1927

Implied Warranties in the Sale of Goods by Trade Name

Frank L. Mechem

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1305

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenxx009@umn.edu.
IMPLIED WARRANTIES IN THE SALE OF GOODS BY TRADE NAME

By Frank L. Mechem*

The subject of implied warranties in the law of sales has always been a troublesome one. This is no less true since the general adoption of the Uniform Sales Act than it was under the common law, as the inconsistent views in many recent cases, decided under the act, ably demonstrate. The greatest conflict of opinion has developed with reference to sales of goods under patent and trade names, and because that method of marketing has achieved considerable prominence in recent years, a few suggestions concerning the obligations of implied warranty in those cases seem justifiable.

1. IMPLIED WARRANTY OF TITLE, FREEDOM FROM INCUMBRANCES, AND QUIET POSSESSION

Although the common law started with the principle that a seller did not warrant the title of goods which he sold,¹ it was not long until the cases began to recognize that an affirmation of title by the seller might amount to a warranty,² and there appears in Blackstone the statement that "a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose."³ And however much this statement may be criticized as inaccurate in view of the then existing law of England, it is certain that the subsequent law crystallized in accordance with it, and the doctrine was generally laid down that, in the or-

*Professor of Law, University of Idaho, Moscow, Idaho.
¹Noy's Maxims, Ch. 42.
Some of the early English and American cases sought to make a distinction in the event the seller was not in possession of the chattel, contending that a lack of possession by the seller was an indication of a possible deficiency in the seller's title but many recent cases are contra by abolishing the distinction, and rightly so, for if under modern methods of dealing, at least, one purports to sell goods as his own, he should be held to have warranted his title whether in possession or out. In fact, the only exception to the general principle which can be supported on reason (and it is more of a limitation than an exception) is that where the seller does not purport to sell goods as his own, but merely to sell what interest he may have in them, or is authorized to transfer for another, he does not impliedly warrant his own title or that of the other. Where the buyer, in good faith, relies upon an implied representation of the seller, he should be protected, but only when such reliance is justifiable under the circumstances.

These views have received the sanction of the Sales Act and, in addition, it has also provided for implied warranties of freedom from incumbrances, and quiet enjoyment, upon the same basis as the implied warranty of title, following the precedent of a group of well-reasoned common law decisions. Neither the act nor the cases applying it make any exception in favor of the seller of specified articles under a trade name and on principle it is obvious that there should be none.

2. IMPLIED WARRANTY OF MERCHANTABILITY

Whether an implied warranty of merchantability attaches to a sale of a specified article under its patent or other trade name, is a problem of greater difficulty. Much of the difficulty seems to arise out of a confusion as to the exact scope and meaning of the term "merchantability" as applied to a sale of goods. However, since such a discussion is not appropriate here, "merchantability" will be taken as the general equivalent for the expression that, "the goods shall be reasonably appropriate for the general


5Jordan v. Van Duzee, (1917) 139 Minn. 103, 165 N. W. 877.

6Johnson v. Laybourn, (1894) 56 Minn. 332, 57 N. W. 933.

7Sec. 13.
purpose for which they are produced and sold." This is the definition most frequently adopted.\(^8\)

Where there is a sale of a specified article under its patent or other trade name, does the seller impliedly warrant that the article shall be reasonably appropriate for the general purpose for which it is produced and sold? The first impulse is to answer in the affirmative. Good conscience and fair dealing would seem to dictate it. But when a sound legal foundation is sought for this principle, additional considerations must be disposed of. If resort is had to the cases for assistance, it appears that all implied warranties of quality, like implied warranties of title, were unknown to the early law. It proceeded upon the theory that a purchaser of chattels ordinarily relied solely upon his own knowledge and judgment concerning their quality, and applied the maxim caveat emptor indiscriminately where the purchaser failed to require an express warranty. That the principle of caveat emptor should be applied to some situations in the law of sales may be admitted, and if the situation in the early law was always that assumed by the courts, i.e., that the buyer relied upon his own judgment, then we can have no objection to their application of it. But this may be doubted. At any rate it is certain that the development and expansion of trade and industry resulted in an ever increasing reliance by the buyer upon the knowledge, skill and judgment of the seller and economic pressure encouraged it as a necessary adjunct to the extension of business relations. Under such circumstances the unqualified principle of caveat emptor was bound to fall and so the courts began to limit its application to those whose situation where the buyer, \textit{in fact}, either did, or should have relied on his own judgment of the quality of the goods, and setting up an obligation of implied warranty against the seller when the buyer placed a reasonable reliance in the seller's judgment. Thus the doctrine of implied warranties of quality was established in the law of sales.\(^9\)

The courts, however, quickly made this distinction,—that since the obligation of the seller upon an implied warranty of quality was directly dependent upon the reasonable reliance of the buyer, irrespective of contract, and since the nature and extent of the buyer's reliance might vary, so might that of the seller's obliga-

\(^8\)Parker \textit{v.} Shaghalian, (1923) 244 Mass. 19, 138 N. E. 236.

\(^9\)Gardiner \textit{v.} Gray, (1815) 4 Campb. 144; Laing \textit{v.} Fidgeon, (1815) 4 Campb. 169.
tion. The buyer in making a purchase might rely wholly upon
the seller to supply him with goods suitable for a particular pur-
pose, making such purpose known to the seller, or, he might rely
upon the seller only to furnish goods of a particular kind or
class, exercising his own skill and judgment as to their fitness
for a particular purpose. In the first instance the seller, unless
he expressed a clear unwillingness at or before the time of the
sale, was held to have assumed the responsibility of delivering
goods which would reasonably suit the particular purpose made
known by the buyer and this obligation was called an implied
warranty of fitness, while in the second, the seller was only held
to the obligation of delivering goods reasonably appropriate for
the general purpose for which they were produced and sold, being
the implied warranty of merchantability.10

Experience has long since proven the practical as well as theo-
retical soundness of this doctrine and it is now well established,
although a few recent decisions may be found which prefer to fol-
low the ancient rule of caveat emptor in such cases. Moreover,
it is generally held that the obligation of the seller attaches even
though the buyer is given an opportunity to inspect the goods, if
such an inspection will not ordinarily, and in the particular in-
stance does not, reveal the defect.11 There also, the buyer may
justifiably rely upon the judgment of the seller, and if he does so,
he should be protected.

Of the two implied warranties of quality, that of merchant-
ability is the most common, and the less severe, from the stand-
point of the seller. May there be sales of specified articles under
patent or other trade names to which this warranty is applicable
and where it should be imposed? An examination of the com-
mon law reports on this point is not very encouraging. In cases
like Jones v. Just12 and Gardiner v. Gray,13 there are recognitions
of an implied warranty of merchantability, under certain circum-
stances, in the sale of “known, described, and definite articles,”
but in none is the discussion extended to the situation mentioned
in the Sales Act,14—a sale of specified goods by patent or trade
name. Nor is the act self-explanatory, since it only mentions the

10Jones v. Just, (1868) L. R. 3 Q. B. 197.
11Priest v. Last, (1903) 2 K. B. 148; Ungerer v. Louis Maull Cheese
Co., (1911) 155 Mo. App. 95, 134 S. W. 56.
12(1868) L. R. 3 Q. B. 197.
13(1815) 4 Campb. 144.
14Sec. 15 (4).
implied warranty of merchantability in reference to a sale by description. Is it to be presumed then, that such a sale, or contract to sell, brings about a situation to which the implied warranty of merchantability was not applicable at common law, or if not, that the act has changed the law in that respect?

There is ample authority tending to rebut either inference. While the common law decisions did not mention sales under patent or trade names, yet they did deal with an analogous situation. Beginning with Garden v. Gray, the rule was broadly stated that in a sale of “known, described, and definite articles,” or “specified goods,” the seller impliedly warranted their merchantability where the contract was not inconsistent therewith, and where the buyer, by reason of a lack of knowledge of the quality of the goods, or, an opportunity for their inspection which should have revealed the defect, reasonably relied on the seller's judgment. It was said that although the buyer relied only upon his own judgment in selecting the type of article he wanted, nevertheless he did rely upon the seller in reference to its general qualities and that therefore the seller must assume the risk of deficiency. The propriety of this rule was usually supported by the facts of the cases in which it was applied. Garden v. Gray may be taken as an illustration. There the defendant struck a bargain with the plaintiff for the purchase of twelve specified bales of “waste-silk” imported by the plaintiff and then lying in dock, not having been unloaded. When delivered, the silk proved to be unmerchantable and the defendant set up this fact by way of defense, when sued for the purchase price, alleging breach of an implied warranty of merchantability. In allowing this defense, the Court said:

“I am of opinion, however, that under such circumstances, the purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied term in every contract . . . The question then is, whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as waste-silk.”

This decision was followed by a large number of common law cases dealing with sales of known, described and definite articles, in many of which the articles were sold under trade name, and it was consistently held that where the trade name was employed only as a designation of the kind of article wanted, an
implied warranty of merchantability should be imposed, where the buyer had apparently relied upon the judgment of the seller as to quality. If, however, the trade name, or other denominator of kind, was also intended as a designation of particular quality, and goods of exactly that quality were delivered, no warranty of merchantability was implied, since there was no reliance of the buyer upon the seller from which one might be inferred.  

Therefore, on principle, it seems that in a proper case (1) Where the trade name is employed in the contract as descriptive of the kind or class of goods to be delivered; (2) where the buyer relies upon the judgment of the seller as to quality, an implied warranty of merchantability should be included as one of the seller's obligations.

If the foregoing may be accepted as a correct statement of the common law principles upon this subject, all doubt as to the proper interpretation of the appropriate Sales Act provisions should be dispelled, and it may be said with confidence that the act also provides for an implied warranty of merchantable quality in similar cases. For this there is ample verification in the history of the act. Its proponents avowedly intended to follow the English Sales of Goods Act, which in turn purported to adopt the desirable principles of the common law, thus incorporating by inference, at least, the rule of warranty just stated. But it is not necessary to rely solely upon that fact, preponderant as it is, since the Sales Act itself contains the most cogent evidence of legal authority to support the assumption. Section 15 of the act containing the law applicable to implied warranties of quality, reads as follows:

\[\text{In the following cases it was held accordingly: Gorby v. Bridgeman, (1919) 83 W. Va. 727, 99 S. E. 88; Gundayotte Coal Co. v. Virginian E. & M. Works, (1923) 94 W. Va. 300, 118 S. E. 512; Franklin Motor Car Co. v. Ratiiff, (1922) 207 Ala. 341, 92 So. 449; Harvey v. Buick Motor Co., (1915) 177 S. W. 774; Little v. G. E. Van Sykele & Co., (1920) 107 Kan. 578, 193 Pac. 182; Rice v. Friend Bros. Co., (1917) 179 La. 355, 161 N. W. 310; G. M. C. Truck Co. v. Kelley, (1924) 105 Okla. 84, 231 Pac. 882. And see other cases collected in 21 A. L. R. 367. The Minnesota cases were clearly in harmony with this view. In Goulds v. Brophy, (1889) 42 Minn. 109, 43 N. W. 834, it is said: "Here the defendant simply ordered a specific article of a known, recognized and defined make or description, which was manufactured by the plaintiffs, and in the market. There was an implied warranty—or, more correctly speaking, condition of the contract—that it should conform to the description and be of good material and workmanship, according to that description, but none that it would answer the purpose described or supposed." See also, Cosgrove v. Bennett, (1884) 32 Minn. 371, 20 N. W. 359; Anderson v. Van Doren, (1919) 142 Minn. 237, 172 N. W. 117.}\]

\[\text{16Sec. 15.}\]

\[\text{17Williston, Sales, Secs. 227, 236a.}\]
"Section 15. (Implied Warranties of Quality.) Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

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

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

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

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

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

Taken separately, there may be a reasonable doubt concerning the scope and application of some of these provisions, resulting in the formulation of some unsound principles. By travelling a narrow path of reasoning, it is possible to conclude that subsection 2 has no application to the kind of situation discussed in subsection 4, arguing that the act has treated them as entirely different instances, necessarily unrelated, since neither contains any express mention of the other. The result of this would be to deny the existence of any implied warranty of quality whenever specified goods are sold under a trade name, simply because subsection 2 does not specifically refer to such sales whereas subsection 4 does,—the inference being that they are thereby withdrawn from the operation of sub-section 2.

Unfortunately some decisions in this country apparently have followed this line of reasoning in deciding cases under the act.\(^{19}\) If followed to a logical conclusion, they will, in all proba-

---

bility, result in establishing an unfair advantage for the seller over the innocent buyer who has placed a reasonable reliance in the seller’s judgment as to the merchantable quality of his goods, since to avoid his normal obligation, the seller need only adopt and use a trade name. Moreover, under these decisions, he may avoid the obligation even though the contract of sale be executory, and the buyer given no actual opportunity to make a test and inspection of the goods.20

By a more sensible construction of the act, a different result has been reached. In section 15 there are two essentially different kinds of provisions, one of general application, the other specific. The heading to the section states that, except as therein provided, there is no implied warranty as to the quality or fitness for any particular purpose, of goods supplied under a contract to sell. Then follow three provisions of general application. Sub-section 1, in effect provides, that no matter how the goods be sold or who the seller be, if the buyer expressly or by implication makes known to the seller the particular purpose for which he is purchasing the goods, and, for that purpose, the facts disclose a reliance on the seller’s skill or judgment, there is an implied warranty of reasonable fitness for such purpose. It will be noted that the language of this provision is sufficiently broad to cover sales of specified articles under their patent or other trade names. In sub-section 2 it is said that where goods are bought by description from one who deals in goods of that description, whether producer or not, and irrespective of the manner of describing, there is an implied warranty that the goods shall be merchantable. Again the language is sufficiently broad to cover sales of specified articles under their patent or other trade names when the sale is by description, and if the act stopped short with these two provisions it would seem to be an irresistible inference that sub-section 2 was intended to apply to trade name sales by description. Proceeding to a consideration of the other four provisions, it is obvious that sub-section 3 can have no bearing upon our problem, which is, whether there may at any time be an implied warranty of merchantability in a trade name sale. Nor do sub-sections 5 and 6 have any particular effect upon it. There remains only sub-section 4,—a provision of expressly restricted application which is painstakingly specific. It says that in the sale of speci-

fied goods under a patent or other trade name, there is no implied warranty as to **their fitness for any particular purpose**, thus qualifying the general application of sub-section 1 in that special instance, but having absolutely no effect upon the general rule of sub-section 2.

It must be admitted that there is but little judicial authority for this interpretation of the act. The first case in which it was mentioned seems to be *Bristol Tramways and Carriage Co. v. Fiat Motors, Limited*,\(^2\) decided under the Sales of Goods Act, from which the substance of section 15 of the Sales Act was derived. In discussing the effect of these provisions, the Court (Farwell, L. J.) says:

"Further, there is the second exception in section 14, on which Mr. Justice Lawrance has also found in the plaintiff's favour, and to this the proviso to the first exception does not apply; the implied condition that the goods are of merchantable quality applies to all goods bought from a seller who deals in goods of that description whether they are sold under a patent or a trade name or otherwise; the only proviso in sub-section 2,—namely, examination by the buyer,—is negatived by Mr. Justice Lawrance's finding of fact in this case. The phrase 'merchantable quality' seems more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products such as grain, wool, or flour, than to a complicated machine, but it is clear that it extends to both; the definition of 'goods' in section 62 makes that word include 'all chattels personal other than things in action or money,' and 'quality of goods' include their state or condition. And this is in accordance with the older cases; for example, in *Laing v. Fidgeon*, (1815) it was held that in every contract to furnish manufactured goods, however low the price, it is an implied term that the goods shall be merchantable. . . . The phrase in section 14, sub-section 2 is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man, acting reasonably, would, after a full examination, accept it under the circumstances of the case in performance of his offer to buy that article and whether he buys for his own use or to sell again, so as to make the term 'salable' apply."\(^2\)

Among the American cases there is one particularly noteworthy supporting opinion. That eminent jurist, Judge Learned Hand, writing the decision of the court in *McNiel & Higgins Co. v. Czarnikow-Rienda Co.*,\(^3\) declares:

"The case, therefore, comes down to whether in a sale of fungibles a stipulation for a specific brand or make is to be taken..."\(^2\)

\(^2\)[1910] 2 K. B. 831.


\(^3\)(D.C. N.Y. 1921) 274 Fed. 397.
as a part of the description of the goods. It is true that literally a brand only means that the goods are made by the brand owner, and it is argued that, if so made the contract is fulfilled. Yet that argument, when applied to the description proper, would, and for long did, preclude any implied warranty whatever, because the assumption in these cases always is that the goods literally conform with the description. The implied warranty is an added obligation imposed by law. Williston, Contracts, sec. 984. It seems to me that precisely the same considerations make for a similar implied warranty touching the brand as touching any part of the description. Although the goods are actually made by the owner, unless they be of passing grade for such goods, the buyer is disappointed in his reasonable reliance. The case can be tested by the supposed sale of a manufacturer. Assume that, having a reputation distinguished by his brand, he agrees to sell under that brand. Presumably the brand means some uniform quality, which has made it known and desired. The buyer exacts it because he expects the delivery to have that quality. The seller knows of the buyer's expectations, and he is in a position to know whether the delivery conforms with those expectations. He knows that the buyer relies upon his better knowledge to insure their realization. He cannot suppose that the buyer cares for the fact that he makes the goods independently of the quality of which that fact assures him. If he is charged with more than a literal compliance with any part of the description because of his better information, he ought, I should say, be charged with this. If not, it can only be because the brand is taken as signifying nothing in the quality of the goods, an erroneous understanding of the parties' meaning. If this be true for a manufacturer, it is under section 96, subd. 2, also true for any seller who deals in the brand.

"I have not been able to find any case exactly in point. Dounce v. Dow, (1876) 64 N. Y. 411, went off on the question of waiver, and the court expressly declined to pass upon the question raised here. In Taylor v. Dalton, (1862) 3 F. & F. 263, a nisi prius ruling of Baron Martin, the case was very closely in point to that at bar, and the ruling in the present defendant's favor. Still it is not exactly on all fours with it. In Lindsborg, etc., Co. v. Danzero, (1915) 189 Mo. App. 154, 161, 174 S. W. 459, 461, there is a suggestion obiter that the delivery must come up to 'the standard of its class,' but it cannot be taken even as a dictum to that effect. Such a dictum occurs in Polly v. Arony, (1918) 172 N. Y. S. 305, 306. On the other hand in Beck v. Sheldon, (1872) 48 N. Y. 365, the case was of a sale made by a manufacturer of pig iron to be made at his furnaces, and of No. 1 and No. 2 grade. The buyer asserted that it was not as good as those grades made elsewhere or in earlier years by the seller. The court said, though obiter, that the contract was satisfied by the product of the sellers' furnaces of that grade, regardless of whether it was merchantable or equal to the earlier product. Earl, C., declined to pass
3. IMPLIED WARRANTY OF FITNESS

There is no implied warranty of fitness for any particular purpose in the sale of a specified article under its patent or trade name. The usual distinction between implied warranties of merchantability and implied warranties of fitness for a particular purpose have already been noticed. An exception to this will be dealt with hereafter. The important point to be remembered at present is that the implied warranty of fitness, like all other implied warranties, depended, at common law, upon the buyer’s justifiable reliance in the skill and judgment of the seller. Accordingly, the reports are replete with decisions which, in effect, hold that there can be no implied warranty of fitness for a particular purpose when the contract is for a known, described, definite article, because it would be a contradiction in terms to say that the seller is bound to deliver a particular and described article chosen by the buyer and at the same time exercise his own judgment as to its suitability for some special purpose. In such cases

---

there can be no justifiable reliance in the seller's judgment, and that is true even though the particular purpose of the buyer is made known to him, since such information, unless amounting to an enforceable modification of the original contract, has no legal effect upon the seller's duty thereunder. This being the well-settled and logically sound rule of the common law, and the Sales Act having therefore intended to exactly restate it, no theoretical obstacles are presented why its pertinent provisions should not be so interpreted.  

But a practical difficulty has been suggested in some quarters. Occasionally it is asserted that the provisions of the Act have modified the law by narrowing the restrictions upon implied warranties of fitness to situations where specified articles are sold under a patent or trade name, and that the Act has to some extent, therefore, abandoned the rule of justifiable reliance as the basis of implied warranties. In support of this, it is said that under the Act there may be sales of known, described, definite articles, to which an implied warranty of fitness will attach, provided those articles have no patent or other trade name. That is wrong. Clearly, there was no intention that these provisions of the act (section 15) should change the law, for, be the appearances what they may, the draftsmen of both acts, Judge Chalmers of the English act, and Professor Williston of the American, and all cases in which the question has arisen, consider these provisions as a restatement of the rule in regard to known, described, definite articles. Nor, upon a proper construction of the acts, can it be

25Holt v. Sims, (1905) 94 Minn. 157, 102 N. W. 386: "But it is insisted on the part of defendants that there was an implied warranty that the plant, when installed, would comfortably heat the other rooms in the building when placed; or, in other words, would answer the intended purpose of defendants in purchasing the same. We are very clear that under the terms of the contract that no such implied warranty can be inferred or impressed upon its terms. The plants to be furnished were known to the defendants; their purposes were understood; their capacity for heating was open for investigation, which was presumably made by the purchaser; and it is nowhere disputed that such plants did in fact possess heating capacity, although not satisfactory to the desires and expectations of defendants. Under such circumstances it cannot be held that the sale of a heating apparatus to be placed in a building necessarily implied that it will heat such structure to any certain degree of temperature or so as to render it sufficient in that respect." And see La Crosse Plow Co. v. Brooks, (1910) 142 Wis. 640, 126 N. W. 3; Pullman Car Co. v. Metropolitan Ry., (1895) 157 U. S. 94, 15 Sup. Ct. 503, 39 L. Ed. 632; Davis Calyx Drill Co. v. Mallory, (C.C.A. 8th Cir. 1905) 137 Fed. 332.

26Chalmers, Sales of Goods 45.

27Williston, Sales, 227, 236a.

asserted that they do actually change the law. The true construction is perhaps more readily indicated by the apt phraseology of the English act. It reads:

“14. Subject to the provisions of this act . . . there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

“(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill and judgment, and the goods are of a description which it is in the scope of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.”

Thus, the trade name proviso becomes an additional limitation to the operation of the sub-section proper. In effect it raises a conclusive presumption of the buyer's self-reliance in such cases, but obviously has nothing to do with other situations. Therefore, a sale of a known, described, definite article will fall within the operation of the other limitations to the sub-section and the benefit of an implied warranty of fitness will be denied the buyer, because, although he may make a particular use known to the seller, it cannot be fairly said that he relies on the seller's judgment in that respect. The American Sales Act follows the English act with minor verbal changes in section 15 (1) down to the words “provided that,” but makes the proviso a separate sub-section of section 15. Nevertheless, the meaning and relationship remain the same as in the English act, though the connection is less apparent at first. This opinion has been expressly sustained in Matleson v. Lagace, and impliedly in the several cases holding that the English and American acts on this point are identical in effect.

The next question to be determined is, to what class of cases section 15 (4) of the American act applies,—what is the sale of a specified article under its patent or other trade name within the meaning of the Act. Several recent cases are very instructive on this problem.

In Folsom v. Boston Consolidated Gas Co., the buyer told the seller he wanted “a four section Kane gas fired steam boiler to heat my house.” The contract of sale was reduced to writing.

29(1914) 36 R. I. 223, 89 Atl. 713.
30(1921) 237 Mass. 565, 130 N. E. 197.
whereby the seller agreed to deliver "a four section Kane gas fired steam boiler," there being no express stipulations that it would be suitable for the particular purpose of heating the buyer's house. The boiler proving unfitted to serve that purpose, the buyer claimed the benefit of an implied warranty of fitness. But the Court said:

"The written agreement shows on its face that it is complete and unambiguous. It cannot be varied or controlled by parol evidence. It merged all previous negotiations and stipulations whether oral or written, and cannot be altered by an earlier or contemporaneous warranty respecting the cost of operation of the boiler, as the defendant contends . . . If it be assumed in favor of the defendant but without so deciding that under any circumstances the Sales Act (St. 1908, c. 237) could be held to apply to the contract in question it nevertheless was for the sale of 'a four section Kane gas fired steam boiler,' and hence was a sale of a specified article under its patent or other trade name. As to such a sale under section 15, clause 4, of the act, there is no implied warranty as to its fitness for any particular purpose."

Matteson v. Lagace was a similar case. The buyer told the seller he needed a steam heating plant in his skating rink. The seller recommended one with a "1-5-28-5 section Ideal, sectional boiler" and a written contract was thereafter made specifying such a boiler, but containing no express warranty. After installation, it was found that such a boiler was wholly inefficient to heat the rink and the buyer relied on an implied warranty of fitness, but it was held, referring to the Sales Act:

"The boiler, provided for in said contract, the insufficiency of which appears, without dispute, to have caused the condition complained of by the respondent, was sold under its trade-name, '1-5-28-5 section Ideal sectional boiler.'

"The question before us is whether the contract between the parties shall be governed by the paragraph numbered (1) or by the paragraph numbered (4) in said section. The section of our statutes referred to appears to have been derived from, and to be nearly identical in language and legal effect with, similar provisions of the English 'Sales of Goods Act' 1893, 56 and 57 Vict. c. 71, 14, save that in the English act the paragraph numbered (4) in our statute appears as a proviso to a paragraph nearly identical with the paragraph numbered (1) in our statute; the English act in this particular being as follows: '(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to

31(1914) 36 R. I. 223, 89 Atl. 713.
IMPLIED WARRANTIES IN THE SALE OF GOODS

supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose. 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.

"The legal effect of these provisions as they are placed in the Rhode Island statute, so far as they relate to the circumstances of the case at bar, are not so plain. However, notwithstanding the language of paragraph (1), we are of the opinion, in view of the positive and unqualified prohibition of implied warranty contained in the paragraph (4) that paragraph (4), in its bearing on the case at bar, amounts to a proviso, limiting the provisions of paragraph (1)."

These cases are fairly representative of the ordinary trade name sale. In each it does appear that the buyer actually informed the seller of the particular purpose for which the article was wanted, but that is not necessarily conclusive evidence of the buyer’s reliance upon the seller. It is common practice to inform a seller of the special purpose for which the kind of article is to be used, but finally selecting a particular one as best adapted, in the buyer’s judgment, to that purpose. Whether that is what happened, in any particular case, is sometimes a very difficult problem of fact. Where the contract is in writing, as in the Folsom and the Matteson Cases, a rule of evidence forecloses the possibility of determining the legal relations of the parties by any facts inconsistent therewith, and as a result, it is often made to appear that a justifiable reliance by the buyer has been denied effect. But the explanation of such an apparent anomaly lies in the legal limitations of the word “justifiable;” for if the legal standing of the parties to a sale or contract to sell may be proven only by the written agreement and facts not inconsistent therewith, and if the agreement specifies an article by its trade name, without express warranty, then no reliance by the buyer in respect to fitness for a particular purpose can be “justifiable,” since, by the agreement, the seller cannot exercise his judgment of the fitness of the article.23 It would seem to follow that whenever the transaction is eventually reduced to writing, specifying an article

23Spaulding & Kimball Co. v. Aetna Chemical Co., (1924) 98 Vt. 169, 126 Atl. 582.
under its trade name, and containing no express warranty of fitness, none can be implied.\textsuperscript{33}

If, however, the contract of sale is entirely oral, and all the communications of the parties may be taken into consideration, it frequently becomes a nice question, what kind of sale occurred. Section 15 (4) of the Act covers only sales under a patent or trade name. Accordingly, if the sale is upon some other basis, even though a patent or trade name exists and is used, the problem as to implied warranties of fitness must be solved under section 15 (1). Some cases have recognized this distinction.

In \textit{Sachter v. Gulf Refining Co.}\textsuperscript{34} the buyer, in purchasing trade-mark oil, relied, not on the trade-mark, but on the seller's representation that the oil was what the buyer's machinery required; and the court said:

"According to the proof adduced by plaintiff, a representative of plaintiff was advised by defendant's salesman, when plaintiff required oil for its refrigerating plant, to order of defendant Choctaw oil. Thereafter plaintiff's representative stated to defendant's manager that defendant's salesman had told plaintiff's representative that the kind of oil for plaintiff to use was Choctaw oil, and defendant's manager told plaintiff to order it. It was accordingly ordered and after being used was found to be unfit for the purposes required. While the sale of the oil was under a trade-name, it appears that this was done at the instance of defendant's salesman, who assured plaintiff's representative of the fitness of the oil for the purposes required by plaintiff. In cases of sales of specified articles under a trade-name, where there may be no implied warranty of fitness for a particular purpose (section 96, subd. 5, Personal Property Law (as added by laws 1911, c. 571)), the buyer relies upon the trade-name as his guide of its fitness. Here the buyer relies, not upon the trade-name, but upon the statement of the seller's representative, which was communicated to defendant's manager. Theretofore subdivision 5 of section 96 of the Personal Property Law does not apply. The examination of plaintiff's plant by defendant's representative, and the advice given to plaintiff that Choctaw oil was the oil to use, and the statement by plaintiff's representative to defendant's manager that defendant's salesman had told plaintiff's representative that Choctaw oil was the oil to use, and the manager's statement to plaintiff's representative that plaintiff should order that kind of oil, indicates that plaintiff made known to defendant the purpose for which the oil was required, and that the plaintiff relies on defendant's skill with reference to the use of the oil. Thus there was an implied warranty that the oil should be reasonably fit for such purposes. Subdivision 1, sec. 96, Personal Property Law."

\textsuperscript{33}There seems to be no reason why the application of section 15 (1) to this situation would not bring about the same result.

\textsuperscript{34}(1923) 203 N. Y. S. 769.
The decision in *Ireland v. Louis K. Liggett Co.* went upon the same point. The plaintiff's intestate went to defendant's store and asked for a particular kind of cold cream; was informed by the clerk that defendants did not have it in stock but had "a cream of their own . . . which was superior to the one which she had been using" and which was "pure and healthful;" relying on his recommendations she purchased the two jars. They were labelled: "Riker's Violet Cerate for the Complexion. a Soothing, Healthful Face Cream. Riker Laboratories, Inc., Distributor." The plaintiff, while using the cream, rubbed some of it in her hand, and a piece of glass contained therein lodged in her palm. In an action for breach of implied warranty, it was held:

"The evidence justified the conclusion that the plaintiff at least by implication made known the particular purpose for which the goods were required and that in purchasing a preparation which she had never used before she relied on the seller's skill and judgment in selecting it.

"The transaction was not as matter of law within the provisions of the statute negativing the existence of an implied warranty of fitness in case of the sale of a specified article. It could have been found that the plaintiff purchased the preparation upon the 'recommendation' that it was superior to that which she had been using and which she desired to purchase and that it was suitable for use on account of its composition and healthful character. The statutory provision now considered applies where the transaction results from the desire of one to purchase and the obligation of another to deliver a definite article having a 'patent or other trade name.' A seller who recommends a specific thing as fit for the buyer's use, does not bring himself within the help of this exception, where it can be found that his advice and judgment were relied upon and that the article was not delivered in fulfillment of the buyer's offer to purchase goods identified by a name known to the trade and the seller's acceptance thereof. The existence of such a warranty is not negatived where the purchaser of an article, for a definite purpose rather than of a particular kind of merchandise, relies on the seller to supply him with something adapted to that end; the latter in that case does not escape liability by the recommendation and subsequent sale of an article having a trade-name. The presence of the glass could have been found to constitute a breach of an implied warranty that the cream was reasonably fit for use. *Ward v. Great Atlantic & Pacific Tea Co.*, (1918) 231 Mass. 90, 120 N. E. 225, 5 A. L. R. 243."

The result of these cases seems to be to limit the trade name proviso, in oral sales, to situations where the buyer makes the
initial move by requesting a specified article under its patent or trade name, thus referring all other situations to section 15 (1) as a sale not under a patent or trade name.

A recent Illinois case, Neigenfind v. Singer, apparently repudiated this distinction. There the buyer entered the seller's store and ordered a box of "Bull Dog Polish to polish my stove;" was told that they had no Bull Dog Polish, but "we have Electric Polish;" accepted the latter, which exploded on a cold stove, and then brought an action on an implied warranty of fitness. The court held that he could not recover and that no warranty of quality could be implied under such circumstances because there was a sale of a specified article under a trade name. It is possible that the result reached is sound, but the reasoning is seemingly open to criticism. Certainly, there was no sale under patent or trade name, but rather, as indicated in the Liggett and Refining Co. Cases, a sale under the express recommendation of the seller. The attempted trade name sale was brought to an unsuccessful conclusion by the seller's statement that he could not supply such an article. Therefore, the question so far as implied warranty of fitness is concerned, properly falls under the operation of section 15 (1) and its solution then depends upon the seller's knowledge of the buyer's particular purpose and the reasonableness of the buyer's reliance upon the seller's judgment. Applying that test, it is probably true that the buyer did not rely upon the seller's judgment as to the special qualities of "Electric Polish," but upon his own, and accordingly, there should be no implied warranty of fitness. Nevertheless, the distinction is important and should not be disregarded, even though, in some cases, it makes no difference in the outcome.

One exception to the general distinction between implied warranties of merchantability and implied warranties of fitness must now be noticed. It sometimes happens that the distinction is so far eliminated as to leave no material difference. Considerable confusion has resulted therefrom. For example, in Stoechner & Pratt, Dodgem Corp. v. Greenburg\textsuperscript{37} the buyer purchased an amusement device known as the "Dodgem," that being its trade name. The contract was in writing and contained no express warranty. In an action for the purchase price the buyer answered that the device showed faulty construction and was constantly out

\textsuperscript{36}(1923) 227 Ill. App. 493.

of repair. Evidence upon that point was excluded because it was said that under Sales Act section 15 (4) there could be no implied warranty of fitness for any particular purpose. But the difficulty with this view is that in excluding evidence of breach of an implied warranty of fitness the court also excludes all evidence of breach of an implied warranty of merchantability, since here, where the buyer's intended purpose is not different from the ordinary purpose for which the machine is sold, the two warranties rest upon identical facts. No doubt there was such a sale under a trade name as to fall within the operation of section 15 (4) and the Massachusetts court rightly excluded the evidence upon that ground but failed to see the possibility of admitting it as proof of breach of implied warranty of merchantability. Under the latter issue, the gist of the buyer's complaint is that the device will not serve the ordinary purpose for which it is constructed and sold, in this case being also the particular purpose for which it was purchased. In the cases involving sales of unwholesome food, the same difficulty has been encountered but generally with more desirable results.\footnote{Farrell v. Manhattan Market Co., (1908) 198 Mass. 271, 84 N. E. 481; Rinaldi v. Mohican Co., (1918) 225 N. Y. 70, 121 N. E. 471; Wallis v. Russell, [1902] 2 Ir. 585.}

The various diversities of interpretation which have here been pointed out are to be regretted; legislation, so important as the Uniform Sales Act deserves a better fate, but is not likely to have it when first principles are disregarded in its application.