SALES WARRANTIES UNDER THE SALE OF GOODS ACT AND THE UNIFORM COMMERCIAL CODE

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The Uniform Sales Act[1] promulgated in 1906 by the American Law Institute and the National Conference of Commissioners on Uniform State Laws was based on the English Sale of Goods Act 1893[2] which it followed closely. It was eventually adopted in thirty-seven American jurisdictions, but as the years passed dissatisfaction with it grew, the main criticism levelled at it being that a statute based on nineteenth century mercantile practice[3] was completely inadequate and out of date in the light of modern methods of the sale and distribution of goods. An Act which was based on the simple transactions of sale and purchase known to the early Victorian consumer was totally inappropriate for resolving problems arising out of the mass production and distribution of goods, the impact on the consumer of massive sales promotion through modern methods of advertising *via* press, radio, and television, the extensive use of credit and documents of title, and the revolution in marketing brought about by the 'forward' contract and the rise of the supermarket, the self-service store, and modern methods of packaging in sealed containers. A future legal historian analyzing either the U.S.A. or the S.G.A. might well conclude that when that legislation was in force the middleman had scarcely emerged, credit was unusual, and the normal buyer was expected to carry his own goods away.[4]

As early as 1938 a move was begun to revise the U.S.A. and this led in 1942 to the undertaking of such a revision by the American Law Institute and the National Conference of Commissioners and eventually to the preparation under their joint auspices of the Uniform Commercial Code.[5] After its promulgation in 1952, the U.C.C. was revised a number of times to incorporate various changes suggested by the New York State Law Revision Commission and other agencies, and the final version was issued in 1962. The popularity of the Code can be gauged from the fact that by the end of April

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1 Hereinafter abbreviated 'U.S.A.'

2 Hereinafter abbreviated 'S.G.A.' Any reference in this article to the provisions of the S.G.A. will be to the relevant section in the Sale of Goods Act 1923 (N.S.W.).

3 The U.S.A. was largely a codification of English common law decisions rendered during the nineteenth century.

4 Isaacs, 'The Sales Act in Legal Theory & Practice' (1940) 26 *Virginia Law Review* 651; Gilmore 'On the Difficulties of Codifying Commercial Law' (1948) 57 *Yale Law Journal* 1341-49; Braucher 'Sale of Goods in the U.C.C.' (1966) 26 *Louisiana Law Review* 192-93.

5 Hereinafter abbreviated 'U.C.C.'

1967 it had been enacted as law, with or without amendment, in fifty-one jurisdictions in the United States of America.[6]

The U.C.C. is not of course confined to the law of sale of goods. Its ten Articles (or chapters) include the codification of the law on negotiable instruments, bank collections and deposits, letters of credit, documents of title, and securities. Article 2 contains the modern law on sale of goods, not merely a revised version of the 1906 Act but a complete recasting of the whole topic. The Article reflects modern commercial practice with its references to the merchant, to standardized contracts, and to problems of credit, shipment and storage. It is true that quite a large number of the old concepts are retained in the new version[7] but the familiar phraseology is gone and new language is employed—of necessity, since the aim of the draftsmen was to avoid the judicial interpretations of the past and to make a completely fresh start.[8]

A fruitful source of litigation in sales contracts is disputes arising out of alleged warranty obligations. It is the purpose of this article to consider the law of warranty as it existed under the U.S.A. (and still exists under the S.G.A.) and to observe the changes made in this law by the warranty provisions in Article 2 of the U.C.C. The approach will be to consider the warranties that may arise under the Code and the extent to which they differ from the corresponding provisions of the S.G.A., the manner in which these warranties may be disclaimed by the seller, and their application to third parties. It may be pertinent to observe at this stage that the scope of Article 2 of the U.C.C. is basically the same as the S.G.A., being limited to transactions in goods as therein defined. The definition in section 2-105 (1) is, however, couched in terms of 'things movable' instead of the 'chattels personal' approach of the S.G.A. It would appear that the Code has not affected the previous law whereby a distinction is made between a contract for work and materials and one for sale of goods, and that where the emphasis is on services rather than goods the transaction will be outside the ambit of the U.C.C.[9] Nonetheless, Article

[6] The remaining State in the Union, Louisana, as might be expected has no plans for its adoption.

[7] Of the 104 sections contained in Article 2, about a third have no counterpart in the U.S.A.

[8] *Cf.* Williston (the architect of the U.S.A.) in 'The Law of Sales in the Proposed U.C.C.' (1950) 63 *Harvard Law Review* 561, 564-65, with Corbin (who assisted in the preparation of the U.C.C.), 'The U.C.C.—Sales: Should it be Enacted?' (1950) 59 *Yale Law Journal* 821, 830.

[9] *Epstein v. Giannattasio* (1963) 197 A.2d 342 (S. Ct Conn.); *Aegis Products Inc. v. Arriflex Corpn* (1966) 268 N.Y.S. 2d 185; *Perlmutter v. Beth David Hospital* (1954) 123 N.E. 2d 792 (C.A.N.Y.); *Dorfman v. Austenal Inc.* (1966) 3 U.C.C. Rep. 856 (N.Y.S. Ct) (Uniform Commercial Code Reporter, ed. Fischer & Willis, Callaghan & Co., Mandelein, Ill.); *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 360 P.2d 897 (S. Ct Calif.). But an implied warranty of fitness *etc.* might arise at common law, or the manufacturer of a product might be held liable to an ultimate *user* on the ground of strict liability in tort as in *Garthwait v. Burgio* (1965) 216 A.2d 189. (S. Ct Errors Conn.). Massachusetts in 1965 (Laws Ch. 297) added a

2 has been applied to the 'general sales aspects' of a transaction in which the seller retains only a security interest, such as a bailment lease financing the purchase of a car.[10]

WARRANTIES THAT MAY ARISE UNDER THE U.C.C.

I.

An essential preliminary to any inquiry as to the warranties which may arise under the U.C.C. is to ascertain the precise meaning of the term 'warranty' as it occurs in the S.G.A. on the one hand and in the U.S.A. and the U.C.C. on the other, for this was one area in the law of sales where Williston, in drafting the U.S.A., departed from his English precedent.

It is trite law that not every statement made in the course of negotiations becomes part of the contract that may ultimately be formed. It may amount to no more than mere words of commendation or puffery; it may be simply a statement of opinion or of intention or of law; it may be a representation of fact which is intended to be and is a substantial inducement to the representee to enter into the contract and, if found to be false, may give grounds for action according to whether it is classified as fraudulent, innocent or negligent misrepresentation. If, however, the statement is found to have become part of the contract—and the test of this is the objective intention of the parties to be deduced from the whole of the circumstances of the case[11]—it may, under the common law, be classified as either a condition or a warranty, depending again on the intention of the parties at the time of contracting. The remedy available to the innocent party when a term of the contract is broken varies according to the category within which the term is held to come. The traditional common law view of a condition is a term 'going to the root of the contract', breach of which justifies rescission on the part of the aggrieved party, whereas a warranty is a term 'subsidiary' or 'collateral to the main purpose' of the agreement, the breach of which sounds only in damages.

This common law distinction, which was well established by the late nineteenth century, was given statutory recognition in the English S.G.A. in 1893 and was perpetuated when the Act was adopted in Australia and New Zealand. 'Condition' is not defined in the S.G.A. but it is clear from section 16 (2) that whether a stipulation amounts to a condition or not is a question of the construction of the contract

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subsection to s. 2-316 whereby human blood, tissue, or organs were not to be deemed commodities for sale for the purposes of Article 2 but medical services, and the implied warranties of merchantability and fitness were inapplicable.

[10] *Associates Discount Corpn v. Palmer* (1966) 3 U.C.C. Rep. 380 (N.J.S.Ct), and s. 9-206(2). S. 2-102 applies only to the 'pure' security transaction.

[11] *Oscar Chess Ltd v. Williams* [1957] 1 W.L.R. 370, 375.

and that the effect of a breach of condition is to enable the innocent party to treat the contact as repudiated, thus enabling him to rescind, unless his right to do so is barred by acceptance of the goods *etc.* The common law test of 'condition' must therefore be applied.[12] On the other hand, 'warranty' is defined in the S.G.A. in traditional terms as an agreement collateral to the main purpose of the contract for the sale of goods, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.[13]

The S.G.A. therefore classifies the express terms of a contract for the sale of goods into conditions and warranties according to the intention of the parties at the time of contracting, and, in the absence of any express statement on the point, the intention of the parties is a matter of construction for the court. The Act also incorporates certain terms in the contract by way of implication, terms which arise not out of the facts of negotiation but by virtue of a certain given situation. These *implied* terms are likewise classified by the Act into conditions and warranties and are applicable if the appropriate fact situation exists, unless their application is clearly negatived by the parties.

The U.S.A. departed from its English model in this area of the law of sales, the dichotomy between warranty and condition being rejected and the word 'warranty' being given one meaning only—a material promise. It was immaterial whether this promise was or was not 'collateral'. In the words of Williston:

> What promises may be called collateral is indeed so difficult a question that the results reached under the English law cannot always be reconciled with the general statements of the rules of that law. It is believed that no greater simplification can be made in the law of sales than to make it of no importance whether an obligation which forms part of a bargain is collateral or not . . .[14]

A breach of warranty in a contract to sell or a sale was followed by the same consequences as the breach of a material promise in other contracts: the innocent party had a right to rescind the transaction. Further, the distinction between an innocent misrepresentation and a term of the contract was rejected. Where there was an *express* affirmation of fact, *i.e.* a representation, that was regarded as a warranty if its natural tendency was to induce the purchase of the goods and the

12 The views of the English Court of Appeal in *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 (especially those of Diplock L.J. at 70) that it is not possible to decide the legal consequences of a breach of contract solely on a consideration of the term broken, but that the nature of the breach is as significant as the supposed importance of the term, would appear to have no application to the sale of goods.

13 S. 5(1).

14 *Sales* (2nd Ed. 1924) vol. I, s. 181, p. 334.

buyer, thus induced, did purchase them. No intention by the seller to warrant was required.[15]

Section 12 of the U.S.A. stated that

> an affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

The comment to the section indicated the draftsman's view that the fundamental basis for liability for breach of warranty was the buyer's justifiable reliance on the seller's assertions, and that whether the buyer was justified in his reliance or not depended, not on the intention of the seller, but on the natural tendency of his acts.

The U.C.C. follows the approach of the U.S.A. in this respect in describing an express warranty as 'any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain . . .'.[16] It goes on to provide that the seller need not use formal words or have a specific intention to make a warranty, but that an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.[17] It will be noted that the Code definition differs from that in the U.S.A. in that the test of tendency to induce a sale followed by actual reliance by the buyer is replaced by the requirement that the statement 'becomes part of the basis of the bargain'. This distinction may not amount to any significant change, for in the past if the seller's statements were of the kind that would naturally induce the buyer to purchase the goods and he did purchase them, that was usually sufficient, whereas under the U.C.C. the presumption, as stated in the Comment to the section, is that any affirmations of fact made by the seller about the goods, become part of the basis of the bargain 'unless good reason is shown to the contrary'.[18]

The definition in the Code likewise differs from that in the U.S.A. by referring to the affirmation or promise being made by the seller *to the buyer*. This may mean that an indirect representation will no

[15] Williston *op. cit.* s. 194 p. 367; s. 197 pp. 373-77; s. 209 p. 403. Williston's view was that an affirmation which led a reasonable man to believe it was made to induce the bargain and which had that effect, should be actionable as a warranty, and that the intent of the affirmer was not his intent to enter into a contract but his intent to assert a fact in order to induce a sale, and was therefore relevant only to distinguish between a statement of opinion and an affirmation of fact. *Vide* 'Representation and Warranty in Sales—*Heilbut v. Symons*' (1913) 27 *Harvard Law Review* 1.

[16] S. 2-313(1)(a). [17] S. 2-313(2).

[18] S. 2-313, Comments 3 and 8. The shift in emphasis is from reliance by the buyer on the seller's statement to the fulfilment of the buyer's reasonable expectations brought about by the seller's words or actions.

longer be covered. Under section 12 of the U.S.A. representations made by a manufacturer in newspaper advertisements and on labels on his products as inducements to the ultimate purchaser to buy have been held to amount to express warranties, for breach of which an action would lie at the hands of the ultimate consumer who has relied on such representations in purchasing the product, despite the lack of privity of contract.[19] It is suggested that in view of the Code's obvious bias in favour of extending warranty protection for the buyer, no different result is intended under the definition of express warranty in section 2-313.[20] The whole development in this area of the law is of course closely bound up with the erosion of the doctrine of privity of contract, and this topic will be further considered when the extent of the relaxation by the U.C.C. of the requirement of privity is discussed.

The one point where the difference in the language of section 12 of the U.S.A. and section 2-313 of the U.C.C. will be of importance is in the case of an affirmation or promise made subsequently to the entry into the contract. This would not come within section 12 as it could not be an inducing cause and there could be no reliance thereon. Under the Code, however, it could be an express warranty if it became part of the basis of the bargain, and it could achieve this by way of modification of the already concluded contract. Comment 7 to section 2-313 indicates that if an assurance is given after the transaction is closed 'the warranty becomes a modification and need not be supported by consideration if it is otherwise reasonable and in order. (Section 2-209)'.

The necessity of drawing the line between an affirmation of fact on the one hand and a statement of opinion or mere 'puffery' on the other remains, and is of course as difficult a problem under the U.C.C. as under the U.S.A. The presumption under the Code, as outlined above, is that all the seller's statements form part of the basis of the bargain; but in the final analysis it is a question of fact.

II.

The warranty sections of the U.C.C. follow basically the pattern set by the U.S.A. and there are for the most part no radical changes

[19] *Eg. Hamon v. Digliani* (1961) 174 A. 2d. 294 (S.Ct Errors Conn.); *Rogers v. Toni Home Permanent Co.* (1958) 147 N.E. 2d. 612 (S.Ct Ohio); *Randy Knitwear Inc. v. American Cyanamid Co.* (1962) 181 N.E. 2d 399 (C.A.N.Y.); *Inglis v. American Motors Corpn* (1965) 209 N.E. 2d 583 (S.Ct Ohio); *Burr v. Sherwin Williams Co.* (1954) 268 P. 2d 1041, 1049 (S.Ct Calif.); *Lane v. C. A. Swanson & Sons* (1955) 278 P. 2d 723, 726 (Distr. C.A. Calif.); Prosser, 'The Assault upon the Citadel (Strict Liability to the Consumer)' (1960) 69 *Yale Law Journal* 1099, 1135-38.

[20] South Carolina has put the matter beyond doubt by making it clear in s. 2-313(1)(a) that affirmations or promises (including those on containers or labels), whether made directly or indirectly to the buyer, are within the definition of an express warranty. *Cf.* s. 2-314(2)(f); *vide* n. 56 *infra.*

from the previous law in this area. However, there are some innovations achieved by the Code, including an attempt to codify the law regarding exclusion or disclaimer clauses. The Code follows the U.S.A. in distinguishing between express and implied warranties (and indeed adds a third category of a *statutory* express warranty in the section dealing with warranty of title), but while these various categories were of little importance under the U.S.A. they are of considerable significance under the U.C.C., for the effect of a disclaimer or exclusion clause may well depend on the type of warranty with which it purports to deal. It is to these warranties and their treatment under the Code that attention must now be drawn.

WARRANTY OF TITLE

The warranty of title section is section 2-312. Subsection (1) provides that

> there is in a contract for sale a warranty by the seller that (a) the title conveyed shall be good, and its transfer rightful; and (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

This is made subject to subsection (2) which allows the warranty to be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the seller does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have. Finally, there is a third subsection containing a warranty against infringement. Unless otherwise agreed, a seller who is a merchant regularly dealing in goods of the kind, warrants that the goods shall be *delivered* free of the rightful claim of any third person by way of infringement or the like. But if the buyer furnishes the seller with specifications to be followed in the manufacture of any article, it is the buyer who must indemnify the seller against any claim of infringement arising out of compliance with the specifications.

Section 2-312 (1) follows basically the provisions of section 17 (1) S.G.A. As in the Act, 'contract of sale' is defined to include both the present passing of title and the passing of title in the future,[21] hence there is still room for controversy over the precise field of operation of the warranty, the argument being that a seller who is not the owner of the goods he purports to sell is not within the ambit of the subsection as he neither transfers nor agrees to transfer the title in the goods, *i.e.* the contract is not a 'contract of sale' as defined in the U.C.C.[22] The controversy is rather a sterile one, both in view of the

21 S. 2-106(1).

22 *Vide* Samek, 'Contracts by Non-Owners to sell Goods' (1960) 33 *Australian Law Journal* 392 and his reply in (1962) 35 *Australian Law Journal* 437 to O'Sullivan, 'Failure to transfer Title in Contracts for Sale of Goods' *ibid.* 343.

authorities holding that such a transaction comes within section 17 (1) S.G.A. and in view of the changed wording in section 2-312 (1)(a) where the warranty is not that the seller has a right to sell the goods, but that the title conveyed shall be good and its transfer rightful. It is clear that section 2-312(1)(a) would have a very limited operation apart from the case of the purported sale by a non-owner.

The warranty of freedom from encumbrance in section 2-312(1)(b) is very similar to that implied in section 17(3) S.G.A. but, in addition, the moment when the warranty will apply is made clear, *i.e.* at the time of delivery of the goods. Indeed, this may be the time when the warranty arises under section 2-312(1)(a), for it stipulates that 'the title conveyed shall be good . . .'.[23] If so, this is a departure from section 17(1) S.G.A. where the appropriate time is at the moment property passes. Under the U.C.C., if the seller's lack of title before delivery jeopardizes the buyer's expectation of due performance, the buyer may invoke section 2-609 whereby he can demand adequate assurance of due performance from the seller.[24]

Subsection (2) of section 2-312 disposes of another area of controversy surrounding section 17 S.G.A. by making it clear that the seller can contract out of the provisions of subsection (1). But he can only do so if he uses 'specific language' or if special circumstances exist, as would be the case in the sale of goods by a sheriff under a writ of execution.[25] The general disclaimer section, section 2-316, has no application to the warranty in section 2-312(1) as the warranty is not designated as an 'implied' warranty so as to enable section 2-316(3) to be invoked, nor in practice is it a warranty which is expressly made by the seller so as to render section 2-316(1) applicable. It is in fact *sui generis* so far as the general disclaimer section is concerned, and exclusion of the warranty is governed by section 2-312(2).[26]

There are two significant changes to the previous law which have been made by section 2-312. In the first place, there is the abolition of the warranty of 'quiet possession' which the Comment to the section explains away on the ground that disturbance of quiet possession is

[23] *Vide* New York State Law Revision Commission (hereinafter abbreviated 'N.Y.L.R.C.') Report on U.C.C. Legis. Doc. (1955) No. 65(c); 53, 387. S. 2-725(2) set out the basic rule that a breach of warranty occurs when tender of delivery is made.

[24] Such a situation might arise where the buyer is purchasing the goods by instalments prior to delivery and after he has paid a substantial part of price he discovers that there is a defect of title in the form of a bill of sale or hire purchase agreement towards which the seller has made no payments in spite of the money received. See *Stewart v. Moss* (1948) 192 P. 2d 362. (S.Ct Wash.)

[25] Comment 5 to the section; *vide* s. 13(4) U.S.A. to the same effect. The sale is so out of the ordinary commercial course that its peculiar character is immediately apparent to the buyer who should know that the seller is purporting to sell only an unknown or limited right.

[26] *Vide* Comment 6. The warranty has been described as a statutory express warranty. The 'specific language' requirement was added in 1957 following criticism by the N.Y.L.R.C.

one way among many in which breach of warranty of title may be established.[27] While this is undoubtedly true, it does not always follow that interference with quiet possession indicates a defect in title. The claimant who interferes may ultimately be proved to be wrong and the seller shown to have conveyed a good title in the first place.[28] Further, the abolition of the warranty alters the time when the Statute of Limitations begins to run against the buyer. Under the S.G.A. the Statute would begin to run when possession was disturbed, while by virtue of section 2-725(2) the Statute begins to run under the Code when the breach of warranty occurs, *i.e.* when delivery is made, regardless of the buyer's ignorance of the breach.

The second significant change is the addition of a warranty against infringement. No doubt such a warranty can be (and has been, in effect) spelt out of the provisions of section 17(1) S.G.A., for the condition implied there is that the seller had a right to sell the goods. It will be recalled that in *Niblett v. Confectioners Materials Co. Ltd*[29] the owner of goods with an unimpeachable title to them was held to have no right to sell the goods where the labels on the packages infringed the English trademark provisions. The draftsmen of the Code, however, having altered the language of the warranty as to title, found it necessary to make specific provision for a warranty against infringement, and in doing so narrowed the scope of the latter warranty. It applies only if the seller is a merchant[30] who regularly deals in goods of the kind, and extends only to an undertaking that the goods shall be *delivered* free of a third party's rightful claim.[31] The warranty may be excluded only by agreement. The buyer is under a duty to notify the seller within a reasonable time of any claim for infringement which results in his being sued, under penalty of losing his remedy against the seller, while the latter, for his part, can demand that the buyer turn over to him control of the litigation.[32]

WARRANTY OF CONFORMITY TO THE DESCRIPTION

The U.C.C. departs from the previous law when it provides in section 2-313(1)(b) that 'any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description'. It will be recalled that under section 18 S.G.A., where the contract is for sale of goods by description

27 Wisconsin is one State which has retained the warranty of quiet possession in s. 2-312(1).

28 The seller may possibly be liable under s. 2-312(1)(a) for the costs of the buyer in successfully defending a claim by a third party in that he warrants that the transfer is rightful. *Vide* Comment 1 to the section.

29 [1921] 3 K.B. 387.

30 Defined in s. 2-104(1).

31 *Quaere* whether this would include claims arising from the *use* of the goods by the buyer. The warranty does not extend to infringement of copy-right as 'literary property' is not within the definition of goods in s. 2-105(1).

32 Ss. 2-607(3)(b) & (5) (b).

there is an *implied* condition that the goods shall correspond with the description. In creating an *express* warranty of conformity, the Code departs more markedly from the S.G.A. than it does from the U.S.A. where descriptive language used by the seller might amount to an express warranty under section 12. It was often difficult to tell under the U.S.A. whether the description amounted to a promise or affirmation of fact and was therefore an express warranty, or whether it was simply a sale of goods by description thus creating an implied warranty.[33] The problem is solved by the U.C.C.

Gone too are the difficulties of the S.G.A. in endeavouring to reconcile the existence of an implied condition as to conformity with the description in the case of a *specific* chattel sold by description, with the common law rule that the contractual description of a specific article did not amount to a condition entitling the buyer to reject but was at most a warranty, unless the description was essential to the identity of the chattel so that its falsity made the chattel something different from what was contracted for.

The requirement that the sale must be a sale by description is done away with by the Code.[34] All the difficulties surrounding such a concept in the era of the supermarket and the self-service store are abrogated, and there is substituted instead the test of whether the description of the goods 'is made part of the basis of the bargain'. All that has been previously said on this topic, such as the necessity to distinguish statements that are mere 'chaffer in the market-place' and whether the buyer has carried out such a detailed inspection of the goods before purchase as to show that the description given did not enter into his calculations, *i.e.* that he did not rely on the description, are relevant here. Of course, as Comment 5 to the section points out, a description need not be given by words but can be supplied by technical specifications, blue-prints and the like, or be set by course of dealing or usage of trade.[35]

The classification of the warranty as to conformity to the description as express has its principal significance where an attempt is made to reduce the seller's obligation by the use of a general exclusion clause disclaiming all warranties express or implied. An express warranty can only be disclaimed under exceptional circumstances as section

[33] *Fairbanks Morse & Co. v. Consolidated Fisheries Co.* (1951) 190 F. 2d 817 (sale of generator described as '1-1420 KVA-1136 KW at 807' held to include an express warranty that the equipment would generate 1136 KW).

[34] The 'sale by description' concept was retained by the U.S.A. as a requirement for the implied warranty of merchantability.

[35] New York has recently supplemented the U.C.C. provisions by enacting as ss. 221 and 222 General Business Law (N.Y. Laws 1966 ch. 985) that a written agreement, bill, invoice, receipt, bill of sale, or any other written note of the sale of a work of fine art which identifies the work with a certain authorship or period or origin shall be deemed an express representation and warranty of the genuiness or authenticity of such authorship *etc.*, unless a contrary intention is expressly and conspicuously stated or evidenced on the face of the writing. A work of fine art is defined to cover a painting, sculpture, drawing or work of graphic art.

2-316(1) shows, and Comment 4 to section 2-313 indicates that it would be the height of inconsistency to allow a seller's duty to supply the goods agreed to be bought to be reduced to the level of a pseudo-obligation. The duty is so essential to the bargain that words of disclaimer in a 'form clause' are repugnant to the basic negotiated terms and should not be given effect to.[36] Exceptionally, where the parties desire in good faith to do so, they can make their own bargain as they wish, but the possibility will be small that a real price is intended to be exchanged for a pseudo-obligation.

One situation, however, where this might arise is in the case of the seed merchant whose standard practice for many years has been either to exempt himself completely from liability for failure to supply the correct type of seed agreed to be bought or else to limit his liability to the purchase price of the goods.[37] The argument in favour of recognition of such a practice is the necessity for a seed merchant to protect himself against claims for large losses that might result to the buyer where the initial purchase price paid by him was small. But this risk can be covered by insurance and thus be spread over the entire agricultural community in the guise of increased prices to meet the costs involved, and as has been cogently remarked, it is a matter of grave doubt whether a farmer's chances of survival exceed those of the seed 'manufacturer' who sells adulterated seed.[38] In *Klein v. Asgrow Seed Co.*[39] the 'manufacturer' of tomato seed knew the description of the goods on the package was wrong and it was held that by this description he had made an express warranty to all who might own or become responsible for the character of the goods or use them. No privity of contract was required to render him liable, as the statement on the package was communication of the warranty to all. The purported limitation of liability to the amount of the purchase price contained in small print on the label and on the invoice was rejected as being made after the contract had been entered into. The Court referred to the fact that a limitation of liability was permitted under section 2-719(2) of the U.C.C., but construed the section to mean that where the remedy provided by the agreement operated to deprive either party of the substantial value of the bargain it would not be enforced.[40]

[36] A similar exemption clause in a contract for sale of goods under the S.G.A. would no doubt be treated the same way on the ground that it would be repugnant to the main purpose of the contract. The U.C.C. puts the matter beyond doubt.

[37] *E.g. Wallis Son & Wells v. Pratt & Haynes* [1911] A.C. 394; *Varga v. Stoke Seeds Ltd* (1962) 32 D.L.R. (2d) 167.

[38] *Vide Klein v. Asgrow Seed Co.* (1966) 54 Cal. Rpter 609, 618; 3. U.C.C. Rep. 935 (Calif. Dist. C.A.).

[39] *Ibid.* The case was decided under the U.S.A. but the Court expressly stated that no different result would be arrived at under the U.C.C.

[40] *Ibid.* 619 n.8. The subsection reads: 'Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.' Statutory provisions exist in Australia dealing with the sale of seeds whereby the package must specify the kind and type of seed sold and, notwithstanding any agreement to the contrary, the statement constitutes a warranty that

SALE BY SAMPLE

The U.C.C. does not set a sale by sample aside in a separate category as is the case under the S.G.A., but includes it in the general classification of sale of goods, with the consequence that there are no separate provisions dealing with merchantable quality or opportunity to inspect. The Code takes the view that the display of a sample or model may be regarded as simply a way of describing the subject matter of the bargain, and accordingly it provides in section 2-313(1)(c) that any sample or model which is made part of the basis of the bargain creates an *express* warranty that the whole of the goods shall conform to the sample or model.

This provision differs from the corresponding provision in the S.G.A. in several respects. In the first place, the reference to a model is new. The distinction between a sample and a model drawn in Comment 6 to the section is that a sample is actually taken from the bulk of the goods which is the subject-matter of the sale, *i.e.* it is a unit of an existing mass, while a model is not drawn from bulk and refers to goods which are not at hand and may yet have to be produced. Thus an offer to sell additional goods of the same kind and quality as those previously delivered will not be a sale by sample as there is nothing drawn from an existing bulk, but will be a sale by model (*i.e.* a sale by description from a model) if a unit is offered for inspection. Secondly, the warranty created is an express one as opposed to an implied condition under the S.G.A. and is to the effect that the sample or model conforms to the *whole* of the goods while the S.G.A. provision is that the *bulk* shall correspond with the sample in quality. It is conceived that no departure from previous law is intended by the use of the word 'whole' in place of 'bulk'.

The requirement in the S.G.A. that in a sale by sample the goods shall correspond with both the sample and the description if the sale is by description as well as by sample seems to be covered by section 2-313(1), for if the display of a sample or model is a way of describing the subject matter of the bargain and if the sample or model is made part of the basis of the bargain, the express warranty of conformity thereby created will include conformity with the description. To the extent, however, that a separate description of the goods is given by the seller, it will come within the express warranty of conformity created by section 2-313(1)(b). The buyer's right of inspection to compare the bulk with the sample contained in section 20(2)(b) S.G.A. is preserved in the general right of a buyer conferred by section 2-513(1) to inspect goods tendered or delivered before payment or acceptance,

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the particulars are true and correct, or that the contents are in accordance with the prescribed limits of the Act as regards purity and germination: ss. 5(1) & (2), 7(1), 9 Seeds Act 1958 (Vic.); s. 7 Seeds Act 1950 (W.A.); ss. 5(2) & 12 Seeds Act 1950 (Tas.); s. 4 Agricultural Seeds Act 1921 (N.S.W.); s. 81(2) Agricultural Standards Act 1952 (Qld); Agricultural Seeds Act 1938 (S.A.).

while the conditions as to merchantability in respect of latent defects implied by section 20(2)(c) S.G.A. is covered by section 2-314 and section 2-316(3)(b). Under section 2-314 there is an *implied* warranty of merchantability only if the seller is a merchant with respect to goods of that kind[41] and by virtue of section 2-316(3)(b) if the buyer before entering into the contract has examined the sample or model as fully as he desired or has refused to examine the goods, there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.[42] It seems that the rule in *Drummond v. van Ingen*[43] will continue to apply to a sale under the U.C.C. where a sample or model forms part of the basis of the bargain and that the sample or model will be regarded as conveying only that information which would be apparent on reasonable examination to a buyer of ordinary experience and diligence of the particular class concerned.

In order to establish the express warranty of conformity under section 2-313(1)(c) the sample or model must be made part of the basis of the bargain. The S.G.A. requirement is that there is a contract for sale by sample where there is a term in the contract express or implied to that effect. Both provisions point to the fact that the mere exhibition of a sample by the seller to the buyer in the course of negotiations leading up to the sale does not necessarily bring the transaction within section 2-313(1)(c) or make it a sale by sample. Comment 6 to section 2-313 indicates a presumption that any sample or model, like any affirmation of fact, is intended to become a basis of the bargain, but in the final analysis it is a question of fact whether the sample has been used in such a way that it is reasonable to assume that the seller has adopted it as the standard to which the goods not exhibited must conform and the buyer has concluded the purchase on this basis; or whether it is merely intended to 'suggest' the character of the subject matter of the contract.

While there is no specific reference in the S.G.A. to the implied condition as to fitness for the particular purpose applying to the case of a sale by sample, it would appear that a warranty to this effect will in appropriate circumstances be implied under section 2-315 of the Code to a transaction where the sample or model forms part of the basis of the bargain. Thus in *Loomis Bros Corpn v. Queen*[44] it was held that fitness for the purpose was a basic ingredient in a sale and that even though the goods conformed to the sample or model they must also be fit for the purpose intended.

[41] No similar restriction exists in s. 20(2)(c) S.G.A. There seems to be no cogent reason for having such a restriction in the sale of goods generally under s. 19(2) but removing it where the sale is by sample.

[42] These examination provisions are considered further in dealing with the warranty of merchantability implied by s. 2-314.

[43] (1887) 12 App. Cas. 284, 297.

[44] (1958) 17 Pa D. & C. 2d 482; also *Smith's Sons Co. v. Lattimer Foundry & Machinery Co.* (1956) 19 F.R.D. 379, 389.

IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

Section 19(1) S.G.A. establishes three requirements for the implication of a condition of fitness for the particular purpose:

(a) that the buyer make known to the seller the particular purpose for which the goods are required;
(b) that the buyer rely on the seller's skill or judgment; and
(c) that the goods are of a description which it is in the course of the seller's business to supply.

In addition, there is a proviso that no implied condition of fitness exists where a specified article is bought under its patent or other trade name. Section 2-315, the comparable provision in the U.C.C., is built upon the first two tests but does not limit the implied warranty to sales by a merchant[45] and omits the proviso. It states that

> where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

There is a slight change in the first requirement in that it is no longer the responsibility of the buyer to communicate to the seller expressly or by implication the particular purpose for which the goods are required, the U.C.C. providing that it is sufficient if the seller 'has reason to know' of the particular purpose. This change would avoid the difficulty which arose in *Ashford Shire Council v. Dependable Motors Pty Ltd*[46] where the problem was whether the buyer, through its engineer-designate, had made known the particular purpose to the seller, or whether the engineer was acting as a principal on his own account in disclosing the purpose for which the goods were required. Apart from this sort of situation, it is suggested that in view of the liberal interpretation which has been placed on the requirement of communication of the particular purpose in decisions under the S.G.A., the change in favour of the buyer made by the U.C.C. will not in practice be of great importance.

It would seem also that the onus on the buyer to show that he relies on the seller's skill or judgment imposed by section 19(1) S.G.A. is abrogated in favour of the 'reason to know' test on the part of the seller. It is sufficient if the seller has reason to know of this actual reliance,[47] but again in practice this may not mean any great difference in result in view of the decisions under the S.G.A. which hold that disclosure of reliance usually arises by implication from the

[45] This requirement was likewise absent from the corresponding provision in the U.S.A.—s. 15(1). The warranty of fitness will usually arise only in the case of a merchant because of the necessity to show reliance on the seller's skill or judgment.
[46] [1961] A.C. 336.
[47] Comment 1, s. 2-315.

circumstances and is satisfied if the reliance is a matter of reasonable inference to the seller and to the court.[48]

The reliance must be on the seller's skill or judgment to *select or furnish* suitable goods. This makes it clear that the seller may be liable where he furnishes goods for a particular purpose and the buyer makes the actual selection of what he wants from among the items supplied by the seller. Again, the warranty is that the goods shall be fit for such purpose, whereas the S.G.A. uses the phrase 'reasonably fit'. It is submitted that no different standard is intended under the U.C.C. by this change and that the test is still reasonable fitness, not perfection.

Finally, there is the omission of the patent or trade-name proviso. This proviso was enacted at a time when widespread brand-name advertising was a thing of the future and, in the light of the restrictive interpretation placed upon it by Bankes L.J. in *Baldry v. Marshall*,[49] it serves no useful purpose, so that its continued retention on the statute-book is a source of embarrassment to the court. If the proviso only applies where the circumstances indicate that the buyer is relying on his own judgment and not on the skill or judgment of the seller, then it is redundant. There must be actual reliance by the buyer, and the use of a trade-name in making purchase is only one factor to be taken into account in deciding whether or not there has been this actual reliance by the buyer.[50]

WARRANTY OF MERCHANTABILITY

Section 2-314 sets out the requirements of the U.C.C. in relation to the implied warranty of merchantability. The most notable features of the section are the elimination of the purchase by description qualification and a detailed statement (which is not intended to be exhaustive) of what constitutes merchantability. Unless excluded or modified, the warranty is implied in a contract for the sale of goods where the seller is a merchant with respect to goods of that kind, and it is made clear that the serving for value of food or drink to be consumed on or off the premises is a sale of goods.[51] The broad definition of 'merchant' in section 2-104(1) may mean that this qualification will

[48] *Grant v. Australian Knitting Mills Ltd* [1936] A.C. 85, 99; *Manchester Liners Ltd v. Rea* [1922] 2 A.C. 74, 90; *Ashford Shire Council v. Dependable Motors Pty Ltd* [1961] A.C. 336, 351.

[49] [1925] 1 K.B. 260, 266.

[50] Comment 5, s. 2-315.

[51] In the past, some courts had considered the supply of food in a restaurant to be a contract for services, and others, which regarded it as a sale of goods, restricted liability to cases where the food was contaminated or contained a foreign substance. Hence where injury was caused by a substance natural to the product sold, such as a fish bone in a bowl of fish chowder—*Webster v. Blue Ship Tea Room Inc.* (1964) 198 N.E. 2d. 309 (Mass. Sup. Jud. Ct)—there was no liability. Other courts applied the 'reasonable expectation' test, *i.e.* what would a reasonable consumer expect to find in the food as served. The U.C.C. does not solve the problem beyond indicating that the serving of food is a sale of goods; whether food is fit for consumption would seem to be a question of fact in each case.

not be so restrictive as the limitation of the implied condition of merchantable quality in section 19(2) S.G.A. to a seller who deals in goods of that description, but it is clear that under both Acts the owner of goods who makes an occasional sale is excluded from the operation of the warranty.[52]

In the 1952 Official Text, section 2-314(1) extended the warranty to a seller who, though not a merchant, stated generally that the goods were guaranteed. This was deleted from the 1957 Official Text on the ground that such a statement would amount to an express rather than an implied warranty and section 2-313(2) covered the same ground by implication,[53] but the draftsmen of the U.C.C. did not delete Comment 4. That Comment, as amended, indicates that the provisions of section 2-314 may furnish a guide to the content of the resulting express warranty where a non-professional seller states that the goods are 'guaranteed'.[54]

Section 2-314(2) sets out minimum standards drawn from trade practices and the ordinary uses of goods, which must be met for goods to be merchantable. The subsection declares that goods to be merchantable must be *at least* such as

(a) pass without objection in the trade under the contract description;
(b) in the case of fungible goods, are of fair average quality within the description;
(c) are fit for the ordinary purposes for which such goods are used;
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
(e) are adequately contained, packaged and labelled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label if any.

Comment 6 indicates that this list does not purport to be exhaustive and that the intention is to leave open other possible attributes of merchantability.

It has been suggested that the only requirement of merchantability set out in section 2-314(2) which was not generally recognized under pre-Code law is the final one requiring the goods to conform to the promises or affirmations of fact on the container or label, the issue under the previous law being whether or not the dealer, in selling

52 The statement in Comment 3 to s. 2-314 that a 'non-professional' seller is under an obligation to disclose any known material but hidden defects in keeping with the underlying reason of the section and the provisions of good faith appears to go too far.

53 1956 Recommendations of Editorial Board of U.C.C., 38.

54 As an express warranty, the 'guarantee' would be more difficult to disclaim: s. 2-316(1), discussed *infra*.

the goods, adopted as his own the representations on the label or container.[55] Now the retailer is bound irrespective of whether he has made the statements his own or not.

The promises or affirmation of fact on the container or label would also seem to be *express* warranties under section 2-313 if they can be shown to be part of the basis of the bargain and would therefore continue to apply even though the implied warranty of merchantability was effectively disclaimed. The same may be true of the requirements of section 2-314(2)(a) and (b) with their reference to 'contract description' and 'description'[56] and may possibly apply to the stipulation in section 2-314(2)(e) that the goods be adequately packaged *etc., as the agreement may require.*[57]

Comments 5 and 8 to the section indicate that the requirement of fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of merchantability. This is not quite on all fours with the test of Lord Wright put forward in *Cammell Laird & Co. Ltd v. The Manganese Bronze & Brass Co. Ltd*[58] whereby the requirement of merchantability is satisfied if the goods are fit for *any* normal purpose, but it may be doubted if in practice there is any significant difference to be found in the use of the plural term 'purposes' instead of the singular. It is conceived that to the extent that the purposes for which the goods are ordinarily used and the particular purpose for which the goods are required by the buyer coincide, as in the case of food for example, there may be implied warranties of fitness for the purpose and of merchantability co-existing and overlapping under the Code as they do under the S.G.A. Comment 2 to section 2-315 endeavours to avoid this redundancy by interpreting a 'particular purpose' as envisaging a specific use by the buyer which is something apart from the ordinary use of such goods and is peculiar to the nature of the buyer's business.[59]

Comment 7 to section 2-314 states that paragraphs (a) and (b) of subsection (2) are to be read together. Under paragraph (a) the goods must pass without objection in the trade under the contract description while under paragraph (b) in the case of fungible goods,

[55] *Vide* Cosway, 'Sales and the U.C.C.' (1960) 35 *Washington Law Review* 412, 617, 623, citing *Cochran v. McDonald* (1945) 161 P. 2d 305 (S.Ct Wash.) The writer asks whether the retailer should have the benefit of any disclaimer clause shown on the container or label and notes that the Code does not cover this.

[56] Note, 'Implied and Express Warranties and Disclaimers under the U.C.C.' (1963) 38 *Indiana Law Journal* 648, 655. South Carolina includes promises and representations on containers and labels within the definition of express warranties in s. 2-313(1)(a) and omits s. 2-314(2)(f).

[57] *Ibid.* 657; but, Hawkland, 'Transactional Guide to the U.C.C.' i (1964), 69 points to Comment 10 to reinforce his view that there is no overlap and that under s. 2-314(2)(e) if the nature of the goods or transaction requires a certain type of container or label, then it must be adequate for the purpose. Milk, for instance, cannot be sold in chipped bottles.

[58] [1934] A.C. 402.

[59] Both warranties were implied in the case of the sale of shotgun shells in *Allen v. Savage Arms Corpn* (1962) 52 Luz. Leg. Reg. Rep. 159 (Pa C.P.).

they must be of fair average quality within the description. It is not clear whether the draftsmen intended that the test in paragraph (a) should cover latent defects or not, *i.e.* whether the goods are to pass without objection in the trade where the buyer is aware of all the hidden defects in the goods, or whether only obvious defects are meant to be covered by this test. If the latter is the true position, resort would have to be made to the 'fit for the ordinary purposes' test in paragraph (c) to meet objections based on latent defects.

Paragraph (b) originally applied to all goods, not merely fungible goods,[60] but was altered to meet criticism by the New York State Law Revision Commission,[61] which found the test of 'fair average quality' difficult to apply as a general standard and to be inconsistent with the requirement in paragraph (d) that the goods should 'run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved'.[62]

It is suggested that the two basic tests of merchantability which would meet most situations are those contained in paragraphs (a) and (c) of section 2-314(2). These tests, taken together, are very close to the definition of merchantable quality given by Salmond J. in *Taylor v. Combined Buyers Ltd*[63]:

> goods sold by description are merchantable in the legal sense when they are of such quality as to be saleable under that description to a buyer who has full and accurate knowledge of that quality and who is buying for the ordinary and normal purposes for which goods are bought under that description in the market.

The fitness for ordinary purposes test would cover the situation of the abnormally sensitive or allergic purchaser, and it would seem that for goods to pass without objection in the trade they must comply with what the law requires, at least at the place of sale,[64] and be adequately packaged and labelled.[65] Thus, with the exception of paragraph (f),

60 The concept of 'fungible goods' is foreign to the S.G.A. but is to be found in the U.S.A. It is defined in s. 1-201(17) U.C.C. as goods 'of which any unit is by nature or usage of trade the equivalent of any other like unit'. Examples of the sale of fungible goods would be of a certain quantity of hay or sugar or wheat out of a larger stock, and of bales of wool of a standard weight and quality. Indeed, the definition is wide enough to cover almost all multi-unit transactions involving standardized units, and would cover manufactured goods despite the reference to agricultural products in Comment 7 mentioned *infra*.

61 1956 Recommendations of the Editorial Board of the U.C.C. 38.

62 N.Y.L.R.C. Report (1955) Legis. Doc. No. 65 (c) 66-7 (pp. 400-1). The Commission referred to Comment 7 to the section whereby 'fair average' was described as a term directly appropriate to agricultural bulk products and meant goods centring around the middle belt of quality. The Comment adds that in cases of doubt as to what quality is intended, the price at which the transaction was completed is an excellent index of the nature and scope of the merchant's obligation.

63 [1924] N.Z.L.R. 627, 645.

64 *Cf. Sumner Permain & Co. v. Webb & Co.* [1922] 1 K.B. 55.

65 In *Silbert Sharp & Bishop Ltd v. Geo. Wills & Co. Ltd* [1919] S.A.L.R. 114, the goods were held to be unmerchantable because the cases and packing were defective. Also *Morelli v. Fitch & Gibbons* [1928] 2 K.B. 636; *Geddling v. Marsh* [1920] 1 K.B. 668.

which breaks new ground, the requirements set out in the remaining paragraphs seem to be applications to specific situations of the basic tests in paragraphs (a) and (c).

Presumably the breach of warranty of merchantability will occur when tender of delivery is made,[66] although if the warranty is to extend for a time that is reasonable in all the circumstances,[67] it might be possible to argue that the warranty 'explicitly extends to future performance of the goods' and hence the situation comes within the exception to the general rule in section 2-725(2).[68] However, it was held in *Citizen's Utilities Co. v. American Locomotive Co.*[69] that an 'implied' warranty that an article would last for thirty years was a warranty of present condition and not of future performance.

Under section 19(2) S.G.A. the condition as to merchantable quality will not be implied if the buyer has examined the goods, at least as regards defects which such examination ought to have revealed. The U.C.C. deals with the effect of an examination or opportunity to make an examination in section 2-316(3)(b). It provides that where the buyer before entering into the contract has examined the goods as fully as he desired, or has refused to examine the goods, there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him. A refusal to examine implies a demand by the seller that he do so, thus putting the buyer on notice that he is assuming the risk of defects which the examination ought to reveal.[70] As Comment 8 to section 2-316 states, there must be such a demand; a mere opportunity to inspect is not enough. The Comment lays stress on the extent of the buyer's reliance, the particular buyer's status as an expert or layman, and whether the defects are latent or not, in determining what defects are excluded by the examination. Even if there is an offer to inspect, the seller may accompany this by representations as to the merchantability of the goods, and if the buyer relies on these representations rather than on his own examination there will be an express warranty and it will be a question of fact whether it has become part of the basis of the bargain or not.

This extension by the U.C.C. to the situation where the buyer refuses to examine the goods is to be welcomed as removing the anomaly whereby an astute buyer familiar with the precise terms of

66 S. 2-725(2).

67 *Wood v. Hub Motor Co.* (1964) 137 S.E. 2d 674, 678 (C.A. Geo.).

68 The word 'explicitly' is, however, a troublesome one.

69 (1962) 184 N.E. 2d 171, 174 (C.A.N.Y.); also *Rufo v. Bastian-Blessing Co.* (1965) 207 A.2d 823 (S.Ct Pa). *Cf. Aced v. Hobbs-Sesack Plumbing Co.* (1961) 360 P.2d 897 (S.Ct Calif.); *Perry v. Augustine* (1965) 37 Pa D. & C. 2d. 416 (express warranty that heating system would heat well in sub-zero weather held to extend to future performance).

70 The U.C.C. does not deal with the case of a buyer's refusal to examine on the ground of inconvenience or the expense involved. The situation would be governed by the requirement of good faith, which in the case of a merchant brings in the test of reasonable commercial standards of fair dealing: ss. 2-103(1)(b) and 1-203.

section 19(2) S.G.A. would make no examination of the goods and thus avoid the operation of the proviso. The limitation of the Code provision to an examination made by the buyer before entering into the contract is in accord with principle, since an inspection made after the contract is concluded will obviously have no bearing on what warranties are to be implied in the contract.[71]

Under section 2-314(3) implied warranties other than the warranty of merchantability may arise from course of dealing or usage of trade, terms which are defined in section 1-205. This subsection is comparable to section 19(3) S.G.A. which is, however, limited to the implication of warranties or conditions as to quality or fitness for a particular purpose annexed by usage of trade. Under section 57 S.G.A., however, both the course of dealing and usage are given legal effect in varying any right, duty or liability which would arise under a contract of sale by implication of law.

EXCLUSION OR DISCLAIMER OF WARRANTIES

Passing reference has already been made to the provisions of the U.C.C. concerning the use of disclaimer clauses to abrogate the seller's liability for breach of warranty. Section 57 S.G.A. gave full scope to the ability of the seller to 'contract out' of his obligations by providing that

> where any right, duty or liability would arise under a contract of 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 usage, if the usage be such as to bind both parties to the contract.

Section 2-316 of the U.C.C. departs radically from the stand taken by the S.G.A. and makes it much more difficult for a seller to absolve himself from liability by the use of sweeping exemption clauses.

The section first of all draws a distinction between express warranties and implied warranties, rendering the disclaimer of an express warranty more difficult than in the case of an implied warranty, no doubt because there is an inconsistency in making an express promise or affirmation on the one hand and taking it away with the other.[72] Indeed, in the 1952 Official Text it was impossible to disclaim an express warranty, section 2-316(1) providing that if the agreement created an express warranty any disclaimer was inoperative. This bold attempt to resolve the conflict between an express warranty and a general disclaimer clause in an agreement foundered on the rock of criticism by the New York State Law Revision Commission[73] and

71 *Taylor v. Combined Buyers Ltd* [1924] N.Z.L.R. 627, 635.

72 Comment 1 to s. 2-313.

73 'The noble intent of the drafters of the Code was blunted by the criticisms of the New York Law Revision Commission and the revision of the provision in response to that criticism has been obscurity.' Lorensen, 'The U.C.C. Sales Article compared with West Virginia Law' (1962) 64 *West Virginia Law Review* 142, 169-170. South Carolina has retained the original text of s. 2-316(1).

the subsection was re-drafted,[74] appearing in its present form in the 1957 Official Text. As it now stands, section 2-316(1) provides that

> words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

This revised version of section 2-316(1) has been described by commentators as 'verbal miasma', 'Gilbertian', 'saying nothing and meaning nothing', 'a seemingly verbose and confusing mass of language', but this criticism appears a little harsh. Admittedly, what is meant by words or conduct 'relevant' to the creation of an express warranty, or by words or conduct 'tending' to negate or limit warranty (not necessarily *express* warranty it will be noted), is obscure; in the light of the history of the subsection, it seems to say that if there is no parol evidence problem an express warranty will be given as much effect against a disclaimed clause as a reasonable interpretation will permit, but that if the two cannot on any reasonable basis be read as consistent with each other the warranty will prevail over any purported negation or limitation of it. It will seldom be that a disclaimer clause can be read consistently with an express warranty, so the practical effect of the subsection is to forbid virtually all disclaimers of express warranties.

In these circumstances the operation of the parol evidence rule as set out in section 2-202 becomes of importance. The section abrogates the previous judicial interpretation of the rule whereby a writing complete on its face was presumed to be an 'integration' embodying the entire agreement between the parties, so that extrinsic evidence was inadmissible to establish additional terms; and provides that it is now a question of the intention of the parties in each case. Under the section, evidence of any prior agreement or contemporaneous oral agreement may not be given to contradict the terms of a contract set forth in a writing which is intended by the parties as a final expression of their agreement with respect to such terms; explanatory or supplementary evidence of such terms may be given in the shape of course of dealing or performance, or usage of trade, or by proof of *consistent* additional terms, unless the court finds the writing to have been intended as a complete and exclusive statement of the terms of the agreement.

Hence if the seller takes the precaution of deleting all unwanted promissory language from the written agreement and inserting an 'integration' or 'merger' clause, such as 'This contract embodies the

74 1956 Recommendations of Editorial Board of U.C.C., 39-40.

entire agreement between the parties and there are no oral understandings, representations, or agreements not fully expressed herein', he can circumvent the U.C.C. prohibition in section 2-316(1).[75] For the 'merger' clause, in combination with the parol evidence rule, will effectively bar evidence being given as to any express warranties other than those included in the writing. The various situations which could arise have been analyzed as follows:[76]

(a) Where there is an express warranty in the written agreement followed by a general disclaimer, the latter will be disregarded on the ground that in a conflict between the general and the specific the specific provision prevails.[77]

(b) Where there is an express warranty in the written agreement followed by a specific disclaimer, there is an inconsistency and under section 2-316(1) the disclaimer is inoperative.

(c) Where there is an express warranty *not* appearing in the written agreement and there is a general disclaimer clause in the agreement, the parol evidence rule will prevent the buyer from proving the warranty as the disclaimer indicates that the parties have reduced all express warranties (if any) to writing and the oral warranty conflicts with the general disclaimer.[78]

To put the position succinctly, a disclaimer clause is ineffective as against inconsistent express warranties contained in the agreement, but the disclaimer together with a clause that the written contract contains all the terms agreed upon will successfully prevent claims of other express warranties made orally prior to the writing from being entertained.

So far as implied warranties are concerned, they arise by operation of law and hence are not excluded by the parol evidence rule. For the same reason, there are no problems of inconsistency in that something is expressly promised on the one hand and is taken away on the other, and the U.C.C. accordingly deals with the disclaimer of implied warranties in a different way. Unless the situation comes within section 2-316(3) (which will be considered further *infra*), the implied warranty of merchantability can only be excluded if the word 'merchantability' is itself mentioned, and if the exclusion is in writing

75 But the express warranty of conformity with the discription cannot be disclaimed in this way, since the contract which does not designate its subject-matter is meaningless; vide Comment 4 to s. 2-313.

76 Note, 'Implied and Express Warranties and Disclaimers under the U.C.C.' (1963) 38 *Indiana Law Journal* 648, 667-70; also Note, 'Warranties, Disclaimers, and the Parol Evidence Rule', (1953) 53 *Columbia Law Review* 858.

77 Restatement of Contracts (1932) s. 236(c).

78 The parol evidence rule does protect the seller against false allegations of oral express warranties—Comment 2 to s. 2-316—but it may be doubted whether the seller needs as much protection as the buyer will need in a Code jurisdiction in the future where the standard form contract will no doubt include a general disclaimer and a merger clause to offset the effect of s. 2-316(1).

it must be conspicuous.[79] A clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it, and language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or colour.[80] Hence a 'merger' clause in an agreement followed by a general disclaimer of all warranties express or implied would not be effective to oust the implied warranty of merchantability unless this word was specifically mentioned and the clause was conspicuous.[81] These provisions of section 2-316(2) seem to be aimed not only at the 'fine print' general disclaimer which catches the buyer by surprise,[82] but also to cause embarrassment and hesitancy amongst sellers by requiring them 'to parade their lack of faith in their own product before prospective buyers' eyes'.[83] But to the ordinary buyer a statement such as 'the seller does not guarantee the merchantability of the goods', even if conspicuously written, may not indicate that protection against latent defects is being withdrawn. To the ordinary consumer, 'merchantability' may suggest resaleability rather than soundness of quality.[84]

The 1952 Official Text placed disclaimer of the implied warranty of fitness on the same footing as the warranty of merchantability, *i.e.* exclusion or modication had to be in specific language and any ambiguity in the contract as a whole was to be resolved against the seller. The reason for this was, as Comment 4 to the 1952 Text indicated, that implied warranties were not to be excluded merely by the use of a general disclaimer clause applying to all warranties express or implied. The provision was recast in Supplement number 1 in 1955 along the present lines of section 2-316(2) whereby a disclaimer of the implied warranty of fitness need not be in specific language but must be in writing and be conspicuous.[85] The subsection proceeded to set out a general statutory formula which would suffice to exclude

79 S. 2-316(2). This indicates that a disclaimer of the warranty can be oral, but this would be difficult to prove in practice and might be caught by the parol evidence rule.

80 S. 1-201(10). The test is whether attention can reasonably be expected to be called to it and this is a matter for decision by the Court.

81 *Duckworth v. Ford Motor Co.* (1962) 211 F. Supp. 888, 891; *S.F.C. Acceptance Corpn v. Ferree* (1966) 39 Pa D. & C. 2d 225; *Minikes v. Admiral Corpn* (1966) 266 N.Y.S. 2d 461.

82 Comment 1, s. 2-316. In Comment 11 to s. 2-314 it is said that the warranty is so commonly taken for granted that its exclusion is a matter threatening surprise and therefore requiring special precaution.

83 Note, 'Contract Draftsmanship under Article 2 of U.C.C.' (1964) 112 *University of Pennsylvania Law Review* 564, 584. It is there suggested that an effective general disclaimer, conspicuously displayed, might read as follows: 'Except for the specifications and descriptions stated in this agreement, it is expressly agreed that no warranty of merchantability nor other warranty express, implied, or statutory, is made by the seller.'

84 See N.Y.L.R.C. Report (1955). Legis. Doc. No. 65 (c) i. 74, (408).

85 In *Boeing Airplane Co. v. O'Malley* (1964) 329 F. 2d 585 there was an express warranty of title given in lieu of all other warranties express or implied, but this was held ineffective to abrogate the implied warranty of fitness even under the amended s. 2-316(2), as it was not conspicuous but was of the same colour and size of the type used for the other provisions of the contract.

all implied warranties of fitness, the formula reading 'there are no warranties which extend beyond the description on the face hereof'.[86]

Thus there cannot be an oral exclusion of the warranty as to fitness, but on the other hand there is no need to use specific language as in the case of the warranty of merchantability. The only justification for drawing a distinction between the two would seem to be on the ground that the warranty of merchantability, especially as so carefully defined in the Code, is more basic than the warranty of fitness for the particular purpose, and accordingly the fact of its exclusion from the transaction must be the more clearly brought home to the buyer.

Even if the requirements of section 2-316(2) are not met, both the implied warranties as to merchantability and fitness may be excluded if the situation comes within the purview of subsection (3), as subsection (2) is specifically made subject to the operation of the former subsection. Under section 2-316(3) there are three alternatives to disclaimer. Clause (a) states that unless the circumstances indicate otherwise,[87] all implied warranties are excluded by expressions like 'as is', 'with all faults', or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.[88] Curiously enough, there is no requirement in this clause that the language used should be conspicuous, and unless this is to be spelt out of the stipulation that the words used must call the buyer's attention to the exclusion,[89] it seems clear that the protection afforded the buyer under subsection (2) can be evaded by the use of 'fine print' clauses containing one or other of the formulae set out in section 2-316(3)(a).

Clause (b), which abrogates any implied warranty as to apparent defects where the buyer has examined the goods, or alternatively, refused to examine them on demand being made, has already been considered in the discussion on the warranty of merchantability. No fur-

[86] It may be doubted whether this formula sufficiently warns the buyer of his lack of protection; the only real safeguard is the requirement that the clause be conspicuous. Even then the buyer may not understand its significance. *Vide* Note, referred to n. 83 *supra,* (1964) 112 *University of Pennsylvania Law Review* 564, 588.

[87] This means that the court can look at circumstances apart from those of the written contract. *Crown Cork & Seal Co. Inc. v. Hires Bottling Co. of Chicago* (1966) 254 F. Supp. 424.

[88] A statement that the buyer accepts the chattel 'in its present condition' did not suffice to exclude warranties in *Hull-Dobbs Inc. v. Mallicoat* (1966) 3 U.C.C. Rep. 1032 (C.A. Tenn.); also *L. & N. Sales Co. v. Stuski* (1958) 146A 2d 154 (Pa Super.); but in *First National Bank of Elgin v. Husted* (1965) 205 N.E. 2d 780 the words 'buyer acknowledges delivery, examination and acceptance of said car in its present condition' printed in the same size type as the remainder of the contract, were held effective by the Illinois Court of Appeals to exclude all implied warranties.

[89] Hawkland 'Transactional Guide to the U.C.C.' i, 77. But the stipulation could equally well be interpreted as referring to the connotation of the language and not to its prominence in the agreement. *Vide First National Bank of Elgin v. Husted* (1965) 205 N.E. 2d 780 (App. Ct Ill.).

ther comment is called for here except to stress that the defects referred to are those which *an*[90] examination ought *in the circumstances* to have revealed to the buyer, and to suggest that in view of the highly technical and complex nature of the articles being produced today, this clause will have its main impact where the buyer is himself a merchant familiar with the intricacies of the goods he is purchasing. The ordinary layman will usually not be in a position to discover any but the most obvious defects in the sort of inspection he is able to make.

Clause (c) permits an implied warranty to be excluded by course of dealing or course of performance or usage of trade. This is more than a paraphrase of section 57 S.G.A. in that course of performance is included, *i.e.* not merely are transactions under prior contracts to be taken into account but also previous deliveries under the instant contract. The extended definitions of these terms in section 1-205 and section 2-208 may also presage a wider scope for the clause than its counterpart under the S.G.A.

Section 2-316 is solely concerned with the codification of the rules as to exclusion or modification of warranties once they are shown to exist in the particular transaction concerned. Obviously there is no need to refer to the section if no warranty express or implied exists in the first place, so that the initial inquiry should always be whether, in the particular circumstances of the case, a warranty has been created. Only then will the section be applicable. Secondly, it is made clear by section 2-316(4) that the section is not concerned with the limitation of *remedies* for breach of warranty, so that even if a warranty has in fact been created, the next inquiry should be whether the remedy for its breach has been validly limited under section 2-718 and section 2-719.[91] If there has been no such limitation the provisions of section 2-316 are relevant in gauging the effectiveness of any exclusion clause,[92] but even then, when the requirements of the section have been strictly followed and the particular warranty has been effectively disclaimed, there is authority which suggests that the unconscionability provision contained in section 2-302 may have an overriding effect. In other words, even though the warranty has been excluded under section 2-316, section 2-302 is the dominant section and the exclusion clause may be disregarded as unconscionable under section 2-302. Some consideration must now be given to both the limitation of remedies for breach of warranty and to the principle of unconscionability set out in the Code.

[90] Not 'such examination' as in s. 19(2) S.G.A.
[91] Comment 2 to s. 2-316.
[92] There can be no exclusion of liability for negligence under the U.C.C.: s 1-102(3).

LIMITATION OF REMEDIES FOR BREACH OF WARRANTY

So far as the limitation of remedies is concerned, the U.C.C. appears to allow the seller greater latitude in limiting his liability for consequential damages arising out of breach of warranty than in absolving himself from liability entirely through the use of exclusion clauses. Under section 2-718(1) the parties can in their agreement fix liquidated damages payable on breach which will be upheld if reasonable in the circumstances, while under section 2-719(1) there may be a modification or limitation of remedies by agreement. The agreement may provide for remedies in addition to or in substitution for those provided in Article 2; for example, it may limit the buyer's remedies to the return of the goods and repayment of the price, or to the repair and replacement of non-conforming goods or components. There is a presumption that such clauses are in addition to the remedies provided under the U.C.C. and if the parties intend the remedies prescribed by them to be exclusive this must be expressly stated.

These provisions of section 2-719(1) are subject to subsections (2) and (3) which furnish certain safeguards designed to ensure that the remedies available do not drop below a certain minimum standard. Under section 2-719(2), where circumstances cause an exclusive or limited remedy 'to fail of its essential purpose', the remedy provided by the U.C.C. will apply. As has already been mentioned, this has been interpreted to mean that where the remedy provided by the agreement operates to deprive either party of the substantial value of the bargain, it will not be enforced.[93] Section 2-719(3) allows consequential damages (which include injury to person or property proximately resulting from any breach of warranty—*vide* section 2-715(2)(b)) to be limited or excluded unless the result is unconscionable, and any limitation for personal injuries in the case of consumer goods[94] is *prima facie* deemed to be unconscionable. There is no such presumption, however, where the loss is commercial.

Under section 2-719 courts have upheld the validity of an express warranty by the seller (stated to be in lieu of all other warranties express or implied) whereby the product is warranted free from defects in material and workmanship under normal use for a certain period and the seller's obligation is limited to the replacement of any parts returned to him which his examination should disclose to his satisfaction to be defective.[95] This type of clause would appear to amount not only to a limitation of remedy but also to an exclusion of all other warranties apart from the one given, so that the provisions

[93] *Klein v. Asgrow Seed Co.* (1966) 54 Cal. Rpter 609, 619 n. 8.

[94] The definition of consumer goods in s. 9-109 applies. *Vide s.* 2-103(3).

[95] *Cox Motor Car Co. v. Castle* (1966) 402 S.W. 2d 429 (C.A. Ky); *Evans Manufacturing Corpn v. Wolosin* (1957) 47 Luz. Leg. Reg. Rep. 238 (Pa C.P.) Cf. *Seely v. White Motor Co.* (1965) 403 P. 2d 145 (S.Ct Calif.) and *Henningsen v. Bloomfield Motors Inc.* (1960) 161 A. 2d 69 (N.J.S.Ct), both decided under U.S.A.

of section 2-316 should be satisfied as well, but the courts have not adverted to the point. Instead they have found ways of evading the effect of the limitation of remedy, such as finding, for instance, that there has been a breach of the express warranty in the failure to correct the defects complained of.

A limitation of remedy by the use of a 'time-bar' clause, such as a provision that all claims by the buyer are deemed to have been waived unless presented within a certain number of days after receipt of the goods, is obviously unreasonable where its effect is to render warranties valueless as regards latent defects not reasonably discoverable within the limitation period. Accordingly, it may be attacked under section 2-719(2), or it may be disregarded as fixing a time limit which is 'manifestly unreasonable'.[96]

A distributor or manufacturer in business in a jurisdiction where the U.C.C. applies may seek to emulate the methods adopted by the seller in *Roto-Lith Ltd v. Bartlett & Co. Inc.*[97] and incorporate in his sales agreement a general disclaimer clause (conspicuously displayed and with the specific mention of the word 'merchantability') whereby all warranties express or implied are excluded, a 'merger' clause under which the written document is said to contain all the terms of the contract, a limitation of his liability to the replacement of any goods which do not conform to the contractural description, and a condition that the buyer must notify the seller at once if such terms are unacceptable to him. In circumstances like these, the court may have no other course of action open to it than to fall back on the principle of unconscionability contained in section 2-302 if it is to do justice between the parties. If there is a presumption that the limitation of damages for personal injury is unconscionable, it would appear to be only consistent that an exclusion from liability clause might likewise be held unconscionable, especially where personal injury results from the breach of warranty as to quality.

UNCONSCIONABILITY

Section 2-302 of the U.C.C. allows a court to refuse to enforce a contract or a clause thereof which it finds as a matter of law to have been unconscionable at the time the contract was made. That the adoption of this principle by the Code may have opened a new way to attack general disclaimer or limitation of liability clauses, to which courts have been traditionally hostile, was emphasized by the Supreme Judicial Court of Massachusetts in giving its opinion in *Hall v. Everett Motors Inc.*[98] This was a case involving the sale of a defective motor vehicle where the contract of sale incorporated the standard

[96] S. 1-204 was applied in *Vandenberg & Sons v. Sites* (1964) 204 A. 2d 494 (Pa Super.).

[97] (1962) 297 F. 2d 497.

[98] (1960) 165 N.E. 2d 107.

limited liability clause adopted generally throughout the automotive industry, whereby the manufacturer's liability was limited to the replacement at its factory of parts which became defective within three months. The clause was castigated as not the kind of agreement which commended itself to the sense of justice of the Court, and while it felt itself bound by precedent established under the U.S.A. to uphold the limitation clause, the Court expressed the hope that a different result might be arrived at if a similar case arose under the U.C.C.

The New Jersey Supreme Court, however, was not prepared to await the advent of the Code before achieving a just result. In the landmark case of *Henningsen v. Bloomfield Motors Inc.*[99] it rejected a similar limited liability clause with its attempted disclaimer of merchantability as inimical to the public good and therefore invalid. In speaking of the gross inequality of the bargaining position of the parties, the lack of freedom of choice of the buyer, and the fact that as an ordinary layman he might not know what rights he was giving up, the Court referred to the U.C.C. although the case fell to be decided under the U.S.A.[1] It is suggested that had the case come up for decision under the Code, the limitation clause would have been regarded as unconscionable both on the ground of oppression through lack of freedom of choice[2] and because of unfair surprise in that the buyer was not clearly advised of the risks he was being asked to assume.[3]

The New Jersey Supreme Court has not been alone in relying on public policy to defeat disclaimer or limitation clauses which it regards as transgressing the standards of commercial decency. Thus, although the Californian legislature did not adopt section 2-302 when it enacted the U.C.C., it appears that this provision was unnecessary 'since the California courts, exercising equity powers, have always assumed the unenforceability of contracts which are against public policy'.[4] Such judicial trends as these are significant, for they indicate that when the matter falls squarely to be decided under the U.C.C., courts may be prepared to find a disclaimer clause unconscionable under section 2-302 even though it complies in all respects with the requirements imposed by section 2-316.[5]

99 (1960) 161 A. 2d 69.

1 The reference at p. 95 was to s. 2-202 which appears to be an obvious mistake for s. 2-302. This decision is also noteworthy for its abandonment of the doctrine of privity and will be referred to later in this connection.

2 Note, 'Unconscionable Contracts under the U.C.C.' (1961) 109 *University of Pennsylvania Law Review* 401, 420. Cf. Hawkland, 'A Transactional Guide to the U.C.C.', (1964) i. 84-5.

3 *Williams v. Walker-Thomas Furniture Co.* (1965) 350 F. 2d 445.

4 *Klein v. Asgrow Seed Co.* (1966) 54 Cal. Rptr 609, 619-20 n. 8, referring specifically to s. 2-302 and limitation of liability.

5 In *Willman v. American Motor Sales Co.* (1961) 44 Erie Co. L.J. 51 (Pa C.P.) the disclaimer clause was ineffective to exclude the implied warranty of merchant-

CUMULATION AND CONFLICT OF WARRANTIES

The principle that warranties are to be construed as cumulative wherever possible is recognized by the S.G.A. which provides in section 19(4) that 'an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith'. This well-established principle of the law of sales is expanded by section 2-317 of the U.C.C. which first of all lays down the basic rule that all warranties, whether express or implied, shall be construed as consistent with each other and as cumulative. If, however, this is unreasonable, the intention of the parties determines which warranty is to prevail, and the section proceeds to set out certain rules to assist in ascertaining that intention. An order of priority is established, the basic tenet of which is that what is specific is to be preferred to the general.[6] The rules are as follows:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Clause (b) may possibly conflict with section 18 S.G.A. providing that the sample must correspond with the description as well as the bulk, but the clause will only apply if the representation based on the sample is in conflict with 'general language of description' and the presumption is that they are cumulative. So far as clause (c) is concerned, the reasoning behind this rule that an express warranty will not displace an inconsistent implied warranty of fitness for a particular purpose is not immediately clear. Section 19(4) S.G.A. suggests that an express warranty will displace any inconsistent implied one, and rule (c) is accordingly a departure from this position. Comment 2 to section 2-315 states that in the case of conflict the implied warranty of fitness must prevail over all other warranties 'except where the buyer has taken upon himself the responsibility of furnishing the technical specifications'. The reasoning behind the rule may therefore be that an inconsistent express warranty by a seller will not always take away the buyer's reliance on his skill or judgment and in such an event, if the necessary conditions exist, the implied warranty of fitness for the particular purpose will prevail.[7]

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ability as the requirements of s. 2-316(2) or (3)(a) had not been met, and the Court expressly refused to give any opinion as to the applicability of s. 2-302, although it adverted to the possibility of that section overriding s. 2-316: p. 57 n. 3.

[6] Note the similarity to s. 236 (c) Restatement of Contracts (1932).

[7] N.Y.L.R.C. Report (1955) i. Legis. Doc. No 65 (c) p. 78 (412).

WARRANTIES AND THE DOCTRINE OF PRIVITY OF CONTRACT

A warranty has its basis in contract[8] and accordingly the traditional view has been that privity of contract between the parties is required before liability for breach of warranty can be established. Over the last thirty years, however, 'the assault upon the citadel of privity'[9] has gained increasing momentum in the area of sales in America and has achieved notable success in alleviating the ill effects of the doctrine.[10] The justification for abrogating the requirement of privity has been well put by the Supreme Court of Ohio in *Rogers v. Toni Home Permanent Co.* in these words:[11]

> Occasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. Today, many manufacturers of merchandise . . . make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right.

The citadel of privity was first successfully breached in relation to defective food and allied products causing personal injury to the consumer,[12] and the exception was then extended to defective chattels put into the stream of trade by a manufacturer who was held to have made an express warranty to the ultimate purchaser injured by the use thereof, by his advertisements or by his representations on the

8 But historically the action for breach of warranty had 'its origin in tort; *vide* Ames, 'History of *Assumpsit*' (1888) 2 *Harvard Law Review* 1, 8; Prosser 'The Assault Upon the Citadel (Strict Liability to the Consumer)' (1960) 69 *Yale Law Journal* 1099, 1126, where he describes warranty as 'a freak hybrid born of the illicit intercourse of tort and contract'.

9 Cardozo C.J. in *Ultramares Corpn v. Touche* (1913) 174 N.E. 441, 445 (C.A.N.Y.): 'The assault upon the citadel of privity is proceeding in these days apace.'

10 For a general survey of the whole topic see Annotation (1961) 75 A.L.R. 2d 39, and Prosser *loc. cit., supra* n. 8.

11 (1958) 147 N.E. 2d 612, 615. Also *Randy Knitwear Inc. v. American Cyanamid Co.*, (1962) 181 N.E. 2d 399, 402. (C.A.N.Y.).

12 Prosser, 'The Assault upon the Citadel (Strict Liability to the Consumer)' (1960) 69 *Yale Law Journal* 1099, 1110.

labels or containers.[13] Protection was next extended beyond the actual purchaser to the person who might in the reasonable contemplation of the parties to the sale be expected to use the chattel, even where there was no advertisement or express representation by the manufacturer the argument being that an implicit representation of fitness arose when the manufacturer put the goods on the market;[14] and this protection has been carried even further to the situation where the person injured was not even a user or consumer but a mere innocent by-stander.[15]

With this development, the action based on breach of an implied warranty of quality or fitness for the purpose was seen to be grounded fundamentally in tort rather than in contract, the seller being strictly liable if he sold a product in a condition dangerous for use even though both negligence and privity of contract were lacking. This doctrine went even further than section 402A of the Second Restatement of the Law of Torts[16] which had adopted the basis of strict liability in the case of a seller of products for occasioning physical harm to a user or consumer or to his property, in that it allowed recovery for personal injury to other than users or consumers.

The inclusion in section 402A of physical harm to a consumer's property has been matched by the new common law doctrine of strict liability, although the courts have been more reluctant to abandon the requirement of privity in the case of mere property or pecuniary loss than where personal injury has resulted. It became clear, however, that if privity was not required for personal injuries it was logically indefensible to insist upon it in claims for damage to property, and in *Jarnot v. Ford Motor Co.*[17] the purchaser of a truck which had been damaged when a defective king-pin broke was held entitled to recover the resultant loss from the manufacturer, who by means of advertising had extolled his product in an effort to persuade the public to buy. The same result was arrived at in *Randy Knitwear Inc. v. American Cyanamid Co.*:[18] where garments had shrunk despite claims

[13] *E.g. Baxter v. Ford Motor Co.*, (1932) 12 P. 2d 409 (S.Ct Wash.); *Burr v. Sherwin Williams Co.* (1954) 268 P. 2d 1041 (S.Ct Cal.); *Hamon v. Digliana* (1961) 174 A. 2d 294 (S.Ct Errors Conn.).

[14] *Henningsen v. Bloomfield Motors Inc.* (1960) 161 A. 2d 69 (S.Ct N.J.), *Garthwait v. Burgio* (1965) 216 A. 2d 189 (S.Ct Errors Conn.); *Goldberg v. Kollsman Instrument Corpn* (1963) 191 N.E. 2d 81 (C.A.N.Y.); *Greenman v. Yuba Power Products Inc.* (1963) 377 P. 2d 897 (S.Ct Cal.).

[15] *Piercefield v. Remington Arms Co. Inc.* (1965) 133 N.W. 2d 129 (S.Ct Mich —bystander injured by shotgun explosion caused by defective shell); *Lonzrick v Republic Steel Corpn* (1966) 218 N.E. 2d 185 (S.Ct Ohio—subcontractor's employee injured by collapse of defective joist purchased by general contractor from manufacturer); *Mitchell v. Miller* (1965) 214 A. 2d 694 (S.Ct Conn.—golfer on fairway killed by runaway car with defective brakes).

[16] Tentative Draft No 10 (1964). The text of s. 402A. is set out in *Garthwait v Burgio, supra* n. 14 at 192. *Cf. Greeno v. Clark Equipment Co.* (1955) 237 F Supp. 427, 428-9.

[17] (1959) 156 A. 2d 568 (Pa Super.).

[18] (1962) 181 N.E. 2d 399 (C.A.N.Y.).

by the manufacturer of a chemical product in advertisements and labels that fabric treated with his product was shrinkproof. Matters were taken a stage further and an ultimate purchaser allowed to recover against the manufacturer for pecuniary loss, *i.e.* loss of the benefit of the bargain in *Inglis v. American Motors Corpn*[19] and in *Santor v. A. & M. Karagheusian Inc.*[20] The rationale of the decision in this last case was disapproved, however, by the Supreme Court of California in *Seely v. White Motor Co.*[21] where the Court indicated that strict liability in tort should apply to physical injury to the buyer's property, but should not be extended to the recovery of lost economic expectations in the absence of representations of quality made by the manufacturer or some agreement by him that he was willing to bear such a risk.

It is obvious from the foregoing sketch that the law of products liability is in a state of flux at the present time and that the extent to which the newly developed common law principle of strict liability in tort will find general acceptance and how far it will supersede the traditional theory of implied warranty based on sale are matters for conjecture.[22] The Supreme Court of California in *Greenman v. Yuba Power Products Inc.*[23] pointed out that as the strict liability principle rested in tort the rules and qualifications governing warranties under sales legislation had no application; in *Seely v. White Motor Co.*[24] it was prepared to recognize that each had its proper place in the scheme of things. The doctrine of strict liability in tort, it said,[25] was designed not to undermine the warranty provisions of the U.C.C. but rather to govern the distinct problem of physical injuries to which field the warranty theory was not suited, while the law of sales had been carefully articulated to govern the economic relations between suppliers and consumers of goods. The rules of warranty which determined the quality of the product the manufacturer promises, functioned well in a commercial setting and determined the liability of the manufacturer for economic loss.

In so far as it may be possible to keep these two principles of liability for defective products in separate compartments, all may be well, but so far as the encroachment of the new common law principle of strict liability into the traditional field of the sales warranty is inevitable, there may be conflict between the two concepts in those jurisdictions

[19] (1965) 209 N.E. 2d 583 (S.Ct Ohio) (defective car purchased. The basis of the claim, however, was that there had been an express warranty of quality made by the manufacturer in its extensive advertising in the mass communications media).

[20] (1965) 207 A. 2d 305 (S.Ct N.J.) (defective carpet).

[21] (1965) 403 P. 2d 145.

[22] For a summary of recent developments indicating that the concept of privity for breach of warranty is on the wane, *vide* Jaeger, 'Warranties of Merchantability and Fitness for Use. Recent Developments' (1962) 16 *Rutgers Law Review* 493, 556-8.

[23] (1963) 377 P. 2d 897.

[24] (1965) 403 P. 2d 145 (S.Ct Calif.).

[25] *Ibid.* 149-50.

which recognize the two bodies of law. At the very least, there may be an independent body of products liability law in existence paralleling Article 2 of the U.C.C. in some respects, but in other respects rendering the sales warranty provisions of the Code outmoded.[26]

It is not every jurisdiction which is faced with this problem. The law in many jurisdictions is still that privity of contract is required in actions for breach of sales warranties except in the case of sales involving food and allied products. At the same time, the social policy behind the imposition of strict liability on all those who make or market any defective product is recognized, but it is stressed that the language of Article 2 of the U.C.C. shows that the concept of privity is intended to be retained by the Code. The arguments are advanced that the reference to 'seller' and 'buyer' as defined in section 2-103(1) and the limited relaxation of the doctrine of privity in section 2-318 are conclusive in this regard, that Comment 3 to section 2-318, indicating that the U.C.C. is not intended to enlarge or restrict the developing case-law on how far the seller's warranties extend to other persons in the distributive chain, was not enacted as law along with the text of the Code itself,[27] and that in any event section 2-318 has no bearing on the question of 'vertical privity'.[28]

While the U.C.C. takes an expressly neutral strand on the question of the relaxation of 'vertical privity', *i.e.* the consumer's right to recover directly from the manufacturer or other remote seller despite the interposition of wholesaler, distributor and retailer,[29] it does take a position on 'horizontal privity' by extending the range of those who can sue the immediate seller. As originally drafted, section 2-318 extended a warranty to any person whose relationship to the buyer made it reasonable to expect that he might use, consume or be affected by the goods,[30] but this was opposed as too extreme and as in conflict with judicial authority in many States, and it was altered to its present form in the 1952 Official Text of the Code.[31] The section now provides that

> a seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his house if it is reasonable to expect that such person may use, con-

26 Rapson, 'Products Liability under Parallel Doctrines: Contracts between the U.C.C. and Strict Liability in Tort' (1964) 19 *Rutgers Law Review*, 692.

27 The comments to the U.C.C. have not been enacted as law in any jurisdiction, but they have been described as powerful *dicta: In re Yale Express System Inc.* (1966) 370 F. 2d 433, 437.

28 *Miller v. Preitz* (1966) 221 A. 2d 320, 325 (S.Ct Pa); *Henry v. Eshelman* (1965) 209 A. 2d 46, 49-50 (S.Ct R.I.).

29 The 1950 Proposed Final Draft of the U.C.C. did contain provisions (in s. 2-718 and s. 2-719) for direct action by a purchaser or any beneficiary to whom the warranty extended under s. 2-318, against any or all previous sellers. This was deleted in response to pressure. Dierson, 'Report on the Proposed U.C.C.' (1951) 6 *Food Drug Companies Law Journal* 943, 947.

30 1950 Proposed Final Draft of U.C.C., 122.

31 Dierson *op. cit.* 946.

sume, or be affected by the goods and who is injured in person by the breach of the warranty. A seller may not exclude or limit the operation of this section.

This limited relaxation of the doctrine of privity has not, however, been universally accepted and no fewer than twelve States, in enacting the U.C.C., have either omitted the section entirely or modified it in one way or another. Thus California and Utah have omitted the section, Texas has replaced it with a provision that Article 2 is neutral on the question of privity and the matter must be left for the courts to decide; the restriction to family, household or guest in the home is deleted in Alabama and Vermont, while in Colorado, Delaware, South Carolina, South Dakota and Wyoming, the seller's warranty is extended to any person who might reasonably be expected to use, consume or be affected by the goods. Virginia and Arkansas[32] go even further by declaring that lack of privity is no defence in any action against a manufacturer or seller although the plaintiff is not the purchaser, if the plaintiff is a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods. Many of these amendments go far to abrogate the doctrine of privity altogether, but in spite of the obvious dissatisfaction thus indicated with section 2-318 as currently drafted, the Permanent Editorial Board for the U.C.C. in its Second Report in 1964 declined to recommend any change in the section.[33]

As section 2-318 stands, those who can sue the buyer's immediate seller for breach of warranty include any natural person[34] who is in the family or household of the buyer or who is a guest in his home, if he can reasonably be expected to use, consume or be affected by the goods; but the action can only be bought for personal injuries. It has been held that a nephew of the buyer who lived next door is within the 'family' of the buyer[35] and could hence claim against the immediate seller although the doctrine of privity prevented him from claiming against the remote seller or manufacturer. The Court recognized that the requirements of privity still had vitality in Pennsylvania. On the other hand, other courts which were unable to bring the plaintiff within the provisions of section 2-318—a guest in the buyer's car cannot be said for instance to be a guest in the buyer's home[36]—have found themselves able to invoke the common law doctrine of strict liability to enable the plaintiff to sustain his action.

32 Act No 35 of 1965.

33 Pp. 39-40. The Board commented that the subject was still highly controversial and there appeared to be no national consensus as to the proper scope of warranty protection. *Se vide Addendum infra.*

34 A company is thus not within the section—see *Facciolo Paving Co. Inc. v. Road Machinery Inc.* (1958) 8 Chester 375 (Pa C.P.).

35 *Miller v. Preitz* (1966) 221 A. 2d 320 (S.Ct Pa) A distinction is to be drawn between 'family' and 'household'.

36 *Thompson v. Reedman* (1961) 199 F. Supp. 120; *Allen v. Savage Arms Corpn* (1961) 52 Luz. Leg. Reg. Rep. 159 (Pa C.P.).

Thus, while some courts have correctly held that an employee of a purchaser is not within the protection of section 2-318,[37] other courts have afforded the employee relief by leaving the section on one side and invoking the common law to enable him to sue his employer's immediate vendor.[38]

It can scarcely be said that section 2-318 is a very happy compromise in an area of law which is developing with such rapidity, and only in the most conservative jurisdictions will it be beneficial, both in extending the type of product where the doctrine of privity is to be relaxed and in widening the scope of the seller's liability for breach of warranty to other people intimately connected with the immediate buyer. Those jurisdictions with well-developed principles of strict liability for defective products will continue to rely on the decisions of the courts to the virtual exclusion of section 2-318, as indeed the draftsmen of the U.C.C. would appear to have intended.[39] It can at least be said that section 2-318 represents a step forward from the strict requirement of privity insisted upon by the S.G.A. and the decisions made under it.

CONCLUSION

It may be concluded from this survey of the warranty provisions of the U.C.C. that, while there have been no fundamental departures from the basic theories underlying the law of sales warranties as it existed prior to the enactment of the Code, this area of the law of sales has received some measure of modernization and realignment to enable it to meet business conditions as they exist today. The main changes that have been made have been the introduction of a warranty against infringement, the reclassification as express of warranties arising in sales by description or by sample, the creation of a broad definition of merchantability, the codification of the rules as to exclusion or disclaimer clauses and some effort towards relaxation of the doctrine of privity of contract.

That this effort is only a partial step in the right direction is not perhaps the fault of the draftsmen of the U.C.C., who were forced to bow to pressure to modify their initial proposals for reform, but alongside the Code provision has arisen the common law doctrine of

[37] *Hochgertel v. Canada Dry Corpn* (1963) 187 A. 2d 575 (S.Ct Pa). But the same Court found no difficulty in bringing an employee within the section when he had bought the goods personally on behalf of his employer, despite whatever the law of agency might say: *Yentzer v. Taylor Wine Co.* (1964) 199 A. 2d 463.

[38] See *Delta Oxygen Co. v. Scott* (1964) 383 S.W. 2d 885. (S.Ct Ark.). Some jurisdictions had reached the point of allowing the employee to sue under the doctrine of strict liability before the U.C.C. was enacted. *E.g., Peterson v. Lamb Rubber Co.* (1960) 353 P. 575 (S.Ct Cal.). The fear that the enactment of s. 2-318 might have the effect of reversing this liberal tendency may have been the reason for omitting the section when the Code was enacted in California.

[39] Comment 3 to s. 2-318 which, however, appears to be restricted to 'vertical privity'.

strict liability based on the realization that the law of warranty of quality cannot be predicated today on the mercantile practices of the nineteenth century. It is no longer true that the ultimate consumer and the manufacturer deal directly with one another; it is no longer the usual practice to have goods custom-made to order, or that there may exist obvious individual variations in the articles produced and any ordinary buyer is as well placed as the seller to determine by casual inspection the real worth of an article. In the world of the standardized and complex manufactured goods of today, 'factory sealed' for delivery to the ultimate purchaser unopened, the retailer himself is no more competent to judge the quality of the products he sells than is the buyer, and the same is true of the wholesaler or distributor. Liability for possible defects, it is recognized, should lie with the manufacturer who is best qualified to meet and provide for the risk.[40]

Addendum

Since the above was written, the writer's attention has been drawn to the 1966 Official Recommendations for Amendment of the U.C.C. which have only just been promulgated by the Permanent Editorial Board[41] and which contain suggestions for the alteration of section 2-318. The Board has put forward as *optional* amendments three alternative versions of section 2-318 for States to choose from. Alternative 'A' is the existing provision. Alternative 'B' is in substantially the same form as the section originally appeared in the 1950 Proposed Final Draft of the Code and extends the seller's warranty to any natural person who might reasonably be expected to use, consume or be affected by the goods, and who is personally injured by breach of the warranty. Alternative 'C' was drawn 'to reflect the trend of more recent decisions as indicated by Restatement of Torts 2d section 402A' and extends the warranty to any person (not simply a natural person) who might reasonably be expected to use, consume, or be affected by the goods, and who suffers injury (not merely personal injury) as a result of the breach. No exclusion or limitation of the section is allowed in respect of personal injury.

In promulgating these alternatives the hope was expressed by the Editorial Board that it might prevent 'further proliferation of separate variations in state after state'.

[40] For a comparative study of warranty provisions, *vide* Kessler, 'The Protection of the Consumer under Modern Sales Law' (1964) 74 *Yale Law Journal* 262. The writer comments at 271 n. 46 that the Uniform Law on International Sale of Goods adopted at the Hague in April 1964 was strongly influenced by the drafting techniques used in S.G.A., U.S.A., and U.C.C.

[41] My thanks are due to Professor R. Braucher of Harvard Law School for referring me to these Recommendations.