

SOME PHASES OF CONDITIONS AND WARRANTIES IN THE LAW OF SALES OF GOODS

WARRANTIES.

It has been said by high authority that there is in the law no word more troublesome than the word warranty; for it is constantly used in different senses, as in the law of insurance, charter-parties and sales.¹ In the law of sales of personal property a warranty is an express or implied statement of something which a party undertakes shall be a part of the contract, collateral to the express object of it.² It is a separate, independent, collateral stipulation, which is not strictly a condition, for it neither suspends, nor defeats the completion of the sale, the vesting of the thing bargained for in the buyer, or the right in the seller to the purchase money.³ That a warranty is an independent agreement appears in those cases in which the seller was permitted to sue for the purchase price without pleading the warranty;⁴ and that it is a part of the contract of sale, is established by the rule that warranties in illegal sales are void.⁵ So, an oral warranty cannot be proved where the contract of sale is in writing and is silent as to warranties,⁶ but it may be proved in a sale within the Statute of Frauds, if the statute is satisfied other than by a written memorandum.⁷ That a warranty is an agreement collateral to the main purpose of the contract of sale to which it is annexed, plainly appears in the following proposal, which the buyer is supposed to have accepted: "I will sell you this watch for fifty dollars, and I will warrant it to be gold eighteen carats fine." This contract of sale contains two promises on the part of the seller, namely: that he will transfer the general property in the watch, and that he will respond in damages if it be not gold eighteen carats fine. The latter promise is

¹ Williston on Sales, Sec. 181.

² Flint-Walling Mfg. Co. v. Ball, 43 Mo. App. 504, citing Benj. on Sales, Sec. 600; Bagley v. Cleveland Rolling Mill Co., 21 Fed. 159.

³ Dorr v. Fisher, 1 Cush. 271; Sales of Goods Act, Sec. 11 (b).

⁴ Rogers v. Brown, 103 Me. 478.

⁵ Finley v. Quirk, 9 Minn. 194, 86 Am. Dec. 93; Northrup v. Foot, 14 Wend. 248.

⁶ Lower v. Hickman, 80 Ark. 505, 97 S. W. 681; Sheperd v. Gilroy, 46 Ia. 193; Vierling v. Furnace Co., 170 Ill. 189; Frost v. Blanchard, 97 Mass. 155; Jolliffe v. Collins, 21 Mo. 338; Seitz v. Brewing Co., 141 U. S. 510. But a written warranty after a sale, based on a prior oral warranty is enforceable. Collette v. Weed, 68 Wis. 428.

⁷ Northwood v. Rennie, 3 Ont. App. 37 (1878).

clearly collateral to the former both in form and effect. Precisely the same things are true in the proposal re-worded thus: "I will sell you this eighteen carat gold watch for fifty dollars," even though the collateral form of the warranty has disappeared.

A warranty like other promises is not an enforceable obligation unless it is supported by a good consideration. If the warranty be made contemporaneously with the contract of sale, the consideration of the latter will support the warranty.⁸ This view is undoubtedly the law and not subject to criticism; but it is the opinion of the writer that the true consideration for such a warranty is the sale itself and not the price of the goods purchased; for it is a fact of common knowledge in legal and business circles that many a sale would not have been made if a warranty had been refused. If a warranty be given after the contract of sale is completed, a new consideration is necessary as a matter of course; for the sale can no longer be an inducement to warrant, and the consideration of the sale has been exhausted by a transfer of the goods.⁹ A very slight consideration however, will suffice to support a subsequent warranty.¹⁰

In the vast majority of cases sales are effected by the statements of the seller regarding the quality, character or fitness for use of the goods transferred. A statement made for the purpose of inducing a purchase of an article may be an expression of opinion, a representation, a condition or a warranty. As to conditions a reference to the first part of this paper must suffice.¹¹ An expression of opinion is no part of a contract of sale, and is therefore neither a cause of action for damages nor a ground for rescission, unless it were given under circumstances which would justify treating it as a warranty.¹² Where the parties possess equal knowledge or means of knowledge concern-

⁸ *Mechem on Sales*, Sec. 1247; *Standard Underground Cable Co. v. Electric Co.*, 76 Fed. 422, 22 C. C. A. 258.

⁹ *Benjamin on Sales*, Sec. 611.

¹⁰ A buyer was justified in refusing to receive goods ordered, and the seller said that he would warrant the goods against freezing, if the buyer would accept them, and the warranty was decided to be valid. *Cougar v. Chamberlain*, 14 Wis. 258.

¹¹ See Vol. II, of this Review, page 53.

¹² In *Worth v. McConnell*, 42 Mich. 473, the court said: "The representation made that it was a very good machine and would do very nice work falls far short of amounting to a warranty. If this statement could be so held, then no man could with any degree of safety say anything in praise of his wares without being held as thereby warranting them—a doctrine certainly not sustained in the law." See also *Baldwin v. Daniel*, 69 Ga. 782; *Burr v. Redhead*, 52 Neb. 617; *Matlock v. Meyers*, 64 Mo. 531; *Elkins v. Kenyon*, 34 Wis. 93; *Sleeper v. Wood*, 60 Fed. 888.

ing the subject matter of a sale, the seller's honest opinion relative thereto will not, as a rule, be held to be a warranty;¹³ but if the seller express an opinion on a matter of which he has special knowledge, and on which the buyer did not, and could not be expected to have an opinion, then the opinion so expressed is a warranty, if relied and acted upon by the buyer.¹⁴

A representation is an assertion of fact made by one party to the other respecting the goods bargained for.¹⁵ Representations are commonly made prior to the formation of the contract of sale, but they may be made at that time or subsequently. However, whenever made, they are no part of the contract of sale;¹⁶ and, even though false, unless fraudulently made, afford no ground for a rescission of the sale or recovery of damages.¹⁷ In the absence of fraud one has no right to rely upon a representation, unless it was made in such a manner and under such circumstances as warranted him in believing that the party who made it intended to be bound by it.¹⁸ Representations, however, may become foundations for actions for breaches of warranty;¹⁹ that is, representations may become warranties, and such is the case whenever by an understanding of the parties the representations are incorporated into and made a part of the contract of sale. If such an understanding be not provable by direct evidence, it will be implied where the seller asserted a material thing as a fact, of which the buyer was ignorant, and on which the buyer relied. A statement of fact incorporated into the contract of sale by implication and thus made a warranty, is an express, not an implied, warranty as it is often called.

Early in the civil law purchasers protected themselves from the operation of the law of *caveat emptor* by exacting covenants as to quality; particularly in the purchase of animals and slaves, whose defects or diseases might not be discoverable until long after the sale.²⁰ Such, too, was doubtless the practice of buyers in the early common

¹³ *Linn v. Gunn*, 56 Mich. 447, 23 N. W. 84; *Roberts v. Applegate*, 153 Ill. 210.

¹⁴ *Benj. on Sales* (5th ed.), 659; *Mechem on Sales*, Secs. 1241-1243, and illustrative cases in the notes.

¹⁵ *Benj. on Sales*, Sec. 561 (7th Am. ed.).

¹⁶ *James & Co v Bocage & Co.*, 45 Ark. 284.

¹⁷ *Hopkins v. Tanqueray*, 15 C. B. 130. See facts of this case stated in *Benj. on Sales*, Sec. 610 (7th Am. ed.).

¹⁸ *Zimmerman v. Morrow*, 28 Minn. 367.

¹⁹ *Crossman v Johnson*, 63 Vt. 333, 22 Atl. 608, 13 L. R. A. 678. The facts of this case are very like those of *Hopkins v. Tanqueray*, *supra*, and the decision seems to be more sound and just than that of the English court.

²⁰ *Moyle's Contract of Sale in the Civil Law*, 192.

law; and it is easily conceivable that covenants as to other things, such as title and fitness for use were soon added to those of quality. These covenants were the first warranties in sales of goods, and were always express in form and nature. A positive assertion by a seller that a horse was sound was not a warranty unless the seller added that he "warranted" him to be sound.²¹ In the course of time the technical word warranty was held to be unessential; and it is now unquestioned law that no particular words or form of words is necessary for the creation of an express warranty.²²

The recognition of informal promises as warranties was accompanied, or closely followed, by the conception that a statement of fact, without semblance of a promise, might be an express warranty. provided, however, that the buyer relied upon it, and that the seller intended the statement to be a warranty. It is still the universally accepted rule that a warranty, to be actionable when broken, must have been relied upon by the buyer;²³ and in many jurisdictions the rule that a seller must intend his words to be a warranty still persists.²⁴ Whether a seller's statements were intended to be warranties or mere representations or expressions of opinion, is an issue for the jury.²⁵ However, the rule that is growing in favor and prevalence, and that is supported by the greater weight of authority, is stated thus by the Supreme Court of Wisconsin: "The better class of cases hold that a positive affirmation of a material matter as a fact, intended to be relied on, is a warranty, whether or not the seller mentally intended to warrant or not."²⁶ But statements of fact relating to goods offered for sale, where there is no fraud and the buyer can inspect the goods, are not warranties, if the seller expressly refuses to warrant.²⁷

²¹ *Chandeler v. Lopus*, Cro. Jac. 4 (1625). See Williston on Sales, Sec. 195, as to the nature of an action on a warranty.

²² *Polhemus v. Heiman*, 45 Cal. 573; *Hanson v. Busse*, 45 Ill. 496; *Unland v. Garton*, 48 Neb. 202; *Young v. Van Natta*, 113 Mo. App. 550; *Richardson v. Coffman*, 87 Ia. 121; *Shordan v. Kyler*, 87 Ind. 38; *Iler v. Jennings*, 87 S. C. 87; *Alvin Fruit Association v. Hartman*, 146 Mo. App. 155, 123 S. W. 957.

²³ *Shoe Co. v. McDonald*, 138 Mo. App. 328; *Shuman v. Heater*, 76 Neb. 119; *Richardson v. Mason*, 53 Barb. 601; *Woolsey v. Ziegler*, 32 Okl. 715, 123 Pac. 167.

²⁴ *Polhemus v. Heiman*, 45 Cal. 573; *McLennan v. Ohmen*, 75 Cal. 558; *Hanson v. Busse*, 45 Ill. 496; *Jones v. Quick*, 28 Ind. 125; *Mattock v. Meyers*, 64 Mo. 531; *Young v. Van Natta*, 113 Mo. App. 550.

²⁵ *Unland v. Garton*, 48 Neb. 202.

²⁶ *Hoffman v. Dixon*, 105 Wis. 315. Also to the same effect, *Danforth & Co. v. Crookshanks*, 68 Mo. App. 311; *Ingrahany v. Union Ry. Co.*, 19 R. I. 356; *Miller v. Moore*, 83 Ga. 684; *Huntington v. Lombard*, 22 Wash. 202.

²⁷ *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5; *Fauntleroy v. Wilcox*, 80 Ill. 477.

Can there be a warranty in an executive contract of sale? The decisions yield contradictory answers to this question. On the one hand we are told that there may be warranties in executory as well as in sales *in presenti*,²⁸ and that the same rights and remedies attach to warranties in executory as in executed sales.²⁹ On the other hand it has been decided that there can be no express warranty of quality of that which does not exist;³⁰ and that a warranty is an incident only of a consummated transaction and has no place as a contract in an executory sale.³¹ Happily, these cases are reconcilable, for a warranty in an executory sale is really a condition precedent,³² and it cannot be sued on as a warranty.³³ Whether these collateral promises in executory sales be called warranties or conditions precedent, it is the general rule both in this country and in England that, if such a promise be broken, the buyer may refuse the goods and sue for a breach of the contract of sales.³⁴ If, however, the buyer accept the goods, or so deal with them as to vest in himself the title to them by estoppel, the law as to the buyer's right to return the goods and sue on his warranty is by no means settled. In England and about one-half of our states there cannot be in an executed sale a return of the goods for a breach of warranty.³⁵ The chief reason for this rule being that the buyer cannot re-vest the title to the goods in the seller without the latter's consent. The cogency of this reason is weakened or destroyed by the universally recognized right of either party to a sale to rescind the sale for fraud and re-vest the title to the goods. If one may rescind and sue on a fraudulent warranty, why may he not do so for a breach of a warranty untainted by fraud?³⁶ In either case the

²⁸ Polhemus v. Heiman, 45 Cal. 573; Maxwell v. Lee, 34 Minn. 511; White v. Selloh, 74 Wis. 435.

²⁹ Briggs v. Hilton, 99 N. Y. 517.

³⁰ Patomac Steamboat Co. v. Harlan Co., 66 Md. 42.

³¹ Osborn v. Gantz, 60 N. Y. 540.

³² Street v. Blay, 2 B. & Ad. 456, 109 Eng. Reprint, 1212; Morse v. Stock Yards Co., 21 Ore. 289, 14 L. R. A. 157.

³³ Harley v. Golden State Iron Works, 66 Cal. 238; Halley v. Folsom, 1 N. D. 325.

³⁴ "The cases in which it has been held that, on the sale of a specific chattel, the buyer's remedy is confined to a cross-action or to a defence by way of reduction of the price, are all cases of the bargain and sale of a special chattel unconditionally, where consequently, the property had become vested in the buyer; but no similar case of an executory contract has been found." Benjamin on Sales, Sec. 890 (7th Am. ed.).

³⁵ Owens v. Sturges, 67 Ill. 366; Lynch v. Curfman, 65 Minn. 170, 68 N. W. 5, Thornton v. Wynn, 12 Wheat. 183; Street v. Blay, 2 B. & Ad. 456, 109 Eng. Reprint, 1212.

³⁶ Branson v. Turner, 77 Mo. 489.

result is the same—the buyer has not bought the goods bargained for and desired. A large number of our states—among them Missouri³⁷—have adopted the juster rule that warranties will survive the acceptance of goods by the buyer,³⁸ and that he may reject or return the goods for a breach of warranty even though the property in the goods has vested in him.³⁹

Implied warranties are conclusions and inferences of law, from facts, which are admitted or proved before the jury.⁴⁰ "A warranty is implied where, from the circumstances surrounding the parties at the time of the sale, or from the nature of the thing sold, the law assumes it to be just that the buyer should be protected, in addition to the contract of sale, by a further implied contract or guarantee on the part of the vendor, and so raises by implication a warranty on the seller's part."⁴¹ With respect to the goods sold implied warranties relate to title or quality. The law creates them in both executed and executory sales, and makes them conclusive.

The development of the implied warranty of title from the time it did not exist to its present perfection in the law of England is an interesting study; but it must suffice now to say that a buyer does not take goods *caveat emptor* as to title, as he did in the olden days.⁴² Be a contract of sale oral or written, in the absence of an express warranty of title, a seller by his act of selling, or by his agreement to sell, impliedly warrants in sales *in presenti* that he has, and in sales *in futuro* that he will have at the time of delivery, an indefeasible title, free from all liens and incumbrances, and sufficient to secure to the buyer the quiet possession of the goods purchased, as against any lawful claims existing at the time of the sale.⁴³ The exceptions to

³⁷ *Branson v. Turner*, *supra*; *Johnson v. Agricultural Co.*, 20 Mo. App. 100; *Viertel v. Smith*, 55 Mo. App. 617.

³⁸ *Briggs v. Hilton*, 99 N. Y. 517; *Carleton v. Jenks*, 80 Fed. 937.

³⁹ See *Williston on Sales*, Sec. 608, notes 89 and 90, where numerous decisions on both sides of the question are collected; *Mechem on Sales*, Sec. 1805, *Sales Act*, Sec. 69 (c); *Wiley v. Athol*, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342; *Day v. Pool*, 52 N. Y. 416.

⁴⁰ *Borrekins v. Beavan*, 3 Rawle, 23.

⁴¹ *Haines v. Neece*, 116 Mo. App. 499, 92 S. W. 919; citing *Biddle on Warranties in the Sale of Chattels*, Sec. 3.

⁴² *Noy's Maxims*, c. 42.

⁴³ *Sales Act*, Sec. 13; *Hodges v. Wilkinson*, 111 N. C. 561, 17 L. R. A. 545; *Dresser v. Anisworth*, 9 Barb. 619; *Wood v. Sheldon*, 42 N. J. L. 421; *Marshall v. Duke*, 51 Ind. 62; *Mathiney v. Mason*, 73 Mo. 677; *Burnside v. Burdette*, 15 W. Va. 702.

this rule are sales by pledgees,⁴⁴ assignees in insolvency,⁴⁵ trustees,⁴⁶ executors and administrators,⁴⁷ chattel mortgagees,⁴⁸ receivers,⁴⁹ sheriffs, constables or other judicial officers,⁵⁰ persons known to buyers to be agents,⁵¹ and by one joint tenant to another.⁵² It has been said that in every sale of a chattel, if the possession be at the time in another, and there be no warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril.⁵³ This enunciation of the law is sustained by numerous *dicta* and a few cases which are in point, but it is seriously doubted to be settled law.⁵⁴ There is no sound reason for observing a distinction between sales made by sellers who are in, and those who are out of possession; and it has been swept away in England by the Sales of Goods Act,⁵⁵ and in our country by those states which have adopted the Sales Act.⁵⁶ In the other states the trend of the decisions is in favor of the English rule,⁵⁷ and one may safely predict that in the very near future it will be uniformly held that a sale of an article carries with it a warranty of title even though the seller be not in possession, except where the buyer knows that the article is in the adverse possession of a third party.

Caveat Venditor expresses the civil law rule that if the seller wishes to secure himself from future responsibility in case the goods should afterwards be found to be different in kind or quality from what the parties supposed them to be, he must provide against such a responsibility by a particular agreement with the purchaser.⁵⁸ The converse of this rule is our thoroughly established maxim of *caveat emptor*, an ancient rule of the common law, that as to quality of the

⁴⁴ *Morley v. Attenborough*, 3 Ex. 500.

⁴⁵ *Johnson v. Laybourn*, 56 Minn. 332.

⁴⁶ *Ricks, Adm'r v. Dillahunt*, 8 Port. 133; *John Storm v. Smith*, 43 Miss. 497.

⁴⁷ *Bingham v. Maxey*, 15 Ill. 295.

⁴⁸ *Sheppard v. Earles*, 13 Hun. 651.

⁴⁹ *Barron v. Mullin*, 21 Minn. 374.

⁵⁰ *Tilley v. Bridges*, 105 Ill. 336; *Neal v. Gillaspay*, 56 Ind. 451; *Hensley v. Baker*, 10 Mo. 157; *The Monte Allegre*, 9 Wheat. 616; Sales Act, Sec. 13 (4).

⁵¹ *Irwin v. Thompson*, 27 Kan. 643.

⁵² *Gurley v. Dickson*, 19 Tex. Civ. App. 203, 46 S. W. 53.

⁵³ 2 Kent, 478.

⁵⁴ See Bennett's notes, *Benj. on Sales* (7th Am. Ed.), 674, where the cases cited as authorities for the doctrine are collected and analyzed. *Williston on Sales*, Sec. 218.

⁵⁵ Sec. 12.

⁵⁶ Sec. 13. The Sales Act has been adopted by Ariz., Conn., Ill., Md., Mass., Mich., Nev., N. Y., N. J., Ohio, Pa., R. I., Wis., Vol. II, No. 3, *The American Bar Association Journal*, 710.

⁵⁷ *Gould v. Bourgeois*, 51 N. J. L. 361, 18 Atl. 64.

⁵⁸ *Wright v. Hart*, 18 Wend. 449; *Morey's Outlines of Roman Law*, 363.

goods the buyer takes them at his own risk.⁵⁹ The early rigorous application of the maxim has been gradually relaxed, and many exceptions to it admitted. Indeed, the exceptions to the rule are more important law than the rule itself, and our maxim is yielding to the influence and justice of the rule of the civil law. It is now well understood law that *caveat emptor* does not apply where there is an express warranty;⁶⁰ or where there is fraud on the part of the seller;⁶¹ or where there are defects in the goods which are not discoverable by reasonable inspection by the buyer;⁶² or in sales by manufacturers and growers of their own products.⁶³ In executory sales for future delivery there is an implied warranty that the goods will be merchantable⁶⁴ when delivered,⁶⁵ but not of any particular degree of fineness or quality within merchantability.⁶⁶ So, in sales by description where the buyer has not inspected the goods, there is an implied warranty that the goods shall be salable.⁶⁷ Especially is this true where the description comprehends quality as well as kind, as in the sale of "No. 2, White mixed corn."⁶⁸ That a seller deliver goods which conform to the description, has been decided to be an implied warranty;⁶⁹ but it is really a condition precedent. Notwithstanding some decisions to the contrary⁷⁰ payment of a sound price does not raise an implied warranty of quality.⁷¹ And in a sale of secondhand goods

⁵⁹ Broom's Legal Maxims, 768.

⁶⁰ Hargous v. Stone, 5 N. Y. 73.

⁶¹ McAdams v. Cates, 24 Mo. 223; Croyle v. Moses, 90 Pa. 250, 35 Am. Rep. 654.

⁶² Grigsbey v. Stapleton, 94 Mo. 423; Rothmiller v. Stein, 143 N. Y. 581; 26 L. R. A. 148.

⁶³ Bierman v. City Mills Co., 151 N. Y. 482, 37 L. R. A. 799; Barnard v. Kellogg, 10 Wall., 383.

⁶⁴ Merchantable quality means ordinary quality; marketable quality; bringing the average price, at least, of medium quality of goodness; good merchandise of stable quality; free from any remarkable defect. 5 Words and Phrases, 4490, citing Warner v. Arctic Ice Co., 74 Me. 475.

⁶⁵ Howard v. Hoey, 23 Wend. 350; Fogel v. Brubaker, 122 Pa. St. 7; Merriam v. Field, 24 Wis. 640.

⁶⁶ Fitch v. Archiband, 29 N. J. L. 160.

⁶⁷ Benj. on Sales (7th Am. Ed.), Sec. 656.

⁶⁸ Miller & Co. v. Moore, 83 Ga. 684, 6 L. R. A. 374; Whittaker v. McCormick, 6 Mo. App. 114; Gachet v. Warren, 72 Ala. 288; Ober v. Blalock, 40 S. C. 31; Hasting v. Lovering, 2 Pick. 214; Forcheimer v. Stewart, 65 Ia. 593.

⁶⁹ Hoffman v. Dixon, 105 Wis. 315, 76 Am. St. Rep. 916; White v. Miller, 71 N. Y. 118; Borrekins v. Bevan, 3 Rawle, 23.

⁷⁰ Lester v. Graham, 1 Mill (1 Constitutional) (S. C.), 182; Barnard v. Yates, 1 Nott & McC. 142.

⁷¹ Sound price does not raise a warranty of quality—Wright v. Hart, 18 Wend. 449; Mixer v. Coburn, 11 Met. 559; Warren Glass Works Co. v. Coal Co., 65 Md. 547.

there is no implied warranty of quality or fitness for use;⁷² but in a sale by a dealer there is an implied warranty that an article is new—not secondhand.⁷³

Akin to the implied warranty of merchantability is that of fitness for use. If a chattel be made to order and no special use thereof be mentioned to the manufacturer, he impliedly warrants that it will be reasonably fit for the purpose for which it is ordinarily used.⁷⁴ But there is no implied warranty that a chattel will be reasonably fit for a particular purpose, unless that purpose was communicated to the manufacturer or dealer and the buyer relied on his judgment in supplying the article.⁷⁵ Where the seller is not the manufacturer, and the purchaser knows that fact, in the absence of an express warranty or proof of fraud and deceit on the part of the seller, he is not responsible for latent defects, even though he knew of the intended use.⁷⁶ But where the seller is the manufacturer or grower of the goods, which he supplies for a particular use, he impliedly warrants, according to all the decisions, against all latent defects due to processes of manufacture or growing, whether known to him or not;⁷⁷ and by what seems to be the preponderance of authority he is also liable for defective materials whether he knew of the defect or used due care in selecting them.⁷⁸ No implied warranty of fitness for a particular use, even though made known to the seller, arises where the buyer relies on his own judgment and receives the very thing which he selected or ordered by description.⁷⁹

Can there be both express and implied warranties in a contract of sale? The answer to this question very obviously ought to be in

⁷² *Ramming v. Caldwell*, 43 Ill. App. 175; *Norris v. Reinstedler*, 90 Mo. App. 626. But in *Hall Furniture Co. v. Crane Breed Mfg. Co.*, 85 S. E. 35, L. R. A. 1915, E 428, the Supreme Court of North Carolina held that the seller of a second-hand hearse was bound to furnish an article capable of being used.

⁷³ *Grieb v. Cole*, 60 Mich. 397.

⁷⁴ *Benjamin on Sales* (7th Am. Ed.), Sec. 645.

⁷⁵ *Armstrong v. Tobacco Co.*, 41 Mo. App. 254; *Morse v. Stock Yards Co.*, 21 Ore. 289, 14 L. R. A. 157; *Omaha Coal Co. v. Fay*, 37 Neb. 68; *Dushane v. Benedict*, 120 U. S. 630.

⁷⁶ *American Forcite Co. v. Brady*, 4 App. Div. 95; *Gentilli v. Starace*, 133 N. Y. 140.

⁷⁷ *White v. Miller*, 71 N. Y. 118; *Carleton v. Lombard*, 149 N. Y. 137 and 601; *Am. Forcite Co. v. Brady*, *supra*.

⁷⁸ *Randall v. Newson*, 2 Q. B. D. 102; *Rodgers v. Niles*, 11 O. St. 48; *Brown v. Sayles*, 27 Vt. 227. *Contra*: *Hoe v. Sanborn*, 21 N. Y. 552.

⁷⁹ *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332, 69 L. R. A. 973; *Hight v. Bacon*, 126 Mass. 10; *Kohl v. Lindley*, 39 Ill. 195; *Tilton Safe Co. v. Tisdale*, 48 Vt. 83; *Talbot Paving Co. v. Gorman*, 103 Mich. 403, 27 L. R. A. 96; *Chanter v. Hopkins*, 4 M. & W. 399.

the affirmative; for there is no reason why both the law and the seller may not make warranties for the buyer's protection; but it has been answered in the negative by a number of able courts. "Nor is there any question as to an implied warranty, of title or otherwise. There being an express warranty, that must be taken to contain the entire contract on the part of the seller."⁸⁰ This old rule of law has been rejected by many courts and modified by others, and is no longer sustained by the weight of authority. The Missouri Court of Appeals in deciding that express and implied warranties may exist together said: "An express warranty, to exclude an implied warranty, must be of such a character as to make it apparent that the expressed warranty contained all the obligations assumed by the warrantor."⁸¹ Two warranties may be so distinct and separate that both may stand, as in the case of an express warranty of title and an implied warranty of merchantability.⁸² But there is still a strong current of authority that an express warranty of one quality excludes implied warranties as to other qualities, or fitness for use.⁸³ The trend of the decisions, however, is toward a simple and just rule, which will in the not distant future be generally recognized, namely; any two or more warranties may co-exist in the same contract of sale if they are distinct and not inconsistent.⁸⁴

A warranty in a sale of goods is neither negotiable nor assignable, and it does not run with the goods. It is a personal indemnity, and the liability of the indemnitor cannot be extended to third parties; and therefore a sub-buyer cannot recover on a warranty given by, or imposed by law on the original seller, for there is no privity of contract between them.⁸⁵

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⁸⁰ *Osborn v. Nicholson*, 13 Wall. 654; *Garr, Scott & Co. v. Hodges*, 90 S. W. 580 (Ky).

⁸¹ *Boulware v. Mfg. Co.*, 152 Mo. App. 567.

⁸² *Merriam v. Field*, 24 Wis. 640.

⁸³ *Carleton v. Lombard Ayres & Co.*, 25 N. Y. Supp. 570; *Cosgrove v. Bennett*, 32 Minn. 371; *Wasatch Orchard Co. v. Canning Co.*, 32 Utah 229, 12 L. R. A. (N. S.) 540; *Dwight Bros. Paper Co. v. Western Paper Co.*, 114 Wis. 414; *De Witt v. Berry*, 134 U. S. 306.

⁸⁴ *Aultman Miller & Co. v. Hunter*, 82 Mo. App. 632.

⁸⁵ *Nelson v. Armour Packing Co.*, 76 Ark. 352; *Smith v. Williams*, 117 Ga. 782; *Zuckerman v. Solomon*, 73 Ill. 130; *Walrus Mfg. Co. v. McMehen*, 39 Okla. 667, 51 L. R. A. (N. S.) 1111; *Post v. Burnham*, 83 Fed. 79, 27 C. C. A. 455.