Implied Sales Warranty of Fitness For Particular Purpose

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HISTORICAL AND SOCIAL GROWTH — 19TH CENTURY

The implied sales warranty of fitness for particular purpose first developed in Anglo-American jurisprudence in the early nineteenth century, subsequent to the origin of the implied warranty of merchantability. Lord Ellenborough established the implied warranty of *merchantability* in terms of resalability in 1815, at a date when, for the first time, a larger proportion of the English population was employed in commerce, navigation and manufacture than in agriculture and mining.[1] Prior to this time, especially during the seventeenth century, there were complaints of intolerable abuse and fraud in the application of the regulation of trade.[2] The elaborate system of trade regulation developed in England during the fourteenth through sixteenth centuries had reached the stage of complete breakdown, due in part to lack of administrative energy and integrity. The coupling of this decline with the expansion of commercial trade, especially within the textile industry, created the underlying impetus for the development of the implied warranty of merchantability. The merchant buyer of waste silk or scarlet cuttings, purchasing without opportunity of inspection, received legal assurance that the product would be resalable in the open market under the denomination mentioned in the purchase contract.[3]

Merchantability, even at this early date, possessed the additional

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[1] HALVEY, HISTORY OF THE ENGLISH PEOPLE IN 1815, at 179 (1924), "According to the census returns for 1811, there were only 6,129,142 persons employed in agriculture and mining, as against 7,071,989 persons in commerce, navigation and manufacture."

[2] Le Viness, *Caveat Emptor Versus Caveat Venditor*, 7 MD. L. REV. 177, 182 (1943).

[3] Gardiner v. Gray, 4 Camp. 144, 145, 171 Eng. Rep. 46, 47 (K.B. 1815), ". . . the purchaser has a right to expect a saleable article answering the description in the contract." (waste silk); Bridge v. Wain, 1 Stark. 504, 171 Eng. Rep. 543 (K.B. 1816) (scarlet cuttings); Laing v. Fidgeon, 4 Camp. 169, 171 Eng. Rep. 55 (C.P. 1815), ". . . the defendant [seller] . . . ought to furnish a merchantable article." (saddles).

There had been an earlier unsuccessful attempt in the United States to incorporate the European obligation of sound goods for a sound price. Bailey v. Nickols, 2 Root 407 (Conn. 1796); Whitefield v. M'Leod, 2 Bay 380 (S.C. 1802).

definition of fitness for *some* purpose.[4] Thus phrased, it was a natural step during the following decade, to establish a warranty of fitness for *particular* purpose, and with the flourishing of English oceanic commerce it was logical that the earliest cases would involve the sale of copper for the sheathing of a *particular* ship.[5] The fact that the vendor was not a manufacturer or that the purchaser selected the copper were not of consequence in these first decisions.[6] Although the obligation was framed in contractual warranty terms, it was the sale itself that was held to constitute the affirmation.[7]

The full impact of mass production was yet to be felt in England and the specialized skill of the individual craftsman was still reflected in the English decisions during the first several decades after the origin of this warranty. Thus judicial relief was afforded the buyer when the commodity involved was hay for oxen,[8] wine to lay down for maturing, or rope to raise wine barrels.[9] By mid-century, however, the nature of the commodity had shifted to items of transportation,[10] and the manufacture of engines and boilers for the

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[4] Laing v. Fidgeon, 4 Camp. 169, 171 Eng. Rep. 55 (C.P. 1815).

[5] Gray v. Cox, 4 B. & C. 108, 115, 107 Eng. Rep. 999, 1002 (K.B. 1825) Abbott C.J.: "At the trial it occurred to me that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose. I am still strongly inclined to adhere to that opinion, hut some of my learned hrothers think differently." Similar comment by Best C. J. in Jones v. Bright, 5 Bing. 533, 130 Eng. Rep. 1167 (Ex. 1829).

[6] Jones v. Bright, *supra* note 5 at 534, 130 Eng. Rep. at 1168. "Copper was lying in the Defendants' warehouse, in sheets of various size, thickness, and weight: The Plaintiff's shipwright selected what he thought fit, and afterwards applied it to the Plaintiff's ship, observing nothing amiss." Park J., however, points out that "[the inspection] was merely of the exterior of the commodity, and he had no means of knowing its intrinsic qualities." *Id.* at 548, 130 Eng. Rep. at 1173.

[7] *Id.* at 544, 130 Eng. Rep. at 1172. ". . . a merchant may guard against defects in manufactured articles; as he who manufactures copper may, by due care, prevent the introduction of too much oxygen . . ." *Id.* at 546, 130 Eng. Rep. at 1173 ". . . the case is of great importance; because it will teach manufacturers that they must not aim at underselling each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold."

[8] Beals v. Olmstead, 24 Vt. *114 (1852) (Hay to keep oxen during the summer while at work on the railroad. Decision based upon breach of express warranty); *cf.* Mallan v. Radloff, 17 C.B. (n.s.) 588, 144 Eng. Rep. 236 (1864) (Sale of unassembled soap frames, decision also based upon express warranty breach).

[9] Osborn v. Hart, 23 L. T. R. (n.s.) 851 (Ex. 1871) (pipe of wine to lay down); Brown v. Edgington, 2 Man. & G. 279, 133 Eng. Rep. 751 (1841) (Rope to raise pipes of wine. Seller determined size of rope necessary).

[10] Ships: Shepherd v. Pybus, 3 Man. & G. 868, 133 Eng. Rep. 1390 (C.P. 1842); Brenton v. Davis, 8 Blackf. *317 (Ind. 1846). *But Cf.*, The E 270, 16 F.2d 1005 (D.C. Mass. 1927); Fisk v. Tank, 12 Wis. *276, 78 Am. Dec. 737 (1860). Supplies: Bigge v. Parkinson, 7 H. & N. *955, 158 Eng. Rep. 758 (Ex. 1862); Leopold v. Van Kirk, 27 Wis. 152 (1870).

purchaser's mill.[11] This corresponded with the economic change in England. Already the manufacture of linen, wool and silk had progressed and the Lancashire cotton mills had achieved first position in world trade.[12] Some 6500 new patents were recorded in the United States between 1840 and 1850 and even this figure quadrupled during the following decade.[13] Mass production originated in the United States about 1850 and advanced to Europe,[14] with the industrial revolution expanding from individual craftsmanship in the textile industry[15] to metal articles, foodstuffs, large scale manufacture of iron and steel, and finally to the manufacture of production machinery.[16] The development of implied warranty adjudication was similar; contrast the 1860 decisions involving liquor for barter to African natives or troop supplies from London to Bombay,[17] with decisions allowing purchaser's relief later in the century, e.g., cloth for overcoat manufacture,[18] steel for manufacture of axes, iron to be converted into nuts and bolts for resale.[19] Emphasis had shifted from trade and commerce to manufacture and processing. The size of English industrial plants increased during this period by seventy-five per cent, the value of goods produced increased 150 per cent, and employment in the iron and steel industries increased more than fivefold.[20] Fur-

[11] Beers v. Williams, 16 Ill. *69 (1854) (boiler and fire place for grist and saw mill); Page v. Ford, 12 Ind. *46 (1859) (engine and boiler for sawmill); Rodgers v. Niles, 11 Ohio St. 48, 78 Am. Dec. 290 (1860) (boiler for mill); Overton v. Phelan, 39 Tenn. 445 (1859) (iron work for use by building contractor); Getty v. Rountree, 2 Pin. 379, 54 Am. Dec. 138 (Wis. 1850) (water pumps for lead mine).

[12] HALVEY, HISTORY OF THE ENGLISH PEOPLE 1830-1841, at 278-79 (1927).

[13] TRAIN, THE STORY OF EVERYDAY THINGS 287 (1941).

[14] 8 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 3, 4, 8 (1932).

[15] TRAIN, *op. cit. supra* note 13, at 288.

[16] *op. cit. supra* note 14, at 11.

[17] Leopold v. Van Kirk, 27 Wis. 152 (1870) (supplies for Lake Superior region); Boothby v. Scales, 27 Wis. 626 (1871) (fanning mill for cleaning grain); Bigge v. Parkinson, 7 H. & N. *955, 158 Eng. Rep. 758 (Ex. 1862) (troop supplies); Macfarlane and Co. v. Taylor and Co., 18 L.T.R. (n.s.) 214 (H.L. 1868) (liquor manufactured for barter).

[18] Bierman v. City Mills Co., 151 N.Y. 482, 45 N.E. 856 (1879) (felt cloth for overcoats); Drummond v. Van Ingen, 12 App. Cas. 284 (1887) (worsted coatings for sale to clothers or tailors); *But* cf., Jones v. Padgett, 24 Q.B.D. 650 (1890) (indigo blue cloth for servants liveries, recovery for warranty breach denied, but purpose may not have been known by seller).

[19] Park v. Morris Axe and Tool Co., 4 Lansing 103 (N.Y. Sup. Ct. 1871) (steel for axes and tools); Dayton v. Hooglund, 39 Obio St. 671 (1884) (Swedisb iron for bolts and nuts).

Construction trades; warranty applied: Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884) (false work on partly completed bridge); Berger Mfg. Co. v. Crites, 178 Mo. App. 218, 165 S.W. 1163 (1914) (metal lumber for use in school building); Omaha Coal, Coke & Lime Co. v. Fay, 37 Neb. 68, 55 N.W. 211 (1893) (lime for plastering building).

[20] 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 176-77 (1932).

naces, engines and boilers predominate late nineteenth century litigation decided on the basis of breach of this implied warranty.[21]

Trade and commerce continued to play an important role in the growth of this warranty during the early twentieth century. Coal from England,[22] sewer pipe in Ontario,[23] lumber, flour, sugar and oil in the United States[24] all continued to be of importance, but recovery for breach was now also granted for highly specialized designed equipment and machinery. Specially constructed ship propellers in England,[25] coal mining equipment, gold washing machines, generators and oil refining plant equipment in America, all exemplified the trend.[26]

The parallel growth of this implied warranty and of industry is typified by the automobile. At the beginning of the twentieth century the motor vehicle had scarcely left the inventor's workshops; by 1929, there were almost thirty-two million cars and trucks in use

[21] McClamrock v. Flint, 101 Ind. 278 (1885) (wind pumps); Fitzmaurice v. Puterbaugh, 17 Ind. App. 318, 45 N.E. 524 (1896) (steam boiler for sawmill and power factory); Blackmore v. Fairbanks, Morse & Co., 79 Iowa 282, 44 N.W. 548 (1890) (Westinghouse engine and boiler for grist and saw mill); George E. Pew Co. v. Karley & Titsenor, 168 Iowa 170, 150 N.W. 12 (1914) (engine and dynamo for motion picture production); International Harvester Co. v. Porter, 160 Ky. 509, 169 S.W. 993 (1914); Glover Mach. Works v. Cooke-Jellico Coal Co., 173 Ky. 675, 191 S.W. 516 (1917) (locomotive for purchaser's coal mine); Tennessee River Co. v. Leeds, 97 Tenn. 574, 37 S.W. 389 (1896) (cast iron piston heads for use in cotton press). Canada: Bigelow v. Boxall, 38 U.C.Q.B. Rep. 452 (1876) (furnace).

[22] Gillespie Bros. v. Cheney, [1896] 2 Q.B. 59 (provisional clause in section 14(1) Uniform Sale of Goods Act limited to manufactured goods).

[23] Ontario Sewer Pipe Co. v. MacDonald, 2 Ont. W.N. 483 (1910).

[24] Davenport Ladder Co. v. Edward Hines Lumber Co., 43 F.2d 63 (8th Cir. 1930) (lumber for tool chests); Louisville Grinding & Mach. Co. v. Southern Oil & Tar Co. 230 Ky. 39, 18 S.W.2d 877 (1929) (oil for racetrack); Country Club Soda Co. v. Arbuckle, 279 Mass. 121, 181 N.E. 256 (1932) (sugar for beverage manufacture); Sperry Flour Co. v. De Moss, 141 Ore. 440, 18 P.2d 242 (1933) (flour for bread); Sachter v. Gulf Ref. Co., 203 N.Y. Supp. 769 (1923) (oil for refrigerating plant); J. A. Campbell Co. v. Corley, 140 Ore. 462, 13 P.2d 610, 14 P.2d 455 (1932), noted 66 U. S. L. REV. 621 (1932), 12 ORE. L. REV. 356 (1933).

[25] Cammell Laird & Co. v. Manganese Bronze & Brass Co., [1934] A.C. 402 (propellers for purchaser's ship).

[26] American Mine Equipment Co. v. Butler Consolidated Coal Co., 41 F.2d 217 (3d Cir. 1930) (coal mining conveyancing equipment); Williamson Daily News v. Linograph Co., 47 F.2d 523 (4th Cir. 1931) (printing machine); Drumar Mining Co. v. Morris Ravine Mining Co., 33 Cal. App. 2d 492, 92 P.2d 424 (1939) (gold washing machine); American Spiral Pipe Works v. Universal Oil Products Co., 220 Ill. App. 383 (1920) (oil stills for oil refining plant); E. Edelman & Co. v. Queen Stove Works, Inc., 205 Minn. 7, 284 N.W. 838 (1939), Note, 25 VA. L. REV. 990 (1939), (generators for wind chargers); Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. 240, 189 Atl. 580 (1937) (bread dough mixing machine). *Compare:* Hurd-Pohlmann Co. v. Sugita, 32 Hawaii 577 (1932) (same); Foss v. Golden Rule Bakery, 184 Wash 265, 51 P.2d 405 (1935) (bottle washing machine); Universal Motor Co. v. Snow, 149 Va. 690, 140 S.E. 653 (1927) (grinding mill).

throughout the world.[27] During the period of initial growth of the automobile industry, courts in England[28] and the Unites States[29] were liberal in finding both particular purpose and reliance in the purchaser's favor. Purchases for the purpose of use as a "pleasure car" or "for touring purposes," or "to convey the purchaser from place to place," are little more than application of the common or general purpose, and yet were found to justify reliance as purchases for a *particular* purpose.[30] Similar decisions are to be noted in the related areas of trucks[31] and farm tractors.[32] As the automobile became the common mode of transportation, the manufacturer's names became household words, and the "particular" purpose became the customary and common one, automobile litigation within the area of breach of implied warranty of fitness for particular purpose di-

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[27] 2 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 322, 325 (1932). During the period 1922-26 more motor vehicles were produced than in the entire previous history of the industry. However, during this period, the number of major producers decreased and by 1923 ten manufacturers produced over ninety percent of the entire production.

[28] Bristol Tramways Co. v. Fiat Motors Ltd., [1910] 2 K.B. 831 (Fiat omnibus chassis for heavy passenger traffic in hilly district of Bristol); Baldry v. Marshall, [1925] 1 K.B. 260 (Bugatti car suitable for touring purposes). Canada: Marshall v. Ryan Motors Ltd. 15 Sask. L.R. 118, 65 D.L.R. 742 (1922) (Overland car for purpose of conveying purchaser from place to place).

[29] Petfalski v. Winkel Garage Co., 190 Wis. 64, 208 N.W. 893 (1926) (Studebaker automobile for use as a pleasure car). *Contra*, Farris v. Alfred, 158 Ill. App. 158 (1910) (liability for warranty breach limited to manufacturer).

[30] See notes 28, 29 *supra*.

[31] Indestructible Wheel Co. v. Red Ball Body Corp., 100 Ind. App. 150, 194 N.E. 738 (1935) (wheels for purchaser's use in manufacturing trucks); Federal Motor Truck Sales Corp. v. Shanus, 190 Minn. 5, 250 N.W. 713 (1933); Marx v. Locomobile Co. of America, 82 Misc. 468, 144 N.Y. Supp. 937 (1913) (wagon for hauling asphalt); Long v. The Five-Hundred Co., 123 Wash. 347, 212 Pac. 559 (1923) (truck for hauling timber products).

[32] Minneapolis Steel & Mach. Co. v. Casey Land Agency, 51 N.D. 832, 201 N.W. 172 (1924); Hausken v. Hodson-Feenaughty Co., 109 Wash. 606, 187 Pac. 319 (1920); *contra*, Peninsula Motor Co. v. Daggett, 126 Wash. 275, 218 Pac. 253 (1923) (Fordson tractor held to be well known in 1923); La Crosse Plow Co. v. Brooks, 142 Wis. 640, 126 N.W. 3 (1910). Canada: Advance-Rumely Thresher Co. v. Lester, [1927] 61 Ont. L.R. 4, 4 D.L.R. 51 (1927) *reversing* 1 D.L.R. 502 (1927) (disclaimer clause involved). Recent truck and tractor decisions also denying implied warranty recovery: Bagley v. International Harvester Co., 91 Cal. App2d 922, 206 P.2d 43 (1949) (truck for hauling logs); Kirkland v. John Deere Plow Co., 66 Ga. App. 304, 18 S.E.2d 109 (1941) (tractor to operate as peanut picker); Spinella v. Atlantic Tug & Equipment Co., 123 N.Y.S.2d 336 (1953) (tractor and loader for landscaping).

Road construction equipment: Warranty applied; Hughes v. Nat'l Equip. Corp., 216 Iowa 1000, 250 N.W. 154 (1933) (dumptors for grading railroad line); Dunn Co. v. Charlevoix Co., 247 Mich. 398, 225 N.W. 592 (1929); National Equipment Corp. v. Moore, 189 Minn. 632, 250 N.W. 677 (1933) (dumptor). Warranty denied; Webster v. L. Romano Engineering Corp., 178 Wash. 118, 34 P.2d 428 (1934).

minished.[83] Except for mass produced, widely distributed goods, implied warranty of fitness for particular purpose has expanded to include the entire range of products without distinction as to level of distribution.[84]

Unfortunately, the legal growth of this implied warranty has not kept pace. Most of the legal milestones in the past hundred years have consisted of mere restatement of existing legal position. Justice Mellor's classic elaboration of warranty rules in the 1860's was merely a crystallization by restatement of the requirements established in England during the first half of the century.[85] Chalmers attempted to restate Mellor in the implied warranty area of his Sale of Goods Act,[86] and after the turn of the twentieth century, Williston restated Chalmers in codifying the law of Sales for the United States.[87] The elements carried forward by these restatements of existing law, primarily those of informing the seller of particular purpose and the purchaser's reliance upon the seller's skill or judgment, are fortunately broad enough so that the individual court is afforded the freedom necessary to assure justice to the individual litigants. Unfortunately, the element of reliance has not been limited to an issue of fact. Instead, during the nineteenth century it became a matter of law for court determination. Reliance in effect became legal right to rely. It was, therefore, not the implied warranty per se that impeded expansion, but the judicial restrictions that have developed with the warranty during the past one hundred years. Having traced the growth of the warranty, consideration must now be given to those areas that have been judicially excluded. These include the sale of "known, definite and described" items, the trade

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[83] Adams v. Peter Tramontin Motor Sales, 42 N.J. Super. 313, 126 A.2d 358 (1956).

[84] Manufacturer-purchaser: Giant Mfg. Co. v. Yates-American Mach. Co., 111 F.2d 360 (8th Cir. 1940) (coils for assembly into air conditioning units). Ultimate retail consumer: Buchanan v. Dugan, 82 A.2d 911 (Munic. Ct. App. D.C. 1951) (hearing aid); Green Mountain Mushroom Co. v. Brown, 117 Vt. 509, 95 A.2d 679 (1953) (roofing cement). For heating equipment purchased at various distribution levels see: Universal Major Electrical App. v. Glenwood Range Co., 223 F.2d 76 (4th Cir. 1955); B.F. Sturtevant Co. v. LeMars Co., 188 Iowa 584, 176 N.W. 338 (1920); Iron Fireman Coal Stoker Co. v. Brown, 182 Minn. 399, 234 N.W. 685 (1931); Skinner v. Kerwin Ornamental Glass Co., 103 Mo. App. 650, 77 S.W. 1011 (1903); Huddleston v. Lee, 39 Tenn. App. 465, 284 S.W.2d 705 (1955) (freezing unit); Carver v. Denn, 117 Utah 180, 214 P.2d 118 (1950) (air conditioning equipment for commercial business); Eliason v. Walker, 42 Wash.2d 473 256 P.2d 298 (1953) (residential heating equipment).

[85] Jones v. Just, [1868] 3 Q.B. *197 (fourth classification).

[86] The Sale of Goods Act, 1893, 56 & 57 VICT., c. 71 §14 (1).

[87] UNIFORM SALES ACT § 15(1); UNIFORM LAWS ANNOTATED 213 (1950), hereinafter U.S.A. § 15(1).

name restriction, strict application of the parol evidence rule, and sales by dealers.

LEGAL RESTRICTIONS — 19TH CENTURY

Known, Definite and Described

The earliest restriction judicially imposed (and of greatest importance in impeding the warranty's growth during the nineteenth century) was classified simply as the sale of, or contract to sell, items that are "known, defined and described." This restriction originated in England with Justice Parke in 1838.[38] A patented smoke consuming furnace was found to be a defined and well-known machine, and thereby excluded from the newly created implied warranty. This was a period of transition from present dealings with raw materials and articles of trade to manufactured articles under executory contracts. Parke was unable to make the transition. The pre-contract manufactured smoke consuming machine, which the manufacturer contracted to install, undoubtedly the only patented device that he made for sale and installation, was equated by Parke with the horse purchaser who says to his horse-trading seller, "Send me that bay horse in the third stall of your stable to draw my carriage."[39] This is Llewellyn's horse-trader law in full application.[40] Lord Abinger, in obiter dictum, recognized the close relationship between this newly created implied sales warranty and the tort action for non-disclosure. Few of the subsequent decisions, however, have given this relationship proper consideration.[41]

During the 1850's-60's, this newly created restriction was again applied to patented devices; first to a printing machine,[42] and again to a self-closing smoke consuming furnace valve.[43] Subsequently, it was applied, almost as a matter of form and rarely with evaluation of its purpose or justification, as a continued restriction on the

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[38] Chanter v. Hopkins, 4 M. & W. 399, 150 Eng. Rep. 1484 (Ex. Ch. 1838).

[39] *Id.* at 404, 150 Eng. Rep. at 1486, Parke J. ". . . [S]uppose the buyer said, 'send that bay horse in the third stall of your stable, to draw my carriage,' then if it did not draw the carriage, it would be the buyer's concern."

[40] Llewellyn, *On Warranty of Quality, And Society*, Part II, 37 COLUM. L. REV. 341 (1937).

[41] See note 38 *supra* at 404, 150 Eng. Rep. at 1487. For the related tort aspects of non-disclosure see Keeton, *Fraud-Concealment And Non-Disclosure*, 15 TEXAS L. REV. 1 (1936); Note, 22 B.U.L. REV. 607 (1942); Berger & Hirsch, *Pennsylvania Tort Liability for Concealment and Nondisclosure in Business Transactions*, 21 TEMP. L.Q. 368 (1948).

[42] Ollivant v. Bayley, 5 Q.B. 288, 114 Eng. Rep. 1257 (1843).

[43] Prideaux v. Bunnett, 1 C.B. (N.S.) 613, 140 Eng. Rep. 252 (C. P. 1857).

growth of the warranty. Mellor by decision[44] and Parsons by text[45] during the 1860's referred to the known, defined and described limitation as a well-established rule of common law. The early decisions in the United States, citing the English decision involving patented mechanisms, applied the same limitation to the sale of fertilizer in Virginia, oxen in New Hampshire, and hogs bought for market in New York.[46] The distinction in type of commodity involved or the fact that most of the negotiations were face-to-face, was never noted, much less emphasized. Here the analogy of the "grey horse purchased to ride"[47] seems more appropriate. Once established, later American decisions imposed the restriction regardless of the nature of the commodity involved or the form of the pre-sale negotiations.[48]

Directly related to the above restriction is the nineteenth century requirement that the sales contract must be executory[49] in order that the implied warranty of fitness for particular purpose may be applicable. Only within the limited area where the contract provided for the seller to supply a non-specific item, with the choice of selection in the seller and the agreement at executory stage, was the implied warranty effective. Meechem, in stating existing judicial opinion before the end of the nineteenth century, included these requirements: The contract must be executory, the particular article must not be described by the buyer, only the

[44] Jones v. Just, [1868] 3 Q.B. 197 (third classification).

[45] 1 PARSONS, CONTRACTS 469-70 (4th ed. 1860); BENJAMIN, SALES §657 (1st Am. ed. 1875).

[46] Deming v. Foster, 42 N.H. 165 (1860) (oxen for farm work); Bartlett v. Hoppock, 34 N.Y. 118 (1865) (hogs for New York Market); Mason v. Chappell, 56 Va. (15 Gratt.) 572 (1860) (fertilizer); Fisk v. Tank, 12 Wis. 276 (1860) (engine for boat, boat must be of sufficient strength for engine).

[47] Deming v. Foster, *supra* note 46 at 174, quotes the following obiter dictum from Keates v. Kadogan, 2 E.L.&E. 320, 10 C.B. 591 (1858): ". . . but if a man says, 'sell me that grey horse to ride', and the other sells it, knowing he can not ride it, that would not make him liable."

[48] Application of tbis implied warranty refused on basis that goods involved were "known, defined and described": Seitz v. Brewers' Refrigerating Mach. Co., 141 U.S. 510 (1891); Oil Creek Gold Min. Co. v. Fairbanks, Morse & Co., 19 Colo. App. 142, 74 Pac. 543 (1903); Wisconsin Red Pressed-Brick Co. v. Hood, 54 Minn. 543, 56 N.W. 165 (1893), *2nd appeal aff'd*, 60 Minn. 401, 62 N.W. 550 (1895); *3rd appeal aff'd*, 67 Minn. 329, 69 N.W. 1091 (1897); Stanford v. National Drill & Mfg. Co., 28 Okla. 441, 114 Pac. 734 (1911); Mine Supply Co. v. Columbia Mining Co., 48 Ore. 391, 86 Pac. 789 (1906); Jarecki Mfg. Co. v. Kerr, 165 Pa. 529, 30 Atl. 1019 (1895); Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 58 N.W. 232 (1894).

For the distinction between Anglo-American and Roman sales warranty law see: 1 WILLISTON, SALES § 247 at 657 (rev. ed. 1948); ZULUETA, THE ROMAN LAW OF SALE 46-51 (1945); Bartlett v. Hoppock, 34 N.Y. 118, 122 (1865) (recognizing the distinction).

[49] 1 SMITH'S LEADING CASES 313 (8th ed. 1879).

buyer's need must be known, the buyer must neither be able nor undertake to determine what will best supply his need, and he must leave it to the seller both to make the determination and assume the risk.[50] The area of expansion for the implied warranty of fitness for particular purpose was indeed narrow.

Judicial justification for use of the "known, defined and described" limitation is rarely expressed. In these few instances, it has been justified on the basis that if the contract requires a specific item, the seller's freedom of choice is thereby eliminated. When the seller suggests, however, the use of his product to accomplish the desired special purpose, then completes the order form and inserts the name of his specific product into the contract, it little behooves him after the contract is mutually signed to hold that his freedom of selection is eliminated because he is now under contractual obligation to furnish his own item. The fact that the contract specifies a particular item may constitute make-weight evidence of the buyer's non-reliance but it should not constitute an automatic exclusion of the implied warranty. It is surprising to find a federal judge of Sanborn's caliber adopting this approach.[51] As Phillip's dissent to Sanborn's opinion aptly explains, this strict application produces a situation where ". . . the doctrine of implied warranty can afford no protection to the confiding purchaser against the smart secretary of the manufacturer."[52] *Caveat emptor* finds its clearest application in the "known, defined and described" restriction. The influence of these late nineteenth century decisions is observable in federal court application well into the twentieth century with observations that this restriction on the implied warranty "makes for the stability of business transactions," even at a time when the court recognizes that enlightened business places more and more responsibility on the seller.[53]

Parol Evidence Rule

During the latter half of the nineteenth century Anglo-American courts often linked the "known, defined and described" restriction with a strict interpretation of the parol evidence rule, thereby creating a joint basis for excluding purchasers' relief through breach of the implied warranty of fitness for particular purpose. Application of the parol evidence rule to this area must rest upon the classifica-

[50] 2 MECHEM, SALES § 1349 (1901).
[51] Davis Calyx Drill Co. v. Mallory, 137 Fed. 332 (8th Cir. 1905).
[52] *Id.* at 340.
[53] Braden v. Mountain Iron & Supply Co., 32 F.2d 244, 246 (8th Cir. 1929).

tion of this implied sales warranty. If it be considered as imposed by law upon the contract for reasons of policy, as contrasted with being a part of the contract itself, the parol evidence rule should not be applied. In many cases the purchase is induced by the seller's oral assurance that his product will accomplish the specialized purpose desired by the purchaser. Proof of the purchaser's reliance often rests upon legally establishing these oral statements that are frequently promissory in nature. Exclusion of this proof by virtue of the parol evidence rule restricts the scope of the implied warranty.

Nor can the problem be solved by determining in advance whether it would be natural to integrate these oral assurances into the written contract. Several text commentators[54] in comparing this warranty with the implied warranty of merchantability have expressed the veiw that it is more natural to expect that the oral assurances of fitness for particular purpose would be included within the writing. Corbin, on the other hand, believes that the word *implied* is used "for the very reason that they are ordinarily not put into express words by the parties."[55] Actually, the matter of integration will turn on the business skill and bargaining ability of the contracting parties in the individual transaction.

Williston relates the parol evidence rule to the specific goods restriction.[56] If the implied warranty of fitness for particular purpose is to be applied to the purchase of specific goods, the warranty must be implied by law rather than agreement of the parties. The result of this approach, however, is to permit courts to find that if the goods are non-specific, the parol evidence rule is applicable to the oral assurance; and if they are specific, the "known, defined and described" restriction is effective.

During the last quarter of the nineteenth century and the first portion of this century the strict application of the parol evidence rule was formidable limitation to the implied warranty of fitness for particular purpose.[57] Today, however, its effect is considerably

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[54] Strahorn, *The Parol Evidence Rule And Warranties Of Goods Sold,* 19 MINN. L. REV. 725, 739 (1935); Comment, *Parol Evidence Rule In Warranties of Sale Of Goods—Contractual Disclaimers,* 7 FORDHAM L. REV. 238, 249 (1938).

[55] 3 CORBIN, CONTRACTS § 585 at 287-88 (1951).

[56] 1 WILLISTON, SALES § 231 at 590-91 (rev. ed. 1948).

[57] Seitz v. Brewers' Refrigerating Mach. Co., 141 U.S. 510 (1891); Standard Brands, Inc. v. Consolidated Badger Co-op., 89 F. Supp. 5 (E.D. Wis. 1950); Fay & Eagan Co. v. Dudley & Sons, 129 Ga. 314, 58 S.E. 826 (1907); Ehrsam v. Brown, 76 Kan. 206, 91 Pac. 179 (1907); Warren Glass Works Co. v. Keystone Coal Co., 65 Md. 547, 5 Atl. 253 (1886); Whitmore v. South Boston Iron Co., 84 Mass. (2 Allen) 52 (1861); McCray Storage Co. v. Woods, 99 Mich. 269, 58 N.W. 320 (1894); Wheaton Roller-Mill Co. v. John T. Noye

diminished in that strict application against the purchaser is limited to a minority of jurisdictions.[58] Most of these earlier decisions, in determining whether the written contract integrated all the negotiations of the parties, erroneously considered only the writing itself,[59] and did not attempt to classify the excluded warranty as the creature either of law or agreement. The philosophy of *caveat emptor* is evident in these nineteenth century rulings.[60]

Most of the decisions in which recovery has been denied because the written contract was inconsistent with an implied warranty of fitness for particular purpose involved the sale of machinery for specialized purpose in which the writing guaranteed the machine's capacity.[61] There is no automatic inconsistency between

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Mfg. Co., 66 Minn. 156, 68 N.W. 854 (1896); Appalachian Power Co. v. Tate, 90 W. Va. 428, 111 S.E. 150 (1922); Lee v. Pauly Motor Truck Co., 179 Wis. 139, 190 N.W. 819 (1922). *Contra:* Grant v. Christensen, 255 Wis. 495, 39 N.W. 2d 453 (1949); Moses Stationery Co. v. Shindo, 32 Hawaii 690 (1933).

[58] See 3 CORBIN, CONTRACTS § 585 n.6 (1951) for recent decisions; Comment, *Warranties, Disclaimers And The Parol Evidence Rule,* 53 COLUM. L. REV. 858, 864-65 (1953).

[59] McCray Storage Co. v. Woods, 99 Mich. 269, 276, 58 N.W. 320, 322 (1894), ". . . [T]he test of the plaintiff's undertaking is the contract as written, not with parol additions in the way of conversations and promises in regard to the efficiency of the apparatus." Lee v. Pauly Motor Truck Co., 179 Wis. 139, 145, 190 N.W. 819, 821 (1922), "The [lower] court found that 'it was understood by both parties that this warranty should and did inhere in their contract.' This conclusion cannot be deduced from a consideration of the contract."

[60] The purchaser's precarious position is exemplified by Morris v. Bradley Fertilizer Co., 64 Fed. 55, 57 (3d Cir. 1894). To establish this implied warranty he must prove seller's knowledge and purchaser's reliance, but if he proved assertions then ". . . [he] would have proved too much, for the warranty shown, if any, would be an express, and not an implied, one . . ." (and therefore subject to the application of the parol evidence rule); The United States Supreme Court in Seitz v. Brewer's Refrigerating Co., 141 U.S. 510 (1891), expressed the view that the parol evidence rule was salutary. In contrast, Moses Stationery Co. v. Shindo, 32 Hawaii 690, 694 (1933), emphasizes the policy value importance of applying the implied warranty: "That warranty is thus implied by law for the sake of furthering honesty and fair dealing by sellers of machines and other articles and for the sake of preventing the possibility of sellers reaping benefits from dishonesty and unfair dealing."

[61] Buckstaff v. Russell & Co., 79 Fed. 611 (8th Cir. 1897), *cert. denied,* 169 U.S. 737 (1898); Middletown Machine Co. v. Chaffin, 108 Ark. 254, 157 S.W. 398 (1913) (engine for mill); Conant v. National State Bank, 121 Ind. 323, 22 N.E. 250 (1889) (machinery for mill); Reeves & Co. v. Byers, 155 Ind. 535, 58 N.E. 713 (1900) (engine for grain separator); Ray Motor Co. v. Stanyan, 123 Me. 346, 122 Atl. 874 (1923); American Historical Soc. Inc. v. Storer, 232 Mass. 372, 122 N.E. 392 (1919); Whitty Mfg. Co. v. Clark, 278 Mass. 370, 180 N.E. 315 (1932) (coal burner to operate all night); Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S.W. 1113 (1903); Cleveland Shear Co. v. Consumer Carbon Co., 75 Ohio St. 153, 78 N.E. 1009 (1906) (machinery to manufacture carbons); Mallow v. Hall, 209 Wis. 426, 245 N.W. 90 (1932) (burner to heat house).

Contractual guarantee of good material and workmanship: Consistent with the implied warranty: J.B. Colt Co. v. Gavin, 33 N.M. 169, 262 Pac. 529

capacity and fitness for specialized purpose. It is possible for the two to complement one another, and once again it should be a matter of considering the facts of the individual situation rather than imposing an automatic exclusion.[62]

Sales by Dealers

Another nineteenth century restriction, limited in application almost exclusively to that period, was the exclusion of sales made by dealers.[63] Only the manufacturer as a vendor was included within the implied warranty of fitness for particular purpose. This was not an issue of factual reliance. The purchaser did not have the legal right to rely upon the dealer's skill or judgement, even though the dealer may have orally suggested the item or made the selection. The restriction imposed during this period was absolute, based upon the relationship of the contracting parties. Most of these decisions involved the present sale of specific chattels. This restriction was, therefore, related both to the nineteenth century "known, defined and described" limitation, and to the implied warranty of

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(1927) (U.S.A. not adopted); Burkett v. Heating Corporation, 241 Mich. 634, 217 N.W. 897 (1928) (U.S.A. adopted); Advance-Rumely Thresher Co. v. Lester, 61 O.L.R. 4 (1927), *affirming* [1927] 4 D.L.R. 51 *reversing* [1927] 1 D.L.R. 502. Inconsistent with implied warranty: Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S.W. 1113 (1903) (U.S.A. not adopted).

[62] The proposed Uniform Commercial Code 2-316(2) (1957) provides ". . . to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicious. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'" § 2-317 (c) provides that "Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose."

See: Hughes v. National Equip. Corp., 216 Iowa 1000, 250 N.W. 154 (1933); City of Moultrie v. J.S. Schofield's Sons Co., 6 Ga. App. 464, 65 S.E. 315 (1909); Vandiver v. B.B. Wilson & Co., 244 Ky. 601, 51 S.W. 2d 899 (1932); Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. 240, 189 Atl. 580 (1937); Quinn v. Bernat, 80 R.I. 375, 97 A.2d 273 (1953); Mallow v. Hall, 209 Wis. 426, 245 N.W. 90 (1932); Valley Refrigeration Co. v. Lange Co., 242 Wis. 466, 8 N.W.2d 294 (1943).

[63] Turner v. Mucklow, 6 L.T.R. (n.s.) 690 (Ex. 1862) (not manufactured for resale purposes). But by 1868 Mellor, J. in Jones v. Just, [1868] 3 Q.B. *197, *202, included within his fourth classification the words ". . . or in which he deals . . ."

Nineteenth century decisions in United States refusing to apply this implied warranty because vendor was a dealer: Archdale v. Moore, 19 Ill. 565 (1858); Hoe v. Sanborn, 21 N.Y. 552 (1860) (obiter dicta); Correio v. Lynch, 65 Cal. 273, 3 Pac. 889 (1884) (based upon CAL. CIV. CODE §§ 1764, 1770); Farris v. Alfred, 158 Ill. App. 158 (1910); Wisconsin Red Pressed Brick Co. v. Hood, 67 Minn. 329, 69 N.W. 1091 (1897); Bragg v. Morrill, 49 Vt. *45 (1876) (latent defect); Canada: Robertson v. Norton, 44 New Bruns. 49 (1916), *new trial granted*, [1916] 30 D.L.R. 369 *see also*: BENJAMIN, SALES 631 (8th ed. 1950); Burdick, *Sales of Goods Statutes In New York*, 13 COLUM. L. REV. 389, 397 (1913).

merchantability requirement that the goods must have been purchased by description. Through the latter half of the nineteenth century, as the importance of the intermediate dealer's position increased, this restriction on the implied warranty gradually diminished. By the close of the nineteenth century, Chalmers, and later Williston, included the dealer as well as manufacturer within the scope of this warranty.

There were also several less effective attempts to restrict this implied warranty during the nineteenth century. Several states imposed the requirement that the manufacturer must specifically assume the risk of satisfying the purchaser as to the item's fitness for particular purpose. Promissory oral statements inducing reliance and consummation of the sale did not establish that the seller undertook the risk of implied warranty liability.[64] In North Carolina an early decision insisted upon additional consideration for the implied warranty before it would be effective.[65] In New York[66] there was an attempt to place the manufacturer's implied warranty obligation at the level of exercise of reasonable care with regard to raw materials and workmanship, as contrasted with the strict liability generally applied to implied sales warranties. The effect of this restriction would have been to eliminate this sales warranty by substituting a standard of tort negligence.

A considerable number of nineteenth century decisions denying the purchaser relief for breach of this warranty, referred to one or more of the above reasons as the basis for the ruling even though the facts clearly indicated that the seller was never aware of the purchaser's particular purpose.[67] The warranty should have been precluded on the basis of failure to establish this basic element. There were, of course, some nineteenth century decisions which

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[64] Savery Hotel Co. v. Under-Feed Stoker Co., 178 Fed. 806 (8th Cir. 1910); Lombard Co. v. Great Northern Paper Co., 101 Me. 114, 63 Atl. 555 (1906); Hight v. Bacon, 126 Mass. 10 (1878); Wilson v. Lawrence, 139 Mass. 318, 1 N.E. 278 (1885).

[65] Dickson & Co. v. Jordan, 33 N.C. 166, 168 (1850).

[66] Hoe v. Sanborn, 21 N.Y. 552 (1860); Bogert & Fink, *Business Practice Regarding Warranties In The Sale Of Goods*, 25 ILL. L. REV. 400, 410 (1930).

[67] Seller may not have known purchaser's particular purpose: Morris v. Bradley Fertilizer Co., 64 Fed. 55 (1894); Peoria Grape Sugar Co. v. Turney, 175 Ill. 631, 51 N.E. 587 (1898); Philbrick v. Kendall, 111 Me. 198, 88 Atl. 540 (1913); Rice v. Forsyth, 41 Md. 389 (1875); Walker v. Pue, 57 Md. 155 (1881); Raisin & Co. v. Conley, 58 Md. 59 (1882); Goulds v. Brophy, 42 Minn. 109, 43 N.W. 834 (1889); Ivans v. Laury, 67 N.J.L. 153, 50 Atl. 355 (1901); Port Carbon Iron Co. v. Groves, 68 Pa. 149 (1871); Ober v. Blalock, 40 S.C. 31, 18 S.E. 264 (1893); La Crosse Plow Co. v. Helgeson, 127 Wis. 622, 106 N.W. 1094 (1906).

justifiably denied relief to the purchaser because the facts failed to establish reliance upon the skill or judgment of the seller. The leading examples involve fact situations in which the purchaser inspected before purchasing,[68] selected the item desired,[69] furnished detailed manufacturing specifications,[70] or realized together with the seller that either the process of manufacture or the use of the item itself for the specialized purpose was still in a stage of experiment.[71]

Twentieth Century Development

The development of the implied warranty of fitness for particular purpose during the present century was affected by two major factors: first, the judicial merger of particular and general purpose; and second, the shift in emphasis – primarily within the trade name cases – from the nineteenth century absolute restriction based upon category, to stress, upon the purchaser's factual reliance.

Particular Purpose

During the nineteenth century development of this implied sales warranty, the word *particular* denoted a *special* rather than general, or common, purpose for which the goods were used. When the English decisions developed this implied warranty, it was rarely necessary to consider whether knowledge of the buyer's purpose was implied to the seller, as the purpose of purchase was specialized and

[68] Colchard Machinery Co. v. Loy-Wilson Foundry & Machinery Co., 131 Mo. App. 540, 110 S.W. 630 (1908) (second hand item); England: Fitzgerald v. Iveson, I.F. & F. 410, 175 Eng. Rep. 786 (N.P. 1858): *cf.* Bluett v. Osborne, 1 Stark 384, 171 Eng. Rep. 504 (K.B. 1817) (merchantability of bowsprit).

[69] Sampson v. Marra, 343 Ill. App. 245, 98 N.E.2d 523 (1951); Erie City Iron Works v. Miller Supply Co., 68 W. Va. 519, 70 S.E. 125 (1911); England: Brown v. Edgington, 2 Man. & G. 279, 133 Eng. Rep. 751 (C.P. 1841) (Erskine, J., obiter dictum); Canada: Smith Sheet Metal Works Ltd. v. Bingham & Hobbs Equipment Co. [1949] 4 D.L.R. 363; Mechem, *Implied Warranties In The Sale Of Goods By Trade Name,* 11 MINN. L. REV. 485, 499 (1927).

[70] Grand Avenue Hotel Co. v. Wharton, 79 Fed. 43 (8th Cir. 1897); Century Electric Co. v. Detroit Copper & B. R. Mills, 264 Fed. 49 (8th Cir. 1920); American Player Piano Co. v. American Pneumatic Action Co., 172 Iowa 139, 154 N.W. 389 (1915); Mianus Motor Works v. Vollans, 83 Wash. 680, 145 Pac. 997 (1915); J.I. Case Plow Works v. Niles & Scott Co., 90 Wis. 590, 63 N.W. 1013 (1895).

[71] Stiefel Feed Co. v. Aerovent Fan Co., 148 F. Supp. 894 (S.D. Ohio 1956), *aff'd* 238 F.2d 859 (6th Cir. 1956); International Filter Co. v. Hartman, 141 Ill. App. 239 (1908); McGraw v. Fletcher, 35 Mich. 104 (1876); Blue Springs Mining Co. v. McIlvien, 97 Tenn. 225, 36 S.W. 1094 (1896); Canada: McNeill v. Motor Service Co. [1929] 1 D.L.R. 594.

Animals purchased for breeding purposes: Hutchings v. Cole, 42 Ill. App. 261 (1891) (warranty enforced); Merchants' & Mechanics' Savings' Bank v. Fraze, 9 Ind. App. 161, 36 N.E. 378 (1894) (warranty enforced); *contra:* Scott v. Renick, 40 Ky. 63 (1840).

necessarily had to be brought to the seller's attention. It could not be indirectly inferred. The coach builder contracted to construct and sell a pole suitable for a specific carriage; the Glasgow distillery knew that the liquor was desired for the specific purpose of use for barter with African natives.[72] Lime, in the United States, was purchased for the specific purpose of making plaster, Swedish iron for the manufacture of bolts, felt cloth for the construction of overcoats.[73]

Prior to the twentieth century, especially in the United States, the word *particular* began to disappear from legal opinions involving this implied warranty. Judicial exposition was in terms of fitness for purpose or at times simply an implied warranty of fitness. Courts began to include within the scope of the warranty, issues of fitness of whiskey barrels to contain whiskey, potato diggers to dig potatoes and pumps for pumping water.[74] Other American decisions continued to weigh particular purpose, but no longer in terms of the purchaser's intent. Courts now considered the particular purpose for which the item was designed[75] or whether it was suitable for the purpose for which such items are commonly manufactured.[76] Functional purpose of design became paramount and the seller's knowledge of the particular (common) purpose was easily inferred.

When the general purpose also became the particular one, personal injury litigation was encompassed within the warranty, thereby tremendously expanding the fact coverage of the implied warranty of fitness for particular purpose. The implied warranty that originated at a time when there was a judicial desire to impose higher commercial standards on merchantile trade and commerce, and had been adapted during the latter half of the nineteenth century to manufactured products in an age of industry, now expanded to include the personal injury field of product liability. These personal injury decisions originated in the early twentieth

[72] Randall v. Newson, 2 Q.B.D. 102 (1877) (carriage pole); Macfarlane v. Taylor, L.R. 1 Sc. & Div. App. 245 (1868) (liquor for barter).

[73] Omaha Coal, Coke & Lime Co. v. Fay, 37 Neb. 68, 55 N.W. 211 (1893); Bierman v. City Mills Co., 151 N.Y. 482, 45 N.E. 856 (1897); Dayton v. Hooglund, 39 Ohio St. 671 (1884).

[74] Hallock v. Cutler, 71 Ill. App. 471 (1897) (potato digger); Poland v. Miller, 95 Ind. 387 (1884) (whisky barrel); Kaull v. Blacker, 107 Kan. 578, 193 Pac. 182 (1920) (flour for bread); Getty v. Rountree, 2 Pin. 379 (Wis. 1850).

[75] Hallock v. Cutler, 71 Ill. App. 471, 473 (1897).

[76] Poland v. Miller, 95 Ind. 387, 391 (1884); Lugg v. Montgomery Ward & Co., 3 App. Div.2d 952, 162 N.Y.S.2d 369 (3d Dep't 1957) (recent decision still considering the implied warranty in terms of reasonable fitness for the purpose for which it was sold). See also: Parsons Co. v. Mallinger, 122 Iowa 703, 98 N.W. 580 (1904).

century in England with *Priest v. Last*,[77] wherein a defective hot water bottle was classified by the court as having been purchased for the particular purpose of holding hot water.[78] Today, innumerable instances of internal injury from food and drink,[79] and external injury from the purchase of defective products[80] are all classified as purchases made for particular purpose. Confusion has resulted from the insistence of some courts that the term *particular* within section 15 (1) of the Uniform Sales Act is restricted in scope,[81] while this factor is ignored in many other decisions. Pianos, washing machines, refrigerators and automobiles purchased only for the generally accepted use are typical of recent items included under U. S. A. 15 (1).[82]

The joining of the implied warranties of fitness for particular purpose and merchantable quality have also resulted in confusion when the goods purchased carry a trade name. Jurisdictions which do not extend the trade name exclusion to the warranty of merchant-

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[77] [1903] 2 K.B. 148 (C.A.), applying UNIFORM SALE OF GOODS ACT § 14(1).

[78] *Id.* at 155.

[79] Note the consistency of Massachusetts decisions: Ward v. Great Atlantic & Pacific Tea Co., 231 Mass. 90, 120 N.E. 225 (1918) (pebble in canned food); Weiner v. D.A. Schulte, Inc., 275 Mass. 379, 176 N.E. 114 (1931) (chewing tobacco); Botti v. Venice Grocery Co., 309 Mass. 450, 35 N.E.2d 491 (1941) (macaroni, U.S.A. § 15(2) involved). Rhodes v. Libby, 133 Ore. 128, 288 Pac. 207 (1930) (sweet relish compound as ingredient used by purchaser in making sandwich spreads).

[80] Pabellon v. Grace Line, 191 F.2d 169 (2d Cir. 1951) (cleaning compound exploded); Frank R. Jelleff, Inc. v. Braden, 233 F.2d 671 (D.C. Cir. 1956) (coat ignited); Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A.2d 650 (1939) (dress shields); Poplar v. Hochschild, Kohn & Co., 180 Md. 389, 24 A.2d 783 (1942) (face powder). England: Preist v. Last, [1903] 2 K.B. 148 (C.A.) (hot water bottle); Wilson v. Rickett, Cockrell & Co., [1954] 1 All E.R. 868 (C.A.) (coal exploded). Canada: Buckley v. Lever Bros. Ltd., [1953] Ont. 704 (clothespin shattered injuring purchaser's eye). Australia: Grant v. Australian Knitting Mills Ltd., 54 Commw. L.R.49 (Austr. 1935) (garment).

[81] Purchaser's purpose must be special as contrasted with general: Dunbar Bros. Co. v. Consolidated Iron-Steel Mfg. Co., 23 F.2d 416 (2d Cir. 1928) *cert. denied*, 277 U.S. 599 (1928); Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922); Sperry Flour Co. v. De Moss, 141 Ore. 440, 18 P.2d 242 (1933).

[82] Western Cabinet & Fixture Mfg. Co. v. Davis, 121 Ark. 370, 181 S.W. 273 (1915) (soda fountain); United States Credit Bureau, Inc. v. Powell, 121 Cal. App. 2d 870, 264 P.2d 229 (1953); Snelling v. Dine, 270 Mass. 501, 170 N.E. 403 (1930) (refrigerators); G.B. Shearer Co. v. Kakoulis, 144 N.Y. Supp. 1077 (1913) (piano); Marino v. Maytag Atlantic Co., 141 N.Y.S. 2d 432 (1955) (washing machine); Dyer & Bro. v. Bauer, 48 N.D. 396, 184 N.W. 809 (1921) (fotoplayer for theater); Cretors v. Troyer, 63 N.D. 231, 247 N.W. 558 (1933) (pop corn machine for pool hall use); Knapp v. Willys-Ardmore, Inc., 174 Pa. Super. 90, 100 A.2d 105 (1953) (station wagon); Kohn v. Ball, 36 Tenn. App. 281, 254 S.W.2d 755 (1952) (automobile).

ability have denied recovery for breach of U. S. A. 15 (1) when the trade named item was purchased only for general use.[83] Both text[84] and legal journal commentators[85] have expressed approval of the broad definition of the word *particular,* although uncertainty has resulted from a division of judicial opinion, especially in the attempt to reconcile U. S. A. 15 (4) with U. S. A. 15 (1).

Several factors have combined to produce an atmosphere favorable to the judicial broadening of the definition of the word *particular* within the implied warranty of fitness for particular purpose. Throughout the nineteenth century, originating with Lord Ellenborough's decision in *Gardner v. Gray,*[86] the implied warranty of

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[83] See notes 104, 105, *infra.*

[84] BENJAMIN, SALES 630 (8th ed. 1950): "A 'particular purpose' is not some purpose necessarily distinct from a general purpose; for example, the general purpose for which all food is bought is to be eaten, and this would also be the particular purpose in any specific instance. A particular purpose is, in fact, the purpose, expressly or impliedly communicated to the seller, for which the buyer buys the goods . . . ." 1 WILLISTON, SALES §248 at 660-61 (rev. ed. 1948): "It would have been unfortunate if the section had been narrowly construed, and had it not already received a liberal construction in England, a construction which it could be assumed American courts would follow, it would have been undesirable to copy the English legislation in this matter."

[85] Gose, *Implied Warranty of Quality Under the Uniform Sales Act,* 4 WASH. L. REV. 15, 17 (1929): "Happily, the words 'particular purpose' in this subsection have received a broader construction than suggested above, both from the English and the American courts." Overstreet, *Some Aspects of Implied Warranties in the Supreme Court of Missouri,* 10 MO. L. REV. 147 (1945); Comment, *Implied Warranty of Goods Sold Under Trade Name,* 18 N.Y.U.L.Q. REV. 271, 275 (1941). Personal view not expressed. Brown, *Implied Warranties of Quality in Sales of Articles Under Patent or Trade Names,* 2 WIS. L. REV. 385 (1924); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases,* 57 COLUM. L. REV. 653 (1957); Comment, *Implied Warranties of Quality in Texas Sales,* 32 TEXAS L. REV. 557 (1954).

[86] 4 Camp. 144, 171 Eng. Rep. 46 (N.P. 1815): Note the twentieth century change in definition of the term "sale by description"; Wren v. Holt, [1903] 1 K.B. 610, 615, Vaughan Williams L.J., ". . . I do not think, taking the generally accepted view of lawyers as to the meaning to be attached to the words 'by description' as applied to a sale, that a sale of goods over a counter, where the seller deals in the description of goods sold, is a sale of goods by description within this sub-section." Morelli v. Fitch & Gibbons, [1928] 2 K.B. 636, 643, Branson J. "I confess that the meaning of the learned Lord Justice [in Wren v. Holt] is not very clear to my mind, and were it not for the fact that in that case the sale, which the Court held was in substance a sale over the counter of Holden's beer, was held to be a sale by description, I think one might have to consider further the question of the meaning of that passage." Grant v. Australian Knitting Mills Ltd., [1936] A.C. 85, 100 (P.C.) "It may also be pointed out that 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., woollen under-garments, a hot-water bottle, a secondhand reaping machine, to select a few obvious illustrations."

United States decisions narrowly construing the word "description" within U.S.A. § 15 (2): Torpey v. Red Owl Stores, 228 F.2d 117 (8th Cir. 1956); Phares v. Sandia Lumber Co., 62 N.M. 90, 305 P.2d 367 (1956);

merchantability was limited to sale by description. This restriction was restated at mid-century in *Jones v. Just*,[87] and incorporated by Chalmers into the Sale of Goods Act. Specific goods available for inspection were excluded from coverage even though the defect was latent. This view corresponded with the eighteenth century judicial attitude of *caveat emptor*,[88] but as legal opinion began to change alternative solutions were available. Either the definition of the word *description* within the implied warranty of merchantability must be extended to include present sales when the defect was latent, or the word *particular* within the implied warranty of fitness for particular purpose must be expanded. Both alternatives have been adopted. The sounder approach, although a contrary view has been championed,[89] is to expand the definition of the word *description* including general purpose within the implied warranty of merchantability. Recent decisions have adopted this view both in the United States and England.[90]

American S.F. Co. v. Medford G. Co., 128 Ore. 83, 262 Pac. 939 (1928); Williams v. Kress & Co., 48 Wash. 2d 88, 291 P.2d 662 (1955); See also: 1 U.L.A. § 15, n. 145 and 1956 Supp.; Comment, *Sale by Description—The Warranty of Merchantability*, 5 DE PAUL L. REV. 273 (1956).

[87] L.R. 3 Q.B. *197 (1868).

[88] Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931); Le Viness, *Caveat Emptor Versus Caveat Venditor*, 7 MD. L. REV. 177 (1943); Bogert & Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 Ill. L. REV. 400 (1930); Waite, *Retail Responsibility and Judicial Law Making*, 34 MICH. L. REV. 494 (1936); Rabel, *The Nature of Warranty of Quality*, 24 TUL. L. REV. 273 (1950).

[89] Gose, *Implied Warranty of Quality Under the Uniform Sales Act*, 4 WASH. L. REV. 15, 17 (1929), "If they [the words 'particular purpose'] are to be so strictly construed as to mean some purpose of the buyer, different from the ordinary or general use of the article, the scope of the act is greatly restricted. This subsection is the only one under which it is possible to find a warranty of a specific article. Consequently, if strict interpretation be given to the words quoted, those who purchase such articles as automobiles, clothing or food merely for purposes for which such goods are ordinarily used will be without remedy should the goods prove defective. Such buyers would be compelled to further particularize their intended purpose in order to raise any warranty, and the warranty so raised would necessarily be one of limited scope. In brief, such a view would entirely exclude the common law warranty of merchantable quality in the sale of a *specific* article."

Brown, *Implied Warranties of Quality in Sales of Articles Under Patent or Trade Names*, 2 WIS. L. REV. 385, 406 (1924), ". . . it is necessary, because of the failure of the Act to provide for any warranty of merchantability except in cases of sales by description, to bring under warranties of fitness for a particular purpose all cases of warranty of merchantability, which are not sales by description."

1 WILLISTON, SALES § 248 at 660 (rev. ed. 1948) "In regard to subsection (1) some difficulty of construction might have existed. This is the only subsection under which a warranty of a specific chattel can be implied . . . ."

[90] Today the goods may be present as long as the defect is not apparent: Thornett & Fehr v. Beers & Sons, [1919] 1 K.B. 486, 488; Medway Oil & Storage Co. v. Silica Gel Corp., (1928) 33 Com. Cas. 195 (H.L.); 1 CHALMERS, SALE OF GOODS 54 (12th ed. 1945); The second draft of the

Vagueness in the definition of the term *merchantability* and ease in including the fact situation within the broad definition of particular purpose have undoubtedly influenced the attorney both in the pleading and proof of an implied warranty of fitness for particular purpose.[91] This fact is often reflected in appellate level opinions, where emphasis is placed on the application of the implied warranty of fitness for particular purpose, and the implied warranty of merchantability receives only secondary attention. This tendency is not limited to the implied warranties in the sale of goods. Breach of implied warranty within bailment for hire is discussed in terms of fitness for purpose rather than quality. Decisions are not based upon a standard of "bailability."[92]

Trade Name Restriction

The most important twentieth century limitation upon the implied sales warranty of fitness for particular purpose is the trade name of goods, as codified in the proviso of section 14 (1) of the Sale of Goods Act and section 15 (4) of the Uniform Sales Act.

Uniform Revised Sales Act in 1941 proposed that the words "by description" be deleted from the implied warranty of merchantability, REVISED UNIFORM SALES ACT § 112 (2d draft 1941); note, 11 RUTGERS L REV. 775 (1957); Stoljar, *Conditions, Warranties and Descriptions of Quality in Sale of Goods.* Part II, 16 MODERN L. REV. 174, 182 (1953), "With so free a manipulation of 'particular purpose', the practical result of these decisions is that a seller is now under a duty to supply merchantable goods, whether the goods are specific or not or whether the buyer has seen them or not. In other words, the whole distinction between sale by description and sale of specific goods, as far as seller's liability in damages for defective quality is concerned, and with it also any significant distinction between subsections (1) and (2) of section 14 of the Act, have completely broken down."

[91] Comment, *Implied Warranties of Quality in Texas Sales,* 32 TEXAS L. REV. 557, 560 (1954), "The lack of any definition of the term 'merchantable' led to more noticeable consequences. The Texas courts, while continuing to find or impose warranties, began to speak in terms of 'fitness for the purpose' rather than 'merchantable quality', thus producing an apparent confusion which still exists." Texas decisions merging implied warranties of fitness for particular purpose and merchantable quality: Houston Cotton Oil Co. v. Trammell, 72 S.W. 244, 247 (Tex. Civ. App. 1903), *reversed on other grounds,* 96 Tex. 598, 74 S.W. 899 (1903) (meal for cattle feed); Taylor Cotton-Seed Oil & Gin Co. v. Pumphrey, 32 S.W. 225 (Tex. Civ. App. 1895). Texas decisions have also classified particular purpose as the purpose for which the goods were manufactured; A.S. Cameron Steam Pump Works v. Lubbock Light & Ice Co., 167 S.W. 256 (Tex. Civ. App. 1914).

[92] Farnsworth, *Implied Warranties of Quality in Non-Sales Cases,* 57 COLUM. L. REV. 653, 657 (1957), "Even where the chattel is unfit for its common use, and the bailor is in the business of supplying such chattels, the tendency is to talk in terms of whether it was fit for the particular purpose and not of whether it conformed to a standard of 'bailability' analogous to that of merchantability." The obligation imposed by the implied warranty upon the bailor, in bailments for hire, is the exercise of reasonable care rather than strict liability. Mc Neal v. Greenberg, 40 Cal. 2d 740, 255 P. 2d. 810 (1953). A similar standard was at one time applied in sale of goods cases in New York; Hoe v. Sanborn, 21 N.Y. 552 (1860).

Sir Mackenzie Chalmers, after successful passage by Parliament of his Bill of Exchange Act in 1882, turned to the drafting of a statement of exisiting English law of sales.[93] The initial draft was completed in 1888 and with the aid of Lord Herschell it was steered through the House of Lords, after rather detailed consideration between 1889 and 1892. During 1893 it was considered and passed by the House of Commons.[94] In discussing section 14 of the Act, Chalmers pointed out that "This section was again and again considered and amended in Committee, and finally settled by the Law Lords in its present form."[95] The Parliamentary debates reveal, however, that there was criticism during special committee hearings in the House of Commons of the speed with which the committee was forced to consider this important bill.[96]

The proviso clause grafted to section 14 (1) was undoubtdly an attempt to rephrase the nineteenth century limitation of "know, definite and described" goods.[97] Chalmers' purpose was merely to restate, not change, existing English common law of sales. Unfortunately, the change in language has resulted in twentieth century judicial confusion and has drawn the tart comment that "it covers not one-tenth of what logic demands".[98]

Williston split the proviso clause away from the implied warranty of fitness for particular purpose and adopted the trade name wording of the English Act, thereby increasing the importance of this restriction and giving it the dignity of a separate sub-section. Although the term *particular* is used only in subsections one and four, this separation has induced some American courts to extend the trade name limitation to merchantability. Early Uniform Sales Act decisions in Illinois,[99] New York[100] and Wisconsin [101] erroneously over-extended the

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[93] Chalmers, *Codification of Mercantile Law*, 19 L.Q. REV. 10 (1903).

[94] BENJAMIN PRINCIPLES OF SALES app. 241 (1896 ed.).

[95] CHALMERS, SALE OF GOODS 59 (12th ed. 1945).

[96] 16 PARL. DEB. (4th ser.) 1054 (1893), "Mr. TOMLINSON: 'Then so far as the English law is concerned it is simply a codification.' "; "Sir. C. RUSSELL: 'Practically so' ": "Mr. BARTLEY said he thought attention ought to be called to the fact that only a few minutes after midnight could be given to this Bill, which enormously affected the interests of the people . . ."

See also: Comment, *Implied Warranties in the Sale of Goods by Trade Name*, 6 ILL. L.Q. 80, 81 (1923).

[97] 1 WILLISTON, SALES § 236a at 614 (rev. ed 1948). U.S.A. § 15(4) classified as merely a restatement of the rule in regard to known, described and definite articles.

[98] LLEWELLYN, *On Warranty of Quality and Society*, Part II, 37 COLUM. L. REV. 341, 364 (1937).

[99] Santa Rosa & Vallejo Tan. Co. v. C. Kronauer & Co., 228 Ill. App. 236 (1923).

[100] Empire Cream Separator Co. v. Quinn, 184 App. Div. 302, 171 N.Y. Supp. 413 (4th Dep't. 1918).

[101] Ohio Electric Co. v. Wisconsin-Minnesota L. & P. Co., 161 Wis. 632,

trade name limitation. Unfortunately, a few recent decisions continue this misapplication.[102]

Although many American courts today interpret the word *particular* within U. S. A. 15 (1) to include general as well as special purpose, some of these jurisdictions limit the definition of the same word as included in section 15 (4).[103] The apparent reason for giving the same term different connotations is to circumvent the necessity for applying the trade name restriction to those cases under U. S. A. 15 (1)involving purchases for general use. Rather than properly limiting U. S. A. 15 (1) to special purpose, confusion is compounded by offering dual definitions for the word *particular*.[104]

During the nineteenth century the "known, definite and described" as well as the sale by dealer limitations were imposed as absolute restrictions based upon the nature of the goods sold or contractual relationship. The issue was one of legal right to rely rather than factual reliance. The latter became an important consideration only in those cases excluded from the area of one of the legal restrictions. This emphasis began to alter before the present century. Sale by dealer restriction was eliminated and strict interpretation of the parol evidence rule began to be relaxed as emphasis was placed on the fact that the implied warranty of fitness for particular purpose was imposed by law rather than mutual agreement. Only within the area of trade name sales did nineteenth century *caveat emptor* philosophy persist.[105] Section 15 (4) of the Uniform

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155 N.W. 112 (1915); Northwestern Blaugas Co. v. Guild, 169 Wis. 98, 171 N.W. 662 (1919).

[102] Craig v. Williams, 97 F. Supp. 725 (D.N.J. 1951); Torpey v. Red Owl Stores, 129 F. Supp. 404, 406 (D. Minn. 1955), *aff'd* 228 F.2d 117 (8th Cir. 1955); Phares v. Sandia Lumber Co., 62 N.M. 90, 305 P.2d 367 1956) (U.S.A. not adopted).

[103] Giant Mfg. Co. v. Yates-American Mach. Co., 111 F.2d 360, 365 (8th Cir. 1940); Mars v. Herman, 37 A.2d 351, 354 (D.C. 1944); 1 U.L.A. 15 (233).

[104] The sale of heating equipment is typical. May Oil Burner Corp. v. Munger, 159 Md. 605, 618, 152 Atl. 352, 357 (1930,: ". . .[T]he 'trade name,' referred to in subsection 4, is the name given to a particular article by its producer . . . and therefore, *by force of the act*, there was no implied warranty of its fitness for any particular purpose." (emphasis added); Bareham & McFarland v. Kane, 228 App. Div. 396, 402, 240 N.Y. Supp. 123, 131 (4th Dep't 1930), "The *contract* . . . calls for a 'No. 52 Therm-Oil Heating Equipment, manufactured by Kellogg Mfg. Co.' This constitutes a sale of a specific article under a trade name . . . ." (emphasis added) (purchaser's reliance not considered); Ellen v. Heacock, 247 App. Div. 476, 286 N.Y. Supp. 740 (4th Dep't 1936) (Delco oil burner for home); *contra;* Implied warranty enforced: Iron Fireman Coal Stoker Co. v. Brown, 182 Minn. 399, 234 N.W. 685 (1931); Carver v. Denn, 117 Utah 180, 214 P.2d 118 (1950) (Palmer Evaporative Cooler).

[105] Boston Consolidated Gas Co. v. Folsom, 237 Mass. 565, 130 N.E. 197 (1921); Quemahoning Coal Co. v. Sanitary Earthenware Specialty Co., 88

Sales Act provided that there must be a sale of a specific article under its patent or other trade name. Some courts construed this language to include all sales in which the purchase contract designated the goods by trade name. The purchaser's factual reliance was de-emphasized. This was certain to produce a division of judicial opinion as there is not any automatic inconsistency between the warranty and the contractual description.[106] This is true whether the facts involve nineteenth century "XX pipe,"[107] improperly classified in terms of

N.J.L. 174, 95 Atl. 986 (1915); Toledo Cooker Co. v. First National Bank, 153 N.E. 856 (Ohio App. 1926); Tinius Olsen Testing Machine Co. v. Wolf Co., 297 Pa. 153, 146 Atl. 541 (1929); Madison-Kipp Corp. v. Price Battery Corp., 311 Pa. 22, 166 Atl. 377 (1933); Powell Co. v. Cowart, 37 Ga. App. 215, 139 S.E. 585 (1927) (U.S.A. not adopted); American Electric Telephone Co. v. Emporia Telephone Co., 83 Kan. 64, 109 Pac. 780 (1910) (U.S.A. not adopted).

Purchaser's reliance as well as trade name factor considered in refusing relief under U.S.A. § 15(1): Santa Rosa-Vallejo Tan. Co. v. C. Kronauer & Co., 288 Ill. App. 236 (1923); Hubbard Fertilizer Co. v. American Trona Corp., 142 Md. 246, 120 Atl. 522 (1923); Demos Const. Co. v. Service Supply Corp., 153 Pa. Super. 623, 34 A.2d 828 (1943) (bailment for hire rather than sale). For discussion of implied bailment warranties see: Farnsworth, *Implied Warranties Of Quality In Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); England: Wilson v. Rickett, Cockerell & Co., [1954] 1 All E.R. 868 (c.n.) (recovery allowed under implied warranty of merchantability).

[106] U.S.A. § 15(1) precluded on basis of U.S.A. § 15(4): Pabellon v. Grace Line, 191 F.2d 169 (2d Cir. 1951); Giant Mfg. Co. v. Yates-American Mach. Co., 111 F.2d 360 (8th Cir. 1940); Davenport Ladder Co. v. Edward Hines Lumber Co., 43 F.2d 63 (8th Cir. 1930); Barrett Co. v. Panther Rubber Mfg. Co., 24 F.2d 329 (1st Cir. 1928); Drumar M. Co. v. Morris Ravine M. Co., 33 Cal. App. 2d 492, 92 P.2d 424 (1939); Rowe Mfg. Co. v. Curtis-Straub Co., 223 Iowa 858, 273 N.W. 895 (1937); Miller v. Economy Co., 228 Iowa 626, 293 N.W. 4 (1940); Halterman v. Louisville Bridge & Iron Co., 254 S.W.2d 493 (Ky. Ct. App. 1953); National Equipment Corp. v. Moore, 189 Minn. 632, 250 N.W. 677 (1933); Federal Motor Truck Sales Corp. v. Shanus, 190 Minn. 5, 250 N.W. 713 (1933); E. Edelman & Co. v. Queen Stove Works, Inc., 205 Minn. 7, 284 N.W. 838 (1939), noted 25 VA. L. REV. 990 (1939); Sachter v. Gulf Refining Co., 203 N.Y. Supp. 769 (Sup. Ct. 1923); E.I. DuPont De Nemours & Co. v. Theater Screen Corp., 12 N.Y.S.2d 338 (1938); Alcock v. Wnuk, 98 N.Y.S.2d 964 (1950); Hobart Mfg. Co. v. Rodziewicz, 125 Pa. Super. 240, 189 Atl. 580 (1937); Green Mtn. Mushroom v. Brown, 117 Vt. 509, 95 A.2d 679 (1953); Universal Motor Co. v. Snow, 149 Va. 690, 140 S.E. 653 (1927); Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 Pac. 1050 (1928); Webster v. Romano Engineering Corp., 178 Wash. 118, 34 P.2d 428 (1934); Hurd-Pohlmann Co. v. Sugita, 32 Hawaii 577 (1932).

History and development of the trade name: 1 NIMS, UNFAIR COMPETITION & TRADE MARKS § 185 at 509-14 (4th ed. 1947); SCHECHTER, HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE MARKS (1925); Isaacs, *Traffic In Trade-Symbols*, 44 HARV. L. REV. 1210 (1931); Steiner, *Trade Names*, 20 YALE L.J. 44 (1910); Comment, *Sales: Warranty Of Goods Sold Under Patent Or Trade Name*, 10 CORNELL L.Q. 521 (1925).

[107] Dounce v. Dow, 64 N.Y. 411 (1876); Twentieth century decisions precluding the application of U.S.A. § 15(1) on basis of U.S.A. 15(4) in which either seller never knew purchaser's particular purpose or where general and particular purpose correspond: Ralston Purina Co. v. Novak, 111 F.2d 631 (8th Cir. 1940); Stoehrer & Pratt Dodgem Corp. v. Greenburg, 250 Mass. 550,

"known, defined and described" goods, or twentieth century trade named products automatically included within the provisions of Uniform Sales Act section 15 (4). It is illogical to impose the trade name restriction as a matter of course on the assumption that there is an automatic inconsistency between the purchase of trade name products and the implied warranty of fitness for particular purpose. This was apparent twenty years ago to Llewellyn[108] and Rabel.[109] Unfortunately, far too many appellate decisions, even today, continue to interpret the "patent or other trade name" language within U. S. A. 15 (4) as precluding U. S. A. 15 (1) liability solely because the sales contract described the property in terms of trade name.[110]

Several recent attempts have been made, commencing with the proposed Uniform Revised Sales Act and continuing through the current draft of the Uniform Commercial Code, to eliminate present day difficulties within the implied sales warranty of fitness for particular purpose.

UNIFORM COMMERCIAL CODE

Section 2-315 of the proposed Uniform Commercial Code[111] will produce several important changes in the law of implied warranties of fitness for particular purpose, as evidenced today by section 15 (1) of the Uniform Sales Act. These proposed changes, however, are not

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146 N.E. 34 (1925); Acorn Silk Co. v. Herscovitz, 250 Mass. 553, 146 N.E. 35 (1925); Empire Cream Separator Co. v. Quinn, 184 App. Div. 302, 171 N.Y. Supp. 413 (4th Dep't 1918); Polly v. Arony, 172 N.Y. Supp. 305 (Sup. Ct., App. T. 1918) *aff'd*, 175 N.Y. Supp. 917 (Sup. Ct., App. T. 1919); Ohio E. Co. v. Wisconsin-Minnesota L. & P. Co., 161 Wis 632, 155 N.W. 112 (1915); Russell Grader Mfg. Co. v. Budden, 197 Wis. 615, 222 N.W. 788 (1929).

[108] Llewellyn, *On Warranty Of Quality, and Society-Part II*, 37 COLUM. L. REV. 341, 363 (1937), "To lay down a fixed rule that one line of description excludes another line which is not inconsistent is to boggle the lawyer's job. That is Exchequer stuff. Yet it is stuff repeated, blindly, by as able an American judge as the elder Sanborn, and by every writer I have read who deals with Section 15 (4)."

[109] *Ibid.* "The question just stated, when painfully explained to a German scholar (Rabel) elicited a grunt and a groan. He (trained in general theory) had difficulty seeing why there was a question. He had thought we would not have Section 15 (1) unless we had meant by it something which needed saying."

[110] See notes 104-07 *supra;* the influence of the Uniform Sale of Goods Act § 14 (1), deemphasizing buyer's reliance when a trade name is involved, is apparent in Uniform Sales Act decisions. Matteson v. Lagace, 36 R.I. 223, 226, 89 Atl. 713, 714 (1914), "Under the English act it would be clear that although the respondent here had contracted for the boiler in question to be used for a particular purpose made known to the petitioner, and had contracted *in reliance on the skill and judgment of the petitioner,* still there would be no implied warranty of the fitness of the boiler for the particular purpose for which it was to be installed." (emphasis added).

[111] UNIFORM COMMERCIAL CODE § 2-315, hereinafter U.C.C. § 2-315.

of recent date, as they originated in the first draft of the old Uniform Revised Sales Act and have been retained with only minor changes[112] through each of the revisions of the proposed Code.

The greatest amount of written comment concerns the alteration in wording from ". . . where the buyer expressly or by implication makes known to the seller . . ." in section 15 (1) of the Uniform Sales Act, to "where the seller . . . has reason to know," as adopted by the proposed Code section.[113] The obligation of the purchaser to inform his seller of the particular purpose for which the goods are purchased is eliminated. It is doubtful that this shift in emphasis regarding the manner in which the seller acquires his information will produce any serious change in future decisions. In most situations in which the seller has not received direct information as to particular purpose, yet has reason to know the purpose, present decisions establish actual knowledge by inference.

The suggestion has been made that the language in the Code, ". . . reason to know any particular purpose," imposes upon the seller the duty to conduct an investigation when he is in possession, before or at the time of sale, of information which would reasonably lead him to believe that the buyer may be purchasing the goods for a particular purpose and relying upon the seller.[114] Neither the

[112] Only two words have been changed. Skill *and* judgment now reads skill *or* judgment, and the word *select* has been substituted for *designate*. The balance of U.C.C. § 2-315 is identical with UNIFORM REVISED SALES ACT § 39, Comment, *Warranties Of Kind And Quality Under The Uniform Revised Sales Act*, 57 YALE L.J. 1389, 1393-1395 (1948); U.C.C. § 2-315 (1957 official draft) now provides: "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."

[113] HAWKLAND, SALES AND BULK SALES UNDER THE UNIFORM COMMERCIAL CODE 43 (ALI 1955). "The major change in the warranties of quality effected by the U.C.C. is the elimination of the 'patent or other trade name' exception to the warranty of fitness for purpose."; Collins, *Warranties Of Sale Under the Uniform Commercial Code*, 42 IOWA L. REV. 63, 69-70 (1956); Goodwin, *How The Adoption Of The Uniform Code Would Affect The Law Of Sales In Oregon*, 30 ORE. L. REV. 193 231-32 (1951); *Symposium On The Proposed Uniform Commercial Code*, 17 ALBANY L. REV. 1, 29 (1953); Comment, *The Treatment Of Warranty Problems Arising From the Sale Of Goods Under the Uniform Commercial Code*, 30 N. DAK. L. REV. 232, 235-36 (1954); Comment, *The Uniform Commercial Code-The Effect Of Its Adoption In Tennessee*, 22 TENN. L. REV. 776, 797-98 (1953); CALIFORNIA ANNOTATIONS TO THE PROPOSED UNIFORM COMMERCIAL CODE 17 (Calif. Comm. On Uniform State Laws 1952); TEXAS LEGISLATIVE COUNCIL STAFF MONOGRAPH. ANALYSIS OF ARTICLE 2 OF UNIFORM COMMERCIAL CODE 94 (Texas Leg. Council 1953).

[114] Collins, *Warranties Of Sale Under The Uniform Commercial Code*, 42 IOWA L. REV. 63, 69-70 (1956). "The seller may have knowledge of facts which would reasonably require investigation of the buyer's intention. If this knowledge is acquired at or before the time of contracting, the seller will

language adopted by the Code section nor the related editorial comment indicated that this change is contemplated. To acquire investigations by the seller prior to sale to determine the buyer's particular purpose would result in a burdensome and almost impossible imposition upon the seller. The seller would never know when he possessed sufficient information to necessitate an investigation. Only when the seller is in possession of facts which in and of themselves produce sufficient reason for him to realize the purchaser's particular purpose will the language of the Code become applicable. Requiring investigation before sale to obtain knowledge of particular purpose would completely defeat the effectiveness of the implied warranty.

The proposed Code section also permits the purchaser to place his reliance on the seller's skill or judgment in *either* selecting *or* furnishing suitable goods for the particular purpose. Judicial decisions have already reached the position of permitting a division of reliance by the purchaser. It is no longer necessary, as it was during the nineteenth century, that total reliance be placed upon the seller's skill or judgment; substantial reliance by the purchaser is sufficient. Now the purchaser will also be afforded the opportunity, if the seller has reason to know of the purchaser's particular purpose, of substantially relying upon the seller *either* to select *or* to furnish suitable goods.[115]

It is the writer's opinion that, unfortunately, the most important proposed changes in the law of implied sales warranties of fitness for particular purpose are not included within the language of the Code provision itself, but are relegated to secondary importance within the Comments following section 2-315. First, the trade name restriction is at last deprived of its specialized importance and becomes merely a matter of factual evidence in establishing the issue of purchaser's reliance. With the adoption of this Code section, decisions will no longer turn on whether the purchase contract specified the goods by trade name.[116] Hawkland is probably correct in

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have to ascertain not only for what purpose the goods may be used, but also what particular purpose the buyer intends and whether the buyer is relying on the seller's skill and judgment."

[115] Comment, *Sales Warranties Under the Pennsylvania Uniform Commercial Code*, 15 U. PITT. L. REV. 331, 344 (1954), "[Under U.C.C. 2-315] a vendee can rely on his own skill in selecting a machine or goods and also rely on the vendor's skill in furnishing him a suitable machine or goods."

[116] For annotation of "trade name" cases see: Annot., 90 A.L.R. 410 (1934); Annot., 135 A.L.R. 1393 (1941). For earlier case annotations on the implied sales warranty of fitness for particular purpose see: Annot., 22 L.R.A. 187 (1893); 102 Am. St. Rep. 607, 619-25 (1905).

evaluating the trade name as the major change in the warranties of quality effected by the Uniform Commercial Code.[117]

The comment to section 2-315 also distinguishes, in clear language, between particular and ordinary purpose, and correctly places fitness for the ordinary purpose under the implied warranty of merchantability.[118] No longer will the two implied warranties be indirectly merged through an erroneous definition of the word *particular*. The adoption of section 2-315, and especially the comments thereto, should clarify the present confusion without overly extending the seller's obligations imposed by the implied warranty of fitness for particular purpose.

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[117] HAWKLAND, SALES AND BULK SALES UNDER THE UNIFORM COMMERCIAL CODE 44 (ALI 1955), "At worst, the rule has been used to deprive buyers of the protection of the warranty of fitness for the particular purpose in situations in which the seller has recommended goods identified by trade name, and the buyer, in reliance on the recommendation, has ordered the goods and identified them by the trade name."

TEXAS LEGISLATIVE COUNCIL STAFF MONOGRAPH, ANALYSIS OF ARTICLE 2 OF UNIFORM COMMERCIAL CODE 94 (Texas Leg. Council 1953), ". . . there has been no indication that the purchase of an article by its trade name negatived the warranty of fitness for purpose (in Texas decisions)."

[118] U.C.C. § 2-315, Comment 2 (1952 official draft): "A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which the goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains."