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AGENCY TO MAKE WARRANTIES

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INTRODUCTION

What are warranties? How are they created? And, particularly, what kind of authority or employment will enable one person to make a warranty that will be binding on another person?

Let us first look at warranties broadly and note their function. When a sale is being made there is commonly a risk of some defect in the thing sold. And in connection with other kinds of transactions there is frequently a risk of loss that will occur if a certain fact exists or comes to pass. There is, for example, a risk that the horse being sold is not sound; that the lot a buyer looks at is not the lot described in his deed; or that the flour being sold will not keep sweet on a contemplated sea voyage. The most common warranties are in connection with sales. But warranties are frequently made in connection with other kinds of legal transactions. A person taking out insurance, for example, may warrant certain facts about the thing that is being insured.[1] An agent is deemed to warrant his authority.[2] A bailor may warrant against defects in the thing bailed.[3] A hotel company may warrant that the room let for hire is free from vermin.[4] And there may be a warranty that food served for a price is fit to eat whether or not the serving is considered to be a sale.[5] The warranty, looked at broadly, is a device used as an adjunct to sales and other transactions for allocating the risk that a certain fact exists or will come to pass.

Now let us look at warranties in their more technical aspects. The term "warranty" has been used as though all warranties are of like character and

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1. VANCE, INSURANCE 408 *et seq.* (3d ed., Anderson, 1951).

2. Collen v. Wright, 8 E. & B. 647, 120 Eng. Rep. 241 (Q.B. 1857).

3. Southern Iron & Equipment Co. v. Smith, 257 Mo. 226, 165 S.W. 804 (1914).

4. Silverman v. Imperial London Hotels, Ltd., 137 L.T. 57, 43 T.L.R. 260 (K.B. 1927). See the excellent Note, *Should the Doctrine of Implied Warranties be Restricted to Sales Transactions?* 2 VAND. L. REV. 675 (1949).

5. Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918).

of like origin.[6] This assumption may be justified so far as the character of the warranty obligation is concerned. When such an obligation exists it gives certain well defined remedies to the warrantee. But there are different kinds of warranties when regard is had for their factual and theoretical bases.

The earliest warranties were deemed to be torts. "The law of warranty is older by a century than special *assumpsit.*"[7] And yet warranties have come to be regarded as contracts.[8] Whence came the idea that all warranties are contracts? Several things have contributed to build up the idea. First, ". . . the remedy for a breach of warranty was taken over into the action of assumpsit, and it was thus established that it had a contract character."[9] Second, the damages for a breach of warranty are calculated according to the formula that is used in cases of broken contract obligations. That is to say, a warrantor, when sued for damages, is made to pay an amount that will make the warrantee as well off as he would be if the facts had turned out to be as they were warranted to be.[10] Third, warranties are commonly given effect as defenses to actions that are brought on contracts. "[T]he so-called warranty [in an insurance policy] is in fact a condition qualifying the liability of the insurer."[11] And where there has been a breach of warranty by the seller, the buyer of a chattel may have "recoupment in diminution or extinction of the price."[12] Fourth, it often happens that one and the same person makes the warranty and makes the sale or contract to which it is appurtenant. For the various reasons that have been noted, "There is no doubt that to-day the obligation of a warrantor is generally conceived of as contractual."[13]

How are warranty obligations really created? That is our present inquiry, with special focus on agency to make warranties. A broad view of the cases reveals that warranties differ in the ways they are created. Some are contracts in the sense that the warrantors intended to bind themselves to answer for the consequences if certain facts are, or come to be true. Others are not contracts but are imposed, regardless of whether the warrantors intended to bind themselves, merely because the warrantors made affirmations of fact. And still others—also not contracts—are imposed for reasons of

6. "Further difficulties and anomalies are created by thinking in terms of names rather than realities. If a given situation is presented in a particular form of action or called by a particular name, it is apt to be regarded as governed by some analogy to the principles applied to the situation originally dealt with in that form of action and called by that name." Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty,* 42 HARV. L. REV. 733 (1929).

7. 1 WILLISTON, SALES § 195 (Rev. ed. 1948).

8. *Ibid.*

9. PROSSER, TORTS 705 (1941).

10. UNIFORM SALES ACT, § 69; 3 WILLISTON, SALES § 613 (Rev. ed. 1948).

11. 1 WILLISTON, SALES § 181 (Rev. ed. 1948); Dayton v. Hooglund, 39 Ohio St. 671 (1884).

12. UNIFORM SALES ACT, § 69 (a).

13. 1 WILLISTON, SALES § 197 (Rev. ed. 1948).

policy, without either a promise or an affirmation on the part of the warrantors. The failure to note that some warranties are consensual and some are not has produced confusion with regard to agency to make warranties. The agency problem becomes simple when we note that some warranties originate as contracts and that others are clapped onto the warrantors regardless of their consent to be bound. An agent who presumes to make a contract of warranty for his principal needs authority as he would to make any other contract. He is attempting to bind his principal by doing a juristic act.[14] But when a representation is the basis of a warranty, "authority" on the part of the person who speaks for another is an improper word and is misleading. The one who makes the representation is a servant. He has done a nonjuristic act: the only agency question involved is whether the servant was acting within the scope of his employment. The agency question is the same as it would be if the representation had constituted fraud, estoppel or negligence.

Let us consider *seriatim* (1) agency to make warranties that derive from contractual promises, (2) warranties that derive from affirmations and (3) warranties that are imposed for reasons of policy without either a promise or affirmation having been made on behalf of the warrantors.

Warranties that Are Contracts

A warranty can be a contractual promise even though it sounds like a statement of fact. "Words which in terms promise the happening or failure to happen of something not within human control, or the existence or non-existence of a present or past state of facts, are to be interpreted as a promise or undertaking to be answerable for such proximate damage as may be caused by the failure to happen or the happening of the specified event, or by the existence or non-existence of the asserted state of facts."[15] "Even where the undertaking relates to an existing or past fact, as in case of a warranty that a horse is sound, or that a ship arrived in a foreign port some days previously, the existence and validity of the undertaking is dealt with in the same way as if the warrantor could cause the fact to be as he asserted. . . ."[16] "There can be no doubt now, of course," says Professor Williston, "that a seller may promise, in consideration of the purchase of goods from him, that he will be answerable for their present, or, indeed, for their future condition. Nor is it open to doubt that a seller who in terms warrants the goods which he sells,

14. The term, juristic act, is here used to mean an act of consenting to be bound in a legal transaction, such as a grant or contract. An extended discussion of the difference between juristic acts and nonjuristic acts appears in Ferson, The Rational Basis of Contracts 60-83 (1949); and Ferson, *Bases for Master's Liability and for Principal's Liability to Third Persons*, 4 Vand. L. Rev. 260, 270-72 (1950).

15. Restatement, Contracts § 2 (2) (1932).

16. *Id.* § 2, comment *a* (1932).

thereby enters into such a contract."[17] Such a warranty may be consented to as an integral part of a "dickered" bargain,[18] or it may be consented to as a collateral obligation. The extent of the warranty may be indicated by samples, specifications or blue prints. Past deliveries—like samples—may indicate what a seller warrants with regard to the goods he now sells or contracts to sell.[19] The basic fact common to this group of warranties is the warrantors' consent to assume the warranty obligations.

A warranty with regard to a fact that may come to pass in the future is naturally promissory and contractual.[20] We shall under the next subhead consider warranties that spring from affirmations of fact. But the affirmation of a future fact would be an anachronism. While a promissory warranty could be imposed without the warrantors' consent, illustrations are far to seek of promissory warranties that are not contracts.

Now comes the question of agency to make a warranty that depends on the warrantors' consent. The compendious answer to the question is this: Such a warranty being contractual, the power of an agent to make it is created like the power of an agent to make any other contract. It calls for real or apparent authorization by the principal. "[T]he better view is that evidence is necessary either of actual authority or that the practice of giving a warranty in a sale of the sort in question was so usual that a reasonable man would have understood that the power was granted."[21]

In many borderline cases a principal has authorized an agent to make a conveyance or contract, and the problem is whether the authorization includes power to make the warranty in question. In *Upton v. Suffolk County Mills*,[22] for instance, an agent who had been authorized to sell—in the sense of transfer—flour for his principal, presumed to warrant that the flour he sold would keep sweet on a sea voyage from Boston to California. The court held that the agent's power to sell did not include the power to make this hazardous warranty. Numerous cases indicate that the power to sell does not necessarily include the power to make a contractual warranty with regard to the thing being sold.[23] Professor Williston emphasizes that the question of

17. Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 470 (1911).

18. UNIFORM COMMERCIAL CODE § 2-313, comment ¶ 1 (Proposed Final Draft, Text and Comments ed. 1950).

19. *Id.* § 2-313, comment ¶ 7.

20. "In *Upton v. Suffolk County Mills*, 11 Cush. 586 [Mass. 1853], the warranty was that the flour should keep sweet during a sea-voyage, not that the flour was sweet at the time of sale. A warranty that an article when sold is sound, is materially different from a warranty that an article shall continue to remain sound for an indefinite period of time." Randall v. Kehlor, 60 Me. 37, 47 (1872).

21. 2 WILLISTON, SALES § 445b (Rev. ed. 1948).

22. 11 Cush. 586 (Mass. 1853).

23. Herring, Farrell & Sherman v. Skaggs, 62 Ala. 180 (1878) (power of an agent to sell safes held not to include power to warrant that safes were burglar proof; Moore v. Switzer, 78 Colo. 63, 239 Pac. 874 (1925) (agent's power to sell secondhand automobile

an agent's power to make a contractual warranty is one of fact.[24] The agent has this power only if there is sufficient evidence of his real or apparent authorization. And it would seem that a principal should be able to limit the power of his selling agent with respect to the making of warranties in the same way that he can limit the power of his agent in other respects. The general rule is that a principal can impose any limitation he may desire.[25] This is so, however difficult it may be for the third person to ascertain the facts on which the agent's authority depends.[26]

AFFIRMATION WARRANTIES

We now turn from warranties that originate as contracts to warranties that derive from affirmations of fact and are imposed regardless of the warrantors' consent to be bound in warranty obligations. An affirmation, like a promise, may be express or implied. And, also like a promise, it can be the basis for a warranty.[27] Professor Williston, having discussed warranties that are created by promises, goes on by saying:

> "This, however, does not either upon authority or reason exhaust the possibilities of express warranties. It should not be the law, and by the weight of modern authority, it is not the law that a seller who by positive affirmation induces a buyer to enter into a bargain can escape from liability by convincing the court that his affirmation was not an offer to contract. A positive representation of fact is enough to render him liable. . . . The representation of fact which induces a bargain is a warranty."[28]

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held not to include power to promise vendee that he could return the car and get his money back if he found the cylinders were scored); Braun v. S. F. Hess & Co., 187 Ill. 283, 58 N.E. 371 (1900) (general agent to sell cigarettes held not to have authority to warrant that a vendee would not lose rebates he had been receiving from another company if the vendee bought from the principal of this agent); Palmer v. Hatch, 46 Mo. 585 (1870) (power of agent to sell whiskey held not to include power to warrant that the whiskey will not be seized by the government); N. Friedman & Sons v. Kelly, 126 Mo. App. 279, 102 S.W. 1066 (travelling salesman's power to sell held not to include power to contract that the buyer might return for credit the goods he could not sell); Reid v. Alaska Packing Co., 47 Ore. 215, 83 Pac. 139 (1905) (agent to sell Alaska salmon held not to have authority to warrant that the salmon he contracted to sell was "equal to the best Puget Sound Fancy Sockeye"); Nixon Mining Drill Co. v. Burk, 132 Tenn. 481, 178 S.W. 1116 (1915) (agent to sell motor truck held not to have authority to warrant that the tires would last a given length of time); Johns v. Jaycox, 67 Wash. 403, 121 Pac. 854 (1912) (agent selling talking machines to be given away by the purchaser to his customers as an advertisement, held not to have authority to guarantee that the purchaser would sell 25 records for every machine he gave away); Pickert v. Marston, 68 Wis. 465, 32 N.W. 550 (1887) (agent to sell fish held to have no authority to warrant that the fish would not spoil during shipment, in the absence of custom, but proof of a custom to warrant held competent).

24. 2WILLISTON, SALES § 445a (Rev. ed. 1948).

25. Ferson, *Bases for Master's Liability and for Principal's Liability to Third Persons*, 4 VAND. L. REV. 260, 267 n.26 (1951).

26. Mussey v. Beecher, 3 Cush. 511 (Mass. 1849).

27. *"Definition of express warranty.*—Any affirmation of fact or any promise by the seller relating to the good is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." UNIFORM SALES ACT § 12. The Act is adopted in 37 jurisdictions.

28. 1 WILLISTON, SALES § 197 (Rev. ed. 1948).

The same author, in another connection has this to say:

> "[W]hen a seller is held liable on a warranty for making an affirmation of fact in regard to goods in order to induce their purchase, to hold such an affirmation is a contract is to speak the language of pure fiction. In truth, the obligation imposed on the seller in such a case is imposed upon him not by virtue of his agreement to assume it, but because of a rule of law applied irrespective of agreement. The obligation is quasi-contractual, inasmuch as the remedy of assumpsit is allowed for its enforcement. The confusion of a thought as to the nature of the obligation seems to be in great measure due to the allowance in modern times of this remedy for breach of any warranty, whether in reality constituting a contract or only a representation."[29]

In order to show the kinship between affirmation-warranties and other forms of liability that are created by representations, let us take a hypothetical negotiation and sale. Cornwall, a farmer, had horses for sale. Thompson was a prospective buyer. Cornwall said to Sambo, his hired man, in the presence of Thompson, "Show Mr. Thompson those two young horses, Pompey and Darby. Tell him about them and be sure not to make any false statement. If Mr. Thompson decides to buy one of the horses, bring him back to the house and I shall close the deal with him." Sambo and Mr. Thompson proceeded to the barn. Sambo led out Pompey for inspection. Mr. Thompson said, "Is this horse broken to ride?" Sambo said, "Yes, he is well broken to ride." Mr. Thompson, thus assured, mounted Pompey. In fact, the horse had never been ridden before; he pitched violently and threw Mr. Thompson against a fence, breaking his arm, as X-ray pictures later showed.

Sambo then led out Darby and Mr. Thompson turned his attention to Darby. Sambo told Mr. Thompson that Darby was sired by Man-O-War, knowing full well that the statement was false and intending to deceive Mr. Thompson. Sambo also told Mr. Thompson that Darby was sound. Sambo believed that this latter statement was true; but, in fact, Darby had the heaves and a stringhalt.

Mr. Thompson was pleased with Darby and returned to the house. Cornwall gave Mr. Thompson a bill of sale for the horse and collected the purchase price. Mr. Thompson took Darby away with him. Do the incidents of this negotiation, and the sale that resulted, put Cornwall under any liability to Thompson? Sambo has made a series of statements. Each one takes its color and legal significance from the circumstance.

First, Sambo said that Pompey had been broken to ride. The statement was carelessly made and was false; and it misled Thompson to his injury. This was negligent conduct on the part of Sambo. "In a relatively large number of negligence cases," says Dean Prosser, "liability has been rested upon some form of misrepresentation on the part of the defendant. . . . Even

29. Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 420 (1911).

where the defendant is not consciously misstating the facts, he may still be liable for negligence in speaking where he has not exercised proper care to ascertain the truth."[30] Was Cornwall liable for this negligent misrepresentation made by Sambo? Sambo was not authorized to make the statement. But any question about the authority of Sambo is beside the point. He was employed as a servant to tell Thompson about the horses. His representation that Pompey was broken to ride made it appear that there would be no danger in getting onto the horse's back. That negligent statement, like any other negligent act in the scope of Sambo's employment would make Cornwall liable for the consequences.[31]

Second, Sambo told Mr. Thompson that Darby was sired by Man-O-War. This statement was, by our assumption, known to be false and was made with an intention to deceive Thompson. When acted on, it made out a clear case of deceit. This statement also was not authorized but was within the scope of Sambo's employment and Cornwall should be held liable.[32]

Third, Sambo said that Darby was sound. This affirmation was different from Sambo's affirmation that Pompey had been broken to ride in that it did not constitute negligence. It was different from Sambo's statement that Darby had been sired by Man-O-War in that it did not constitute deceit. Sambo believed that Darby was sound and did not mean to deceive. The representation that "Darby is sound" would, however, be a sufficient basis for a warranty if it were made by Cornwall. And since it was clearly within

30. PROSSER, TORTS 252-53 (1941). See also *id.* at 701-02. "There is nothing novel in recognizing negligent misstatements as a basis of tort liability . . . . [T] here are innumerable cases in which merely negligent misrepresentations of the conditions of buildings or of chattels have been held to create liability towards those, who in reliance upon them, have entered the buildings or used the chattels to their bodily injury." Bohlen, *Should Negligent Misrepresentations Be Treated as Negligence or Fraud?* 18 VA. L. REV. 703, 705 (1932). See also Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. 2d 409 (1932) (plaintiff injured by flying glass from a windshield that had been represented by the manufacturer to be nonshatterable); Cameron v. Mount, 86 Wis. 477, 56 N.W. 1094 (1893) (plaintiff induced to drive defendant's horse by defendant's representation that the horse was gentle and free from tricks); Bohlen, *Misrepresentation as Deceit, Negligence or Warranty,* 42 HARV. L. REV. 733 (1929).

31. Gleason v. Seaboard Air Line Ry., 278 U.S. 349, 49 Sup. Ct. 161, 73 L. Ed. 415 (1929); Woodburn v. Standard Forgings Corp., 112 F.2d 271 (7th Cir. 1940); Chicago & A. Ry. v. Cox, 145 Fed. 157, 160 (8th Cir. 1906); Seaboard Air Line Ry. v. Ebert, 102 Fla. 641, 138 So. 4 (1931); Buchanan v. Chicago M. & St. P. R. R., 75 Iowa 393, 39 N.W. 663 (1888); Stevens v. Boston & Maine R.R., 1 Gray 277 (Mass. 1854); Peck v. Michigan Cent. R.R., 57 Mich. 3, 23 N.W. 466 (1885); Williams v. Goldberg, 58 Misc. 210, 109 N. Y. Supp. 15 (Sup. Ct. 1908).

32. "[N]o sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for every such wrong of the servant or agent as is committeed in the course of the service and for the master's benefit, though no express command or privity of the master be proved," Willis, J., in Barwick v. English Joint Stock Bank, L.R. 2 Ex. 259, 265 (1867). "This case," says Professor Philip Mechem, ". . . represents the settled law of England and that of the very great majority of American States." MECHEM, CASES ON AGENCY 230 (3d ed. 1942). See also FERSON, THE RATIONAL BASIS OF CONTRACTS 252 *et seq.* (1949).

the scope of Sambo's employment to make such a representation it should be charged to Cornwall.

The three representations that Sambo made have been considered in juxtaposition in order to show the kinship that exists between affirmation-warranties and other representations.[33] The representations Sambo made differ one from another in their legal effect. But as acts they are alike and the question of Sambo's agency to make any one of the representations is the same whether the representation, when made, constituted negligence, fraud or warranty. Sambo was not authorized to make any of these representations in the sense that Cornwall consented to be charged with them. Cornwall did not even apparently consent to be bound by or charged with false representations that Sambo might make. But the point is that agency (in the broad sense) to make this kind of a warranty is not a question of *authority* to make a *contract;* it is rather a question of *employment* to make a *statement.* Sambo was within his real and apparent employment when he made the statements.[34] They should be charged to Cornwall.

It must be admitted that judges and other writers commonly use the term "authority" to describe the ability of one person to make another person liable on a warranty. In many cases, however, an employer is charged as a warrantor when he has given his employee neither real nor apparent authority to make the warranty. The factual requirement is not authorization but is that the employee shall have made the affirmation within the scope of his employment. In *Boehm v. Friedman,*[35] the servant-agent had induced the plaintiff to buy a mule by representing that it was a "good working mule." In truth the mule "could not be coerced to work under any circumstances." The representation was deemed to create a warranty. Said McGehee, J., "Representations which are usually incident to such a transaction are held to have been made with authority by an agent entrusted with the sale of an animal, *although without authority or apparent authority to give a warranty* in regard thereto."[36] In *Sharlette v. Lake Placid Co.,*[37] a servant-agent had induced the plaintiff to buy pigs by representing that the pigs "were alright

33. A positive declaration of quality, possessing all the other requisites of a warranty, does not cease to be a warranty because known to be false, and, therefore a fraud. "[A]ny distinct assertion or affirmation of quality made by the owner [or servant to make such affirmations] *during a negotiation* for the sale of a chattel, which it may be supposed was intended to cause the sale, and was operative in causing it, will be regarded either as implying or as constituting a warranty. If such affirmation were made in good faith, it is still a warranty; and if made with knowledge of its falsity, it is a warranty, and it is also a fraud." 1 PARSONS, CONTRACTS 579-80 (5th ed. 1866); First Acceptance Corp. v. Kennedy, 95 F. Supp. 861 (N.D. Iowa 1951).

34. Northwestern Mut. Life Ins. Co. v. Steckel, 216 Iowa 1189, 250 N.W. 476 (1933) (later overruled on another point).

35. 190 Miss. 664, 1 So.2d 508 (1941).

36. 1 So.2d at 509 (italics added).

37. 194 App. Div. 844, 185 N.Y. Supp. 543 (3d Dep't 1921).

and free from cholera." The master-principal was charged with a warranty. Said Kellogg, P. J., "An agent of the seller owes the duty to his principal truly to state the qualities of the things to be sold and present them in as attractive a way as the circumstances permit. . . . If Bellmere [the servant-agent] believed the pigs were well, he would not have faithfully represented his master when asked about hog cholera, if he had refused to speak." And, it may be added, a representation is still as representation whether it is true or false. In *Nelson v. Cowing and Seymour,*[38] it appeared that David Cowing had sold pumps for his principal-master and there was evidence that he warranted the pump sold to the defendant. Said Bronson, J., "True, there is no direct proof that David had authority to warrant the pumps, or make any representation concerning their quality or condition. But a *warranty—and so of a representation—is one of the usual means for effecting the sale of a chattel."*[39]

The job to be done by an employee, in such cases as the ones just cited, is to work on a third person and persuade him to enter a bargain. That job is commonly done by making representations—a kind of nonjuristic act. On general principles, therefore, the employer should be charged with representations made by his servant whether the particular representation makes out negligence, fraud or affirmation-warranty. By a large majority of the decisions the master is so held.[40]

What is the difference between "authorizing" and "employing"? It will bear repeating that authorizing an agent is like the making of an offer to enter a legal transaction. An offer is a consenting to be bound if the offeree shall render the specified acceptance.[41] An authorization is a consenting to be bound if the agent and a third person shall agree to such and such a

38. 6 Hill 336 (N.Y. 1941).

39. *Id.* at 338 (italics added).

40. Miller v. Economy Hog & Cattle Powder Co., 228 Iowa 626, 293 N.W. 4 (1940); Sokoloski v. Splann, 311 Mass. 203, 40 N.E.2d 874 (1942); Weiner v. D.A. Schulte, Inc., 275 Mass. 379, 176 N.E. 114 (1931); Bagnall v. Frank Fehr Brewing Co., 203 Mo. App. 635, 221 S.W. 793 (1920); Darks v. Scudders-Gale Grocer Co., 146 Mo. App. 246, 130 S.W. 430 (1910); Laumeier v. Dolph, 145 Mo. App. 78, 130 S.W. 360 (1910); Haynor Mfg. Co. v. Davis, 147 N. C. 267, 61 S.E. 54 (1908).

"Even though the agent may not be deemed to be *authorized* to make representations, but he nevertheless does so as part of the sale, the principal may be affected by them." MECHEM, AGENCY § 890 (2d ed. 1914). One who employs an interpreter is charged with the interpreter's rendition. Miller v. Lathrop, 50 Minn. 91, 52 N.W. 274 (1892); Bonelli v. Burton, 61 Ore. 429, 123 Pac. 37 (1912).

On the assumption that "authority" is necessary in order that an agent can make a warranty, courts have sought to find authority as an included power in the power to sell. Following this line of thought the test has often been said to be this: Is it usual in the sale of such goods as are being sold to give the warranty in question? TIFFANY, AGENCY 72 (2d ed. 1924); Nelson v. Cowing & Seymour, 6 Hill 336 (N.Y. 1844); Westurn v. Page, 94 Wis. 251, 68 N.W. 1003 (1896). Such a test is ambiguous because the word "sell" has two meanings. Sometimes it means to work on a prospective buyer and persuade him to part with his money; and, sometimes it means to consent that a title shall pass in exchange for a price.

41. For more detailed discussion see FERSON, *supra* note 25, at 266.

transaction. Employment is something else. It consists in procuring, or merely accepting, the service of another in the doing of nonjuristic acts. The liability of the master is thrust upon him regardless of his consent. Such is the doctrine of *respondeat superior.*

Readers of Mark Twain's stories will recall this episode. Tom Sawyer and Huckleberry Finn had on hand the business of rescuing a colored prisoner from a hut that had no floor. Tom, a great stickler for principle, had a notion that the only heroic way to rescue their man was to dig an opening under the hut with a case knife. The job had been done in that manner in stories Tom had read. A pick ax was at hand but Tom spurned the use of such an instrument until his companion, Huck, had the gumption to hand Tom a pick ax, calling it a "ease knife." That made the tool quite satisfactory and usable. So it is with agency to make affirmation-warranties and other representations. Factual employment is sufficient to create such agency but warranties are thought of as contracts and so the ability of one person to make another person liable on a warranty must be called "authority."

The point has been made that one who claims to have a warranty by virtue of a contract made by an agent of the warrantor must show that the agent had authority to make it, while one who claims a warranty by virtue of a statement made by a servant of the warrantor needs only to show that the statement fell within the scope of the servant's employment. What if the servant-agent attempts both to state that a fact is so, and to contract that his principal will indemnify if the fact is not so? The servant-agent might, for instance, say that the horse he is boosting for sale is sound and also presume to contract that his principal will indemnify the buyer if the horse is not sound.[42] There is thus an overlap of the two kinds of warranties. It would seem that the warrantee should have the advantage of whichever kind of warranty he can establish. And so where the servant-agent has made a statement that is sufficient basis for a warranty, the warrantee should not be put to the burden of showing that the speaker had authority. It is at this point that most of the confusion about agency to make warranties has come. The case of *Ellner v. Priestley*[43] will serve to illustrate. In that case a salesman had said of the goods he was boosting for sale that they were "all wool." But the court did not charge the employer with a warranty. The judge said that, in the absence of authority, an agent cannot warrant. The

42. It would seem that in most instances where a servant agent presumes expressly to make a contractual warranty his words would include a statement of fact as well as a promise. Such a statement of fact could reasonably be implied in most express warranties except promissory warranties—*i.e.*, warranties with regard to what will be a fact in the future.

43. 39 Misc. 535, 80 N.Y. Supp. 371 (N.Y. City Ct. 1902); and see Art Metal Works, Inc. v. Abraham & Straus, Inc., 4 F. Supp. 303 (E.D.N.Y. 1933).

decision does not seem to recognize the possibility of an affirmation-warranty being made by a servant speaking within the scope of his employment.

WARRANTIES IMPOSED WITHOUT PROMISES OR AFFIRMATIONS

Warranties have been deemed to exist in a good many instances where the warrantor had not made any promise or affirmation, and no one had made any promise or affirmation for them.[44] The basis of such warranties is like the basis of other quasi-contracts; they are imposed by courts for the sake of justice and expediency. A Texas case will serve to illustrate "an implied warranty imposed by operation of law." In *Jacob E. Decker & Sons, Inc. v. Capps*[45] it appeared that the defendant had manufactured sausage. It was packed in cellophane wrappers and sold under the trade name "Cervalet" to a retailer. The plaintiff bought a package of this sausage soon after it came to the retailer and it was served to the plaintiff's family. The sausage proved to be poisonous and members of the plaintiff's family, after eating the sausage, became ill. One child died. Suit having been brought against the defendant, the jury found that the sausage, at the time of its manufacture, was contaminated and poisonous but that the defendant was not negligent and "did not fail to properly inspect the sausage" and that "the illness suffered by Capps' family from eating the sausage was the result of an unavoidable accident." On these facts should the defendant be held liable? The court, after noting that there is some difference of authority, aligned itself with the side holding the defendant, and frankly gave its reasons for so holding as follows:

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44. Of a number of cases allowing recovery on implied warranties in recent years, see: Smith v. Great Atlantic & Pacific Tea Co., 170 F.2d 474 (8th Cir. 1948) (plaintiff purchased unwholesome spinach at a grocery), 4 ARK. L. REV. 98 (1949); Amdal v. F. W. Woolworth Co., 84 F. Supp. 657 (N.D. Iowa 1949) (restaurateur served plaintiff with ice cream containing glass), 35 IOWA L. REV. 724 (1950), 34 MINN. L. REV. 156 (1950), 23 So. CAL. L. REV. 289 (1950); Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272 93 P.2d 799 (1939) (plaintiff became ill after eating a maggoty cheese sandwich prepared in sealed package by defendant), 15 IND. L.J. 242 (1940), 25 WASH. U.L.Q. 293 (1940); Cliett v. Lauderdale Biltmore Corp., 39 So.2d 476 (Fla. 1949) (plaintiff served unwholesome food in hotel dining room), 3 MIAMI L.Q. 638; Swengle v. F. & E. Wholesale Grocery Co., 145 Kan. 555, 77 P.2d 930 (1938) (wholesaler liable to consumer of poisonous sauerkraut juice), 52 HARV. L. REV. 328 (1938); Delta Nehi Bottling Co. v. Lucas, 184 Miss. 693, 185 So. 561 (1939) (plaintiff became ill after finding paper clip in soft drink bottle), 24 IOWA L. REV. 790; Yochem v. Gloria, Inc., 134 Ohio St. 427, 17 N.E.2d 731 (1938) (defendant restaurateur served plaintiff contaminated drinking water with meal), 38 MICH. L. REV. 269 (1939); Bonenberger v. Pittsburg Mercantile Co., 345 Pa. 559, 28 A.2d 913 (1942) (plaintiff recovered from retailer for injury caused by shell in can of oysters), 47 DICK. L. REV. 124 (1943), 17 TEMP. U.L.Q. 203 (1943); Ford v. Waldorf System, Inc., 57 R.I. 131, 188 Atl. 633 (1936) (restaurant keeper liable for serving food unfit for human consumption to plaintiff), 15 CHI-KENT REV. 253 (1937). For recent law review materials, see Notes, 9 MONT. L. REV. 101 (1948), 14 N.Y.U.L.Q. REV. 519 (1937), 23 TULANE L. REV. 96 (1948).

45. 139 Tex. 609, 164 S.W.2d 828 (1942), 28 WASH. U.L.Q. 287 (1943). See also Sencer v. Carl's Market's, Inc., 45 So.2d 671 (Fla. 1950), 3 ALA. L. REV. 251, 3 U. OF FLA. L. REV. 380, 99 U. OF PA. L. REV. 111.

"A majority of the American courts that have followed this holding have not based such warranty upon an implied term in the contract between buyer and seller, nor upon any reliance by the buyer on the representation of the seller, but have imposed it as a matter of public policy in order to discourage the sale of unwholesome food.... While a right of action in such a case is said to spring from a 'warranty', it should be noted that the warranty here referred to is not the more modern contractual warranty, but is an obligation imposed by law to protect public health."[46]

In another Texas case,[47] the facts were similar to the facts in the *Capps* case except that suit was brought against the retailer. The plaintiff was allowed to recover and again the court was explicit in stating the grounds for its decision. It said:

"[W]e held [in the *Capps* case] that a non-negligent manufacturer who processed and sold contaminated food to a retailer for resale for human consumption was liable to the consumer thereof for the injuries sustained by him as a result of eating of such food. That holding was not based upon any supposed negligence of the manufacturer, nor upon the breach of any warranty implied in fact from the supposed terms of the contract, but was based upon the broad principle of an implied warranty imposed by law as a matter of public policy for the protection of human health and life."[48]

The illustrations that have been given of warranties imposed by law were cases where impure food had been sold; and there was some emphasis, in those cases, on the "public policy" involved in food sales. But warranties are sometimes imposed by law in other kinds of transactions. Judge Learned Hand, in dealing with an implied warranty that a ship was seaworthy, gave the frank and realistic explanation that implied warranties are "obligations imposed *'in invitum,'* " and says further, "it is only by a fiction that we call them promises at all in the sense that express warranties are promises."[49] Judge Lehman, in dealing with the implied warranty by an agent that he has authority, says, "The doctrine of an implied warranty is based upon a fiction."[50] And it has even been suggested that an insurance company should be held to warrant that a policy it puts out is fit "to cover the risk for which it was secured."[51]

46. 164 S.W.2d at 829, 831 (1942).
47. Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942).
48. *Ibid.*
49. Strika v. Netherlands Ministry of Traffic, 185 F.2d 555, 558 (2d Cir. 1950), 4 VAND. L. REV. 921 (1951).
50. Moore v. Maddock, 251 N.Y. 420, 167 N.E. 572, 574 (1929). Professor Jeremiah Smith under the subhead, "As to Fiction Contracts," says: "Under this head must be classed a very large number of cases which, under the old forms of action, were enforced in an action of contract, but in which there was no contract whatever, the promise alleged in the declaration being an absolute fiction. . . . 'The term "contract implied in law" is used, however, to denote, not the nature of the evidence by which the claim of the plaintiff is to be established, but the source of the obligation itself. It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent.'" Smith, *Surviving Fictions*, 27 YALE L.J. 317, 324 (1918).
51. Note, 35 YALE L.J. 203, 208 (1926).

These warranties that are imposed by law pose no question of authority to make a promise, or employment to make an affirmation. They are, as Judges Hand and Lehman have said, "fictions." When a sale, or other transaction to which implied-in-law warranties attach, has been made, the appropriate warranty is imposed as an inevitable incident and without any regard for what the agent promised or affirmed. The fact that the sale was made through an agent rather than directly by the principal does not affect the warranty in any way.

But there is one warranty which is imposed as a matter of law in which the agency relationship may possibly affect the seller's liability. This is the warranty that the article being sold is fit for the buyer's use. It is a factor in creating this warranty that the seller must know the intended use of the article. Is it sufficient if his servant knows about the intended use of the article? On both principle and authority, the seller is charged with the notice.[52] Assuming that it is within the scope of the servant's employment to communicate the notice, the master has the information or else the servant has been remiss. The master is chargeable in either event.[53]

SUMMARY

Some warranties originate as contracts—*i.e.*, they spring from the consent of the warrantors to be bound. To make such a warranty binding on his principal, an agent must have authority, as he must to bind his principal in any other contract. The usual rules with regard to authorization apply.

Some warranties are imposed without regard to the warrantors' consent, by reason of affirmations of fact that have been made by, or on behalf of, the warrantors. The representation is a nonjuristic act: A servant who makes it does not have to be authorized in order to charge the master. The rule of *respondeat superior* applies.

Still other warranties are imposed by law for reasons of justice and expediency. They are a kind of quasi-contract and are not dependent on promises or affirmations. Assuming a sale or other transaction to have been made by a principal, or by an agent who was authorized to make it, there is no separate question about agency to make this kind of a warranty. It is implied-in-law.

52. Graham v. Jordan Marsh Co., 319 Mass. 690, 67 N.E.2d 404 (1946); Weiner v. D. A. Schulte, Inc., 275 Mass. 379, 176 N.E. 114 (1931); Lentz v. Omar Baking Co., 125 Neb. 861, 252 N.W. 410 (1934); Fulwiler v. Lawrence, 7 S.W.2d 636 (Tex. Civ. App. 1928).

53. See Ferson, *Agency to Make Representations*, 2 VAND. L. REV. 1, 22 (1948).