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## **SOME ASPECTS OF IMPLIED WARRANTIES IN THE SUPREME COURT OF MISSOURI**

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On October 27, 1938, Teresa Marra, in an over the counter transaction, purchased a blouse for her own use as wearing apparel from the Jones Store, a retailer, in Kansas City, Missouri. The Jones Store had bought the blouse from a reputable manufacturer. Nothing in the appearance of the blouse indicated that it would be harmful to anyone who might wear it. Miss Marra wore the blouse on November 11, 1938, and, thereafter, developed a dermatitis which, she alleged, was caused by harmful chemicals in the blouse. She brought suit, as plaintiff, against the Jones Store Company, for breach of the implied warranty of fitness for a particular purpose which she claimed was an incident of the sale. The plaintiff had judgment for \$3000 in the trial court. On appeal, the Kansas City Court of Appeals, one judge dissenting, affirmed the judgment on the basis that, in the sale and purchase of the blouse, there was to be implied a warranty that the blouse was fit for the particular purpose of being worn by the plaintiff.<sup>1</sup> On certiorari to review the opinion of the Kansas City Court of Appeals for alleged conflict with controlling previous decisions of the Supreme Court, the opinion of the Kansas City Court of Appeals was quashed by the Supreme Court, *en Banc*.<sup>2</sup> The ground for decision was that controlling previous decisions of the Supreme Court denied the implication of a warranty covering injuries resulting from the wearing of the blouse, since such wearing of the blouse was an "ordinary use"<sup>3</sup> of the blouse and not a "particular purpose."<sup>4</sup> The case is apparently the first Missouri case to arise out of a sale of clothing at retail

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1. *Marra v. Jones Store Co.*, 170 S. W. (2d) 441 (Mo. App. 1943).

2. *State ex rel. Jones Store Co. v. Shain*, 179 S. W. (2d) 19 (Mo. 1944), Gantt, J., absent.

3. *Id.* at 21.

4. *Ibid.*

in which it is asserted that there should be implied warranty of fitness of the article of clothing for the particular purpose of wear by the consumer.<sup>5</sup>

In view of the apparent trend of decision in the various Courts of Appeals of Missouri in the recent past toward the view that warranties of fitness for particular purposes were to be liberally implied,<sup>6</sup> the decision of the Supreme Court came as a shocking surprise. Considered as an exercise in abstract logomachy, the decision is an air-tight proposition. Considered as an attempt to dispose of a problem in the fields of retail marketing and consumer protection, the decision is unsatisfactory in that it fails to consider any relevant factors in those fields, but confines itself solely to the juggling of abstract rules of law purportedly deduced from prior decisions of the Supreme Court. Considered as an instance which presents an opinion of a Court of Appeals as being in conflict with controlling previous decisions of the Supreme Court, the decision fails to convince this writer that any conflict existed.

#### THE PROBLEM

A buyer who has suffered injury through the negligence of his seller may recover from that seller for that negligence.<sup>7</sup> A defrauded buyer may set up the fraud as a cause of action in tort.<sup>8</sup> In appropriate cases, the buyer may recover from his seller upon the basis of an express warranty.<sup>9</sup> In the absence of an express warranty, recovery sometimes may be had upon the

5. 170 S. W. (2d) 441, 448.

6. *Fantroy v. Schirmer*, 296 S. W. 235 (Mo. App. 1927); *DeGouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S. W. (2d) 336 (1936); *McNicholas v. Continental Baking Co.*, 112 S. W. (2d) 849 (Mo. App. 1938); *Bell v. S. S. Kresge Co.*, 129 S. W. (2d) 932 (Mo. App. 1939); *Beyer v. Coca-Cola Bottling Co.*, 75 S. W. (2d) 642 (Mo. App. 1934); *Namela v. Coca-Cola Bottling Co.*, 104 S. W. (2d) 773 (Mo. App. 1937); *Carter v. St. Louis Dairy Co.*, 139 S. W. (2d) 1025 (Mo. App. 1940); *Atkins Bros. Co. v. Southern Grain Co.*, 119 Mo. App. 119, 95 S. W. 949 (1906); *The Kimball-Fowler Cereal Co. v. Chapman & Dewey Lumber Co.*, 125 Mo. App. 326, 102 S. W. 625 (1907); *Glasgow Milling Co. v. Burgher*, 122 Mo. App. 14, 97 S. W. 950 (1906); *Cline v. Mock*, 150 Mo. App. 431, 131 S. W. 710 (1910); *Moore v. Koger*, 113 Mo. App. 423, 87 S. W. 602 (1905); *Lee v. J. B. Sickles Saddlery Co.*, 38 Mo. App. 201 (1889); *Aultman, Miller & Co. v. Hunter*, 82 Mo. App. 632 (1900); *Morton Electric Co. v. Schramm*, 277 S. W. 368 (Mo. App. 1925); *Columbia Weighing Machine Co. v. Young*, 222 Mo. App. 144, 4 S. W. (2d) 828 (1928); *Columbia Weighing Machine Co. v. Fitzgibbons*, 43 S. W. (2d) 897 (Mo. App. 1931); *Progressive Finance & Realty Co. v. Stempel*, 231 Mo. App. 721, 95 S. W. (2d) 834 (1936). See notes 237, 238 and 239 *infra*.

7. *Shroder v. Barron-Dady Motor Co.*, 111 S. W. (2d) 66 (Mo. 1937).

8. *Moore v. Miller*, 100 S. W. (2d) 331 (Mo. App. 1936).

9. *Turner v. Central Hardware Co.*, 186 S. W. (2d) 603 (Mo. 1945).

basis of an implied warranty. Implied warranties may be inferred from the facts, or may be imposed by the law because, under the circumstances of the case, it is felt that the loss should be borne by the seller, even though he be without fault.<sup>10</sup> If recovery is sought to be based on negligence, tort is the proper action. If recovery is sought to be based upon warranty, contract is the normal form of action despite the theoretical availability of a tort remedy. A broad view of the problem pictures the wronged buyer as the potential subject of redress, which may take either the form of action of tort, for negligence, or contract (or tort), for warranty. With tort, fraud, negligence and express warranty, we are not concerned.

The modern law of implied warranty found its first clear exposition in the case of *Jones v. Just*,<sup>11</sup> which was decided only seventy-seven years ago. Prior to that time, the so-called doctrine of *caveat emptor* is stated to have been the rule.<sup>12</sup> Fifty-six years after *Jones v. Just*, Division Number 2 of the Supreme Court of Missouri made the following statement, which sets forth accurately the modern doctrine of implied warranty of fitness for a particular purpose:

"There is nothing in the Missouri cases relied upon by respondent in conflict with the general rule that where the seller, be he manufacturer or dealer, undertakes to supply an article for a particular purpose, knowing that the buyer trusts to his judgment that the article is suitable for that purpose, an implied warranty arises that the article is suitable for such purpose. We will not undertake to consider the cases from other jurisdictions cited by respondent. This rule is well established by our own decisions."<sup>13</sup>

The quoted statement is an accurate paraphrase of section 15(1) of the Uniform Sales Act<sup>14</sup> which, although adopted in 34 states, Alaska, Hawaii

10. VOID, HANDBOOK OF THE LAW OF SALES (1931), §§ 144-149. (Hereinafter, this text will be cited as "VOID, SALES.") For a capsule summation of the situation, see *Conner v. Great Atlantic & Pacific Tea Co.*, 25 F. Supp. 855 (D. C. W. D. Mo., W. D. 1939).

11. L. R. 3 Q. B. 197 (1868).

12. 1 WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT (2d ed. 1924), §§ 228-229. (Hereinafter, this text will be cited as "WILLISTON, SALES.")

13. *Hunter v. Waterloo Gasoline Engine Co.*, 260 S. W. 970, 973 (Mo. 1924). For an earlier statement, see *Mark v. H. D. Williams Cooperage Co.*, 204 Mo. 242, 265, 266, 103 S. W. 20 (1907).

14. "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."

and the District of Columbia, has not been enacted in Missouri,<sup>15</sup> despite attempts by the Missouri Bar Association to secure its enactment in this state.<sup>16</sup> It would seem that, under the statement quoted above, the rule of the Uniform Sales Act and cases decided thereunder would be applicable. If it be said that, in view of Missouri's failure to adopt the Uniform Sales Act, the common law rule should be the effective one, one might inquire as to whether the common law rule is to be determined as of the times of the adoption of the Uniform Sales Act in the various adopting states,<sup>17</sup> or whether it is to be determined, as of today, from the decisions of the 14 states which have not adopted the Uniform Sales Act,<sup>18</sup> or whether it is to be determined solely and only from within the framework of decided Missouri cases, without assistance from the outside world? Solution of the problem is further complicated by the fact that development in the general field of implied warranty of fitness for a particular purpose has been both liberal and rapid in the 77 years since the decision in *Jones v. Just*.<sup>19</sup> Inasmuch as the Supreme Court of Missouri rested its decision in the principal case upon the basis that the opinion of the Kansas City Court of Appeals was in conflict with controlling previous decisions of the Supreme Court, it would seem to be clear that the court in the instant case purported to discover and apply only "Missouri Law," as announced by Supreme Court decisions, as the basis for its action.

#### *The Question of Conflict of Decision*

Under the Constitution of 1875, which was in effect at the time of the decision of this case, the various Courts of Appeals were courts of last resort in their specified fields, but were required to regard the last previous rulings of the Supreme Court as controlling authority.<sup>20</sup> The Supreme Court stated that the opinion of the Kansas City Court of Appeals was in conflict with 5 previous rulings of the Supreme Court. The opinion of the Kansas City Court of Appeals had held, in effect, that a warranty of fitness for wear

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15. 1 Uniform Laws Annotated, 1945 Cumulative Annual Pocket Part 6; Handbook of the National Conference of Commissioners on Uniform State Laws (1943) 246.

16. 6 Mo. B. J. 245 (1935); 9 *id.* 209, 210 (1938).

17. 1 Uniform Laws Annotated, 1945 Cumulative Annual Pocket Part, 6.

18. Florida, Georgia, Kansas, Louisiana, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Virginia and West Virginia.

19. L. R. 3 Q. B. 197 (1868).

20. MO. CONST. (1875) Art. VI; AMEND. (1884) § 6.

was to be implied where: a buyer of a blouse had told the retail seller that she wanted the blouse to wear; had not asked for any particular brand, but took what the seller selected; the retail seller had not been negligent, having bought the blouse from a reputable manufacturer and having no more knowledge about the harmfulness of the blouse than did the buyer; the seller made no express representation, nor was one requested; the amount paid was the prevailing retail price.<sup>21</sup>

The first Supreme Court decision relied upon as establishing a conflict was that of *Lindsay v. Davis*,<sup>22</sup> which was decided in 1860, just 8 years before the decision of *Jones v. Just*,<sup>23</sup> the starting point of the modern law of implied warranty. In *Lindsay v. Davis* the buyer of sixteen mares and a jack sued the seller for damages resulting from the infection of the buyer's stock with glanders transmitted from the purchased animals. The petition was in two counts: one based on "express" warranty, the other based on fraud. Judgment went for the defendant seller in the trial court. The Supreme Court reversed and remanded the case, deciding that, although there was evidence of only the expression of an opinion by the seller, which could not be the basis of an express warranty, the matter of fraud should have been submitted to the jury, since there was evidence from which fraud could have been found. There was no issue whatever in the case as to the existence of an "implied" warranty but Judge Napton, speaking for the court, *before* proceeding to the decision of the case, said:

"One question was, whether there was a warranty; the other was, whether there was any fraud. There must be a warranty or fraud to hold the vendor of a horse with a secret malady responsible to the purchaser. The maxim that a sound price implies a sound commodity, although a favorite one in the civil law, and occasionally borrowed to settle question under our system, has never met with general favor, or taken root as a permanent part of the common law. Our law is, that the buyer takes the risk of quality and condition, unless he protects himself by a warranty, or there has been a false representation fraudulently made by the vendor."<sup>24</sup> (Italics added)

The last two sentences of the quotation set forth above were dictum in the case and have not been regarded as the law in Missouri for many

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21. This simplification of the case is borrowed from that set forth in Waite, *Retail Responsibility and Judicial Law Making* (1936) 34 MICH. L. REV. 494, n. 1.

22. 30 Mo. 406 (1860).

23. L. R. 3 Q. B. 197 (1868).

24. *Lindsay v. Davis*, 30 Mo. 406, 409 (1860).

years,<sup>25</sup> but they are quoted by the Supreme Court in the instant case as setting forth the broad rule of *caveat emptor* as decisive in this state.<sup>26</sup> If the quoted language of the court in *Lindsay v. Davis* be read as it stands above, the seller of a "horse" is not to be held liable upon any implied warranty, but is only to be liable for fraud or upon an express warranty. Horse-trading ethics, both in the field and in the law, appear to demand that the parties deal at arm's length and that, absent fraud or "express" warranty, the buyer takes what he gets, without any hope of redress. A cursory reading of the opinion of Judge Napton in *Lindsay v. Davis* will show that the only two cases cited dealt with horses and that the opinion is largely based on the hardy exemplification of horse-trading ethics expressed in *McFarland v. Newman*.<sup>27</sup> I fail to see what horse-trading ethics, cast in the pattern of primitive law, before the development of implied warranties, have to do with the purchase of a blouse at retail in 1938. I fail further to see how a "horse" case decided in 1860, upon the issues of "express" warranty and fraud is at all a controlling decision in a case decided in 1943, upon the issue of "implied" warranty in the sale of a blouse at retail. As early as 1829, the Court of Common Pleas in England recognized the difference between contracts concerning horses and other articles.<sup>28</sup> I cannot see how such an obvious difference, mentioned in a case 115 years old at the time of the decision of the instant case, could be so blithely ignored. It may well be that our courts feel that when horse traders get together, they are to be treated as though they were both possessed of an equal fund of knowledge concerning the horse flesh before them, but that has nothing to do with how our courts should feel when a consumer purchases a blouse, at retail, from what is now advertised as being "Kansas City's Largest Store, where Everyone Shops with Confidence."<sup>29</sup> I can see no conflict here.

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25. *Mark v. H. D. Williams Cooperage Co.*, 204 Mo. 242, 265 to 266, 103 S. W. 20 (1907); *Hunter v. Waterloo Gasoline Engine Co.*, 260 S. W. 970, 973 (Mo. 1924).

26. *State ex rel. Jones Store Co. v. Shain*, 179 S. W. (2d) 19, 20, 22 (Mo. 1944).

27. 9 Watts 55, 34 Am. Dec. 497 (Pa. 1839).

28. "Reference has been made to cases on warranties of horses: but there is a great difference between contracts for horses and a warranty of a manufactured article. No prudence can guard against latent defects in a horse; but by providing proper materials, a merchant may guard against defects in manufactured articles; . . ." Best, C. J. in *Jones v. Bright*, 5 Bing. 533, 544 (1829).

29. Thus runs the legend in all of the present day advertising of the Jones Store. See almost any issue of the *Kansas City Star* or *Times*; and, particularly, at the time of the disposition of the instant case in the *Kansas City Court of Appeals*, see the *Kansas City Star*, Vol. 63, No. 165, p. 7. At the time of the last consideration of the case in the *Supreme Court*, see Vol. 64, No. 199, p. 7.

The next case relied upon by the Supreme Court is that of *Barton v. Dowis*,<sup>30</sup> which was decided in 1926. There, the buyer and seller were neighboring farmers, both of whom raised hogs. At a public sale conducted by the seller, the buyer bought 6 hogs, which he told the seller were to be used for breeding purposes and which he selected from a lot of 10 or 12 hogs which the seller had designated as fit for such purpose. One of the hogs was sick and was unfit for breeding purposes. All or some of the hogs had hog cholera, which was transmitted to the buyer's hogs and killed all but 20 of his 133 hogs. The buyer sued for the damage resulting from the death of his hogs, pleading an express warranty, which was abandoned at the trial, and an implied warranty, upon which recovery was had in the trial court. On appeal, the Kansas City Court of Appeals affirmed the judgment,<sup>31</sup> on the basis that there was an implied warranty of fitness which had been breached, but certified the case to the Supreme Court because of conflict with the decision of the Springfield Court of Appeals in *Wells v. Welch*,<sup>32</sup> another hog cholera case. The Supreme Court reversed, saying that the only warranty to be implied was that the hogs were fit for breeding purposes and that there was no evidence that the hogs were not fit for such purposes, except in the case of the one sick hog, which was unfit for such purposes.<sup>33</sup> The opinion reiterated the proposition that: "In the sale of animals the rule of *caveat emptor* applies, and there is no implied warranty that the animals are free from disease,"<sup>34</sup> but stated that: "Where an article is sold for a special purpose it carries with it a warranty that it is fit for that purpose. And that applies to animals."<sup>35</sup> If the dictum quoted by the Supreme Court from *Lindsay v. Davis*<sup>36</sup> by the law, it seems to me that *Barton v. Dowis* is more in conflict with the *Lindsay* case than is the *Marra* case. At least, both of the former cases involved "animals."

There is language in the *Barton* case which describes warranties as being in the nature of collateral covenants and a warrantor as being bound only by the terms of his covenant,<sup>37</sup> and which sounds as though the court felt that the only effective warranties were those based upon contractual

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30. 315 Mo. 226, 285 S. W. 988, 51 A. L. R. 494 (1926).

31. *Barton v. Dowis*, 276 S. W. 1047 (Mo. App. 1925).

32. 205 Mo. App. 136, 224 S. W. 120 (1920).

33. *Barton v. Dowis*, 315 Mo. 226, 231, 285 S. W. 988 (1926).

34. *Id.* at 230, 285 S. W. at 989. (Italics added to "animals.")

35. *Id.* at 230, 285, S. W. at 989.

36. 30 Mo. 406, 409 (1860). See note 26 *supra*.

37. *Barton v. Dowis*, 315 Mo. 226, 231, 285 S. W. 988 (1926).



intent of the seller, which would leave, of course, no room for the express warranty based upon express representation<sup>38</sup> or the implied warranty imposed by law.<sup>39</sup>

The *Barton* case is a fine example of *caveat emptor* dressed up in implied warranty language. I can think of diseases which might not make hogs unfit for breeding purposes but if hog cholera is transmitted by the contact incidental to the insemination of the sow and death, from cholera, instead of pigs, from breeding, results, I would hardly call the disease transmitter "fit for breeding."<sup>40</sup> Truly, the *Barton* case lifts from the medical profession into the hog world that ancient saw: "The operation was a success, but the patient died." Perhaps the *Barton* case anticipated the development of artificial insemination, which, had the purchased hogs been kept separate from the buyer's hogs in the *Barton* case, might have resulted in the fulfillment of the warranty and the continued life of the buyer's hogs.

I can readily see that neighboring farmers may well be deemed to be equally expert in their knowledge of animals and so be held to have assumed the risk in connection with the sale and purchase of hogs, and I can see that in the case of hogs or animals in an agricultural community, the analogy of *caveat emptor* from the case of the horse may be overpowering, but I cannot see what such a case has to do with the purchase of a blouse at retail from a large city department store, about whose wares the purchaser knows nothing. I can see no conflict here.

The third case relied upon by the Supreme Court is that of *Hunter v. Waterloo Gasoline Engine Company*,<sup>41</sup> decided in 1921. In that case, the buyer told the retail seller that he needed a tractor for specified uses on

38. This oft-recurring blunder was attempted to be foisted upon the Supreme Court in the very recent past, in *Turner v. Central Hardware Co.*, 186 S. W. (2d) 603 (Mo. 1945), but the Court in that case stated that the intention to be bound was not a necessary part of an express warranty based only upon the seller's representations of fact.

39. "...implied warranties are obligations which the law raises upon principles foreign to the actual contract." Bland, J. in *The Belt Seed Co. v. Mitchelhill Seed Co.*, 236 Mo. App 142, 155, 153 S. W. (2d) 106, 112 (1941).

40. In *Dale v. Pierson-Brewen Commission Co.*, 160 Mo. App. 314, 142 S. W. 745 (1911), sheep purchased for breeding purposes had "the lip and limb" disease, which was highly contagious. The Kansas City Court of Appeals held there was an implied warranty of fitness for a particular purpose, which was breached. In this case, the buyer sued for damages caused by loss of the sheep and infection of his pasture. Is there a sufficient difference between infecting a pasture and infecting hogs to explain the difference in the result reached in this case from that reached in *Barton v. Dowis*?

41. 260 S. W. 970 (Mo. 1924).

his farm. The manufacturer's agent told the buyer that the "Waterloo Boy" tractor would do the work. The seller, a retailer, told the buyer that he would stand back of whatever statements the manufacturer's agent had made. Neither the seller nor the buyer knew anything about tractors. After a demonstration on his farm the buyer bought, and paid for, a "Waterloo Boy" tractor, which proved to be unfit for the specified farm uses. The buyer sued to recover the purchase price on the theory of implied warranty, after having tendered the tractor to the seller. The trial court directed a verdict for the defendant. The St. Louis Court of Appeals affirmed the judgment on the basis that there had been no reliance by the buyer upon the seller's skill and judgment in the purchase of the tractor, since the buyer had himself selected a known, described and definite tractor.<sup>42</sup> The case was certified to the Supreme Court because of conflict with decisions of the Springfield and Kansas City Courts of Appeal. The Supreme Court reversed and remanded the case on the ground that the buyer's evidence made out a case of "implied" warranty of fitness for a particular purpose, even though the seller was a dealer, and not a manufacturer, particularly in view of the facts that the seller-dealer had delegated the manufacturer's agent to demonstrate the tractor and had agreed to stand behind whatever he said about it.<sup>43</sup> In view of the express statement of the manufacturer's agent in the *Hunter* case, and whether that statement be regarded as a promise or a representation, it would seem that the facts presented a case of "express," rather than "implied," warranty and that the case should have been dealt with on that basis. If, however, one accepts the case as an instance of implied warranty, the fact is that neither the seller-retailer nor the buyer knew anything about tractors generally or whether the tractor in question would do the work required to be done on the buyer's farm. The point really decided in the *Hunter* case appears to be that the purchaser reasonably relied upon the seller's skill and judgment to supply a tractor, rather than having purchased on his own initiative,<sup>44</sup> even though he ordered a "Waterloo Boy" tractor, by its trade name and, so, was entitled to the protection of a warranty. Once again, the dictum quoted from

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42. *Hunter v. Waterloo Gasoline Engine Co.*, 237 S. W. 819 (Mo. App. 1921).

43. *Hunter v. Waterloo Gasoline Engine Co.*, 260 S. W. 970, 971 (Mo. 1924).

44. *Lindsborg Milling & Elevator Co., v. Danzero*, 189 Mo. App. 154, 174 S. W. 459 (1915); *Mark v. H. D. Williams Cooperage Co.*, 204 Mo. 242, 103 S. W. 20 (1907). Both of these cases are based upon *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 12 Sup. Ct. 46 (1891).

*Lindsay v. Davis*<sup>45</sup> appears to preclude the existence of any implied warranty, so that the *Hunter* case would seem to be in conflict with the *Lindsay* case. The same court, however, decided both cases.

It is true that in the *Hunter* case the buyer wanted the tractor for particular uses on his farm and so informed the seller-retailer. It is likewise true that tractors may be put to many different uses on many different farms and that, if a buyer does not rely upon a seller to furnish him a tractor to do a particular job, there will be no warranty implied that a tractor is fit for any particular job. It is also true that in the instant case the buyer told the seller-retailer that she wanted the blouse to wear. Blouses, however, are adapted to but only one use, that of wear, and for this reason the Supreme Court said that the use of the blouse by the buyer was not a "particular use" but was a "general use,"<sup>46</sup> thus precluding the implication of warranty of fitness for a particular purpose.<sup>47</sup> Such a point was not presented or decided in the *Hunter* case. I cannot see how the opinion in the *Marra* case was in conflict with the decision in the *Hunter* case.

The next decision cited by the Supreme Court as being in conflict with the *Marra* case was that of *Busch & Latta Painting Co., v. Woermann Constr. Co.*,<sup>48</sup> decided in 1925, in which a painter ordered a special scaffold, for a particular painting job, to be constructed by a construction company which was engaged in the business of erecting scaffolds and which undertook to build a scaffold which would be suitable for the job. The scaffold collapsed, due to its negligent construction, injuring the painter's employees, who sued for and recovered damages for their injuries from the painter. The painter then sued the construction company to recover the amounts paid, as damages, to the injured employees. Judgment for the plaintiff in the trial court was affirmed, on condition of remittitur, on the solid basis that there was an implied warranty of fitness for the particular use of the scaffold because of the fact that the construction company was the "manufacturer" of the scaffold for that particular purpose. Nothing in this case in any way curtails or affects the instant case. The negligent manufacturer of a scaffold built for a particular use is liable either in a suit for negligence or upon an implied warranty of fitness for a particular purpose,

45. 30 Mo. 406, 409 (1860). Note 24 *supra*.

46. State *ex rel.* Jones Store Co. v. Shain, 179 S. W. (2d) 19, 21 (Mo. 1944). See notes 3 and 4 *supra*.

47. See text *infra* at notes 59 to 96.

48. 310 Mo. 419, 276 S. W. 614 (1925).

but law made for his case hardly seems to touch the question of the liability of a retail department store for injuries resulting to the purchaser of a blouse from poisons contained in the blouse.

Generally speaking, I cannot see how the decisions in the *Barton*,<sup>49</sup> *Hunter*<sup>50</sup> and *Busch & Latta*<sup>51</sup> cases can be regarded as precedents which control the instant case. In all three of those cases, relief was granted to buyers upon the theory of implied warranties of fitness. How can these cases, which all held that implied warranties existed, be regarded as in conflict with the decision in the *Marra* case, which also held that an implied warranty existed. The *Marra* case seems, rather, to be in complete accord with them. If the three cases had denied the existence of implied warranties they might have been regarded as being in conflict with the *Marra* case, but they did not. The Supreme Court uses these cases, and particularly the *Hunter* case, as "implied precedents," by emphasizing that, in the *Hunter* case, the buyer wanted to use the tractor for a "very special" use, as contrasted with an ordinary use. Thus, by stressing the fact that the tractor was capable of many uses, the Court says that there can be no implied warranty if the article has only one use, or purpose, as contrasted with many. On speaking of the use of "implied precedents," one writer has said: "It is seriously questionable, however, whether such decisions can be classed as 'precedents' having jurisprudential force."<sup>52</sup> I can see no conflict here.

The last case mentioned by the Supreme Court as being in conflict with the *Marra* case is that of *Gibbs v. General Motors Corp.*,<sup>53</sup> which was decided in 1942. In that case, the trial court had sustained general demurrers to the petition which was based upon the *res ipsa loquitur* rule and named the manufacturer and retailer of a new automobile as defendants and sought to recover damages for personal injuries suffered by the buyer in an accident caused by an abrupt swerve of the automobile when the brakes were applied some two months and 1530 miles after the purchase. Allegations of general negligence on the part of "the defendants" in the manufacture, inspection, adjustment and sale of the automobile were intermingled with

49. See notes 30-40 *supra*.

50. See notes 41-47 *supra*.

51. See note 48 *supra*.

52. Waite, *Retail Responsibility and Judicial Law Making* (1936) 34 MICH. L. REV. 494, 496, n. 4.

53. 350 Mo. 431, 166 S. W. (2d) 575 (1942).

cursory allegations of implied and specific warranties. The trial court, in sustaining both demurrers, made no reference to the allegations as to warranties, but based the ruling solely upon the fact that the general allegations of negligence against both defendants were insufficient to indicate whether either or both of them were liable.<sup>54</sup> The Supreme Court, in affirming the action of the trial court, said not one word about the matter of implied warranty. The opinion discussed the liability of the manufacturer of an automobile to the ultimate consumer for negligence; the liability of a dealer to the ultimate consumer for negligence in failing to inspect an automobile sold by him; and the question of whether the *res ipsa loquitur* rule applied to the case. I can't even find the word "warranty" in the opinion except where it appears once in the portion of plaintiff's petition which is quoted in the court's statement of the case. Thereafter, in the opinion, every remark of the court has reference only to the issue of negligence and every case and authority cited by the court deals only with negligence. The fact seems to be that the Supreme Court, in the *Gibbs* case, did not deal with the question of implied warranty. I suspect that one very good reason why the matter was not mentioned is to be found in the standard form of sale contract used by automobile dealers, which provides, in effect, that there are no warranties, express or implied, except those set forth in the printed form.<sup>55</sup> I can see no conflict here.

If, then, there was no conflict between the opinion of the Kansas City Court of Appeals in the *Marra* case and the five decisions canvassed above, it would seem that there was no occasion for the Supreme Court to have granted certiorari and quashed the opinion in the *Marra* case. Only if there had been conflict should the Supreme Court have intervened<sup>56</sup> and no conflict is apparent. The fact, perhaps, is that the ready ability of the Supreme Court to find conflict based upon such dictum as that quoted from the totally inapplicable *Lindsay* case and that found in the other authorities

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54. The trial court's memorandum is reprinted at pages 18-20 of respondent General Motors Corporation's Statement, Brief and Argument of the *Gibbs* case in the Supreme Court.

55. *Crossan v. Noll*, 120 S. W. (2d) 189, 190, (Mo. App. 1938) gave full effect to a provision which read: "No warranties, expressed or implied, representations, promises or statements have been made by the mortgagee unless endorsed hereon in writing." The mortgagee in that case was the seller of an automobile to the buyer-mortgagor, who was held to have excluded any implied warranty under the quoted provision. The standard sales form differs from the language just quoted only in the substitution of "seller" for "mortgagee."

56. MO. CONST. (1875) ART. VI; AMEND. (1884) §§ 6 & 8.

cited is due to the comparative rarity of cases involving the field of implied warranties in the Supreme Court,<sup>57</sup> which has resulted in the court's view of implied warranties being restricted to that embodied in early nineteenth century ideas.

Section 10 of Article V of our newly adopted Constitution removes the need for any such straining by the Supreme Court to find a conflict of decision as was performed in the instant case. That section provides for the transfer of any case from the courts of appeals, by order of the Supreme Court ". . . because of the general interest or importance of a question involved in the case, or for the purpose of re-examining the existing law, . . ."<sup>58</sup> Under this provision, if the Supreme Court does not like a decision of one of the Courts of Appeals, it may take the case on either of the grounds just quoted, without having to resort to legerdemain such as that practised in the instant case. It will then be clear that the conflict, if any, will be with ideas of the court, as then constituted, rather than with any of the previously decided cases of the court.

#### THE QUESTION OF LOGOMACHY

Word juggling is a fascinating game.<sup>59</sup> Nicety in the use of words and phrases is to be commended. I doubt, however, whether the claims of injured persons for damages should be treated either as counters in a fascinating game of words or as the end result of undue nicety in the use of words.

In the *Marra* case the Kansas City Court of Appeals had held that, when the purchaser bought the blouse from the retailer for her own use, there was to be implied a warranty of fitness for the "particular" purpose of wear by the plaintiff, saying:

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57. The *Barton*, *Hunter*, and *Busch & Latta* cases are greatly outnumbered by the Courts of Appeals cases cited *supra* note 6 and *infra* notes 89 and 237. A search through the subject of Implied Warranties (key numbers 265 through 275) under the Missouri Digest heading "Sales," for the period ending July 10, 1945, shows that in the 124 years of its existence, the Supreme Court has had only 13 cases on the subject while, in the 69 years since 1876, the Courts of Appeals have had 89 cases on the subject. Even if you divide the 89 cases equally between the three Courts of Appeals, that makes the score 29-2/3 cases for each Court of Appeals to 13 for the Supreme Court. One way, the frequency is almost 7 to 1; the other way it is better than 2 to 1. If experience means anything, the Courts of Appeals should know this subject far better than the Supreme Court. See notes 238 and 239 *infra*.

58. MO. CONST., ART. V, § 10.

59. HUTCHESON, JUDGMENT INTUITIVE (1938) Chap. II, reprinted from 14 CORN. L. Q. 274 (1929).

60. *Marra v. Jones Store Co.*, 170 S. W. (2d) 441, 448 (Mo. App. 1943).

"The blouse was made and adapted for but one use and that was for some one to wear, and it is apparent that both parties at the time of the sale had in contemplation that plaintiff was purchasing the blouse for the particular purpose of wearing apparel for herself."<sup>60</sup>

The Supreme Court disagreed with the view set forth in the quoted excerpt above, saying:

"In the case at bar, the intended use by plaintiff was not a special one. The blouse in question was made by the manufacturer and offered for sale by the retailer for the obvious purpose that it be worn by a woman. The fact that the blouse was to be worn by plaintiff, the person who made the purchase, rather than by some other woman, made it neither more or less adapted for use as wearing apparel . . . Her use was an ordinary use, and not special."<sup>61</sup>

The two quotations set forth make it evident that the point of collision—or conflict—between the two courts is entirely on the matter of whether or not the wearing of the blouse by the plaintiff was a "particular purpose," as held by the Kansas City Court of Appeals, or a "general purpose," as stated by the Supreme Court.

Considered purely as a word exercise, in the abstract, I suppose that the general purpose for which an article is made is always to be contrasted with a particular purpose for which it may be used. A tractor, for instance, may fulfill many of the general uses of tractors and yet be unfit for a particular purpose in a particular locality.<sup>62</sup> Unless, therefore, a tractor purchaser makes full disclosure of the particular, as distinguished from the general, use to which he intends to put the tractor, he cannot claim the protection of an implied warranty of fitness. A tractor, however, is capable of many uses, the aggregate of which may be said to be its "general" purpose. Much of the merchandise sold has this same characteristic of possible devotion to many uses and, so, encounters the "general purpose" doctrine.<sup>63</sup>

Some types of merchandise, however, are not so many-sided in their uses. They are capable only of one use. Are articles of this sort, such as blouses, to be bracketed with those of the other type so that when they are

61. *State ex rel. Jones Store Co., v. Shain*, 179 S. W. (2d) 19, 21 (Mo. 1944).

62. *Hunter v. Waterloo Gasoline Engine Co.* 260 S. W. 970 (Mo. 1924).

63. *Fairbanks, Morse & Co. v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113 (1903). (Buyer of gasoline motor not entitled to protection of implied warranty of its fitness to run newspaper machinery because he selected the motor and did not rely on seller to furnish the motor for that purpose.)

bought and sold to be used for the very, and only, purpose for which they are made, they will be said to have been purchased for a "general," rather than a "particular" purpose? Coats,<sup>64</sup> underwear,<sup>65</sup> a bed,<sup>66</sup> dress shields,<sup>67</sup> a hat,<sup>68</sup> a print dress,<sup>69</sup> a taxicab,<sup>70</sup> an automobile jack,<sup>71</sup> a hot water bottle,<sup>72</sup> and a weighing machine<sup>73</sup> are all articles which, respectively, are designed and adapted for one use only. Coats, underwear, dress shields, hats and dresses are all designed for the sole purpose of wear by humans; beds for sleeping; taxicabs for carrying persons for hire; automobile jacks for lifting automobiles; hot water bottles for holding hot water; and weighing machines for weighing. If the idea set forth by the Supreme Court in this case be accepted, the answer to the question must be "No." But, courts in Massachusetts,<sup>74</sup> Rhode Island,<sup>75</sup> Iowa,<sup>76</sup> Illinois,<sup>77</sup> England,<sup>78</sup> Maine,<sup>79</sup> New Jersey,<sup>80</sup> the District of Columbia,<sup>81</sup> Oregon,<sup>82</sup> and, even Missouri,<sup>83</sup>

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64. *Flynn v. Bedell Co. of Massachusetts*, 242 Mass. 450, 136 N. E. 252, 27 A. L. R. 1504, (1922); *Keenan v. Cherry & Webb*, 47 R. I. 125, 131 Atl. 309 (1925); *Brandenberg v. Samuel Stores*, 211 Iowa 1321, 235 N. W. 741 (1931); *Mandel v. Mulvey*, 230 Ill. App. 588 (1923).

65. *Grant v. Australian Knitting Mills*, [1936] A. C. 85, 105 A. L. R. 1483 (1935).

66. *Paradis v. A. L. Nichols Co.*, 299 Mass. 364, 12 N. E. (2d) 863 (1938).

67. *Ross v. Porteous, Mitchell & Braun Co.*, 136 Me. 118, 3 Atl. (2d) 650 (1939).

68. *Zirpola v. Adam Hat Stores*, 122 N. J. L. 21, 4 Atl. (2d) 73 (1939).

69. *Kurriss v. Conrad & Co.*, 312 Mass. 670, 46 N. E. (2d) 12 (1942).

70. *Shawen v. District Motor Co.*, 34 Atl. (2d) 29 (D.C. Mun. App. 1943).

71. *Stonebrink v. Highland Motors, Inc.*, 171 Ore. 415, 137 P. (2d) 986 (1943).

72. *Priest v. Last*, [1903] 2 K. B. 148 (1903).

73. *Columbia Weighing Machine Co., v. Young*, 222 Mo. App. 144, 4 S. W. (2d) 828 (1928); *Columbia Weighing Machine Co. v. Fitzgibbons*, 43 S. W. (2d) 897 (Mo. App. 1931); *London Guarantee & Accident Co. Ltd. of London, England v. Strait Scale Co.*, 322 Mo. 502, 15 S. W. (2d) 766, 64 A. L. R. 936 (1929).

74. *Flynn v. Bedell Co. of Massachusetts*, 242 Mass. 450, 136 N. E. 252, 27 A. L. R. 1504 (1922), cited *supra* note 64; *Paradis v. A. L. Nichols Co.*, 299 Mass. 364, 12 N. E. (2d) 863 (1938), cited *supra* note 66. *Kurriss v. Conrad & Co.*, 312 Mass. 670, 46 N. E. (2d) 12 (1942), cited *supra* note 69.

75. *Keenan v. Cherry & Webb*, 47 R. I. 125, 131 Atl. 309 (1925), cited *supra* note 64.

76. *Brandenberg v. Samuel Stores*, 211 Iowa 1321, 235 N. W. 741 (1931), cited *supra* note 64.

77. *Mandel v. Mulvey*, 230 Ill. App. 588 (1923), cited *supra* note 64.

78. *Priest v. Last*, [1903] 2 K. B. 148 (1903), cited *supra* note 72; *Grant v. Australian Knitting Mills*, [1936] A. C. 85, 105 A. L. R. 1483 (1935), cited *supra* note 65.

79. *Ross v. Porteous, Mitchell & Braun Co.*, 136 Me. 118, 3 Atl. (2d) 650 (1939), cited *supra* note 67.

80. *Zirpola v. Adam Hat Stores*, 122 N. J. L. 21, 4 Atl. (2d) 73 (1939), cited *supra* note 68.

81. *Shawen v. District Motor Co.*, 34 Atl. (2d) 29 (D. C. Mun. App. 1943), cited *supra* note 70.



have answered "Yes," when the cases were presented to them. Professors Williston<sup>84</sup> and Vold<sup>85</sup> are of the same mind. I find it hard to believe that these courts and authors were so unskilled in the use of words that they could not distinguish between a "general" and a "particular" purpose. I do believe that they all realized that, when an article was designed for, and capable of, only one use and was expressly purchased for that use and would not properly perform it, the matter of juggling the words "general" and "particular," in the abstract, was a very poor way to attempt to solve a problem in legal liability. Some of them even say that an implied warranty of fitness for a particular purpose in this sort of a situation is identical with the warranty of merchantability, which is breached if the article is unfit for the use for which it was designed.<sup>86</sup> Others attempt to demonstrate that the particular purpose doctrine will apply, even though the article will perform only the general, and only, purpose for which it is made and sold.<sup>87</sup> One might say that tractors are adapted to uses on farms so that use on a specified farm is a particular use. Why not say, then, that blouses are adapted to uses on many forms, so that use on a specified female form is a particular use?

Although the Supreme Court, in the instant case, was deciding a case which involved a retailer, the word-juggling of "general" and "particular" purpose applies with equal force to cases of sales by manufacturers, and others. If, then, there be a sale by any type of seller, whether he be manu-

82. *Stonebrink v. Highland Motors, Inc.* 171 Ore. 415, 137 P. (2d) 986 (1943), cited *supra* note 71.

83. *Columbia Weighing Machine Co., v. Young*, 222 Mo. App. 144, 4 S. W. (2d) 828 (1928), cited *supra* note 73; *Columbia Weighing Machine Co., v. Fitzgibbons*, 43 S. W. (2d) 897 (Mo. App. 1931), cited *supra* note 73; *London Guarantee & Accident Co. Ltd. of London, England v. Strait Scale Co.*, 322 Mo. 502, 15 S. W. (2d) 766, 64 A. L. R. 936 (1929), cited *supra* note 73.

84. 1 WILLISTON, SALES § 235, n. 46, 47, and § 248, n. 86 to 92.

85. VOLD, SALES, p. 458, n. 56.

86. *Keenan v. Cherry & Webb*, 47 R. I. 125, 131 Atl. 309 (1925), cited *supra* notes 64 and 75; *Brandenber v. Samuel Stores*, 211 Iowa 1321, 235 N. W. 741 (1931), cited *supra* notes 64 and 76; *Stonebrink v. Highland Motors, Inc.*, 171 Ore. 415, 137 P. (2d) 986 (1943), cited *supra* notes 71 and 82. See text, *infra* at notes 249-260.

87. *Flynn v. Bedell Co. of Massachusetts*, 242 Mass. 450, 136 N. E. 252, 27 A. L. R. 1504 (1922), cited *supra* notes 64 and 74; *Mandel v. Mulvey*, 230 Ill. App. 588 (1923), cited *supra* notes 64 and 77; *Grant v. Australian Knitting Mills*, [1936] A. C. 85, 105 A. L. R. 1483 (1935), cited *supra* notes 65 and 78; *Ross v. Porteus, Mitchell & Braun Co.*, 136 Me. 118, 3 Atl. (2d) 650 (1939) cited, *supra* notes 67 and 79; *Kurris v. Conrad & Co.*, 312 Mass. 670, 46 N. E. (2d) 12 (1942), cited *supra* notes 69 and 74; *Priest v. Last*, [1903] 2 K. B. 148 (1903), cited *supra* notes 72 and 78.

facturer, producer, grower, distributor or dealer, of any article which the Supreme Court would say was manufactured for, and adapted to, only one general purpose, there can be no implied warranty of fitness for a particular purpose, under the instant case. That is the proposition for which the instant case stands, if one take the language of the opinion as it reads, which leaves the buyer without a remedy, by way of implied warranty, against either the retailer or the manufacturer because the buyer's "purpose" would be the same, no matter from which the article might have been bought. The buyer, then, is left to her highly theoretical, expensive and abstract remedy of travelling to New York to bring suit, in negligence, against the manufacturer of the blouse who has been, throughout the transaction, an absolute and utter stranger to her.

The great source of difficulty in this field seems to be found in the desire of the Supreme Court to treat all chattels as though they were in the same class for all purposes. Horses, hogs, tractors, scaffolds, blouses, food and drink are all chattels, and are all to be treated in the same fashion, so that the same rule of law applied to one chattel in 1860 is to be held to apply to any other chattel in 1944, or any other year. This view has one very apparent virtue: that of ease of administration by the court. Fortunately, some of our courts have been more concerned with the substantive rights of litigants than with the relative ease of administration of abstract rules and have cut through the tangle of words and come to grips with the real problem.<sup>88</sup>

The field of food and drink is one in which the courts have refused to befuddle themselves with words. The Courts of Appeals in this state have uniformly held that when an ultimate consumer of food or drink buys such articles from a retailer or manufacturer for his consumption, there is to be implied a warranty that the articles are fit for that particular purpose.<sup>89</sup> Food and drink, when intended for immediate consumption, seem to me to fall within the class of articles which are manufactured for, or adapted to, the one, and only, general purpose of being consumed by humans. The

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88. See notes 6 and 64-73 inclusive, *supra*.

89. *Smith v. Carlos*, 215 Mo. App. 488, 247 S. W. 468 (1923); *Madourus v. Kansas City Coca-Cola Bottling Co.*, 230 Mo. App. 275, 90 S. W. (2d) 445 (1936); *Fantroy v. Schirmer* 296 S. W. 235 (Mo. App. 1927); *DeGouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S. W. (2d) 336 (1936); *McNicholas v. Continental Baking Co.*, 112 S. W. (2d) 849 (Mo. App. 1938); *Bell v. S. S. Kresge Co.*, 129 S. W. (2d) 932 (Mo. App. 1939); *Beyer v. Coca-Cola Bottling Co.*, 75 S. W. (2d) 642 (Mo. App. 1934); *Nemela v. Coca-Cola Bottling Co.*, 104 S. W. (2d) 773 (Mo. App. 1937); *Carter v. St. Louis Dairy Co.*, 139 S. W. (2d) 1025 (Mo. App. 1940).

technical perfection of this word pattern has not interfered with our Courts of Appeals in their holdings that in the sale of food and drink for immediate consumption a warranty of fitness for that "particular" purpose is to be implied.<sup>90</sup> If the holding of the Kansas City Court of Appeals to the effect that the purchase of the blouse in the *Marra* case was for a particular purpose was in conflict with controlling decisions of the Supreme Court which held that the general purpose of an article could never be the particular purpose, I can't see why the Courts of Appeals decisions in the food and drink cases are not all likewise in conflict with such "controlling" Supreme Court decisions. It may be answered that cases involving food and drink called for, and got, special treatment. One of the present day masters in the field of Sales has said of these cases: "The emotional drive and appeal of the cases centers in the stomach."<sup>91</sup> To this, I say that the perception of the need for special treatment is one of the earmarks of a properly functioning court and is judging, at its best, particularly when the need for breaking away from antiquated and outmoded precedents is pressing. The Courts of Appeals saw the need in the food and drink cases and the Kansas City Court of Appeals saw the need in the blouse case. The fact that the Courts of Appeals are in closer contact with reality in the field of implied warranties than is the Supreme Court, as judged by the relative frequency of decision of this matter,<sup>92</sup> may well be the explanation of why the Kansas City Court of Appeals, in the *Marra* case, perhaps, used words so as to make them coincide with realities, while the Supreme Court treated words as the primary realities, leaving such facts as modern merchandising and the poison-

90. *Ibid.*

91. LLEWELLYN, *CASES AND MATERAALS ON SALES* (1930) 342, where the author continues: "The negligence line begins with belladonna masquerading as dandelion extract. The warranty line finds some historical support in the ancient law of food; it waxes great by way of glass in beverages or bread, and poisonous meat. Food spoke to the imagination of the courts, and proved persuasive. But the development is not confined to this, its center. It spreads to cover other hazards to consumers." The text, of which the quoted material is a part, starts on page 340 of Llewellyn's book and beautifully sets forth the nature of the entire problem (mentioned *supra* at notes 7 to 10) and the developing lines of solutions.

92. See notes 6, 57 and 89 *supra*; see note 237 *infra*. The only case which I have found in which the Supreme Court dealt with an implied warranty food case is that of *Stewart v. Martin*, 181 S. W. (2d) 657 (Mo. 1944), in which defendant *conceded* the existence of an implied warranty. The court contented itself with the citation of Courts of Appeals, and foreign, decisions. The failure, or refusal, of the Court to state what it thought the law on this point should be has, to me, a rather ominous meaning. I interpret the Court's action as indicating that it may, in the future, strike down the Courts of Appeals authorities on this point (*supra* notes 6 and 89; *infra* note 237). I hope that I am wrong.

ing of customers entirely out of the picture. So long as the law and morals require people to wear clothes in public,<sup>93</sup> it seems to me that it is just as important to protect purchasers of clothing from the perils of poisoning from that clothing as it is to protect purchasers of food from the perils of poisoning from that food. Poison, whether absorbed through the stomach, from food, or through the skin, from clothing, is equally dangerous to the person of the ultimate consumer. Yet, under the Missouri case law after the instant case, if I purchase food and clothing for my immediate use, at the same time, in the same transaction and from the same retailer, and both of them poison me, I take it that the courts of this state will tell me that, although I purchased the food—which was adapted for the single purpose of being eaten—for a particular purpose, under an implied warranty as to its fitness,<sup>94</sup> I purchased the clothing—which was adapted for the single purpose of being worn—for a general, not a particular, purpose, and am not protected by any implied warranty as to the fitness of that clothing.<sup>95</sup> If the opinion in the *Marra* case had not been quashed, I would have been told that I had purchased both articles for a particular purpose and that I would be protected by an implied warranty of fitness in both instances.<sup>96</sup> I leave it to the reader's good judgment as to which result seems to present, either the proper use of words, or the proper way to dispose of a case which directly involves the health and well-being of a consumer under modern marketing conditions.

#### THE PROBLEM OF RETAIL MARKETING AND CONSUMER PROTECTION

Much good writing is found in the law reviews on the subject of implied warranties. The food and drink cases in the field of implied warranties, in particular, have warranted, and gotten, good treatment. It has been stated that the cases which impose implied warranties of fitness upon retailers of food and drink who are without fault, are, on the one hand, unwarranted innovations,<sup>97</sup> and, on the other hand, are only instances of the

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93. *State of Missouri v. Rose*, 32 Mo. 560 (1862), holding that an indictment which charged the defendant with indecent exposure of his person on a public highway was valid as charging a common law offense.

94. See note 89 *supra*.

95. See notes 2 to 4 *supra*.

96. See notes 1, 6 and 89 *supra*.

97. Waite, *Retail Responsibility and Judicial Law Making* (1936) 34 MICH. L. REV. 494; Waite, *Retail Responsibility—A Reply* (1939) 23 MINN. L. REV. 612; Waite, *Judge-Made Law and the Education of Lawyers* (1944) 30 A. B. A. J. 253, 255-256.

application of established principles.<sup>98</sup> Much perspective has been given to the law of warranties by the writings of Llewellyn, who properly insists that only by reading a case in the lights of the morals of the times and the knowledge of the judges in the field can the case be fitted into its proper place in the developing picture.<sup>99</sup> Hamilton has exploded the myth that *caveat emptor* was a well-settled doctrine of the ancient English law.<sup>100</sup> Any decision on a state of facts different from those in prior cases and which is rested upon an extension of established legal principles is either a discovery, by the court, of "The Law," from some vast reservoir, or it is the making of new law, to cover the case. As between the two ideas, the latter seems to me to be descriptive of what courts have been doing ever since their inception. If that be called "judicial law making,"<sup>101</sup> I

98. Brown, *The Liability of Retail Dealers for Defective Food Products* (1939) 23 MINN. L. REV. 585; Perkins, *Unwholesome Food as a Source of Liability* (1919) 5 IOWA L. BULL. 6 and 86; Prosser, *The Implied Warranty of Merchantable Quality* (1943) 27 MINN. L. REV. 117.

99. Llewellyn, *On Warranty of Quality, and Society* (1936) 36 COL. L. REV. 699; Llewellyn, *On Warranty of Quality, and Society* (1937) 37 COL. L. REV. 341; Llewellyn, *Across Sales on Horseback* (1939) 52 HARV. L. REV. 725; Llewellyn, *The First Struggle to Unhorse Sales* (1939) 52 HARV. L. REV. 873; LLEWELLYN, *CASES AND MATERIALS ON SALES* (1930) 204, 340.

100. Hamilton, *The Ancient Maxim Caveat Emptor* (1931) 40 YALE LAW J. 1133.

101. It is so described in Waite, *Retail Responsibility and Judicial Law Making* (1936) 34 MICH. L. REV. 494.

On this point, it is well to remember Austin's statement about ". . . the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges." 2 AUSTIN, *LECTURES ON JURISPRUDENCE* (3d ed. 1869) 655. On the same matter, Gray said: "When the element of long time is introduced, the absurdity of the view of Law preexistent to its declaration is obvious. What was the Law in the time of Richard Coeur de Lion on the liability of a telegraph company to the persons to whom a message was sent? It may be said that though the Law can preexist its declaration, it is conceded that the Law with regard to a natural force cannot exist before the discovery of the force. Let us take, then, a transaction which might have occurred in the eleventh century: A sale of chattels, a sending to the vendee, his insolvency, and an order by the vendor to the carrier not to deliver. What was the Law on stoppage *in transitu* in the time of William the Conqueror?"

"The difficulty of believing in preexisting law is still greater when there is a change in the decision of the courts. In Massachusetts it was held in 1849, by the Supreme Judicial Court, that if a man hired a horse in Boston on a Sunday to drive to Nahant, and drove instead to Nantasket, the keeper of the livery stable had no right to sue him in trover for the conversion of the horse. But in 1871 this decision was overruled, and the right was given to the stable-keeper. Now, did stable-keepers have such rights, say, in 1845? If they did, then the court in 1849 did not discover the Law. If they did not, then the court in 1871 did not discover the Law." GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921) 98-99. Chapter IV of Gray's book, in which the quoted material appears, makes it quite clear that courts are constantly *making* law.

still think that that is what courts have been doing and what courts ought to do, basing their decisions upon sound judicial consideration of the current relevant factors involved, whether they be legal, economic, social, or what not.

One great trouble in attempting to state what the law of warranties generally may be, lies in the fact that, at common law, the views of the various jurisdictions varied greatly from one another, so that it was possible to speak only of majority and minority rules.<sup>102</sup> Another difficulty in the way of a smooth statement of the law of any given state is found in the fact that ideas as to law and morals change from time to time, so that what might have been good case law in 1860, or earlier, is not good case law in 1944. Cutting across this idea, particularly in the field of warranties, is the further fact that many of the early cases were not so much concerned with the substantive idea of warranty as they were with whether or not there was failure of consideration,<sup>103</sup> or whether or not the warranty was to exist at all in both the present sale and the contract to sell<sup>104</sup> or whether it was to be set up as an affirmative cause of action, or as the basis for an attempted rescission,<sup>105</sup> counterclaim or set-off,<sup>106</sup> or whether or not the wronged party had to tender back the goods before he could successfully assert the warranty or "failure of consideration."<sup>107</sup> What might be excellent from the standpoint of procedural law might be highly undesirable from the viewpoint of commercial law.

Then, too, there should be considered the problem of what the situations may be of the parties so generally described as "Seller" and "Buyer." A

102 See any text book on the subject "Sales," or the same subject in 46 AM. JUR., §§ 332-361.

103. Barr v. Baker, 9 Mo. 850 (1846); Compton v. Parsons, 76 Mo. 455 (1882).

104. Wade v. Scott, 7 Mo. 509, 513 (1842); Lee v. The J. B. Sickles Saddlery Co., 38 Mo. App. 201, 205 (1889).

105. Wade v. Scott, 7 Mo. 509, 511, 512 (1842).

106. *Id.*, at 510; Crenshaw v. Looker, 185 Mo. 375, 387, 388, 84 S. W. 885 (1904).

107. The procedural difficulties mentioned in the text are aptly illustrated by the following line of cases: Myers v. Hay, 3 Mo. 98 (1832); Ferguson v. Huston, 6 Mo. 407 (1840); Wade v. Scott, 7 Mo. 509 (1842); Barr v. Baker, 9 Mo. 850 (1846); Smith v. Steinkamper, 16 Mo. 150 (1852); Murphy v. Gay, 37 Mo. 535 (1866); Compton v. Parsons, 76 Mo. 455 (1882); Branson v. Turner, 77 Mo. 489 (1883). It is not until the opinion of Ellison in the Kansas City Court of Appeals in Brown v. Weldon & Lankford, 27 Mo. App. 251, 267 to 273, (1887) which was affirmed in Brown v. Weldon, 99 Mo. 564, 13 S. W. 342 (1889), that the matter is finally put on its proper basis and the just-cited line of cases is satisfactorily reviewed and explained. The problem reappears in Crenshaw v. Looker, 185 Mo. 375, 84 S. W. 885 (1904), where the court contents itself by referring to Ellison's opinion in Brown v. Weldon & Lankford, *supra*, as settling the matter.

manufacturer or grower may sell to a wholesaler<sup>108</sup> or jobber, a retailer,<sup>109</sup> or direct to a consumer.<sup>110</sup> The sale may be of goods intended for the purpose of resale, further manufacture or processing, or consumption. The wholesaler or jobber may sell to a manufacturer, or to a retailer for purposes of resale. The seller, or the buyer, may be relatively large or small, or relatively expert or inexperienced or equally expert or inexperienced. The seller may be a farmer, selling horses or animals to a neighboring farmer<sup>111</sup> or to a packing house, large or small.<sup>112</sup> The sale may be only one link in a long chain of manufacture, processing or distribution, or it may be the only transaction involved from the producer to the consumer. It has been pointed out that one great line of development of warranty took place in the mercantile field, *i.e.* in the cases of sales between manufacturers and merchants and between merchants and other merchants, all of which present the picture of disputes *within* the production and distribution system, to which the consumer is not a party. The needs, and obligations, of the "professionals" were seen and only protected. What, now, of a sale by a "professional" to an ultimate consumer?<sup>113</sup> Is a case involving a manufacturer and a wholesaler to be regarded as controlling in another case involving a retailer and a consumer? Is a case involving horses or hogs sold by one farmer to another to be treated as binding authority in a case involving a large, city department store and an unformed woman buyer? The basic underlying premises of law may be decided to be the same, or different, in all instances and yet the conclusions as to liability may coincide. It may well be that a manufacturer will be held liable because of the idea of fault, or negligence, but that does not mean that a dealer will not be held liable because he is not at fault.<sup>114</sup>

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108. Crocker Wholesale Grocer Co., v. Evans, 272 S. W. 1017 (Mo. App. 1925).

109. St. Louis Union Packing Company v. Mertens, 150 Mo. App. 583, 131 S. W. 354 (1910).

110. Harvey v. Buick Motor Co., 177 S. W. 774 (Mo. App. 1915).

111. Moore v. Miller, 100 S. W. (2d) 331 (Mo. App. 1936).

112. Carney v. Swift & Co., 195 S. W. 511 (Mo. App. 1917).

113. LLEWELLYN, *CASES AND MATERIALS ON SALES* (1930) 340 to 343.

114. Compare Waite, *Retail Responsibility, and Judicial Law Making* (1936) 34 MICH. L. REV. 494; Waite, *Retail Responsibility—A Reply* (1939) 23 MINN. L. REV. 612; Waite, *Judge-Made Law and the Education of Lawyers* (1944) 30 A. B. A. J. 253, 255.

Of the first article cited in this note it has been said: "Waite . . . writes in a tradition that would verge on sanctity, if it had only been dead the requisite time. . . . Waite's critique moves either from within the more ancient legal system itself (which makes *any* change appear objectionable), or purely from the tacit factual

In this last instance, the dealer, although completely without fault, may well be held to be liable, if only commercial, and court, morals, dictate that he should bear the risk. The manufacturer is liable, even though he did not know of the defect.<sup>115</sup> If, by chance, the manufacturer uses parts supplied by another, he knows no more about latent defects in those parts than the retail dealer knows about latent defects in articles which he secures from a manufacturer or wholesaler. Yet, in such an instance, the manufacturer is held to an absolute liability even though, in fact, he knew nothing of the defect. Without the intervention of the retailer, the goods would not have found their way into the buyer's hands.

There is, throughout much of the discussion about this matter, a tendency to treat the word "retailer" as though it describes only a small, virtually helpless, one-man, corner store owner who operates as one of the outposts of "rugged individualism" in a frontier economy. No account is taken of the fact that the word "retailer" covers, in our day, mercantile establishments which, in the cases of Sears Roebuck, Montgomery Ward and other large retailers, are economically able to dictate the processes of manufacture of the goods which they sell. No account is taken of the fact that several large retail establishments may band together for the purpose of buying merchandise for their several stores in a lump transaction. No account is taken of the fact that, in these instances and in the case of every department store, skilled buyers, who are well acquainted with the manufacturing processes, are the means through which merchandise is acquired for the purpose of retail sale to the public. No account is taken of the fact that today's buyer is so far removed from the production of the goods that he knows nothing of either the goods or their manufacture.<sup>116</sup> The word "retailer" is used, indiscriminately, to describe all of these situations and then, miraculously, the word means only the poor corner store owner, who lives in the next house and who, in our frontier society, knows no more about the wares he sells than does his neighbor, who has just as good a chance to know them as does he. I think that the realities of present-day merchandising call for a recognition of the facts that today's "retailer" is

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understanding of the parties (which disregards the occasional desirability of imposing regulation where regulation is needed)." Llewellyn, *On Warranty of Quality, And Society* (1936) 36 COL. L. REV. 699, 704, n. 14.

115. *Randall v. Newson*, 2 Q. B. D. 102 (Court of Appeal, 1877); *American Tank Co. v. Revert Oil Co.*, 108 Kans. 690, 196 Pac. 1111 (1921).

116. For an extremely well done and exhaustively documented treatment of these important aspects of this subject, see Note, (1937) 37 COL. L. REV. 77.



so much more skilled in his knowledge of the goods, the processes of their manufacture, and their manufacturers, than is the buyer, that his superior knowledge and skill should be recognized through the imposition of liability upon him. If that needs to be cast in terms of a legal formula, let it be said that "the buyer *justifiably* relies upon the seller's skill and judgment." Liability without fault is no stranger in our law,<sup>117</sup> and certainly has been present in every case where a non-negligent dealer has been liable upon a warranty of fitness or marchantability.

Any survey of Missouri case law must take into consideration the fact that from 1821 until 1876, the Supreme Court was the only functioning appellate court in the state of whose decisions we have a record.<sup>118</sup> The Saint Louis Court of Appeals, with a very limited appellate jurisdiction, was created in 1875,<sup>119</sup> and started to function in 1876.<sup>120</sup> In 1884,<sup>121</sup> provision was made for the Kansas City Court of Appeals to start its work in 1885.<sup>122</sup> At this same time, the jurisdiction of the St. Louis Court of Appeals was expanded<sup>123</sup> so that the two Courts of Appeals had limited appellate jurisdiction over appeals from all counties in the state.<sup>124</sup> Finally, in 1909, the Springfield Court of Appeals was set up by the Legislature.<sup>125</sup> Thus, out

117. *Respondet superior* is, perhaps, the outstanding example of liability imposed upon one who is not at fault. The liability of broadcasters for defamation, even though the broadcaster did not know that the defamatory words were to be spoken, is another instance. In Vold, *The Basis for Liability for Defamation by Radio* (1935) 19 MINN. L. REV. 611, other instances of liability, without fault, are set forth at 627 and 628, n. 44 to 51. See Pound, *Law and Morals—Jurisprudence and Ethics* (1945) 23 N. C. L. REV. 185, 213, 214.

In LLEWELLYN, *CASES AND MATERIALS ON SALES* (1930) 343, it is pointed out how, when the law courts failed efficiently to handle cases in the employer-employee field, Workmen's Compensation Acts were passed to remedy the situation.

118. MO. CONST. (1820) ART. V. § 2. Holmes, *Historical Review of the Judicial System of Missouri* (1942) 8 MO. R. S. A. 307, 310, points out that the Superior Court of Chancery, which was set up in the Constitution of 1820, functioned for only a brief period of time, and that the first general system of intermediate appellate courts, called District Courts, which were created by the Constitution of 1865, was abolished in 1870.

119. MO. CONST. (1875) ART. VI, § 12, limited the jurisdiction of the St. Louis Court of Appeals to the City of St. Louis, and to St. Louis, St. Charles, Lincoln and Warren Counties.

120. *The State of Missouri v. Foster*, which is the first case in 1 Mo. App., at 1, was decided on January 10, 1876.

121. MO. CONST. (1875) ART. VI; AMEND. 1884, § 2.

122. MO. CONST. (1875) ART. VI; AMEND. 1884, § 4.

123. MO. CONST. (1875) ART. VI; AMEND. 1884, § 1.

124. MO. CONST. (1875) ART. VI; AMEND. 1884, § 1, 2 & 3.

125. MO. LAWS 1909, p. 393. This Act also reapportioned the counties over which the Courts of Appeals had jurisdiction.

of the 124 year period of Missouri's statehood, the case law of Missouri was written solely by the Supreme Court for the first 55 years, by the Supreme Court and the Saint Louis Court of Appeals for the next 9 years, by the Supreme Court and the Saint Louis and Kansas City Court of Appeals for the next 24 years, and by the Supreme Court and the three present Courts of Appeals for only the last 36 years. In view of the constitutional requirements that the Courts of Appeals shall regard the last previous rulings of the Supreme Court as controlling authority<sup>126</sup> and that the Supreme Court shall have superintending control over the Courts of Appeals,<sup>127</sup> it is theoretically possible for the Supreme Court to reach back into the early case law of the state and find outmoded or inapplicable precedents or abstract rules of law which it may regard as controlling authority in conflict with decisions of the Courts of Appeals.

Reference has previously been made to the fact that cases involving questions of Sales Law now occur much more often in the Courts of Appeals than in the Supreme Court.<sup>128</sup> This is very likely due to the fact that the amount in controversy in such cases is normally under \$7500.00,<sup>129</sup> which has been the amount necessary to confer jurisdiction on the Supreme Court since 1909.<sup>130</sup> Between 1901 and 1909, this amount was \$4500.00.<sup>131</sup> From 1884 until 1901 the amount was \$2500.00.<sup>132</sup>

Whether or not it be true that the Courts of Appeals have written the bulk of the case law in this state in the field of sales since 1884, the fact is that the Supreme Court wrote all of the Missouri case law that was written from 1821 until 1876,<sup>133</sup> an dall of it for practically all of the state from 1875 until 1885.<sup>134</sup> Peculiarly enough, it was in the period from 1821 to 1885 that most of the foundation of the modern law of implied warranty was being laid in England.

In 1802, the King's Bench had decided, in *Parkinson v. Lee*,<sup>135</sup> that a warranty of merchantability was not to be implied in a sale of hops from one dealer to another when it appeared that the hops had been watered

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126. Mo. CONST. (1875) ART. VI; AMEND. 1884, § 6.

127. Mo. CONST. (1875) ART. VI; AMEND. 1884, § 8.

128. See note 6 *supra*.

129. Mo. REV. STAT. (1939) § 2078.

130. Mo. Laws 1909, p. 397.

131. Mo. Laws 1901, p. 107.

132. Mo. CONST. (1875) ART. VI, § 12.

133. See notes 118 to 120 *supra*.

134. See notes 120 to 122 *supra*.

135. 2 East 314 (K. B. 1802).

by the grower and that neither the seller nor the buyer knew of this defect at the time of the sale. The judges apparently felt that, inasmuch as the law should be the same for all classes of cases, the rule applicable to the sales of horses should apply to the case of the hops<sup>136</sup> and that, absent express warranty or fraud, no recovery could be had by the buyer against the seller. The English courts lost no time in whittling away the broad doctrine of *Parkinson v. Lee*. In *Gardiner v. Gray*,<sup>137</sup> at *nisi prius* in the King's Bench, in 1815, the seller agreed to sell waste silk which he was importing. The silk was defective and the buyer sued for breach of warranty. Lord Ellenbrough was of the opinion that the purchaser had a right to expect a saleable article answering the description in the contract and that this was an implied term in every contract. *Laing v. Fidgeon*,<sup>138</sup> in the Common Pleas in 1815, was to the effect that in a contract to sell saddles it was to be implied that they were to be merchantable. In *Gray v. Cox*<sup>139</sup> in the King's Bench, in 1825, the dealer-seller sold copper sheathing for a vessel. The sheathing was defective and the buyer sued for breach of warranty. It was decided that there was a variance, but Chief Justice Abbot was of the opinion that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose.<sup>140</sup> In *Jones v. Bright*,<sup>141</sup> decided by the Court of Common Pleas in 1829, it was determined that there was to be implied a warranty that copper sheathing, sold by a manufacturer-dealer to a ship owner for the purpose of sheathing a vessel, was fit for that purpose. Chief Justice Best stated that, either the same rule applied as to horses or the rule as to horses did not apply to *manufactured* articles,<sup>142</sup> and that: ". . . if a man sells generally, he undertakes that the article sold is fit for *some* purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose."<sup>143</sup> Next, in 1841, came *Brown v. Edgington*,<sup>144</sup> in which a wine merchant had ordered a crane rope, for use in his warehouse, from a manufacturer of, and dealer in, ropes. The seller's foreman, after viewing the crane, undertook to supply a rope for that purpose, which

136. *Id.* at 322 (Grose, J.), 323 (Lawrence, J.), and 324 (Le Blanc, J.).

137. 4 Camp. 144 (1815).

138. 4 Camp. 169. 6 Taunt. 108 (1815).

139. 4 B. & C. 108 (1825).

140. *Id.* at 115.

141. 5 Bing. 533 (1829).

142. *Id.* at 544.

143. *Id.* at 546.

144. 2 Man. & G. 279 (1841).

was manufactured by a third party. The rope, when installed, broke, causing a cask of wine to be broken and lost. The Court of Common Pleas decided that the seller was liable under an implied warranty of fitness even though he was not the manufacturer. Each one of the four judges stated that, inasmuch as the seller had contracted to supply the rope for a particular purpose, the fact that he was a dealer, and not a manufacturer, did not absolve him from liability. In 1842, in *Shepherd v. Pybus*,<sup>145</sup> the Court of Common Pleas refused to imply a warranty of fitness of a barge for the particular purpose of carrying cement, for the reason that the buyer had not made known to the manufacturer-seller the particular purpose for which the barge was to be used, but did imply a warranty of merchantability, i.e., that the barge was reasonably fit for use as a barge.

Thus, the idea of implied warranty grew, in England, from the poor beginning in 1802,<sup>146</sup> through the cases mentioned, and, finally, in *Jones v. Just*,<sup>147</sup> was restated in the beginnings of its modern form. There is, in these cases, after *Parkinson v. Lee* a recognition of the fact that what may be "horse law," whether good or bad, is not necessarily applicable to other articles.<sup>148</sup> There is, too, the emergence of the idea that, even though the seller of an article other than a horse has not acted fraudulently or given an express warranty, a buyer is entitled to the protection of an implied warranty either that the article be fit for the purpose for which it is designed or that it be fit for a particular purpose. With this background furnished by the English cases, let us look at the Missouri cases.

The decisions of the Missouri Territorial Appellate Court are not available to this writer, so that this survey of the cases must start with the published reports of the Supreme Court of Missouri, which started to function in 1821.<sup>149</sup> Slaves, horses and animals are the articles most frequently dealt with in litigation between sellers and buyers during the period in question.

#### SLAVES

Cases involving warranties as to slaves are very numerous until the Emancipation Proclamation puts an end to dealing in that commodity.<sup>150</sup>

145. 3 Man. & G. 868 (1842).

146. See note 135 *supra*.

147. L. R. 3 Q. B. 197 (1868).

148. Best, C. J. in *Jones v. Bright*, 5 Bing. 533 (1829), cited *supra* note 142,

149. MO CONST. (1820) ART. V, § 2. *Collier v. Weldon*, which is the first case in 1 Mo., at 1, was decided in the March Term, 1821.

150. 1 SHOEMAKER, MISSOURI AND MISSOURIANS (1943) 577, 944. Shoemaker points out that Missouri emancipated her slaves on January 11, 1865.

The idea expressed in *Parkinson v. Lee*,<sup>151</sup> to the effect that a buyer is not to be protected unless he exacts an express warranty or there be fraud on the part of the seller appears in Missouri as early as 1835 in *Stewart v. Dugin*,<sup>152</sup> where the buyer had known the slave for a long time before he bought him and the seller had failed to disclose the fact of the slave's illness. On a bill in chancery to enjoin the enforcement of a judgment at law for the purchase price of the slave, the Court, after finding no fraud, said: "If he had desired a warranty of soundness, he could have asked for it; he did not ask it, and none was proved;—unless these things were proved, we think no question of law can well arise in the case."<sup>153</sup> The seller's failure to disclose the slave's illness was not treated as fraud, perhaps because of the buyer's long acquaintance with the slave. The cases on slaves follow the older formula; there must be either an express warranty or fraud and the purchaser who does not exact an express warranty cannot expect one to be implied. As a matter of fact, the cases seem to indicate that slave buyers usually exacted express warranties,<sup>154</sup> which sometimes were so strictly construed as to be worthless.<sup>155</sup> The intention to warrant must be present for a warranty to exist.<sup>156</sup> The buyer is as good a judge of the health of a slave as is the seller.<sup>157</sup> Such decisions reflect the influence of a society which was largely based on agriculture<sup>158</sup> and small individual

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151. See notes 135 and 136 *supra*.

152. 4 Mo. 245 (1835).

153. *Id.* at 248.

154. Express warranties are found in: *Sloan v. Gibson*, 4 Mo. 32 (1835); *Wade v. Scott*, 7 Mo. 509 (1842); *Thompson v. Botts*, 8 Mo. 710 (1844); *Ross v. Barker*, 30 Mo. 385 (1860). These are only random examples of the appearance of the express warranty in cases concerning sales of slaves; many others are present in the reports.

155. In *Soper v. Breckenridge*, 4 Mo. 14 (1835), the bill of sale contained a statement that the slave was "sound in body and mind" and a warranty of title. The court held that the presence of the express warranty of title showed an intention not to be bound by the "affirmation" that the slave was sound.

156. *Ibid.*

157. *Ibid.*

158. I SHOEMAKER, MISSOURI AND MISSOURIANS (1943) 284 states that: "The society of the frontier by 1828 was based largely on the interest and ideals of the small farmer, and was characterized by the frontier attributes of hardihood, adventure, courage and independence." 2 *id.* at 546, states that "Pioneer life was so ordered that in the matter of occupations and all other material features, it was impossible to escape from the influence of a society with a single dominating interest—agriculture. For a great period in Missouri's history, all manufactures were auxiliaries of the tiller of the soil, merely implements of his domineering economy." 2 *id.* at 553, says that: "In 1850 almost all of the population of Missouri was engaged in agricultural pursuits."

holdings of slaves,<sup>159</sup> and which stressed the idea of the individual's being best fitted to take care of himself.<sup>160</sup> In 1858,<sup>161</sup> and again in 1862<sup>162</sup> it was decided that the seller's failure to disclose a known defect in the slave sold amounted to fraud. The only authority cited by the earlier case was a horse case, decided in 1857,<sup>163</sup> which will be mentioned later.<sup>164</sup> I have not found any case which admits the possibility of the existence of any implied warranty in the sale of slaves. With the Emancipation Proclamation of 1865, commerce in slaves ends.

### HORSES AND ANIMALS

Horses, jacks and cattle are the other subjects of sale which most often appear in the cases. Express warranties appear to be exacted by the usual buyer<sup>165</sup> and the cases concern themselves mostly with whether there be either fraud or express warranty and with the troublesome questions of whether the purchaser must resort to his cross action or be permitted to set up the breach of warranty by way of set-off,<sup>166</sup> or whether he must tender back the animals before setting up the warranty as a defense.<sup>167</sup> Occasionally, however, an unwary buyer failed to exact an express warranty and found himself protected only by fraud, if any, or failure of consideration, as a defense to an action for the purchase price. Any assertion by the buyer that any warranty is to be implied in such cases is squelched,

159. 1 SHOEMAKER, MISSOURI AND MISSOURIANS (1943) 560 to 565.

160. See the remarks of McGirk, J., in *Stewart v. Dugin*, 4 Mo. 245 (1835), cited *supra* note 153. One gains this same impression from reading of the history of Missouri in SHOEMAKER, MISSOURI AND MISSOURIANS (1943). Such a reading will readily convince one that the Missouri of today is far different from that of the nineteenth century. Reading of this, and kindred sorts, might well be made required readings by judges—and law teachers—so that cases might be read in their proper setting.

161. *Barron v. Alexander*, 27 Mo. 530 (1858).

162. *Cecil, Adm'r., v. Spurger*, 32 Mo. 462 (1862).

163. *McAdams v. Cates*, 24 Mo. 223 (1857).

164. See note 174 *infra*.

165. Express warranties are found in: *Myers v. Hay*, 3 Mo. 98 (1832) (Jack); *Smith v. Steinkamper*, 16 Mo. 150 (1852) (horse); *Labeaume v. Pocklington*, 21 Mo. 35 (1855) (horse); *Branson v. Turner*, 77 Mo. 489 (1883) (oxen); *Stamm v. Kuhlmann*, 1 Mo. App. 296 (1876) (horse). These are only illustrative examples of the appearance of the express warranty in the reports. The implied warranty is a very rare bird, indeed.

166. *Myers v. Hay*, 3 Mo. 98 (1832); *Smith v. Steinkamper*, 16 Mo. 150 (1852); *Branson v. Turner*, 77 Mo. 489 (1883).

167. *Smith v. Steinkamper*, 16 Mo. 150 (1852); *Branson v. Turner*, 77 Mo. 489 (1883).

and the court will frequently digress from the point, in cases involving either fraud or express warranty, to promulgate dicta to the effect that that stranger from the civil law—implied warranty—has no place in the law of Missouri.

In 1846, came the case of *Barr v. Baker*,<sup>168</sup> in which suit was brought on a note given by the buyer of a jack. The buyer set up the defenses of fraud and failure of consideration, based upon the fact that the jack was worthless for breeding purposes. The trial court instructed on the matters of fraud and failure of consideration, but refused an instruction which stated that, absent express warranty or fraud, the purchaser of the jack had bought at his peril. The Supreme Court said that the refused instruction had properly stated the law in the abstract,<sup>169</sup> but affirmed judgment for the buyer upon the alternative grounds of fraud and failure of consideration, saying that, with full instructions having been given to the jury upon these alternative grounds, the refused instruction could not “. . . have aided the jury much in forming their verdict.”<sup>170</sup> “Failure of consideration” looks and acts very much like “implied warranty” here.<sup>171</sup>

The next year, in *McCurdy v. McFarland*,<sup>172</sup> the seller sued for the balance of the purchase price of a yoke of steers. The buyer, who had not returned the steers, attempted to defend on the ground that one of the steers was “a very ‘breachy’ steer,” and sought an instruction, which was refused, based on the assumption that there was an implied warranty that the steer was manageable and not mischievous. Judge Napton stated that there was no implied warranty of the “character” of the steer, or of a slave, because it would be too difficult to fix a standard by which the moral character of either a slave or a steer could be determined. Standards of purchasers’ might vary greatly and, therefore: “It is better that purchasers should be left to protect themselves by special warranties.”<sup>173</sup>

In *McAdams v. Cates*,<sup>174</sup> the buyer of a filly sued the seller, who had not disclosed the filly’s unsoundness, which was unknown to the buyer. The

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168. 9 Mo. 850 (1846).

169. *Id.* at 853.

170. *Id.* at 854.

171. “. . . the Supreme Court uses the term ‘failure of consideration,’ interchangeably with damages on a breach of warranty.” Ellison, J. in *Brown v. Weldon & Lankford*, 27 Mo. App. 251, 268.

172. 10 Mo. 377 (1847).

173. *Id.* at 380.

174. 24 Mo. 223 (1857).

trial court instructed the jury that the seller was not liable unless he had made express representations or had used some artifice to conceal the filly's unsoundness from the buyer, and the seller had a verdict. In reversing the judgment the Supreme Court held that the seller's failure to disclose known, latent and undiscoverable defects would have amounted to fraud, although "If both parties had been ignorant of the defect, the loss would have fallen upon the plaintiff, . . ." <sup>175</sup> In course of the opinion the court, without stating whether the point had been raised, or not, mentioned the existence of the implied warranty in the civil law but said that: "All this, however, is otherwise in a common law scale. Here there is no implied warranty against defects, unless there be fraud by some false representation or undue concealment . . . Although many duties must be left by the law to the honor and conscience of individuals, the public morals require us to lay down and enforce such rules in relation to the business affairs of men as will secure fair and honorable dealing, as far as this is practicable consistently with the freedom of individual action and the interests of commerce." <sup>176</sup>

With the foregoing as the background, *Lindsay v. Davis*, <sup>177</sup> which is so relied upon by the court in the instant case, came on for decision in 1860. Judge Napton, who had spoken for the court in the steer case of *McCurdy v. McFarland*, <sup>178</sup> correctly states, by way of dictum, the Missouri law as to horses, that: "There must be a warranty or fraud to hold the vendor of a horse <sup>179</sup> with a secret malady responsible to the purchaser." <sup>180</sup> and then proceeds to deal with the only questions presented in the case: "express" warranty, and fraud. The only two authorities cited dealt with "express" warranties in the sale of horses, as earlier mentioned, <sup>181</sup> and the question of implied warranty was not presented in the case.

Another horse appears in *Matlock v. Meyers*, <sup>182</sup> decided in 1877, in which the seller said that the animal "was a good mare." The mare had diseased eyes and the buyer sued for damages on the theory that the seller had "represented" her to be "sound," when she was not. He did not allege

175. *Id.* at 226.

176. *Id.* at 225.

177. 30 Mo. 406 (1860).

178. See notes 172 and 173 *supra*.

179. Italics added.

180. *Lindsay v. Davis*, 30 Mo. 406, 409 (1860).

181. See note 27 *supra*.

182. 64 Mo. 531 (1877).



that the defendant had "warranted" the mare or had knowledge of the defect. Judgment for the buyer was reversed because: the representation that the mare was a "good" mare was not a representation that she was "sound;" a representation cannot amount to a warranty unless it was so intended by the seller; and, also, because: "In the sale of a horse<sup>183</sup> there is no implied warranty of soundness . . ."<sup>184</sup> Despite the availability of the Missouri cases discussed above, the court cites only cases from other jurisdiction including that fine example of rugged individualism; *McFarland v. Newman*.<sup>185</sup>

Both *Lindsay v. Davis* and *Matlock v. Meyers* have been recently cited, with approval by the Supreme Court,<sup>186</sup> on the point of an expression of opinion not being a sufficient basis for an express warranty, but it is interesting to note that the very able opinion which cites them also determines, contrary to *Matlock v. Meyers*, that an intention to warrant or to be bound is not necessary to the existence of an express warranty.<sup>187</sup> Here, at any rate, was one instance where outmoded precedents were disregarded by the Supreme Court in an intelligent manner.

Times may change, but the attitude of the Supreme Court toward implied warranties in the sale of animals does not. *Barton v. Dowis*,<sup>188</sup> decided in 1926, and cited with approval in the instant case, says, by way of dictum, that the rule of *caveat emptor* applies in the sale of animals and that, although there may be an implied warranty of fitness for a particular purpose, there is no implied warranty that the animals impliedly warranted as fit for breeding are free from disease.<sup>189</sup> Only if there be knowledge of the disease by the seller, which he does not disclose, will the buyer be protected, on the theory of fraud.<sup>190</sup> That makes practically an unbroken line of animal authority to that effect in this state, if one can conveniently for-

183. Italics added.

184. *Matlock v. Meyers*, 64 Mo. 531, 532 (1877).

185. 9 Watts 55, 34 Am. Dec. 497 (Pa. 1839), cited *supra* note 27.

186. *Turner v. Central Hardware Co.*, 186 S. W. (2d) 603, 606 (Mo. 1945). The opinion in this case is a fine example of how a good judge can cut his way out of a fog of irrelevant doctrine and reach a result consonant and consistent with life today.

187. *Id.* at 608.

188. 315 Mo. 226, 285 S. W. 988, 51 A. L. R. 494 (1926), cited *supra* notes 30 to 40.

189. *Id.* at 230, 231.

190. *Id.* at 230.

get the "failure of consideration" case.<sup>191</sup> Apparently, the Supreme Court has not considered the facts that there were only 791,510 head of cattle in this state in 1860,<sup>192</sup> as compared to 3,500,000 head in 1943.<sup>193</sup> To be considered with these facts are other pertinent ones, such as, that, in the early days of our statehood, the lack of transportation and the existence of self-sufficient communities resulted in there not being what we now call the "cattle industry." In the old days, it may have been that a sale of cattle from S to B was thought of as involving only freedom of individual action and as being a transaction involving only individual interests, in which no evil effects to the public could be perceived if the cattle were diseased. Under such conditions, the disease could not spread far, so that B's misfortune was solely his concern. Today, we have a very different picture. The cattle industry, and even sub-divisions within that industry, such as beef cattle and dairy cattle, is a matter of state and nation wide concern. Transportation has linked most of the state together in a close pattern, so that the self sufficient community is now a rarity. Any contagious disease which affects cattle may be rapidly spread by dispersal of an affected herd to many points, as the result of a sale, public or private. The doctrine of *caveat emptor* is a direct invitation to sellers to dispose of diseased cattle which may infect others and, thereby, directly affect production in the cattle industry. The public is sufficiently interested in the matter so that its moneys are being spent for control and eradication of cattle diseases. An examination of the 1943 Session Acts discloses appropriations to the Department of Agriculture for the control of Bangs Disease,<sup>194</sup> tuberculosis,<sup>195</sup> Swine Erysipelas<sup>196</sup> and other animal diseases,<sup>197</sup> which total \$153,698.89. The sixty-second General Assembly also enacted a law providing for inspection, by a veterinarian, of animals to be sold at community sales.<sup>198</sup> If sellers of diseased cattle had been held to be liable upon an implied war-

191. *Barr v. Baker*, 9 Mo. 850 (1846), cited *supra* notes 168 to 171. One must, also, forget some of the Courts of Appeals cases which protected buyers through implied warranties of fitness.

192. 2 SHOEMAKER, MISSOURI AND MISSOURIANS (1943) 449. Although the text cited states that the number of cattle mentioned is taken as of 1850, the author of the text has informed me that the correct date is 1860, rather than 1850.

193. THE BULLETIN, (Missouri State Dept. of Agric. December 1944) p. 36.

194. Mo. Laws 1943, pp. 97, 229 and 290. These sums total \$109,823.89.

195. *Id.* at p. 228. This sum is \$6,000.00.

196. *Id.* at p. 96. This sum is \$1,875.00.

197. *Id.* at pp. 97 and 228. These sums total \$36,000.00.

198. *Id.* at p. 310.

ranty of their freedom from disease there would have been less need for the Legislature to have enacted the "Community Sales Act," which was necessitated by the spread of disease through the sale of diseased cattle at community sales.<sup>199</sup> If there ever was a time when, and a place where, the doctrine of *caveat emptor* filled a need in the sales of cattle, I submit that the time has long since passed and that the place is not present day Missouri. As conditions change, the law should change, in order accurately to reflect the need of the times. Apropos of this, the Court of Civil Appeals of Texas, in commenting upon the passing of the rule of *caveat emptor* from that state, said:

" . . . the law is a progressive science, and . . . its rules governing the conduct of persons in their dealings with each other accommodate themselves to the standard of the times, and . . . today the law conforms to a higher standard of dealing than that in vogue in former days."<sup>200</sup>

#### CHATELS OTHER THAN SLAVES AND ANIMALS

In 1840, the case of *Ferguson v. Huston*<sup>201</sup> appears in the reports. The buyer had ordered a mail coach, to be used on a specified route, from a carriage manufacturer, and had given his note for the purchase price. The coach was unfit for the intended use, but the buyer did not offer to return the coach to the seller. The assignee of the note brought an action of debt. The trial court instructed the jury that, if the coach was not fit for the intended purpose and was wholly worthless, their verdict should be for the defendant, but that, if the coach was worth anything, and the buyer did not either give notice of the defects or return it, he was not entitled to any deduction from the face of the note. On appeal from a judgment for the

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199. THE BULLETIN, (Missouri State Dep't. of Agric. December 1944) p. 38. Pages 36 to 39 relate the diseases to which Missouri livestock are subject. It is pointed out that: rabies is reaching epidemic proportions; Bang's disease is far from adequately controlled; mastitis threatens dairy cattle; sheep scab is a potential menace; equine encephalomyelitis (sleeping sickness) was present late in 1944; anthrax has reappeared in Missouri; and, that, the existence of swine erysipelas justifies definite control measures.

200. Pannill, C. J., in *Norvell-Wilder Hardware Co. v. McCamey*, 290 S. W. 772, 774 (Tex. Civ. App. 1926).

See, on this point, Von Moschzisker, *Stare Decisis in Courts of Last Resort* (1924) 37 HARV. L. REV. 409; Oliphant, *A Return to Stare Decisis* (1928) 6 AM. L. SCHOOL REV. 215; Pound, *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 641, 802, 940.

201. 6 Mo. 407 (1840).

plaintiff, the court consisted of only two judges, who differed in opinion, so that the judgment was affirmed by operation of law. Judge Tompkins, who favored affirmance, stated that the buyer, who had not returned the carriage, could not make any defense against the note unless he proved that the carriage was "worth nothing at all."<sup>202</sup> Judge Napton was of the opinion that the buyer, upon discovering the breach of warranty, could have: either rescinded and returned the carriage, thus completely barring recovery on the note; or, retained the carriage and set up the damages resulting from the breach of warranty by way of set-off or recoupment, thus avoiding circuity of action. Judge Napton's opinion discloses a firm knowledge of the existence and subject of implied warranties. After stating that Blackstone had declared that there was no implied warranty in the sale of chattels in England, except that of title, Judge Napton remarks that, since Blackstone's time: ". . . the courts of the highest authority in that country, have recognized a very different rule, as existing at common law, or have very much modified the old one laid down by that learned commentator, if such an one really existed. The principle of *caveat emptor* has not, at least for the last half century, been understood in that extensive sense which Judge Blackstone gave it, . . ."<sup>203</sup> Napton recognized the existence of an implied warranty of fitness for a specific purpose as binding the coach manufacturer in the *Ferguson* case.<sup>204</sup>

The Napton who, in 1840, wrote the words quoted above, in a case concerning a carriage, and who demonstrated such a sound knowledge of the existence of implied warranties in the sale of non-horse chattels, was the same Napton who wrote the dictum in *Lindsay v. Davis*,<sup>205</sup> which is quoted by the court in the instant case<sup>206</sup> as establishing, or recognizing, the rule of *caveat emptor* as applicable to all sales of personal property in this state. When Napton wrote about a horse, in a case involving fraud and express warranty, he knew that that kind of personal property carried no

202. *Id.* at 414.

203. *Id.* at 418, 419.

204. *Id.* at 421, 425. See the propositions as to sales of chattels set forth at 415 and 416.

205. 1 SHOEMAKER, MISSOURI AND MISSOURIANS (1943) 434, points out that Napton served from 1839 to 1861. *Id.* at 628, identifies Napton as the author of the "Jackson Resolutions" which played a part in the defeat of Thomas Hart Benton in 1851.

206. *State ex rel. Jones Store Co. v. Shain*, 179 S. W. (2d) 19, 20 (Mo. 1944), quoting *Lindsay v. Davis*, 30 Mo. 406, 409 (1860), cited *supra* notes 24, 25, and 26.

implied warranty,<sup>207</sup> but when he wrote about a carriage, in a case involving implied warranty, he knew that that kind of personal property carried an implied warranty of fitness for a particular purpose.<sup>208</sup> He demonstrated that he knew what was involved in the judging of a case when, in the *Ferguson* case, he said:

“The impracticability of laying down any general rule that will inflexibly govern the construction of contracts, which assume such an infinite variety of hues, in the ordinary transactions of life, will not be a matter of astonishment. The great stumbling block to a rational and uniform rule on this subject has however been ancient judicial precedent.”<sup>209</sup>

I wonder what the Napton who wrote in the *Ferguson* and *Lindsay* cases would say if he knew that his dictum in the *Lindsay* case had been wrenched out of its “horse” context and set forth as “ancient judicial precedent” to serve as a “great stumbling block to a rational and uniform rule” in the case of the blouse? Napton’s opinion in the *Ferguson* case is all the more remarkable when one considers that it was written only 25 years after *Gardiner v. Gray*<sup>210</sup> and *Laing v. Fidgeon*,<sup>211</sup> 15 years after *Gray v. Cox*,<sup>212</sup> 11 years after *Jones v. Bright*,<sup>213</sup> 1 year before *Brown v. Edgington*,<sup>214</sup> 2 years before *Shepherd v. Pybus*<sup>215</sup> and 28 years before *Jones v. Just*.<sup>216</sup>

One waits from 1840 until 1882 for a case which presents anything that even looks like an implied warranty. Then, in *Compton v. Parsons*,<sup>217</sup> where the buyer was being sued for the purchase price of a patent device to water stock, one of the buyer’s grounds for defense was that the device was worthless for the particular purpose for which it was purchased. Nothing in the case indicates whether express or implied warranty is involved, whether the seller was manufacturer or dealer, or whether the article was sold presently or as the result of a contract to sell. Whatever the situation

207. *Lindsay v. Davis*, 30 Mo. 406 (1860); cited *supra* notes 177 and 180.

208. *Ferguson v. Huston*, 6 Mo. 407, 414 (1840).

209. *Id.* at 415.

210. 4 Camp. 144 (1815); cited *supra* note 137.

211. 4 Camp. 169, 6 Taunt. 108 (1815); cited *supra* note 138.

212. 4 B. & C. 108 (1825); cited *supra* note 139.

213. 5 Bing. 533 (1829); cited *supra* note 141.

214. 2 Man. & G. 279 (1841); cited *supra* note 144.

215. 3 Man. & G. 868 (1842); cited *supra* note 145.

216. L. R. 3 Q. B. 197 (1868); cited *supra* note 147.

217. 76 Mo. 455 (1882).

may have been, Sherwood said that, if the device was worthless for the purpose for which it was purchased, the buyer would have a valid defense, amounting to an entire "failure of consideration,"<sup>218</sup> whether or not a return had been made, or notice given of its worthlessness. Cited as the only authority was a case of express warranty of worthless pipe, by a dealer, decided in 1866.<sup>219</sup> If, by chance, one begins to wonder about what is meant by the phrase "failure of consideration" mentioned in this case and in *Barr v. Baker*,<sup>220</sup> Judge Ellison of the Kansas City Court of Appeals makes it clear when he says: ". . . the Supreme Court uses the term 'failure of consideration' interchangeably with damages on a breach of warranty."<sup>221</sup>

In 1893, by way of dictum, it was stated, in *Comings v. Leedy*, that: "The adaptation of a machine to the uses for which it is made is always warranted."<sup>222</sup> Although the case largely dealt with fraud, the excerpt just quoted reads as though it were excellent law.

In 1907, the Court, although holding the seller of pipe not to be liable because the buyer had not informed the seller of the particular purpose for which the pipe had been ordered, and because the buyer had used the pipe, knowing of its defects, said:

" . . . if I contract to supply pipe to my neighbor to be applied to a known and particular use, under such circumstances that my neighbor trusts to my judgment, and not to his own, that the pipe will serve the known and specified purpose, then a promise or undertaking is implied on my part that the pipe is reasonably fit for the particular purpose. If, therefore, I sell pipe to my neighbor under an implied warranty that it is fit to use to supply steam heat for drying kilns in a cooperage plant and my neighbor relying on the warranty and knowing nothing of the unfitness of the pipe, *i.e.*, without negligence on his part, applies it to such use and damages result to his staves, cooperage stuff and otherwise from such use, I am liable for such consequential damages. . . ."<sup>223</sup>

218. *Id.* at 457.

219. *Murphy v. Gay*, 37 Mo. 535 (1866).

220. 9 Mo. 850 (1846), cited *supra* notes 168 to 171.

221. *Brown v. Weldon & Lankford*, 27 Mo. App. 251, 268; also cited *supra* note 171.

222. *Comings v. Leedy*, 114 Mo. 454, 478, 21 S. W. 804, 810 (1893). The quoted dictum becomes, by repeated citation, quite respectable law, despite its inroad upon that fine old doctrine: *caveat emptor*.

223. *Mark v. H. D. Williams Cooperage Co.*, 204 Mo. 242, 266, 103 S. W. 20 at 26 (1907); see cases cited *supra* note 25.

This statement by Judge Lamm, in 1907, is the first clear statement of the law of implied warranty of fitness for a particular purpose which I have been able to find in a Supreme Court opinion since that by Judge Napton in 1840.<sup>224</sup> The quoted excerpt does not restrict the operation of the implied warranty to manufacturers, but extends it to any seller. It was not shown whether the seller was a dealer or a manufacturer.

In 1924 came the *Hunter* case,<sup>225</sup> in which it was expressly held that a dealer was liable on an implied warranty of fitness of a tractor; in 1925, came the *Busch & Latta* case,<sup>226</sup> involving the manufacturer of a scaffold; and in 1929, in *London Guarantee & Accident Company, Limited v. Strait Scale Company*,<sup>227</sup> it was held that the manufacturer of a scale who had been informed of the purpose for which it was to be used was held to have impliedly warranted the fitness of the scale for a particular use. The Court did not say that, since the scale was made for the obvious and general purpose of "weighing," the intended use by the purchaser was not a special one, but said, rather, that it was a particular one. Although the case was not mentioned in the instant case, I take it that it must be regarded as having been overruled by implication, on the point of "particular purpose."

It is of interest to note that, in many cases mentioned above, cases involving slaves or animals are cited indiscriminately, as authorities, in cases concerning other chattels, and *vice versa*, without regard to the fact that the chattel involved and the conditions under which the older cases arose were far different from those concerned in, and current at the time of the later cases. The instant case, with its citation of horse, hogs, tractor, scaffold and automobile cases, in the abstract, is a further illustration of this process. Are our courts to ignore the fact that, although until comparatively recent times, sales, whether at retail or not, were conducted much in the same manner as were sales of horses or slaves, the present day sales pattern is very different? Early, there was dickering between the seller and buyer as to the price and, the buyer being as close to production as the seller, may frequently have been, in fact, as good a judge of the

224. *Ferguson v. Huston*, 6 Mo. 407, 414 (1840), cited *supra* notes 203, 204, 208 and 209.

225. *Hunter v. Waterloo Gasoline Engine Co.*, 260 S. W. 970 (Mo. 1924), *supra* notes 13, 25, and 41 to 47.

226. *Busch & Latta Painting Co., v. Woermann Constr. Co.*, 310 Mo. 419, 276 S. W. 614 (1925), cited *supra* note 48.

227. 322 Mo. 502, 15 S. W. (2d) 766, 64 A. L. R. 936 (1929), cited *supra* notes 73 and 83.

quality and fitness of the goods as was the seller.<sup>228</sup> In our day, and for some time past, that has changed. The price is set on a cost basis and the buyer can take the article, or leave it, at that price. The buyer is far removed from production and knows nothing about the quality or source of the goods, save that they are offered for sale by the retailer,<sup>229</sup> except in the cases of extensively advertised articles, as to which he knows only that both the retailer and manufacturer, or distributor, have together conspired to bring about a belief in the purchaser's mind that the articles are the best of their kind. Synthetics have taken production off the farm and into the laboratory. The effects of synthetic materials and dye-stuffs upon the buyer's skins are not yet fully known. The anonymity of city life is far removed from the pattern of the small and closely-knit community where all parties knew one another—and the goods—intimately.

This, then, is the case law of the Missouri Supreme Court on the subject of implied warranty of fitness. Oddly enough, in neither the *London Guarantee & Accident Company* case,<sup>230</sup> the *Busch & Latta* case,<sup>231</sup> the *Hunter* case,<sup>232</sup> the *Mark* case,<sup>233</sup> the *Comings* case,<sup>234</sup> nor the *Compton* case<sup>235</sup> was it stated by the Supreme Court that the "horse" dictum, as to *caveat*

228. LLEWELLYN, *CASES AND MATERIALS ON SALES* (1930) 204; Llewellyn, *On Warranty of Quality, and Society* (1936) 36 COL. L. REV. 699; Llewellyn, *On Warranty of Quality, and Society* (1937) 37 COL. L. REV. 341.

"We are not in the field of jurisprudence where we have two farmers horse-trading, and one can see there is something wrong with the horse." Beutel speaking in 21 Proc. A. L. I., (1944) at p. 133.

229. Hamilton, *Caveat Emptor* (1930) 3 ENCYC. SOC. SCI. 280; Soule, *Consumer Protection* (1930) 4 ENCYC. SOC. SCI. 282; Note (1937) 37 COL. L. REV. 77; See note 228 *supra*.

". . . in the modern situation where the vendor has all the information and the average man buying from the vendor has no knowledge other than to walk into a store and buy something that is supposed to be all right, and all the warranties ought to flow the other way." Beutel speaking, in 21 Proc. A. L. I., (1944) at p. 132.

The Kansas City Court of Appeals took full cognizance of the facts of modern retail conditions when it said: "The buyer and seller in this case are not on grounds of equality for relief against the manufacturer. The doctrine of implied warranty is founded upon reasons of justice. It is used as a practical means of affording a remedy and in obtaining right results when the relationship of the parties is similar to that shown in this case. All rules that aid the administration of justice are good rules." Sperry, C., in *Marra v. Jones Store Co.*, 170 S. W. (2d) 441, 449 (Mo. App. 1943).

230. See note 227 *supra*.

231. See note 226 *supra*.

232. See note 225 *supra*.

233. See note 223 *supra*.

234. See note 222 *supra*.



*emptor*, found in *Lindsay v. Davis*,<sup>236</sup> stood in the way of an implied warranty. What is the law of Missouri on this point today? If an answer is presently to be found, it will be in the decisions of the three Courts of Appeals, which are, and have been, writing most of the cases having to do with implied warranties in this state,<sup>237</sup> when left to their own devices.

The deciding of only 13 cases by the Supreme Court in the field of implied warranties in the 124 years of its existence<sup>238</sup> means that, on the average, 1 case in that field was handled by that Court every 9½ years. It means, also, that there are only 13 cases in that field to which the Court can look for guidance. The deciding of 89 cases by the Courts of Appeals in that same field in the 69 years since the first Court of Appeals came into existence<sup>239</sup> means that, on the average, slightly under 1.3 cases in that field were handled by those Courts every year. It means, also, that there are 89 cases in that field to which those Courts, and sometimes the Supreme Court, can look for guidance. If frequency of decision in a given field results in familiarity with that field—and I think that it *should*—it would

235. See note 217 *supra*.

236. See note 24 *supra*.

237. *Smith v. Carlos*, 215 Mo. App. 488, 247 S. W. 468 (1923); *Fantroy v. Schirmer*, 296 S. W. 235 (Mo. App. 1927); *Madouros v. Kansas City Coca-Cola Bottling Co.*, 230 Mo. App. 275, 90 S. W. (2d) 445 (1936); *DeGouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S. W. (2d) 336 (1936); *McNicholas v. Continental Baking Co.*, 112 S. W. (2d) 849 (Mo. App. 1938); *Bell v. S. S. Kresge Co.*, 129 S. W. (2d) 932 (Mo. App. 1939); *Beyer v. Coca-Cola Bottling Co.*, 75 S. W. (2d) 642 (Mo. App. 1934); *Nemela v. Coca-Cola Bottling Co.*, 104 S. W. (2d) 773 (Mo. App. 1937); *Carter v. St. Louis Dairy Co.*, 139 S. W. (2d) 1025 (Mo. App. 1940); *Atkins Bros. Co. v. Southern Grain Co.*, 119 Mo. App. 119, 95 S. W. 949 (1906); *The Kimball-Fowler Cereal Co. v. Chapman & Dewey Lumber Co.*, 125 Mo. App. 326, 102 S. W. 625 (1907); *Glasgow Milling Co. v. Burgher*, 122 Mo. App. 14, 97 S. W. 950 (1906); *Cline v. Mock*, 150 Mo. App. 431, 131 S. W. 710 (1910); *Moore v. Koger*, 113 Mo. App. 423, 87 S. W. 602 (1905); *Lee v. J. B. Sickles Saddlery Co.*, 38 Mo. App. 201 (1889); *Aultman, Miller & Co. v. Hunter*, 82 Mo. App. 632 (1900); *Morton Electric Co. v. Schramm*, 277 S. W. 368 (Mo. App. 1925); *Columbia Weighing Machine Co. v. Young*, 222 Mo. App. 144, 4 S. W. (2d) 828 (1928); *Columbia Weighing Machine Co. v. Fitzgibbons*, 43 S. W. (2d) 897 (Mo. App. 1931); *Progressive Finance & Realty Co. v. Stempel*, 231 Mo. App. 721, 95 S. W. (2d) 834 (1936); *Farmers Bank of Trenton v. Ray & Son*, 167 S. W. (2d) 963 (Mo. App. 1943); *Barton v. Dowis*, 276 S. W. 1047 (Mo. App. 1925), reversed in *Barton v. Dowis*, 315 Mo. 226, 285 S. W. 988, 51 A. L. R. 494 (1926); *Marra v. Jones Store Co.*, 170 S. W. (2d) 441 (Mo. App. 1943), reversed in *State ex rel. Jones Store Co. v. Shain*, 179 S. W. (2d) 19 (Mo. 1944).

In note 57, *supra*, it is shown that the Courts of Appeals have dealt with implied warranties either 7 times to the Supreme Court's 1, or better than 2 times to the Supreme Court's 1.

238. See note 57 *supra*.

239. *Ibid.*

seem that the Courts of Appeals are quite familiar with the law of implied warranties. If infrequency of decision in a given field results in unfamiliarity with that field—and I think that it *might*—it would seem that the Supreme Court has not had the opportunity to familiarize itself with the law of implied warranties as it has grown, and in its modern applications, to the same extent as have the Courts of Appeals. I believe that this familiarity, and unfamiliarity, are perfectly and precisely illustrated by the decisions of the Kansas City Court of Appeals and the Supreme Court in the *Marra* case and the instant case, respectively. The authorities cited by the two courts, the handling of those authorities, the approaches of the two courts to the problem and the solutions of the case show, on the one hand, a thorough knowledge of the problem and its proper present-day solution and, on the other hand, a bare nodding acquaintance with the problem and a purported solution of it on the bases of antiquated and inapplicable precedents and word-juggling in the abstract. Expertise was here displayed by the court having the most, and most modern, contact with the subject, and that Court was the Kansas City Court of Appeals. The Supreme Court will, of course, have the final word as to what the law on this matter will be but, absent an examination of the entire field by the Supreme Court and its decision of the matter, the existing Courts of Appeals decisions must serve as guides until they are either overturned, or approved, by the Supreme Court.

Although it was 1907 before the Supreme Court clearly set forth the modern doctrine of implied warranty of fitness for a particular purpose,<sup>240</sup> and 1924 before the court finally held that such a doctrine was the law in this state,<sup>241</sup> the two Courts of Appeals then in existence had each pre-

240. *Mark v. H. D. Williams Cooperage Co.*, 204 Mo. 242, 266, 103 S. W. 20 (1907), cited *supra* note 223.

241. *Hunter v. Waterloo Gasoline Engine Co.*, 260 S. W. 970 (Mo. 1924), *supra* notes 13, 25, 225 and text at notes 41 to 47.

The *Hunter* case is the only case which I have found in which the Supreme Court's view of the law was more liberal than that of the Courts of Appeals, although the point of difference between the Supreme Court and the Court of Appeals was, in reality, whether the tractor had been purchased as a known, described and definite article, which barred reliance on the seller (*Hunter v. Waterloo Gasoline Engine Co.*, 237 S. W. 819 [Mo. App. 1921], cited *supra* at note 42), or for a particular purpose, made known to the seller, and for which the buyer justifiably relied on the seller's skill and judgment (*Hunter v. Waterloo Gasoline Engine Co.*, 260 S. W. 970 [Mo. 1924], cited *supra* at notes 41-47.) In the *Barton* case, the Court of Appeals found that an implied warranty existed and was breached (*Barton v. Dowis*, 276 S. W. 1047 [Mo. App. 1926], cited *supra* note 31), but the Supreme

viously determined, in 1890<sup>242</sup> and 1903,<sup>243</sup> that a dealer was liable upon an implied warranty of fitness for a particular purpose. In the 1890 case, the Kansas City Court of Appeals cited no Missouri authority for the proposition. In the 1903 case, the Saint Louis Court of Appeals relied upon the 1890 case and the dictum previously quoted from the *Comings* case<sup>244</sup> in the Supreme Court. The Springfield Court of Appeals came to the same result, by way of dictum, in 1910,<sup>245</sup> during the first year of its existence.<sup>240</sup> Time does not permit, at this writing, a detailed study of the progress made by the Courts of Appeals in their handling of cases in the field of implied warranties.<sup>247</sup> In the sale of food and drink for immediate consumption, the Courts of Appeals have been alert to note the need for consumer protection through the device of implied warranty of fitness for a particular purpose in the cases of sales by dealers and manufacturers,<sup>248</sup> even though food and drink sold for immediate consumption are adapted only to the

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Court took the narrower view that there was no implied warranty that hogs sold for breeding were free from disease (*Barton v. Dowis*, 315 Mo. 226, 285 S. W. 988, 51 A. L. R. 494 [1926], cited *supra* at notes 33-40). Thus, the *Barton* case is, along with the instant case, an example of how the Supreme Court has restricted the development of a modern law of implied warranties in this state.

242. *Armstrong, Gilbert & Co., v. The Johnson Tobacco Co.*, 41 Mo. App. 254 (1890), decided by the Kansas City Court of Appeals.

243. *Skinner v. Kerwin Ornamental Glass Co.*, 103 Mo. App. 650, 77 S. W. 1011 (1903), decided by the St. Louis Court of Appeals.

244. *Comings v. Leedy*, 114 Mo. 454, 478, 21 S. W. 804, 810 (1893), cited *supra* note 222.

245. *Laumeier v. Dolph*, 145 Mo. App. 78, 84, 130 S. W. 360 (1910).

246. In 1915, the Springfield Court of Appeals ranged itself solidly on the side of implied warranties, in a case involving a flour manufacturer and a baker. *Lindborg Milling & Elevator Company v. Danzero*, 189 Mo. App. 154, 174 S. W. 459 (1915). This case has been frequently cited, by the Supreme Court, on the matter of implied warranty of fitness for a particular purpose. On some fine day, someone is going to *read* this case and discover that the warranty in it amounts, in truth, to one of merchantability, rather than one of fitness for a particular purpose.

247. Even if time permitted, it might be unwise to reveal that many of the Courts of Appeals cases, like the *Lindborg* case mentioned in the preceding note, have concealed a warranty of merchantability under language which talks in terms of fitness for a particular purpose. Such a revelation would disclose that *caveat emptor* has been more honored in the breach than in the observance and would, also, disclose that words can be juggled to bring about a desirable result in the world of today, as well as to revive an archaic anachronism.

248. *Fantrooy v. Schirmer*, 296 S. W. 235 (Mo. App. 1927); *DeGouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S. W. (2d) 336 (1936); *McNicholas v. Continental Baking Co.*, 112 S. W. (2d) 849 (Mo. App. 1938); *Bell v. S. S. Kresge Co.*, 129 S. W. (2d) 932 (Mo. App. 1939); *Beyer v. Coca-Cola Bottling Co.*, 75 S. W. (2d) 642 (Mo. App. 1934); *Nemela v. Coca-Cola Bottling Co.*, 104 S. W. (2d) 773 (Mo. App. 1937); *Carter v. St. Louis Dairy Co.*, 139 S. W. (2d) 1025 (Mo. App. 1940); *Smith v. Carlos*, 215 Mo. App. 488, 247 S. W. 468 (1922); *Madourous v. Kansas City Coca-Cola Bottling Co.*, 230 Mo. App. 275, 90 S. W. (2d) 445. See notes 6 and 89 *supra*.

“general” or ordinary purpose of being eaten by a human. If the opinion of the court in the instant case is to be read in the same literal fashion in which the authorities cited by the court were by it read, all of the case law built by the Courts of Appeals in the food and drink cases will fall, because of the fact that food sold for immediate consumption is adapted to, and sold for a general, and not a particular, purpose.

I happen to be one of those who feel that the circumstances of modern retail merchandising call for the implication of a warranty which will protect the ultimate consumer in the case of a purchase at retail, such as was present in the instant case. I don't care whether that warranty be cast in terms of “merchantability,” or of “fitness for a particular purpose.” In a case such as this one, they seem to me to be interchangeable.<sup>249</sup> The trouble in this state comes, perhaps, from the fact that the constant, indiscriminate, reiteration of the *caveat emptor* dictum of the *Lindsay* case has resulted in the failure of our courts, and the profession, to realize the existence of the implied warranty of merchantability and its application to cases of sales by dealers. If that isn't the situation, then the cold, hard fact must be that there is no implied warranty of merchantability in this state, *i.e.*, the dictum in the *Lindsay* case is to be taken literally in all cases, except those where implied warranties of fitness for a “particular” purpose remove them from the operation of the general doctrine of *caveat emptor*. If this latter situation be the case, then we, in Missouri, are, indeed, living in the Dark Ages of the law and, when speaking of the instant case, must say: “That good old doctrine for the encouragement of trade, known as *caveat emptor*, has received no such support for many years.”<sup>250</sup>

In order for an article to be merchantable, it should be reasonably fit for the general purpose for which it is manufactured.<sup>251</sup> A poisoned

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249. 1 WILLISTON, SALES § 235, at notes 46 to 48, and § 248, at notes 86 to 92; VOLD, SALES, p. 458, at notes 56 to 58; WAITE, THE LAW OF SALES (2d ed. 1938) p. 232 at notes 91 and 92. Although I do not at all agree with Waite's analysis and treatment of the implied warranty cases (see note 114 *supra*), his text is, otherwise, a striking example of how new and helpful light may be thrown upon old—and new—problems, by an original—and thoughtful—approach.

250. Williston, *Representation and Warranty In Sales—Heilbut v. Buckleton* (1913) 27 HARV. L. REV. 1, 13. It should, perhaps, be pointed out that Williston's remark was heavily loaded with sarcasm.

251. 1 WILLISTON, SALES § 235, at notes 46 and 47; VOLD, SALES, p. 459, at notes 57 and 58.

The discussion of implied warranties of merchantability and fitness had at the 22nd annual meeting of the American Law Institute supports the text. 21 PROC. A. L. I., (1944) 131-145.

blouse would hardly seem to be a merchantable blouse. If the implied warranty of merchantability is to be applied to sales by retail dealers, it should make no difference, in a case such as this one, whether the blouse was sold for a "particular" or a "general" purpose. One purpose articles, such as blouses and the other such articles previously mentioned,<sup>252</sup> would fall within the scope of the doctrine of the implied warranty of merchantability, inasmuch as a poisoned blouse would not seem to be fit for the only purpose for which it was manufactured, and sold, *i.e.*, wearing. Thus, with the implied warranties of merchantability and fitness for a particular purpose working side by side, merchantable articles fit for many uses, but not for a particular one, would fall in the fitness for a particular purpose category, and unmerchantable articles, even though manufactured and sold for but a single purpose, would come within the protection of the implied warranty of merchantability.

Prior to the adoption of the Uniform Sales Act, there were jurisdictions which held that the implied warranty of merchantability extended to sales by dealers.<sup>253</sup> The Uniform Sales Act expressly provides that the implied warranty of merchantability applies to sales, by description, of goods by dealers.<sup>254</sup> The current draft of the Uniform Revised Sales Act likewise so provides,<sup>255</sup> adding that: "goods to be merchantable must at least be such as . . . (c) are fit for the ordinary purposes for which such goods are used; . . ."<sup>256</sup> It is thus apparent that those jurisdictions which abandoned the doctrine of *caveat emptor* without the aid of statute and those which adopted the Uniform Sales Act have imposed the two implied warranties of merchantability and fitness upon sellers, whether dealers, or not, and regardless of the fact that the dealers may not have had any knowledge of the fact that the goods were defective. It is particularly true, in the cases of sales of specified goods, that the implied warranty is imposed by law, with-

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252. Coates, underwear, beds, dress shields, hats, a print dress, taxicab, automobile jack, hot water bottle, weighing machine, all disclosed *supra* notes 64 to 87. The feeder, in *Ferguson Implement Co. v. Farmer*, 128 Mo. App. 300, 107 S. W. 469 (1908) was another one purpose article.

253. 1 WILLISTON, SALES § 233, which cites *Skinner v. Kerwin Ornamental Glass Co.*, 103 Mo. App. 650, 77 S. W. 1011 (1903), and *Atkins Bros. Co. v. Southern Grain Co.*, 119 Mo. App. 119, 95 S. W. 949 (1906), for the proposition that dealers, in Missouri, are liable upon implied warranties of merchantability.

254. Uniform Sales Act, Sec. 15, par. (2).

255. Uniform Revised Sales Act, Sec. 38, par. (1).

256. *Id.* at Sec. 38 par. 2(c). See the illuminating discussion in 21 PROC. A. L. I. (1944) 131-145.

out there being any intention of the dealer either to be bound, or to warrant. Judge Bland, of the Kansas City Court of Appeals neatly put it, thus: ". . . implied warranties are obligations which the law raises upon principles foreign to the actual contract. Implied, unlike express, warranties are arrived at by operation of law and conclusions announced by the court upon established facts."<sup>257</sup> I had believed that the warranty of merchantability was as much a part of our Missouri law as was the warranty of fitness for a particular purpose,<sup>258</sup> but the repetition of the horse dictum of the *Lindsay* case is beginning to wear away that belief.

I find it hard to believe that the court which fostered the drafting of the Civil Code of Missouri,<sup>259</sup> which adopted rules supplementing and harmonizing that Civil Code,<sup>260</sup> and which is about to embark upon the drafting of a new Criminal Code, can be so indifferent to the need for a modernized law of implied warranties in this state. If there be such a thing as an implied warranty of merchantability in a sale by a dealer in this state, I find it hard to believe that our pleading requirements were, or are, so strict that a litigant's case must stand, or fall, upon his selection of a theory of the pleadings to such an extent that, if he declares on an implied warranty of fitness and it develops that an implied warranty of merchantability has, instead, been breached, a judgment in his favor will not be sustained on that ground. Any such strict system of pleading and procedure would, indeed, be archaic. I should rather think that, in the instance just supposed, a pleading which set forth facts upon which a claim for relief might be upheld, whether upon a theory of implied warranty of merchantability or one of fitness for a particular purpose, when supported by proof showing the

257. *Belt Seed Co. v. Mitchelhill Seed Co.*, 236 Mo. App. 142, 155, 153 S. W. (2d) 106 (1941).

258. That is the way that I read the dictum in *Comings v. Leedy*, 114 Mo. 454, 478, 21 S. W. 804, 810 (1893), which was cited *supra* note 222 and referred to *supra* note 244. In *Atkins Bros. Co. v. Southern Grain Co.* 119 Mo. App. 119, 124, 95 S. W. 949, 950 (1906), the Kansas City Court of Appeals said: "The plaintiff was entitled to corn that could be put to the ordinary purposes for which corn is used, and also be merchantable. The buyer, of course, has a right to use the corn himself, and therefore it should be reasonably fit for the ordinary purposes for (*sic*) which such corn is put." *Ferguson Implement Co. v. Parmer*, 128 Mo. App. 300, 107 S. W. 469 (1908) is to the same effect.

259. Mo. Laws 1943, p. 353. For the part of the Supreme Court in this work, see Carr, *The Modernized Civil Code of Missouri* (1944) 9 Mo. L. REV. 1, 1 and 2. and Atkinson, *Missouri's New Civil Procedure: A Critique of the Process of Procedural Improvement* (1944) 9 Mo. L. REV. 47, 47 to 52.

260. Rules of the Supreme Court of Missouri (1945), Rule 3, "Supplementing and Harmonizing The Civil Code For Practice and Procedure In All Courts."

existence, and breach, of either warranty, would establish the palintiff's right to recover. The ultimate outcome of this matter will, thus, depend upon whether or not our Supreme Court will reconsider this matter and overrule the instant case. If the Court refuses so to do, the outcome depends upon whether or not it will recognize the existence of the implied warranty of merchantability and its applicability to this situation and, if these be answered affirmatively, upon whether or not the two warranties will both have to be set forth in the pleadings or can be founded upon a statement of fact, and proof, from which the existence of either can be implied.

Even though the Supreme Court had found that the blouse in the instant case had been bought and sold for a "particular purpose" it would not have necessarily followed that the buyer should have recovered. In all of the preceding discussion, I have assumed, as apparently did the Supreme Court, that the blouse contained deleterious matter which poisoned the buyer. A careful examination of the case, however, shows that analysis of the blouse failed to reveal the presence of any substance which might have caused the buyer's dermatitis. The buyer's physician stated as his conclusion that her poisoning must have been due to some substance in the blouse, but did not identify any substance therein which did poison her. The seller's expert, without naming any substance that might have caused the condition, stated that the buyer was allergic to something contained within the blouse. It seems, then, that there was a failure of proof on the buyer's part to establish that the implied warranty of fitness had been breached. There was no showing that any substance in the blouse had poisoned her so that, as I see it, the mere existence of the warranty, absent a breach, would not have resulted in recovery by the buyer. Just three months, to the day, after the decision of the instant case, the Supreme Court decided, in *Stewart v. Martin*,<sup>261</sup> that the buyer of a ham sandwich had failed to prove that he had been poisoned by the sandwich and, so, had not proved that an implied warranty of wholesomeness had been breached. If only the Court had dealt with the instant case in the same manner, the

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261. 181 S. W. (2d) 657 (Mo. 1944). I hasten to point out that the defendant in this case conceded that an implied warranty of wholesomeness existed in the case of a sale, or service, of a ham sandwich by a cafeteria so that the Court was not called upon to decide whether or not a warranty was to be implied. The Court merely cited Courts of Appeals decisions and cases from other states on this conceded point.

matter of implied warranty would have been on a much better footing today than it is, after the instant case.<sup>262</sup> If the buyer were allergic to some unknown material in the blouse, as stated by the seller's expert, then, again, it seems to me that if the buyer's allergy were a personal idiosyncrasy, the Supreme Court might well have held that the scope of the implied warranty extended only to buyers with normal skins, in the absence of any disclosure, by the buyer, that she suffered from such an unusual condition. Under this view, there would have been no breach of the warranty, and recovery would have been denied the buyer.<sup>263</sup> Either of these last two mentioned alternatives would have dealt with the case before the Court, rather than with one in which it was assumed that the buyer, as a normally reacting human, had been poisoned by the blouse, but that no warranty of fitness for a particular purpose was to be implied. A disposition of the instant case upon either or both of these alternative grounds would have had either the virtue of deciding that there was an implied warranty of fitness for a particular purpose, which was not breached,<sup>264</sup> or that of leaving open the important questions of whether or not *caveat emptor* was to be ruthlessly applied to sales at retail in this state, and of what was to be considered as a "particular purpose" in the field of implied warranties, until such time as the Supreme Court could have carefully considered these questions in the light of modern conditions in the retail marketing and consumer fields. As the case stands, it is an exemplification of mechanical case law in its very worst aspect. Worse than that, it is a decision which, until overruled, will be con-

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262. In *Ross v. Porteous, Mitchell & Braun Co.*, 136 Me. 118, 3 Atl. (2d) 650 (1939), cited *supra* notes 67 and 79, the buyer's physician, although attributing her injuries to the dress shields, could not point out how she had been injured or what substance in the shields had injured her. The court, although holding that there was an implied warranty of fitness, held that there was no showing that it had been breached. In *Bradt v. Hollaway*, 242 Mass. 446, 136 N. E. 254 (1922) the buyer failed to show that any poisonous substance in a fur neck-piece had caused her injury and the court held that she had failed to show any breach of the implied warranty. Both of these cases seem to me to present the same situation as is found in the instant case and the *Stewart* case, cited *supra* note 261, so far as any evidence of breach of the warranty is concerned.

263. In *Stanton v. Sears, Roebuck & Co.*, 312 Ill. App. 496, 38 N. E. (2d) 801 (1942); *Ross v. Porteous, Mitchell & Braun Co.*, 136 Me. 118, 3 Atl. (2d) 650 (1939); *Payne v. R. H. White Co.*, 314 Mass. 63, 49 N. E. (2d) 425 (1943); and *Barrett v. S. S. Kresge Co.*, 144 Pa. Super. 516, 19 Atl. (2d) 502 (1941), it was held that the scope of the implied warranty of fitness for a particular purpose extended, in the case of clothing, only to buyers with normal skins, so that, if the buyer's illness was due to an individual allergy, rather than to a poisonous substance, there had been no breach of the warranty.

264. *Supra* at notes 261, 262 and 263.



trolling in all other courts of the state, at least in all cases where a lady named Marra buys a wine colored satin blouse at retail from the Jones Store in Kansas City, in 1938. Whether it will be a controlling decision in cases where other persons buy other garments, or articles, at retail, remains to be seen. Whether it will be overruled likewise remains to be seen. Being an incurable optimist, particularly in matters where the courts of my state are concerned, I live in hope.<sup>265</sup>

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265. The reader who has more than a passing acquaintance with the subject of implied warranties will have noticed that many of its phases have not been touched upon. One might spend much time in fruitless debate upon the question of whether the buyer, when asking for a blouse for her own wear, had made known the purpose for which the blouse was wanted. The answer, obviously, is "yes." Another stunning hypothetical case might revolve about the point of whether, in view of the fact that the buyer had selected her choice of the offered blouses, she had relied upon the seller's skill and judgment to furnish her a blouse fit for wearing. Once again, the only sane answer is "yes." It might be argued that, inasmuch as the buyer called for a blouse and selected the one which she purchased, the sale was of a "known, described and definite" article and, so no warranty was to be implied. To this, the proper response would be that the blouse was sold as an article fit for wear and one which would accomplish that purpose and that the buyer relied upon the seller to furnish such a blouse, in consequence of which warranty would be implied. Another might say that warranties are only to be implied in connection with *executory* contracts to sell and never in cases of *present* sales. To this, the answer is that the law has changed in the last 100 years and that warranties are now implied, or imposed, in connection with present sales. Another solution of the case might be said to depend upon the doctrine that a warranty does not survive inspection of the goods by the buyer, so that the inspection of the blouse by the buyer nullified the existence of any warranty. Such a solution fails to take into account the fact that inspection would not have revealed the *latent* defect in the blouse to the unskilled buyer. All these, and other matters, are proper subjects for inquiry in determining whether or not implied warranties exist, in given cases, but none of them were presented, or decided, in the instant case. For this reason, they are relegated to this final footnote where they will serve only to "jog the memories" of those who are bitter-end, last-ditch and indefatigable footnote readers.