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## Sale by Description - The Warranty of Merchantability

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modify *caveat emptor*—that we give more protection to the purchaser. It has been the purpose of this comment to show that his modification has begun—*Old maxims never die, they just fade away.*

## SALE BY DESCRIPTION—THE WARRANTY OF MERCHANTABILITY

Under the Uniform Sales Act, as adopted by Illinois and 32 other states, a sale of goods “by description” has the special legal consequence of imposing upon the seller a “warranty of merchantability”:

Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.<sup>1</sup>

Identification of sales by description which would give rise to this warranty is important. The Uniform Sales Act does not define the term, and, therefore, cases must provide the definition.

### HISTORICAL DEVELOPMENT

*Gardiner v. Gray*<sup>2</sup> is a very early case involving a warranty of merchantability. Two dealers in silk contracted to buy and sell “waste silk.” The subject matter of the sale was in transit to England, and not subject to the buyer’s inspection. The waste silk when it arrived was not resaleable as such and the court found that the seller impliedly warranted that it would be so. In the later case of *Jones v. Just*,<sup>3</sup> Manila hemp was the subject of a similar sale. This hemp was, at the time of sale, on board ship many miles from buyer and seller. Upon arrival, the hemp was found to have been partially ruined by sea water, and therefore not resaleable as Manila hemp. The court held that the seller by describing the hemp as Manila hemp impliedly agreed to sell Manila hemp *fit for resale*. Again the parties were dealers in the type of goods bought and sold, and not growers or manufacturers.

As the warranty arose, in England it was implied between dealers who intended to resell the goods. Thus specific goods,<sup>4</sup> not subject to the scrutiny of the parties, could apparently be the subject of a sale by description. In both the *Gardiner* and *Jones* cases the goods were specific in that they were identified and agreed upon but not subject to inspection. The seller offered a certain type of goods to the buyer who wished to resell

<sup>1</sup> Uniform Sales Act § 15(2).

<sup>2</sup> 4 Camp. 144, 171 Eng. Rep. 46 (1815).

<sup>3</sup> [1868] 3 Q.B. 197 (L.R.).

<sup>4</sup> Those goods “identified and agreed upon at time a contract to sell or sale is made.” Uniform Sales Act § 76(1).

and the court implied a warranty that the goods be of merchantable quality which was equated with resalable quality.<sup>5</sup> However, in America, the common law rule was that the warranty of merchantable quality was limited to sales by a manufacturer or grower.<sup>6</sup>

At the same time a warranty of fitness for particular purpose had arisen which was more often applied and which required reliance by the buyer as well as the disclosure of his particular purpose in buying the goods.<sup>7</sup> There were apparently no limitations on who might be parties to the sale, and the warranty was one of fitness for the buyer's particular purpose. Such a warranty was found in sales by butchers of diseased meat.<sup>8</sup> Opportunity for the seller to inspect was part of the reason for implying this warranty. The warranty in the *Gardiner and Jones* cases actually partakes somewhat of the nature of an implied warranty of fitness. The purpose of the buyer, resale, was made known to the seller, and the buyer might be said to have relied on the seller to furnish resalable goods. However, the warranty which was implied by the court was one of *quality* rather than fitness for purpose. However that may be, the two warranties *were* distinguished. This paper will not consider the warranty of fitness except as it relates to the warranty of merchantability.

#### EARLY ILLINOIS DECISIONS

The position of the Illinois court before the Sales Act was in accord with the common law view and is well illustrated in the case of *Fuchs & Long Mfg. Co. v. Kittredge & Co.*<sup>9</sup> Therein, the plaintiff sold a bronzing machine, which it manufactured, to defendants. Various oral negotiations took place, and finally a letter referring to a "No. 10 latest model bronzing machine" was sent and the machine sold according to that description. Defendant refused to pay, alleging that the machine was unfit for his purposes. Plaintiff alleged, and was upheld by the court, that the sale was one under a trade name, which precluded a warranty of fitness. The issue of merchantability was submitted to the jury who decided against the de-

<sup>5</sup> *De Stefano v. Associated Fruit Co.*, 318 Ill. 345, 149 N.E. 284 (1925); *Raymond Syndicate Inc. v. American Radio & Research Corp.*, 263 Mass. 147, 160 N.E. 821 (1928); *Parker v. S. G. Shaghalian & Co.*, 244 Mass. 19, 138 N.E. 236 (1923).

<sup>6</sup> *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 392, 175 N.E. 105, 106 (1931).

<sup>7</sup> This has been incorporated in the Uniform Sales Act § 15 (1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is as [an] implied warranty that the goods shall be reasonably fit for such purpose."

<sup>8</sup> *Wiedeman v. Keller*, 171 Ill. 93, 49 N.E. 210 (1898); *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N.E. 481 (1908); *Rinaldi v. Mohican Co.*, 225 N.Y. 70, 121 N.E. 471 (1918).

<sup>9</sup> 242 Ill. 88, 89 N.E. 723 (1909).

defendant. Thus it may be concluded then that in Illinois in 1909 a sale under a trade name precluded a warranty of fitness, but not of merchantability, and that a sale by trade name was a sale by description, at least when the goods were not present and identified. The court stated:

Where a known, described and definite article is ordered of a manufacturer, . . . [stated to be for a particular purpose by the buyer] there is no warranty that it shall answer the particular purpose intended by the buyer. . . . If the buyer gets what he bargained for, there is no implied warranty, though it does not answer his purpose.<sup>10</sup>

This statement applied to implied warranties of fitness as the warranty of merchantability was submitted to the jury, seemingly, with the approval of the Supreme Court and it would also appear, that merchantability meant more than resalability, since defendant planned to use the machine, not resell it.

The *Fuchs* case involved the liability of a manufacturer under the warranties of merchantability and fitness. The Sales Act, however, extends this liability in Illinois to the “. . . seller . . . (whether he be the grower or manufacturer or not).” The *Santa Rosa-Vallejo Tan. Co. v. C. Kronauer & Co.*<sup>11</sup> was then decided under the Sales Act. Defendant had contracted to buy leather from plaintiff by trade name—“Butt-branded”—which in the trade denoted a particular type and grade of leather. The leather was not serviceable and the buyer refused to pay for it. The court precluded a warranty of fitness because it was a sale under trade name, and quoted Professor Williston<sup>12</sup> to the effect that in sales by description there is an implied warranty of merchantability. But, the court stated:

This statement, however, we think, refers to subsection 2 of section 15, which lays down the law applicable where goods are bought by description. The section clearly distinguishes between such a sale and the sale of a specified article under its patent or trade name.<sup>13</sup>

It would appear that section 15 (4)<sup>14</sup> of the Uniform Sales Act was held to preclude warranties of fitness and quality. This appears to be contra to the law as stated in the *Fuchs* case and the Sales Act. The further result would be that a sale by description is not possible under a patent or trade name.

At about the same time, a case arose where it appeared that plaintiff housewife called up defendant storekeeper and asked for stove polish.<sup>15</sup>

<sup>10</sup> *Ibid.*, at 97, 726.

<sup>11</sup> 228 Ill. App. 236 (1923).

<sup>12</sup> Williston on Sales, 311 (1909).

<sup>13</sup> *Santa Rosa-Vallejo Tan. Co. v. C. Kronauer & Co.*, 228 Ill. App. 236, 246 (1923).

<sup>14</sup> “In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.” Uniform Sales Act § 15(4).

<sup>15</sup> *Neigenfind v. Singer*, 227 Ill. App. 493 (1923).

She claimed she asked for stove polish and he claimed she asked for Bull Dog brand, and that he had recommended and sent Electric Shine. The polish caught fire and injured the woman. It was found that there was a sale under a trade name which precluded recovery on a warranty of fitness. Plaintiff did not allege that the polish was not of the same quality as other polish of the same brand so as to show unmerchantable quality, nor was there any mention of sale by description. Yet it would appear that this was a sale by description and plaintiff might have recovered on breach of implied warranty of merchantability.

#### EXTENSION BY DECISIONS

In West Virginia, a jurisdiction where the Sales Act had not been adopted, and presumably the common law was in force, a similar case arose.<sup>16</sup> There the plaintiff ordered an "Isko refrigerating unit No. 20." He had seen similar machines, but he bought this one solely on the buyer's description. The machine did not work, not even after repair. This was held to be a sale under a trade name, and therefore no warranty of fitness was implied. However, it was held that this was a sale by description giving rise to a warranty of merchantability. The buyer showed that this machine was defective, not repairable, and therefore not merchantable.

The landmark case of *Ryan v. Progressive Grocery Stores, Inc.*<sup>17</sup> decided by Justice Cardozo extended the idea of sale by description still further. Ryan's wife had gone to defendant's store and requested a loaf of "Ward's bread." A clerk selected a loaf, handed it to her, and she paid for it. A pin contained in the loaf injured the plaintiff. This was distinctly a sale under a trade name precluding a warranty of fitness. However, the court decided that a sale by trade name was a sale by description, and that a warranty of merchantability attached. It was admitted that at common law such a warranty was limited to buyers who bought from manufacturers or growers, but the court pointed out that under the Sales Act no such distinction was made. Thus, the warranty was also extended to the ultimate consumer, and not merely to a dealer who bought for resale.

Prior to the *Ryan* case, a breach of an implied warranty of fitness had been found when a buyer requested a can of beans, and the grocer had supplied it.<sup>18</sup> Sale under a trade name had been avoided.

The customer at a retail store is ordinarily bound to rely upon the skill and experience of the seller in determining the kind of canned goods which he will purchase, unless he demands goods of a definite brand or trade name.<sup>19</sup>

<sup>16</sup> *Appalachian Power Co. v. Tate*, 90 W. Va. 428, Ill. S.E. 150 (1922).

<sup>17</sup> 255 N.Y. 388, 175 N.E. 105 (1931).

<sup>18</sup> *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918); *Chapman v. Roggenkamp*, 182 Ill. App. 117 (1913).

<sup>19</sup> *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 91, 120 N.E. 225, 226 (1918).

Thus, whether the container was sealed or not, or whether the goods were in the original package or not, the warranty could be implied even though the seller could not inspect the article. A similar case arose in Connecticut where a woman entered a store and asked for a can of "corned beef."<sup>20</sup> The requirements for a warranty of fitness were found and recovery allowed for a death caused by a piece of metal contained in the beef. The facts, as compared to the *Ryan* case, were very similar, but resulted in different warranties.

#### THE TORPEY CASE—FACT SITUATIONS

The recent case of *Torpey v. Red Owl Stores, Inc.*<sup>21</sup> denied recovery to a guest in the purchaser's home who was injured when a jar, containing applesauce purchased from defendant, collapsed in her hands. The basis of the denial was no privity of contract, but the court made some interesting statements by way of dicta. The woman who actually purchased the applesauce went into the self-service store and selected, without help or hindrance by any clerks, the particular jar of applesauce which she desired. The court said: "These facts and circumstances cannot be construed to be a purchase by description."<sup>22</sup> Therefore, it would seem that no implied warranty could attach to a sale in a self-service store, unless a clerk's advice or help was sought.

However, two and a half months after the Sales Act became law in Illinois, a case was decided wherein the purchaser entered defendant's store, picked up a can of herring labeled "Nord Star" from a display counter, paid for it, and took it home.<sup>23</sup> The fish made the purchaser very ill. Recovery was allowed on the basis of public policy, and an implied warranty of fitness. No mention was made of the Sales Act.

In Texas, where the Uniform Sales Act has not been adopted, a woman walked into a self-service store and selected, without assistance, a can of "Iona Brand Corn" from the shelf.<sup>24</sup> She and her family became violently ill as a result of contaminated corn. The court wondered who the purchaser could sue if not the retailer since there was no privity of contract with the manufacturer. To give force to its Pure Food Acts, the purchaser was allowed to recover for the breach of an implied warranty, but no mention was made of what type of implied warranty.

In *D'Onofrio v. First National Stores*,<sup>25</sup> a Rhode Island court, presented with an almost identical fact situation as was present in the *Torpey* case,

<sup>20</sup> *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932).

<sup>21</sup> 228 F.2d 117 (C.A. 8th, 1955).

<sup>22</sup> *Ibid.*, at 121.

<sup>23</sup> *Sloan v. F. W. Woolworth*, 193 Ill. App. 620 (1915).

<sup>24</sup> *Walker v. Great Atlantic & Pacific Tea Co.*, 131 Tex. 57, 112 S.W.2d 170 (1938).

<sup>25</sup> 68 R.I. 144, 26 A.2d 758 (1942).

relied on the *Ryan* case and *Botti v. Venice Grocery Co.*<sup>26</sup> A woman selected a can of corn from a shelf in a self-service grocery store. The corn was contaminated and caused the plaintiff to become ill. Recovery was allowed on the basis of an implied warranty of merchantability. The sale here was not by description in that the plaintiff selected the can from the shelf without defendant's assistance as in the *Torpey* case. In both the *Ryan* and *Botti* cases, the clerk selected the particular goods desired according to the plaintiff's description. Although this distinguishing factor would seem to negative a warranty of merchantability, the court apparently saw fit to ignore the distinction. In an Ohio case, the plaintiff bought a cigar at a drugstore which exploded because of a firecracker in it.<sup>27</sup> The sale was held to be under a trade name, so, the plaintiff was allowed recover for breach of implied warranty of merchantability. The actual circumstances of the case were not clear. If the plaintiff had asked for and received three El Ropo cigars, there would be a sale by description and the holding would be in accord with the *Ryan* case. However, if the plaintiff asked for El Ropo cigars and the box containing the store's supply of those cigars was presented so that he might select the cigars, the fact situation might be altered sufficiently so that the sale might not be by description, but by the buyer's own selection, thus precluding such a warranty.

In *Bowman v. Woodway Stores, Inc.*<sup>28</sup> the Illinois court considered a situation similar to that in the *Ryan* case. A father came into a grocery store and asked for canned milk by trade name. The milk apparently was taken from a shelf by a clerk and given to him and later given to his child who died shortly thereafter. The court held that there was a warranty of *fitness* because subsection 4 of section 15 of the Sales Act did not apply to the sale of foodstuffs for immediate consumption. This was done to give effect to the Pure Food and Drug Act.<sup>29</sup> No mention was made of warranties of merchantability or sales by description.

A more recent Illinois case involved the sale of mascara at a ten-cent store.<sup>30</sup> Plaintiff selected a tube of mascara without assistance from the clerk, and then paid for it. The court held that no warranty of fitness could be implied because of the sale under a trade name. There was some

<sup>26</sup> 309 Mass. 450, 35 N.E.2d 491 (1941). In this case plaintiff asked for and received "La Rosa" macaroni from the clerk in a store. After eating this he became ill. The trade name precluded an implied fitness warranty, but the sale was held to be by description and a warranty of merchantability was implied.

<sup>27</sup> *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E.2d 130 (1936).

<sup>28</sup> 258 Ill. App. 307 (1930), rev'd on ground that evidence did not show that milk was the cause of death, 345 Ill. 110, 177 N.E. 727 (1931).

<sup>29</sup> Ill. Rev. Stat. (1955) c. 56½, § 16.

<sup>30</sup> *Beckett v. F. W. Woolworth Co.*, 376 Ill. 470, 34 N.E. 2d 427 (1941).

discussion of possible express warranties made by the sales girl, but it was found that none were given. This sale was not by description, but if the woman had asked for a certain brand of mascara and the clerk had given it to her, a warranty of merchantability might have been implied.

## RECENT DECISIONS

The New York courts since the *Ryan case* seem to have had little trouble finding a warranty of merchantability without discussion of sale by description. Refrigerators,<sup>31</sup> smoking tobacco,<sup>32</sup> a television set,<sup>33</sup> a hammer,<sup>34</sup> and a washing machine<sup>35</sup> were all purchased apparently by trade name. Judge Cardozo himself said, in the *Ryan case*, that "the rule is different, to be sure, upon a sale of specific goods, not purchased by description."<sup>36</sup>

In a recent Massachusetts case, plaintiff's agent went to defendant's store and asked if there were any more metal coffee makers that had been on sale.<sup>37</sup> The clerk replied in the affirmative, pointed to some and asked if that was what was meant. Plaintiff's agent said yes, purchased the coffee maker, and returned it to plaintiff. The device blew up, injuring plaintiff. The court held that this was probably a sale by description. The coffee maker had a trade name but the sale was not found to be under a trade name. It appeared that recovery was allowed for breach of implied warranties of fitness and merchantable quality.

A New Jersey court allowed recovery on some warranty (it was not quite clear which) in a fact situation in which the *Torpey dictum* indicated that no warranty should be implied.<sup>38</sup> Parents had come into a self-service store and selected packaged rolls without help from the storekeeper. A piece of wire in a roll injured the son. The parents were allowed to recover medical expenses from the retailer who was allowed to recover the same amount from the baker.

In Pennsylvania, a seller sued to recover the purchase price of a hoist from the buyer who alleged that the hoist would not do the work required.<sup>39</sup> The seller's salesman had shown the buyer a catalogue containing

<sup>31</sup> *Kelvinator Sales Corp. v. Quabbin Improvement Co.*, 234 App. Div. 96, 254 N.Y.Supp. 123 (1st Dep't, 1931).

<sup>32</sup> *Foley v. Liggett & Myers Tobacco Co.*, 136 Misc. 468, 241 N.Y.Supp. 233 (S.Ct., 1930), aff'd 232 App.Div. 822, 249 N.Y.Supp. 924 (2nd Dept., 1931).

<sup>33</sup> *Horowitz v. Bursens*, 198 Misc. 399, 91 N.Y.S.2d 413 (S.Ct., 1949).

<sup>34</sup> *Aldock v. Wnuk*, 198 Misc 474, 98 N.Y.S.2d 964 (S.Ct., 1950).

<sup>35</sup> *Marino v. Maytag Atlantic Co.*, 141 N.Y.S.2d 432 (Mun. Ct. N.Y., 1955).

<sup>36</sup> 255 N.Y. 388, 394, 175 N.E. 105, 107 (1931).

<sup>37</sup> *McCabe v. L. K. Liggett Drug Co.*, 330 Mass. 177, 112 N.E.2d 254 (1953).

<sup>38</sup> *Duncan v. Juman*, 25 N.J. Super. 330, 96 A.2d 415 (1953).

<sup>39</sup> *Frantz Equipment Co. v. Leo Butler Co.*, 370 Pa. 459, 88 A.2d 702 (1952).

a picture of the hoist, and a description of it. When the hoist arrived it was found defective and irreparable. The court, in allowing recovery, stated:

Whether the sale here be regarded as one "under a trade name" or "by description" (in fact it was both) is wholly immaterial since a designation by trade name is itself a "description" which makes applicable clause second of Section 15 of the Act. . . . It would be wholly unreasonable to hold that, if one were to purchase, for example, an automobile under the trade name of "Ford" or "Buick" or "Cadillac" or the like, no implied warranty of merchantable quality could be asserted by the purchaser even though the particular car delivered was in such bad condition . . . [that it] was wholly useless for the ordinary purpose which an automobile is designed to serve.<sup>40</sup>

This discussion does not seem to indicate much concern for whether the sale was by description or not. A short time later another Pennsylvania court found a warranty of merchantability in the sale of a new car.<sup>41</sup> The buyer was shown a similar car and allowed to drive it. He selected the particular color and model of his own car, which was then ordered. This was clearly a sale by description, since the car in question was identified only by the seller's words. Eight days after the car was delivered, the steering mechanism failed, causing a crash. The seller offered to repair the car, but the buyer demanded a new one or the return of the purchase price. The seller's implied warranty of merchantability was held to be broken and the buyer recovered, though the sale was held to be under a trade name which excluded a fitness warranty.

#### EFFECTS OF INSPECTION

In Tennessee, a buyer purchased a new car from a dealer under a trade name.<sup>42</sup> A leaky roof and doors injured the upholstery. The dealer claimed to have fixed the defect, but the buyer sued for adjustment of the purchase price. An implied warranty of merchantability was found and while the exact circumstances of the sale do not appear, the court had this to say:

The term sale by description strictly means an executory sale where the article is not present, but the term has been broadened to include all sales, whether or not the goods are present, where there is no adequate opportunity for inspection.<sup>43</sup>

This view is not without support.<sup>44</sup> In *Wade v. Chariot Trailer Co.*,<sup>45</sup> a purchaser of a trailer by trade name inspected it before buying. Within

<sup>40</sup> *Ibid.*, at 465 and 706.

<sup>41</sup> *Knapp v. Willys-Ardmore, Inc.*, 174 Pa. Super. 90, 100 A.2d 105 (1953).

<sup>42</sup> *Kohn v. Ball*, 36 Tenn. App. 281, 254 S.W.2d. 755 (1953).

<sup>43</sup> *Ibid.*, at 286 and 758.

<sup>44</sup> In fact, it closely resembles the thought in the *Gardiner* and *Jones* cases noted *supra*, notes 2 and 3.

<sup>45</sup> 331 Mich. 576, 50 N.W.2d 162 (1951).

three months the trailer had deteriorated far more than it should have under the normal use given it. The court held that the fact of a sale under a trade name might exclude a warranty of fitness for a particular purpose, "but its reasonable fitness for the general purpose for which it was manufactured and sold is not excluded."<sup>46</sup> This could refer only to a warranty of merchantability, and consequently to a sale by description. It would appear, therefore, that if the defect were latent, this warranty would attach even though an inspection of the goods were made.

A prior holding in the same court is not altogether in accord.<sup>47</sup> There, *Maldover* agreed to sell aluminum sheeting to *Salzman* in a lot of approximately 790,000 pounds. The sheeting was surplus metal, and some had been made into other shapes. The contract recited that the metal had been inspected. The court held that there could be no implied warranty of merchantability because:

. . . the transaction was not a sale of goods by description, but was a sale of specifically designated aluminum sheets. Having expressly stated in the contract that they had examined these sheets, plaintiffs may not now assert an implied warranty of quality or fitness.<sup>48</sup>

The fact was that inspection was at best very difficult. Be that as it may, the inspection precluded a sale by description, and thus no warranty of merchantability arose. The later decision in the *Wade* case, which allowed a warranty of merchantability although inspection was made, seems to be a departure.

In *Grass v. Steinberg*<sup>49</sup> an Illinois court ruled on a similar situation. *Steinberg*, a dealer in machinery, sold a turret lathe to *Grass* who, previous to the sale, had the machine thoroughly inspected by machinists of wide experience. The contract described the machine as a "Warner Swasey Turret Lathe . . . as is." Apparently the machine was a hodge-podge of parts, not like anything which *Warner & Swasey* had made. The court held that:

. . . if this was not a sale by description, no implied warranty, such as plaintiff relies upon, ever existed. In view of the inspection and examination of the machine by plaintiff and his experts on numerous occasions before the purchase, we think this transaction cannot be considered as a sale by description . . . [this was not the sale of a] machine standardized only by description.<sup>50</sup>

The court goes on to say that an implied warranty of merchantability arises only in ". . . cases where the specific article bought was either not in existence or not on hand at the time and place of the sale."<sup>51</sup> It would

<sup>46</sup> *Ibid.*, at 581 and 165.

<sup>47</sup> *Salzman v. Maldover*, 315 Mich. 403, 24 N.W.2d 161 (1946).

<sup>48</sup> *Ibid.*, at 410 and 166.

<sup>49</sup> 331 Ill. App. 378, 73 N.E.2d 331 (1947).

<sup>50</sup> *Ibid.*, at 383 and 334.

<sup>51</sup> *Ibid.*, at 384 and 334.

seem, therefore, by inference that the court would not extend the meaning of sale by description even as far as the *Ryan* case, and would perhaps hold that a description such as "Ward's Bread" was simply an identification of the loaf desired. In an earlier Illinois case, opportunity to inspect a lot of furniture precluded a warranty of merchantability.<sup>52</sup> A few articles were inspected, but the bulk was not. Though the seller manufacturer knew that the buyer intended to resell the goods, no warranty was implied.

Another early case in Illinois precluded a warranty in the sale of hay because of inspection by the buyer.<sup>53</sup> The defect was not obvious. A recent decision in Washington, by contrast, allowed recovery although the buyer, who was an experienced hay buyer, examined and selected the bales of hay that he bought.<sup>54</sup> Recovery was allowed under a warranty of merchantability and fitness arising under sections 15 (1) and 15 (2) of the Sales Act. It would seem that the fitness warranty should have been defeated on the ground of non-reliance, and the quality warranty on the basis that there was a sale of specific goods and inspection by the buyers.

#### RELATED PROBLEMS

Occasionally, goods are misdescribed and a warranty under section 14 of the Uniform Sales Act could be found.<sup>55</sup> For example, a farmer came into a store which sold seed and asked for "good field corn, the kind you husk." He was given seed which turned out to be ensilage corn seed. Recovery, however, was allowed on a breach of warranty of merchantability.<sup>56</sup> Although it would appear that the sale was by description and that goods which did not conform were furnished the possibility of recovery under Section 14 was not discussed.

There are occasions when goods are sold by description or under a trade name and are not suited to the buyer or his purpose. Recovery cannot be had under a warranty of merchantability if the goods are perfectly all right as such.<sup>57</sup> However, in such sales a warranty of fitness may be found because of a buyer's special reliance on the seller.<sup>58</sup>

<sup>52</sup> *People v. Western Picture Frame Co.*, 368 Ill. 336, 13 N.E.2d 958 (1938).

<sup>53</sup> *Becker v. Brawner*, 18 Ill. App. 39 (1885).

<sup>54</sup> *Libke v. Craig*, 35 Wash. 2d 870, 216 P.2d 189 (1950).

<sup>55</sup> "Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description." Uniform Sales Act § 14.

<sup>56</sup> *Sokoloski v. Splann*, 311 Mass. 203, 40 N.E.2d 874 (1942).

<sup>57</sup> *Dunbar Bros. Co. v. Consolidated Iron-Steel Mfg. Co.*, 23 F.2d 416 (C.C.A. 2d, 1928); *Outhwaite v. A. B. Knowlson Co.*, 259 Mich. 224, 242 N.W. 895 (1932); *Green Mountain Mushroom Co. v. Brown*, 117 Vt. 509, 95 A.2d 679 (1953).

<sup>58</sup> *Ralston Purina Co. v. Novak*, 111 F.2d. 631 (C.A.8th, 1940); *Giant Mfg. Co. v. Yates-American Mach. Co.*, 111 F.2d 360 (C.A.8th, 1940); *Davenport Ladder Co. v.*

## DESCRIPTION AS EXTENDING TO CONTAINER

In *Torpey v. Red Owl Stores, Inc.* it was further stated:

The merchandise was primarily food and it is doubtful whether in any event an implied warranty would include the glass jar which, of course, was not intended for consumption.<sup>59</sup>

Thus, it would seem that an implied warranty of merchantability would not extend to a container, even if there were a sale by description. In *Crandall v. Stop & Shop, Inc.*,<sup>60</sup> a woman was injured by a spring clamp holding the lid on a jar of fruit preserves. Recovery was denied because no negligence by the defendant was discovered, and because an implied warranty of fitness did not extend to the container. The court relied upon a defective pop bottle explosion case decided in a lower California court which denied recovery and which was reported in the *Chicago Daily Law Bulletin* of the time. Also cited in the *Torpey* case was *Poplar v. Hockschild, Kohn & Co.*<sup>61</sup> wherein a box containing beauty aids was sold to plaintiff. An injury was caused by a large metal star with sharp points which was mounted on top of the box. Recovery was denied, but the danger of injury was obvious rather than latent. The sale was over a counter and perhaps not by description.

Since these cases, other decisions have extended an implied warranty to the container as well as the contents. Store owners who purchased carbonated beverages by description from dealers were injured by bottle explosions, and the implied warranty of merchantability was extended so as to include the container as well as the beverage itself.<sup>62</sup> Other courts have imposed what amounted to absolute liability on the store keeper in allowing recovery for carbonated beverage bottle explosions.<sup>63</sup> When bottles exploded upon removal from a shelf in a self-service store, causing injury, two courts refused recovery on any warranty because there was no contract, but not necessarily because the implied warranty could not extend to the container.<sup>64</sup>

In a recent Massachusetts case, recovery was allowed when the plaintiff was injured by a pop bottle explosion which occurred as plaintiff opened

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Edward Hines Lumber Co., 43 F.2d 63 (C.A.8th, 1930); Halterman v. Louisville Bridge and Iron Co., 254 S.W.2d 493 (Ct.App.Ky., 1953).

<sup>59</sup> 228 F.2d 117, 120 (C.A.8th, 1955).

<sup>60</sup> 288 Ill. App. 543, 6 N.E.2d 685 (1937).

<sup>61</sup> 180 Md. 389, 24 A.2d 783 (1942).

<sup>62</sup> Poulous v. Coca Cola Bottling Co. of Boston, 322 Mass. 386, 77 N.E.2d 405 (1948); Naumann v. Wehle Brewing Co., 127 Conn. 44, 15 A.2d 181 (1940).

<sup>63</sup> Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Mahoney v. Shaker Square Beverages, Inc., 102 N.E.2d 281 (Ohio Com. Pl., 1951).

<sup>64</sup> Lasky v. Economy Grocery Stores, 319 Mass. 224, 65 N.E.2d 305 (1946); Loch v. Confair, 361 Pa. 158, 63 A.2d 24 (1949).

the bottle.<sup>65</sup> The beverage was purchased from an automatic vending machine. The court held that this was a sale by description under a trade name, which precluded an implied fitness warranty. However, an implied warranty of merchantability was found. It would seem, therefore, that there is a trend toward extending a warranty of merchantability to the container of goods, particularly in those cases where the defect is latent, and potentially dangerous to person. In *Ouzts v. Maloney*<sup>66</sup> two dealers contracted to buy and sell pie mix. The sale was by sample. Plaintiff was shown the carton and he approved it. Subsequently, it was discovered that the package violated government regulations. The defendant was held not liable on an implied warranty of merchantability because each party to the sale had equal opportunity to discover the defect, but not because such a warranty could not extend to the package. Here the defect was not latent, nor could it be said to be very dangerous to person.

#### ENGLISH DECISIONS

In the realm of implied warranties of merchantability, the English courts have been quite liberal. In *Wren v. Holt*<sup>67</sup> it was stated that ordinarily sales over the counter could not be sales by description so as to give rise to an implied warranty of merchantability. Later, it was stated:

The implied condition that the goods are of merchantable quality applies to all goods bought from a seller who deals in goods of that description, whether they are sold under a patent or trade name or otherwise. . . . The phrase "merchantable quality" seems more appropriate to a retail purchase buying from a wholesale firm than to private buyers, and to natural products, such as grain, wool, or flour, than to a complicated machine, but it is clear that it extends to both. . . .<sup>68</sup>

On the meaning of sale by description it was said:

There is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woolen under-garments. . . .<sup>69</sup>

The sale that gave rise to this statement was a sale of woolen undergarments over a counter in a clothing store. The injury complained of was dermatitis caused by free sulphites in the garment. The court stated the prevailing view of implied warranties of fitness and quality: ". . . [these] two implied conditions by which it has been said the old rule [of caveat emptor] has been changed to the rule of caveat venditor. . . ."<sup>70</sup>

<sup>65</sup> *Mead v. Coca Cola Bottling Co.*, 329 Mass. 440, 108 N.E.2d 757 (1952).

<sup>66</sup> 157 Ohio St. 537, 106 N.E.2d 561 (1952).

<sup>67</sup> [1903] 1 K.B. 610.

<sup>68</sup> *Bristol Tramways, etc., Carriage Co. v. Fiat Motors*, [1910] 2 K.B. 831, 840.

<sup>69</sup> *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85, 100.

<sup>70</sup> *Ibid.*, at 98.

In 1928, the English court extended a warranty of merchantability to the container as well as to the contents.<sup>71</sup> The plaintiff went into defendant's public-house and asked for a bottle of Stone's ginger wine. The sale was held to be under a trade name precluding a fitness warranty. The court had little difficulty in finding that the bottle sold to plaintiff was not of merchantable quality, because the bottle broke injuring plaintiff while he was engaged in opening it properly.

The English courts have been quite willing to extend the meaning of sale by description, so as to include most all sales and all things purchased, container or not, probably to a greater extent than most American courts.

By contrast, the Illinois courts, as indicated previously, have been loathe to extend the pale of implied warranties. In a recent case, plaintiff ordered printed programs and selected the kind of type to be used. Such selection was held to prevent an implied warranty of fitness from arising.<sup>72</sup> There was no discussion of a warranty of merchantability under Sec. 15 (2) though the sale was by description and it seemed possible that the programs were not of merchantable quality. In another case decided at the same time, a bottling company escaped liability to the ultimate consumer on the grounds that the bottle might have been tampered with.<sup>73</sup> The court spoke of warranty and applied tort law, not considering privity of contract, reliance by the buyer or sale by description. Apparently in such a case something similar to absolute liability may be applied if non-tampering can be proved.

#### THE COMMERCIAL CODE

The Uniform Commercial Code became law in Pennsylvania on July 1, 1954, but this is the only jurisdiction which has adopted it to date. It provides as follows:

(1) Unless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind or though not a merchant states generally that they are guaranteed. The serving for value of food and drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) are of fair average quality in the trade and within the description; and (c) are fit for the ordinary purposes for which such goods are used; and. . .<sup>74</sup>

Exactly what changes in decisions this statute will bring about remain to be seen. Sale under a trade name, however, no longer would preclude a warranty of fitness for the buyer's purpose.<sup>75</sup> It would seem that this pro-

<sup>71</sup> *Morelli v. Fitch and Gibbons*, [1928] 2 K.B. 636.

<sup>72</sup> *Sampson v. Marra*, 343 Ill. App. 245, 98 N.E.2d 523 (1951).

<sup>73</sup> *Williams v. Paducah Coca Cola Bottling Co.*, 343 Ill. App. 1, 98 N.E.2d 164 (1951).

<sup>74</sup> Uniform Commercial Code § 2-314.

<sup>75</sup> *Ibid.* § 2-315, Comment 5 (Revised final draft, 1952).

vision should cover many cases now being decided under section 15 (2) of the Sales Act as sales by description under the implied warranty of merchantability.

#### CONCLUSION

As has been noted, a sale by description has been understood to include almost *any* sale, whether the goods were present or not. This is a most liberal view. Other courts have ignored the problem that the phrase "by description" *should* raise, or perhaps it has not been brought to their attention. Still other courts have considered inspection by the buyer to be the key to the problem, in spite of the contradiction between "by description" and "by inspection." Difficulty of thorough inspection, latent defects, and the like have moved these courts to stretch the meaning of sale by description so that a warranty might be found. In the sale of foodstuffs which cause injury it would seem that almost any result is possible. For example, in Illinois, where there is apparently a tendency toward strictness in the interpretation of "by description," warranties in the sale of carbonated beverages have been implied without a contract much less a sale by description, in spite of the fact that the statute does not differentiate between sales of foodstuffs or hard goods.

The whole problem is a technical one, the handling of which has varied from fact situation to fact situation. This is due, perhaps, to conflicting desires to extend, on the one hand, the utmost in protection to the consumer public at large; and, on the other, to comply with the law as it is written.

#### EFFECT ON A PERCENTAGE LEASE OF A TENANT'S CONDUCTING THE SAME BUSINESS ON OTHER PROPERTY

A percentage lease is one wherein the tenant is required to pay as rental a specified percentage of the gross income from business conducted upon the premises. To the ordinary covenants of a lease are added certain clauses governing the manner in which business may be conducted, how the percentage is estimated, and how it is to be paid to the landlord.<sup>1</sup>

Litigation in the percentage lease field most often centers around the determination of gross income. The most common situation is the subject matter of this note—the tenant, either innocently or willfully, deprives the landlord of his expected return on the lease by transferring some or all of the business to another location. The amount of business to which the percentage clause is to attach is accordingly decreased, to the detriment of the landlord and to the benefit of the tenant.

<sup>1</sup> McMichael, Leases, p. 21 (4th ed., 1947).