THE REFORM OF THE LAW OF SALES

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The Law governing the sale of goods in Canada and Australia is based on the English Sale of Goods Act of 1893. This Act has rarely been amended and is very much out of touch with modern conditions. The author feels that a mere amendment of this Act is insufficient to update the law and that what is needed is a complete redrafting of the Act. As a starting point for reform he points out the defects of the present Act, and analyzes the solutions offered by the revolutionary American Uniform Commercial Code and the Uniform Sales Act.

The present law governing the sale of goods in force throughout Australia is a very close copy of the English Sale of Goods Act 1893 which itself was largely a codification of decisions rendered by the English Courts of common law during the course of the nineteenth century.[1] Practically no amendment has been made to this legislation since its enactment, and the result is that the law governing the every day transactions of the buying and selling of goods is that representing the outlook and marketing conditions of the England of the years of the industrial revolution. A statute which was concerned with the business practices of the mid-nineteenth century determines the rights and duties of the consumer in the vastly different society of today.

In Victorian England the marketing of goods was an uncomplicated process, when most articles were "custom made" and the success of a manufacturer depended on his reliability and the excellence of his product. Mass production with its assembly-lines and the supply of myriad components by sub-contractors was as yet unknown. Nation-wide distribution of these mass produced goods by means of a complex system of wholesalers, distributors, and local "agents" was a thing of the future; while the existence of highly organized marketing departments, where manufacturers could plan massive sales promotion campaigns and influence consumer demand in a dozen different ways through the media of press, radio and television, was as yet undreamed of. In the nineteenth century, the relationship between manufacturer and consumer was a fairly close one; individual contracts were negotiated to fit the circumstances of each transaction; the use of credit in the purchase of goods was quite exceptional, a man buying only what he could afford to pay for in full; and the items he bought were uncomplicated and open to view and he could usually see by inspection if he was getting value for money. This was a far cry from the marketing practices of today where the era of the supermarket and the self-service store has given rise to the packaging of goods in sealed containers which defy inspection, and where in any case many consumer goods are so complex and of such intricate design that an inspection would convey nothing about the quality of the article to the average purchaser.

Finally, the nineteenth century knew little of the modern marketing techniques of bulk buying and the "forward" contract, and it was left

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1 The Sale of Goods Bill as drafted by Chalmers in 1888 "endeavored to reproduce as exactly as possible the existing law." See the Introduction to Chalmers, *Sale of Goods Act* (1st ed. 1894). In so doing, he inevitably relied on concepts and rules which had developed much earlier than the last quarter of the nineteenth century.

to another generation to develop the extensive use of documents of title and their concomitant instruments of credit. As has been well put, a legal historian analysing the English Sale of Goods Act in the future might well conclude that at the time of its enactment the middleman had scarely emerged, credit was unusual, and the normal buyer was expected to carry his own goods away.[2]

Discontent with the outmoded provisions of the Act has been voiced from time to time, but so far, at least in Australia, dissatisfaction has not been followed by action, and reform is little more than a vague hope which may or may not materialise in the future. While Australian lawyers continue to debate at length the ramifications of s.92 of the Constitution or to explore the more rarefied air of jurisprudential theory, they appear to rest more or less content with a system of commercial law designed for another time and another place. It is true that the New South Wales Law Reform Commission was in August 1966 charged with the task of reviewing the law as part of a scheme for uniform legislation covering the sale of goods, and it is also true that the Standing Committee of State and Commonwealth Attorneys-General at about the same time set up a committee to study the need for added protection in the field of consumer credit, but to date there has been no indication of the progress if any that has been made by these bodies in their investigations.[2a]

It is further true that, following the lead given in England, there have been developments in recent years in the protection of the consumer in respect of purchases made by him. In 1959 the United Kingdom Government appointed the Molony Committee to consider measures desirable for the protection of the consuming public, and its lengthy report issued in 1962 covered a multitude of topics of concern to the consumer from advertising to safety standards and hire purchase.[3] It gave some attention to the Sale of Goods Act[4] which it described as basically "a sound and fair measure" but recognized that the Act had "precluded the judicial development that has advanced most branches of the law since Victorian days." It accordingly proposed rather timidly a certain measure of reform to protect consumer sales (as defined by it), while taking care to see that none of its reforms interfered with the basic structure of the law. In the result its caution satisfied nobody.

The Molony Report inspired Victoria to enact the Consumers' Protection Act in 1964, setting up a Consumers' Protection Council with powers to investigate only those matters affecting the interests of consumers which were referred to it by the Minister. It could however make recommendations on other matters calculated to protect the interest of consumers and could consult with manufacturers, retailers, and advertisers on such matters as advertising and marketing practices, the packaging or labelling of goods, and questions of fitness for the pur-

2 See Isaacs, *The Sales Act in Legal Theory and Practice* (1940), 26 Va. L. Rev. 651, 653.

2a There has been a spate of legislation in Canada in the last three years regulating consumer credit. See Ziegel, *Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint* (1968), 68 Colum. L. Rev. 488, 489, at n. 3. A Uniform Consumer Credit Code regulating credit charges, disclosure of the cost of credit, and the rights of creditors will shortly be promulgated in the U.S.A. See Jordan & Warren, *The Uniform Consumer Credit Code* (1968), 68 Colum. L. Rev. 387.

3 Cmnd. 1781 (1962). Following suggestions in the Report, the U.K. Government appointed a Consumer Council in 1963 and enacted the Hire-Purchase Act, 1964, in an attempt to provide greater consumer protection.

4 Hereinafter abbreviated S.G.A. References in this paper, unless otherwise indicated, will be to the N.S.W. Act.

pose for which goods were offered for sale. The Council has been described as a "toothless body," a "paper tiger," with publicity as its main weapon, and it would seem to have less powers than a similar body originally set up in New Zealand in 1959 and reconstituted under the Consumer Council Act 1966 (N.Z.). However it is a step in the right direction which so far is unique in Australia.[5]

The Council's report for the year ended 30th June 1967 shows that the greatest number of complaints were in respect of television and radio repairs, followed by home improvements and renovations, retail sales, faulty merchandise, door sales, and packaging and advertising, in that order. Practices objected to included the offering of discounts after "loading" the price, the display of price tags with the wrong price reduction markings, the display of goods which were superior in quality to those actually offered for sale, and "bait and switch" selling whereby the customer's interest was deliberately distracted from the "special" to a more expensive product. The report indicates that in many cases, after an approach was made by the Council to the manufacturer or retailer concerned, some sort of redress was afforded the complainant. In this respect, the Council's activities are reminiscent of the "hot line" column which is a feature of the daily newspapers published in New South Wales, with the editorial staff acting as a kind of ombudsman to deal with complaints by the public. It says a great deal for the power of the Press that in the vast majority of cases some sort of redress is forthcoming for legitimate grievances.

But fear of publicity is not the only effective sanction available to the consumer. Some of the objectionable sales practices outlined above can never be remedied, for the sad truth is that "you cannot legislate for fools" and that the maxim *caveat emptor* still has some meaning. But recent legislation has attempted to curb abuses in specific situations where the necessity for intervention has become urgent. Of course, legislation concerned with the safety of the consumer has been on the statute-books for some time,[6] while there have been a few enactments that have dealt with questions of quality, as witness the various Trade Description Acts (the effect of which is not always easy to ascertain) in force in the various States.[7] However, the last five years have seen the placing on the statute-book of door-to-door sales legislation in every State except South Australia and the Australian Capital Territory,[8] and also legislation dealing with short weight and the marking of pre-packaged goods.[9]

The basic purpose of every Door-to-Door Sales Act is to allow a buyer who has been induced to enter into a purchase of goods on credit at his home, a "cooling-off" period during which he can resile from the agree-

5 Legislation to protect consumers has been promised in other States, e.g. N.S.W. and S. Australia.

6 See e.g. Pure Food Act 1908-61 (N.SW.); Electrical Articles and Materials Act Amendment Act 1967 (S.A.).

7 See e.g. Goods (Trade Descriptions) Act 1935 (S.A.); ss. 120-131 Factories, Shops and Industries Act 1962-64 (N.S.W.); Goods Act 1958 (Vic.) (Part V).

8 See Door-to-Door Sales Act 1963 (Vic.); Door-to-Door Sales Act 1964 (W.A.); Door-to-Door Sales Act (Qd.); Door-to-Door Sales Act 1967 (N.S.W.); Door-to-Door Sales Act 1967 (Tas.); Door-to-Door Sales Ordinance 1967 (N.T.). The genesis of the legislation appears to have been a proposal by the Molony Committee. See too s. 11 Hire-Purchase Act 1965 (U.K.).

9 See Packages Act 1967 (S.A.); Weights and Measures Act Amendment Act 1967 (Qd.); Weights and Measures (Pre-packed Articles) Act 1967 (Vic.); Weights and Measures Act Amendment Act 1967 (W.A.); Weights and Measures Act Amendment Act 1968 (N.S.W.).

ment if he is so minded, and is the legislature's answer to the high pressure salesmanship displayed by door-to-door canvassers which has become so pronounced of recent years. The Act gives the buyer a right which is unique in the law of contract to cancel the agreement after he has signed it, provided he did not solicit the agreement in the first place.[10] Unfortunately, the legislation varies considerably from State to State. Thus, in some jurisdictions only certain types of goods are covered; the cooling-off periods range from 5 to 10 days; the agreements that are exempted differ (not all Acts cover the position of the hire-purchase agreement for instance); the transactions may be limited to agreements made at the buyer's home or may include any offer made or negotiations conducted at the purchaser's residence or place of employment, or even any agreement reached away from the vendor's trade premises; and there may or may not be statutory provisions against "contracting out" of the terms of the Act. The Act usually provides that the agreement is unenforceable unless it is in writing and a copy thereof, together with a statement in the prescribed form, is given to the buyer at the time it is entered into; while on termination the agreement is deemed rescinded by mutual consent, there is deemed to be a total failure of consideration, and restitution by both parties must be made.

The legislation dealing with pre-packed goods is designed to control the marketing of such goods, and aims at curbing such practices as inadequate marking of weight, the display of misleading statements on the package such as "cents-off" to indicate that it is sold at a reduced price, the use of "oversized" containers which are not filled to their full capacity, and the use of misleading expressions such as "giant" or "economy size." The legislation was drafted as a uniform code setting out the requirements and restrictions necessary to protect the consumer who purchased pre-packed goods, and provides a quite intensive regulation of the most seriously misleading of packaging practices.[11]

Developments like these in the field of consumer protection are to be welcomed as affording some relief against the juggernaut of big business, but they do not purport to do more than attempt to correct specific abuses. Alongside this sort of "piece-meal" legislation to meet specific situations, there should be a complete overhaul of the law of sales and a re-writing of the Act. It is submitted that the sale of goods legislation is so out of touch with modern conditions that mere amendment of the provisions in an endeavour to bring them up-to-date would simply amount to "papering over the cracks," and that the S.G.A. should be redrafted to meet the demands of today. A precedent for this is to be found in the unique American experiment contained in the Uniform Commercial Code where, over a period of ten years from 1942 to 1952 a team of judges, law-teachers, and practising lawyers, working under the auspices of the American Law Institute, combined to produce a complete Code of the law governing commercial transactions, including sales of goods, negotiation of cheques and other commercial paper and the various forms of financing a sale, and problems associated with the storage and delivery of the goods.[12] Article 2 of this Code amounted to a complete re-

10 Cf. the right to determine the hiring at any time conferred on the hirer by s. 12 Hire-Purchase Act 1960 (N.S.W.).

11 See the note in (1967), 41 Aust. L.J. 371.

12 See the account of the scope of the Code (hereinafter abbreviated "U.C.C.") in Sutton, *The Uniform Commercial Code and the Law of Contract* (1967), 5 Syd. L. Rev. 398, 398-400.

casting of the law relating to sales of goods in new statutory language—an innovation designed to allow the new legislation to function untrammelled by the judicial interpretations of the past. It is not suggested in this paper that any revision of the S.G.A. should be carried to this extent —the writer can only echo the views of Williston[13] that novelty of phraseology will inevitably mean lack of certainty—but it is suggested that revision of the law of sales in Australia is urgent, and that any such revision must of necessity take into account the American experiment, and the principles and theories adopted and expounded by the architects of the Code in their modern reformulation of the law of sales.

Accordingly, in considering the reform of the law of sales in the following pages, it is proposed to refer from time to time in some detail to the innovations and experiments to be found in Article 2 of the U.C.C.

II

There are two obvious areas in the S.G.A. where reform is long overdue, and they are the notorious s. 4 Statute of Frauds section and the sales in market overt provision. The requirement of writing or part payment of the price or acceptance and receipt in respect of goods of the value of $20 or more is still insisted on in Australia despite its abolition in both the United Kingdom and New Zealand,[14] and there seems to be no valid reason why it should be retained. With its removal would go all the learning on what constitutes a sufficient memorandum to satisfy the statute; the necessity to distinguish between a contract for the sale of goods and one for work done and materials supplied; and to what extent a contract caught by s.9 S.G.A. could be altered verbally and to what effect. The "unhappy confusion of authority" and the "embarrassing ambiguity of principle" referred to by McCardie, J., in *Hartley* v. *Hymans*[15] could be forgotten; whilst any objection to such a reform from the Cassandras of the law could be met by the reminder that catastrophe has not overtaken the commercial world in either the United Kingdom or New Zealand since the abrogation of s.9 in those jurisdictions.

So far as sales in market overt are concerned, these have been abolished by statute in New South Wales and New Zealand,[16] the same result has been achieved in Queensland by judicial, as opposed to legislative, means,[17] and there is no justification for the retention of this historical anomaly in the remaining States of the Commonwealth. Practically all trade today is conducted in retail shops, not in the market place, and the concept serves no practical or useful purpose. If the provision is to be abrogated, it is suggested that there is little reason to retain the section in the S.G.A. divesting the title of all intermediate buyers and sellers where goods have been stolen and the thief is later prosecuted to conviction, even where the sale is in market overt.[18] It is clear from *Payne* v. *Wilson*[19] that the section is subject to the provisions of the

13 See *The Law of Sales in the Proposed U.C.C.* (1950), 63 Harv. L. Rev. 561, 565.
14 See s. 2 Law Reform (Enforcement of Contracts) Act 1954 (U.K.) and s. 4 Contracts Enforcement Act 1956 (N.Z.). The Law Reform (Statute of Frauds) Act 1962 (W.A.) does not affect the S.G.A. in any way.
15 [1920] 3 K.B. 475, 483.
16 S. 4(2) S.G.A. 1923 (N.S.W.); s. 2 Sale of Goods Amendment Act 1961 (N.Z.).
17 *Sorley & Stirling* v. *Surawski*, [1953] Q.S.R. 110.
18 See e.g. s. 83(1) S.G.A. (Vic.). There is no such provision in N.S.W.
19 [1895] 1 Q.B. 653, *rev'd* [1895] 2 Q.B. 537.

Factors Act, and it is therefore difficult to see what operation it can have if the concept of market overt is to be done away with.

It is true that the United Kingdom Law Reform Committee in its Twelfth Report issued in April 1966[20] by a majority recommended in effect that the principle behind sales in market overt should be extended to retail sales to an innocent purchaser at trade premises or at public auction. Onus of proof of his bona fides was to rest on the purchaser, who was not to acquire a good title if he knew of any facts which should have put him on inquiry; while "trade premises" meant premises open to the public at which goods of the same or similar description were normally offered for sale by retail in the course of business. This proposal involves a notable shift in theory from the protection of ownership of property to the protection of the innocent buyer and the facilitation of commercial transactions[21] and will be considered later in this paper in discussing the rule *nemo dat quod non habet.*

Another area in the S.G.A. which is ripe for reform is that dealing with the conditions and warranties implied in a contract of sale, and the right of the parties to exclude these implied terms by agreement. The first point to be made concerns the distinction drawn in the S.G.A. (and indeed, in the common law) between a vital term of the contract, breach of which entitles the innocent party to rescind (subject to loss of this right in certain circumstances), and a subsidiary term breach of which sounds only in damages. There is the further distinction drawn by the common law between an express term of a contract and a representation inducing the making of a contract but not properly part of it. The whole purpose of the classification is to enable the Court to decide when the remedy of rescission will be available and when the innocent party will be limited to a claim for damages or, indeed, be left without any remedy at all. Thus, an affirmation which is a "mere puff" or does not induce the making of the contract gives rise to no remedy, whereas an affirmation which has induced the entry into a contract but is nevertheless not a term thereof will enable an innocent party to rescind,[22] subject to various bars, not the least important of which from the point of view of the present inquiry, is the rule that there cannot be rescission for innocent misrepresentation of a contract for the sale of goods and that the remedy is in any event no longer available once the goods have been accepted.[23] Where the representation has become a term of the contract, the remedy available for breach will depend on its classification as a warranty or a condition as already indicated. It is therefore of vital significance to ascertain how this classification is to be made.

The cases establish that whether a statement becomes a term of the contract or not depends on the objective intention of the parties to be deduced from the whole of the circumstances of the case,[24] and that this test is again used to decide whether a statement which is a contractual term is to be classified as a warranty or a condition. In the result, the

20 *Transfer of Title to Chattels*, Cmnd. 2958 (1966). See the discussion in Sutton, *Law of Sale of Goods in Australia and New Zealand* 395 *et seq.* (1967).
21 Cf. Denning, L.J., in *Bishopsgate Motor Finance Corpn. Ltd.* v. *Transport Brakes Ltd.*, [1949] 1 K.B. 332, 336-7.
22 If the affirmation is fraudulently made, damages are available as well as rescission, but it is notoriously difficult in practice to prove fraud.
23 See Sutton, *op. cit. supra*, n. 20, at 5 *et seq.*
24 *Oscar Chess Ltd.* v. *Williams*, [1957] 1 W.L.R. 370, 375. This is subject to the parol evidence rule forbidding the variation of a contract which the parties have purported to reduce to writing in its entirety.

classification comes down to the Court's view of the conduct of the parties and to the importance which it thinks should be attached to the particular statement in the light of all the circumstances. The matter has been considered by Prof. D. Allen in his recently published paper *The Scope of the Contract* and he concludes that:[25]

> A reading of the cases can only leave one with the impression that the test is unworkable and the decision as to the grade of importance arbitrary. Too often the court appears to decide whether the remedy sought would be appropriate in all the circumstances, and then classifies the statement appropriately; and one is left with no more reason than the bald assertion that it does or does not appear that the importance of this statement to the parties was such as to justify the relief sought.

Admittedly, this does enable the Courts to have considerable flexibility of approach, but to quote Allen again:[26]

> Courts should not . . .be forced into artificial casuistry in order to do justice; and each new decision adds a further precedent to the law until a body of highly technical distinctions has been amassed which renders the task of advising clients a fine exercise in speculation.

Space does not permit a detailed investigation of the extent to which the traditional method of making the classification has been eroded by such decisions as *Dick Bentley Productions Ltd.* v. *Harold Smith (Motors) Ltd.*[27] and *Hong Kong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*[28] or how far the classification, with consequent allocated remedy, can be evaded by using the concept of the collateral contract, the doctrine of total failure of consideration, or the principle of liability for negligent misstatement established in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[29] These developments are significant in relation to statements made expressly during negotiations leading up to the contract, but so far as the terms of the contract *implied* by the S.G.A. are concerned, the condition/warranty dichotomy remains unimpaired.

What is clear is that a thorough overhaul is required of the existing law in relation to the legal effect of misstatements made in the course of negotiations leading up to a contract, and this overhaul should be extended to cover the conditions and warranties of quality etc. implied under the S.G.A. Allen, in his paper already referred to, made a number of suggestions for reform which, however, were directed to the whole area of the law of contract. He saw no justification for the present classification of statements as mere representations or contractual terms and advocated the abrogation of innocent misrepresentation as a separate category. In his view, if a statement induced the making of the contract, it was part of the bargain between the parties and should be viewed as contractual. The question of the appropriate remedy, should the statement turn out to be untrue, was a separate issue and should turn, not on an initial arbitrary classification of the affirmation, but on the nature of the consequences that flowed from the breach.[30]

25 (1967), 41 Aust. L.J. 274, 276.
26 *Id.*, at 275.
27 [1965] 2 All E.R. 65.
28 [1962] 2 Q.B. 26.
29 [1964] A.C. 465. These aspects of the problem are examined by Allen, *loc. cit. supra*, n. 25, at 277-81. See too Sutton, *op. cit. supra*, n. 20, at 13-15. The recent case of *Beale* v. *Taylor*, [1967] 1 W.L.R. 1193 (C.A.) indicates that the distinction between a sale by description, a contractual warranty and a mere representation is very fine and that a statement may be classified as part of the description and hence give rise to total failure of consideration or to a claim for damages in appropriate circumstances.
30 This is, of course, the approach adopted by Diplock & Upjohn, L.JJ., in *Hong Kong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*, *supra*, n. 28.

These suggestions though radical are not completely new and untried but bear a close resemblance to the position existing under both the Uniform Sales Act[31] and the U.C.C. The relationship between the American legislation and the condition/warranty dichotomy of the S.G.A. has been examined by the writer elsewhere[32] and it will suffice in this paper merely to summarize the points there made.

The U.S.A. when promulgated in 1904 departed from English law in rejecting the condition/warranty dichotomy and substituting the concept of a warranty as a material promise. A breach of warranty in a contract of sale was followed by the same consequences as the breach of a material promise in other contracts; the innocent party had a right to rescind the transaction (subject to certain limits[33]). Further, the distinction between an innocent misrepresentation and a term of the contract was abolished and the principle established that an *express* affirmation of fact was to be regarded as a warranty if its natural tendency was to induce the purchase of the goods, and the buyer, thus induced, did purchase them. No intention by the seller to warrant was required, the draftsman Williston, taking the view that an affirmation which led a reasonable man to believe it was made to induce the bargain and which had that effect, should be actionable as a warranty, and that the intent of the affirmer was not his intent to enter into a contract but his intent to assert a fact in order to induce a sale, and was therefore relevant only to distinguish between a statement of opinion and an affirmation of fact.[34]

This principle was written into s. 12 of the U.S.A., the basis for liability being the buyer's justifiable reliance on the seller's assertions; and whether the buyer was justified in his reliance or not depended, 'not on the intention of the seller, but on the natural tendency of the seller's acts. The principle was re-affirmed with but slight change of emphasis in the U.C.C., s. 2-313 (1) (a) describing an express warranty as "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain. . . ." The comment to the section indicated that any affirmation of fact made by the seller becomes part of the basis of the bargain "unless good reason is shown to the contrary."[35]

Hence, the American legislation at one stroke did away with innocent misrepresentation, collateral contracts, and the dichotomy between conditions and warranties, and achieved what Allen advocated—to make the seller contractually liable for statements for which he had assumed responsibility and on which the other party had relied. It is true that to accomplish this in Australia would involve a modification of the parol evidence rule and an investigation of the statutes requiring written evidence of contractual terms, and these reforms together with the casting out into limbo of the distinction between a term of the contract and a representation outside it might be too radical a step for local lawyers to swallow, especially in view of the provisions of the Misrepresentation

31 Hereinafter abbreviated "U.S.A."
32 See Sutton, *Sales Warranties Under the S.G.A. and the U.C.C.* (1967), 6 Melb. U.L. Rev. 150, 152-155.
33 See s. 69(1)(d) U.S.A. and the minor restrictions placed on rescission in s. 69(3). The buyer had to elect between rescission and the recovery of damages.
34 See Williston, *Representation and Warranty in Sales—Heilbut* v. *Buckleton* (1913), 27 Harv. L. Rev. 1.
35 S. 2-313 Comments 3 & 8.

Act 1967 (U.K.) retaining the distinction. The argument will be that such a change will not mean any great alteration in result, that if a judge thinks damages ought to be given he finds that there was a collateral contract rather than an innocent misrepresentation,[36] and that there must be a distinction between the terms of a contract and the representations which induce it.

In answer, the writer can only respectfully adopt and perhaps embellish the points made by Allen in his paper already referred to. The rules governing the different categories of affirmations are easy to state but difficult to apply, and make the lawyer's task of advising his client an impossible feat of speculation. Even if justice is achieved under the present situation, it is achieved through the use of casuistry and technicality which can only bring law into disrepute. Why should the category of misrepresentation be "useful in its own right" when the sole purpose of the classification of statements made during negotiations for a contract is to allocate the available remedies should those statements turn out to be wrong? If, under the Misrepresentation Act 1967 (U.K.) damages in lieu of rescission can be had for innocent misrepresentation (albeit at the discretion of the Court), what is the point in differentiating between misrepresentation, conditions and warranties, or collateral contracts assuming, of course, that corresponding legislation were to be adopted here?[37] Even the "timorous souls" among the legal fraternity in Australia will realize that something has got to be done to clear up this particular area of the law and they may be prepared to go as far as the English Misrepresentation Act has gone; but having done that, they will in effect have removed any rational basis for retaining the different categories of statements at all. It is submited that the categories should be done away with, that any statement *material* to the formation of a contract should be actionable if it turns out to be false,[38], and that the remedies for breach should be governed by the consequences that flow from the breach as set out in *Hong Kong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*[39]

So far as the S.G.A. is concerned, this reform would mean the end of the condition/warranty dichotomy for terms implied by the Act, for if the distinction is to be removed for the express terms of the contract of sale, it can hardly survive in respect of the implied terms. It would also mean the end of the controversy as to whether any remedy lies for innocent misrepresentation inducing the formation of a contract for the sale of goods, and the limits to be placed on that remedy. At present the position would seem to be that, provided it is possible to rescind such a contract for innocent misrepresentation at all, that right is lost once the goods have been accepted.[40] It would seem advisable to retain some such time-limit on the exercise of his remedies by the buyer, if only on the grounds that the buyer must exercise reasonable diligence

36 See Lord Denning, M.R., speaking to Allen's paper in (1967), 41 Aust. L.J. 293.

37 The continued retention of these categories can only be justified if the parol evidence rule and the Statute of Frauds were to be applied rigorously to exclude all but the written terms of a contract.

38 The requirement of materiality would prevent misrepresentations which are neither meant nor understood to be promissory, such as statements of opinion or mere "puffery," from being actionable.

39 *Supra*, n. 28. If the consequences of the breach substantially deprive the innocent party of what he had contracted for, he is entitled to treat the contract as at an end. The question of remedies is discussed *infra*.

40 See Sutton, *op. cit. supra*, n. 20, at 11-12. This assumes that the rule in *Angel* v. *Jay*, [1911] 1 K.B. 666 has no application to contracts for the sale of goods. This assumption is established fact in England by virtue of the Misrepresentation Act 1967.

in the protection of his rights, and that there must be an end to the particular transaction, otherwise "business dealings . . . would become hazardous, difficult and uncertain."[41] It would be necessary however to provide in any legislation as it is provided in the Misrepresentation Act 1967 (U.K.) that the right to reject specific goods would depend, not on the passing of the property therein to the buyer, but on his acceptance thereof, and to make it clear that there should be no acceptance of the goods until the buyer had had a reasonable opportunity to examine them.

So far as the actual content of the terms implied in the contract of sale by the S.G.A. are concerned, no *major* recasting of these provisions would appear to be necessary to bring them up-to-date. In a comparative survey of the warranty provisions[42] of the S.G.A. and the U.C.C., the writer concluded that in the Code there had been no fundamental departures from the basic theories underlying the law of sales warranties as it existed under the S.G.A., but that this area of the law of sales had received some measure of modernization and re-alignment to enable it to meet business conditions as they exist today.[43]

Specific reforms in the area of implied warranties which should however be carried out in any revision of the S.G.A. include the following. In the warranty of title section it should be made clear that a seller who is not the owner of the goods he purports to sell is within the ambit of the section (indeed, this is the precise area where the section is most likely to be invoked), while the ability of a seller to "contract out" of the warranty should be accurately delimited. It is suggested that exclusion or modification of the warranty if permited at all should be permitted only by specific language[44] or by circumstances which give the buyer reason to know that the seller does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have. This provision is to be found in the U.C.C.,[45] which also contains a novel provision creating a warranty against infringement, but it would seem that this latter section is unnecessary in the S.G.A. since it is implicit in the language of s. 17 (1).[46]

In any overhaul of the warranty of title section, opportunity should also be taken to correct the effects of the unfortunate decision in *Rowland* v. *Divall.*[47] That case is authority for the proposition that if the seller has no right to sell the goods there is a total failure of consideration, and the buyer can recover the purchase price without any set-off for depreciation despite the considerable use he may have made of the goods, on the ground that the buyer did not get what he contracted to get, namely the property in the goods. It is submitted that it would be more consonant with justice and with reality in such a situation to leave on one side any notions of quasi-contract, and to award damages to the injured buyer for breach of the warranty of title, which would amount to

41 See Lord Evershed, M.R., in *Leaf* v. *International Galleries*, [1950] 2 K.B. 86, 95.
42 The term "warranty" will be used henceforth to embrace both conditions and warranties implied under the S.G.A.
43 See Sutton, *loc. cit. supra*, n. 32.
44 It may even be advisable as a matter of policy to prevent "contracting-out" at all in certain specific situations, e.g. in lay-by sales and in sales of motor vehicles by dealers. See s. 15 Lay-by Sales Act 1943 (N.S.W.) and s. 27 Motor Vehicles Dealers Act 1958 (N.Z.).
45 S. 2-312(2).
46 The seller wararnts that he has a right to sell the goods. See *Niblett* v. *Confectioners Materials Co. Ltd.*, [1921] 3 K.B. 387.
47 [1923] 2 K.B. 500.

the value of the chattel repossessed by the true owner[48] less an appropriate sum for the use of it in the interim. In situations other than the breach of warranty of title, use of the goods will prevent recovery of the price on the ground of total failure of consideration.[49] The English Law Reform Committee in its Twelfth Report, already referred to, proposed that the buyer in such a situation as arose in *Rowland* v. *Divall* should recover no more than his actual loss, giving credit for any benefit he may have had from the goods while in his possession, and it is suggested that this proposal should be incorporated in any revised sales legislation in Australia.

The warranty of conformity to the description will need considerable overhaul, and the solution put forward by the U.C.C. would seem to be the best approach to adopt to avoid the many difficulties that have arisen in the S.G.A. over this provision. The Code does away with the requirement that the sale must be a sale by description (thereby removing all the problems associated with that concept in the era of the supermarket and the self-service store) and substitutes the test of whether the description of the goods is made part of the basis of the bargain. Any such description creates an *express* warranty of conformity.[50] It is further made clear that a description need not be given by words, but can be supplied by models, samples, technical specifications, blueprints and the like. It was for this reason that the Code saw no need to set a sale by sample aside in a separate category, but provided that any sample or model which was made part of the basis of the bargain created an express warranty that the whole should conform to the sample or model.[51]

The requirement that the sale must be a sale by description should likewise be deleted from the provision of the S.G.A. dealing with the warranty of merchantable quality. Further, a detailed statement of what is meant by mechantability, along the lines of that set out in s. 2-314 of the U.C.C. should be included in the S.G.A. so that it can be clearly understood what is meant by that elusive term. Incidentally, the Code breaks new ground when it includes in its description of merchantability the requirement that the goods must "conform to the promises or affirmation of fact made on the container or label if any." The retailer is liable if this conformity is lacking. It will be noted that this does not deal with the problem of how the manufacturer or distributor can be made liable to the ultimate consumer for extravagant claims in respect of his product, but this will be considered further below in discussing the question of privity of contract.

The proviso freeing the seller from liability for defects apparent on examination is retained in the U.C.C. but it is made clear that the proviso operates even where the buyer refuses to examine the goods.[52] The language of s. 19(2) S.G.A. should be suitably altered to make it clear that the proviso operates where the buyer refuses to examine the goods after being requested to do so.

48 It is suggested that the value of the chattel would be taken as at the date of delivery which is the date of breach.

49 See *Yeoman Credit Ltd.* v. *Apps*, [1962] 2 Q.B. 508.

50 S. 2-313(1)(b).

51 S. 2-313(1)(c). The other terms implied in a sale by sample by s. 20(2) S.G.A. are to be spelt out of general sales provisions of the U.C.C.

52 S. 2-316(3)(b).

Finally, there is the implied warranty of fitness for the particular purpose. The Code provision follows s. 19 (1) of the S.G.A. except that there is no requirement that the seller deal in goods of that kind[53] and the proviso respecting sales under patent or trade name is done away with. It is suggested that there is an inconsistency in retaining the qualification that the seller be a dealer so far as the warranty of merchantability is concerned and abrogating it in the case of the warranty as to fitness, although in the latter case the seller will usually need to be a merchant so that the necessary element of reliance on his skill or judgment can be proved. There seems to be little reason for retaining the qualification at all in the light of the facts that merchantability is a relative term indicative of the reasonable expectations of the buyer in the circumstances and that the seller is not liable in respect of apparent defects. The name "merchantability" of course connotes that the seller is disposing of the goods by way of trade, and there is some merit in placing the risk of latent defects on the merchant-seller as opposed to the buyer. But it should suffice that the seller has disposed of the goods by way of trade without the buyer having to show that he deals in goods of that kind.

Further, as regards liability for latent defects, the risk should lie with the manufacturer of the goods under a theory of common law liability for putting defective goods into circulation, rather than with the retailer who cannot be expected to be familiar with the make-up of the goods he sells, no matter how frequently he disposes of them. Under s. 5 (2) Hire Purchase Act 1960 (N.S.W.) neither the owner nor the dealer is liable in respect of defects of which they could not reasonably have been aware at the time the agreement for hire-purchase was made,[54] and it is suggested that a similar position should obtain under the S.G.A. as least so far as the retailer is concerned, leaving the burden of liability on the shoulders of the manufacturer.

With regard to the trade name proviso, it was enacted at a time when large-scale brand advertising was unknown, and its continued retention can no longer be justified in the light of the interpretation placed upon it by Bankes, L. J., in *Baldry* v. *Marshall.*[55] The proviso only applies where the circumstances indicate that the buyer is relying on his own judgment and not on the skill or judgment of the seller, and it is therefore redundant.

Discussion of the implied warranties as to quality brings to the fore the question of "contracting-out" of these provisions of the S.G.A. and the widespread use of the exemption clause. It is well-known that sellers can exclude any right, duty or liability arising under a contract of sale by implication of law[56] but that the same privilege is only accorded the owner in a hire-purchase transaction in very limited circumstances.[57] Whatever the theorists may say, it is suggested that in this day and age the distinction between a sale and a hire-purchase transaction based on the existence of an option in the latter case entitling the hirer to withdraw from the deal up to the last moment, is completely unrealistic

53 S. 2-315. This requirement was likewise omitted from s. 15(1) U.S.A. Cf. s. 5(3) Hire-Purchase Act 1960 (N.S.W.) which omits both this requirement and the requirement of reliance on the other party's skill or judgment
54 Cf. the Molony Report which rejects this provision as designed to protect the finance company which has never seen the goods at all.
55 [1925] 1 K.B. 260.
56 See s. 57 S.G.A.
57 See s. 5 & s. 36(1)(i) Hire-Purcase Act 1960 (N.S.W.).

and should be done away with. It should be recognized that a hire-purchase transaction is what the consumer considers it to be—a sale on credit, not a hiring. If this be admitted (and the extended definition of hire purchase agreement in the Hire-Purchase Act is some help in this regard), then it should be recognized that the same rules should apply to both a sale and a hire-purchase transaction so far as implied warranties of quality and their exclusion are concerned. If no more far-reaching amendment were made, at least the S.G.A. should be altered to conform to the terms of the Hire-Purchase Act, and thus remove the anomaly whereby the consumer may be better off (in this respect at least) if he takes goods on hire purchase instead of for cash.[58]

If this were done, it might be necessary to expand the limited "contracting-out" provisions of the Hire-Purchase Act to meet specific situations, such as the sale of seeds[59] or the sale of goods "as is" "where is," in an appropriate situation, although such goods will usually be second-hand and therefore able to be exempted under the terms of the Hire-Purchase Act. This however will not always be so, as for instance in the case of shopsoiled, imperfect, or salvaged goods.

But the better solution might be to tackle the problem on a wider basis and to declare all exemption clauses (using that phrase in a wide sense to include limited liability clauses, limited guarantee clauses, and time-bar clauses) as prima facie void and only to be upheld if shown to be reasonable in the interests of the parties and of the public. Respectable authority for this approach is to be found in the present judicial attitude to covenants in restraint of trade and in the provisions of the Railway and Canal Traffic Act 1854 (U.K.) whereby in a contract for the carriage by goods by rail the carrier could only exempt himself by such terms as the Court thought reasonable.[60] It might even be possible to go as far as Israel has done and set up a tribunal to which standard form contracts governing transactions in particular fields could be submitted for approval on the basis that once this approval was given the terms could not be challenged for unreasonableness.[61] This approach would certainly be better than the piecemeal use of devices adopted by the Courts as instruments of control over the use of exemption clauses, especially as some of these devices appear to have broken down or may be neutralized by skilled draftsmanship[62] or are capricious in their operation, while at the same time the approach would allow full play to be given to the principle that exemption clauses may be legitimately used in an appropriate situation.[63]

58 The Molony Report recommended in 1962 that the implied warranties of the S.G.A. and the Hire-Purchase Act should be brought into line. The complete abolition of the technical distinction between a sale and a hire-purchase transaction would mean that s. 28(2) S.G.A. would no longer be a protection to the owner in a hire-purchase transaction. But it may be doubted whether the subsection serves any useful purpose in protecting third parties as it stands in view of the tremendous increase in hire-purchase transactions in recent years. Cf. s. 27 Hire-Purchase Act 1964 (U.K.) whereby a private purchaser of a motor vehicle the subject of a hire-purchase agreement obtains a good title if he acts in good faith and without notice of the agreement. The point is discussed further *infra*.

59 Statutory provisions exist in Australia which impose a fairly strict liability on the seller of seeds insofar as quality is concerned. See e.g. s. 7 Seeds Act 1950 (W.A.).

60 See Treitel, *Law of Contract* 168 (2d ed. 1966). Sales, *Standard Form Contracts* (1953), 16 Mod. L.Rev. 318, 335-6, thought that this would be unduly burdensome on the judges and suggested the establishment of a tribunal to settle standard form contracts for particular transactions.

61 See Gottschalk, *Israeli Law of Standard Contracts* (1965), 81 L.Q.R. 31.

62 See e.g. *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361.

63 *Id.*, at 406, per Lord Reid: "Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are

A somewhat similar approach with the same end in view of curbing the use of oppressive or unfair exclusion clauses is to be found in s. 2-302, the "unconscionable contracts" provision of the U.C.C. This provision has been examined by the writer elsewhere[64] and its effect will be only briefly considered here, but it permits a court to refuse to enforce a contract for the sale of goods, or alternatively to strike out the offending clause or limit its application, where the Court finds as a matter of law that the contract or any clause therein was unconscionable at the time it was made. Although framed generally in the Code, it is clear from its history that the section was originally aimed at standard form contracts and their one-sided terms. "Unconscionable" is not defined but it appears to embrace two concepts, that of unfair surprise where there is in fact no assent to the terms of the bargain, the exemption clause in fine print being either not read before the contract is signed, or, if read, not understood; and that of oppression where, even though the buyer is aware of the objectionable terms, he has in effect no choice but must accept the contract as it stands.

Allied to this provision of the U.C.C. are provisions rendering it difficult for a seller to exclude or modify warranties of quality.[65] Briefly put, under the Code an express warranty is more difficult to disclaim than an implied warranty, while in the latter case, requirements of prominence for the exclusion clause and in the case of merchantability, specific mention of the word, are insisted upon. It would seem that s. 2-302 is the dominant section and that an effective disclaimer clause might be struck out as unconscionable.[66]

It may be that the "unconscionable contracts" provision of the U.C.C. is too radical in concept and too uncertain in operation to be regarded favourably by local legislators, while it is felt by the writer that the same end could be achieved by subjecting exemption clauses to the test of what is reasonable in the interests of the parties and of the public as suggested above. On the same grounds, the complicated provisions of the Code with regard to the effectiveness of disclaimers of warranty should not be copied here.

It is clear that some degree of reform in this area of the law is overdue in Australia. Common commercial practices today include the addition to invoices or order forms of such clauses as "goods are at purchaser's risk during transit" "no claim recognized unless made within seven days of delivery of goods," or "all warranties conditions and liabilities whatsoever implied by common law, statute or otherwise are hereby expressly negatived and excluded." Sometimes the goods are supplied with a "manufacturer's warranty" which usually turns out to be a snare and a delusion and amounts to no more than an undertaking to replace or repair within a certain period any parts which in the seller's

now so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.

"At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason. But this rule [i.e. that a fundamental breach abrogates an exemption clause] appears to treat all cases alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable or whether it is freely agreed by the customer."

64 See Sutton, *loc. cit. supra*, n. 12, at 416-419.
65 See Sutton, *loc. cit. supra*, 32, at 169-174.
66 Sutton, *loc. cit. supra*, n. 12, at 418-419.

or manufacturer's opinion are defective. It is expressly declared that the seller shall not be answerable for any contingent or resulting liability or loss arising through any defects, while as an added safeguard, it is provided that the decision of the seller in all cases of claims or disputes shall be final and conclusive.[67] One local manufacturer issues a "ten-year biennial guarantee" which on examination turns out to be a warranty limited to the rectifying within two years of delivery of any fault due to defective material or workmanship upon the delivery of the goods to the premises of an accredited service agent at the owner's expense each way. At the end of the two-year period the goods are to be returned for servicing and restoration to first-class working order (at a charge of course) whereupon the same warranty applies for the next two years, and so on until the total period of ten years has elapsed. The "guarantee" is not valid unless registered within fourteen days of purchase and unless the full list price has been paid; while the purchaser is deemed to have bought the goods after full inspection and approval of the conditions of guarantee.

This brings squarely to the fore the question of misleading "guarantees" by manufacturers. Instead of providing an additional assurance of workmanship, performance, and quality, as the ordinary purchaser fondly imagines they are doing, many guarantees seriously limit the consumer's rights and replace them with a vague undertaking to make good certain defects at the seller's or manufacturer's discretion.

The layman thinks he has a valuable undertaking which he can use against the manufacturer, when the reverse is the case. Further, in the usual course of events the manufacturer is not even in contractual relation with the buyer and is not liable to him, a situation of which the purchaser who descends on the retailer with his complaints, brandishing the manufacturer's guarantee, is happily ignorant. It is true that matters are usually settled satisfactorily with the retailer either referring the complaint back along the chain of distribution or advising the customer of the appropriate service centre maintained by the manufacturer where the guarantee should be honoured according to its terms. The customer is left in ignorance of the fact that in law his sole right of redress is against the retailer and usually does not even realize that the retailer is under any liability at all. Of course it might be possible in certain circumstances to spell out a contract between manufacturer or consumer based on the existence of the guarantee. Where the buyer is aware of the guarantee before he buys and is influenced by it in his decision to make the purchase, there are all the ingredients for a collateral contract based on an offer to all the world by the manufacturer along the lines of *Carlill* v. *Carbolic Smoke Ball Co.*[68] But the necessary ingredients are lacking when the buyer is unaware of the guarantee until after he has bought the goods.

Related to this topic are the advertising techniques of the manufacturer. In the modern world where brand-images and sales promotion by "gimmickry" or by direct advertising on a nation-wide scale are an accepted feature of every-day life, it is the manufacturer who plays

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67 Insofar as this amounts to an attempt to exclude the jurisdiction of the Courts it will be void as against public policy. Presumably any decision by the seller or manufacturer must be made honestly.

68 [1893] 1 Q.B. 256.

the vital role in persuading the consumer to purchase his product. The buyer relies more and more heavily on the manufacturer, and yet the sale is not normally made through him but through some retail firm. The manufacturer can make what extravagant claims he likes for his product but he will be under no contractual liability to the purchaser for these promises, unless he can be brought within the *Carlill* v. *Carbolic Smoke Ball Co.* principle. It can be argued that a manufacturer who makes precise statements about the quality and safety of his product makes an offer to the world at large which is accepted by a purchaser buying the product concerned from a retailer on the faith thereof.[69] But so far, there has been no great enthusiasm by the English or Australian Courts to develop any theory of liability on the part of the manufacturer on this basis, and indeed the Molony Committee when considering the liability of manufacturers felt itself unable to endorse the principle that there should be liability without privity of contract. As one commentator has remarked, "it is perhaps fortunate that *Donoghue* v. *Stevenson* came before the House of Lords, rather than being referred to a committee such as this."[70]

But the statements made in advertisements, or catalogues, as in guarantees, must be clear and not vague or ambiguous. Given sufficient precision, the manufacturer should be liable if his representations have induced a sale and have then turned out to be false.[71] It is suggested that the approach adopted in America in relation to the liability of the manufacturer to the ultimate consumer should be adopted here. This involves two considerations, the liability of the manufacturer for representations made by him in advertising media, and the relaxation of the doctrine of privity of contract.

So far as liability for representations in advertisements is concerned, it seems clear that the manufacturer could not evade responsibility on the ground that the statements were "chaffer in the market place" and that there was no intention to be legally bound. This argument failed in 1893 in *Carlill* v. *Carbolic Smoke Ball Co.* and should fail now.[72] In America, representations made by a manufacturer in newspaper advertisements and on labels on his products as inducements to the consumer to buy have been held to amount to express warranties under s. 12 of U.S.A., for breach of which an action would lie at the hands of the ultimate purchaser who relied on such representations in deciding to buy the product. Thus, in 1932 in *Baxter* v. *Ford Motor Co.*[73] the purchaser of a Ford car who bought the vehicle in reliance on a statement in a sales pamphlet that the windscreen was shatterproof, recovered damages for personal injuries sustained when the statement proved to be

69 See too *Shanklin Pier Ltd.* v. *Detel Products Ltd.*, [1951] 2 K.B. 854.

70 Diamond discussing the Molony Report in (1963) 26 Mod. L. Rev. 66, 71.

71 Under s. 133 Factories, Shops and Industries Act 1962-64 (N.S.W.) it is an offence to publish a false or misleading advertisement intended to promote the sale or disposal of any goods. See too s. 84A Auctioneers, Stock & Station, Real Estate and Business Agents Act 1941-57 (N.S.W.) enacted in 1957. But there seems to be no provision for recommensing the misled purchaser, and why conceal such a clause in a Factories Act?

72 It is submitted that the deposit of money in a bank to prove the advertiser's sincerity is not essential, so long as the representation is precise enough. But the statement must be made in such circumstances that the advertiser can be said to have contemplated that contractual relations might result. See *Australian Woollen Mills Pty. Ltd.* v. *Commonwealth* (1954), 92 C.L.R. 424, *aff'd* (1955), 93 C.L.R. 546 (P.C.); *Administration of Territory of Papua and New Guinea* v. *Leahy* (1961), 105 C.L.R. 6.

73 (1932), 12 P. 2d. 409 (S. Ct. Wash). See too *Burr* v. *Sherwin Williams Co.* (1954), 268 P. 2d. 1041 (S. Ct. Calif.); *Hamon* v. *Digliani* (1961), 174 A. 2d. 294 (S. Ct. Errors Conn.).

false. The justification for permitting an action to succeed in such circumstances has been well put by the Supreme Court of Ohio in *Rogers* v. *Toni Home Permanent Co.*[74] in these words:

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

Closely allied to this development in America has been a relaxation of the doctrine of privity of contract along with the parallel rise of a doctrine of strict liability in tort. This "assult upon the citadel of privity" has gained increased momentum over the last thirty years, and its progress can be traced from the first successful breach in relation to defective food and allied products causing personal injury to the ultimate purchaser; to the extension of liability to injury caused by defective chattels put into the stream of trade by a manufacturer even where no advertisement or express representation had been made by him, the argument being that an implicit representation of fitness arose when the manufacturer put the goods on the market; followed by the extension of protection beyond the actual purchaser to anyone who might in the reasonable contemplation of the parties to the sale be expected to use the chattel,[75] and even beyond that to where the person injured was not even a user or consumer but a mere innocent by-stander.[76]

At this point the action based on breach of an implied warranty of quality or fitness for the purpose is seen to be grounded fundamentally in tort rather than contract, the manufacturer being strictly liable if he sold a product in a condition dangerous for use, even though both negligence and privity of contract were lacking. As such, the doctrine goes further even than s. 402A of the Second Restatement of the Law of Torts (which had adopted the basis of strict liability in the case of a seller of products for occasioning physical harm to a user or consumer or to his property) in that it allows recovery for personal injury to other than users or consumers. But it matches the section in allowing claims for injury to property, although Courts have shown greater reluctance in extending the doctrine beyond claims for physical injury.[77]

The U.C.C. took an expressly neutral stand on the question of relaxation of "vertical privity" i.e. the consumer's right to recover directly from the manufacturer despite the interpolation of wholesaler, distributor,

74 (1958), 147 N.E. 2d. 612, 615.

75 See *Henningsen* v. *Bloomfield Motors Inc.* (1960), 161 A. 2d. 69 (S. Ct. N.J.); *Goldberg* v. *Kollsman Instrument Corpn.* (1963), 191 N.E. 2d. 81 (C.A. N.Y.); *Greenman* v. *Yuba Power Products Inc.* (1963), 377 P. 2d. 897 (S. Ct. Calif.).

76 See *Mitchell* v. *Miller* (1965), 214 A. 2d. 694 (S. Ct. Conn.); *Lonzrick* v. *Republic Steel Corpn.* (1966), 218 N.E. 2d. 185 (S. Ct. Ohio); *Piercefield* v. *Remington Arms Co. Inc.* (1965), 133 N.W. 2d. 129 (S. Ct. Mich.).

77 See Sutton, *loc. cit. supra*, n. 32, at 179-181.

and retailer, but it did relax the doctrine so far as "horizontal privity" was concerned by extending the range of those who could sue the immediate seller. Section 2-318 provided that a seller's warranty extended to any natural person who was in the family or household of the buyer or who was a guest in his home, if it was reasonable to expect that he might use or consume the goods. However, it covered only personal injury.

In 1966 the Permanent Editorial Board of the U.C.C. taking cognisance of developments in the common law doctrine of strict liability and of the obvious dissatisfaction with the Code's limited relaxation of privity requirements shown in many States, promulgated three alternative versions of s. 2-318, each one more liberal than the last, for States to choose from. The most liberal version extended the protection of the seller's warranty to any person who might reasonably be expected to use, consume or be affected by the goods, and who suffered injury as a result.

It is obvious that the American law has gone far beyond its English or Australian counterpart in extending protection to the consumer.[78] The only way in which a manufacturer or other remote seller can become liable to the consumer in England or Australia for putting into the stream of trade a defective chattel, is by invoking the principle of *Donoghue* v. *Stevenson* or by establishing the existence of a contract between the two parties. Liability on the basis of *Donoghue* v. *Stevenson* involves the proof of a duty owed to the consumer and breach of that duty by failure to use reasonable care, and despite the doctrine of *res ipsa loquitur* it is not always easy for the plaintiff to discharge that onus of proof. So far as the establishment of a contract is concerned, the attitude of the Courts is quite unpredictable and this approach is unreliable in affording the consumer protection. Further, the manufacturer can at present exclude his liability by so providing in the contract. It is suggested that the S.G.A. should be amended to transfer the strict liability of the immediate seller to the person really responsible for the defective nature of the goods sold in the modern world of mass manufacture and standardized products, i.e. the manufacturer, and that he should not be able to "contract-out" of his obligations except in exceptional circumstances. This reform would be merely adapting the law to meet changing social conditions; it would put the blame where it really belongs,[79] and would remove the danger that a purchaser might fail to obtain redress because his immediate seller has turned out to be a man of straw unable to satisfy any judgment.

The law should also be amended so as to extend the protection of the warranty provisions of the S.G.A. to persons other than the immediate buyer. The provisions should cover all persons who ought reasonably to be expected to use, consume, or be affected by the goods and should at least protect them in respect of personal injury.[80] A reform such as this would go a considerable way to removing the difficulties caused by the doctrine of privity of contract.

78 The Consumer Protection Act 1961 (U.K.) merely gives power to make regulations about any goods in order to protect the public from the risk of death or injury. Goods which do not comply with the regulations are not to be sold in the course of business, and if they are, any person injured by the faulty goods can sue the seller for breach of statutory duty.

79 As a matter of practicalities, the distributor for the State should be made liable where the manufacturer is a "foreign" concern, but he should be indemnified by the manufacturer.

80 Cf. the terms of s. 3(1) Consumer Protection Act 1961 (U.K.) referred to *supra*, n. 78.

A widespread practice, akin to the use of exemption clauses and misleading guarantees, is the insertion in sales contracts of clauses that the written document constitutes the entire contract between the parties and any liability for representations made in the course of negotiations is excluded. For good measure, it is provided that the seller is not to be responsible for any warranties, guarantees or promises made by any employee or agent, unless the same are specifically set out in the contract, and also that no employee or agent has authority to add to or alter the terms of the agreement. Alternatively, the contract may provide that the purchaser acknowledges that he has inspected the goods, that they conform to the contract, and that he buys in reliance on his own judgment and not on any representation or warranty made by the seller.[81]

This sort of clause brings into play the parol evidence rule whereby, if the Court considers that the writing is intended by the parties to contain the entire agreement between them, neither party can adduce oral evidence to add to, vary, or contradict the written contract. The rule may be evaded by the device of the collateral contract, provided it is not inconsistent with the main contract, at least where only two parties are involved. But this device is unreliable, and the proper approach to clauses of the type is, it is suggested, that put forward by Allen[82] viz. that such clauses should be regarded as merely evidentiary to be taken into account by the Court in deciding as a question of fact what was said and whether it operated as an inducement to contract, and whether in truth the parties have agreed to so limit the understanding between them. A mere statement to that effect in the document itself should not be conclusive of the issue. Obviously the existence of such clauses in a standard form printed agreement would not carry as much weight as a similar clause in a specially negotiated written contract.

Legislation would of course be necessary to achieve this end. Some assistance might be obtained from s. 6 Hire Purchase Act 1960 (N.S.W.) giving rights to the hirer in respect of statements made by the owner, dealer, or the agent of either of them in spite of any agreement to the contrary, and s. 3 Misrepresentation Act 1967 (U.K.) which forbids "contracting-out" of liability for misrepresentations unless such provision is fair and reasonable in the circumstances. Attention could also be paid to the terms of s. 2-202 U.C.C. which has sought to modify the parol evidence rule and prevent its too hasty application.

To be Continued

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81 In *Lowe* v. *Lombank Ltd.*, [1960] 1 W.L.R. 196, admittedly a case of hire-purchase, the clause read that the hirer had examined the goods (a motor-car), acknowledged that they were merchantable and that the particular purpose for which they were required had not been made known to the owner, and agreed that the goods were fit for the purpose for which they were in fact required. The Court of Appeal rejected the clause as an attempt to evade the provisions of the Hire-Purchase Act. The defence of estoppel failed also as the defendant had not proved that the plaintiff intended the statement to be acted upon or that the defendant believed the representation to be true and had acted upon it.

82 Allen, *loc. cit. supra*, n. 25, at 288, 290. See too *Lowe* v. *Lombank Ltd.*, *supra* n. 81, at 204, where the Court of Appeal indicated that whether or not the plaintiff had made known to the defendant by implication the particular purpose for which the car was required was a pure question of fact to be inferred in the light of all the circumstances, including the terms of the contract itself.