MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1957 - 1958

January next after their election. The term of a sheriff therefore expires at midnight on December 31st.

The same constitutional provision goes on to provide that vacancies in the office of sheriff shall be filled in the same manner as is provided in the case of judges and registers of probate:

> "Vacancies occurring in said office by death, resignation or otherwise, shall be filled by election in manner aforesaid at the (September) election, next after their occurrence; and in the meantime the governor, with the advice and consent of the council, may fill said vacancies by appointment, and the persons so appointed shall hold their offices until the first day of January next after the election aforesaid."
>
> Article VI, Section 7, Maine Constitution.

It will be recalled that the above quoted provision was proposed to be amended by Chapter 94, Resolves of 1957, and was in fact amended, upon affirmative referendum vote of the people, in the following manner, with respect to filling the vacancy:

> "Vacancies occurring in said offices by death, resignation or otherwise, shall be filled by election in manner aforesaid at the *November* election, next after their occurrence. . ."

Your question relates particularly to the office of Sheriff of Androscoggin County.

The sheriff-elect, as of the September election of 1958, died two days after the said September election.

The Governor and Council appointed a person to fill the vacancy created by the death of the sheriff, and by the terms of the commission the person so appointed was to hold office until January 1, 1961.

We submit that, in the first instance, the appointment was to fill a vacancy in the present term of office of the deceased sheriff, which term would have expired on January 1, 1959. The commission of such person should then properly run until midnight, December 31, 1958, with a second appointment to follow, to fill the vacancy that will be inevitable in the term of sheriff running from January 1, 1959, to midnight on December 31, 1960. See Opinion of Justices, 137 Me. 347.

With respect to the second such appointment, we are of the opinion that the Governor and Council can properly anticipate the certain vacancy in that office and appoint a person to fill that vacancy before the vacancy actually occurs, such vacancy occurring before the expiration of the terms of office of the Governor and Council.

JAMES GLYNN FROST
Deputy Attorney General

December 3, 1958

To George F. Mahoney, Commissioner, Insurance Department

Re: Sale of Used-Car Warranties

The question, "Is the conduct of the sale of used-car warranties in this state the carrying-on of insurance business?" has been submitted to me.

In answering this question, we shall define insurance, warranty, and guaranty; explain their relationship; outline the operation of the used-car warranty business; and determine whether it fits any of the definitions.

Insurance

The 1954 Revised Statutes of Maine, Chapter 60, Section 1, define a contract of insurance as follows:

> "A contract of insurance, life excepted, is an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured upon the destruction or injury of something in which the other party has an interest."

This section of the statute is decisive of the definition of insurance in the State of Maine. The only reason for pursuing the question of this definition any further is to see whether there are any interpretive cases or texts.

In *Getchell v. The Mercantile and Manufacturer's Mutual Fire Insurance Company* 109 Me. 274, it is stated at page 277, "A contract of insurance is a contract of *indemnity,* the object being to reimburse the insured for his actual loss not exceeding an agreed sum." The statutory definition of insurance quoted above was in effect in 1912 when this case was handed down.

In *Carleton v. Patrons Androscoggin Mutual Fire Insurance Company* 109 Me. 79 at page 83, the Court said, "A policy of insurance is a *contract* between the parties, and like all other contracts founded upon a proposal on one side and acceptance on the other, it does not become operative as a complete and valid contract until the application for it is accepted."

According to *Hutchins v. Ford* 82 Me. 363 at page 369, "It is familiar law, that insurance becomes payable upon loss from *a peril insured.*"

In *Rumford Falls Paper Company v. The Fidelity and Casualty Company* 92 Me. 574 at page 576, this quotation appears, "It must be remembered, in the first place, that this policy of insurance is a contract of indemnity in which the parties have a legal right to insert any conditions and stipulations which they deem reasonable or necessary, provided no principle of public policy is thereby contravened. *Like all other contracts it is to be construed in accordance with its general scope and design and the real intention of the parties as disclosed by an examination of the whole instrument.*"

Thus Maine law tells us that an insurance policy is a contract of indemnity payable upon loss from a specified peril. We are reminded that a contract is to be construed according to its general scope and design from an examination of the whole instrument.

Vance on Insurance (3rd ed.) at page 2 says the contract of insurance is distinguished by the presence of five elements:

> "(1) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest.
>
> (2) The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils.
>
> (3) The insurer assumes that risk of loss.
>
> (4) Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing somewhat similar risks.

(5) As consideration for the insurer's promise, the insured makes a ratable contribution, called a premium, to a general insurance fund."

Vance comments further: "A contract possessing only the three elements first named is a risk-shifting device, but not a contract of insurance, which is a risk-distributing device; but if it possesses the other two as well, it is a contract of insurance, whatever be its name or its form."

Warranty

An express warranty is defined in the *Uniform Sales Act* in the 1954 Revised Statutes of Maine, Chapter 185, Section 12, as follows:

"Any affirmation of fact or any promise by the seller relating to the goods 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. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

According to *Black's Law Dictionary* (2nd ed.), "A warranty is a statement made by the seller of goods contemporaneously with, and as a part of, the contract of sale, although collateral to the express object of it, having reference to the character, quality, or title of the goods by which he promises or undertakes to insure that certain facts are or shall be as he then represents them." This, or a similar definition, has been accepted by a majority of the states prior to enactment of the Uniform Sales Act. See 55 C. J. 652.

In some jurisdictions it is held that a contract of sale acts exclusively for transfer of property in a described or designated chattel and a warranty is collateral to it. *Barton v. Dowis* (Mo.) 285 SW 988, 989. In others, the contract of sale is regarded as one in which the seller undertakes a double obligation to transfer the property in the goods and to assume a duty to answer for them in certain particulars to the buyer. *Battles v. Whitley* (Ala.) 82 So. 573. See 77 C.J.S. 1118-1119. These cases are not necessarily inconsistent in result, and they all regard the sale of the property as the primary object of the contract of sale. *It is nowhere stated or implied that there is a separate charge or an additional charge for any warranty included in the contract or additional to it.*

Guaranty

"A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who, in the first instance, is liable to such payment or performance." *Black's Law Dictionary* (2nd ed.)

"A guaranty, in its legal and commercial sense, is an undertaking by one person to be answerable for the payment of some debt, or the due performance of some contract or duty by another person, who himself remains liable to pay or perform the same." *Story on Promissory Notes,* Section 457.

A review of Maine cases does not reveal a definition of "guaranty", but the treatment of the guaranty cases indicates acceptance of the above definitions.

Relationship among Insurance, Warranty, and Guaranty

Vance on Insurance (3rd ed.) at pages 4 and 5 expresses concisely the relationship among insurance, warranty, and guaranty:

"In every contract of risk-shifting, three elements are conspicuously present: First, one party possesses an interest susceptible of pecuniary estimation; secondly, that interest is subject to some well-defined peril or perils, the happening of which will destroy or impair it, thereby causing loss to the risk-bearer; thirdly, there is an assumption of this risk of loss by the other party to the contract. Thus, in a contract of guaranty, or indorsement, or of warranty on a sale of goods, an interest possessed by the creditor, the note holder, or the vendee, is exposed to impairment by the happening of contingent events, and the risk of the interest owner is assumed by the guarantor, indorser, or warranting vendor. But these are not contracts of insurance, which are more than risk-shifting devices. For the insurance contract, additional elements are required; that is, the contract for assuming the risk must be an integral part of a general scheme for distributing a loss that may be suffered by any individual interest owner among a considerable group of persons exposed to similar perils, and the insured must make a ratable contribution, called a premium, to the general insurance fund. The same idea is expressed when we say that an indemnitor becomes an insurer only when he goes into the business of indemnifying. While a policy under seal for no premium paid would at common law be enforceable as an indemnity bond, it could scarcely be considered a proper insurance contract."

It has been stated that a warranty promises indemnity against defects in the article sold, while insurance indemnifies against loss or damage resulting from perils outside of and unrelated to defects in the article itself. *State ex rel Duffy v. Western Auto Supply Co.* (Ohio) 16 NE 2d 256, 259. We reject this idea as being inaccurate. Indeed, the Ohio Court in *State ex rel Herbert v. Standard Oil Co.* 35 NE 2d 437, while refusing to overrule the Duffy case, stated its doctrine was not to be extended beyond the facts of that case.

According to *Patterson on Essentials of Insurance Law* (2nd ed.) at page 10, "A warranty (commonly called a *guaranty*) of the qualities of goods or services is distinguished from an insurance contract by the *degree of control* that the promisor has over the happening of the contingent event." We reject this idea as unsound and impossible to apply. Control does not appear in the usual definition of warranty or insurance. A dealer who has absolutely no control over the manufacture of a tire can warrant its life or performance. On the other hand, the tire manufacturer having complete control of his tire production could purchase insurance on the life or performance of his tires, if such coverage were written.

Patterson's statement is a misapplication of the New York law which defines an insurance contract as an agreement by which one party is obligated to confer a benefit of pecuniary value on the other party upon the happening of a fortuitous event. Fortuitous event is defined as an occurrence which is, *or is assumed by the parties to be,* substantially beyond the control of either. The theory is that if substantial control is in the hands of either party, a contract of indemnity is not insurance. The difficulty then arises of determining the meaning of substantial control.

New York has said that a proper inspection of the "warranted" parts of a motor vehicle eliminates the happening of the fortuitous event resulting in their impairment or destruction. This is like saying that a medical examination of a person eliminates the fortuitous event of his physical impairment or death.

The inaccuracy of this idea is shown patently by the claims which have resulted from used-car "warranty" contracts all over the country. To say that the buying public could be induced to lay out substantial sums to protect itself from events which could not occur because of control in another is to overlook the economic facts of life.

The New York definition must be applied with great rigidity if it is to have any practical value. That is, emphasis must be placed with equal force on that part of the definition stating that assumption by the parties that control is to a substantial extent beyond them is sufficient to permit the fortuitous event thus constituting insurance.

Used-car Warranty Business

A typical used-car warranty business operates in this way:

> A corporation enters into a contract with a dealer. The dealer agrees to sell warranty certificates on certain cars reconditioned by him. He agrees to send a certain amount to the corporation for each certificate he sells. Part of this amount is retained by the corporation to cover its expenses and the balance is retained by the corporation as a reserve fund to cover claims under the warranty. The corporation agrees to make necessary repairs on the warranted parts of each car which are impaired or destroyed within the warranty period. It agrees to return to the dealer a percentage of the reserve fund remaining after claims have been paid. There are certain provisions for making up losses in excess of the reserve fund and for cancellation of the contract.
>
> The dealer then sells warranty certificates to the purchasers of certain reconditioned cars for a certain fee. The certificate states that the car has been reconditioned by the dealer and that the corporation will indemnify the purchaser for the cost of repairs on specified parts which become impaired within the warranty period.
>
> The corporation reserves the right to determine the necessity for repair or replacement. Cars used for commercial purposes are excluded by the terms of the warranty. Liability for personal injury or property damage caused by defective parts of the car; the cost of tune-ups or adjustments; repairs arising out of or revealed by collision; and repairs resulting from neglect, misuse, acts of God, or major alteration not recommended by the manufacturer are also excluded.
>
> The certificate is neither transferable nor assignable. It contains a statement that it is not an insurance policy and is not to be construed as such.

Applying the Maine statute (R. S. 1954, Chapter 60, Section 1), which admittedly is very broad, to the operation of the used-car warranty business we find as follows:

1. There is an *agreement* between the company issuing the "warranty" and the purchaser of it.

2. The purchaser pays a *consideration* for the agreement. The fact that the payment may be made indirectly is of no consequence, since the money for the "warranty" comes from the purchaser of the car in the final analysis.

3. The company *promises to pay money or to do some act of value to the insured.*

4. The company promises to pay the money or perform the act *upon the destruction or injury of something in which the purchaser has an interest.*

It could be argued that under this statute even a warranty would be considered insurance. To eliminate this possibility, let us apply the more stringent five-point definition outlined by Vance to the used-car warranty business:

(1) Does the insured possess an insurable interest?

Yes. He owns an equity in the car which is the subject of the "warranty" contract.

(2) Is the insured subject to a risk of loss through the destruction or impairment of that interest by the happening of a designated peril?

Yes. The "warranted" parts of the car may be injured or destroyed through normal use of the car.

(3) Does the insurer assume that risk of loss?

Yes. He promises to indemnify the purchaser for all or part of the cost of repairs.

(4) Is this assumption part of a general scheme to distribute actual losses among a large group of persons bearing somewhat similar risks?

Yes. The company seeks to issue these "warranties" to the purchasers of all cars which meet age and inspection requirements.

(5) Does the insured make a ratable contribution, called a premium, to a general insurance fund?

Yes. He pays a fee either directly or indirectly to the company which retains a certain part of it to cover losses and expenses.

Several types of "used-car warranties" have been called to our attention. Though their details differ, their patterns fit the definition of insurance.

For the reason stated, it is our unqualified opinion that the conduct of the sale of used-car warranties in this state is the carrying on of insurance business.

ORVILLE T. RANGER
Assistant Attorney General

December 5, 1958

To Kenneth B. Burns, Business Manager, Institutional Services

Re: Gift to State

We have your memorandum of November 19, 1958, relative to the bequest of cash and other properties to the Maine School for the Deaf and the Maine Institution for the Blind from the Estate of Nellie E. Fuller. Your share of the bequest amounts to $7,119.37 and is on deposit with the State Treasurer.

You state that it is the desire of the department to establish a permanent trust fund from the proceeds of this estate from which the income only will be made available for the benefit of the students of the Governor Baxter State School for the Deaf.