Implied Warranty Against Latent Defects: A Historical Comparative Law Study

Daniel E. Murray
Implied Warranty Against Latent Defects: A Historical Comparative Law Study

Daniel E. Murray*

INTRODUCTION

It is a familiar rule of Anglo-American jurisprudence that, in general, a vendor of goods impliedly warrants that they are of merchantable quality. In addition when the vendee, expressly or by implication, makes known to the vendor the particular purpose for which the goods are being purchased so as to indicate that the vendee is relying on the vendor's skill or judgment, there is an implied condition that the goods shall be reasonably fit for such a purpose.¹

The cumulative effect of modern legislation and judicial decisions is to make "the seller an insurer of his goods."² The outer limits of liability still are being developed as to the liability of the manufacturer to an ultimate vendee when there is no privity of contract between them. Under the nineteenth century view the concept of implied warranty was an aspect of the field of contracts and if there was no privity between the parties, there could be no breach of warranty. Many jurisdictions today, while paying lip service to the notion of implied warranty as a contractual concept, actually are assimilating implied warranty into the field of tort law with the result that the stumbling block of privity is either ignored or circumvented by judicial dialectics.³

It has been shown that in the fourteenth century implied warranty was not contractual in nature, but rather it was spoken of as a part of delict.⁴ It would appear that many modern courts

*Assistant Professor of Law, University of Miami.

have unconsciously made the full circle of reasoning and have returned to the original basis of liability. This approach seems somewhat remarkable when one considers that tort liability is usually based upon some aspect of "fault," while in a breach of warranty case the questions of negligence, due care and fault are irrelevant. If the goods have some latent defect, the vendor is liable even though he did not know of and had no means of ascertaining the existence of the defect.

When one considers the vendor's liability for consequential damages (e.g., injury to the person or property of the vendee or strangers to the sales transaction) it becomes apparent that this whole concept of an implied warranty against latent defects is now a hybrid of the law of sales and torts, and while the courts talk about contracts they are really talking about torts.5

This implied warranty concept, as we presently know it, was developed during the nineteenth century as the result of "the growth of a business practice by which reputable sellers stood behind their goods, and a changing social viewpoint towards the seller's responsibility"; with the first case being decided in 1815.7 It is the purpose of this article to show that the antecedents of this principle were developed much earlier in English law, and that on a universal basis other ancient ethnic groups and races had business practices and social viewpoints not too dissimilar from those prevailing in our modern business society.

**EUROPE**

**England, Norway, and Germany**

Inasmuch as the ancient laws of England, Norway, and Germany are derived from a Germanic root, the author has grouped them together even though the following will show that while Anglo-Saxon and Norwegian laws recognized (to a limited degree) the principle of implied warranty against latent defects,
the earliest Germanic laws gave full vent to the maxim "he who does not open his eyes opens his purse."  

_England_. The earliest series of laws which have been preserved were enacted during the reign of Æthelberht I (circa 597-616 or 617), King of Kent. A somewhat ambiguous decree provided:  

"If a man buys a maiden, the bargain shall stand, if there is no dishonesty.

1. If however there is dishonesty, she shall be taken back to her home, and the money shall be returned to him."

It would seem that if there were any "dishonesty" involved, it would have to be by the vendor who, in most cases, would be the father of the maiden. It would seem a somewhat strained construction if this decree were interpreted as meaning that the maiden herself would have to be without "guile" in order for the bargain to stand.

The laws of Ine King of Wessex (c. 688 to 725) were probably enacted between the years 688 and 694 A.D. One provision seemed to give at least a limited recognition to the implied warranty notion:

"If anyone buys any sort of beast, and then finds any manner of blemish in it within thirty days, he shall send it back to [its former owner] ... or [the former owner] shall swear that he knew of no blemish in it when he sold it to him (sic)."

This law seemed to be comparable to the Norwegian law of the _Gulathing_ (discussed hereafter), which was enacted approximately 460 years later, in that the vendor was liable for "blemishes" in all beasts (Wessex law) or for "latent defects" in cows (Norwegian law) only in the event that he knew of the defects when he sold the beast. The vendor who was without knowledge

---

8. HUERNER, HISTORY OF GERMANIC PRIVATE LAW 549 (1918).
10. INE, cap. 56; ATTENBOROUGH, THE LAWS OF THE EARLIEST ENGLISH KINGS 370 (1922); HENRY, CONTRACTS IN THE LOCAL COURTS OF MEDIEVAL ENGLAND 180 (1926). Henry believes that because of the forms of the oaths taken by the plaintiff and the defendant when the case was litigated an express rather than an implied warranty was involved in this law and the former law of ÆTHELBERHT, cap. 77. HENRY, op. cit. supra, at 180-81. For a view that is seemingly contra to Henry's, see LAUGHLIN, THE Anglo-Saxon LEGAL PROCEDURE IN ESSAYS ON Anglo-Saxon LAW 182, 195-96 (1876).
would not be liable. It also seems remarkable that both laws had a comparable period of thirty days (Wessex law) or a month (Norwegian law) in which the vendee could raise the question of latent defects.

_English Borough Customs and Fair Court Decisions._ The Berwick Gild Statute of 1249\(^{11}\) seemed to recognize the implied warranty principle when it stated:

> “It is ordered that if it happens that a buyer of anything shall discover any of his purchase to be good above and worse below, the seller of the thing ought to amend it by the view and decision of honest men appointed for this purpose.”

It is to be noted that the vendor's duty to “amend it” would seem to indicate that perhaps monetary compensation was to be given by the vendor to the vendee rather than any type of rescission of the sale which is authorized in the modern civil law.\(^{12}\)

The Ipswich statute of 1291 and the Yarmouth statute\(^{13}\) of 1272 provided respectively for the appointment of “surveyors of merchandise who are not partners in the sale” or “four surveyors of goods who know the nature of the goods.” If the sale was consummated without their assistance, the vendor in Ipswich would have to recover as best he could if the vendee withdrew from the bargain. In Yarmouth, the penalty for non-compliance was placed upon the vendee who could be forced to pay if he rued the bargain. Although these statutes did not state expressly that the vendor would be liable for latent defects under any implied warranty theory, it would seem logical to assume that this was encompassed; otherwise there would seem to be no necessity for the appointment of surveyors “who know the nature of the goods.”

Contrary to the above statutes, the Exeter statute of 1282 and the Lancaster Statute of 1562\(^{14}\) both provided that the vendee could not recover unless he proved an express warranty for the rule in Lancaster was “lette their eye be their chapman,” a rule not too far removed from the Germanic cliché mentioned previously.

An examination of the records of the Fair courts fails to

---

11. _2 Borough Customs_, 21 _Selden Society_ 182-183 (1906).
12. _e.g., French Civil Code_ art. 1644.
14. _Id._ at 182-83.
indicate clearly that any conception of implied warranty was utilized. In fact, only four cases involving an express warranty were discovered; all of them being conducted in the Fair Court of St. Ives in the years 1291, 1312, and 1317. Two of them seem worthy of mention in that they seemed to be a forerunner of Section 15 of the English Sale of Goods Act. In the first case on a plea of covenant, the vendee purchased a last of red herring from the vendor when the vendor “showed him three kemps (barrels) of good herring and assured him that all the residue of said herring was similar to the said three kemps. . . .” Unfortunately, the vendee discovered that the sample did not truly represent the goods sold because the residue “was mixed with sticklebacks and with putrid herring.” The vendee was awarded damages. In the other case, the vendee complained that he purchased “a bale of plume alum containing 216 pounds” from the apothecary-vendor on the vendor’s pledge that the bale was uniform throughout with a sample. However, he contended that the alum was mixed with clay and earth and not uniform with the sample. The vendor admitted the sale and the pledge, but the inquest determined that the alum was consistent in quality with the sample and relief was denied to the vendee. It is true that both cases mentioned that the vendor “covenanted” or “pledged” that the goods sold would be consistent in quality with the sample, and therefore there would appear to be express rather than implied warranties. It is to be wondered, however, how much of the actual transaction was obscured by the ritual of pleading?

Norwegian Laws

The Gulathing laws enacted about the year 1150 A.D. were seemingly based upon Germanic concepts. Despite the Germanic flavor of the laws, some of the later provisions dealing with warranties of quality seem to have at least a faint resemblance to the Roman laws.

15. 1 Select Cases on the Law Merchant, 23 Selden Society 50, 91, 102, 105-106 (1908).
16. Id. at 102.
17. Id. at 105-06.
18. For example, in both cases the defendants said either that he “denies tort and force, etc., and says that he broke no covenant with him as the said . . . has alleged,” or “and deny tort and force etc., and they fully acknowledge the said sale and pledge.” There was no implied warranty concept in the Royal Courts: “[A]nd his Eyes and His Taste ought to be his judges.” FitzHerbert, Natura Brevium 213C (c. 1378) (8th ed. 1755).
20. Id. at 4.
"If a man buys a horse or other farm beast from another, all responsibility (for the beast) rests with the purchaser as soon as he has led it away. In the sale of livestock let no one deal dishonestly with another by concealing defects. It is a latent defect if a cow sucks herself. If the purchaser discovers this flaw during the first month, the seller shall take the cow back or swear that he was not aware of such a latent defect."  

This delineation of the implied warranty against latent defects is of course much more restrictive than the modern Anglo-American law in that the Norwegian vendor was not liable if he were ignorant of the defect in a cow, although it is doubtful that the protestations of ignorance by a cattle-vendor would have been believed.

The implied warranty liability of vendors was not confined to sellers of cattle, for the sellers of thralls (slaves):  

"... shall give warrant for the time of the waxing and waning of the next moon that he does not suck cows and that he is not epileptic or does not have a stitch in the side or any other serious ailment; also that he can retain his own water and does not befoul his clothes; and he shall give warrant covering all latent defects for the following month."

This law stated that the vendor was to warrant; this might, after cursory reading, seem to indicate that it dealt with express warranties. However, when the law compels one to warrant it is the same as saying that every contract has certain implied warranties whether they actually are made or not. In the event that some of the enumerated latent defects were discovered by the vendee, he had to return the thrall within the following month in the presence of witnesses. The law did not state expressly that the vendor was to refund the purchase price; it is only implied that he was so bound.

Subsequent to the Gulathing law, the Frostathing law was enacted (supposedly in 1260) under the reign of King Hakon. One of its provisions removed the former immunity of the vendors of horses by providing that when men bargained about

21. Ordinance 44, id. at 70.
22. See note 1 supra.
24. Id. at 27.
a horse, the sale should be valid if it was made according to the law, but:

"[t]he buyer may return the horse within five days, if latent defects come to light. Latent defects are such as these: deafness and blindness, impaired breathing and lameness, spasms and a balky disposition."^{25}

This amendment is extremely important because it, in effect, contained two principles, viz., the vendor's lack of knowledge of the defect apparently was immaterial, (2) many of the itemized defects hardly could be termed "latent" from a practical sense, and therefore a buyer seemingly was relieved of all real responsibility to examine the horse prior to the transference of title. In the event that the vendee was on a journey with a horse and was unable to return it to the vendor within the prescribed five-day period, he had to take an oath that he actually discovered the defect within five days of his purchase and that circumstances prevented him from returning within five days. When these conditions were satisfied, the vendor was to return the purchase price and take back the horse. However, if the horse suffered a new defect as the result of faulty usage by the vendee, the defect was to be "rated by discerning men" and the vendee was to make proper compensation. If the vendor refused to take back the horse, the vendee had the right to charge the vendor "with robbery, demand a fine for the king, and summon him before the thing" (assembly).^{26}

**Germanic Laws**

An examination of the *Lex Visigothorum*, the *Lex Salica*, and the *Liber Constitutionum Sive Lex Gundobada*,^{27} fails to disclose that the Visigoths, Franks, and Burgundians had any concept of warranty, either expressed or implied as to the quality of goods, although considerable attention was devoted to questions of title. In spite of this dearth of codified precepts, a considerable body of law developed.^{28} The rule of *bona fide* required that goods sold were to possess qualities that were bargained for and were to be free of serious faults. Generally, if the vendee accepted the goods this was considered to be an approval which would bar

---

any recourse for subsequently discovered defects. When the vendor concealed defects with an intent to deceive or when there were certain serious defects "which were typically defined for different sorts of goods," he was liable. The buyer had the right to demand a rescission of the sale by returning the goods to the vendor who had to restore the purchase price. If there was a concealment with intent to deceive, the vendor also could be held liable in damages.

Subsequently, the German law was modified in favor of the vendee when the Roman rules became effective; these Roman rules will be discussed subsequently. In spite of the adoption of the Roman rules, vendors of cattle were exempted from coverage with the result that they were liable only for haupt (chief) defects which were delineated by statute. The similarity between these "cattle" laws of Germany and the "horse" laws of Norway seems remarkable.

Medieval Russian Law

It is possible to trace a rudimentary bit of the implied warranty theory in the medieval Russian law. The Charter of the City of Pskov (c. 1397-1467) stated:

"And if anyone buys a cow at a price agreed upon, and after the purchase [the cow gives birth to a calf], the seller may not sue the buyer for that calf; [on the other hand], if the cow discharges bloody urine, it may be returned and the money is to be refunded."

This article gave no time limit as to the assertion of claims by the vendee, but it is probable that the specified defect would appear, if at all, very soon after the purchase. The unusual provision preventing the vendor from recovering the value of the new-born calf from the vendee possibly might be an illustration of a denial of any remedy for mistake.

Greek, Roman and Greco-Roman Laws

Greece: Pre-Roman Period

It appears that the pre-Roman Grecian period had fairly well developed rules as to implied warranties against defects in the
sale of slaves; little evidence has been adduced that these rules were extended to animals and to other movables. The rules of slave markets enacted by the market officials required the vendors of slaves publicly to inform potential vendees twice of any diseases of the slave. In the event that the slave was discovered to be diseased after the sale, the vendee had to lead the slave to the vendor and to the market officials for an examination of the disease. The vendee by bringing a successful suit would be entitled to the return of his purchase price after placing the slave in the custody of the market officials. It seems that the action had to be brought within a period of one month after the sale was consummated. Although there are views to the contrary, it would appear that this period of Grecian law did not develop any general theory of implied warranty or extend the rules relating to slaves to animals and other movables as later occurred in the Roman law under Justinian.

An examination of this period fails to disclose a norm covering cases where the slave may have been suffering from a disease without the knowledge of the vendor. Plato enumerated certain diseases such as tuberculosis, stones, and strangury which might not make their presence known to a vendor before a sale. What would have happened in this case remains uncertain.

Post-Roman Period of Grecian Law

The available evidence indicates that the introduction of the Roman law which generally extended the vendor's liability for implied warranties for *vitia* and *morbus* (loosely defects and diseases) had little, if any, real effect on the Greek vendors of slaves and animals. The sales contracts were so worded as to exclude all liability for any defects in the sale of animals and all defects in the sale of slaves with the exception of leprosy and epilepsy. Various phrases were used, e.g., "with all faults," "without warranty," and "not to be returned." It is remarkable to see this ancient language duplicated in Section 2-316 of the Uniform Commercial Code; the law has made a full circle.

Egyptian Law

Only two recorded sales of slaves during the Ptolemaic period

---

32. ROMAN LAW OF SALE 121 (Drube ed., 1859).
33. FRINGSHEIM, THE GREEK LAW OF SALE 481-84 (1850).
have been found, and they are inconclusive as to whether the concept of implied warranty was in effect in Egypt prior to the Grecian-Roman influence. Under the Grecian influence slaves were sold with a warranty against leprosy and epilepsy. Perhaps the vendor would have been liable for these diseases even in the absence of an express warranty in accordance with the Grecian rules.

After the introduction of the Roman law, some sales contracts contained express warranties against physical as well as moral defects, while other documents without warranties also were used. Seemingly most sales expressly excluded warranties, again with the exception of leprosy and epilepsy. In the case of a sale of animals, only one example of a warranty against latent defect has been discovered.

Roman Law

Classical Period. The Roman beginnings in the development of the concept of implied warranty greatly resemble the early development in Greece. However, the Roman conquest of Greece prevented the Greeks from developing the concept as fully as did the Romans. In Rome, as in Greece, the market official (curule aediles) in either the second or first century B.C. seemingly forced the sellers of slaves to stipulate that the slaves were free from defects. Subsequently, it was developed that express warranties were not required, but that the vendor had to announce (similarly to the Grecian method) that the slave did not have certain defects. In the event that the vendor's statements proved false, the vendee could rescind (redhibition) the sale within six months after the purchase. The good faith of the vendor was no defense; whether a similar rule prevailed in the Greek law is uncertain.

During this classical period the rules as to slaves were extended to the sale of animals, but whether they were further extended to movables in general remains unclear. In any event, in the post-classical period the aedilician rules regarding the

34. Id. at 480-81.
sales of cattle were not followed in the Western Empire, and it remained for the jurists under Justinian to broaden the coverage to all movables.  

_**Roman Law Under Justinian.**_ These _aedilician_ rules were interpolated into the Digest although it is possible that this was simply a reflection of a development which may have started during the classical period. The main texts which accomplished this stated:

> "Labeo writes that the edict of the _curule aediles_ applies as well to sales of land as sales of movables inanimate or animate. It should be understood that this edict relates only to sales, though to sales not of slaves only, but of everything else."

If the vendee knew of the defects in a slave, for example, or the sale negatived any warranties, the vendee would not be able to recover; for the Digest stated: "In the _aedilician_ actions it is fair to admit a plea exonerating the seller, if the buyer was aware that the slave was a runaway or had been in chains and so on . . . . The custom is not to allow redhibition in the case of sales from which warranty is excluded." The parallel between these rules and the practice in the Post-Roman Grecian period seems obvious. Again, some of our modern rules can claim no higher standard of business morality.

In attempting to determine what defects in movables were of a serious enough nature to justify a rescission (_actio redhibitoria_) or for monetary compensation (_quantum minoris_) for the difference between the sales price and the value with the defect, it is difficult to find any standards except for slaves. And some of the standards are more in the vein of what is not a sufficient defect:

> "Pomponius also says that though a seller has not to answer for the slave being highly intelligent, still, if the slave he sells is so silly or idiotic as to be entirely useless, this is considered a defect. But the actual law appears to be that the terms

42. _Digest_ 21.1.1.
43. _Digest_ 21.1.63.
44. _Digest_ 21.1.48.
45. _Uniform Commercial Code_ § 2-316(3).
46. _Digest_ 21.1.4, § 3.
defect and disease refer only to physical qualities; for moral or mental defect the seller will be answerable only if he gave an express warranty, but otherwise not. That is why the edict makes express requirements concerning vagabonds and runaways, these being non-physical faults."

However, if the vendor was aware of some mental or moral defect and did not disclose it:47

"An action *ex empto* will, however, lie, supposing that the seller did not declare a mental or moral defect of which he was aware, whereas the action for redhibition will lie (regardless of his knowledge), if the defect is purely physical or both physical and mental or moral."

About all that can be said as to an all-inclusive norm as to the degree of defect was:48

"... if there be anything in the nature of a defect or disease that interferes with the utility and serviceableness of the slave, it will be ground for redhibition, provided that we bear in mind that some quite trivial fault will not cause him to be considered diseased or defective. Thus there is no default in not having declared a mild fever, or an old quartan which can now be disregarded, or a slight wound; it was permissible to treat such things as negligible."

What more could be said by a modern court or legislature?49

The action for rescission had to be instituted within six months of the sale; the action for a reduction in the sales price could be brought within a year.50 This is another example of an ancient law that had a definitely fixed period for the bringing of actions — have the modern codes been as certain?

Finally, the Digest provided for consequential damages in the event that the vendor knowingly sold defective goods.51

**MIDDLE EASTERN CONCEPTS**

**Semitic Laws**

Two thousand years before the earliest recorded Germanic laws came into existence, the Semitic peoples already had de-

47. *Id.* § 4.
48. *Id.* § 8.
veloped the implied warranty of fitness, and, even more remarkable, had developed a theory of consequential damages at least insofar as the manufacturing process is concerned. In the Hammurabic Code, the builder of a house "who has not made strong his work" causing the house to collapse thereby killing the owner is put to death for his negligence. If the defective workmanship results in the death of the son of the owner, then the son of the builder was put to death. For the death of slaves killed in the house, the builder had to replace them. For loss of goods in the house, the builder had to replace them as well as rebuild the house at his own expense. More directly related to the subject matter of this article, the Code provided:

“If a man has bought a manservant or a maidservant, and he has not fulfilled his month and the bennu sickness has fallen upon him, he shall return him to the seller, and the buyer shall take the money he paid.”

And:

“If a man has bought a manservant or a maidservant and has a complaint, his seller shall answer the complaint.”

Although the exact nature of the bennu sickness is not known, it is implied in the above law that it would not manifest itself until after the sale; otherwise the buyer would be able to notice it. The second law seems difficult to explain because it seems encompassed in the first law. However, the bennu sickness provision seemed to be limited to a serious illness occurring within the first month after purchase which might indicate that there had been a complete failure of the bargain. While the second provision might provide for defects that appeared after this one-month period and were not serious enough to justify rescission but only a claim for damages, the Code failed to specify the degree of seriousness of any claim which would entitle the vendee to sustain his complaint.

53. Section 230.
54. Section 231.
55. Section 232.
56. Section 278; JOHNS, THE OLDEST CODE OF LAWS 56 (1911). Compare translations given in DRIVER & MILES, THE BABYLONIAN LAWS 95 (1955) for this and the following note.
57. Section 279.
58. JOHNS, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS 234 (1904).
The Laws of Eshnunna which governed a portion of the country of Iraq are considerably older than the Code of Hammurabi.\textsuperscript{59} And although they covered in some detail the sales of goods and other commercial practices, they made no mention of anything that could be considered as touching upon the warranty concept. Likewise, the Laws of the Hittites (c. 14 cent. B.C.) provided for price controls over the sale of goods\textsuperscript{60} but again made no mention of questions of quality. Subsequent to the reign of Hammurabi, another code may have appeared during the reign of Ashurbânipal, king of Babylon. One fragment provided:\textsuperscript{61}

"The man, who has sold a female slave and has had an objection made concerning her, shall take her back. The seller shall give to the buyer the price named in the deed of sale, to its exact amount, and shall pay half a shekel of silver for each of the children born to her."

This law seems to resemble Section 279 of the Code of Hammurabi\textsuperscript{62} in that no time period was fixed in which the vendee must make complaint. And inasmuch as the law provided for payment by the vendor "for each of the children born to her," it would appear that a considerable period of time could elapse before complaint was made about any defects in the slave. It has been theorized that vendees may have purchased slaves in order to have children by them. If they were born deformed, the vice of their imperfection would be charged against the slave and through the slave to the vendor.\textsuperscript{63}

It subsequently appeared that any type of law in a legislative sense as to implied or express warranties vanished in the later Babylonian period, for contracts of sale indicate that clauses were inserted which allowed the vendee a hundred days within which to rescind the transaction on the grounds of the diseases of \textit{sibtu} and \textit{bennu}, and that the existence of other defects could be asserted at any time as justifying a rescission of the sale.\textsuperscript{64}

The Hebrew laws\textsuperscript{65} that followed the codifications of the

\textsuperscript{59} Goetze, \textit{The Laws of Eshnunna} 16 (1956).
\textsuperscript{60} Neufeld, \textit{The Hittite Laws} 187 (1951); Smith, \textit{The Origin and History of Hebrew Law} 270-71 (1951).
\textsuperscript{61} Johns, \textit{Babylonian and Assyrian Laws, Contracts and Letters} 70 (1904).
\textsuperscript{62} Section 279.
\textsuperscript{63} Johns, \textit{Babylonian and Assyrian Laws, Contracts and Letters} 70 (1904).
\textsuperscript{64} Id. at 234.
\textsuperscript{65} Horowitz, \textit{The Spirit of Jewish Law} 364-70 (1953).
Babylonians, Hittites, and Eshnunna showed a much greater development in ethical content. In the second century A.D. if a vendor sold produce and the vendee planted it but it did not germinate, the vendor was not liable. However, if the produce was garden seed and the vendor had actual or implied notice that it was purchased for planting, then he would be liable. This Hebraic rule has a startling similarity to certain American decisions. Between the years 175 and 257 A.D. the two masters, Rav and Samuel, were concerned about an ox that proved to be dangerous. As to the question of implied notice to the vendor, Samuel contended that the vendor would not be liable for the propensities of this ox if he claimed that it was sold to be slaughtered. Rav was of the view that since oxen usually were purchased for farming purposes, the vendor would have implied notice and should be liable because the animal was not fit. The views of Samuel were sustained. The Hebraic law reached a high level of morality when it declared that non-disclosure was a fraud and the vendor was obligated to reveal any defects in the goods. If goods were sold by description and the goods delivered did not measure up to the description, the sale could be rescinded by either party on the grounds of mistake. However, if the goods delivered were better than those described, only the vendor could rescind; if the goods were of a poorer quality, only the vendee could rescind. Between the years 1135 and 1204 it was determined that even if the goods sold were like the described goods, the sale could be rescinded if there was a mistake as to quality. If the defects were not serious enough to justify rescission, the vendor would have to compensate the vendee. Contrary to the modern view expressed in the Uniform Commercial Code, "Even if the seller declared in general terms that he would not be responsible for any fault or blemish, the buyer might rescind if he discovered a defect not specifically pointed out, for a buyer's waiver is void unless he knows exactly what is involved."

HINDU AND MOSLEM CONCEPTS

Ancient Hindu Laws

The Mânava-dharma-câstra or the Ordinances of Manu were supposedly written about the year 500 A.D. It is essentially a
religious book utilized as a source of law; "... law is in India not differentiated from what is elsewhere [a] matter of re-
ligion."[70]

In regard to sales, it was provided:[70]

"One thing should never be sold mixed with another, nor (should anything be sold) damaged, deficient, far away or concealed."

The prohibition against "concealment" has been interpreted as "a covering over or by dyeing it."[71] This Hindu interpretation is directly comparable to the ancient Hebraic laws that "One may not furbish up man or beast or vessels." As stated by Horowitzz:[72]

"One may not, for example, dye a slave's hair black to make him look younger and more vigorous; nor drug an animal to the same end; nor paint old, second-hand implements in order to pass them off as new."

This Hindu provision by using the wording "damaged" and "de-

This Hindu provision by using the wording "damaged" and "de-

The later commentators were of the view that this ten-day period could not be used if injury to the vendor would result by the vendee keeping the goods for this period of time.[75]

If a latent defect should become manifest within this ten-

69. Id. at xxxiii.
70. Lecture VIII, Section 203; id. at 211.
71. Id. n. 8.
73. Lecture VIII, Section 222; HOPKINS, THE ORDINANCES OF MANU 214 (1891).
75. Lecture VIII, Section 223, n. 8.
day period, it would appear that the regretful vendee would have the right to a rescission; conversely any claim for defects which became evident after this period would seem to be barred. It is worthy of note that such diverse peoples as the Hindus, Norwegians, and Germans should have had a fixed time period in which the vendee could raise the question of latent defects; particularly when the modern codes make no mention of any period of time.

Moslem Law

It is quite inaccurate to attempt to state the ancient Moslem law as to implied warranty inasmuch as there were four ancient orthodox schools of law.\textsuperscript{76} Shâfit, who wrote in the eighth century A.D. and whose doctrines prevailed in Egypt, Arabia, and a few places in the south of India,\textsuperscript{77} stated:

“If a man buys a slave girl and she has a defect which the seller has concealed from him, the case is the same in law, whether the seller did it wittingly or unwittingly, and the seller commits a sin if he does it wittingly.”\textsuperscript{78}

It is worthy of note that this law was much simpler than the Roman law in that, from the legal standpoint, there were no nice questions as to the vendor’s state of knowledge.\textsuperscript{79} However, if the slave while in the possession of the vendee acquired another defect and then the vendee discovered the original defect, he could not return her. The smallest possible defect, if it existed before the sale and was concealed, would have given him the right to return her to the seller because the existence of such a defect made the sale binding only at the option or election of the vendee. If the defect developed while she was in possession of the buyer, he had the right of “recess” against the seller for the amount by which the defect diminished her value. The right of regress worked as follows:\textsuperscript{80}

“The value of the slave girl, free of the defect, is estimated and amounts to, say, one hundred; then her value, given the defect, is estimated and amounts to, say, ninety; the relevant value is that of the day on which the buyer took delivery of

\textsuperscript{76} Wilson, Principles of Hindu and Mohammedan Law xx-xxi (1860).
\textsuperscript{77} Ibid.
\textsuperscript{78} Tr. I, 6; Schacht, Origins of Mohammedan Jurisprudence 325 (1950).
\textsuperscript{80} Schacht, Origins of Mohammedan Jurisprudence 326 (1950).
her from the seller . . . . Then the buyer has the right of regress against the seller for one-tenth of her price, what it amounted to."

If the vendor was prepared to take her back without charge, with the defect which she developed while in possession of the vendee, then the vendee had the choice of either returning the slave or keeping her without any claim for damages.

This school developed a system of "options" which, in the opinion of the author, well could be copied by modern laws. The sale of a slave "or any merchandise" could contain a stipulation that the vendor, or vendee, or both, could have the option for a period of three days of rescinding the sale. Generally, any type of option to rescind was frowned upon because "it is inadmissible for the buyer to hand his money to the seller and for the seller to hand his slave girl to the buyer, without the seller being free to use the price of his merchandise and the buyer being free to use his slave girl." However, this option was permitted because the Prophet laid down a rule affording an option of three days from the conclusion of the sale in the case of the musarrat (an animal which the seller had not milked for some time before the sale so as to make its yield of milk appear greater) and "tradition therefore shows that an option of three days is the extreme limit." In the event that the option exceeded the period of three days, the sale was to be rescinded.

The School of Abu Hanifa, who also wrote in the eighth century A.D., developed the Moslem law in the northern part of India. This law provided:

"A warranty as to freedom from defect and blemish, is implied in every contract of sale. Where the property sold differs, either with respect to quantity or quality from what the seller had described it, the purchaser is at liberty to recede from the contract."

If a vendee did not agree to accept property "with all its faults" he was at liberty to return it to the seller upon discovery of a defect, provided he was not aware of the defect at the time of purchase and provided further that it did not receive "a

81. Ibid.; Tr. 1, 12.
82. Id. at 123.
83. WILSON, PRINCIPLES OF HINDU AND MOHAMMADAN LAW xx (1860).
84. Id. at 200, § 21.
85. Id. at 200, § 22.
further blemish" while in the possession of the vendee. In the
latter case the vendee was entitled only to compensation.\textsuperscript{86} If
the vendee had sold the faulty article to a third person, he could
not exact compensation from the original vendor unless he (the
vendee) had made an addition to the article and was thereby
precluded from returning the article to the original vendor.\textsuperscript{87} In
conjunction with this rule, if the vendee sold an article and he
was compelled to take it back and refund the purchase price be-
cause of an inherent defect, he could assert the same remedy
against his vendor.\textsuperscript{88}

In the case of a defect complete restitution of the price could
be demanded from the vendor even though the goods were de-
stroyed in "the act of trial"; if the vendee derived any beneficial
use from the faulty articles he was entitled only to proportional
compensation.\textsuperscript{89} Also, if the vendee, after becoming aware of the
defect, made use of the article or attempted to remove the defect
he was barred from recovering from the vendor unless there was
some special clause in the contract.\textsuperscript{90}

In the event that part of the goods were defective and they
could not be separated without injury, the vendee could not keep
a part and return the defective part for a proportional restitu-
tion of the purchase price. He had to return all of the article
demanding complete restitution of the price, or he had to return
all of the article demanding compensation for the defective
part.\textsuperscript{91}

The law also provided for options which did not provide for
the time limitations found in the law of Şafi. When a vendee
stipulated in the sales contract for the right to dissolve the con-
tract, he was liable for the purchase price when the article was
destroyed while in his possession. When the stipulation was to
the effect that the vendor had the right to rescind and the prop-
erty was destroyed while in the possession of the vendee, then
the vendee was liable only for the value of the article.\textsuperscript{92} The
option of rescission was annulled in any case where the vendee
exercised any act of ownership which would "take the property
out of statu quo."\textsuperscript{93}

\textsuperscript{86} Id. at 201-02, § 28.
\textsuperscript{87} Id. at 202, § 29.
\textsuperscript{88} Id. at 202, § 30.
\textsuperscript{89} Id. at 202, § 31.
\textsuperscript{90} Id. at 202, § 32.
\textsuperscript{91} Id. at 202, § 32.
\textsuperscript{92} Id. at 201, § 24.
\textsuperscript{93} Id. at 201, § 25.
When the vendee bought property without seeing it or a sample of it, he was at liberty to rescind the contract of sale (provided he did not exercise any act of ownership) if it did not suit his expectations, even though no option to do so was stipulated in the contract. On the other hand, the vendor who sold goods which he had not seen was not permitted to rescind the contract unless the contract gave him the option to do so. This rule did not cover the cases of a sale of "goods for goods" wherein the vendor would be allowed to rescind even though no option had been contained in the contract.

It seems obvious that the Moslem law (particularly the Hanifa school of Moslem law) was much more sophisticated in its treatment of the implied warranty concept than any of the other ancient laws. It is true that it was first developed four hundred years or so after the Roman law reached its peak under Justinian, and it therefore had the advantage of developing in a more "modern" community. However, when one compares the implied warranty concepts of the modern Anglo-American laws with the Moslem law, it does not appear that we have been as precise and specific in our concepts as the law-givers who lived eleven hundred years ago.

CONCLUSION

It seems apparent that most societies have gone through an inevitable development in "the growth of a business practice by which reputable sellers stood behind their goods, and a changing social viewpoint towards the seller's responsibility." The Greek and Roman laws particularly show the stages of development; the other laws just imply it. It is to be wondered if history will record that our age made any startling advances over the laws of ancient man?

94. Id. at 201, § 26.
95. Id. at 201, § 27.