, it being sufficient if they are "reasonably fit" for the designated purpose.

Warranty in Sales by Description

Subsection 2 provides that where goods are bought by description from a dealer, they are impliedly warranted to be of mer chantable quality The rule announced obliges the seller, upon whom selection of the goods rests, to supply goods of sound quality without regard to any knowledge on his part as to the buyer's particular purpose. Little difficulty should be encountered from this subsection, since its language seems entirely unambiguous and it is declaratory of the general common law It is to be noted that it is to be limited to sales by dealers. It has been suggested that this limitation operates only where the goods are actually "bought," and that therefore sellers other than dealers cannot per form their *contracts to sell* by tendering or delivering unmerchant-

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[12] *Parker v. Shaghalian*, note 4, *supra*.

[13] United States: *Parker v. Shaghalian*, note 4, *supra*, *Sampson v. Pals*, 199 App. Div. 854, 192 N. Y. S. 538 (1922) *Dexter & Carpenter v. Bliss Bldg. Co.*, 123 Misc. 379, 205 N. Y. S. 412 (1924). Great Britain: *Jacobs v. Scott*, 2 Fraser, Sc. 70 (1899).

[14] *Ward v. Great Atl. Tea Co.*, note 4, *supra*.

able goods.[15] This proposition is undoubtedly correct as a general principle of contract law, and furthermore seems to be expressly provided for in sec. 14 of the Sales Act.[16]

"Merchantable quality" is an expression familiar to the common law, and the various definitions which it has received in the decided cases furnish the sole basis for its determination under the Sales Act. It would unnecessarily extend the length of this discussion to review those cases here, but in general it may be said that to be merchantable goods need not be of the first quality on the one hand nor may they merely be of medium quality on the other, but that they shall at least be salable in the market as goods of the kind that they supposed or purport to be.[17]

One other important question arises under this subsection. Does it extend to sales under "a patent or other trade name" referred to in subsection 4? This question will be considered in connection with the discussion of the latter subsection.

Effect of Inspection and Opportunity to Inspect

Subsection 3 provides that where the buyer has examined the goods, there is no implied warranty as to such defects as the examination ought to have revealed. Like the preceding subsection, the language here is quite unambiguous. The exclusion of a warranty as to obvious defects is in keeping with the general idea of the necessity of justifiable reliance on the seller's judgment which pervades the entire section. In this connection it is to be noted that it is not necessary that the buyer actually observe the defects, it is sufficient if the examination should have revealed them to him.

The limitation of the effect of inspection to obvious defects changes the law of a number of American jurisdictions which held the view that inspection precluded the rights of the buyer regardless of the fact that the defect was latent. However, the rule laid down by this subsection of the act seems to be the saner one in view of the principle of justifiable reliance already adverted to and the fact that a warranty is not based on fault on the part of the seller.[18]

The examination referred to must, of course, be one prior to or

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[15] Williston On Sales, (2d ed.) p. 499.

[16] Rem. Comp. Stat., 1927 Supp., sec. 5836-14. (No detailed consideration of this section is given in this article.)

[17] Williston On Sales, (2d ed.), p. 486, sec. 243 and cases there cited.

[18] Williston On Sales, (2d ed.), p. 466, sec. 237. But see *U. S. Fidelity & Guaranty Co. v. Western Iron Stoves Co.*, —— Wis. —— 220 N. W 192 (1928) where this fundamental rule of the law of warranty was entirely disregarded.

contemporaneous with the making of the bargain. After that time the buyer is entitled to accept such goods as are delivered and recover his damages for breach of warranty by the seller.[19]

Perhaps the most noteworthy fact concerning this subsection is that it uses the words "has examined," which if strictly construed would make opportunity to examine, without actual examination, unimportant. In the few cases where the question has arisen, however, the words have been liberally construed so as to include opportunity to examine.[20] Actually this does violence to the language of the act, but the result at least seems a salutary one.

In any case, regardless of the operation of this subsection, inspection or opportunity for inspection is evidence of want of reliance by the buyer on the seller.[21]

WARRANTY OF GOODS SOLD UNDER A PATENT OR TRADE NAME

Subsection 4 provides that in case of a contract to sell or a sale of goods under their patent or other trade name, there shall be no warranty for any particular purpose. The recurrence of the words "particular purpose" in this subsection raises the question as to whether the general warranty of merchantability is also excluded. It would seem the better view that such is not the case. It is conceded that this subsection was intended as a limitation on subsection 1,[22] and in fact it is expressly made so in the English act. Also it was intended as a restatement of the common law rule applicable to the sale of a known, defined and described article.[23] Under the latter rule it was felt that the buyer could not be said to have relied on the seller to furnish something fit for the buyer's particular purpose, but the common law cases almost uniformly held that the seller warranted the goods to be merchantable.[24] Thus, if the common law is to be followed in this regard there seems no reason for denying the

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[19] UNIFORM SALES ACT, sec. 49; Rem. Comp. Stat., 1927 Supp., sec. 5836-49.

[20] Great Britain: *Thornett v. Beers*, 1 K. B. 486 (1919). United States: *Rosenbush v. Learned*, 242 Mass. 297, 136 N. E. 341 (1922) *Dunbar Bros. Co. v. Consolidated Iron Steel Mfg. Co.*, 23 F (2d) 417 (1928) (construing Conn. act).

[21] *Keenan v. Cherry & Webb*, note 4, *supra*.

[22] *Aetna Chemical Co. v. Spaulding, etc., Co.*, 98 Vt. 51, 126 Atl. 582 (1925).

[23] WILLISTON ON SALES, (2d ed.). p. 500.

[24] *Kaull v. Blacker* 107 Kan. 578, 193 Pac. 182 (1920) *Flaherty v. Maine Motor Carriage Co.*, 117 Me. 376, 104 Atl. 627 (1918) *Appalachian Power Co. v. Tate*, 90 W Va. 428, 111 S. E. 150 (1922). Contra. *Ivans v. Laury*, 67 N. J. L. 153, 50 Atl. 355 (1901)

buyer the benefit of a warranty of merchantable quality Certainly there seems nothing in the language of this subsection repugnant to such a holding.

However this may be, it seems that the same result should be provided for in subsection 2. On principle there seems no reason why a sale by patent or trade name should not be a form of sale by description. The expression "sale by description" is in no way limited in subsection 2. Thus conceding that the fourth subsection is a limitation on subsection 1, its effect is merely to prevent warranties other than those of merchantable quality By thus interpreting the scope of this subsection, no violence is done to the interpretation of the words "particular purpose" in subsection 1 as construed earlier in this article. To illustrate the harmony of subsections 1, 2 and 4 in this respect, let us consider, for instance, a sale of shoes. Under subsection 1 the buyer of shoes would impliedly inform the seller that he desired them for the particular purpose of wearing them. If it was then further found that buyer relied on the seller's judgment, an implied warranty of fitness for purposes of general wear would arise. It happens that this warranty would be identical with the general warranty of merchantable quality But suppose further that the buyer desires shoes which will aid or protect some deformity of the feet, informs the seller of his purpose and relies on the latter's judgment. This would be a particular purpose also, but one not identical with the general purpose of the goods, and here again there would be a warranty under the first subsection. Now suppose that the buyer demanded a certain brand of shoe by its patent name. Then, regardless of whether he added a statement of his purpose or not, there would, considering only subsections 1 and 4, be no warranty for any purpose whatever. Here, however, subsection 2 comes into operation (conceding the sale to be by description) and unequivocally says that the goods are warranted to be of merchantable quality, in brief, as subsection 4 qualifies subsection 1, so also does subsection 2 in effect qualify subsection 4.

The foregoing argument is based on reasoning submitted as correct on principle. As yet there is but a small body of judicial authority directly supporting it,[25] and still less authority holding directly

[25] Great Britain: *Bristol Tramways & Carriage Co. v. Fiat Motors*, 2 K. B. 831 (1910) *Sumner Permain & Co. v. Webb & Co.*, 1 K. B. 55 (1922). United States: *McNiel & Higgins v. Czarnikow-Rienda*, 274 F 397 (1921) (per Learned Hand, J.) *Raymond Syndicate v. American Radio Corp.*, (Mass.) 160 N. E. 821 (1928). To the same effect without an express con-

the opposite view[26] among the cases construing the Sales Act. It is submitted that the latter cases (neither decided by the court of final resort of the jurisdiction) are not sound on principle and neither cites any cases in support of its proposition.

The next question presented involves the definition of the expression "patent or other trade name." No dispute can reasonably be expected to arise as to the meaning of the term "patent name," but the more general term "trade name" has received judicial definition. In *Barrett Co. v. Panther Rubber Mfg. Co.*,[27] a trade name was said to be one by which the goods are known in the market and among those familiar with goods of that kind. But a general name, such as "high speed steel,"[28] applicable to a certain grade of goods sold by all dealers, at least some of whom have an additional private name for their brand, is not a trade name. Also there is authority for the proposition that the name must have some standing in point of time to be a trade name within the meaning of this subsection.[29] Some argument might perhaps be predicated on these latter cases, but in general it may be said that a trade name is construed to mean some known and recognized name of distinctive character given to the goods by their manufacturer or seller.

The fact that goods having a patent or trade name are bought is not sufficient to bring this subsection into operation. It is further necessary that the sale be made *under* a patent or trade name. Just when a sale or a contract to sell is of this sort sometimes presents a difficult question. Often this question will be one of fact only, but in some cases it develops into one of law and fact. Where a written contract is drawn up, describing the goods by a patent or trade name, the subsection will apply so as to exclude a warranty for a particular purpose.[30] By such a contract the seller has bound himself to furnish a definite article, and there is no opportunity left for him to

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sideration of the question is *Parker v. Shaghalian*, 244 Mass. 19, 138 N. E. 236 (1923). But see *Stoehner etc. Corp. v. Greenburg*, 250 Mass. 550, 146 N. E. 34 (1925), where the general purpose and particular purpose were the same and the court in refusing warranty for the latter apparently overlooked the possibility of warranty of merchantable quality. Also see the following articles in legal periodicals in accord with the view here taken: 11 Minn. L. R. 497 by Frank L. Mechem, 10 Corn. L. Q. 521, 23 Mich. L. R. 805.

[26] *Santa Rosa Vallejo Tanning Co. v. Kronauer & Co.*, 228 Ill. App. 236 (1923) *Empire Cream Separator Co. v. Quinn*, 184 App. Div. 304, 171 N. Y. S. 413 (1918)

[27] 24 F (2d) 329 (1928).

[28] *Griffin et al. v. Metal Product Co.*, 264 Pa. 254, 107 Atl. 713 (1919).

[29] *Stroock & Co. v. Lichtenthal*, 229 N. Y. S. 371 (1928).

[30] *Folsom v. Boston Consolidated Gas Co.*, 237 Mass. 565, 130 N. E. 197 (1921) *Matteson v. Lagace*, 36 R. I. 223, 89 Atl. 713 (1914)

exercise his judgment as to its fitness for the buyer's particular purpose. The same will be true, of course, in an oral transaction where the buyer has asked for an article of a certain brand, but where the buyer takes the goods on the basis of the seller's recommendation and not because of any reliance on the brand of the goods, the courts have reached the opposite result.[31] Other similar cases doubtless may arise and be disposed of in accordance with these principles.

The importance of this subsection is apparent in this day of widespread advertising when so many articles are known and sold by name. While the exclusion of certain classes of warranties will no doubt be generally salutary in effect, it is equally important that the application of this subsection be confined within its proper limits.

Effect of Usage of Trade

Subsection 5 provides that a warranty of fitness for a particular purpose may be annexed by usage of trade. On its face this subsection is quite clear, but some pertinent observations may be made regarding it.

Prior to the act a number of American courts, including the Supreme Court of the United States,[32] held that trade usage was not competent to establish a warranty Clearly this subsection changes the law of those states.

To bring this subsection into operation, the usage must be known to both parties, or if unknown to one, the other must be justified in assuming knowledge on the part of the man with whom he deals.[33] Usage supports a warranty simply because the parties have intended that a rule different from the usual one would apply by reason of the known custom. Naturally there could be no such intention unless the parties were aware of the custom at the time the contract to sell or sale was made. But even though one party actually is ignorant of the custom he will be bound by it if he should have known, and the other party acted on the justifiable assumption that he did know.

This subsection provides only *for the implication of a warranty*, it says nothing of the effect of a usage not to warrant. Proof of such usage to destroy a warranty that otherwise might be implied

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[31] *Sachter v. Gulf Refining Co.*, 203 N. Y. S. 769 (1923) *Ireland v. Liggett Co.*, 243 Mass. 243, 137 N. E. 371 (1922). But see *Neigenfind v. Singer*, 227 Ill. App. 493 (1923).

[32] *Barnard v Kellogg*, 10 Wall. 383, 19 L. Ed. 987 (1871).

[33] Williston On Sales, (2d ed.), sec. 246.

would doubtless be proper. So far as this subsection is concerned, there is nothing prohibiting such a showing, consequently if the common law on this matter were to be applied, those jurisdictions which prior to the act permitted a showing of usage not to warrant may still do so.[34] Also, such proof would rebut justifiable reliance by the buyer on the seller. In addition to these reasons, the question seems to be squarely covered in sec. 71 of the Sales Act

> Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom if the custom be such as to bind both parties to the contract or the sale.

This language is broad enough to support proof of usage not to war rant in a particular case.

The reason stated by those cases which have denied usage as a means of establishing or destroying a warranty is that the result is the contradiction of a recognized rule of law Doubtless it was the object of this subsection to obviate that argument by placing usage on a parity with other bases for the implication of warranty This seems to have been lost sight of in a Maryland case[35] decided under the Sales Act, where it was held that a sale of goods under a trade name precluded all possibility of warranty for a particular purpose, and hence that proof of trade usage to warrant for such purpose was not admissible. The result is to limit the operation of this subsection to cases in which a warranty may be implied under the other subsections, and then, of course, this subsection becomes wholly unnecessary On this point Williston says:[36]

> But if usage is ever to be given any effect it necessarily changes the rule of law applicable to the case. It does this, not by denying the rule, but by showing by usage, instead of express words, an intent to bring the case under another rule. If the parties intend to warrant, unquestionably they may, the law does not forbid it. If there is no usage, parties will naturally express their intention. If a well recognized usage exists, instead of expressing their intention, they may properly take it for granted.

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[34] See *DeStefano v. Associated Fruit Co.*, 318 Ill. 345, 149 N. E. 284 (1925) *Seattle Seed Co. v. Fujimori*, 79 Wash. 123, 139 Pac. 866 (1914).

[35] *Hubbard Fertilizer Co. v. American Trona Corp.*, 142 Md. 246, 120 Atl. 522 (1923).

[36] WILLISTON ON SALES, (2d ed.). sec. 246.

Both on principle and on sound theories of interpretation this subsection should not be arbitrarily subordinated to any of the other subsections.

EFFECT OF PRESENCE OF AN EXPRESS WARRANTY

No controversy should arise concerning the interpretation of subsection 6, which provides that the presence of an express warranty shall not negative an implied warranty unless the two are inconsistent. This presents only a question of fact as to whether the two are in a given case inconsistent.

MATTERS NOT COVERED BY THE SALES ACT. DISCLAIMER OF WARRANTY

It is provided by sec. 73 of the Sales Act that matters not expressly covered therein shall be governed by the general rules of law and equity Consequently pre-existing authorities on such matters are entitled to as much weight as if the Sales Act had never been adopted, subject perhaps to the qualification that certain general principles embodied in the act may be extended by inference to apply to cases not specifically mentioned therein.

One quite important matter of which the Sales Act makes no express mention is the right of the seller to disclaim liability on warranty of any sort. That he has such a right there is no reason to doubt, disclaimer at least destroys the right of the buyer to rely on the seller as to those matters to which it refers, and thus cuts out the very foundation of a warranty implied under the Sales Act. To constitute an effective disclaimer, a statement made prior to or at the time of the sale that the seller refuses to be liable on warranty, express or implied, seems sufficient. Written disclaimers of warranty accompanying bags of seed have been held sufficient in the state of Washington,[37] but such disclaimer is effective only as to the original purchaser and cannot be invoked by the latter as a defense to a suit by one to whom he in turn sold the goods.[38] Where a warranty has already come into existence, a disclaimer by the seller will not avoid it, nor will a disclaimer be effective if the seller afterward substitutes other goods than those referred to by the disclaimer.[39]

THE EFFECT OF THE SALES ACT ON THE WASHINGTON CASES

By far the most radical change effected on the Washington law

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[37] *Seattle Seed Co. v. Fujimori*, 79 Wash. 123, 139 Pac. 866 (1914) *Larson v. Inland Seed Co.*, 143 Wash. 557, 255 Pac. 919 (1927).

[38] *Jolly v. Blackwell*, 122 Wash. 620, 211 Pac. 418 (1922).

[39] *Ward v. Valker*, 44 N. D. 598, 176 N. W 129 (1920). See *Bekkevold v.*

of implied warranty of quality by the adoption of the Sales Act is the abolition of all distinction between sales by manufacturers and sales by dealers. In cases involving the latter class, the Washington court has quite uniformly held that, in the absence of knowledge of the defective nature of the goods, no warranty is to implied. Some inconsistencies are to be found between the cases on this point as will be hereinafter noted, but in the main the distinction has been followed. Consequently the unequivocal language of subsections 1 and 2, wiping out such a distinction, has seriously impaired, if not totally destroyed, the value of these cases as authority for future cases.

The first case squarely dealing with this proposition is *Ketchum v. Stetson Post Miller Co.*[40] That case dealt with a sale of logs by a person who had not cut them. The court held that the seller was not liable for the damage resulting to the buyer from the presence of iron in the wood. Knowledge on the part of the seller is declared to be essential to liability on his part where he is not the original producer of the goods. This rule is untenable under the Sales Act, but it is possible that this case might still be decided the same way on the ground that there was no justifiable reliance by the buyer upon the seller's judgment.

The next case involving this point is *Hurley Mason Co. v. Stebbins.*[41] The Washington court has in the later decisions adopted this case as the leading one recognizing a distinction between sales by a manufacturer and sales by other persons. A quantity of cement was sold subject to inspection by tests to be made by the buyer. The seller was not the manufacturer. The cement was not tested until after a considerable portion of it had been used and found unsatisfactory Although the decision turns largely on the proposition, undoubtedly correct, that the failure of the buyer to exercise its opportunity and duty to inspect precluded any warranty as to defects that such an inspection would have revealed, the fact that the sale was made by a dealer is invoked in aid of the decision. In a later paragraph the court seems to limit this distinction to the facts

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Potts, 173 Minn. 87, 216 N. W 790 (1927) for a strict view as to the requirements for a disclaimer. The following provision in the contract was held ineffective as to implied warranty of quality· "No warranties have been made in reference to said motor vehicle by the seller to the buyer unless expressly written hereon at the date of purchase."

[40] 33 Wash. 92, 73 Pac. 1127 (1903)

[41] 79 Wash. 366, 140 Pac. 381, L. R. A. 1915B, 1131, Ann. Cas. 1916A, 948 (1914)

of the case,[42] but the subsequent cases have ignored this entirely and accepted the rule first stated as one of general application. Regardless of what limits the court intended to put on the rule of this case, the plain language of the Sales Act entirely abolishing such distinction makes the rule and its limitations equally unimportant as a precedent for future disputes.

The question arose again in *Perine Machinery Co. v. Buck*,[43] where a dealer who was cognizant of all the facts told the buyer that he needed a new impeller for his pump, and the buyer immediately ordered one from the dealer, who in turn ordered it from the manufacturer. The new impeller proved to be entirely unsatisfactory for the operation of the pump. The court held that there was no implied warranty The facts bring the case squarely within the operation of subsection 1, so the case may be regarded as overruled by the adoption of the Sales Act. The case contains a statement that the sale was one by sample, but there seems to be no foundation whatsoever for this in the facts as given.

In *Hausken v. Hodson Feenaughty Co.*,[44] the next case decided, the court places a limitation on the broad distinction followed in the earlier cases. A dealer sold a tractor to a farmer, knowing that it was desired for special farm work. Without reference to the earlier cases, the court held that the tractor was warranted fit for such purposes. The fact that the buyer made known a very particular purpose for which the machine was desired is the only basis for distinguishing this case from the earlier ones, and even on such a basis the case seems irreconcilable with *Perine Machinery Co. v. Buck, supra.* The result is undoubtedly good law under the Sales Act, but as already noted in the discussion of the first subsection, such a detailed particularization is not necessary to establish a warranty where the article itself has a definite and well known purpose. Thus it is submitted that on the sale of a tractor to one known to be a farmer raises a warranty that it shall be reasonably fit for the purposes for which a tractor is commonly used by farmers, and that a statement that the buyer wishes to put it to such a use is unnecessary

Perhaps the most important case overruled by the adoption of

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[42] In this connection the court says: "It is probably true that, on a sale even by a dealer without specific warranty and not subject to inspection or test, there is an implied undertaking that the thing sold shall be reasonably fit for the purpose intended, where that purpose is known to the seller."

[43] 90 Wash. 344, 155 Pac. 20 (1916)

[44] 109 Wash. 606, 187 Pac. 319 (1920).

the Sales Act is *Hoyt v. Haynsworth Motor Co.*[45] The court there held that a dealer who sold an Oldsmobile automobile did not warrant freedom from latent defects. The main reason given is that the seller was not the manufacturer, and the *Hausken* case is distinguished on the basis of the detailed particularization of purpose discussed in the preceding paragraph. Enough has already been said to show that neither the reason given nor the distinction made is tenable under the Sales Act. Certainly, by the cases decided under the act, the buyer's known purpose of using the automobile generally for pleasure and convenience is sufficiently a particular purpose to raise a warranty under subsection 1.[46] It is also said that this was a sale of a known, defined and described article. On the facts, this statement is open to question, but conceding its truth for the sake of argument this would not preclude a warranty of merchantable quality which in this case would be identical with a warranty for the buyer's particular purpose.

The remaining cases involving this question add nothing to those already discussed. *Long v. Five Hundred Co.*[47] expressly follows the *Hausken* case,[47a] and is subject to the same criticism as has already been directed at the latter case. *Andrews & Son v. Harper*[48] reiterates the rule of *Hoyt v. Haynsworth Motor Co.*,[48a] and consequently is not good law under the Sales Act. The most recent case, *Gilpatrick v. Downie*,[49] recognizes the distinction as announced in *Ketchum v. Stetson Post Mill Co.*[49a] Both the *Andrews* and the *Gilpatrick* cases were decided after the enactment of the Sales Act, but they are expressly excepted from the operation of the act since the sales were made prior to the enactment.[50]

As an abstract proposition, the justice of the Sales Act rule making the dealer as well as the manufacturer liable may at first glance seem open to question. But since the buyer normally has no remedy against the manufacturer, and the dealer is generally in a better position to know the trustworthiness of the manufacturer with whom he deals, the rule stated in the act is, in the last analysis, the better one.

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[45] 112 Wash. 440, 192 Pac. 918 (1920).
[46] Note 4, *supra*. Also see *Petfalski v. Winkel Garage Co.*, 190 Wis. 64, 208 N. W 893 (1926).
[47] 123 Wash. 347, 212 Pac. 559 (1923)
[47a] Note 44, *supra*.
[48] 137 Wash. 353, 242 Pac. 27 (1926).
[48a] Note 45, *supra*.
[49] 143 Wash. 671, 225 Pac. 1028 (1927).
[49a] Note 40, *supra*.
[50] Rem. Comp. Stat., 1927 Supp., sec. 5836-76a.

In other respects little change seems to have been wrought by the act on the decided Washington cases. *Springfield Shingle Co. v. Edgecomb*[51] contains dictum to the effect that an inspection by the buyer will preclude warranty as to any defect (latent or obvious). This, of course, has been changed by subsection 3.

The rule with regard to sales under patent or trade name has quite generally been held to be the same as that announced by the Sales Act.[52] As has already been noted, however, an interpretation inconsistent with the act was suggested in *Hoyt v. Haynsworth Motor Co.*,[52a] and the cases following it. These cases would deny the possibility of any warranty where the sale was under a trade name.

The propriety of evidence of usage not to warrant is recognized by the Washington court as has been previously noted in this article.[53]

The Sales Act makes no distinction between sales of new and second-hand articles as such. It has been held in *Little v. Fynboh*[54] that a warranty of goods of the latter class may be implied, and this should remain the law under the Sales Act.

The adoption of the Sales Act probably overrules another Washington case of considerable importance.

In regard to the law of implied warranty of quality, sec. 15 designates the persons merely as "buyer" and "seller." There is no express language making privity between the parties an essential to a right of action for breach of warranty However, the act was intended generally as a codification of the common law, and the requirement of privity of contract as a basis of an action on a warranty at the common law is too well settled as a general principle to necessitate the citation of authority But the Washington court in *Mazetti v. Armour & Co.*[55] recognized an exception to this rule. There it was held that a subpurchaser of canned tongue, which contained certain unwholesome and noxious substances, had a right of action against the manufacturer. The court states in the opinion that the general requirement of privity may be departed from (1) Where the goods are of noxious and dangerous kind, (2) Where the original seller is guilty of fraud, (3) Where the original seller is guilty of

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[51] 52 Wash. 620, 101 Pac. 233, 35 L. R. A. (n. s.) 258 (1909).
[53] *U. S. Cast Iron Pipe Co. v. Ellis*, 117 Wash. 601, 201 Pac. 900 (1921) *Caldwell Bros. v. Coast Coal Co.*, 58 Wash. 461, 108 Pac. 1075 (1910).
[52a] Note 45, *supra*.
[53] *Seattle Seed Co. v. Fujimori*, 79 Wash. 123, 139 Pac. 866 (1914).
[54] 120 Wash. 595, 207 Pac. 1064 (1922).
[55] 75 Wash. 622, 135 Pac. 633 (1913).

negligence. More specifically the case seems to have turned on the fact that the goods were sold in a container, and consequently the defect ascertainable only by the actual consumer. At the close of the opinion, Justice Chadwick speaking for the court says

> Our holding is that in the absence of an express warranty of quality, a manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages, and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade.

It is difficult to understand why either the latent character of defect or the fact that the goods are food products would justify a departure from the general rule. The result of the case is doubtless satisfactory in that it does away with the necessity for several suits, substituting a single one in their stead. This argument, however, may be advanced in any case where subpurchasers are involved, and consequently does not lend support to the limited rule announced in this case. That it is so limited has been recognized in later Washington cases,[56] and so the law stood at the time the Sales Act was adopted. Mention has been made earlier in this article to the fact that matters not covered by the act are to be decided according to the common law, but this rule cannot well operate so as to sustain a warranty, since the introductory paragraph of sec. 15 purports to make its provisions exclusive as to the implication of warranties. Considering the entire section, there seems little doubt that it was intended to affect only buyers and sellers standing in direct contractual relation to each other. In this light the *Mazetti* case is nullified.[57]

Both in connection with the case just discussed and as an original proposition it is to be noted that the distinction which obtained at the early common law between sales of food and other goods finds no support in the Sales Act, whe the term "goods" is used in the

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[56] *Peregrine v. West Seattle Bank*, 120 Wash. 653, 208 Pac. 35 (1922) *Jolly v. Blackwell*, 122 Wash. 620, 211 Pac. 418 (1922).

[57] In this connection see: *Chysky v. Drake Bros. Co.*, 235 N. Y. 468, 139 N. E. 576, 27 A. L. R. 1533(1923) *Abercrombie v. Union Portland Cement Co.*, 35 Idaho 231, 205 Pac. 1118 (1922). These cases merely deny the existence of a warranty available to subpurchaser· the liability of a manufacturer for injuries sustained because of his negligence in making the article is in no way affected. For a proper case for the application of the latter doctrine see *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916 C. 440, L. R. A. 1916 F 696 (1916)

broadest sense. In *Flessher v. Carstens Packing Co.*,[58] the Washington court seems to recognize such a distinction, while the result reached in that case remains good law at the present time, the distinction mentioned is no longer of any consequence.

CONCLUSION

As its name suggests, the chief aim of the Uniform Sales Act is to bring the law of the different jurisdictions into conformity as to the matters which it covers. To effect this purpose the following rule of construction was incorporated into the act:[59]

> This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.

This section removes all doubts as to the right and duty of the Supreme Court of the state of Washington to follow those cases in England and America which seem to give the soundest interpretation to the provisions of the act, even though such a course may abolish or alter local doctrines of long standing. It is unfortunate but true that certain of the subsections considered in this article are so drawn as to admit of wide differences of interpretation. Such a result can be obviated only by giving due regard to the principles already developed elsewhere. It is submitted that the views set forth in the present discussion are in consonance with such of those principles as are based on the best authorities, and that they should serve as the basis for the future law of this state.

J. GORDON GOSE.*

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[58] 93 Wash. 48, 160 Pac. 14 (1916).

[59] UNIFORM SALES ACT, sec. 74; Rem. Comp. Stat., 1927 Supp., sec. 5836-74.

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*Of the Seattle, Washington, Bar.