THE SILENT PROMISE SELDOM MADE: IMPLIED WARRANTY IN THE SALE OF SECOND-HAND GOODS

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In the sale of goods it may be said generally that a warranty is a statement or representation made by the seller, collaterally with, and as a part of, the contract of sale having reference to the character, quality, or title of the goods. By this representation the seller promises or undertakes to insure that certain facts are or shall be as he then represents them.[1] Sometimes a statement of assurance is the condition upon which an executory sale is made and is referred to as a warranty. Such an assurance is not a warranty in the strict legal sense as discussed herein. The latter meaning is sometimes used in insurance policies and other such contracts.[2] A true warranty may be either express or implied. It is a statement of something undertaken as a part of a contract, but collateral to its object.[3]

A warranty, even though it is a collateral contract, must form part of the transaction involving the sale. Generally, courts decline to construe as warranties affirmations or representations made by the seller after the agreement for the sale has taken place, and this is true even though made before the goods are delivered or before the price is paid.[4] A contract of warranty requires consideration.[5] The usual case is that a warranty is made at the time of the sale and is supported by the price paid or agreed to be paid. Where the warranty is made after the sale, it must be supported by new consideration. The consideration given, *i.e.*, the price paid, is exhausted by the transfer of the property in the goods without a warranty, and there is nothing to support the subsequent agreement to warrant, unless a new consideration is given.[6]

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1. Mitchell v. Rudasill, 332 S.W.2d 91 (Mo. App. 1960).
2. Norrington v. Wright, 115 U.S. 188, 203 (1885); Gay Oil Co. v. Roach, 93 Ark. 454, 125 S.W. 122 (1910).
3. Miller v. Germain Seed & Plant Co., 193 Cal. 62, 222 Pac. 817 (1924); Fairbank Canning Co. v. Metzger, 118 N.Y. 260, 23 N.E. 372 (1890); Hurley-Mason Co. v. Stebbins, Walker & Spinning, 79 Wash. 366, 140 Pac. 381 (1914). In support of the proposition that rules for determining warranties are the same whether the action arises in contract or in tort, see Colvin v. Superior Equip. Co., 96 Ariz. 113, 392 P.2d 778 (1964).
4. Stone v. Farmington Aviation Corp., 363 Mo. 803, 253 S.W.2d 810 (1953); Hexter v. Bast, 125 Pa. 52, 17 Atl. 252 (1889).
5. White v. Oakes, 88 Me. 367, 34 Atl. 175 (1896); Continental Supply Co. v. Stephenson, 94 W.Va. 313, 118 S.E. 537 (1923).
6. W. & S. Job & Co. v. Heidritter Lumber Co., 255 Fed. 311 (2d Cir. 1918); Pritchard v. Hall, 175 Miss. 588, 167 So. 629 (1936).

EXPRESS WARRANTIES

The seller will sometimes make an express representation about his goods, and the buyer will reasonably rely upon the statement as an inducement to the deal. Under these circumstances, the law imposes upon the seller the obligation to make such representations good. Generally, a warranty obligation arises in the case of express (or implied) representations only where the representations are justifiably relied upon as inducements.[7] Where the buyer's actual information is known by him to be equal or superior to the seller's information, reliance is not justified.[8] Likewise, the buyer is not justified in relying on matters constituting mere opinion of the seller as opposed to affirmative statements of fact. An interesting point might be raised if it were contended that the seller had made positive affirmation that something was his opinion, where in fact, the seller had no such opinion at all.

Express warranty is treated by the UNIFORM SALES ACT section 12, and by the UNIFORM COMMERCIAL CODE sections 2-312 and 2-313.

IMPLIED WARRANTIES

Generally an implied warranty arises under certain circumstances by operation of law, irrespective of any intention of the seller to create it.[9] It has been said that an implied warranty arises on a presumed intention of the parties. It originated for the purpose of promoting high standards in business and to discourage sharp dealings. It rests upon the principle that "honesty is the best policy," and it contemplates business transactions in which both parties may profit.[10]

Implied warranties are provided for by the UNIFORM SALES ACT in sections 13, 14, 15, and 16. They are imposed by operation of law, and, unless specifically negatived or waived, become a part of the contract of sale by virtue of the statute.[11]

The UNIFORM COMMERCIAL CODE provides for implied warranties of merchantability and expressly makes the serving of food and drink to be consumed on the premises or elsewhere a sale.[12] The Code also sets up an

7. Curby v. Mastembrook, 288 Mich. 676, 286 N.W. 123 (1939); Start v. Shell Oil Co., 202 Ore. 99, 273 P.2d 225 (1954); Nielson v. Hermansen, 109 Utah 180, 166 P.2d 536 (1946).
8. Seitz v. Brewer's Refrigerating Mach. Co., 141 U.S. 510 (1891); Roscher v. Band Box Cleaners, 90 Ohio App. 71, 103 N.E.2d 404 (1951); *cf.* Tinnell v. Commercial Carriers, Inc., 383 S.W.2d 914 (Ky. 1964).
9. Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Mitchell v. Rudasill, *supra* n. 1; Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958). *But see* Yanish v. Fernandez, 397 P.2d 881 (Colo. 1965), where the seller expressly disclaimed warranty in the written contract thereby preventing the buyer from being able to rely on the seller's representations.
10. Stanfield v. F. W. Woolworth Co., 143 Kan. 117, 53 P.2d 878 (1936); Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927); Deere & Webber Co. v. Moch, 71 N.D. 649, 3 N.W.2d 471 (1942). The law imputes implied warranty to the seller in commercial dealings whenever it is required by good faith, whether he actually intends to assume it or not. McClure v. Central Trust Co., 165 N.Y. 108, 58 N.E. 777 (1900).
11. See Deer & Webber Co. v. Moch, *supra* n. 10.
12. UNIFORM COMMERCIAL CODE §2-314.

implied warranty of fitness for a particular purpose[13] and provides for exclusion or modification of implied warranties by express language; and it quotes words which will be allowed to exclude or modify.[14]

GENERAL RULE

"Caveat emptor" was the general doctrine at common law in the sale of chattels. "Let the buyer beware" is generally applied where there is no express warranty and no fraud on the part of the seller inducing the sale.[15] Implied warranties are exceptions to this general rule expressed by the maxim "caveat emptor."[16] Exceptions to the general rule at common law are title and certain special matters of quality, such as merchantability, fitness for the purpose for which the goods are purchased, and the like, and then only within prescribed limitations. There is an increasing tendency on the part of the courts to extend the scope of implied warranty;[17] and the common-law rules regarding the implied warranties have been somewhat modified by the UNIFORM SALES ACT.[18]

Caveat emptor applies in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity and the seller is guilty of no fraud and is neither the manufacturer nor the grower of the article sold.[19] It appears that the caveat-emptor doctrine has become more and more limited in its application. It is gradually becoming "caveat venditor." This trend insists that it is the seller's duty to do what the ordinary prudent man would do under the circumstances. The doctrine of caveat emptor is further limited by reason that a warranty is made not only where made in so many words, as "I warrant," but also where, although explicit words are absent, the intent to warrant may be in-

13. UNIFORM COMMERCIAL CODE §2-315.
14. UNIFORM COMMERCIAL CODE §2-316.
15. Walton v. Petty, 107 Ga. App. 753, 131 S.E.2d 655 (1963); see also 46 AM. JUR. *Sales* §337 (1943).
16. CIT Corp. v. Shogran, 176 Okla. 388, 55 P.2d 956 (1936); Larson v. Farmers Warehouse Co., 161 Wash. 240, 297 Pac. 753 (1931).
17. Brennan v. Shepherd Park Pharmacy, 138 A.2d 494 (Mun. Ct. App. D.C. 1958), noted 9 MERCER L. REV. 367 (1958).
18. UNIFORM SALES ACT §13: "In a contract to sell or a sale, unless a contrary intention appears, there is:
(1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.
(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.
(3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumberance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale was made.
(4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law, goods in which a third person has a legal or equitable interest." Southern Irons & Equipment Co. v. Bamberg. E. & W. R.R., 151 S.C. 506, 149 S.E. 271 (1929).
19. Kellog Bridge Co. v. Hamilton, 110 U.S. 108, 112-116 (1884); Wisconsin Red Pressed Co. v. Hood, 67 Minn. 329, 69 N.W. 1091 (1897); Kircher v. Conrad, 9 Mont. 191, 23 Pac. 74 (1890). As to the privity requirement, see Note, 17 MERCER L. REV. 316, 318 (1965).

ferred or implied in fact. The courts are increasingly inclined to make the inference.[20]

Contrary to the common law, the civil-law rule is that a warranty of soundness as against hidden or latent defects may be implied where a full or sound price is paid. This rule is followed in Louisiana[21] and, with some important exceptions in South Carolina.[22]

SECOND-HAND GOODS

The majority common-law view recognizes without qualification that there is no implied warranty of quality, condition, or fitness in the sale of second-hand goods. This rule is followed in Alabama,[23] Arkansas,[24] Colorado,[25] Florida,[26] Kansas,[27] Maryland,[28] Massachusetts,[29] Michigan,[30] Mississippi,[31] Missouri,[32] Montana,[33] Oklahoma,[34] Oregon,[35] Texas,[36] Vermont,[37] and Washington.[38] The rule announced has been qualified in some jurisdictions. These cases have stated that the seller is in no position to know the condition of the goods where they are second-hand. In such cases it is sometimes implied that if the seller actually did have superior knowledge, the outcome might be different. On the other hand, some of the decisions hold that there is no implied warranty of quality, condition, or fitness of second-hand goods only if the buyer has inspected, or has had an opportunity to inspect, the goods purchased. These jurisdictions are Arkansas,[39] California,[40] Missouri,[41] Oklahoma,[42] and Texas.[43] It should be noted that some of these cases are from jurisdictions where other cases in the same jurisdiction have applied or recognized the general rule without this qualification. A

20. 46 AM. JUR. *Sales* §339 (1943).
21. Meyer v. Richards, 163 U.S. 385 (1895); Buckley v. Honold, 60 U.S. (19 How.) 390 (1856).
22. Bond Bros. Cash & Delivery Grocery Inc., v. Claussen's Bakeries, 184 S.C. 195, 191 S.E. 717 (1937).
23. Johnson v. Carden, 187 Ala. 142, 65 So. 813 (1914).
24. Yellowjacket Mining Co. v. Tegarden, 104 Ark. 573, 149 S.W. 518 (1912).
25. Elliot v. Parr, 100 Colo. 204, 66 P.2d 819 (1937).
26. McDonald v. Sanders, 103 Fla. 93, 137 So. 122 (1931).
27. Ziegelmeier v. Allis-Chalmers Mfg. Co., 145 Kan. 652, 66 P.2d 387 (1937).
28. Kernan v. Crook, Horner & Co., 100 Md. 210, 59 Atl. 753 (1905).
29. Morley v. Consolidated Mfg. Co., 196 Mass. 257, 81 N.E. 993 (1907).
30. Hysco v. Morawski, 230 Mich. 221, 202 N.W. 923 (1925).
31. Williams v. McClain, 180 Miss. 6, 176 So. 717 (1937).
32. Hanna Breckinridge Co. v. Holley-Matthews Mfg. Co., 160 Mo. App. 437, 140 S.W. 923 (1911).
33. Jones v. Armstrong, 50 Mont. 168, 145 Pac. 949 (1915).
34. Henry v. Kenard, 178 Okla. 368, 62 P.2d 1184 (1936).
35. Durbin v. Denham, 106 Ore. 34, 210 Pac. 165 (1922).
36. American Soda Fountain Co. v. Palace Drug Store, 245 S.W. 1032 (Tex. Civ. App. 1922).
37. Stevens v. Smith, 21 Vt. 90 (1849).
38. Fairbanks Steam Shovel Co. v. Holt & Jeffery, 79 Wash. 361, 140 Pac. 394 (1914).
39. Oil City Iron Works v. Belmont, 177 Ark. 223, 7 S.W.2d 772 (1928).
40. Lamb v. Otto, 51 Cal. App. 433, 197 Pac. 147 (1921).
41. Colchord Mach. Co. v. Loy-Wilson Foundry & Mach. Co., 131 Mo. App. 540, 110 S.W. 630 (1908).
42. Tibbets & Pleasant, Inc. v. Town of Fairfax, 145 Okla. 211, 292 Pac. 9 (1930).
43. Joy v. National Exch. Bank, 32 Tex. Civ. App. 398, 74 S.W. 325 (1903).

number of these courts in actually applying the rule have either made no mention of the fact as to whether the buyer inspected the goods or had opportunity for inspection. In reviewing the facts some such decisions noted that the goods were inspected, but this factor was not discussed by the courts in reaching their conclusions.

The rule that there is no implied warranty in the sale of second-hand goods, at least where there was an opportunity for inspection, has been variously applied. It was applied where the seller of a second-hand sawmill sued for breach of contract on the part of the buyer, a dealer in second-hand machinery, who refused to receive the machinery when it arrived at the directed destination because he asserted that it was worthless for the purpose for which he purchased it.[44] A similar application was made in an action by an administrator to recover on a note given in part payment on a second-hand light plant. It was held that the note showed it was part payment for a second-hand machine; and while an express warranty could have been shown by expression of the intestate, the "dead man's statute" prohibited it.[45]

The rule was also applied where a second-hand drilling rig was examined and inspected by the buyer prior to purchase.[46] The same ruling was made where a contract was made for the sale of a second-hand dredge boat in good merchantable condition. Its shovel was to be repaired so that it would be in good condition. Evidence showed that the buyer saw the equipment before he executed the written contract.[47] The rule was similarly stated in an action for personal injuries sustained because of defects in a second-hand cream separator, the court placing the burden upon the plaintiff-buyer to show an express warranty.[48] The rule was also stated in a case where the plaintiff visited a poolroom to negotiate the purchase of a pool table. He examined two of six covered tables and received assurances that the others were the same as those examined. After stating the rule in dictum, the court held that the plaintiff would have to base his case on the fraudulent representations of the defendant.[49] Another case reiterating the principle involved the purchase of a pump. After inspecting it the buyer took it away to be loaded upon a car for transportation. After so removing it, he discovered that it was practically worthless as a pump due to its bad condition. In an action for the purchase price the buyer was held liable.[50] And in a case where the buyer of a second-hand machine was familiar with the particular machine, admitting that he knew it was old and worth less than the purchase price, the court held:

> The rule of decision for the present case is that in the sale of per-

44. Johnson v. Carden, *supra* n. 23.
45. Outler v. Gladson, 176 Ark. 671, 3 S.W.2d 973 (1928).
46. Oil City Iron Works v. Belmont, *supra* n. 39.
47. Brierton v. Anderson, 180 Ark. 12, 20 S.W.2d 313 (1929).
48. Elliot v. Parr, 100 Colo. 204, 66 P.2d 819 (1937).
49. Hysko v. Morawski, 230 Mich. 221, 202 N.W. 923 (1925).
50. Norris v. Reinstedler, 90 Mo. App. 626 (1901).

> sonal property without an express warranty, where the buyer has an opportunity to inspect the commodity and the seller is guilty of no fraud, and is neither the manufacturer nor the grower of the article sold, the doctrine of Caveat Emptor applies. . . .[51]

Here the court seems to discount the importance of the goods being second-hand.

Where it was sold by one farmer to another, a used plow was held not to carry an implied warranty that it was fit for sod breaking.[52] A highway contractor purchased a road-oiler wagon from a municipality after the contractor had inspected it. The court decided that the principle of no implied warranty on second-hand machinery applied because from the nature of the purchaser's business he would be a better judge of suitability of the machine for the work it was purchased for than the city.[53] A purchaser was compelled to pay a note made as part of the purchase price of an airplane on the theory of the rule under discussion, the purchaser being an expert on airplane motors and having flown the plane before he bought it.[54] In the case of the sale of a used soda fountain, the rule was applied, and the court emphasized the fact that the purchaser knew he was buying used equipment and there was no concealment of any facts known to the seller who was not the manufacturer.[55] This holding was made without regard to the fact that the purchaser had never inspected the fountain.

One of the most significant areas of application of the rule is that of used motor vehicles. These goods are purchased by large numbers of individuals in the United States, many of whom have little or no technical knowledge about the complex machines they are buying. Sellers vary in their expertise, but overall they tend to stand, or at least represent themselves to be, superior in the knowledge of their wares. In spite of this disadvantage to the average purchaser, the general rule remains that there is no implied warranty covering the condition of a second-hand automobile.[56] A typical case applying this rule would involve a salesman without authority making an express representation, or a situation where a speedometer is set back and it is *indicated* that the car is in good condition, suitable for a particular use, or that it is a particular model.[57] However, the seller must choose his words carefully. He cannot make false representations about used cars. In one case, it was shown that the seller said the automobile was "in first-class shape" and if anything about it proved wrong the seller would put it "in good shape," and the buyer purchased, relying on those statements. The automobile was not as stated and the purchaser returned it the next day;

51. Colchord Mach. Co. v. Loy-Wilson Foundry & Mach. Co., *supra* n. 41, at 632.
52. Jones v. Armstrong, *supra* n. 33.
53. Tibbets & Pleasant, Inc. v. Town of Fairfax, *supra* n. 42.
54. Aeronautical Corp. of America v. Gossett, 117 S.W.2d 893 (Tex. Civ. App. 1938).
55. American Soda Fountain Co. v. Palace Drug Store, *supra* n. 36.
56. Moore v. Switzer, 78 Colo. 63, 239 Pac. 874 (1925); Williams v. McClain, 180 Miss. 6, 176 So. 717 (1937); Henry v. Kenard, *supra* n. 34; see 34 A.L.R. 535 (1925); 43 A.L.R. 648 (1926); 78 A.L.R.2d 460, 493, §14 (1961).
57. Moore v. Switzer, *supra* n. 56; Henry v. Kenard, *supra* n. 34.

the seller declined to fix it. The doctrine of caveat emptor was held inapplicable.[58] As a practical matter the puffing and statements of a used-car dealer may often mislead the average purchaser and cause him to rely on the superior knowledge such a seller may represent himself to possess. Then if the vehicle fails to measure up to what he was led to believe, the burden is on the purchaser. He must prove that the car was not in the running condition the seller *said* it was.[59]

A small number of cases have taken the opposite point of view and hold that an implied warranty as to condition, quality, or fitness may arise in the sale of second-hand goods or machinery in such jurisdictions as Illinois,[60] Oregon,[61] South Carolina,[62] and West Virginia.[63] In one such decision, second-hand typesetting machines had been purchased with the knowledge that they were used goods. The court found that there had been no express general warranty, but that it had been represented that the machines would not break the type.

> Notice that the machines were second-hand did not put the defendant (purchaser) on notice not to rely on the representations of the seller that the machines would not break type, and would be of [no] value in the work for which they were to be used. . . . The general rule is that a warranty is not implied against defects which are obvious, or of which the purchaser is notified. But if by fraud, misrepresentation, or deceit the purchaser is misled respecting the character, extent, or probable consequence of the defect or disease of which he has no notice, a warranty is implied.[64]

It would be most desirable to make the law certain in the area of implied warranties concerning second-hand goods. Justice should be done at the same time. It would seem that unjust results are reached by deciding such cases merely on the shallow consideration of whether the goods are second-hand. The relation of the parties to the transactions is the critically important factor. If the seller either is in a position of superior knowledge concerning the goods, or if he represents himself so to be, and the buyer justifiably believes in and relies on this superior position, then an implied warranty of fitness should arise. Such a rule would have to be imposed by statute in most jurisdictions. But in any case it would protect many an unsuspecting buyer such as the victim of the high-pressure used-car salesman. At the same time it would not overburden the seller. All he would have to do is make plain the truth as to his knowledge of the goods.

58. Lester v. Superior Motor Car, Inc., 117 F.2d 780 (D.C. Cir. 1941).
59. Dweyer v. Redmond, 100 Conn. 393, 124 Atl. 7 (1924); Lane v. McLay, 91 Conn. 185, 99 Atl. 498 (1916).
60. Markman v. Hallbeck, 206 Ill. App. 465 (1917).
61. Bouchet v. Oregon Motor Car Co., 78 Ore. 230, 152 Pac. 888 (1915).
62. Walker, Evans & Cogswell Co. v. Ayer, 80 S.C. 292, 61 S.E. 557 (1908).
63. Virginia Elec. & Mach. Works, 94 W.Va. 300, 118 S.E. 512 (1923).
64. Walker, Evans & Cogswell Co. v. Ayer, *supra* n. 62, at 560.