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Some Thoughts about Warranty Law in North Dakota Part One: The Warranty of Title

Richard A. Lord

SOME THOUGHTS ABOUT WARRANTY LAW IN NORTH DAKOTA, PART ONE: THE WARRANTY OF TITLE

RICHARD A. LORD*

I. INTRODUCTION

In 1966, when the Uniform Commercial Code (the Code)[1] became effective in North Dakota, many changes were brought about in the law of this state.[2] Among the provisions of the Code which generate much interest and litigation are the sections dealing with warranties made in connection with the sale of goods.[3] This article will deal with those warranties, part one being concerned with the warranty of title of section 2-312. The purposes of this part are dual: first, the warranty of title in general will be outlined; and second, cases dealing with the more prominent problems in warranty of title law will be discussed, with particular attention given to North Dakota law.

II. THE WARRANTY OF TITLE

A. IN GENERAL

The Code provides for three distinct types of warranties: the war-

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* Assistant Professor of Law, University of North Dakota School of Law; J.D., Memphis State University School of Law, 1975; L.L.M., Yale Law School, 1976.

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1. The provisions of the Uniform Commercial Code (1972 official text) [hereinafter cited as U.C.C.] are found at N.D. CENT. CODE tit. 41 (1968), *as amended*, (Supp. 1975). For the sake of cross-referencing, citations to both U.C.C. and N.D. CENT. CODE sections will be given.

2. In 1954, a number of student notes appeared in the North Dakota Law Review which concerned the U.C.C. Among these is one directly concerned with warranties, Note, *The Treatment of Warranty Problems Arising From the Sale of Goods Under the Uniform Commercial Code*, 30 N.D.L. REV. 232 (1954), wherein the authors noted the changes between the Uniform Sales Act and the U.C.C.

3. U.C.C. §§ 2-312 through 2-318, N.D. CENT. CODE §§ 41-02-29 through 35 (1968). Although the scope of this article will not permit discourse in general about other applicable legislation, the practitioner ought to be aware of the federal legislation enacted in 1975 and the regulations promulgated by the Federal Trade Commission pursuant thereto. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified in 15 U.S.C. §§ 2301-2312 (Supp. IV 1974)). This act applies generally to consumer products sold with a written warranty. Several recent law review articles explain and comment upon it. *See, e.g.*, Saxe and Blejwas,

ranties of good title and against infringement;[4] express warranties;[5] and implied warranties.[6] Although the warranty of good title has been considered an implied warranty,[7] it is in actuality a hybrid warranty having some of the attributes of both implied warranty and express warranty. The warranty of good title arises without regard to the expressions of the parties.[8] To the extent that that would indicate "an imposition of liability irrespective of . . . the positive contract of the parties . . . ,"[9] it may be said that the warranty is implied. However, the official comments to the Code quite clearly indicate that the warranty was specifically "not designated as an 'implied' warranty,"[10] at least for purposes of disclaiming it.[11] Thus, although the warranty of good title arises by operation of law, and is in that sense an implied warranty, it has the attribute of an express warranty in that general language will not be sufficient to disclaim it.

The warranty of good title arises whenever there is a contract for the sale of goods, irrespective of whether or not the seller is a mer-

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Federal Warranty Act: Progress and Pitfalls, 22 N.Y.L.S.L. REV. 1 (1976); Popper, *New Federal Warranty Law: A Guide to Compliance*, 32 BUS. LAW. 399 (1977); Leete, *Look at the Consumer Warranty Problem—The Federal Solution*, 6 U. TOL. L. REV. 351 (1975).

4. U.C.C. § 2-312, N.D. CENT. CODE § 41-02-29 (1968).
5. U.C.C. § 2-313, N.D. CENT. CODE § 41-02-30 (1968).
6. U.C.C. § 2-314, N.D. CENT. CODE § 41-02-31 (1968).
7. J. WHITE AND R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 299 (1972) [hereinafter cited as WHITE AND SUMMERS].
8. U.C.C. § 2-312(1)(a), N.D. CENT. CODE § 21-02-29(1)(a) (1968), states in part as follows: "there is in a contract for sale a warranty by the seller that (a) the title conveyed shall be good, and its transfer rightful; . . . ."
9. 8 WILLISTON ON CONTRACTS § 985 (3rd ed. 1964).
10. U.C.C. § 2-312, Comment 6.
11. U.C.C. § 2-316, N.D. CENT. CODE § 41-02-33 (1968), which provides for the disclaimer of express and implied warranties, states in part as follows:

> (2) Subject to subsection 3, to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of witness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
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> (3) Notwithstanding subsection 2
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> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
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> (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
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> (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

U.C.C. § 2-312(2), N.D. CENT. CODE § 41-02-29(2) (1968), which is the only means by which the warranty of good title can be disclaimed, states as follows:

> A warranty under subsection 1 will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

Thus, it is more difficult to disclaim the warranty of good title than to disclaim a mere implied warranty. The disclaiming language must be specific, not general, unless circumstances exist which give the buyer reason to know his seller does not have good title. *See infra.* notes 22-35, and text accompanying.

chant.[12] The seller at that point warrants that title is good,[13] that the transfer is rightful,[14] and that the goods will be delivered free from any security interest, lien or encumbrance of which the buyer has no knowledge at the time of contracting.[15] If the buyer knows of the outstanding interest at the time of contracting, the contract will certainly deal with the interest, and the buyer will be able to protect himself. If the buyer does not know of the interest at the time of delivery, there will be a breach of the warranty of good title. Thus, the buyer is protected from interests which exist at the time of the contracting and about which he does not know, even if the interests are perfected by a filing under the secured transactions provisions of the Code.[16]

The breach of warranty as to outstanding interests occurs, if at all, at the time of delivery.[17] Thus, if a buyer and seller contract for the sale of a chattel on January 2, to be delivered February 2, and unknown to the buyer at that time there is a perfected security interest in the chattel, which the buyer learns of on January 15, there has been no breach of the warranty of good title. It is only if the interest has not been extinguished at the time of delivery that the warranty will be breached.

The warranty of good title is in the form of strict liability[18] in the sense that the seller's good faith, lack of knowledge of a defect in title or reasonableness in attempting to ascertain whether title is good is immaterial.[19] Moreover, the buyer's right to good title is apparently not dependent upon any inquiry on his part, as long as he does not have knowledge of an outstanding interest at the time of contracting. Thus, even if the circumstances of the sale would lead a

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12. The Code deals differently with merchants and nonmerchants, holding merchants generally to a different, higher standard. Where no reference is made concerning whether a different rule is applicable if or when a merchant is involved, the rule applies without regard to the seller's or buyer's status. Certain warranties are given only by merchants of one type or another. The term merchant is defined in U.C.C. § 2-104(1), N.D. CENT. CODE § 41-02-04(1) (1968), as follows:

> (1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

13. U.C.C. § 2-312(1)(a), N.D. CENT. CODE § 41-02-29(1)(a) (1968).
14. *Id.*
15. U.C.C. § 2-312(1)(b), N.D. CENT. CODE § 41-02-29(1)(b) (1968). The buyer must actually know of the outstanding interest, or the warranty will be breached upon the encumbered delivery. Mere constructive notice is not enough. U.C.C. § 1-201(25), N.D. CENT. CODE § 41-01-11(25) (1968), defines knowledge as "actual knowledge," differentiating between that concept and the concept of notice.
16. U.C.C. art. 9, N.D. CENT. CODE ch. 41-09 (1968), *as amended*, (Supp. 1975).
17. U.C.C. § 2-725(2), N.D. CENT. CODE § 41-02-104(2) (1968).
18. Grant Gilmore, in discussing the concept of strict liability in THE DEATH OF CONTRACT (1974), has suggested that "strict liability" is perhaps not so strict, as it is applied by the courts. *Id.* at 93-94. *See infra.* note 86.
19. *See* WHITE AND SUMMERS at 300. This is essentially the same rule that has long been applied in North Dakota. *See* St. Anthony & Dakota Elev. Co. v. Dawson, 20 N.D. 18, 126 N.W. 1013 (1910).

reasonable person to inquire as to the status of the title, if the buyer does not actually discover another interest he will have a cause of action for breach of warranty against the seller.[20] While this could cause hardship for the seller in a given situation, it is quite clearly the preferable rule from a policy standpoint, for, at least in theory, the innocent seller will be able to find his seller and in turn sue him for his breach of warranty.[21]

B. DISCLAIMING THE WARRANTY

The seller, whether innocent or not, can disclaim the warranty of good title by the means described in sections 2-312 (2) of the Code. As indicated earlier,[22] among the advantages of the hybrid nature of the warranty of good title is the fact that a general disclaimer will not serve to avoid the impact of the warranty. Exclusion or modification of the warranty can be effected only by specific language or by circumstances which would put the buyer on notice that the seller does not claim title or is selling only that title which he or a third person may have. Thus, it is clear that the seller can disclaim the warranty by telling the buyer that he does not have or claim to have title.[23]

The more difficult situation is that spoken to directly by the sec-

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20. A distinction is here made between suspicious circumstances which might give rise to a duty to inquire, as where the price is so low that a prudent person might be concerned that merchandise is contraband, and those circumstances mentioned in section 2-312(2) which will serve to disclaim the warranty.

An interesting North Dakota decision, State v. Hastings, 77 N.D. 146, 41 N.W.2d 305 (1950), which arose in a criminal context, is illustrative of the distinction. The defendant, a licensed fur buyer, made a contract for the sale of some 2,000 muskrat hides with one Olson, also a licensed fur buyer. Although Olson was acting for a fur company, Hastings made the initial contact with Olson at Olson's home (suspicious circumstance No. 1). Moreover, Hastings demanded Olson's personal check, rather than a business check (suspicious circumstance No. 2). Hastings initially did not have the hides with him, but stated "that he knew where he could get some" (suspicious circumstance No. 3). The furs were in fact illegally trapped, which Olson's employer discovered, apparently immediately, although Olson himself had fully inspected the furs and failed to ascertain their contraband nature (suspicious circumstance No. 4). Defendant was thereafter charged with obtaining money by false pretenses, in that he obtained and cashed the check in exchange for goods to which he had no title. He contended, among other things, that he had made no representation as to title, and that Olson, by means of his inspection and his expertise should have realized (as had his employer) that the pelts were taken out of season. The court held that the representation was implied, and that the question was not whether the buyer should have discovered the lack of good title (i.e., the falsity of the representation) but whether the buyer in fact did. Since the jury found that he had not so discovered it, Hastings' conviction was affirmed.

21. If a court desires to avoid the hardship to the seller in a given case, as where the circumstances quite clearly indicate that a buyer is using his lack of actual knowledge to the innocent seller's detriment, and the court is convinced that the buyer *should have known* of an outstanding interest, the language of section 2-312(2) can be construed broadly enough to find a disclaimer. To this author, such a construction is far preferable to a dilution of the knowledge requirement in section 2-312(1)(b).

22. *Supra* note 11, and text accompanying.

23. *See* WHITE AND SUMMERS at 304. The Code, the comments and the cases do not give any indication of what sort of language is "specific language" for purposes of disclaiming the warranty of title. There appears to be only one case dealing with the question. In Jones v. Linebaugh, 34 Mich. App. 305, 191 N.W.2d 142 (1971), the bill of sale provided by the seller stated that he sold all his "right, title, and interest" in the chattel and that to the "best of [his] knowledge there [was] no title in existence by way of registration with the State of Michigan or any other State or with any Nation." *Id.* at ——, 191 N.W.2d at 144. The court held that such language was not specific, and thus did not disclaim the warranty of good title. It stated as follows:

ond type of disclaimer set out in section 2-312(2).[24] What are the circumstances that will serve to put the buyer on notice of the fact that the seller does not himself claim title, or is selling only such title as he or a third party possesses? The comments to the Code indicate that in cases where "sheriffs, executors, foreclosing lienors and persons similarly situated"[25] are involved, the buyer is put on notice that the seller is not claiming title or is only selling that which he does claim. That leaves unanswered the question of who else is "similarly situated." It has been noted in at least one jurisdiction that insurance companies selling recovered stolen vehicles are not similarly situated,[26] while auctioneers who inform buyers that they are selling other's goods are similarly situated.[27]

Another problem is presented by the question of what constitutes notice of the sale of that part of the title that is claimed by the seller; that is, will general quit claim language, analogous to that used in the sale of realty, put the buyer on notice that the seller "is purporting to sell only such right or title as he . . . may have?" General quit claim language should not be sufficient to put the buyer on notice of the possible limited nature of the seller's title; that is, to disclaim the warranty.[28] But it is submitted that the question should not be categorically answered by a refusal to give effect to any quit claim language. The inquiry should be whether the particular language used, in the particular transaction, was sufficient to put the particular buyer on notice. Thus, a very general quit claim disclaimer would not be operative ("Seller hereby quit claims all his right, title and interest in these goods to buyer"). Although such language purports to sell only that which the seller has, it contains the word "all." Such language could take an unwary buyer by surprise.[29] Contrarily, a very

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> The language of the bill of sale in the present case is not precise and free from ambiguity. Indeed, it would appear to convey to the reader an ambiguous connotation. The seller transferred *all* of his right, title, and interest, stated that *no other title*, to his knowledge, existed, and that the bill of sale was the original evidence of title. Such language, as a matter of law, is not sufficient to exclude the warranty of title.

Id. (emphasis added).

Thus, it appears that the Michigan court equates "specific" with "unambiguous," as that term is generally used in contract law.

24. *See supra* notes 20-21.

25. U.C.C. § 2-312, Comment 5.

26. Spillane v. Liberty Mut. Ins. Co., 65 Misc. 2d 290, 317 N.Y.S.2d 203 (1970); John St. Auto Wrecking v. Motors Ins. Co., 56 Misc. 2d 232, 288 N.Y.S.2d 281 (1968).

27. Gaito v. Hoffman, 5 U.C.C. Rep. Serv. 1056 (N.Y. Sup. Ct. 1968).

28. *See* Jones v. Linebaugh, 34 Mich. App. 305, 191 N.W.2d 142 (1971). This case was directed mainly to the question of whether general quit claim language was "specific language" for purposes of §.2-312(2). *See supra* note 23. The court did not expressly discuss notice to the buyer, but it is implicit in the court's opinion that general quit claim language is not sufficient notice.

29. The surprise could exist because the buyer is unsophisticated, or more likely, because the clause was not conspicuous. As to conspicuousness, "circumstances which give the buyer reason to know" could quite clearly be read broadly enough to encompass a conspicuousness requirement comparable to that required by U.C.C. § 2-316(2). If the quit claim were such as would not readily come to the attention of the buyer, he would have no reason to know the circumstances. This implies something of an objective standard of notice. The former situation, the unsophisticated buyer, is more difficult to deal with.

specific quit claim, conspicuously placed and apparently bargained for ("In consideration of the low price paid, buyer agrees to accept such title as the seller has or may have"), should be effective to disclaim the warranty of title.[30] Disclaimer language lying between the above general and specific quit claim language presents greater difficulties. But in general, the policy underlying section 2-312 would favor the maintenance of the warranty.[31]

A third problem presented by section 2-312 (2) is whether circumstances not dealt with by the official comments might nevertheless be sufficient to place the buyer on notice. Suppose, for example, that the seller is selling at "too good a price"; or that the surroundings of the transaction are suspicious, perhaps bordering on fraudulent; or that a reasonable person would otherwise have serious misgivings about the legitimacy of the seller's title.[32] Under these circumstances, the warranty of good title would still exist under section 2-312 (2), provided that the suspicious buyer asks no questions, and thus receives no knowledge.

A court, however, might be tempted to say that the buyer, in light of what he suspected, knew, or should have known, had a duty to inquire further to secure knowledge, and that the failure to do so amounted to knowledge.[33] Such a solution, subverting the knowledge

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because of the time honored rule that one is bound by what one signs. The "reason to know" language, however, included in cross reference to § 1-201(25), is not only objective but subjective as well. That is, the test is whether from all the facts *known* to the buyer, a reasonable person would be on notice. This should take into account the particular buyer's knowledge of the transaction and its components, and that knowledge would be based at least in part on his particular attributes, including age, ability, experience, education and sophistication.

30. Arguably, this might be considered "specific language" rather than circumstances giving the buyer notice, whereas the first situation might concern non-specific language. *See supra* note 23, and text accompanying. Conceptually, however, it is easier to fit the total transaction into the "circumstances" language of section 2-312(2), rather than attempt to place reliance solely on the language used. This may make the wording of the statute seem to read "and/or" rather than "or," but in a close case, it is difficult to segregate the language from all the circumstances.

31. The policy underlying section 2-312 is stated in comment 1 following that section as follows:

> Subsection (1) makes provisions for a buyer's basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely, that he receive a good, clean title transferred to him also in a rightful manner so that he will not be exposed to a lawsuit in order to protect it.

Thus, disclaimers that deprive the buyer of what he rightfully expects to get will not be looked upon with favor.

32. *See* State v. Hastings, 77 N.D. 146, 41 N.W.2d 305 (1950); *supra* notes 20, 21.

33. *See, e.g.*, the dissent in Adrian Tabin Corp. v. Climax Boutique, Inc., 34 N.Y.2d 210, 313 N.E.2d 66, 356 N.Y.S.2d 606 (1974). This was a bulk sales case in which the transferee had relied upon the listing of transferor's creditors by the transferor without making further investigation. U.C.C. § 6-104(3) provides that "[r]esponsibility for the completeness and accuracy of the list of creditors rests on the transferor, and the transfer is not rendered ineffective by errors or omissions therein unless the transferee is shown to have knowledge." The majority in *Adrian* read § 6-104(3) together with § 1-201(25), which defines knowledge as "actual knowledge," and held that the transferee had no duty to inquire beyond the list provided by the transferee under any theory of "constructive knowledge." 34 N.Y.2d at 216, 313 N.E.2d at 69, 356 N.Y.S.2d at 610.

The dissent, however, argued that a requirement of constructive knowledge should be imposed on transferees despite the language of the code in order to further the general purposes of article 6, the protection of creditors. The dissenting judge stated as follows:

> We emphasize that adherence to the position and concept adopted by

requirement to mean notice, might be particularly tempting when the seller is more innocent than the buyer.[34] But to afford relief on the ground of "constructive knowledge" under section 2-312(2) subverts the legitimate requirement that the buyer must *actually* have known of the outstanding encumbrance. It seems apparent that the language of section 2-312(2) was not intended to cover the above hypothetical situation. A construction of the statute which makes such circumstances effective as a disclaimer should not dilute the "knowledge" requirement and should allocate the loss where in justice it ought to be. The goals of doing justice and of retaining the requirement of actual knowledge can be accomplished in the hard case by reading the Code to mean that the seller "does not claim title *solely* in himself." While this construction has the clear effect of injecting flexibility where the Code demands rigidity, it is less likely to haunt a court than is the dilution of the concept of knowledge. Moreover, it has the advantage of disclaiming not only the warranty of delivery free of encumbrance, but also the warranty of good title and rightful transfer generally.[35]

C. THE WARRANTY AGAINST INFRINGEMENT

While the Code provides that all sellers give the warranties of

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> the majority will permit a buyer to be entirely free of any liability despite even his own reckless disregard of the natural consequences of his failure or refusal to make any inquiry of the liability status of the business being purchased—all to the damage and loss of innocent creditors of the seller. Such a concept—permitting a buyer to completely ignore the realities of the business world and, further, to cavalierly brush aside any inquiry as to the status of the seller's business debts—destroys one of the prime aims of article 6, to wit, to safeguard creditors.

Id. at 221, 313 N.E.2d at 72, 356 N.Y.S.2d at 614-15.

A court in a warranty of title case might be tempted to utilize the same reasoning as the dissent did in *Adrian*, and for reasons of public policy, etc., impose a requirement of constructive knowledge, undercutting the clear intent of the Code drafters.

34. Under the circumstances posited in the text, the desire of a court to relieve the seller would not stem from the seller's innocence, but rather from the buyer's likely equal culpability. An even more difficult situation arises where the buyer ought to know of an outstanding interest because of the nature of the transaction, and but for his failure to ask and the seller's (assumed) unintentional failure to inform, the buyer would have had actual knowledge. For example, if an individual offered a late model automobile for sale at a price low enough to suggest that he was seeking only his equity, and indicated in his offer that the low price was due to nothing else (for example, the offer did not stipulate "moving, must sell," "needs work," etc.) a buyer, particularly one with some expertise, might realize that the low price was due to an outstanding security interest. Both parties might thereafter enter into a contract for sale, the seller intending that the sale would be subject to the indebtedness and the buyer, although suspecting as much, never having agreed to it. Because the buyer did not "know" of the security interest, the warranty of good title would be breached at the time of delivery, and, theoretically at least, the buyer would be entitled to the difference between the value of the car with no lien on it, and the value of the car as transferred, or the amount of the lien. To allow such a recovery is quite clearly inconsistent with justice, but to disallow it is apparently in conflict with the meaning of "knowledge." The foregoing analysis, of course, assumes no independent breach of the warranty given in section 312(1)(a), or at least a merger of that warranty into the section 312(1)(b) warranty.

35. The buyer's knowledge would only free the seller of the breach caused by an encumbrance, which would be sufficient in the hypothetical given in footnote 34 *supra*. It would not necessarily free the seller from a breach of the general warranty of good title, or rightful transfer, under facts at least where the seller had no right or title in the goods at all, or where they were stolen or otherwise contraband. Under such circum-

good title discussed above, unless disclaimed, it also provides that a special, extra warranty is given by a merchant seller who regularly deals in goods of the kind. This special warranty is the warranty against infringement.[36] It provides that a merchant seller who regularly deals in goods of the kind warrants to his buyer that the goods sold shall be delivered free of the rightful claim of any third person based on infringement or the like. Unlike the warranties discussed above, this warranty can be disclaimed by the "otherwise agreement" of the parties; thus, under ordinary circumstances, there will be no need to resort to great machinations to effect a disclaimer. Moreover, if the buyer furnishes the specifications for the goods to the seller, the buyer must hold the seller harmless against a claim which arises after the seller has compiled with the specifications.

This special warranty against infringement section has not been judicially interpreted, and there seem to be few and minor problems with it.[37] The section is directed at the sale of goods by a seller in the business of selling goods of the kind, and it insists that the sale be unencumbered by an outstanding trademark or patent right. The point is that a buyer should not, in addition to purchasing goods, purchase a lawsuit.[38] Thus, if a merchant seller manufactures goods and sells them to a buyer, he warrants that when the goods are delivered, no third party will be able to assert a rightful claim against them. Where the buyer furnishes specifications for the manufacturer, however, there is no need to protect him, but there is a need to protect the manufacturer. Thus, the buyer must hold the seller harmless for any infringement caused by the seller's compliance with the specifications.

III. DAMAGES

The measure of damages for breach of the warranty of title is perhaps the most fascinating aspect of warranty of good title law. The remainder of this article will deal with the question of damages, particularly the time at which damages are to be measured. Several important cases will be discussed, and special attention will be given North Dakota law.

A. IN GENERAL

Section 2-725 provides that the breach of warranty occurs at the

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stances it might still be desirable to disallow the equally culpable buyer any recovery against even the criminal seller; *see supra* note 32, and text accompanying; and thus urge that the circumstances were such as to put the buyer on notice that no warranty was given.

36. U.C.C. § 2-312(3), N.D. CENT. CODE § 41-02-29(3) (1968).

37. WHITE AND SUMMERS at 302.

38. U.C.C. § 2-312, Comment 1.

time of delivery.[39] The comments to section 2-312 make clear that the effect of this language is to start the statute of limitations running from the time the breach occurs.[40] Likewise, damages would ordinarily be fixed as of the time of breach; that is, when the goods are delivered to and accepted by the buyer.[41] It would follow that the damages would normally be the amount necessary to discharge the outstanding interest. Thus, for example, if a seller sold a snowmobile to the buyer for $1,000, the unencumbered value of which was $1,000, with a $500 perfected security interest therein, the buyer's damages at the time of breach would be $500, the difference between the value of the goods unencumbered, and the encumbered value. By the same token, if the seller sold a snowmobile to which he had no title (if, for example, it was stolen before coming into the seller's hands), the buyer's measure of damages would theoretically be the difference between the value as accepted (0) and the value of the goods as warranted ($1,000).

There are times, however, when the general scheme of determining damages breaks down, due to the professed belief that an injured party should neither be overcompensated nor undercompensated for his injury. The overcompensation of a buyer would occur in the following hypothetical situation: the snowmobile buyer gets a "good deal" from his seller, paying only $850 for a snowmobile with an unencumbered value of $1,000; immediately after the sale, a third person asserts a $500 perfected security interest in the snowmobile. A literal reading of the Code would give the buyer $500, the difference between the value as accepted and as warranted, even though the buyer was really harmed only to the extent of $350. Altering the above hypothetical, so that the snowmobile is stolen, and thus valueless, the buyer is given $1,000, thus benefitting him to the extent of $150 beyond his out-of-pocket loss. The result is justifiable, either on the ground that the buyer who makes a good contract deserves the benefit of his good bargain, or on the ground that as between an innocent buyer and a culpable seller, the seller ought to bear the risk of defective title. Moreover, it is consistent with "the general purpose of the law . . . to

39. U.C.C. § 2-725(2), N.D. CENT. CODE § 41-62-104(2) (1968), provides as follows:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance. The cause of action accrues when the breach is or should have been discovered.

40. U.C.C. § 2-312, Comment 2, states as follows: "[T]he breach of warranty of good title occurs when tender of delivery is made since the warranty is not one which extends to 'future performance of the goods.'"

41. U.C.C. § 2-714(2), N.D. CENT. CODE § 41-02-93(2), provides as follows: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

give compensation, that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract."[42]

The fact remains, however, that by awarding the buyer the benefit of his bargain, he has actually been overcompensated. In the proper case, a court might be tempted to limit the buyer's damages to his out-of-pocket loss. If this course is followed, the buyer in the above hypothetical could recover only $350 (assuming the outstanding interest) or $850 (assuming the valueless good). While such damages fail to take into account the true value of the goods, and thus their true worth to the buyer, they more accurately reflect what the buyer has in fact lost, and what the seller has gained.[43]

The undercompensation of a buyer, if the normal method of determining damages for breach of warranty is used, may occur in the following situation: the buyer purchases a snowmobile with an unencumbered value of $1,000 for $1,250, obviously a bad bargain for the buyer; immediately after the sale, a third person asserts a $500 perfected security interest in the snowmobile. Giving the Code its literal interpretation, the buyer would be awarded $500, the difference between the value the snowmobile would have had if it had been as warranted ($1,000) and the value as delivered ($500). The undercompensation here ($250) is merely reflective of the bad bargain, for if the snowmobile had been worth $1,250, the buyer could have recovered $750. But to the extent that the buyer now has what he bargained for, there does not seem to be a miscarriage of justice. If the snowmobile in the above situation is valueless, the buyer would get only $1,000, the difference between the value as warranted and as delivered. In this situation, the inequity seems more acute; the buyer has been "fully compensated" for the value of the snowmobile and yet is short $250. Perhaps at this point the last phrase of section 2-714(2) becomes applicable, for these are "special circumstances [which] show proximate damages of a different amount." Thus, to avoid undercompensation, a different measure of damages is applied, the difference between the contract price and the value of the goods as delivered.

A problem in determining the measure of damages for breach of warranty of good title also arises when, through the passage of time, the goods as to which the warranty of good title has been breached either appreciate or depreciate in value. Determining the measure of damages for depreciating goods presents fewer problems; one need only view the time of breach as the time of delivery, according to section 2-725. Thus, if buyer purchases a snowmobile in 1974 for

42. WILLISTON ON CONTRACTS § 1378, at 198. *See also* U.C.C. § 1-106, N.D. CENT. CODE § 41-01-06 (1968).

43. This is of course true only to the extent that a buyer measures his actual tangible loss in terms of money parted with.

$1,000, its value at the time, and discovers in 1976, when the value has depreciated to $500, that it was stolen when purchased, the court need look only to the time of breach to determine the measure of damages. The breach occurred in 1974, when the value of the snowmobile was $1,000. The snowmobile was valueless as delivered to buyer. Thus, the measure of damages is $1,000.

Two problems arise from the above analysis. The first deals with whether the seller may set off against his liability the reasonable rental value of the good. To the extent that the depreciation of the good and its reasonable rental value are identical, to allow the seller the set off is to create a wash-out transaction. A court allowing such a set off gives mere lipservice to section 2-725's statement that the time of delivery is the time of breach and in fact makes the operative time of breach the date of dispossession. While such a result more nearly reflects the true loss to the buyer, it is inconsistent with the measure of recovery granted by the statute, and the inconsistency is not legitimized by policy. The policy behind the warranty of good title is the implied right of a buyer to get that which he pays for,[44] and failing that, the seller is virtually strictly liable.[45] To subvert the statutory measure of damages, and give the seller a set off, is to ignore the fact that the buyer must now either give up his good and attempt to replace it, or give the true owner the value of the good at the time of the true owner's dispossession. To deduct the fair rental value from the buyer's recoverable damages is to assume that he otherwise will have been unjustly enriched. That assumption is not possible to make. It would seem clear, therefore, that allowance of the set off for fair rental value should not be made available to the seller who breaches the warranty of good title.

The second problem, which arises when the good is a depreciating good or an appreciating good, concerns the running of the statute of limitations of section 2-725. Section 2-725 provides for a four year statute of limitations, beginning when the cause of action has accrued.[46] Section 2-725(2) states the applicable time of accrual for breaches of warranty as follows: "A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance . . . the cause of action accrues when the breach is or should have been discovered."[47] Thus, the cause of action for breach of warranty of good title accrues at the time of tender of delivery, unless the warranty extends to future performance. The official comment to section 2-312 makes quite clear that the warranty of good title is not such a continuing warranty.[48]

44. U.C.C. § 2-312, Comment 1.
45. *See supra* note 18, and text accompanying; *infra*. note 86.
46. U.C.C. § 2-725(1), N.D. CENT. CODE § 41-02-104(1) (1968).
47. U.C.C. § 2-725(2), N.D. CENT. CODE § 41-02-104(2) (1968).
48. *See* U.C.C. § 2-312, Comment 2, *supra* note 40.

If one keeps in mind the strict liability nature of the warranty of good title, one can quite readily see a difficulty when there is a substantial lapse of time between the tender of delivery and the bringing of the action, during which the goods in question do not totally lose their value. In the situation where there is an appreciating asset, suppose the following fact situation, suggested by the case of *Menzel v. List*,[49] which was decided after the Code was in effect, but on facts which arose under the Uniform Sales Act.

In 1932, a buyer purchases a painting by a noted artist for approximately $150, and thereafter it is appropriated by invading German forces during World War II. The painting's whereabouts are unknown until 1955, when it appears in a Paris art gallery, from which it is purchased for $2,800. It is subsequently resold that same year to defendants for $4,000. In 1962, seven years later, the original (1932) buyer sees a reproduction of the painting, crediting the defendants with ownership, and thereupon brings suit against defendants, who implead the 1955 seller. On these facts, defendants and third party defendant assert that their maximum liability should be $4,000, the value of the painting at the time of delivery. The court orders return of the painting to the plaintiff, and finds the third party defendant liable for $22,500, the value of the painting when the defendant was forced to surrender it. The breach, and damage flowing therefrom, occurred at the time of dispossession, and not in 1955, the time of tender of delivery. The effect of such a ruling, of course, is to start the statute of limitations period running from the time of the breach, the date of dispossession.

Two problems with the case exist on the facts. First, and most obvious, is the fact that the case was governed by the Uniform Sales Act, which did not contain its own statute of limitations and specifically allowed for a breach of warranty of quiet possession.[50] Second, the court which decided the case was unclear (and apparently purposefully so) as to whether the question under consideration was one of breach of warranty of title or one of breach of warranty of quiet possession.[51] The distinction between the two warranties for present

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It is not altogether clear why damages are measured as of the date of acceptance, although the breach occurs earlier; i.e., at the time of tender of delivery. However, for our purposes the statute of limitations becomes important generally on the basis of years, not days, so this minor discrepancy can largely be ignored at this point.

49. 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

50. Uniform Sales Act § 13(2).

51. The lower court had specifically held that the statute of limitations had not run because of the fact that the warranty of quiet possession, and not the warranty of title, had been breached. Menzel v. List, 28 App. Div. 2d 516, 279 N.Y.S.2d 608 (1967). The Court of Appeals framed the issue as follows: "[W]hat is or should be the proper measure of damages for the breach of an implied warranty of title (or quiet possession) in the sale of personal property." 24 N.Y.2d at 95, 246 N.E.2d at 743-44, 298 N.Y.S.2d at 981 (1969). Although the court thus was apparently willing to treat the two warranties as the same, there are distinctions between them. *See* WHITE AND SUMMERS at 299-303; 8 WILLISTON ON CONTRACTS §§ 975-980 (3rd ed. 1964).

purposes is magnified by the language of an official comment to the Code, which indicates that there is no longer a warranty of quiet possession.[52] That comment language has led commentators to assert that under the Code, the four year statute of limitations would bar the bringing of an action in a like case[53] due to the fact that the breach occurs at the time of tender of delivery and not at the date of dispossession. There are, however, cogent arguments to be made for the proposition that the statute should not run, at least in the warranty of good title case when there is an appreciating asset, until the disturbance of possession.

Initially, it should be remembered that the liability of the seller is strict,[54] so that any balancing with respect to potentially ruinous liability due to inflation should remain heavily weighted against him. Then, too, it is not difficult for the seller to disclaim liability for breach of this warranty, and in fact, when the title to the good in question is uncertain, it would be more than a good idea to so disclaim.[55] Furthermore, the only time that this type of situation will manifest itself is when the good at issue is an appreciating asset; the plaintiff in a depreciating asset case will ordinarily not desire to rely on the date of dispossession as the time of breach, because he will seek damages measured as of the time of purchase, when the good was at its highest value.[56]

In the appreciating asset situation, then, the question of when breach occurs is one of policy; on whom should the loss be placed?[57] To the extent that we desire to place the plaintiff in as good a position as if he still had the asset, and further, to the extent that generally it will be the seller who is better able to bear and spread the loss, it is probably just to place the loss, at least in this rare case, on the seller.

The foregoing discussion assumes two things: first, *Menzel v. List*[58] applied a warranty of quiet possession rationale, which, as stated earlier, is not altogether clear; and second, a court would be

52. U.C.C. § 2-312, Comment 1.

53. *See* WHITE AND SUMMERS at 343 n. 58; Comment, *Measure of Damages for Breach of Implied Warranty*, 20 SYR. L. REV. 1018 (1969).

54. *See supra* note 18; *infra.* note 86.

55. *See* Menzel v. List, 24 N.Y.2d 91, 98, 246 N.E.2d 742, 745, 298 N.Y.S.2d 979, 984 (1969).

56. The cases generally have dealt with automobiles, whose value beyond 4 years is substantially depreciated. The value may be so diminished that it does not even pay to bring suit seeking the dispossession loss.

57. Unless a court is thoroughly willing to split hairs, the question is posed both in appreciating and depreciating asset situations. In the depreciating asset situation, however, there will be costs associated with the bringing of the action that even a victory may not compensate. Given that, a typical plaintiff, more desirous of recovering his losses than vindicating a principle, might forego litigation entirely. Should he not do so, a court could either award him the dispossession date value, or draw the distinction between the two types of assets. A third alternative, construction of the statute to make the limitations period inapplicable, will be discussed at *infra.* notes 68-72, and text accompanying.

58. 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

unwilling to disregard that portion of the comment which indicates that the warranty of quiet possession is abolished.[59] To the extent that the first assumption is incorrect, it may be that a subsequent court will find the *Menzel* rationale compelling if faced with a similar question, and adopt it despite the comment. To the extent that the second assumption is invalid a court might well disregard the comment altogether, and treat the warranty of quiet possession as alive under the Code, albeit as an implied warranty falling under another section of the Code,[60] or entirely external to the Code, as a supplementary principle thereto.[61]

Lurking behind this discussion is an anomaly; the date at which damages are assessed and the date on which a cause of action accrues may not be the same. This may cause a court to allow the plaintiff *some* damages regardless of when the dispossession occurs in relation to the date of sale. Several courts which have considered the issue, including the North Dakota Supreme Court, have held that damages are to be measured as of the date of dispossession, based on the "special circumstances" language of section 2-714, and the desire to do justice to the parties.[62] Although it will often happen that damages will be measured at a date subsequent to the actual time of the breach,[63] that is generally done to allow the injured party an opportunity to discover the breach, resell, cover, or the like, and thus not freeze his damages at a point in time when it may have been advantageous for the other party to breach. In view of the underlying purpose of statutes of limitations, to avoid stale claims,[64] it is rare to find a court willing to hold a cause of action barred before it has come into being, or, more precisely, before it has come to the attention of the injured party.[65] It appears from the explicit language of section 2-725, however, that that is precisely the

59. While most courts have shown a remarkable willingness, and indeed a desire, to accept the comments as gospel, as every first year law student learns or should learn, the comments are not binding and may indeed go beyond the statute itself. *See* WHITE AND SUMMERS at 11-13. It is not unheard of that a court should disregard a comment, particularly when it appears just to do so. *See* Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597.

60. *See* U.C.C. § 2-314(3), N.D. CENT. CODE § 41-02-31(3) (1968).

61. *See* U.C.C. § 1-103, N.D. CENT. CODE § 41-01-03 (1968).

62. *See* Schneidt v. Absey Motors, Inc., 248 N.W.2d 792 (N.D. 1976); Ricklefs v. Clemens, 216 Kan. 128, 531 P.2d 94 (1975).

63. *See, e.g.*, U.C.C. §§ 2-706, 2-708, 2-713, 2-714; N.D. CENT. CODE §§ 41-02-85, 41-02-87, 41-02-92, 41-02-93 (1968).

64. State v. Halverson, 69 N.D. 225, 285 N.W. 292 (1939).

65. This is readily apparent in that area of the law where contract (warranty) and tort (strict liability) merge, where many courts have gone to severe lengths to compensate injured victims although any conceivable contract statute of limitations, if invoked under traditional theory, would have run long ago.

Although it has been argued that the desire to shift to a tort statute of limitations (where the statute commences from date of injury or date of discovery of the defect) is primarily manifested when physical harm has been done to a plaintiff (as opposed to *mere* economic harm) more and more courts are showing a willingness to compensate a plaintiff when the cause of action is a mixed tort/contract, the contract statute has run, and there has been no personal harm. *See* WHITE AND SUMMERS at 339-43; Victorson v. Bock Laundry Machine Co., 37 N Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d

intent of that section. To give credence to that language, at least in the area of breach of warranty of title, is in accordance with the time for measuring damages specified in section 2-714. In other words, if a court reads section 2-725 to say that the cause of action accrues at the time of the breach, and a breach of warranty occurs at the time of tender of delivery, it reasonably follows that damages are assessable then or shortly thereafter. Thus, the Code scheme, evidenced by section 2-714, measures damages according to time of acceptance, shortly after the breach. In the ordinary breach of warranty case, that is precisely when the damage will be suffered by the plaintiff, so it makes sense to award the plaintiff his compensatory damages based upon that time. Where, however, a court determines that special circumstances exist, thus making damages measurable at a later time, it is in effect determining that one of three alternative situations exists.

First, the breach occurred on day one, but no damage was inflicted on the plaintiff[66] until dispossession, so a suit prior to that time would be premature. This would start the statute of limitations running from day one, which appears to be the Code scheme. It is highly workable as long as the dispossession occurs within the four year period, because it allows a court to do complete justice.[67] If dispossession occurs outside the statutory period, however, this alternative bars the plaintiff's action entirely.

Second, the breach occurred and damages are determined as of the date of dispossession, and not earlier. This allows the court to compensate the injured plaintiff, and probably comports with the special circumstances language of section 2-714. It does, however, necessitate either disregard for, or serious misconstruction of, section 2-725, for the court must either assert, contrary to section 2-725, that a breach of warranty occurs substantially later than the date of tender of delivery, or that the warranty of title is one which "explicitly extends to future performance," something which the comment to 2-312 refutes, and with good reason. Of course, a court faced with the hard case could opt for this determination, or could develop the facts to lead to the conclusion of explicit extension. But this manner of dealing with the problem is unsatisfactory, not only because it requires statutory dissembling, but because it largely ignores the equities (whatever they might be in a given case) in favor of the seller.

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39 (1975); Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968); Rapson, *Products Liability Under Parallel Doctrines: Contracts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUT. L. REV. 692 (1962).

66. A better statement of this would be to the effect that whatever damages were inflicted would be at best nominal, and at worst nonexistent until dispossession, which was what led many courts at common law to force the plaintiff to await the dispossession. *See* cases cited at 8 WILLISTON ON CONTRACTS § 980 n.3 (3rd ed. 1964).

67. That is to say that regardless of depreciation or appreciation, the court will be able to fully compensate the plaintiff, and neither over-compensate him nor under-compensate him.

A third alternative exists which coincides with the Code, comports favorably with North Dakota law, and ensures maximum flexibility for a court. It involves the utilization of section 2-725(4), which simply states that the Code statute of limitations "does not alter the law on tolling of the statute of limitations." Coupled with the North Dakota provisions on tolling[68] and the language of sections 1-103, 2-714 and 2-725(2), section 2-725(4) allows the court to engage in the following analysis.

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68. In North Dakota, besides the statutory provisions relating to the tolling of the statute, *infra.*, there exists a common law basis for tolling the statute. In Fetch v. Buehner, 200 N.W.2d 258 (N.D. 1976), the court stated that although the statute of limitations had run and none of the tolling statutes were applicable, an equitable estoppel could be applied to toll the statute. The elements of an equitable estoppel which must be shown in order to toll the statute are as follows: (1) it must be shown from the nature of defendant's statements and all the surrounding facts and circumstances that the statements were made with the idea that plaintiff would rely thereon; (2) there must be a reliance by plaintiff on the representations or acts of defendant, and, as a result of that reliance, plaintiff failed to commence the action within the prescribed period; and (3) the acts of the defendant giving rise to the assertion of estoppel must have occurred before the expiration of the limitation period. *Id.* at 261.

In a warranty of title case, if damages are measured from the date of dispossession, and more than four years have passed since the date of acceptance, the plaintiff's cause of action will not be barred by the statute of limitations if the elements of an equitable estoppel, as enunciated in *Fetch*, are met.

The N.D. CENT. CODE provisions on tolling the statute of limitations, which are quite narrow, but which may be used in the proper case, are as follows:

> 28-01-16. Actions having six years limitations—The following actions must be commenced within six years after the cause of actions has accrued:
>
> . . . .
>
> 6. An action for relief on the ground of fraud in all cases both at law and in equity, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud; . . . .
>
> . . . .
>
> 28-01-24. Limitations on claims for relief fraudulently concealed.—When, by fraud or fraudulent concealment, a party against whom a cause of action exists prevents the person in whose favor such cause of action exists from obtaining knowledge thereof, the latter may commence an action within one year from the time the cause of action is discovered by him or might have been discovered by him in the exercise of diligence. Such fraud or fraudulent concealment must be established to the satisfaction of the court or jury, as the case may be, by a fair preponderance of the evidence.
>
> 28-01-25. Disabilities extend limitations on actions generally—Exceptions.—If a person who is entitled to bring an action . . . is:
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> 1. Under the age of eighteen years;
> 2. Insane; or
> 3. Imprisoned on a criminal charge or in execution under the sentence of a criminal court for a term less than for life,
>
> at the time the cause of action accrues, the time of such disability is not a part of the time limited for the commencement of the action. However, the period within which the action must be brought cannot be extended more than five years by any such disability except infancy, nor can it be extended in any case longer than one year after the disability ceases.
>
> 28-01-26. Limitation in case of death.—If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives and is not one based upon a claim which may be filed in a probate proceeding, an action may be commenced against his executors or administrators after the expiration of that time and within one year after the issuing of letters testamentary or of administration.
>
> . . . .
>
> 28-01-28. Limitation when judgment reversed.—If an action is commenced within the time prescribed therefor and the judgment therein is reversed on appeal, the plaintiff, or, if he dies and the cause of action survives, his

According to the Code, the breach occurs, and the cause of action accrues, as of the date of tender of delivery.[69] It has been determined in the past that in a case such as this, special circumstances exist which cause the damages to be measured as of the date of dispossession.[70] The Code directs that its provisions are to be supplemented by the principles of equity[71] and in this case it would be inequitable to bar a plaintiff before he knew he had a cause of action. Moreover, it has been held that a statute of limitations is tolled under certain circumstances,[72] and the same circumstances which lead to a different time for determining the measure of damages in this case lead to a decision in favor of tolling the statute. Therefore, in view of the special circumstances in this case and the aforementioned provisions of the Code, the plaintiff's cause of action, which accrued on day one, was tolled until he was dispossessed, and the action is therefore not barred.

Such an analysis is clearly beneficial in the appreciating asset situation because it allows the court to take into consideration what the plaintiff has actually lost, and at the same time allows the court the flexibility of viewing each transaction objectively and singularly, to avoid iron-clad precedent which might work a hardship on a given defendant. The appreciating asset situation is, unfortunately, a rarity in modern day personal property; the question therefore must be whether this analysis is helpful in the more common depreciating asset situation.

There have been several cases which have dealt with the measure

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heirs or representatives, may commence a new action within one year after the reversal.

28-01-29. Limitation when commencement of action stayed.—When the commencement of an action is stayed by injunction or other order of a court, or by a statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action.

. . . .

28-01-32. Absence from state tolls limitations—Exception.—If any person shall be out of this state at the time a cause of action accrues against him, an action on such cause of action may be commenced in this state at any time within the term limited in this chapter for the bringing of an action on such cause of action after the return of such person into this state. If any person shall depart from and reside out of this state and remain continuously absent therefrom for the space of one year or more after a cause of action shall have accrued against him, the time of his absence shall not be taken as a part of the time limited for the commencement of an action on such cause of action.

. . . .

28-01-36. New promise must be in writing in order to extend limitation—Effect of any payment.—No acknowledgment or promise is sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby, but this section shall not alter the effect of any payment of principal or interest.

69. U.C.C. § 2-725(2), N.D. CENT. CODE § 41-02-104(2) (1968).

70. Citing Schneidt v. Absey Motors, Inc., 248 N.W.2d 792 (N.D. 1976).

71. Citing U.C.C. § 1-103, N.D. CENT. CODE § 41-01-03 (1968).

72. Citing Fetch v. Buehner, 200 N.W.2d 258 (N.D. 1972); Aune v. City of Mandan, 167 N.W.2d 754 (N.D. 1969); Roles v. Roles, 58 N.D. 310, 225 N.W. 809 (1929); Grovenor v. Signor, 10 N.D. 503, 88 N.W. 278 (1901); N.D. CENT. CODE §§ 28-01-16, 24 25, 26, 28, 29, 32, 36 (1974).

of damages in the depreciating asset situation. The question whether there are "special circumstances" which determine the measure of damages has been involved in all these cases, whether treated explicitly or implicitly.

B. SPECIAL CIRCUMSTANCES

Following *Menzel v. List*,[73] the courts have been confronted with the "special circumstances" language of section 2-714 only in the depreciating asset situation. No court has squarely reached the statute of limitations question, but it is quite clearly applicable once a court asserts that the date of dispossession is the proper time for measuring damages, tacitly assuming that the date of the breach was the date of tender of delivery. Courts, attempting to do justice, have rather uniformly held that the date of dispossession is the proper time for measuring damages, even in the depreciating asset situation. The cases dealing with "special circumstances" and the time for measuring damages will be discussed in the following order: first, *Ricklefs v. Clemens*,[74] a Kansas case; second, a series of New York cases;[75] and third, *Schneidt v. Absey Motors, Inc.*,[76] a North Dakota case. Although the cases are factually quite similar, they approach the issue in question in different ways and illustrate some of the problems in warranty of title law.

1. *Ricklefs v. Clemens*

In *Ricklefs*, plaintiff purchased an automobile from defendant in March 1971. The automobile was described as a 1969 model. Plaintiff paid $1,500 in cash, and received a trade-in credit of $2,400. The automobile in question was in fact a 1968 model which had been stolen sometime earlier. Plaintiff discovered this fact in December 1971 when he was informed by an F.B.I. agent that his continued use of the car could place him in jeopardy. After unsuccessfully seeking restitution from defendant, plaintiff instituted an action for breach of warranty of good title, seeking damages keyed primarily to the purchase price and/or difference in value at date of acceptance.[77] The trial court found that the special circumstances envisioned by

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73. 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).
74. 216 Kan. 128, 531 P.2d 94 (1975).
75. Itoh v. Kimi Sales, Ltd., 74 Misc. 2d 402, 345 N.Y.S.2d 416 (1973); Spillane v. Liberty Mut. Ins. Co., 65 Misc. 2d 290, 317 N.Y.S.2d 203 (1970); John St. Auto Wrecking v. Motors Ins. Corp., 56 Misc. 2d 232, 288 N.Y.S.2d 281 (1968).
76. 248 N.W.2d 792 (N.D. 1976).
77. The plaintiff requested 5 different instructions on the proper measure of damages: (1) difference in value at the time of acceptance plus incidental and consequential damages; (2) purchase price plus consequential damages; (3) difference in value without specifying a time when the difference should be measured, but limited to $5,000; (4) a sum as found by the jury, that would fully compensate the plaintiff; and (5) retail value without specifying a time. The court refused all of these instructions. 216 Kan. at 131-32, 531 P.2d at 97.

section 2-714 were present, and that plaintiff was entitled to the value of the automobile as of the date he lost its use, which the court held was the date a final judgment of replevin was entered against the plaintiff, June 25, 1973. The Supreme Court of Kansas reversed, holding that the applicable time for measuring damages was indeed when plaintiff lost the use of the automobile; that event, however, occurred in December 1971, not June 1973.

Although the court in *Ricklefs* articulates a rule that should work to the advantage of the seller in a depreciating asset case (i.e., value at date of dispossession rather than date of acceptance), the effects of the rule are mitigated by two factors that were present in *Ricklefs* but might not be present in other similar cases.

First, under the court's view that the date of dispossession is the date of loss of use or control, the period of time between acceptance and dispossession is merely nine months, a period short enough that even a rapidly depreciating asset (such as an automobile) will not have declined greatly in value. Second, plaintiff had apparently introduced evidence that he had made substantial repairs and improvements, which he alleged supported a claim for consequential damages. The court ruled that the evidence was admissible, not to demonstrate consequential damages, but rather as evidence bearing on the value of the car as of December 1971. The practical effect is to allow plaintiff indirect recovery of sums expended on a chattel with a defective title, while at the same time denying plaintiff's right to collect those sums directly, because they are not within the contemplation of section 2-715(2)(b).[78] One pauses briefly to ask why a loss of the value of improvements made to a chattel with a title defect would not fall within the definition of "injury to . . . property proximately resulting from any breach of warranty," thus being directly recoverable under section 2-715. But assuming such a loss is not directly covered by section 2-715, and should not be covered absent amendment,[79] the course taken by the Kansas Supreme Court is perhaps the most satisfactory.

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78. U.C.C. § 2-715(2)(b), N.D. CENT. CODE § 41-02-94 (1968), provides as follows: "Consequential damages resulting from the seller's breach include . . . (b) injury to person or property proximately resulting from any breach of warranty."

79. An amendment to section 2-714 would be appropriate to clarify both the time for measuring damages in a breach of warranty of good title case and the types of damages includable in any recovery. Subsection (2) would be amended to begin "Except as otherwise provided for breach of warranty of good title. . . ." A new subsection (3) would be added as follows:

> (3) The measure of damages for breach of warranty of good title shall be the value of the goods at the time and place of dispossession or loss of use caused by the defect in title, unless special circumstances show proximate damages of a different amount.
>
> In determining value, evidence of the purchase price, as well as the cost of repairs or improvements, if any, shall be admissible.

Or, section 2-715 could expressly allow for the contingency of repaired or improved goods by adding a new subsection (2)(b) and making current subsection (2)(b) new subsection (2)(c), as follows:

Three questions remain with respect to the *Ricklefs* decision: first, what constitutes special circumstances making the time for measuring damages the date of dispossession?; second, should the seller be entitled to set off the value of the buyer's use?; and third, when does the statute of limitations begin to run?

a. *Special Circumstances Making the Date of Dispossession the Time for Measuring Damages*

The court in *Ricklefs* was less than convincing or clear concerning what constitutes special circumstances for purposes of section 2-714. There appear to be several elements in that case that led the court to agree with the trial court's finding that special circumstances existed and that damages should be measured from the date of dispossession. The first element is the innocence of the seller; but as stated earlier,[80] good faith or innocence is not generally a defense to the breach of warranty of good title. It may be that the court is stating that as a matter of policy, innocence and good faith will serve as equities in favor of a seller when the choice to be made is whether to increase or diminish his liability. But would this same court opt for the higher measure of damages if the seller had suspected the history of the automobile, demonstrating that he was to some degree culpable?[81]

To the extent that the warranty is framed in terms of strict liability,[82] the *bona fides* of the seller should not serve as special circumstances limiting his liability, either alone or in conjunction with other elements. This is particularly so if one assumes that all or most sellers of goods do not sell fraudulently or in bad faith, so that the innocence of the seller is not "special" at all. Moreover, if good faith and innocence serve as special circumstances in the depreciating asset situation, should they not also be taken into account in the appreciating asset situation to lessen the seller's liability? To do so in that situation is to allow recovery based upon time of acceptance. It would seem that good faith should not be viewed as affecting the time for measuring damages, and to that extent, one can argue that the dictum in *Ricklefs* so suggesting is merely a small peg on which to hang other factual findings.

The second element viewed as evidence of special circumstances is really composed of three events: the number of transactions in-

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(b) The depreciated cost of repairs or improvements made by a buyer subsequently dispossessed of goods because of a breach of warranty of good title.

80. *See supra* note 18, and text accompanying; *infra*. note 86.

81. There is no indication that defendant-seller was a car dealer himself. Had he in fact been a dealer, the plausibility of his claim of good faith would have been diminished, because a reputable dealer should be able to determine the model year of an automobile

82. *See supra* note 18; *infra*. note 86.

volving the automobile at issue;[83] the fact that the transactions crossed state borders;[84] and the difficulty in identifying the automobile as the same one which had been stolen, because of the alteration of model year in the title. It is extremely difficult to perceive why these events in this case should serve as circumstances sufficiently different from those in any breach of warranty of good title case to justify their being termed "special." It is only in the most grossly *atypical* good title case where these sorts of circumstances do not surround a chattel whose title is called into question. It seems that the court is in fact setting forth a rule that when the warranty of good title is breached, special circumstances always exist, thus modifying the standard measure of damages. But perhaps not. The court asserts that one more factor contributes to the finding of special circumstances; coupled with the foregoing, it is all that is necessary. That factor is that the plaintiff used and possessed the car from the time he purchased it (March) until the time he was constructively dispossessed of it by learning of the defect (December). Thus, special circumstances will be found if the defect in title goes undiscovered for a nine month period. It is submitted that by the very nature of the warranty of good title, this factor will almost always exist, and that the effect of the *Ricklefs* ruling is to make the damages for breach of warranty of good title measurable virtually always as of the date of dispossession, actual or constructive.[85]

This means, of course, that a special rule (or exception) has been carved out of the statutory measure of damages set forth in section 2-714, for it is a subterfuge to assert that each case must be decided on its own "special circumstances," when all, or almost all, breach of warranty of good title cases will involve a finding of special circumstances. It is proposed that recognition be given to this fact, either judicially by unequivocal language, or legislatively by amendment to the Code. It should be recognized, however, that the effect of this special rule is to aid the seller in all but the rarest case by limiting substantially his strict liability.[86] To the extent that the special

83. This is puzzling, because the scenario in *Ricklefs* is not terribly more complicated than in any stolen chattel case. There was a sale from a retailer to a buyer and the car was stolen and reached another car dealer who sold to defendant who in turn sold to plaintiff. Thus, counting the original sale and the theft as independent transactions, there were at most five transfers.

84. Two states, Kansas and Missouri, were involved. Again, one questions how "special" this circumstance is.

85. The author uses the weasel words "almost" and "virtually" in the text largely because it is quite clearly possible to formulate hypothetical situations where the special circumsances would not be found to exist. For example, a buyer who suspects the defect of title in an appreciating asset case might be held to have had such notice as to be estopped from claiming special circumstances. Or, since in the depreciating asset case, the finding of special circumstances will generally aid the seller, it is conceivable that suspicion on his part of the defect would preclude his assertion of special circumstances.

86. Such a limitation on the seller's strict liability seems to be contrary to the general trend in this area of the law. *See* G. GILMORE, THE DEATH OF CONTRACT (1974), where the author states as follows:

circumstances language was drafted into section 2-714 to allow flexibility and balancing, the effect of the special rule is to undercut that intent. Unless the policy of the section is now to be construed as entirely pro-seller, some corresponding advantage ought to be afforded the buyer. It is true that under the *Ricklefs* rule, if the buyer makes improvements or repairs, he will recover his depreciated costs; and of course, he has had the use of the chattel since the sale. Nevertheless, the scale seems to be tilted in the "strictly liable" seller's favor. To afford the buyer some equality of position, it does not seem unfair to allow the statute of limitations in this situation to run only from the date of dispossession. Although to do so may overtly resurrect the warranty of quiet possession, the effect of finding special circumstances in all warranty of good title cases is covertly to do the same. To allow the statute of limitations to run from the date of dispossession also brings into the picture the legitimate consideration of the balancing of the parties' rights.[87]

b. *Set Off of the Value of Buyer's Use*

The *Ricklefs* court dealt with the question of whether the seller should be entitled to set off the value of the buyer's use of the chattel during the period between purchase and dispossession by stating that the value of the use of the chattel was "counterbalanced by any depreciation in the value of the automobile" during such time.[88] Having chosen the date of dispossession as the time for measuring damages, it would have been difficult to arrive at any other result without overcompensating the seller. But if the equation of the court is even approximately correct, the effect is to award the plaintiff the value of the automobile as of the time of acceptance (or standard damages) minus a set off for the use of the automobile. In other words, the coincidence of these two values (depreciation and use), whether actual or perceived, may be the final special circumstance. But to the

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> The term "strict liability" has often been used to describe what has been going on in the cases as well as in § 402A [of the Restatement of Torts (Second)]. That is, no doubt, an exaggeration since liability is imposed on a "seller" only where his product is "defective" when sold and the defect makes it "unreasonably dangerous" to use. It has indeed been argued that the courts, by manipulating "defective" and "unreasonably dangerous," could quite as effectively restrict liability as ever they did in the heyday of *caveat emptor*. So they could, but it is entirely clear that, for the past ten or fifteen years, they have been manipulating the new catchwords in such a way as considerably to increase the liability of manufacturers and other commercial sellers to the users of their products. It should be noted that § 402A, by cutting the liability loose from its previously secure base in contract, at one stroke abolishes the "no privity of contract" defense, makes disclaimers of warranty ineffective and gets rid of the previously universal requirement of timely notice to the seller of the claimed "breach of warranty."

Id. at 93-94.

87. The author is not sure that balancing is appropriate here, because the liability is supposedly without fault. But clearly, if balancing is to be done, something favoring the buyer should offset the special rule in favor of the seller, keeping in mind that it is the buyer, not the seller, who has been harmed.

88. 216 Kan. at 135, 531 P.2d at 101.

extent that the true owner is entitled to recover the value of a converted chattel at the time of conversion or the chattel itself, at his option,[89] the buyer, and not the breaching seller, bears the bulk of the loss. It is submitted that the bearing of such loss by the seller is contrary to the Code scheme and to common sense; for that reason alone, in the depreciating asset situation the date of dispossession formula should not be used. The proper time for measuring damages is the date of acceptance. By the same reasoning, use value should not be considered at all.

c. *The Running of the Statute of Limitations*

As was mentioned earlier, if a finding of special circumstances is going to lead in most cases to the utilization of the time of dispossession as the time for measuring damages, an advantage for the seller, a sense of equity demands that the buyer be given a counterbalancing advantage; the statute of limitations should not begin to run until the time of dispossession.

Although the question of the statute of limitations was not discussed in *Ricklefs*, there are some implications that the court would, if faced with the question, opt for one of two alternatives: first, the statute would run strictly according to Code terms;[90] or second, the statute would begin to run with the discovery of the defect in title. As indicated earlier,[91] it is believed that the latter alternative is the bet ter one, although the former is clearly easier to implement. The rather literal reading given the Code by the *Ricklefs* court would point to the choice of strict construction. There are, however, some indications to the contrary. First, the court recognized the buyer's right to admit into evidence the value of repairs and improvements to show the value of the automobile as of the date of dispossession. Second, the court refused to accept the seller's contention that dispossession occurred only after a replevin judgment was rendered against the buyer, choosing a date some eighteen months earlier, substantially aiding the buyer. But perhaps the strongest suggestion of the *Ricklefs* court's willingness to apply the more pro-buyer statute of limitations rule is its discussion of the language of the comment to section 2-312, dealing with the warranty of quiet possession.[92] Taking the comment to indicate that disturbance of quiet possession is one means of demonstrat-

89. N.D. CENT. CODE § 32-03-23 (1976) provides that the damages recoverable in a conversion action are presumed to be "[t]he value of the property at the time of the conversion, with the interest from that time; . . . ." The true owner may collect conversion damages or he may recover the chattel pursuant to North Dakota's claim and delivery statute, N.D. CENT. CODE ch. 32-07 (1976), but he may not do both. Recovery of the chattel and collection of money damages are alternative remedies. *See* DOBBS, REMEDIES 14 (1973).

90. *See supra* notes 66-67, and text accompanying.

91. *Supra* notes 66-72, and text accompanying.

92. 216 Kan. at 133, 531 P.2d at 99-100.

ing the fact of breach, the court concludes that the notice to the buyer of the car's history was such disturbance. This enables the court to assign the earlier period as the true date of dispossession, and could be taken as a sign that the court would accept a contention that the breach of warranty occurred only as of that time. Because the court used cautious language, however, this precise point will have to await future determination.[93]

2. *The New York Cases*

a. *John St. Auto Wrecking v. Motors Insurance Corp.*[94]

The first of the New York cases, *John St. Auto Wrecking v. Motors Insurance Corp.*, was addressed primarily to the issue of whether an insurance company which sold a car it had acquired after paying out a claim on it was included within section 2-312(2).[95] The court also considered both the time of breach and the measure of damages. Using extremely loose language the court ruled first that "[a]s to the time a warranty of title is breached, . . . a cause of action arises when the buyer is disturbed in his possession."[96] Somewhat inconsistently,[97] the court, with little discussion, went on to rule that the proper measure of damages is purchase price plus expenses incurred in making the car saleable.

b. *Itoh v. Kimi Sales, Ltd.*[98]

Standing in isolation, *John St. Auto Wrecking* is an unremarkable case, particularly when one considers that the final recovery was only $339. But the case does not stand in isolation. Almost a full year later, *Menzel v. List*[99] was decided by the New York Court of Appeals. There is no mention in the *Menzel* decision of the *John St.*

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93. The court's language is cautious in that it parallels the comments, the court stating that the imparted information "establishes a breach of warranty of title," *Id.* at 134, 531 P.2d at 100, rather than stating that the information "constituted" the breach of warranty. It is, of course, possible that the "established" language was used purposefully to avoid the possibility of the interpretation which is being promoted. It is equally possible that it was used to keep available that interpretation.

94. 56 Misc. 2d 232, 288 N.Y.S.2d 281 (1968).

95. That is, whether such a sale was made without warranty based on circumstances which would put a buyer on notice that the seller sold limited title. *See supra* notes 24-31, and text accompanying.

96. 56 Misc. 2d at ——, 288 N.Y.S.2d at 284 (1968). Because the sentence following the quotation suggests only that the dispossession "established" a breach, it is unclear whether the court meant to say that the breach actually occurred at dispossession. Hence, the indictment for loose language. The difference, of course, determines when the statute of limitations will run. *See supra* note 87, and text accompanying.

97. If the court intended to state the time the cause of action accrues, it seems a bit odd to relate back the damages to a time when there had been no breach. On the other hand, it may be that the court tacitly realized the effect of measuring damages based upon date of dispossession with a depreciating asset, and rather than thoroughly analyze the situation, chose to do rough justice. Note that the effect of the decision comes remarkably close to the tolling theory propounded earlier. *See supra* notes 68-72, and text accompanying.

98. 74 Misc. 2d 402, 345 N.Y.S.2d 416 (1973).

99. 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

Auto Wrecking case. Four years after *Menzel, Itoh v. Kimi Sales, Ltd.* was decided, declaring that *Menzel* resolved the question of whether damages were measured by purchase price or by dispossession value. That declaration notwithstanding, one should look rather closely at all three cases to determine the finality of *Menzel* on the issue.

Itoh is a typical breach of warranty of title case, once again dealing with an automobile purchased from the defendant by the plaintiff. Two years after the purchase the car was discovered to have been stolen. Plaintiff sued the seller, seeking the purchase price plus the value of improvements, and the rental cost of a substitute automobile when plaintiff's stolen car was confiscated by the police. Plaintiff sought punitive damages as well. Defendant, who purchased the car at an auction, sued the auctioneer as third party defendant. The court synopsized the New York cases which allowed or disallowed purchase price as the proper measure of damages, and concluded that *Menzel* resolved the question in favor of disallowance. As to the difficulty of the depreciating asset case, which, it will be recalled, the *Menzel* court did not face, the court stated as follows:

> That the value of a stolen item may have depreciated in value—as may be the case with automobiles generally . . . —would not require a different measure of damages. The object is to reflect what the buyer has "actually lost" and . . . award . . . to him only the loss which has directly and naturally resulted, in the ordinary course of events, from the seller's breach of warranty.[100]

Thus, the damages, even in the depreciating asset case, will be measured as of the date of dispossession. But the court's conclusory answer, without an examination of what the buyer "actually lost," is unsatisfactory. The buyer may actually have lost far more than the mere value of the chattel at the date of dispossession. He may have lost the chattel itself, which may not be replaceable at its "value;"[101] he may have lost higher conversion damages;[102] he may even have lost more intangible things such as his good standing and reputation.[103]

One cannot but question the *Itoh* court's glib assertion that *Menzel* laid to rest the proper time for measuring damages, particularly in the depreciating asset situation, the situation most often con-

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100. 74 Misc. 2d at ——, 345 N.Y.S.2d at 419, *quoting,* Menzel v. List, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

101. *See infra.* note 140, and text accompanying.

102. *See infra.* note 136, and text accompanying.

103. As to these other items of damages, the court indicates that they may be recoverable as incidental and consequential damages. 74 Misc. 2d at ——, 345 N.Y.S.2d at 420. This might even include punitive damages, says the court. *But see infra.* notes 110-121, and text accompanying, for the discussion of Schneidt v. Absey Motors, Inc., 248 N.W.2d 792 (N.D. 1976).

fronted by the courts. Too many circumstances point in the opposite direction, leading to a determination that the question was left open by the New York Court of Appeals in *Menzel*. It first must be reiterated that the *Menzel* court did not have before it a depreciating asset case, and, as has been shown, date of dispossession *is* the proper time for measuring damages in an appreciating chattel case. Second, *Menzel* was not decided under the Code, but under the Uniform Sales Act, which would clearly have pointed more authoritatively to the date of dispossession for measuring damages. Third, although the *Menzel* court had before it *John St. Auto Wrecking*, it did not cite the case[104] or indicate that it was repudiated. In fact, there is an indication that the court appreciated fully the irrelevance of the depreciating asset model in an appreciating asset case.[105] Finally, and perhaps most compelling, is the fact that in *Menzel* an award of the purchase price would have worked to the detriment of the plaintiff, a result the court refused to sanction.[106] Implicit in that refusal is the thought that were an award of date of dispossession damages to cause detriment to the plaintiff, date of dispossession would not be the proper time for measuring damages. Thus, it is at least plausible that the *Itoh* court and others seriously misread the *Menzel* opinion.[107] Further evidence of such misreading is

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104. There are, of course, at least three possible reasons for this. First, the court may have felt that the case law was so indecisive that prolonged discussion of it was not warranted, when the final decision in *Menzel* would chart a brand new course. This rationale would be consistent with the treatment of this issue as one of first impression. *See* 24 N.Y.2d at 96, 246 N.E.2d at 744, 298 N.Y.S.2d at 982. Second, the court may have been unaware of *John St. Auto Wrecking*: this is unlikely, given the repute of the New York Court of Appeals and the accessibility of the decision. Third, the court may have thought *John St. Auto Wrecking* irrelevant, because it, unlike the controversy before it, dealt with a depreciating asset. Given the infrequency of an appreciating asset case, this too would square with the treatment of the case as one of first impression.

105. A depreciating asset situation is mentioned in Menzel v. List which lends credence to the theory that the court recognized the substantial distinction between the depreciating and appreciating asset case. The depreciating asset situation is mentioned in connection with the discussion of why, in *Menzel*, purchase price plus interest was not found by the lower court to be the proper measure of damages. "In Armstrong v. Percy, 5 Wend. 535, *supra*, the buyer recovered the purchase price *but only because the chattel, a horse, was found to have depreciated in value below the price paid.*" 24 N.Y.2d at 95, 246 N.E.2d at 744, 298 N.Y.S.2d at 981 (emphasis added).

The court stated further as follows: "The parties have cited no New York case which squarely meets the issue. . . ." *Id.* Although "the issue" is initially framed in terms of the very broad measure of damages question, the foregoing would amply support the notion that the more narrow question of measure of damages in an appreciating asset case was in fact being addressed.

106. If *List* recovers *only* the purchase price plus interest, the effect is to *put* him in the same position he would have occupied *if the sale had never been made.* Manifestly, an injured buyer is not compensated when he recovers only so much as placed him in status *quo ante* since such a recovery implicitly denies that he had suffered any damages.

Id. at 97, 246 N.E.2d at 745, 298 N.Y.S.2d at 983.

107. This may be further buttressed by the cases cited by the *Menzel* court to support the proposition that a plaintiff is entitled to the benefit of his bargain, even though the purchase price does not reflect that bargain. For example, in Spillane v. Corey, 323 Mass. 673, 84 N.E.2d 5 (1949), cited in *Menzel* with approval, the court awarded the value of a sewing machine ($179) for which the plaintiff had paid $60. Because the plaintiff got a good bargain, the factual setting more closely resembles the appreciating asset case than the depreciating asset case. And in Pillgrene v. James J. Paulman, Inc., 45 Del. 225, 71 A.2d 59 (1950), the only other case cited by the *Menzel* court, the subject, an automobile,

the fact that another New York court, of equal authority to the *Itoh* court, decided a warranty of title case a year after *Menzel* and applied a different measure of damages than did *Menzel*.

c. *Spillane v. Liberty Mutual Insurance Co.*[108]

Spillane v. Liberty Mutual Insurance Co. dealt with an automobile sold by defendant to plaintiff for $575, which was then impoved by plaintiff at a cost of $3,017.19. Without discussing *Menzel* or the value of the automobile at the date of dispossession, the court awarded plaintiff $3,592.19, presumably the purchase price plus consequential damages.[109] Although one can only assume the depreciating nature of the automobile, it seems apparent that the *Spillane* court, if it was aware of *Menzel*, was more concerned with that case's direction to properly compensate a harmed plaintiff than with the application of a rule which would leave the plaintiff less than whole. To that extent, it may be urged that the *Spillane* court did not read *Menzel* to have set out the measure of damages in all warranty of title cases. Apparently, the question of when damages are to be measured is not so clearly settled as the *Itoh* court would have liked to believe.

While the question of the time for measuring damages has thus apparently been left unanswered by the New York Court of Appeals, other state courts of last resort, including the Supreme Court of North Dakota, appear to have followed the lead of *Itoh*, wrongly applying *Menzel* to a depreciating asset situation.

3. *Schneidt v. Absey Motors, Inc.*[110]

In *Schneidt v. Absey Motors, Inc.*, the North Dakota Supreme Court dealt with the question of determining damages for breach of warranty of good title. As in most warranty of good title cases, the chattel involved was an automobile. The automobile was stolen in 1971 from Hertz. It passed through the hands of a Florida man, to third party defendant, to defendant, which consigned it to an auctioneer, who sold it to plaintiff. Plaintiff thereafter resold it. When Hertz discovered the car in the hands of plaintiff's buyer, the buyer returned it to plaintiff, who was compelled by court order to turn the automobile over to Hertz, the true owner. Thereafter, suit was brought by plaintiff, and, although liability was clear,[111] a trial was had on the measure of damages. The lower court awarded purchase price

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had appreciated in value because of "unusual economic conditions." *Id.* It thus appears that *Menzel* was in fact directing itself only to the appreciating asset situation.

108. 65 Misc. 2d 290, 317 N.Y.S.2d 203 (1970).

109. Because there was no discussion, it is, of course, possible that the car was found to have a value of the judgment amount, so that in fact *Menzel* was followed. But the *Itoh* court views the case as including purchase price as a proper damage item.

110. 248 N.W.2d 792 (N.D. 1976).

111. Summary judgment was granted to plaintiff in the main action, and to defendant in the third party action. *Id.* at 794.

($2,110), attorney's fees in the title defense action ($336), the wholesale value of repairs and improvements ($583.26), rental value of an automobile furnished by plaintiff to his buyer after Hertz discovered its stolen car ($615), subject to an unexplained set off of $300, for a total of $3,344.26, plus costs and disbursements. The supreme court reversed, holding that there had been error in the calculation of damages.[112]

The supreme court appeared at first to recognize the importance of properly compensating, but not overcompensating, an injured party. But after having stated that principle, the court cited *Itoh v. Kimi Sales, Ltd.*,[113] to the effect that the *Menzel v. List*[114] measure of damages, determination from the time of dispossession, ought to be applied even in the depreciating asset situation. The court failed to scrutinize carefully enough the ramifications of such a decision, particularly in the case where the true owner, instead of receiving back the chattel, opts to recover his conversion damages.[115] Indeed, it appears that the court assumed, *sub silentio*, that because of the short time period between time of acceptance and time of dispossession involved here,[116] plaintiff's losses due to depreciation would be quite small. As in *Ricklefs*, the resulting inequity to plaintiff, if it exists at all, seems small.

The rule enunciated by the court in *Schneidt* is that damages in warranty of title cases are to be determined as of the date of dispossession.[117] As has been noted previously in this article,[118] the application of the *Menzel* rule of damages, determination as of the date of dispossession, by the *Itoh* court to a depreciating asset was at best questionable, and at worst an appropriation of precedent in a manner likely to cause serious harm to an injured plaintiff. The agreement by the North Dakota court with the rule set out in *Itoh*, without examining fully the possibilities created thereby, is somewhat distressing. In the context of the fact situation in *Schneidt*, the decision of the court does not seem very harmful, because the plaintiff was compelled to return the automobile rather than pay conversion damages. Hopefully, if and when the conversion damage case comes before the court, it will not adhere too closely to the rule set out in *Schneidt*.[118a]

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112. A subsidiary point, which will not be discussed here, had to do with avoidable consequences, and whether or not plaintiff had acted not to increase defendant's damages by failing to settle Hertz's claim for $1,000. *Id.* at 796.
113. 74 Misc. 2d 402, 345 N.Y.S.2d 416 (1973).
114. 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).
115. *See supra* note 89.
116. From April 1973 to November 1973.
117. 248 N.W.2d at 800.
118. *See supra* notes 104-107, and text accompanying.
118a. This is particularly true in North Dakota, where the plaintiff in a conversion action can opt for the highest value of the chattel, even beyond the date of conversion. *See infra*, note 136.

In addition to adopting the date of dispossession as the time for measuring damages, the court excluded from the damages the plaintiff's repair claim, except as the repairs might bear on the value as of the date of dispossession.[119] One again must question the exclusion of these as incidental or consequential damages. Assuming they are excludable, the question arises whether their value is to be measured as of the time that the plaintiff sold the automobile, or as of the time that he was compelled to turn it over to the true owner. The court indicates that the latter time is operative, suggesting that plaintiff, who is least able to bear the loss, nevertheless do so.[120] The effect of this, of course, is to make the plaintiff liable to the true owner for a higher value than he is going to be able to recover from the defendant.

It is easy to understand why the court chose to allow only the discounted value of repairs and improvements (i.e., the depreciated value reflected by value as of date of dispossession rather than as of date of repair). In theory, the plaintiff was compensated for the repairs both in the lower price he paid for the car from his seller, and in the higher price he received from his buyer. As the court assumes, the repair work done did not reflect in any measure upon the utility of the car; the claim is in breach of warranty of title, not merchantability. Nevertheless, to assert from this that the repair costs should not be recovered directly because they "did not flow from the breach of warranty of title,"[121] is to ignore two critical factors: first, but for the breach of warranty of title, the plaintiff would not have been deprived of the value of repairs, other than by depreciation alone; and second, the denial of such damages denies the possibility of an expectation on the part of the plaintiff and his seller that such repairs would, in the ordinary course, be made. This appears to be placing the heavier burden on plaintiff, when it probably ought to rest on defendant. Such a distinction makes little sense, if one considers that regardless of the position of the parties, the party closest to the converter ought to bear the loss.

In *Ricklefs v. Clemens*[122] and *Schneidt v. Absey Motors, Inc.*,[123] the courts justified the date of dispossession measure of damages partially on the ground that not too great an inequity would be done to plaintiff because of the unique facts present. It is submitted that the precedents of these cases will present great problems for the re-

119. 248 N.W.2d at 799.
120. The court stated as follows:
> It is immaterial whether he used the car personally or sold it to a third party, as he did buy the car back from Bentley before it was returned to Hertz. The repairs made to the car affected its value at the time Schneidt lost its use, which is the correct measure of damages.

Id.
121. *Id.*
122. 216 Kan. 128, 531 P.2d 94 (1975).
123. 248 N.W.2d 792 (N.D. 1976).

spective courts in future cases where the facts are not so favorable. The choices will be as follows: first, the court may follow its earlier precedent and use the date of dispossession as the time for measuring damages, working a great inequity while subverting the language of the statute; or second, the court may overrule itself and use the date of acceptance as the time for measuring damages, hardly a course of action which enhances the court's credibility. In any event, the court will be haunted by its past rulings.

The North Dakota court in *Schneidt* has embarked upon a course in warranty of title law not altogether satisfactory. In view of the paucity of cases in the area, however, and the fact that other courts have decided similar cases in a similar fashion, such a course is understandable. It is hoped that in future warranty of title litigation the court will be more precise in its formulation of rules and more sensitive to the policy questions surrounding warranty of title problems.

IV. VOUCHING IN

Section 2-607(5)(a) provides a procedure by which circuitous litigation may be avoided in breach of warranty cases.[124] The "vouching in" procedure of section 2-607(5)(a)[125] is used most often in the following situation: retailer *B* sells a defective product to buyer *C*; when *C* discovers the defect, he brings an action against *B* for breach of an implied or express warranty of quality. *B* could, after judgment is entered against him, bring an action against his seller, manufacturer *A*, or he could utilize the vouching in procedure of section 2-607(5)(a) and have *A*'s liability determined in the same action. The procedure of section 2-607(5)(a) is as follows:

> Where the buyer is sued for breach of warranty or other obligation for which his seller is answerable over
>
> (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

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124. *See* Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969). Although this case did not involve section 2-607(5)(a), the court stated that when a retailer is sued for damages caused by a defective product, "it would seem to make sense procedurally to have the plaintiff's cause of action whenever possible adjudicated in one action against manufacturer and retailer. If the plaintiff sues the dealer alone, the dealer in his own interest should implead the manufacturer and thus avoid circuity of action." 54 N.J. at ——, 258 A.2d at 705. The advantages to settling all aspects of a case in one action are obvious; there will be savings in costs and time, both to the courts and the parties.

125. N.D. CENT. CODE § 41-02-70(5)(a) (1968).

The vouching in procedure of section 2-607 has not yet been used in a warranty of title case, but there is no reason to believe that it is not applicable when there is a breach of a warranty of title.[126] The vouching in procedure could be used in the following situation, the situation most often present in warranty of title cases: buyer *B* purchases an automobile from seller *A*, who does not have title to the automobile; true owner *C* discovers the automobile in *B*'s possession and sues for conversion. *B* will lose, because innocence or good faith is no defense in an action for conversion.[127] *B* could now bring an action against *A* for breach of warranty of good title. Or he could use the vouching in procedure of section 2-607(5)(a), and have *A*'s liability determined in the original conversion action.

Vouching in in the situation outlined above would not only avoid circuitous litigation; it would also avoid the potentially improper loss allocation that is placed upon the buyer when the court uses the date of dispossession as the time for determining damages in a warranty of title action. For example, in the *Ricklefs* case, the true owner, under a conversion theory, would be able to collect $3,295, the value of the automobile at the date of the conversion,[128] from the buyer. The buyer, in a breach of warranty of title action, is able to collect $1,750,[129] the value of the automobile as of the date of

126. There might be an objection to vouching in because the original action is not one for breach of warranty, but for conversion. The language of section 2-607(5)(a), however, states that "[w]here the buyer is sued for breach of warranty *or other obligation*" (emphasis added), the vouching in procedure may be utilized. An action for conversion is clearly such an "other obligation." *See* Dodge Trucks, Inc. v. Wilson, 140 Ga. App. 743, 231 S.E.2d 818 (1976), where a buyer being sued in a personal injury action attempted to vouch in his seller; Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969), where the court recommended the vouching in procedure in a products liability (tort) case.

Historically, the vouching in procedure developed in connection with the warranty of title to chattels. It was used in the following situation at common law: *A*, the true owner of goods, brings an action against *C*, who is in possession of the goods, to collect damages for their conversion or to replevy the goods. *C* would vouch to the court that he had received the goods from *B*, who had made representations to *C*, that he, *B*, was the true owner of the goods. *C*, by doing this, would bring *B* into court and make him defend the action. If it was determined that *A* owned the goods, *B* was held liable and *C* was held harmless. Squillante, *Section* 2-607: *Problems Relating to "Vouching In" Under the UCC*, 1 OHIO NOR. U.L. REV. 48, 50-51 (1973).

In the situation posited above, *C*, the innocent converter, uses the vouching in procedure to protect himself from liability in an action in conversion against him. Originally, the only warranty actions in which vouching in was permitted were warranty of title actions. *Id.* at 51. Eventually the procedure was extended to warranty of quality actions. *See* London Guar. & Accident Co. v. Strait Scale Co., 322 Mo. 502, 15 S.W.2d 766 (1929).

Today, when we think of vouching in, we think of the procedure of section 2-607(5)(a). Many of the cases decided under this section involve a breach of warranty action against the party who vouches in a third party. *See, e.g.*, Bendix-Westinghouse Automotive Air Brake Co. v. Swan Rubber Co., 55 Cal. App. 3d 256, 127 Cal. Rptr. 571 (1976); Schroeder v. Fageol Motors, Inc., 12 Wash. App. 161, 528 P.2d 992 (1974). It must be remembered, however, that the common law origins of vouching in involved not warranty actions, but actions for conversion or replevin. Thus, vouching in when the original action is for conversion is not only not precluded by section 2-607(5)(a), but it is in accord with its historical origins.

127. Hovland v. Farmers Union Elev. Co., 67 N.D. 71, 269 N.W. 842, 843 (1936).

128. This value is based on the price paid by the true owner for the automobile, and would not necessarily be the amount recovered. In *Ricklefs*, the true owner had been compensated by its insurer, and the insurer pressed the claim against the buyer, seeking the automobile or the money it had paid; it received the automobile.

129. If one assumes no repairs or improvements, this would be between 25% and 35%

dispossession. This leaves $1,545 unaccounted for, and unless there is some way to shift the loss, the buyer ends up bearing it totally. Although other means are available,[130] the easiest way of resolving the whole dispute is to allow the buyer, in the action for conversion, to vouch in the seller under the "other obligation" language of section 2-607(5)(a). By doing so, the seller is made to answer for the injury he caused by his act of selling, and, at least in theory, the act of conversion can be traced back to the original converter. Failure to allow some form of vouching in or other recourse leaves the totally innocent, and wronged, buyer to bear a loss which in fairness he should not bear.

The desire to render justice to all the parties, however, creates substantial difficulty with the vouching in technique. There are two reasons for this, both of which can be illustrated by *Ricklefs*, but with equal applicability in *Schneidt*. First, except under the best of circumstances, the value of the chattel at the time of conversion and its value at the time of acceptance[131] will undoubtedly be different, or at least appear to be different because of price differences.[132] Unless the values at the time of conversion and the time of acceptance were the same the buyer will be left uncompensated for some of the loss which has now been shifted to the seller. For example, in *Ricklefs* the automobile was converted in January 1971, when it was stolen. Its value at that time, measured by the purchase price, was $3,295. The car was purchased by the buyer-plaintiff in March 1971, for $3,900; again, ostensibly its value.

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of the original price of the automobile. Assuming an original 1968 purchase price of $5,000 and about average depreciation, by December 1971, the value of the car would be between $1,250 and $1,750.

The Federal Highway Administration has estimated the following depreciation figures for automobiles:

Average Used Car Depreciation Rate

Age of Car (Model Years)	Value of Car (% of Orig. Price)
1	70%
2	50%
3	35%
4	25%
5	18%
6	13%
7	10%

FEDERAL HIGHWAY ADMINISTRATION, COST OF OWNING AND OPERATING AN AUTOMOBILE 1976.

130. The innocent converter could also recover from his seller the value of judgment against him by utilizing the common law rules of indemnity, *see* RESTATEMENT OF JUDGMENTS § 107 (1942), or the impleader provisions of the North Dakota Rules of Civil Procedure, N.D.R. CIV. PRO. 14(a), which are identical to the Federal Rules of Civil Procedure.

131. Whether one uses date of acceptance or date of dispossession is irrelevant if one accepts the availability of a voucher, since liability will be measured by what the buyer is found to owe the true owner.

132. Many courts have stated that value and price are not synonymous, and that value, rather than price, controls. *See* 11 WILLISTON ON CONTRACTS § 1395A n.1 (3rd ed. 1964). Price, however, to the extent that it is strong evidence of value in a market economy, will be utilized in determining value. *See* 11 WILLISTON ON CONTRACTS, § 1391 (3rd ed. 1964).

Ignoring for the moment the possibility of a bad bargain on the part of the buyer, it becomes apparent that allowing the buyer to vouch in the seller on the conversion claim still does not make him whole. Based on these figures, if the buyer is sued in conversion and vouches in his seller, the seller's maximum liability is limited to $3,295 (or the true value of the car on the date of conversion). The buyer, on the other hand, is out-of-pocket $3,900, a difference of $605. Unless it can be established that one or both of the parties did not in fact pay the true value of the chattel, or that the value was subject to a range, the buyer who vouches in a seller, where the price paid for the chattel is more than its value on the date of conversion, is subject to absorb any loss reflected by these two different figures. This will be true regardless of whether the date of acceptance or the date of dispossession is deemed determinative, as long as factors such as use value and set off are not taken into account; that is, as long as what is being reflected is the out-of-pocket damages of the buyer. If the value as of the date of conversion is lower than the value as of the date of the buyer's acquisition, and the conversion damages are based on the date of conversion, the buyer cannot be made whole by the method of vouching in alone. The seller's liability will be frozen as of the date of conversion; the buyer's out-of-pocket loss will be determined as of the date of purchase.

Of course, one may not desire to aid the buyer in this situation, but leave him where he finds himself. After all, there is at least the possibility, and with an ordinary chattel, the probability, that the appreciation is merely reflective of the buyer's poor bargain or the true owner's good bargain. But if one desires to shift this out-of-pocket loss to the seller, there are a variety of means available.[133] A court could shift it partially, as by noting the amount of the loss ($605 in *Ricklefs*) and arbitrarily dividing it between the buyer and the seller.[134] Or it could be shifted totally, by allowing the buyer to vouch in the seller in the conversion action *and* collect his breach of warranty damages, to the extent that they exceed the conversion liability. This seems more appropriate, since it disallows entirely the seller's windfall, and forces him to return at least the purchase price.[135]

It may also be possible to avoid the question entirely, for it arises only when the true owner is entitled to recover an amount less than the buyer spent for the chattel; that is, when the conversion damages are frozen as of the date of conversion and the chattel has appreci-

133. The least satisfying is the use of a legal fiction to lower the out-of-pocket loss; for example, allowing the seller a set-off for use of the buyer.

134. Here, fault or lack of it, time of possession and other variables could enter into the consideration, or the court could "equitably" divide by two.

135. Of course, this is subject to the criticism that it denies effect to the date of dispossession as the proper measuring date, since it gives the buyer his out-of-pocket expenses (i.e., his purchase price).

ated in value. Through the use of a helpful statute, this is or can be avoided in North Dakota, so that the seller, if he can be vouched in, can be forced to pay the highest value of the chattel after the date of conversion.[136] Because the buyer can vouch in the seller, and the seller will therefore be responsible to the true owner for the total amount recovered, any windfall occasioned by appreciation goes to the true owner, not the seller. Only the true owner can claim the higher measure of damages (i.e., the buyer cannot assert the true owner's right), so the buyer's fate rests in the hands of the true owner. Of course, the result of this is to place the totality of the loss on the seller, who may be as blameless as his buyer. The seller, then, ought still to be allowed to show that his buyer made a bad bargain, and that the asset did not in reality appreciate in value.

Lest the impression be given that the vouching in tool is merely a convenient way of saddling the seller with greater liability, the depreciating asset situation ought to be treated. If the asset has depreciated in value or appears to have depreciated, the seller's liability under section 2-607 will be limited to the value as of the date of the conversion.[137] If, as in *Ricklefs* and *Schneidt*, the transactions occur within a short time period, this liability should closely resemble the purchase price received from the buyer. Any difference would be small, and again, apportionment is available.

The second major difficulty with the use of vouching in occurs when the true owner receives possession of the chattel, rather than or in addition to a damage award. In that situation, of course, the buyer will still be interested in recovering something from his seller. The question is, what can be recovered? Since the true owner regains possession of the chattel, the first problem is placing a value on it. If possession alone is awarded a court might justifiably grant the buyer date of dispossession value damages under simple breach of warranty provisions, and obviate the need to vouch in the seller at all. That is, the buyer loses a chattel worth *X* dollars at the time of the loss, and the seller simply pays the buyer that amount. This, of course, has all the disadvantages and uncompensated losses inherent in using the date of dispossession as the measuring date initially. The court could

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136. N.D. CENT. CODE § 32-03-23 (1976), states the measure of damages for conversion as follows:

> The detriment caused by the wrongful conversion of property is presumed to be:
>
> 1. The value of the property at the time of the conversion, with the interest from that time; or
> 2. *When the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party;* and
> 3. A fair compensation for the time and money properly expended in pursuit of the property.

(emphasis added).

137. *Id.*

instead opt to measure damages based upon the date of conversion, even though the chattel itself has been returned. This would involve assigning a fixed value to the chattel, without regard either to what the buyer has lost, or to what the true owner has regained. A third, less probable measure, would be the highest value of the chattel, fictionalizing the transaction into one where the true owner could have demanded that amount,[138] but chose the chattel instead, thus indicating its higher value. This too may involve substantial unjust enrichment. A final possibility would be to require the seller to return the purchase price, with or without a set off for the buyer's use.

Whether the true owner can recover possession of the chattel, or merely its value, or possession and other damages, will be a matter largely dependent on the applicable law of the jurisdiction. Although the North Dakota conversion statute does not allow for an action for recovery of the personal property itself, another statute does provide for such recovery.[139] The claim and delivery statute, roughly equivalent to common law replevin, makes provision for recovery of a chattel and/or a damage award.[140] It is not altogether clear what damages are recoverable when the property is delivered to the true owner,[141] but they could plausibly include any loss in value from the time of the true owner's dispossession and his repossession. If such a recovery is allowed the true owner, vouching in would be the most satisfactory means of insulating the buyer from the imposition of such unjust liability. Absent the recovery of damages, however, vouching in does little to aid the buyer who is forced to surrender the chattel he purchased. And an award in the buyer's favor, based upon date of dispossession, does not fully protect him. Therefore, it is submitted that where the chattel is returned to the true owner, the buyer ought to have at his disposal both the vouching in procedure, to cover expenses and any additional assessed damages, and a procedure to be made whole for the damages incurred by virtue of the defective title. Although this may lead to multiplicity of litigation, and in fact may subject the seller to liability above what he received from the buyer, it is preferable to burdening the buyer with an undeserved loss.

V. CONCLUSION

In this part, a general outline of warranty of title law has been given. It has been shown that the Code scheme was meant to abolish the warranty of quiet possession. Yet, most courts that have applied

138. At least in North Dakota; *see supra* note 136.
139. N.D. CENT. CODE ch. 32-07 (1976).
140. N.D. CENT. CODE § 32-07-12 (1976).
141. *See, e.g.*, Tooz v. Tooz, 76 N.D. 732, 39 N.W.2d 257 (1949), where the court indicated that use value could be recovered in addition to repossession. Dictum indicates, however, that this is available only because the property generated income.

section 2-312 have treated the warranty of title as if it were the warranty of quiet possession and have not applied the correct measure of damages prescribed by the Code, determination as of the time of acceptance. This result has been reached by utilizing the "special circumstances" language of section 2-714, which is unfortunate.

The language of the Code sections on warranty of title and the comments thereto are clear. The time of acceptance is to be the time for measuring damages, absent *special* circumstances. If, however, every case dealing with breach of warranty of good title finds special circumstances and applies a measure of damages outside the statute, there really are no special circumstances. The exception will have swallowed up the rule, and the warranty of quiet possession will have been resurrected, contrary to the intentions of the drafters of the Code. Such a resurrection would not be so hard to understand or accept if equitable results were achieved thereby. But the end result is not equitable. The courts have subverted the language of the statute, something which should not be lightly done, to achieve a result harmful to those they should be protecting, innocent buyers of goods with defective title.

Some of the problems raised by this part of this article, such as vouching in and the running of the statute of limitations, have yet to be considered in the context of warranty of title litigation. Other issues have been dealt with judicially, albeit in a not altogether satisfactory manner. Although the courts do not often confront warranty of title problems, when they do, it is essential for them to consider carefully the effects of their pronouncements. Because of the deceptively simple formulae set out by the Code, many courts have failed to do this. It is hoped that in the future, courts confronted with warranty of title disputes will examine both the statute and the policy underlying it, and avoid decisions they will later regret.