A DISCUSSION OF THE LAW OF WARRANTY, IN THE SALE OF CHATTELS, WITH THE DECISIONS OF THE COURTS OF ILLINOIS.

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1. ANALYSIS OF SUBJECT.

1. Definition of Warranty.
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4. Discussion of implied warranty generally.
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6. Discussion of the law of Illinois as to implied warranty.
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11. BIBLIOGRAPHY.

The following text books and cases are used and cited in the preparation of this discussion:


Chanter v. Hopkins, 4 M. & W. 404: Stuckey v. Bailey, 3 P. & F. 1:
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Ferguson,1 Cheves(S.Car.)190:McGaughey V. Richardson,148 Mass.608: 
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beck,Doug1.655: Stewart V. Wilkins,Doug1.18: Fitzherbert,N.B.94c: 
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34 Wis.93:Polhemus V. Herman,45 Cal. 573:Murray V. Smith 4Daly,277: 
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31 Iowa 333:Hahn V. Dolittle,18 Wis.196: 13 Henry4,1b,pl.4: 11 Ed.
WARRANTY DEFINED.

"A warranty is an express or implied statement of something which a party undertakes shall be part of a contract and though part of the contract collateral to the express object of it." This definition given by Lord Abinger in Chanter V. Hopkins, 4 K.& W. 404, has been regarded by jurists as extremely satisfactory, being declared in the case of Stuckey V. Bailey, 3 F.& F. 1, to be the best definition yet given and being quoted with approval by Benjamin in his work on Sales.

It is with the consideration of the law in regard to the sale of chattels that the doctrine of warranty is most concerned. And it is in this connection that Justice Parker, in Fairbank Canning Co. V. Metzger, 118 N.Y. 260, quoting with approval the definition of Lord Abinger above given, said, "All contracts of sale with warranty, therefore must contain two independent stipulations. First, an agreement for the transfer of title and possession from the vendor to the vendee: Second, a further agreement that the subject of the sale has certain qualities and conditions."

And Shaw, Chief Justice, delivering the opinion of the Court in Dorr V. Fisher, 1 Cush. (Mass.) 273, says, "A warranty is a separate in-
dependent collateral stipulation on the part of the vendor, with the vendee for which the sale is the consideration, for the existence or or truth of some fact relating to the thing sold. It is not strictly a condition for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right the right of the purchase money in the vendor. And it is an incident only of consummated or completed sales, and has no place as a contract having present vitality and force in an executory agreement of sale. Osborn V. Gautz, 60 N.Y. 540.

And Black in his Law Dictionary, defines a warranty to be,

"A statement or representation contemporaneously with and as a part of the contract of sale, though collateral to the express object of it, having reference to the character, or the quality of or the title to, the goods or article sold, and by which he promises or undertakes that certain facts are or shall be as he represents them."

The law of warranty has undergone a long and gradual course of development, receiving the favor of the courts because of its consonance with justice and equity. For at the common law the vendor was not bound to answer for the quality of the article sold, except under especial circumstances as if he expressly warranted the goods, or made some fraudulent representation or some fraudulent concealment concerning the goods, such as amounted to a warranty at law. It required the purchaser to attend when he made his contract of purchase, to those qualities of the purchase which are supposed to be within the reach of his observation and judgment, to exert which for his own interests he was in law and duty bound. And if there was no express warranty by the seller or fraud on his part the buyer who
who examined the article for himself was compelled to abide by all losses arising from latent defects equally unknown to both parties. Seixas V. Woods, 2 Caines Rep. 48; Swett V. Colgate, 20 Johns. Rep. 196.

This was the doctrine of *caveat emptor*, in exact contradiction to the maxim of the civil law, *caveat venditor*.

Blackstone says, 2 Commentaries 451, "By the civil law an implied warranty was annexed to every sale in respect to the title of the vendor: and so too in our law the purchaser of goods may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose. But with regard to the goodness of the wares so purchased, the vendor is not bound to answer, unless he expressly warrants them to be sound and good, or unless he knows them to be otherwise and has used any art to disguise them, or unless they turn out to be different from what he represented them to the buyer."

In every sale at the common law, if the possession was at the time of sale in another and there was no covenant or warranty of title, the rule of *caveat emptor* applied and the party bought at his peril: (Fairfield, Ch. B. in Cro. Jac. 197; Holt, Ch. J. in Medina V. Stoughton, 1 Salk. 210) though Justice Buller was firmly of the opinion that if in such a case the vendor affirmed the title to be his, he should answer for the title— the vendee having in such case nothing else to rely upon if the vendor was out of possession. Paisley V. Freeman, 3 Term Rep. 57.

Again the terms 'warranty!' and 'representation' as used in the above definitions are not synonymous. A warranty is always a representation, express or implied by law, while the reverse is not necessarily true. Warranty is the more comprehensive term. Palmer V. Mt. Sterling Nation-
Aside from the distinction the courts make between these two terms in regard to insurance contracts, representations may be said to be statements which may be made prior or subsequent to the bargain as well as contemporaneous with its formation, while warranty in sales has to do with those statements only which are so made as to become part of the contract, which enter into the contract and become part of the *aggregatio mentium*. 2 Schouler's Personal Property, 231.

A warranty, as said above, is a collateral contract and not, generally, a condition. For a breach of a condition avoids the whole contract, or prevents it becoming executed, according as the condition is subsequent or precedent, while a breach of warranty properly is ground only for an action or counterclaim for damages. Dorr v. Fisher 1 Cush. 274: Opinion of Hogeboom J. in Randall v. Reed, 29 N.Y. 358. Yet there are cases in which a warranty has been regarded as a condition subsequent, the breach of which would authorize the vendee to treat the contract as at an end. Milliken v. Skilling (Me.) 36 Atl. Rep. 77: Dorr v. Fisher, supra, holding the right of the vendee to elect. Boardman v. Spooner, 13 Allen, (Mass.) 361: Byant v. Isburgh, 13 Gray, 617.

Again it has been regarded as a condition precedent to the existence of an obligation on the part of the vendee. Safety Fund National Bank v. Westlake, 21 Mo. App. 565. And in England the doctrine prevails that in a sale by description it is condition precedent that the article delivered shall answer the description. This view is sustained by Benjamin but is opposed by the weight of authority in the United States.

It is not necessary that in this collateral agreement the word 'warranty' be used. No particular phraseology is requisite to
constitute a warranty. It may be implied by law. It must however be a representation on which the vendee relies and not the expression of an opinion. Fairbank Canning Co. V. Metzger, 118 N.Y. 260. The vendee need not even have intended the representation to constitute a warranty. For if in writing, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares. Hawkins V. Pemberton, 51 N.Y. 198.

While the warranty need not of course be made at the conclusion of the bargain, it should be more than a mere statement by way of inducement to the purchase; it should enter into the treaty and constitute part of the basis of the sale. Schouler Per. Prop. sec. 321.

From the above discussion, we may on the whole, define a warranty in the sale of personal property to be an agreement, either by express representation on the part of the vendor, or by implication of law, part of that contract of sale in that the sale of the chattel forms the consideration for the warranty, yet collateral to the express object of it, having reference to the character, the quality, the fitness of the goods for the purpose for which they are wanted, or the title to the goods, and by which agreement the vendor promises that such alleged or implied facts are as he represents them to be.

II.

CONSIDERATION.

A warranty being a collateral contract or agreement, like other contracts is invalid unless supported by a consideration. Where a warranty is made at the time of the sale, the warranty is a part of the whole contract and the price paid for the chattel constitutes
the consideration for the warranty. Tiedeman on Sales, sec. 181: Curtis V. Moore, 15 Wis. 134. Generally the warranty should be made at the time of the sale, but if when the parties are first in treaty respecting the sale, the owner offers to warrant the article, the warranty will be binding, though the sale does not take place until some days afterward. Wilmot V. Hurd, 11 Wend. 584. But though a warranty made after the sale is invalid unless it has a new consideration to support it, and though the consideration already given is exhausted by the transfer of the property in the thing sold and there is nothing to support the subsequent warranty unless a new consideration is given, (Benj. on Sales: Da Lee V. Blackburn, 11 Kans. 190: Roscowa V. Thomas, 3 Q. B. 234: Bloss V. Kittridge, 5 Vt. 28: Burdit V. Burdit 2 A. K. Marsh 143: Towell V. Gatwood, 3 Ill. 22: Summer V. Vaugh, 35 Ind. 323: Hogins V. Plympton, 11 Pick. 97: Morehouse V. Constock, 42 Wis. 626.): still where a written guaranty of quality is given a day or two after the sale, in pursuance of an oral promise made at the time of the sale, the consideration of the contract of sale will extend to this written guaranty and support it. Vincent V. Leland, 100 Mass. 432: Collette V. Weid, 68 Wis. 428.

It may however be stated that under the rule that a consideration is conclusively presumed in the case of a contract under seal, a warranty under seal, though given after the sale, cannot be impeached for want of consideration. Wilson V. Ferguson, 1 Cheves (S. Car.) 180.

And in Massachusetts, it was held that if before the sale is completed a question arises between buyer and seller as to the warranty, and they agree as to a particular form of words, which are thereupon inserted in the bill of sale as part of the contract, the
warranty rests upon a good consideration and will bind the seller—otherwise if the seller after delivery and payment of the price, voluntarily and without being bound by the contract to do so inserts the warranty in the bill of sale. McGaughey v. Richardson, 148 Mass. 608. And in the same State it was held that if the seller of an article who has inserted a warranty of it in the bill of receipt, attempts, in an action against him on the warranty to give evidence of a prior bargain for the sale of the thing at the same price, without warranty for the purpose of showing that the warranty was without consideration, he will not be permitted to do so. Davis v. Ball, 60 Mass. 505.

In considering in detail the doctrine of warranty it is customary to examine it in the two branches into which it naturally divides itself—express warranty and implied warranty. It is not to be understood, however, that an express and an implied warranty may not exist in the same contract, if not relative to the same obligation, for they may, as when there is an express warranty of quality and an implied warranty of title, (Wells v. Spear, 1 McCord 421) yet when the warranty of quality is expressed, especially if in writing, an implied warranty as to quality is naturally excluded. De Witt v. Berry, 134 U.S. 306. There is no conflict between these authorities and those which hold that goods sold by a manufacturer in the absence of an express warranty, are impliedly warranted as merchantable or as suited to the known purpose of the buyer. Dushane v. Benedict, 120 U.S. 630.

Doctrine of Express and Implied Warranty Distinguished.

A warranty is express when it is created by the apt and explicit statement of the seller. It is implied when the law derives it from the nature of the transaction or the relative situation or

III.

EXPRESS WARRANTY.

Since the maxim, caveat emptor, ruled at common law, in but few of the earlier cases do we find the doctrine of warranty asserted or affirmed, and in those cases even, in which a warranty is adjudged, the question of deceit appears to have had great influence in the decision of the court. In the case of Chandelar v. Lopus, Cro Jac. 4, it was determined in the Exchequer by all the judges, save one, that for selling a stone, affirmed to be a bezoar stone when it was not one, no action lay unless the defendant knew the jewel was not a bezoar stone, or had warranted it to be one. By this last I take it that the court meant unless the defendant had expressly in terms warranted it to be a bezoar stone. And in the case of Parkinson v. Lee, 2 East 314, it was decided that a fair merchantable price did not raise an implied warranty: that if there be no warranty and the seller sells the thing such as he believes it to be, without fraud, he will not be liable for latent defects. These decisions are two centuries apart and the intermediate decisions are to the same effect. Co. Litt. 102a; Cro. Jac. 197: 1 Sid. 146: Yelv. 21: 2 Ld. Raym. 1121: per Holt, Ch. J. Doug. 20: Aleyn 91, cited 2 East 498 notis.

In the case of Bree v. Holbech, Doug. 655, assumpsit was brought to recover back money paid as the consideration for the assignment of a mortgage which turned out to be a forgery. The defendant, being an administrator with the will annexed and finding the mortgage a-
it to be a forgery, and it was adjudged that he was not liable to ref-

fund, having acted in good faith; and there being no covenant for the

goodness of the title, that it was incumbent on the plaintiff to have

looked to the goodness of it. And in the case of Stewart v. Wilkins,

Doug. 18, it was ruled that assumpsit was the proper form of action

where there is an express warranty. Lord Mansfield there said that-

selling for a sound price without warranty may be a ground for assump-
sit, but in such case it ought to be laid that the defendant knew of

the unsoundness. And in Williamson v. Allen the law as laid down in

Chandelar v. Lopos was fully recognized. Here we see the courts de-

ning the doctrine of the civil law in relation to warranty. 'For by

the civil law', says Lord Coke, 'every man is bound to warrant the

thing that he selleth, albeit there be no express warranty, but the

common law bindeth him not, unless there be a warranty in deed or in

law.' So Fitzherbert, N.B. 94c, says that if a man sell wine that is
corrupt, or a horse that is diseased, and there be no warranty, it is
at the buyer's peril and his eyes and his taste ought to be his jud-
ges in that case. In the case cited from 2 East., the judges were
unanimous that the rule applied to the sale of all kinds of comodi-
ties, that without a warranty on the part of the seller or fraud by
him, the buyer must stand to all losses arising from latent defects
and that there was instance in the English law of a contrary rule
being laid down. The common law thus happily reconciled the claims
of convenience and good faith. It required the purchaser to apply
his attention to those particulars which may be supposed to be within
the reach of his observation and judgment, and the seller to commun-
icate those particulars and defects which cannot be supposed to be
within the immediate reach of such attention. And even against his
want of vigilance the purchaser may provide by requiring the vendor expressly to warrant the article. Yet for a hundred years and more the tendency of the courts has been to enlarge the application of the doctrine of warranty, both express and implied.

Necessarily whenever the vendor has given an express warranty in regard to the quality or fitness of an article sold the doctrine caveat emptor is excluded. And this exception to the common law is far reaching since an affirmation made by the vendor at the time of the sale in relation to the goods sold is a warranty, if it be intended as such. But in considering whether a statement is intended as a warranty, it is the subject matter, and the circumstances under which it is made, rather than its form, which is to be regarded. Kinley v. Fitzpatrick, 4 How. 59; Hughes v. Finiston, 23 Iowa 267; Thorne v. McVeagh, 75 Ill. 81. Undoubtedly any assertion or affirmation made by the seller to the purchaser during the negotiation to effect the sale, respecting the quality or efficiency of the article sold, will be regarded as a warranty if relied upon by the purchaser. Neave v. Amtz, 56 Wis. 176; Akins v. Kenyon, 34 Wis. 93. And the same rule applies as is held in California, when the contract of sale is executory, if the vendor at the time of the sale affirms a fact as to the essential qualities of his goods in clear and definite language, and the purchaser buys on the faith of such affirmation. Polhemus v. Heiman, 45 Cal. 573.

A mere assertion of value where no warranty is intended is no ground of relief to a purchaser, because it is a mere matter of opinion which does not imply knowledge and in which men may differ. Every one reposes at his peril in the opinions of others when he has
an equal opportunity to form and exercise his own judgment, for simplex commendatio non obligat. Whether what passed between the parties amounted to a warranty or was mere matter of opinion is for the determination of the jury unless the language has a technical or fixed meaning. Murray v. Smith & Daly (N.Y.) 277; Morrel v. Wallace, 9 N.H. III. See also Dunham v. Barnes, 9 Allen (Mass.) 352.

If the affirmation is made in good faith it is still a warranty and if made with a knowledge of its falsity it is none the less a warranty though it is also a fraud. 1 Parson on Con. 579; McLennan v. Ohmen, 75 Cal. 558; Drew v. Edmunds 60 Vt. 401; Herrell v. Dibrell, 87 Va. 289. An action will against a person not interested in the property, for making a false and fraudulent representation to the seller whereby he sustained damage by trusting the purchaser on the credit of such representation. This was established in England after great discussion and opposition in the case of Paisley v. Freeman, 3 T.R. 61 and the doctrine has been repeatedly recognized both in English and American Jurisprudence. Allen v. Addington, 7 Wend. (N.Y.) 1; Upton v. Vail, 6 Johns. 181; Bean v. Herrick 3 Fairf. 22; Gallagher v. Brunel, 6 Cowen 346; Benton v. Prath, 2 Wendell 385.

In Hobart v. Young, 63 Vt. 363, Rowell, J. considering whether the words, "sound and kind" in a bill of sale, said, "The law of warranty has undergone much change since Chandelar v. Lopus, Cro. Jac. 4, decided by the Exchequer Chamber in 1803. It was held that the affirmation that the thing sold was a bezoar stone was no warranty: for it was said every one in selling his wares will affirm that they are good, or that the horse he sells is sound, yet if he does not warrant them to be so it is no cause of action. But latterly courts have manifest-
ed a strong disposition to construe liberally in favor of the pur-
chaser what the seller affirms about the character and kind of his
goods and have been disposed to treat such affirmation as warranties
when the language will bear that construction and it is fairly infer-
able that the purchaser so understood it. Stone V. Denny, 4 Metc. (Mass.)
155. Hawkins V. Pemberton, 51 N.Y. 198. And now any affirmation as to the
kind or quality of the thing sold, not uttered as matter of commenda-
tion, opinion nor belief, made by the seller pending the treaty of sale
for the purpose of assuring the purchaser of the truth of the affirm-
ation and of inducing him to make the purchase, if so received and re-
lied upon by the purchaser, is deemed to be an express warranty."

If any word or affirmation is used in such manner as to show that
the party expects or desires the other to rely upon the assertion
as a matter of fact, instead of taking it as an expression of the judg-
ment of the vendor it amounts to a warranty. And a false statement
when deliberately made, although in the shape of an expression of an
opinion as to the quality, quantity or condition of the article sold,
may often be construed to be a warranty if it be so intended or under-
stood by the parties. Tabors V. Peters, 74 Ala. 90; Whart. Con. sec. 259;
Barrett V. Stanton, 2 Ala. 181. But to constitute expressed opinion
a ground or instrument of fraud, it must be knowingly false, made with
intent to deceive and must be accepted and relied upon as true. Wil-
cox V. Henderson, 64 Ala. 535. "And what would be matter of opinion,"
says Mr. Wharton, "when spoken by a non-specialist, may be matter of
fact when spoken by a specialist." 1 Whart. Con. sec. 259, 260.

In determining the intent of the parties it has been held to be
a question for the jury to determine whether or not words in a bill
of sale amount to a warranty. Kinley V. Fitzpatrick, 4 How. 59.
The same rule has been held to prevail in Massachusetts, where it was said, Henshaw v. Robbins, 9 Metc. 83, "when a bill of parcels is given on a sale of goods, describing the goods or designating them by a name well understood, such bill is to be considered a warranty that the goods sold are what they are thus described or designated to be, and the rule applies though the goods are examined by a purchaser at or before the sale, if they are so prepared and present such appearance as to deceive skillful dealers." Same held in Hastings v. Lovering, 2 Pick. 214. This rule, too, is in conformity with modern decisions in England, Pennsylvania, Maryland, and we may say, the American States generally. Yates v. Pym, 6 Taunt. 446. But the rule is otherwise where the goods are sold by inspection of sample. McKnight v. Baillee, 18 Pa. St. 375, 57 Am. Dec. 669.

In the sale of city bonds, it was alleged in action that the defendants agreed that the principal and interest of the bonds were or should be guaranteed and provided for by a sinking fund set aside for that purpose, and that such representations and agreements for the securing of the bonds was a material part of the contract. The court held that the representations constituted a warranty that the bonds were or would be secured by an adequate fund for their ultimate payment. Callanan v. Brown & Co. 31 Iowa 333. And upon the sale of a note and mortgage the maker of which was known by both parties to be insolvent, if the vendor represents the mortgage to be good as an inducement to the purchaser to buy, and the latter buys upon that representation, but the mortgagor has in fact no title to the mortgaged premises, the vendor is liable to the purchaser for the consideration paid. Hahn v. Dolittle, 18 Wis. 196.
All warranties however expressed are open to such construction from surrounding circumstances and the general character of the transaction and the established usage in similar cases, as will make the engagement of warranty conform to the intention of the parties, provided however that the words of warranty are neither extended nor contracted in their significance beyond their fair and rational meaning. The words of a general warranty are said not to cover defects plain or obvious to the purchaser, or of which he had cognizance, as if a horse be warranted perfect and want an ear or a tail, as is quaintly said in the old cases. 13 H. 4, 1b. pl. 4: 11 Ed. 4, 6b. 71. 10: Southern V. Howe, 2 Rolle 6: Long V. Hicks, 2 Humph. 305: Schuyler V. Russ 2 Caines 202: Margetson V. Wright 5 M&P. 606: Dillard V. Moore, 2 Eng. (Ark.) 166. Yet as has been shown the modern holding has enlarged the scope of the warranty and if the vendee expressly relies upon the statement of the vendor the courts will go far to hold such contract a warranty. The fact that the buyer had opportunity to and did inspect before purchasing is not material where there is proof that the defect complained of was embraced in the express warranty: then the only question is whether he waived the benefit of the warranty. Gould V. Stein, 149 Mass. 577.

In the sale of a horse, bought for a particular use, the vendor being aware of the fact and representing the horse as all right, to induce the purchaser to make the purchase, if the latter purchases relying upon such representation, the statement amounts to a warranty not only of soundness, but that the horse is reasonably fit for the use intended. Smith V. Justice, 13 Wis. 602. And if the party make such representation at the sale as to amount to a warranty he, as stated
before, avoids its effect by showing that he did not intend to warrant.

Smith V. Justice, supra. Austin V. Nickerson, 21 Wis. 542. And a warrant as to the soundness of a horse, unless expressly restricted, extends to all manner of unsoundness, whether known to the vendor or not, and the question whether the animal was in any way unsound at the time of sale is a question of fact for the jury. Van Hoesen V. Cameron, 54 Mich. 609. And where a vendor selling goods which he knows to be designed for a particular purpose, warrants them to be 'perfect,' this must be construed to mean that they are perfect for the use intended, and parol evidence of the vendor's knowledge of the intended use is admissible to explain such a warranty in writing. Roe V. Batchelder, 41 Wis. 360: Jones V. George, 61 Tex. 345.

Where there is a full opportunity to inspect the goods and the purchaser, though he could by ordinary diligence examine as to the quantity, yet fails to do so, the question of quantity being made to depend purely on the judgment, he cannot after the sale complain that he has been deceived as to the quantity or claim a deduction from the price on that account. Pattison V. Jenkins, 33 Ind. 87.

The mere exhibition of testimonials by a dealer, cannot be considered as a warranty that the goods conform to such testimonials, unless something is said which expressly or impliedly warrants that the goods do so conform. Richey V. Daenicke, 86 Mich. 647.

Value may be the subject of warranty in a contract of sale. Pickard V. McCormick, 11 Mich. 68. It is undoubtedly true that value is a mere matter of opinion and that a purchaser must expect that a vendor will seek to enhance his wares and accordingly disregard his statement. But value may be made by the parties themselves the prin-
principal element in a contract; and there are many instances in which articles possess a standard commercial value, which is a chief criterion of quality among those that are not experts. It is a matter of everyday occurrence to find various grades of manufactured articles known more generally by their prices than by any test of their quality which can be furnished by ordinary inspection, as in the case of the sale of a watch or a jewel. Contra, however, Davis V. Meeks, 5 Johns. Rep. 354.

It is the rule in New York that upon the sale and delivery, in praesenti of goods with an express warranty, if the goods upon trial or examination turn out to be defective and there is a breach of the warranty, the vendee may retain and use the property and may have his remedy upon the warranty without returning or offering to return. In fact it seems to be regarded as settled, though perhaps not necessarily determined in any case, that he has no right to return the goods in any case unless there was fraud in the sale. Day V. Pool, 52 N.Y. 416 and cases cited 419. In an executory sale, as well as in a sale in praesenti, a vendor may warrant that the article shall have certain qualities, and this agreement to warrant in an executory contract of sale is just as obligatory as in warranty on a present sale and delivery of goods. Day V. Pool, 52 N.Y. 416; Parks V. The Morris Axe & Tool Company, 54 N.Y. 586; Dounce V. Dow, 57 N.Y. 16; Brigg V. Hilton, 99 N.Y. 517.

In Vermont Farm-Mach. Co. V. Batchelder, 35 Atl. Rep. 381, where a machine was guaranteed to do as good work as any other like machine in the market, the machine when compared with other machines depends upon whether it can do the same amount and quality of work at the same
amount and quality of work at the same expense. If it cannot, it does not do as good work within the meaning of the parties, as the other.

In regard to warranty it must be said that there is a wide difference between an option given to the buyer to return the goods if not satisfactory, and a warranty of quality. The latter is continuing and runs with the goods, but the former must be exercised within a reasonable time after the receipt of the goods, and their retention after such reasonable time must be regarded as an acceptance unless the option be extended in unmistakable language, Childs v. O'Donnel, 34 Mich. 533.

IV.

IMPLIED WARRANTY.

An implied warranty is a contract which the law implies as collateral to and arising out of an express one for the sale of personal property, and wherein, by implication of law, the vendor is held to have warranted the title or quality of the property sold, at the time of sale. Lord Abinger, in the case of Chanter v. Hopkins, 4 M&W. 399, said, "Implied warranties arise by implied operation of law. They are not conclusions or inferences of fact drawn by a jury, but they are the conclusions or inferences of law pronounced by the Court upon facts admitted or proved before the jury.

Blackstone says, "By the civil law an implied warranty was annexed to every sale, in respect to the title of the vendor, and so to in our law a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title prove deficient, without any express warranty for that purpose. 2 Com. 461. Chancellor Kent, too, supports the doctrine that in every sale
of a chattel if the possession be at the time in another, and there be no covenant or warranty or title, the rule of caveat emptor applies and the party buys at his peril. But if the seller has possession of the article and he sells it as his own, and the title prove deficient, without any express warranty, and for a fair price, he is understood to warrant the title. A fair price implies a warranty of title and the purchaser may have a satisfaction from the seller if he sells the goods as his own and the title proves deficient. This was also the rule of the civil law in all cases whether the title has wholly or partially failed. 2Kent's Com. 478.

It is a universal doctrine founded upon the plainest principles of natural justice, that whenever in the sale of a chattel the article sold has some latent defect which is known to the seller but not to the purchaser, the former is liable for this defect if he fails to disclose his knowledge on the subject at the time of the sale. In all such cases where the knowledge of the vendor is proved by direct evidence, his responsibility rests upon the ground of fraud. But there are cases in which the probability of knowledge on the part of the vendor is so strong that the court will presume its existence without proof and in these cases the vendor is held liable as upon an implied warranty. The only difference between these two cases is that in one the scienter is actually proved, in the other it is presumed. It is obvious that the vendor of goods must know whether he has title to the goods he sells. He knows the source from which such title was obtained and has therefore means of judging of its validity which the purchaser can not have. Hence it is the doctrine both of the civil and the common law that every vendor impliedly warrants
that he has title to what he assumes to sell.

Some slight doubt has been supposed to be thrown upon this doctrine in England by the remarks of Park, B. in the case of Morley v. Attenborough, 13 Wxch. 500. It is however too well settled both in England and in this country to be shaken by the obiter dicta of a single judge. That case in itself tends to strengthen the position above taken, that is the presumed superior knowledge of the vendor in regard to his title. It arose upon a sale by a pawnbroker of a harp pledged with him as security for a debt. The sale was made through auctioneers and a general catalogue was furnished to the bidders which "stated on the title page, that the goods consisted of a collection of forfeited property." The court held that there was no implied warranty of title in that case, and there seems good reason for sustaining this exception to the general rule. The probability was he had received the property on the faith of the vendor's possession alone, and the purchaser was in this respect on an equal footing with himself. There are other exceptions to the general rule,—the case of judicial sale for example. There is no ground for supposing that the officer of the law has any peculiar knowledge on the subject of the title he exposes for sale. No doubt both the officer and the pawnbroker if shown to have knowledge which they conceal, would be liable for fraud, or if they could be justly presumed to have such knowledge liable upon an implied warranty. It was expressly held in the case of Peto v. Blades, 5 Taunt. 657, that the law raises an implied promise on the part of a sheriff who sells goods taken in execution, that he does not know that he is destitute of title to the goods.

A very ancient and leading case on the subject of implied warrant-
ty of title, Cross V. Gardner, Carth. 90, shows the ground of liability to be that of superior knowledge on the part of the vendor. There the plaintiff sought to recover against the defendant for selling a pair of oxen as his when in truth they belonged to another. It was objected that the declaration neither stated that the defendant deceitfully sold the oxen, nor that he knew them to be the property of another person. But the Court held him liable because the plaintiff had no means of knowing to whom the property belonged but only by the possession. This plainly implies and the Court evidently proceeded upon the presumption that the defendant had the better means of knowledge. That this was the foundation of the action appears from another report of the same case (1 Shaw 68) where the ground was taken that if a man having the possession of goods, sells them as his own, an action lies for the deceit. Deceit implies knowledge and as no knowledge was proved it must have been presumed.

In an older case, Dale's case, Cro. Elizabeth 44, the court decided by two judges against one that the action would not lie, because there was no allegation or proof that the defendant knew of the defect in his title. But to use the language of Croke, "Anderson contra, for it shall be intended that he that sold had knowledge whether they were his goods or not." The ground thus taken by the dissenting judge is that the vendor is presumed to know whether he has title to the goods he sells, and this ground forms the solid basis for the doctrine of implied warranty of title.

It is equally clear that implied warranties in such cases as they arise, rest upon the presumption in the particular case that the vendor knew of the defect. It is plain that in respect to all that class of personal chattels which do not enter extensively into the
into the business and trade of a people, and which do not pass rapidly from hand to hand such as horses, cattle and furniture, the vendor who has the article in possession and use for some time would be likely to know if it was defective and a presumption of knowledge would in most cases be both reasonable and safe. On the other hand with regard to those goods which are the subject of general traffic and are habitually purchased not for use, but to be sold again, no such presumption could fairly arise. On this basis may be accounted in some degree for the difference between the civil and the common law rule upon the subject of latent defects in the articles sold. The rule of the civil law caveat venditor was adopted at an early period, and in reference, it would seem, rather to those articles which are of general and ordinary use, than such as enter extensively into the commerce of the country, while that of the common law, caveat emptor, originating in a commercial age and among a highly commercial people, naturally took the form best calculated to promote freedom of trade. No doubt the common law is upon the whole wisest and best adapted to an advanced state of society, and yet there is a large class of cases in which that of the civil law would serve to prevent a multitude of frauds. Take for instance the case of horses. Undoubtedly as to them it would be more conducive to justice if the vendor were held in all cases to warrant against latent defects. But the commercial law because of the impracticability of discriminating among the infinite varieties of articles applies the maxim of caveat emptor as a general rule to all cases.

It has been frequently said that in the civil law a warranty is implied from the payment of a sound price for the article sold. But a sound price, though it may show that the purchaser has not, yet it
does not show that the vendor has cognizance of any defect, and thus can have no tendency to show which of the parties ought to bear the loss. Where however the price paid is less than the value of the article, supposing it were sound, this would tend to show that the parties contracted with reference to the defect and that the purchaser therefore was apprised of it. In such case no warranty would arise. In this respect alone the price becomes of importance. For the civil law presumes knowledge on the part of the vendor and therefore raises the warranty, while the want of a sound price prevents a warranty since it evidences an equal knowledge on the part of the vendee.

The theory of the civil and the common law in respect to implied warranty is entirely different. The civil law holds that the warranty enters into and forms an integral part of the contract of sale itself, while the common law regards the warranty as a collateral contract and derives the obligation from the general doctrine which holds vendors responsible for every species of deception. This is rendered apparent by three early cases, two of which have already been referred to, Dale's case: Cross V. Gardner, supra, and Furniss V. Leicester, Cro. Jac. 474. These cases show by what gradations the inherent principles of justice overcame the strict rules of the common law and forced the courts to sustain an action for deceit without any averment or proof of wilful deception.

It has been said that implied warranties when they exist at all are based upon the ground of presumptive knowledge in the vendor, of the defect. This will appear from some of the exceptions to the old rule of caveat emptor. One exception generally recognized is that on the sale of provisions, purchased not for the purpose of re-sale but
for consumption on the part of the purchaser, there is an implied warranty that the provisions are sound and wholesome. In Van Bracklin V. Fonda, 12 Johns. 468, which was an action to recover damages for selling a quantity of beef as good and sound, when in fact it was bad and unwholesome. The Court said, "In the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome at his peril." And in Moses V. Mead, 1 Denio, 378, the doctrine is clearly shown to rest upon the presumption of knowledge on the part of the vendor. The counsel for the defendant did not dispute the rule but argued that in the case of provisions sold by wholesale the vendor has no opportunity of knowing the quality of the provisions greater than that of the purchaser. The Court gave judgment for the defendant on this ground saying, "But there is a very plain distinction between selling provisions for domestic use and selling them as articles of merchandise, which the buyer does not intend to consume but to sell again. Such sales are usually made in large quantities and with less of opportunity to know the actual condition of the goods than when they are sold by retail."

Another exception to the general rule, recognized with some hesitation is that a manufacturer who sells goods of his own manufacture impliedly warrants that they are free from any latent defect growing out of the process of manufacture. If the vendor can be proved to have knowledge of the defect and failed to disclose it, he certainly would be liable. It is reasonable to presume, too, that he who made the article is aware of any defect growing out of the manner in which it is made. And if the manufacturing be done by agents the law will hold the principal liable. In an executory sale or
contract for the sale and delivery of an article of merchandise or of indeterminate things at a future time, when there is no selection or setting apart at the time of sale so as to pass the property in praesenti, there is always a warranty implied that the thing to be delivered shall be free, at least from any remarkable defect. If the article delivered come short of a medium quality of goodness, the vendor is liable upon the implied warranty. Howard and Pickman v. Hoey, 23 Wendell, 350.

When a person desirous of obtaining an article for a particular purpose, but not skilled himself in respect to such articles, applies to one professing to be acquainted with the subject, or who by his occupation holds himself out to the world as understanding it, and then furnishes what he alleges to be suitable it is plainly to be inferred that both parties understand the purchase to be made upon the judgment and responsibility of the seller. In view of some such case, one or more of the English judges laid down, at an early date the broad proposition that upon the sale of goods for a specified purpose the law raised an implied warranty, that the goods were suitable for that purpose. In Bluett v. Osborn, 1 Stark, 384, Lord Ellenborough said, "A person who sells implies warrants that the thing sold shall answer the purpose for which it is sold." Lord Tenterden used similar language in Gray v. Cox, 4 Barn. & Cress. 108, and the doctrine was re-iterated by Best, J. in Jones v. Bright, 5 Bing. 533.

It appears however that there can be no such general rule as that referred to, but it must depend upon the circumstances of each particular case whether there is a warranty or not. For if a purchaser understands what he wants and selects such goods as he deems
adapted to the intended use there is no warranty. Chanter V. Hopkins, 4 Mess. & Wells 399; Brown V. Edgington, 2 Man. & Gr. 279. In the last case, Tindal, Ch. J. says, "It appears to me to be distinction well founded both in reason and on authority that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible on the ground that the article turns out to be unfit for the purpose for which it was required: but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me that the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed."

But as implied warranties do not rest upon any supposed agreement in fact it would seem from this extract that these are not cases of implied warranty in the ordinary sense of the term. The question seems to be, in the two cases cited above, one of fact as to the actual contract of the parties. As implied warranties are obligations raised by law upon principles foreign to the actual contract, principles analogous to those upon which vendors are held liable for fraud, it is for the sake of convenience that this obligation is permitted to be enforced under the form of a contract.

The third great exception to the rule of caveat emptor is not strictly, one of implied warranty at all. It is the case of a sale of goods by sample. But in this to raise an implied warranty from the exhibition of the sample it must be shown that the parties mutually understood that they are dealing with the sample upon an agreement by the seller that the bulk of the commodity corresponds with it. Beirne V. Borden, 5 N.Y. 95; Waring V. Mason, 18 Wend. 425. And even in this case it is not an implied warranty of quality but a representa-
tion that the sample has been fairly taken from the bulk of the com-
modity..It is clear that these are not implied warranties but are
made out as matters of fact if they exist at all. In Jones v. Bright,
supra, a leading case, the plaintiff purchased from the warehouse of
defendant copper for sheathing a ship. The defendant, informed of the
purpose for which the copper was intended, said, "I will serve you well".
The copper being defective lasted but four months instead of four
years, the usual time. Best, Ch. J. left it to the jury whether the
defect in the copper was intrinsic or occasioned by external acci-
dent, and if intrinsic, whether caused by the process of manufacture.
The jury found that the decay was caused by some intrinsic defect,
but that there was no satisfactory evidence as to the cause of that
defect. The defendant was held liable. The Chief Justice took the
stand that the words, "I will serve you well," constituted an express
warranty, but said further, "I wish to put the case on a broad princi-
ple. If a man sells an article he thereby warrants that it is fit
for some purpose.... If he sells it for a particular purpose, he there-
by warrants it fit for that purpose." This case while not directly
pertaining to sale by sample, illustrates the difference between a
warranty inferred from circumstances proved, and one imputed without
proof.

In Parkinson v. Lee, 2 East 315, there was an express war-
 ranty that the bulk of the hops purchased by plaintiff from defend-
ant corresponded with the sample by which they were sold. It appear-
ed that though the bulk of the commodity agreed with the sample, yet
there was a latent defect existing in the hops, unknown to the seller
and without fraud on his part, but arising from the fraud of the grow-
er from whom he purchased. It was held by all the judges that the
law did not raise an implied warranty that the hops were merchantable.
In the argument of this case counsel for plaintiff contended that in every contract of sale of chattels, where a fair price was paid there was an implied warranty that the commodity should be in a merchantable condition at the time of sale. But the judges unanimously rejected this doctrine and asserted the old common law rule of caveat emptor in all its integrity. (But in South Carolina the civil law rule prevails that a sound price implies a warranty of soundness. Rose v. Beattie, 2 Nott. & McCord, 540, and in Com'rs. of Highways v. Newbury Dist., 2 McCord 407, Justice Richardson says, "We find practically established in judicial proceedings a kind of eminent domain to make or break contracts.") In the principal case, it appears that the English court rejected the whole doctrine of implied warranty in regard to quality of the article sold, as inapplicable to any case of an executed contract of sale.

But since the decision of Parkinson v. Lee, decided in 1802, the judges of Westminster Hall have departed from the strict rule of the common law and have step by step introduced various modifications of the civil law doctrine of implied warranty in the sale of chattels. In Hilbert v. Shee, 1 Camp. N. P. 113, 1807, and in Gardner v. Gray, 4 Camp. 144, in 1815, Lord Ellenborough recognized the principle that a sale by sample implied a warranty that the bulk of the goods corresponded in quality with the sample.

In a number of cases of sales by sample the doctrine of implying a warranty has been applied in what were clearly instances of express warranty. Thus in the case of the Chieda Manufacturing Co. v. Lawrence, 4 Cowen. 440, the seller presented the purchaser's agent with samples, declaring that they were drawn from the bales of cotton in his warehouse, that it was good upland cotton and that they were true
31.

In a similar case, Waring v. Mason, supra, the plaintiff agreed to purchase, if the cotton was equal to the samples exhibited, and the agent of the defendant sold to the plaintiff on this condition. In each instance there was an express warranty that the bulk corresponded in quality with the sample. In the last case Chancellor Walworth said that every exhibition of a sample to a purchaser at the time of sale does not per se make a sale by sample; there must be an agreement to sell by sample or at least an understanding by the parties that there is to be a sale by sample. The mere exhibition of a sample at the sale amounts only to a representation that the sample exhibited has been taken from the bulk of the comodity offered for sale, in the usual way. From this it appears that a sale by sample may in fitting instances be classed with the doctrine of either express or implied warranty.

Again the mere circumstance that the seller exhibits a sample at the time of sale, will not of itself make a sale by sample so as to subject the seller to liability on an implied warranty as to the nature and quality of the goods, because it may be exhibited not as a warranty that the bulk corresponds to it, but merely to enable, but merely to enable, the purchaser to form a judgment on its kind and quality. If the contract be connected by the circumstances attending the sale with the sample, and refer to it, and be exhibited as the inducement to the contract, it may be a sale by sample and then the consequence follows that the seller warrants the bulk of the goods to correspond with the sample exhibited. Whether a sale is a sale by sample or not is a question of fact for the jury to find from the evidence in each case; and to authorize a jury to find such a verdict the evidence must satisfactorily show that the parties
contracted solely in reference to the sample exhibited. Bierne v. Dord, 6 N.Y. 95. And in case it be shown that the sale was by sample and that the goods do not correspond in nature and quality to those exhibited, the purchaser may either rescind the contract by returning the goods in a proper time or keep them and recover damages for the breach of warranty.

This outline, brief as it is will, I hope, give some idea of the origin and development of implied warranties in the sale of chattels, a branch of the law on which volumes could now be written without exhausting the subject so great has been its enlargement. A few of the cases will show the line of modern decisions.

The decisions are numerous that there is an implied warranty of title in every sale of a chattel at the time of sale in the possession of the vendor, and the better rule seems to hold that this is so whether there by a 'sound price' or not. Coolidge v. Brigham, 1 Metc. 561; Shattuck v. Green, 104 Mass. 421; Wdgerton v. Michaels, 66 Wis. 124.

That a sale at a sound price does not of itself imply a warranty. 2 Indiana App. 440. It is said too that at common law an implied warranty extends only to defects existing at the time of sale. Postel v. Card, 1 Ind. App. 252, 259.

The rule is well settled that an indorser warrants the genuineness of the prior indorsement on the bill and also his title to the paper. Williams v. Tishomingo Savings Institution, 57 Miss. 633. A contract for the exchange of title implies and includes a warranty of title. Hunt v. Sackett, 31 Mich. 81.

When articles of food are bought for express consumption and the vendor sells them for that purpose, the law implies that they are
fit for such purpose whether the sale be by a retailer or by any other person. Hoover v. Peter, 18 Mich. 51; Windsor v. Lombard, 18 Pick. (Mass.) 62. And in Michigan it was held that a baker impliedly warrants the wholesomeness of the bread which he sells at a discount to the pedlar who distributes it. Sinclair v. Hathaway, 57 Mich. 60.

Where a chattel is to be made or supplied to the order of the purchaser there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the seller when the order is given. Blackman v. Fairbanks, 79 Iowa, 382; Russel v. Critchfield, 75 Iowa, 69; Davis v. Suceney, 75 Id. 45. The same is held where a manufacturer sells an article previously made but with knowledge of the place where it is to be used and the purpose to which it is to be implied. McClamrock v. Flint, 10 Indiana 278; Conant v. National State Bank 121 Ind. 323; Walton v. Cody, 1 Wis. 420; Bud v. Mayer, 8 Wis. 362; Fish v. Tank 12 Wis. 276; Swett v. Shumway 102 Mass. 385.

A purchase of a machine from a dealer implies that it shall be new—that is not second hand or the worse for wear, and under the order the dealer cannot impose upon the vendee a second hand and worn machine, whether it complies with the terms of his warranty or not as being well made and that it will do as good work as any machine of its class. Grub v. Cole, 60 Mich. 397.

In the case of the sale of negotiable instruments there is an implied warranty that the instrument is what it purports to be, the genuine, valid and binding obligation of the parties thereto for the full amount for which it appears to be, and that there is no defect in the instrument. Challis v. McCrum, 22 Kans. 157, and cases cited.
Meyer V. Richards, 163 U.S. 385.

In passing however it is worthy of note that while the civil law enforces in the contract of sale generally the broadest obligation of warranty it has so narrowed it when dealing with credits, and incorporeal rights as to confine it to the title of the seller and the existence of the thing sold, and e converso, the common law which restricts warranty within a narrow compass virtually imposes the same duty by broadening the warranty so as to impose the obligation on the vendor to deliver the thing sold as a condition of the principal contract, or by implication of warranty as to identity of the thing sold. By these processes of reasoning the two great systems while apparently divergent in principal practically work substantially to the same salutary conclusion.

There is also an implied contract of warrant of the signatures and capacity of every prior party, in the contract of an indorser. Prescott Bank v. Caverly, 7 Gray, 217: this includes the existence and capacity of a firm, Dalrymple v. Hillenbrand, 62 N.Y. 5; or of a corporation, Glidden v. Chamberlain, 167 Mass. 486, 494: of a married woman, Edmunds v. Rose, 51 N.J.L. 547.

And on the assignment of every written instrument, whether negotiable or not, for a full and fair price, there is a valid warranty that it is valid, but there is no warranty that the obligors are pecuniarily responsible. Merriam v. Wolcatt, 3 Allen, 265; Cabot v. Morton, 4 Gray, 156.

It is intended that the exhibition of a sample shall save the purchaser the trouble of examining the whole quantity. Every such exhibition imports that the article proposed to be sold is like that which is shown as a parcel of it. Bradford v. Manly, 13 Mass. 139.
It has been held that evidence is admissible of a custom that on the sale of berrigs in bags, by sample, the sample represents the average quality of the entire lot and not the average quality of the amount contained in each bag, taken separately. Schnitzer v. Oriental Print Works, 114 Mass. 123.

In conclusion I may say in the words of Justice Paige of New York, that the rule of caveat emptor is emminently adapted to a commercial community: it encourages trade by preventing action against all in turn through whose hands the article of commerce has passed in dealing. Large quantities of products and articles of manufacture are daily passing through the hands of bona fide purchasers and of agents, commission merchants, consignees and factors, and to apply to these persons the principle of caveat venditor would lead to endless litigation, and seriously embarrass the operations of trade. This rule creates obligation where none were intended; it implies warranties where none are actually made. The most just and convenient rule is to confine the responsibility of the seller in relation to the quality and goodness of the articles sold, to the case of an express warranty or fraud. This rule will effectuate the intentions of the parties and will not surprise the seller with responsibilities he never intended to assume. Where the article sold is equally accessible to both parties, and its quality is equally unknown to both there can be neither justice nor propriety in implying a warranty on the part of the seller against latent defects. It is more just to require the purchaser to apply his attention to those particulars which are within the reach of his observation and judgment, and the vendor to communicate all defects within his knowledge and not apparent on inspection.

See 1 Fonblanque's Equity 380, n. And if the purchaser does not wish
to run the risk of latent defects, to require him to provide himself an indemnity against such defects, by exacting an express warranty from the vendor. When such warranty is required the vendor will be at liberty to decide for himself whether he will enter into the contract of warranty or not. Thus there has been gradually worked out a just and symmetrical system jurisprudence in the sale of chattels that is conducive to commercial prosperity, convenience and fair dealing.
DISCUSSION OF EXPRESS WARRANTY IN ILLINOIS.

It may be premised briefly in citing a few of the cases in which the courts of our State have passed upon the law of warranty that the decisions follow the holdings of the English Court, and of the American States generally, very closely. The cases then will be found to agree in the main with the case above cited and referred to in the discussion of the foregoing sections.

In Kenner v. Harding, 85 Ill. 264, the Court say, "In determining whether there was in fact a warranty, the decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer also may be expected to have an opinion and to exercise his judgment. In the former case there is a warranty, in the latter not." The Court say further in the same case that the general rule that a warranty does not protect against defects that are plain and obvious to the senses of the purchaser, and which it requires no skill to detect, has no application to a case where the vendor uses art to conceal and does conceal such defects. The same doctrine is set forth in Reed v. Hastings, 61 Ill. 266; Thorne v. McVeagh, 75 Ill. 81.

In regard to the common law doctrine of caveat emptor the Appellate Court held, in Rockford Wholesale Grocery Co. v. Stevenson, that there can be no application of this doctrine where there is an express warranty or where the article is sold in bulk upon a sample, but that the rule of caveat emptor does apply to a purchaser of goods where he has an opportunity of examining them before purchasing but fails
And in the case of Thorne V. Prentice, 83 Ill. 99, the rule is stated, that if the seller makes a distinct assertion of the quality or condition of the articles sold, whether it amounts to a warranty or not, which he knows, or should know, to be untrue, with a view to induce another to buy, and the other relies on and believes the assertion to be true, and relying thereon purchases and damages ensue, he may maintain an action for the deceit. To the same effect are Allen V. Hart, 72 Ill. 106; and Mitchel V. McDougal, 62 Ill. 498.

In the case of a warranty, too, it is not necessary that the buyer should have relied upon the representation of the seller and that alone. It is sufficient if he would not have purchased but for them. In part he may have relied upon additional facts.

In the case of Hoerper V. Jung, 33 Ill. App. 144, the Court held that a warranty of title in a bill of sale of fixtures, constituting a part of the freehold, cannot be avoided by the parol statement of the vendor, before the execution of the bill of sale, that he does not own them. In that case a recovery was allowed on the warranty for the value of the property in question. Holding that parol evidence is not admissible to vary or contradict a written warranty the Court cited Wadhams V. Innes, 4 Ill. App. 642; Wadhams V. Swan, 109 Ill. 46; Beach V. Miller, 51 Ill. 206; Keegan V. Kinnaire, 12 Ill. App. 484.

In Connecticut Mutual Life Ins. Co. V. Young, Adm'r, 77 Ill. App. 440, that Court said that where an application for a life insurance policy is expressly declared to be part of the policy, and the statement therein are warranted to be true, such statements will be deemed material whether they are so or not, and if they are shown to be false there can be no recovery on the policy. Union V. Arnhorst, 74 App. 482.
And in Commercial Mutual Accident Co. v. Bates, 74 App. 336, a statement in an application for insurance was held to be a mere promise to do a particular thing in the future, which, if not performed, would subject the promissor to such liability as might follow the breach but which would not have the effect of rendering the entire contract nugatory, nor would it be regarded as a warranty of any existing fact.

That a third party, the assignee of a vendee, may avail himself of a warranty, is decided in Cox v. Cox, 17 Ill. 503, where the Court held that any fact which would tend to destroy in whole, or in part, the purchaser's liability, such as, in this case a breach of warranty, may be available to his grantee. Citing Gray & Scott v. Phillips, & Eaton, 35 Miss. 116; Phillips on Mechanics liens, sec. 104, 421.

In Towell v. Gatewood, 2 Scam. 22, it is held essential to the validity of a warranty that it should be made at the time of the sale, or, if made afterwards, that it be upon a new consideration.

In Wightman v. Tucker, 50 App. 75, the rule is laid down that an action cannot ordinarily be maintained for false representations as to the value of merchandise but that an exception to the rule exists when the property is at a distance and not conveniently accessible. The Court say, "It is well settled that parties dealing at arms' length with each other may puff their commodities to any reasonable extent, and expressions thus made, which are mere matters of opinion, will not afford ground for an action of deceit." Referring to Towell v. Gatewood, supra, Schram v. O'Connor, 98 Ill. 539; Noetting v. Wright, 72 Ill. 390.

In Hanson v. Busse, 45 Ill. 596, the doctrine is held, too, that a commendation of the goods or representation that they are of a
certain quality will not create a warranty unless the language of the vendor taken in connection with the circumstances of the case fairly implies such an intention.

In Roberts v. Applegate, 153 Ill. 210, it was held that a dealer's statement in a catalogue of breeding horses, and which was referred to by the dealer in making the sale, that a young and untried stallion would "make his mark as a foal-getter" is a mere opinion and prediction and does not amount to a warranty. It was permissible, the court admit, to make statements extolling the qualities of the horse to the buyer, and his predictions as to what the horse would turn out or prove to be in the future, cannot in the absence of fraud be construed into a warranty. In this same case, in the Appellate court, 48 App. 176, that Court said that this was by no means a warranty that the horse would attract attention or make his mark as a foal getter, but it was only the expression of the belief of the seller as to what might be expected of the horse in the future. This holding followed the decisions of a number of cases previous to it. Adams v. Johnston, 15 Ill. 345: Towell v. Gatewood, 2 Scam. 22: Kohl v. Linden, 39 Ill. 139.

In Glidden v. Pooler, 50 Ill. App. 36, where Pooler had bought a Percheron stallion of Glidden upon a warranty that he was a sure foal-getter, it appearing that the foal-getters of the Percheron breed did not get on an average of more than fifty per cent of the mares served with foal, it was held that the warranty was to be interpreted with reference to the Percheron breed of horses, and if the horse had the capacity of a good foal getter of such breed, the warranty, although the vitality or potency of the breed was much less than that of other breeds of horses, was not broken.
It may be stated generally that in Illinois a warranty of soundness in a horse or mule amounts to a warranty against any defects which render it incapable of immediate use, put to any fair work the owner may choose. If at the time of the sale the animal has any disease which either does diminish its actual usefulness so as to make it incapable of less work of any description, or which in its ordinary progress will diminish the actual usefulness of the animal, or if it has either from disease or accident undergone any change of structure that either does at the time or will in its ordinary effect diminish the natural usefulness of the animal it is unsound.

In Morris v. Wibaux, 159 Ill. 627, in a case where on a sale of cattle and steers, bearing certain brands, on certain ranges, and three years old and upwards, it was held that a warranty arises in a sale by description under a written contract that the goods will correspond in quality and kind to the description, and that the identity of the subject matter of the thing or property sold by description being the subject matter of the performance of the contract, must be proved by the seller in an action for the price. But it was further held that a breach of warranty of the qualities of property is a matter of defense, on which the buyer has the burden of proof. The Court say, page 643, that where there is a sale and delivery by an executory contract with an express warranty, and the property turns out to be defective, the purchaser may receive, retain and use and become vested with the title to the property without waiving his warranty, and a right to sue thereon or set it up in defense on a suit for the purchase price. The rule is laid down in Underwood v. Wolff, 131 Ill. 425, as the law in this State, the Court saying, "The buyer will lose his right of returning goods delivered to him under war-
wante of quality, if he has shown by his conduct an acceptance of them or if he has detained them a longer time than was necessary for testing them, or has exercised acts of ownership over them, as by offering to resell them, all of which acts show an agreement to accept the goods, but do not constitute an abandonment of his remedy by cross action or by counterclaim in an action by the vendor for the price." In Aultman V. Withrow, 48 Ill.App.492, the rule was laid down as well settled, that in the absence of fraud, agreement to rescind, in case of breach or insolvency of the seller, or some like special reason, the buyer of property by an unconditional or complete sale, cannot demand a rescission of the contract simply because the warranty has failed. A a general rule he must rely on the warranty and recover damages for the breach or he may recoup such damages in an action against him for the purchase money. Kemp V. Freeman, 42 Ill.App.500. Babcock V. Trice, 18 Ill.420: Crabtree V. Kile, 21 Ill.184: Strawn V. Cogswell, 28 Ill.457: Mears V. Nichols, 41 Ill. 207: Pick V. Brewer, 48 Ill.54: Doane V. Dunham, 65 Ill. 512, where the Court say, there is a distinction, executed and executory contracts in this regard, and hold that in the former the law gives the buyer a reasonable time for making an examination of the chattels sold, that it is for the jury to determine under all the circumstances what is such reasonable time, that the failure to make an examination within a reasonable time may preclude the buyer from offering the property back, rescinding the contract and avoiding payment on that ground, but will not deprive him of the right to rely upon the breach of the warranty for damages. The principal case is also affirmed by Owen V. Stringas, 67 Ill.386.
In Williams, Brown & Co. v. Leslie & Co., 66 Ill. App. 246, where a part of a car load of raisins purchased by the vendee were not of a quality corresponding to the contract, but the vendee had accepted them and sold them after objecting to the quality that he could show that he disposed of them at the risk of the seller, so as to recover the difference between the amount advanced on them and the proceeds. If there was a breach of warranty, the buyers were entitled to show it in defense and if their damages exceeded the amount of the unpaid purchase price, to recover it under a plea of set-off. Hyde v. Love Bros., 64 App. 43; McCormick Harvesting Machine Co. v. Robinson, 60 App. 253; Tully v. Excelsior Iron Works, 11 Ill. 344; Wadhams v. Swan, 109 Ill. 46; Cook v. Preble, 80 id. 32; Murray v. Carlin, 87 id. 286; Huck v. Bruckman, 55 id. 441; Meares v. Nicholson, 41 id. 207; Babcock v. Trice, 18 id. 420; Higgins v. Lee, 16 Ill. 496.

As a warranty is not a part of the contract of sale, except as a part of the consideration received for the price paid, this rule seems logical and that the vendee's right should be limited to the amount of the depreciation due to the breach. He can not lawfully compel the vendor to take back the property and return the price paid. Skinner v. Mulliken, 56 Ill. App. 47; Doane v. Dunham, 65 Ill. 512; Kemp v. Freeman, 42 Ill. App. 500; Crabtree v. Kile, 24 Ill. 180. In Owen v. Sturges, 65 Ill. 366, it is again recognized that where the contract is unexecuted or there is a stipulation that the property may be returned if not found satisfactory, or if the warranty be accompanied with fraud in the sale, in such case the vendor may return the property on discovering the breach of warranty, but otherwise the rule is above set forth correctly.
In Moore Furniture Co. v. Sloane, 166 Ill. 457, the Court held that the fact that the buyer, after a reasonable opportunity to examine the goods sold by sample, retained possession of them without complaining of their quality of offering to return them, may be considered by the jury in determining whether or not there was a breach of warranty. But it was held in Wheelock v. Berkely, 38 App. 518, where property was sold with a warranty and the purchaser gave a note for the purchase money, that a renewal of such note, by the purchaser, of such note after he has discovered that there has been a breach of warranty, does not operate to release his claim against the vendor for such breach.

In Hoover & Gamble V. Doetsch, 54 App. 85, D. bought a harvesting machine upon a warranty that it was well built, of good material and would do good work where any such machine could be successfully operated. It was provided that should the machine fail to work properly when started due notice should be given to the agent, and time allowed to send a person to put it in order. If not made to work well might be returned and any payment that had been made before the trial should be refunded or a perfect machine given in its place. The Court held that the offer to return the machine was not sufficient even although the agent said he would not receive it. If the machine had been taken to the agent's place of business and the agent there refused to receive it, then the purchaser would have been relieved from responsibility, and the vendor compelled to refund the payment received or furnish a perfect machine. And in Aultman V. Wykle, 36 App. 293, the Court say that one party cannot enforce a warranty imposing mutual and dependant obligations and covenants, until he has
shown a compliance on his part. A provision in a contract of sale, warranting a machine to do good work, and which required the purchaser to give notice of dissatisfaction within five days, and made his failure to do so evidence of the fulfillment of the warranty, was in that case, held just and binding, and an instruction to the jury that the purchaser had a right to test the machine for a reasonable time was held erroneous. In Aultman v. Henderson, 32 App. 381, it was held that where a contract of sale of a machine contains provisions fixing the rights of the parties in case after trial the machine in question should fail to comply with the warranty, the purchaser cannot decline to receive the machine upon the ground that the year before, in other hands, it had failed to work properly. In this case the machine had been repaired and the Court held that it would be presumed to be in working order, it being the duty of the person ordering it to give it a fair trial.

In Tully v. Excelsior Iron Works, 115 Ill. 544, it was laid down by the Court, that if A. agrees with B. to manufacture a machine for him and procures C. to do the work for him, C. to furnish the materials, the latter cannot maintain an action against B. for the value of the work and materials, but must sue A. But if he sues B., B cannot set off or recoup any damages he may sustain in consequence of a breach of guaranty made by A.

In the case of Jackson v. The People, 126 Ill. 139, plaintiff in error had been convicted of obtaining money under false pretences. It appears that he had sold a horse which he falsely and designedly warranted to be a healthy horse, without bad tricks, and capable of trotting a mile in three minutes. The Court held that the indictment would
lie, since the vendor had effected the sale of the horse and obtained the purchase price by these representations, knowing their falsity, although the plaintiff in error had given the purchaser a written warranty stating that payment was made in consideration of the warranty alone. The People were not precluded from showing the true state of facts and the consideration upon which the money was in fact paid.

As a general rule an agent who has the power to sell has power to do all that is necessary and usual in the course of the business of selling. If it is usual in the trade to warrant, the agent has authority to warrant. McCormick Harvesting Machine v. Snell 23 App. 79.

The burden of proving that an article does not fulfill a warranty is upon the party asserting it. Erie City Iron Works v. Dempsey 77 App. 667; Wadleigh v. Robbins, 74 App. 126.

In Wheelock v. Berkeley, 138 Ill. 163, the Court hold: "The measure of damages for a breach of warranty is the difference between the value of the property as warranted and its actual value at the date of the breach. It is immaterial how much the purchaser may have realized from the property." And the mere fact that a person retains possession of the property bought, after a known breach of warranty, as said above does not bar his counterclaim or cross-action for the damages sustained. The same rule as to damages is maintained in Moore Furniture Co. v. Sloane, 166 Ill. 467, where the Court hold the amount of damages to be the difference between the value of the goods at the time of the sale, and their value had they been as warranted. Owen v. Sturges 67 Ill. 368; McClure v. Williams, 65 Ill. 390.
In the case of the Forest City Furniture Co, V. Morgan, supra, it was held that the expression as to quality in a contract of sale, excludes any implication of a further warranty as to quality. And in Skinner V. Mulliken 56 App. 47, it is said that the law never implies a promise where one is expressed, which in terms governs the case, is still subsisting and forcible. Aultman V. Wilcox, 28 App. 91.

In Ramming V. Caldwell, 43 Ill. App. 176, the Court held:

1. There can be no implied contract between parties named touching a given matter, there being a complete written contract expressly embracing the same. Also, Ruff V. Jarrett, 49 Ill. 475: Robinson V. McNeil, 61 Ill. 225: Graham V. Eisener, 28 App. 267.

2. If a written contract contain no warranty the law will imply there was none, and that a given purchase was made at the risk of the purchaser and upon his own judgment. Also, Walker V. Brown, 28 Ill. 378: Ogden V. Kirby, 79 Ill. 555: W. St. L. & P. R. Co. V. Jaggeman, 115 Ill. 407.

3. It is proper for the Court to construe a written contract, and instruct the jury, if such be the case, that there is no warranty.

4. No implication exists that an article sold as second hand is (impliedly) warranted to answer the purpose for which it was made. Archdale V. Moore, 19 Ill. 565: Kohl V. Lindley, 39 Ill. 195: Misner V. Granger, 4 Gilman 69.

5. An express warranty in writing cannot exist as to one part of an express contract, and an implied one of the vendor as to another part of the same contract, growing out of the same transaction and the same in point of time.

In an early case, De Marquis Misner V. Granger, 4 Gil. 69, the
Court say that it is a well established rule of the common law, that a purchaser takes property at his own risk, unless he exacts a special warranty, where there has been no fraud on the part of the vendor. To this rule however the Court admits exceptions. There is an implied warranty on the part of the vendor that he has title to the goods he sells: and where the goods are sold by sample that the bulk is of as good quality. So in the case of executory contracts for the sale of personal property, in the absence of an express stipulation to that effect the law implies that it shall be of a fair merchantable quality and condition, and this rule holds when there is a sample exhibited or there is an opportunity for inspection. But in such case there is no implied warranty as to a particular degree of quality in the article sold. Same in Babcock V. Trice, 18 Ill. 420; Fisher V. Roseberry, 22 Ill. 288-9. The Court say further that where a manufacturer sells his own goods or wares, and nothing is said of the quality, there is an implied warranty that they are of a fair ordinary quality according to their appearance. There is however a qualification of this rule, as where the article is of such a quality or character that ordinary skill cannot generally produce a good article but success depends in a great measure on chance. Sometimes also the law will imply warranty even in extraordinary cases, the article sold, as where an article is sold for a given specific purpose and not for the ordinary and general use to which such articles are applied. Followed in Beers v. Williams, 169 Ill. 69 and cases cited in note.

In Kohl v. Lindley, 39 Ill. 195, another leading case, the Court say, "The doctrine of the civil law undoubtedly is that there is an implied warranty that the article sold is what it appears to be, and is sold as sound and as of a merchantable quality. The maxim is in that
case that 'a sound price warrants a sound commodity,' the seller taking
the risk of all defects which are not disclosed at the time of the
sale, Before Lord Mansfield's time, that was understood to be the
rule of the common law also. Ever since his opinion in 1778, in the
case of Stuart v. Wilkins, Douglas 20, the rule is recognized, which
he there laid down, that the vendor of property was not responsible
for any defects unless he was guilty of fraud, or had made an ex-
press warranty."

"Blackstone in his Commentaries so states the rule, 2 Bl. Com. 461
and with but slight and occasional departure has been followed by
all the common law courts of England and this country. The doctrine
was fully examined by this court in the case of Mizner v. Granger
4 Gil. 69, and fully recognized."

Yet like most general rules it has its exceptions, as in the
case of goods sold by sample, where the law implies a warranty that
the bulk is of as good a quality as the sample: and in executory con-
tracts for the sale of personal property the law implies as a
part of the contract, in the absence of express stipulation to that
effect that the property shall be of a fair merchantable quality
and condition and fit for the uses for which it is purchased. And
the rule is the same when the purchase is made without sample or
without an opportunity for inspection. In such case it would be un-
just to say, 'let the buyer beware' when he has no opportunity for
looking at the article. If however there is no fraud and he takes
the article on inspection, or with an opportunity to inspect it he
has no right to complain. The maxim of caveat emptor is then appli-
cable to him."
"In the case of an article manufactured by the seller this Court held in Archdale V. Moore, 19 Ill. 565, that there is an implied warranty that they are manufactured in a workmanlike manner, but in the case of a mere vendor of the article, if there is neither fraud nor express warranty, the purchaser buys at his peril. Again in Nichols V. Guibor, 20 Ill. 285, it was said the purchaser of an article not warranted as to quality must take the hazard of his bargain."

In the third leading case in this State, Lunt V. Wrenn, 113 Ill. 168, a case in assumpsit to recover money paid on a consideration of some script which proved to be counterfeit, the Court, Scholfield J. say, "It would seem to be more accurate in this class of cases to say that the right of recovery is for the purchase money, because of the failure of the consideration on which it was paid, than to say that it for the breach of an implied warranty in that which was professed to be sold."

"The seller has got the buyer's money and the buyer has received nothing from him for it. It is not the case of the failure of title, but one of the non-existence of the subject matter of the sale."

"The distinction pointed out by Lord Abinger in Chanter V. Hopkins, 4 Mees. & Wells. 399, has been generally approved and seems to be sufficiently accurate. He said, 'A good deal of confusion has arisen from the unfortunate use of the word 'warranty.' Two things have been confounded together, a warranty is an express or implied statement of something which the party undertakes shall be part of a contract, and though part of the contract, collateral to the express object of it. But in many of the case, some of which have been referred to the circumstance of a party selling a particular thing
by its description has been called a warranty and a breach of such a contract a breach of warranty, but it would be better to distinguish such cases as a non-compliance with the contract which a party has engaged to fulfill, as if a man offer to buy peas of another and he sends him beans, he does not perform his contract, but that is not a warranty. There is no warranty that he should sell him peas. The contract is to sell peas and if he sells him anything else in their stead, it is a non-compliance of it.' Benjamin in his work on Sales, page 443 (1st Am. Ed.) after copying this quotation observes, 'If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition is not performed the purchaser is entitled to reject the article sold, or if he has paid for it, to recover the price as money had and received for his use, whereas in the case of warranty the rules are very different. He then adds that there is no controversy as to this principle and as illustrative cites and quotes from a number of English cases, after which he says, 'Under this head may properly be included the class of cases in which it has been held that the vendor who sells bills of exchange, notes, certificates and other securities is bound, not by the collateral contract of warranty but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that which is false, counterfeit or not marketable by the name or denomination used in describing it.'

"It is true that this Court in Tyler v. Bailey, 71 Ill. 34, without alluding to the distinction between the breach of an implied warranty and the non-performance of a condition of sale, speak
of an implied warranty of the genuineness of the thing sold, but at the same time it will be observed that the right of recovery in the case of a contract to sell land warrant, and the delivery of counterfeits in their stead, is of money paid by the buyer on the ground of failure of consideration.

And in the case of Siegel v. Brook., 25 App. 207, the Court say, that in sales of personal property by one in possession thereof there is an implied warranty of title in the vendor. If the contract is still executory, the vendee may refuse to accept the article sold unless the vendor makes him a clear title; but where the sale is consummated and the article delivered and accepted the rule, though not fully settled, would seem to be that the vendee can maintain no action on the warranty so long as his title and possession are undisturbed.

In Titlry v. The Enterprise Stone Co. 127 Ill. 457, the Court after holding that in that case there was no implied warranty, say, "If the quality delivered did not correspond with the stipulation of the contract, the objection should have been made known at the time, and this not having been done, the objection is deemed to be waived."

When a purchaser orders an article of a manufacturer and designates a particular kind of material, out of which the article is to be made in whole or in part, such material not being made by the manufacturer himself, if he uses the designated material, the law will not imply a warranty as to its quality or fitness, unless it be shown that the manufacturer failed to use reasonable and ordinary care in selecting it.

But where a manufacturer furnishes materials or appliances designed for a specific use, he impliedly warrants the quality of
the materials, the goodness of the workmanship, and that the machinery is or appliances reasonably fitted for the purpose for which it was designed and sold. But this implied warranty cannot be availed of if the articles are sold upon an express warranty as to such quality workmanship and fitness. It is held further that a warranty may be gathered from the acts and conversation between the parties, and that no particular words are necessary to constitute a warranty. White V. Gresham, 52 App. 398.

In Lanz V. Wachs, 50 App. 263, O&Co. being dissatisfied with a boiler which Wachs had put in for them, on account of its being too small, wanted to exchange it for one larger. After some talk they said to Wachs, "You go ahead and put in what is right and charge the difference." On the trial of a suit for the breach of warranty, it was held that the contract being executory, the law implied that the boiler should be a good merchantable boiler of its kind, and raised a warranty to that effect, and that the contract could be fulfilled only by putting in a boiler of that character.

When a dealer contracts to sell or supply an article in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the dealer, there is an implied warranty that it is fit for the purpose to which it is to be applied. Edwards V. Dillon, 147 Ill. 14.

In Hanson V. United States Brewing Co. 70 App. 265, it was held that a contract to purchase 2000 barrels of beer, delivery to be made from time to time as requested, contemplated beer of a merchantable quality in the vendee's business.

In Peoria Grape Sugar Co. V. Turney, 175 Ill. 631, where the court modified an instruction that there was no warranty of the goods sold
were not warranted, by another charge that if the sale was based on goods previously sold furnished, they should be equal in quality to those previously furnished, and if they were not equal in character and grade to those previously furnished, then damages should be allowed. The Supreme Court held the instructions as to implied warranty sufficient.

In Halleck v. Cutter, 71 App. 471, a case in which to an action was set off an implied warranty that an instrument sold to defendant as a potato digger would dig potatoes, the court after discussing the text-books said, "The very name 'potato digger' implies that it is an instrument calculated and intended to take potatoes out of the ground and leave them on top of the soil. The evidence is all one way that these machines would not do this but only shoved the soil and the potatoes to one side, leaving the potatoes still in the soil. A common plow would do the same thing. This instrument according to the evidence was no aid in digging potatoes and it is not shown to have been fit for any other use. We hold that one who manufactures an instrument, names it a potato digger and sells it to another, impliedly warrants that it will dig potatoes and place them on top of the ground ready to be picked up."

In regard to the implication of warranty in the sale of provisions, the Court say, Wiedeman v. Keller, 171 Ill. 98, closing an exhaustive discussion as to the law of implied warranty in the sale of provisions, "In an ordinary sale of goods, the rule of caveat emptor applies, unless the purchaser exacts of the vendor a warranty. Where however articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous,
to the health and life of the consumer, that public safety demands that there should be an implied warranty on the part of the vendor, that the article sold is sound and fit for the purpose for which it was purchased. It may be said that the rule is harsh one, but as a general rule in the sale of provisions the vendor has so may more facilities for ascertaining the unsoundness of the article offered for sale, than are possessed by the purchaser, that it is much safer to hold the vendor liable than it would be to compel the purchaser to assume the risk. Moreover we have a statute which makes it a crime for any person to sell or offer to sell or keep for sale, flesh of any diseased animal."

"Sheffer V. Willoughby, 163 Ill. 518, has no bearing on this case, as that case was predicated by the plaintiff on the sole ground of negligence of the defendant."

In the case of Sheffer V. Willoughby, above cited, the action was on the case, for damages, and the court held that a restaurant keeper does not impliedly insure the soundness of food not manufactured by him, which he furnishes to his patrons, but that he is liable only for negligence.

And lastly as to sale by sample, the doctrine is laid down in Everingham V. Lord, 19 Ill. App. 565, that in every sale of goods by sample, the vendor impliedly warrants that quality of the bulk to be equal to that of the sample, and there is no distinction between the contract so expressed in words, and as implied by law. It was further held that any usage or custom which would be competent evidence to affect the rights of the parties under the warranty implied would be competent under the same warranty expressed.
VII.

CONCLUSION.

In conclusion I may say only that the law of warranty as laid down by the Courts in Illinois follows the general rule of the English and American Courts, as mentioned before, except in that instance in which the Court of Illinois have followed the English rule of regarding the correspondence of the article delivered in description with the article sold as a condition precedent, instead of regarding it as warranty implied by law, the doctrine of the American Courts generally.

The law of warranty, then, rests upon the reasons brought out in the decisions, that a purchaser who purchases goods which he has never had an opportunity to inspect should be protected against those things which an examination would have revealed to him, and secondly, that a buyer who naturally relies upon the representations or the superior knowledge or skill of the dealer, should be protected to the extent of this natural reliance. If in any case neither reason exists for protecting the buyer, in the absence of an express warranty, the rule is caveat emptor.