HISTORICAL ASPECT OF CONDITIONS AND WARRANTIES

(1) At Common Law-

The term "warranty" is very significant in the law of sale of goods, in so far as the duties of the sellers are concerned. The central aspects of law of sale of goods are fully based on law relating to warranty. Its origin is shrouded with uncertainty and great complexity. However, a brief account of the same is given as under.

Warranty started first as an agreement and required special words for its creation. A notion of undertaking was involved which was very well conveyed by "Warrantizando"


3. Chanceler v. Lopus (1603) Cro.J. 4. It was observed in this case "that the bare affirmation that it was a bezoar-stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezoar-stone, it is not material, for every one in selling his wares will affirm that his wares are good, or the horse which he sells in sound, if he does not warrant them to be so, it is no cause of action."
vendidit" and is equivalent to promise for Roman Stipulatio.

In exceptional cases, any one who sold goods, knowing that he had no title to them was liable in action on the case for Deceit and was liable generally when he was under public duty from the nature of his calling to sell articles of a certain quality.

Glanvill writes that a remedy for breach of warranty was available locally under the reign of Edward I. Sometimes, promise was emphasized and damages were awarded for breach of covenant. Sometimes fraud was emphasized and action lay for "trespass" or "deceit" Royal Courts entertained such actions from the beginning of 14th century.


5. 3 Y.B. 42 Lib. Ass.pl.8- But in Dale's case (1585)Cro.Eliz.44 majority was of the view that express undertaking or knowledge of lack of title was essential to hold the seller liable. In Medina v. Stoughton (1700) 1 Ld.Rayon 593; S.C. 1 Salk 216. Lord Holt observed that where a man is in possession of a thing which is a colour of title, an action will arise upon a bare affirmation that the goods sold are his own. Later on the rule developed that even without such affirmation an obligation was implied at least if the seller was in possession when sale took place (Williamson Sales Sec. 218).

6. Glanvill, X, 14,

7. Sel. Cases on Law Merchant, vol. 1,
Sel.d.Soc.vol.23,PP. 102, 105-106; Cal. Early Mayor's Court Rolls, 1298-1307,
Sel.d. Soc. Vol. 46, P. 28
At common law, the earliest report with regard to breach of warranty of title to land was first evidenced in 1368 in which action was brought for deceit. The royal courts, as a matter of policy did not enter the field until late in 14th century. Thereafter the matter was taken up in tort. The seller used to bring action for the price by declaring that he supplied goods of merchantable quality and buyer used to defend his case for breach thereof. Warranties upon which the buyer could sue the seller, sounded much in tort. Such precedents are placed in the write on Transactions.

A report of 1406 suggests that a seller could be held liable for defective foodstuffs without such warranty and the same was repeated in 1471. For goods other than foodstuffs, he was liable if he knew the defect. Whether or not knowledge could fix liability on a seller who had not warranted, it was always alleged against those who had fraud in 1507 thought that liability on a warranty was independent of knowledge. Knowledge of its falsehood was not essential. This gave birth to a warranty

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q. Peq. "prev., pp. 108, 111 (walt)
  10. Y. "covenants, p. 7 HY. IV, p. 11, par 53d per Coard.
  11. For similar views, refer Froude in V. "m. HY VI, p. 1.10, F 96 at p. 6d.
  12. YB. 11, ed. IV, p. 1.10, per 6d per Brian, Kellaway, H. 27 HY. VII p. 1.16 F 91
in fact. Its effect was two fold: first it extended contractual liability of express warranty without an express undertaking to that effect. Secondly, it also created a purely tortious liability in those cases where the seller had induced the buyer through his affirmations.

In olden days, the warranty related to present facts and not future performance: It was said that one could warrant the nature of seed and about its quality but not that it would grow all right. This strengthens the fact that previously the warranty was a delictual action. It is said that it was established clearly two centuries before Assumpsit became an independent action and many centuries before the tort of deceit was finally established. Up to latter part of eighteenth century, warranty sounded much in tort, and was not directly related

15. Y.B.T. 11 Ed. IV, Pt. 10 £. 6d per Brian and Choke. Blackstone also stated that "The warranty can only reach things in being at the time of warranty made, and not things in future; as, that a horse is sound at buying of him and not that he will be sound two years hence" (3 Comm. 165)
16. Winfield "The Province of Law of Torts" (1931) P. 66 Warranty has been traced back to 1383. Fitz., Abl. Monst. de Faites pl. 160
17. Pasly v. Freeman (1789) 3 Term Rep. 51
to assumpsit. But in Stuart v. Wilkins, an action for breach of warranty was brought in contract. Before that, it was essentially an action in tort based on warranted statements which induced certain actions and later turned out to be false. After the decision in above case, it could be remedied in contract and the emphasis was laid on the element of promise and consequently it became associated exclusively with Contract of sale. Upto the year 1891, warranty was remedied under Tort. During the transitional period, the implied terms of contract of

18. It literally means "promised or undertook". It is a common law action which grew out of the action of trespass on the case. It was brought for breach of an undertaking and it was a cause of action analogous to deceit. It gradually supplanted the action of debt and came into general use for the enforcement of an agreement not under seal and for which an action of Covenant would not lie. The actions of assumpsit were abolished by Judicature Act 1873-75.

19. (1778) 1 Dong 19

20. "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the Warrantor's assent to be bound, it later ceased necessarily to be consensual and at the same time came to lie mainly in contract" Comment "Necessity for Privity of Contract. In Warranties By Representation"(1928-29) 42 Har.L.Rev. 414-15

sale grew out of the express warranties generally given at the time of sale. Once the warranty became attached to contract, the promissory aspect of warranty overshadowed the representational aspect. Further there was some confusion about its nomenclature too. In 1867, Blackburn J. observed that a warranty was an inferior term of contract of sale. In 1893 Chalmers conferred a statutory inferiority to warranties under a contract of sale.

Though English and American Laws were influenced with the same type of developments, but in the state jurisdiction warranty has kept its tortious character and has served as a remedy in those situations where it has gone unremedied under English Law. This was all due to cautious approach of Williston who was much alive of its historical antecedents than Chalmers.

Williston is of the view that mere affirmations with regard to quality or fitness of goods are not promises by which the buyer is induced to purchase. The obligation is quasi-contractual and is implied by law. Assumpsit was not allowed as a remedy for breach of warranty till the end of eighteenth century. This is recognition of the fact that a warranty is a hybrid between tort and contract”. 23

22. To say that warranty "is a contract is to speak the language of pure fiction" Williston "Liability for Honest Misrepresentations" (1911) 24 Har. L. Rev. 415

23. id. at 420. Blackstone classified warranties with contract "implied by reason and construction of law" (3 Comm. 163-65)
(2) Statutory Provisions-

At the time when E.A. was passed, the law with regard to conditions and warranties was very much in confused state in this country as well as in England. Indian Contract Act, 1872 used the term "Warranties" commonly for "Conditions" and "Warranties" both. However none of these terms was defined. After passing of E.A., the Courts in India, attempted to ascertain whether the provisions contained under section 118 of the said Act were equivalent to term Condition as understood under English Law. It was held in Buch v. Goverdhandas that the word "Warranty" in section 118 was used in the present sense of condition. The same reads as follows:

118 Right of buyer on breach of warranty in respect of goods not ascertained.

Where there has been a contract, with a warranty, for the sale of goods which, at the time of contract, were not ascertained or not in existence, and the warranty is broken, the buyer may accept the goods or refuse to accept the goods when tendered, or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them; provided that, during such time, he exercises no other acts of ownership over them than is necessary for the purpose of examination and trial.

24. 24 Bom. L.R. 991
In any case, the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty; but, if he accepts the goods, and intends to claim compensation, he must give notice of his intention to do so within a reasonable time, after discovering the breach of the warranty.

Chapter VII of Indian Contract Act, 1872 relating to sale of goods was repealed and replaced by S.C.A. due to the fact that the former could not cope up with the modern conditions of sale. The S.C.A. is almost a replica of E.A. with slight modifications. Section 12 of S.C.A. corresponds with section 11 of E.A. our Act defines 'Condition' whereas; the same has not been defined by the English Act.

The provisions of repealed section 117 of Indian Contract Act, 1872 were equivalent to warranty in the modern sense. They were as follows:

"Where a specific article, sold with a warranty, has been delivered and accepted and the warranty is broken, the sale is thereby rendered voidable, but the buyer is entitled to compensation from the seller for the loss caused by the breach of warranty."

25. The Special Committee observed "The English Act does not give any definition of the word 'Condition'..... we have ventured to define the expression, a condition".
The unamended section 13(2) of S.C.A. is based upon the above provisions and is as follows:

"Where a contract of sale is not severable and the buyer has accepted the goods or part thereof or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term in the contract, express or implied to that effect."

Section 3 of the Amendment Act, 1963 omits the words "or where the contract is for specific goods, the property in which has passed to the buyer" from the above provision. As a result of which the buyer may now reject the goods in which the property might have passed to him after acceptance.

In England, section 4(1) of the Misrepresentation Act, 1967, carries out similar amendments by repealing "or where ... to the buyer" appearing in section 11(1)(c) of E.A. Further, sub-section (2) of section 4 inserts the words "except where section 34 of this Act otherwise provides" before section 35, which had to be done in view of the decision in *Hardy & Co., Ltd. v. Millern & Fowler* where it was held

27. (1923) 2 K.R. 490
that under sections 34 and 35, a buyer may be held to have "accepted" the goods and lost his right of rejection before he had a chance to examine them, if he had done some act inconsistent with the right of ownership of the seller. The effect of this amendment in England is that the buyer will not loose his right of rejecting the goods, if he had no reasonable opportunity to examine them, even though he had done some act which was inconsistent with the right of the ownership of the seller. Such amendment of section 42, corresponding with section 35 of E.A. is desirable.

(a) Implied Condition as to Title:

In the earlier stages of development of law relating to sale of goods the rule was that in case of sale of specific goods, there was no implied warranty as to title and that in absence of fraud, the seller was "not liable for a bad title unless there was an express warranty, or an equivalent to it by declaration or conduct." Later on the common law recognized the warranty of "Title" and from there it was introduced under section 109 of Indian Contract Act 1872. The section reads as follows:

28. Moreley v. Attenborough (1849) 3 Ex 500 at P. 512
"If the buyer or any person claiming under him is, by reason of the invalidity of the seller's title deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him for loss caused thereby, unless a contrary intention appears by the contract."

This provision, that a stipulation regarding title is merely a warranty breach of which entitles a claim for damages, is based on a rule which was included in the report of Law Commissioners and also stated by Sir Henry Maine in the statement of objects and reasons to the Indian Bill. This was a departure from the English Law. But the reasons thereof have not been given. However, section 109 of the said Act did not mention anything as to Warranties of Quiet possession and Freedom from encumbrances. These are recognised by the laws of civilised modern countries. Hence they were incorporated in the E.A. and from there, they have been introduced in to S.C.A.

29. Baron Parke in Moseley v. Attenborough id.at 510 said "According to the Roman Law and in France and Scotland and partially in America, there is always an implied contract that the vendor has the right to dispose of the subject which he sells". (Citing Domat bk.1 tit.2 S.2; the French Civil Code, art.1675; Sunden an eminent authority observed that although a purchaser cannot ordinarily obtain relief against a vendor for any incumbrance or defect in the title to which his Covenants do not extend, an exception is made to this rule in the case of a vendor or his agent suppressing an incumbrance or a defect in the title. Vendors & Purchasers P.5 ed. XIII. Quoted from Galspath v. Alagha 9, (1886) Mad. 99 at 91

30. Section 12
31. Section 14
Later on when the judicial opinion and that of the eminent text book writers crystallised, it was thought that the title to goods being an important factor in sale of goods, it should be treated as condition. Hence Benjamin observed:

"In regard to conditions as to title, in as much as it is an essential element of the contract of sale that there should be a transfer of the absolute or general property in the thing from the seller to the buyer, it would seem naturally to follow that by the very act of selling the Chattel, the seller undertakes to transfer the property in the thing and thus warrants his title or ability to sell, and it is believed that such was the true rule of the common law."

That is how old section 12(1) of E.A. contained the law on the point and has been now completely amended by the Amending Act of 1973.

The provisions of section 14 of S.C.A. corresponding to section 12 of E.A. gives greater relief to the buyer than repealed section 109 of Indian Contract Act, 1872. The "warranty" of title has been replaced by "Condition" of title. Apart from that, warranties of Quiet possession and Freedom from encumbrance, added to this section are very useful provisions.

33. Strictly speaking, the implied engagement of the seller is not a warranty of title. It consists of (1) an obligation to deliver and (2) a guarantee against eviction. It is equivalent of a covenant for quiet possession rather than the equivalent of a covenant for title pothier "contract De Vente" Pos.48, 82 De Zulvata "The Roman Law of Sale" P.P. 35-37
34. Section 14(1) of S.C.A. corresponds to it.
Section 12 of E.A. is based on section 7 (1) of the conveyancing Act, 1881, relating to immovable property. Now the same is replaced by section 76 and schedule II of Law of Property Act 1925.

(b) Implied Conditions as to Description -

The provision with regard to sale of goods by description was originally contained under Indian Contract Act 1872 but was not properly framed. The word "description" was mentioned as "denomination" and "condition" as "warranty" under the said Act. The Report of the Select Committee states that word denomination was out dated and the word warranty was equal to "condition" in the modern sense. Explanation to the section relating to the said Act was also inconsistent with the rule in Wallis v. Pratt. Hence they recommended that the provision of section 13 of E.A. be incorporated under S.C.A. The same is contained now under section 15.

35. 30 Halsbury’s Statutes (3rd ed.) 455, 664
36. Section 118 read:
"When goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk."
Explanation:- But if the contract specifically states that the goods though sold as of a certain denomination are not warranted to be of that denomination, there is no implied warranty.

37. For a discussion on the point, refer Tukaram v. Deoli I.C. 1920 (V, LIV) at 315; Chanter v. Hopkins (1838) 4 M & W 399
38. (1911) A.C. 394
(c) Implied Conditions as to 'Quality' and 'Fitness'-

It was observed by Cockburn C.J. in Pigge v. Parkenson that where the buyer purchases specific article, the rule of Caveat Emptor applies. But where he orders goods trusting upon the judgment of the seller, and the seller knows the purpose for ordering those goods, but there is no express stipulation that the goods should be fit for that purpose, there is no implied warranty that they should be fit for that purpose. However, in case of sale of provisions, such warranty is implied.

Section 114 of the Indian Contract Act 1872 was based upon the above principle and the present proviso to section 16(1) is based upon the principle in section 115 of the said Act. Sub-section (1) to section 16 declares that

39. 71 L.J. Exch. 301
40. "114 Warranty where goods ordered for a specified purpose. Where goods have been ordered for a specified purpose, for which the goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose.

41. "115 Warranty on sale of article of well known ascertained kind. Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of its fitness for any particular purpose".
whether the seller is a manufacturer or producer or not, he is liable for all the defects in the goods. This controversy raised in *Parkinson v. Lec*, has been set at rest now.

The proposition stated in sub-section (2) is well established in *Jones v. Just* and has been followed in India.

Sub-section (3) is based upon provisions of section 110 of Indian Contract Act 1872. The provisions of Section 111 were dropped, in the light of the recommendations of the Select Committee, as no distinction was drawn between the provisions and other goods.

(d) Implied Conditions as to Sample -

Before passing of E.A., there was only warranty on a sale by sample that the sample was fairly taken from the bulk. The Indian Contract Act 1872 had provision only with regard to the right of the buyer to reject the goods, if the

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42. (1802) 2 East 314
43. (1868) L.R. 3 P.B. 197
44. Peer Mohammad v. Dalooram (1918) 35 Mad. L.J. 180 & Wall & Co. v. V.A. Firm (1922) 43 Mad. L.J. 208
45. "110 Establishment of implied warranty of goodness or quality. An implied warranty of goodness or quality may be established by the custom of any particular trade"
46. "111 Warranty of soundness implied on sale of provisions. On the sale of provisions, there is an implied warranty that they are sound"
47. *Savers v. Birmingham Flint Glass*, 27 L.J. Ex. 294
bulk did not correspond with the sample. A more comprehensive rule with regard to sale of goods by sample was laid down by C.A.

Section 17 of our S.C.A. is a true copy of section 15 of the E.A. with slight modification of clause (2).

3. Sale of "Specific Goods" and "Goods sold by Description"-

In ancient England, the maxim of Caveat Emptor was a dominant feature of sale of horses in market overt. The result was that if a buyer purchased a horse after duly examining it in the market, he could not repudiate the contract later, on discovering the unsoundness of the horse. The reason was that such goods were known as "specific goods" for which the said rule applied. In order to protect himself from the rigours of this rule, a buyer pressed to obtain warranties from the seller to the effect

48. Section 112 read as follows:
"On the sale of goods by sample, there is an implied warranty that the bulk is equal in quality to the sample;"

49. Sec.15 Sale by Sample-(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied to that effect.
(2) In the case of a contract for sale by sample-
(a) There is an implied condition that the bulk shall correspond with the sample in quality;
(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
(c) There is an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

that he would accept the horse back if it were found to be unsound. Such warranty being subsequent to and separate from the seller's promise to sell, made the whole transaction look like two separate contracts, one of sale of specific goods and the other a special contract of warranty. (They mostly appeared to be collateral in form.) Since, the Contract of sale of specific goods was executed (i.e. payment of price for delivery of horse) other part of contract, (namely, express warranty) always appeared to be executory. This distinction, artificial and inefficient though it was, became the cornerstone upon which, in the nineteenth century, the whole conceptual framework of the law of sale of goods was built.

In early Nineteenth century, the concept of "sale by description" had eclipsed the rule of Cavent Emptor and warranty of quality was considered to be implied by law in many cases. However, before the law could be fully settled, there arose a case in which the warranty of quality was not implied. This rule travelling through two important

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51. Stoljar "Conditions, Warranties and Descriptions of Quality- In Sale of Goods I" 15 Mod.L.Rev.425 at 432
52. Jones v. Bright (1829) 5 Bing 533, Shephard v. Pybus (1842) 3 Man. & S. 868; Gardiner v. Gray (1815) 4 Camp.144
Lord Ellenborough declared in this case that where there is no opportunity to inspect the goods purchased, the rule of Caveat Emptor does not apply.
53. Barry v. Gibson 3 M & W 390 (1838)
cases, found its resting place in Section 14 of E.A. In two earlier cases, the courts had declared that where the goods were specific and the property therein had passed to the buyer after acceptance, he could not reject the goods and unilaterally revest the title in the seller. These decisions were rather unhappy. If the buyer purchased a horse of unsound mind, warranted as sound, it will be little satisfaction to him if he gets the horse at half the price and damages for breach of warranty of its unsoundness. It is noteworthy that this anomaly has been removed in India as well as in England.

55. Street v. Play, (1831) 2 P & Ad. 456; Dawson v. Collis, (1851) 10 CR 523
56. See Uniform Commercial Code, § 2-401(4). It reads: "A rejection or other refusal by the buyer to receive or retain the goods whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a sale.
58. Sec. 3 of the Amendment Act, 1963 omits the words" or where the contract is for specific goods the property in which has passed to the buyer" from Sec. 13(2) of S.C.A. The effect of this omission is that the buyer shall have right to reject the goods even though the property in them has passed to him.
59. Sec. 4(1) of the Misrepresentation Act 1967, repeals the words"or where the contract is for specific goods the property in which has passed to the buyer" in Sec. 11(1)(c) of S.A. Further, Sec. 4(2) inserts the words "except where Sec. 34 of this Act otherwise provides" before Sec. 35
At common law, statement as to quality of goods sold by description amounted to "condition" and in case of specific goods, amounted to "warranty". In Heyworth v. Hutchinson, it was said that when contract is to "any" goods such clause is a condition but when the contract is as to "specific goods" it amounts to warranty. Further, implied conditions of fitness for particular purpose and merchantability did not apply to sale of "specific goods" but were only confined to "sale by description".

The decision of Heyworth is not compatible with certain other cases, which, though involving contract to sell specific goods, declared that the assumption was that the buyer had a right to reject.

In a case, where the sale was of a machine, stated to be new which the buyer had not seen, it was held that the transaction was "Sale by description" and such sale being

60. See, Street v. Blay (1831) 2 R & Ad. 456;
   Harrison v. Knowles & Foster (1917) 2 K.B. 606. Also see Nichol v. Codts (1954) 10 Ex. 191 at 193 where Park C.B. remarked that "Warranty affects quality and not the nature of article itself".
61. (1867) L.R. 2 C.P. 447
62. Barr v. Gibson (1838) 3 M & W 390; Chanter v. Hopkins 4 M & W 399. In these cases the term "warranty" was used and not the term "Condition".
63. Supra note '61
64. Gardiner v. Gray, (1915) 4 Camp, 144; Miller v. Schillizi (1856) 17 C.B. 619; Jones v. Just, (1867) L.R. 3 W.P. 197
65. Warley v. Whin 1 Q.B. 513
conditional, the property in the goods had not passed, hence the buyer could reject the machine. But in a later 66 case, where certain ships each with a dead weight capacity of 360 tons were sold with particulars that they were, *inter alia*, of 460 tons each and the sellers were "not accountable for errors in description", it was held that there was only breach of "warranty and not condition."

Thus, these two cases stand in contrast; in the former, the existing goods were construed as goods "sold by description"; in the latter, similarly situated goods were held to be "specific". It is, therefore, clear that the line of demarcation between "condition" and "warranty" or between "specific goods" and "goods sold by description" is not very sharp. This introduces uncertainty and confusion in the law relating to sale of goods. In *Beale v. Taylor*, 67 the court of Appeal held that the sale of goods was sale by description, even though the buyer had inspected the goods before purchasing it, simply because the seller had advertised his car as "Herald Convertible".

68 The English & Scottish Law Commission had recommended the amendment of section 13 of F.A. to make it clear that it applies to sales in self-service stores. It reads "A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale, they are selected by the buyer". This recommendation has been accepted and inserted by the Amendment Act 1973.

67. (1967) 1 W.L.R. 1193
68. Exemption clauses in contracts, First Report; Amendment of E.A.