

EXPRESS WARRANTIES IN SALES OF GOODS

GEORGE GLEASON BOGERT

The object of this paper is to discuss the common law cases on express warranties, in connection with the statutory definition of express warranty contained in the Uniform Sales Act.¹

Nature of warranty and of action for breach. A warranty was originally regarded as a representation, rather than a contract, and an action for breach of warranty was purely a tort action.² In early actions in America for breach of warranty trespass on the case was used,³ and recent cases indicate that the tort theory still clings to the action,⁴ although assumpsit or other contract action is now at least an alternative remedy.⁵ Certainly, however, the modern tendency is to make more and more of the contract idea and to minimize the tort notion.⁶ The Sales Act has nothing to do with *forms of action* or *procedure* for the recovery of damages for breach of warranty, but that a promise or contract is not necessary to a warranty under the Act is shown by the statement that an "affirmation of fact" is a warranty under certain circumstances. The seller need not have made an offer or intended to enter into a contract. It is sufficient that he made a statement of fact which was justifiably relied upon by the buyer.

It is frequently said that a warranty is collateral to the main contract of sale;⁷ that is, that the warranty runs alongside but forms no part of the agreement to pass the property in goods and pay the price. At common law the collateral nature of the warranty was important when

¹ Uniform Sales Act, sec. 12. "Definition of express warranty. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

² Ames, *History of Assumpsit* (1888) 2 HARV. L. REV. 1, 8; *Chandelor v. Lopus* (1603, Exch. Ch.) Cro. Jac. 4.

³ *Seixas v. Woods* (1804, N. Y. Sup. Ct.) 2 Caines, 48; *Schuyler v. Russ* (1804, N. Y. Sup. Ct.) 2 Caines, 202; *Beeman v. Buck* (1830) 3 Vt. 53.

⁴ *Farrell v. Manhattan Market Co.* (1908) 198 Mass. 271, 84 N. E. 481; *Way v. Martin* (1891) 140 Pa. 499, 21 Atl. 428.

⁵ *Oneida Mfg. Soc. v. Lawrence* (1825, N. Y. Sup. Ct.) 4 Cow. 440; *Chapman v. Murch* (1822, N. Y. Sup. Ct.) 19 Johns. 290; *Ingraham v. Union R. Co.* (1896) 19 R. I. 356, 33 Atl. 875; *Foster v. Caldwell* (1846) 18 Vt. 176; *Beals v. Olmstead* (1852) 24 Vt. 114; *Standard Paint Co. v. Vietor & Co.* (1917) 120 Va. 595, 91 S. E. 752.

⁶ *Millsapp v. Woolf* (1911) 1 Ala. App. 599, 56 So. 22; *Bolt v. State Sav. Bank* (1915, Tex. Civ. App.) 179 S. W. 1119 (if a warranty is procured by fraud, it may be avoided by the seller).

⁷ *Bagley v. Cleveland R. Mill Co.* (1884, C. C. N. D. N. Y.) 21 Fed. 159; *Ferguson v. Johnson* (1918, Tex. Civ. App.) 205 S. W. 512.

the question of the survival of the warranty after acceptance of the goods was considered. Many courts held that acceptance of the goods barred all right to claim that the seller had not performed the main sale contract, but did not bar the right to recover for breach of a collateral obligation, namely, a warranty. The collateral nature of the warranty is sometimes of practical importance in other connections.⁸ The Sales Act has nothing to say regarding the collateral nature of the warranty obligation and the pre-existing law on that subject will doubtless be continued where the Act is adopted. By providing that all warranties, express and implied, survive acceptance of the goods,⁹ the Act might be said to lend force to the opinion that a warranty is a collateral obligation.

There has been some controversy in the common law cases as to whether an express warranty can be an incident of a contract to sell goods, a contract that the property in goods shall pass at a future date. Some cases have held that there can be no warranty except in connection with a completed or consummated sale,¹⁰ but this must be deemed to mean that if the obligation of the seller under the main sale contract is subject to a condition precedent which is not performed and so the seller does not have to go on with the contract by delivery and passage of property, there is no liability on his part on any warranty. The obligation on the warranty is subject to the same condition precedent. If the main contract falls to the ground, the collateral contract falls with it. But this does not mean that a seller may not bind himself by a warranty unless the property in the goods is to pass at the time of the making of the sale contract. Other common law cases have appeared to indicate that there can be no warranty regarding the quality of an article not in existence,¹¹ but this means that the obligation is an "implied condition," or part of the main sale contract, as distinguished from a collateral warranty. The Sales Act calls these common law "implied conditions," warranties.¹² Where the point has been squarely presented whether a warranty can arise only if the parties intended to pass property at once,

⁸ Thus in *Wills v. Wright* (1911, Del. Super. Ct.) 81 Atl. 507, an action for breach of warranty was brought in the court of a Justice of the Peace. That court had jurisdiction over contracts to deliver goods and pay money, but it was held that it had no jurisdiction over the collateral obligation, the warranty. In *Sanderson v. Trump Mfg. Co.* (1913) 180 Ind. 197, 102 N. E. 2, it was held that the seller might recover the price without introducing evidence regarding the warranty, the burden of proving the existence and falsity of the warranty being on the buyer.

⁹ See Uniform Sales Act, sec. 49.

¹⁰ *Osborn v. Gantz* (1875) 60 N. Y. 540; *Levis v. Pope Motor Car Co.* (1911) 202 N. Y. 402, 95 N. E. 815 (*semble*; here the sale was subject to a condition subsequent, and it was held that an express warranty might be an incident of such a sale).

¹¹ *Potomac Steamboat Co. v. Harlan* (1886) 66 Md. 42, 4 Atl. 903; *Cheboygan Paper Co. v. Eichberg* (1915) 184 Mich. 30, 150 N. W. 312.

¹² Uniform Sales Act, secs. 11 and 14.

the courts have held that a warranty and an agreement to pass property in the future are not inconsistent.¹³

It is ordinarily held that privity of contract is necessary to an obligation on a warranty,¹⁴ that such obligation can exist only between seller and buyer, and that the seller's liability for breach of warranty does not extend to remote buyers of the goods; that is, does not run with the goods.¹⁵ There are, however, cases where the seller of goods has been held liable to another than the buyer because of breach of the warranty which was given to the buyer,¹⁶ and also a few cases where other persons than the seller have been held liable to the buyer for breach of warranty on the basis of statements or promises regarding the goods.¹⁷ If another than the seller guarantees, for a consideration, that the goods shall possess certain qualities, he has doubtless made a valid contract, but it is not technically a warranty. It would seem to be unsound to hold such third person for mere affirmations of fact about the goods. If an agent of the seller or a bystander desires to undertake on his own behalf to guarantee the quality of the goods, there is no reason why he may not do so, but the elements of true contract should be present. The Sales Act, in this section and throughout, indicates that the term "warranty" is to be reserved for an obligation from seller to buyer. The contracts of third parties about the goods are not true warranties and warranties do not run under the Act to remote vendees.

It is elementary that *scienter* is not necessary to an obligation to respond for breach of warranty. The buyer does not need to prove that the seller knew that his statements about the goods were false or that his promises regarding their quality or capacity would not be fulfilled.¹⁸

¹³ *Polhemus v. Heiman* (1873) 45 Calif. 573; *Parks v. Morris Axe & Tool Co.* (1874) 54 N. Y. 586.

¹⁴ *Roberts v. Anheuser Busch Brewing Ass'n* (1912) 211 Mass. 449, 98 N. E. 95.

¹⁵ *Birmingham Chero-Cola Bottling Co. v. Clark* (1921) 205 Ala. 678, 89 So. 64; *Hood v. Warren* (1921) 205 Ala. 332, 87 So. 524; *Drury v. Armour & Co.* (1919) 140 Ark. 371, 216 S. W. 40; *Welshausen v. Charles Parker Co.* (1910) 83 Conn. 231, 76 Atl. 271; *Fulton Bank v. Mathers* (1918) 183 Iowa, 226, 166 N. W. 1050; *Booth v. Scheer* (1919) 105 Kan. 643, 185 Pac. 898.

¹⁶ *Richardson Mach. Co. v. Brown* (1915) 95 Kan. 685, 149 Pac. 434 (seller of threshing machine who had warranted it held liable on the warranty to third party whose grain was injured by defective operation of the machine); *Mazetti v. Armour & Co.* (1913) 75 Wash. 622, 135 Pac. 633 (manufacturer held liable to retailer on implied warranty, although no privity).

¹⁷ *Mobile Auto Co. v. Sturges & Co.* (1914) 107 Miss. 848, 66 So. 205 (purchaser of draft for price and bill of lading representing goods held a co-warrantor with seller); *Hadley v. Bordo* (1890) 62 Vt. 285, 19 Atl. 476 (*semble*; one not seller may warrant for a consideration, but is not likely to do so); *Cooper v. Huerth* (1914) 156 Wis. 346, 146 N. W. 485 (agent may engage for self that goods shall have certain qualities).

¹⁸ *Williamson v. Allison* (1802, K. B.) 2 East, 446; *Raft River Land & Livestock Co.* (1917) 30 Idaho, 804, 168 Pac. 1074; *House v. Fort* (1837, Ind.) 4 Blackf. 293 (even though form of action be tort); *Dodson Fruit Co. v. Galanter* (1920) 145 Minn. 319, 177 N. W. 362; *Brisbane v. Parsons* (1865) 33

The state of the seller's knowledge regarding the facts affirmed or the promises made is immaterial.¹⁹ If the seller did actually know that the statements he made about the goods were untrue, the buyer may elect between deceit and breach of warranty.²⁰

Form of warranty; words necessary. While in the early law the use of the word "warrant" was necessary, and the allegation had to be *warrantizando vendidit*,²¹ this formality has long since been dispensed with, and it is universally held that no particular words or phrases are necessary to constitute a warranty.²² The use of the word "warrant," without reference to any particular qualities, is equivalent to an assertion of general soundness.²³ Sometimes the word "guaranty" is used in the sense of "warranty;"²⁴ but this is a loose use of the former word, for it properly applies only to "an assurance of the payment of a debt or the performance of a duty or contract by another person."²⁵

Consideration: time of warranty. The contract nature of the warranty obligation is shown by the requirement that there be consideration for the warranty. If the warranty is made at the time of the sale, the agreement to pay, or payment of, the price is sufficient consideration,²⁶ and no separate consideration for the warranty need be agreed upon.²⁷

If the statements of the seller were made previous to the sale, it is a question for the trier of facts to determine whether the statements were justifiably relied on by the buyer at the time of the making of the sale contract or whether they were mere preliminary representations which were set aside and superseded by what was said and done at the time the parties entered into the contract.²⁸ In many cases statements made

N. Y. 332; *Madden v. Graham* (1918, Okla.) 174 Pac. 259; *Flood v. Yeager* (1913) 52 Pa. Super. Ct. 637; *Beeman v. Buck*, *supra* note 3.

¹⁹ *Chappell v. Boram* (1911) 159 Mo. App. 442, 141 S. W. 19.

²⁰ *Barnard v. Napier* (1916) 167 Ky. 824, 181 S. W. 624; *Barthelemy v. Foley Elevator Co.* (1919) 141 Minn. 423, 170 N. W. 513; *Blair v. Hall* (1918, Mo. App.) 201 S. W. 945. But if the buyer alleges fraud and breach of warranty in the same complaint and proves the latter only, it has been held that he cannot recover, since the gravamen of his action was fraud. *Ross v. Mather* (1872) 51 N. Y. 108.

²¹ *Chandelor v. Lopus*, *supra* note 2.

²² *Cross v. Gardner* (1689, K. B.) 1 Shower, 68; *Medina v. Stoughton* (1700, K. B.) 1 Ld. Raym. 593; *Polhemus v. Heiman*, *supra* note 13; *White Automobile Co. v. Dorsey* (1913) 119 Md. 251, 86 Atl. 617; *Holman v. West* (1919, Mo. App.) 215 S. W. 766; *Chapman v. Murch*, *supra* note 5.

²³ *Richardson v. Brown* (1823, C. P.) 1 Bing. 344.

²⁴ *Accumulator Co. v. Dubuque St. Ry. Co.* (1894, C. C. A. 8th) 64 Fed. 70; *Conkling v. Standard Oil Co.* (1908) 138 Iowa, 596, 116 N. W. 822; *Scott v. Keith* (1908) 152 Mich. 547, 116 N. W. 183; *State Bank v. Cape Girardeau and Chester R. Co.* (1913) 172 Mo. App. 662, 155 S. W. 1111.

²⁵ *Gay Oil Co. v. Roach* (1910) 93 Ark. 454, 455, 125 S. W. 122, 123.

²⁶ *McCauley v. Ridgewood Trust Co.* (1911, Sup. Ct.) 81 N. J. L. 86, 79 Atl. 327.

²⁷ *Standard Underground Cable Co. v. Denver Consol. Elec. Co.* (1896, C. C. A. 3d) 76 Fed. 422.

²⁸ *Percival v. Oldacre* (1865) 18 C. B. (N. S.) 398; *Powers v. Briggs* (1905) 139 Mich. 664, 103 N. W. 194; *Way v. Martin* (1891) 140 Pa. 499, 21 Atl. 428.

prior to the formation of the contract have been regarded as warranties,²⁹ while in other cases it has been held that the contract was not made with reference to such statements.³⁰ Where the prior statements of the seller are regarded as warranties, the assumption is that there is an implied repetition of them at the time of the making of the contract and that the buyer's payment of, or agreement to pay, the price forms the consideration for the warranties.

If the statement relied on by the buyer as evidence of a warranty was made after the making of the sale contract, proof must be made of some new consideration, aside from the payment of, or agreement to pay, the price.³¹ Such new consideration has been found where the buyer paid the price before due,³² or accepted the goods after the failure of the seller to deliver on time.³³ If the warranty was made after the sale, but in compliance with an understanding reached at the time of the making of the contract, it has been held to relate back to the date of the contract, and to be supported by the consideration of the main contract.³⁴ It would seem that mere acceptance of the goods, an act which the buyer was under an obligation to perform, ought not to constitute sufficient consideration for a warranty made after the formation of the contract but before delivery,³⁵ but there is some authority to the contrary.³⁶

²⁹ *Wilmot v. Hurd* (1834, N. Y. Sup. Ct.) 11 Wend. 584 (offer to warrant, followed by sale, held warranty); *Moore v. King* (1890, Sup. Ct.) 57 Hun, 224, 10 N. Y. Supp. 651 (first sale with warranty, followed by second order on same terms); *San Antonio Mach. & Supply Co. v. Josey* (1906, Tex. Civ. App.) 91 S. W. 598; *Hobart v. Young* (1891) 63 Vt. 363, 21 Atl. 612 (warranty in negotiations, sale three days later); *Milburn Wagon Co. v. Nisewarner* (1894) 90 Va. 714, 19 S. E. 846 (warranty in catalogue furnished before sale); *Winkler v. Patten* (1883) 57 Wis. 405, 15 N. W. 380 (various shipments under a single contract).

³⁰ *Carnac v. Warriner* (1845) 1 C. B. 356; *Hopkins v. Tanqueray* (1854) 15 C. B. 130; *Battles v. Whitley* (1919) 17 Ala. App. 125, 82 So. 573; *Loper v. Lingo* (1916, Del. Super. Ct.) 97 Atl. 585 (said that warranty must be statement "at the time of the sale"); *Martin v. Shoub* (1916) 62 Ind. App. 586, 113 N. E. 384 (though seller talked of warranting); *Ransberger v. Ing* (1894) 55 Mo. App. 621 (statement that shoats were sound made in notice of auction three weeks in advance); *Noble v. Buddy* (1911) 160 Mo. App. 318, 142 S. W. 436; *Shull v. Ostrander* (1863, N. Y. Sup. Ct.) 63 Barb. 130.

³¹ *Baldwin v. Daniel* (1883) 69 Ga. 782, 791; *Anderson v. Eastman* (1912) 168 Ill. App. 172; *Summers v. Vaughan* (1871) 35 Ind. 323; *Farmers' Stock Breeding Ass'n v. Scott* (1894) 53 Kan. 534, 36 Pac. 978; *Cady v. Walker* (1886) 62 Mich. 157, 28 N. W. 805; *Morehouse v. Comstock* (1877) 42 Wis. 626.

³² *International Harv. Co. v. Haneisen* (1918) 66 Ind. App. 355, 118 N. E. 320.

³³ *Congar v. Chamberlain* (1861) 14 Wis. 258.

³⁴ *Barton Bros. v. Chicago Fire Proof Cov. Co.* (1905) 113 Mo. App. 462, 87 S. W. 599; *Brown v. Nevins* (1913, Sup. Ct.) 84 N. J. L. 215, 86 Atl. 938.

³⁵ *Fletcher Bros. v. Nelson* (1896) 6 N. D. 94, 69 N. W. 53.

³⁶ *Douglass v. Moses* (1893) 89 Iowa, 40, 56 N. W. 271; *Bowen v. Zaccanti* (1919) 203 Mo. App. 208, 208 S. W. 277; *Luckes v. Meserole* (1909) 132 App. Div. 20, 116 N. Y. Supp. 350. In *Vincent v. Leland* (1867) 100 Mass. 432, the goods had been delivered, but the price had not been fixed. It was held that the fixing of the price and the agreement to pay it constituted consideration.

Oral or written warranty: the parol evidence rule. It is obvious that an express warranty may be either oral or written.³⁷ If what is alleged to be a warranty is in writing, the construction of it is for the court.³⁸ Where the evidence is oral, the existence of a warranty is for the jury,³⁹ unless reasonable men could draw but one deduction.⁴⁰ The buyer has the burden of showing a warranty and its breach.⁴¹

The parol evidence rule of course applies to contracts of sale as well as other documents. Hence where a paper purports to contain all the terms of the contract of sale, parol evidence will not be admitted to show an express warranty,⁴² and, in the absence of fraud or mistake, a contract containing written warranties will be conclusively presumed to contain all the express warranties made in connection with the sale.⁴³ But where the paper is a mere memorandum or partial statement of the contract, oral evidence will be received to show a warranty.⁴⁴

"Affirmation of fact." The reports are replete with cases where affirmations of fact have been regarded as express warranties, and the

³⁷ *Hoopes & Sons v. Simpson Fruit Co.* (1917) 180 Iowa, 833, 161 N. W. 629.

³⁸ *Osgood v. Lewis* (1829, Md.) 2 H. & G. 495; *Brown v. Bigelow* (1865, Mass.) 10 Allen, 242; *El Paso & Southwestern R. Co. v. Eichel* (1910, Tex. Civ. App.) 130 S. W. 922.

³⁹ *Van Horn v. Stautz* (1921) 297 Ill. 530, 131 N. E. 153; *Unland v. Garton* (1896) 48 Neb. 202, 66 N. W. 1130; *Whitney v. Sutton* (1883, N. Y. Sup. Ct.) 10 Wend. 411; *Kime v. Riddle* (1917) 174 N. C. 442, 93 S. E. 946; *McAllister v. Morgan* (1905) 29 Pa. Super. Ct. 476.

⁴⁰ *DeZeeuw v. Fox Chem. Co.* (1920) 189 Iowa, 1195, 179 N. W. 605; *Young v. Van Natta* (1905) 113 Mo. App. 550, 88 S. W. 123. In *Swift and Co. v. Meekins* (1920) 179 N. C. 173, 102 S. E. 138, an oral statement that fertilizer was as good as any in the market was held to be a warranty as a matter of law.

⁴¹ *Turl's Sons Inc. v. Williams Eng. Co.* (1910) 136 App. Div. 710, 121 N. Y. Supp. 478.

⁴² *Graham v. Eiszner* (1888) 28 Ill. App. 269; *Telluride Power Transm. Co. v. Crane Co.* (1904) 208 Ill. 218, 70 N. E. 319; *Nichols, Shepard & Co. v. Wyman* (1887) 71 Iowa, 160, 32 N. W. 258; *Diebold Safe & Lock Co. v. Huston* (1895) 55 Kan. 104, 39 Pac. 1035; *Frost v. Blanchard* (1867) 97 Mass. 155; *Nichols, Shepard & Co. v. Crandall* (1889) 77 Mich. 401, 43 N. W. 875; *McCormick Harv. Mach. Co. v. Thompson* (1891) 46 Minn. 15, 48 N. W. 415; *Eighmie v. Taylor* (1885) 98 N. Y. 288; *Somerville v. Gullett Gin Co.* (1917) 137 Tenn. 509, 194 S. W. 576; *Buchanan v. Laber* (1905) 39 Wash. 410, 81 Pac. 911; *Cooper v. Cleghorn* (1880) 50 Wis. 113, 6 N. W. 491.

⁴³ *Wilson v. New U. S. Cattle Ranch Co.* (1896, C. C. A. 8th) 73 Fed. 994; *Buckstaff v. Russell & Co.* (1897, C. C. A. 8th) 79 Fed. 611; *Fitch v. Woodruff & Beach Iron Works* (1860) 29 Conn. 82; *United Iron Works v. Outer Harbor Dock & Wharf Co.* (1914) 168 Calif. 81, 141 Pac. 917; *Baldwin v. Daniel* (1883) 69 Ga. 782; *Allen v. Young* (1879) 62 Ga. 617.

⁴⁴ *Allen v. Pink* (1838, Exch.) 4 M. & W. 140; *Schneider v. Fairmon* (1917) 128 Ark. 425, 194 S. W. 251; *Ruff v. Jarrett* (1880) 94 Ill. 475; *Jackson v. Mott* (1888) 76 Iowa, 263, 41 N. W. 12; *Hitz v. Warner* (1911) 47 Ind. App. 612, 93 N. E. 1005; *Herson v. Henderson* (1850) 21 N. H. 224; *Perrine v. Cooley* (1877, Sup. Ct.) 39 N. J. L. 449; *Filkins v. Whyland* (1862) 24 N. Y. 338; *Selig v. Rehfuß* (1900) 195 Pa. 200, 45 Atl. 919; *Houghton v. Carpenter* (1868) 40 Vt. 588; *Red Wing Mfg. Co. v. Moe* (1885) 62 Wis. 240, 22 N. W. 414.

form of a promise, warranty or guaranty has not been insisted upon. The difficulty has been to decide whether a given statement was an affirmation of fact or mere seller's talk or expression of opinion. In solving this question the courts have considered the amount of knowledge possessed by both parties concerning the goods, the character of the goods, and many other points. Cases illustrating the kind of statements regarded by the courts as affirmations of fact are cited below.⁴⁵ The affirmation must be to the buyer. A statement to a third party is not admissible.⁴⁶ And the affirmation must be definite.⁴⁷

⁴⁵ *Riddle v. Webb* (1895) 110 Ala. 599, 18 So. 323 (mules sound as a dollar); *Burge v. Stroberg* (1871) 42 Ga. 88 (age of horse); *Able Transfer Co. v. Wm. E. Dee Co.* (1915) 192 Ill. App. 14 (machines in satisfactory condition); *Ryan v. Brown* (1917) 206 Ill. App. 534 (horse sound); *Latham v. Shipley* (1892) 86 Iowa, 543, 53 N. W. 342 (machine in first class order); *Stevens v. Bradley* (1893) 89 Iowa, 174, 56 N. W. 429 (that hogs were as healthy as any seller had ever owned); *Powell v. Chittick* (1893) 89 Iowa, 513, 56 N. W. 652 (hogs were all right); *Briggs v. Rumely Co.* (1895) 96 Iowa, 202, 64 N. W. 784 (machine as good as any other of same size in United States); *Aultman-Taylor Mach. Co. v. Ridenour* (1896) 96 Iowa, 638, 65 N. W. 980 (with good management separator is capable of doing good business); *American Fruit Products Co. v. Davenport* (1915) 172 Iowa, 683, 154 N. W. 1031 (that vinegar complies with pure food laws); *Merkle-Hines Mach. Co. v. Gaynor* (1919) 185 Iowa, 210, 170 N. W. 381 (machine in first class condition); *Vaupel v. Lamply* (1914) 181 Ind. 8, 103 N. E. 796 (hay is good); *McCarty v. Williams* (1915) 58 Ind. App. 440, 108 N. E. 370 (horse sound and all right); *Kemp v. Mays* (1920) 73 Ind. App. 236, 127 N. E. 156 (hogs all right); *Footte v. Wilson* (1919) 104 Kan. 191, 178 Pac. 430 (goods salable); *McClintock v. Emick Stoner Co.* (1888) 87 Ky. 160, 7 S. W. 903 (mules all right); *Lamme v. Gregg* (1858, Ky.) 1 Metc. 444, and *Dickens v. Williams* (1842, Ky.) 2 B. Mon. 374 (that jack is a sure foal getter); *Siegel v. Riebolt* (1910) 110 Minn. 344, 125 N. W. 582 (horses sound); *Wertheimer-Swaris Shoe Co. v. McDonald* (1909) 138 Mo. App. 328, 122 S. W. 5 (goods equal in quality to other goods of a well known kind); *Deijen v. Moerschel Brewing Co.* (1911) 157 Mo. App. 614, 138 S. W. 696 (mule is straight and all right); *Richardson v. Mason* (1868, N. Y. Sup. Ct.) 53 Barb. 601 (that cows are with calf); *Cook v. Mosely* (1835, N. Y. Sup. Ct.) 13 Wend. 277 (mare not lame and seller would not be afraid to warrant her); *Woolsey v. Ziegler* (1912) 32 Okla. 715, 123 Pac. 164 (cow a first class No. 1 Jersey); *Crescent Cotton Oil Co. v. Union Gin & Lumber Co.* (1917) 138 Tenn. 58, 195 S. W. 770 ("good, sound cotton seed"); *Barnum Wire & Iron Works v. Seley* (1903) 34 Tex. Civ. App. 47, 77 S. W. 827 (will give you a strictly first class job, with respect to an awning to be put up by seller); *Harrell v. McDuffie* (1910) 61 Tex. Civ. App. 30, 128 S. W. 1149 ("mighty good shingles, as good as you can get anywhere"); *Studebaker Bros. Co. v. Anderson* (1917) 50 Utah, 319, 167 Pac. 663 (car in perfect condition for work desired); *Globe Granite Co. v. Clements* (1918) 92 Vt. 383, 104 Atl. 104 (monument sound and free from cracks); *Herron v. Dibrell Bros.* (1891) 87 Va. 289, 12 S. E. 674 (tobacco sound, redried and would certainly keep); *Smith v. Justice* (1861) 13 Wis. 600 (horse all right); *Milwaukee Rice Mach. Co. v. Hamacek* (1902) 115 Wis. 422, 91 N. W. 1010 (second hand machine was as good as new).

⁴⁶ *Phillips v. Vermillion* (1900) 91 Ill. App. 133.

⁴⁷ *Hogins v. Plympton* (1831, Mass.) 11 Pick. 97 ("good, fine wine" too indefinite); *Greer v. Whalen* (1915) 125 Md. 273, 93 Atl. 521 (heifers same as buyer had been getting of seller sufficiently definite).

Is descriptive matter an express warranty? The seller may execute and deliver a bill of sale by which he passes property in "one sound, gentle six year old horse," or he may orally agree upon the sale of a horse before the eyes of the parties and state during the negotiations that the horse is sound, gentle and six years old. Is there any difference between the obligations incurred by the seller in these two cases? Are the engagements of the seller to be called by different names? In one the statements about the age and qualities of the horse form a part of the description of the subject-matter of the contract, in the other transaction the horse is identified by the observation of the parties and the affirmations about quality and age are separate and collateral.

The majority of the courts which have considered the effect of statements about the quality of goods, embodied in the description of the subject-matter, held at common law that such statements were not express warranties because they were not collateral to the sale contract, but were rather a part of the main agreement to transfer the property in goods and pay a price in exchange therefor.⁴⁸ That the goods be as described was an "implied condition,"⁴⁹ but it was not an express warranty. The Sales Act⁵⁰ deduces from the description a warranty that the goods shall conform to the description, an obligation which takes the place of the common law "implied condition" that the goods conform. But in many cases descriptive statements, part and parcel of the statement of what the subject-matter was, have been held to amount to express warranties.⁵¹

⁴⁸ *Anthony v. Halstead* (1877, C. P. Div.) 37 L. T. (N. S.) 433; *Case Threshing Mach. Co. v. Copren Bros.* (1917) 32 Calif. App. 250, 162 Pac. 647 (but see *Barrios v. Pac. States Trading Co.* [1919] 41 Calif. App. 637, 183 Pac. 236, where a description of the goods as "export cured boneless codfish" was held to amount to an express warranty); *Shambaugh v. Current* (1900) 111 Iowa, 121, 82 N. W. 497; *Diebold Safe & Lock Co. v. Huston* (1895) 55 Kan. 104, 39 Pac. 1035; *Baird v. Mathews* (1838, Ky.) 6 Dana, 129; *St. Anthony & Dakota Elev. Co. v. Princeton Roller Mill Co.* (1908) 104 Minn. 401, 116 N. W. 935; *Kircher v. Conrad* (1890) 9 Mont. 191, 23 Pac. 74; *Willard v. Stevens* (1849) 24 N. H. 271; *Brown v. Baird* (1897) 5 Okla. 133, 48 Pac. 180; *Brown v. Davidson* (1914) 42 Okla. 598, 142 Pac. 387; *United Iron Works Co. v. Henryetta Coal & Mining Co.* (1917) 62 Okla. 99, 162 Pac. 209; *Shisler v. Baxter* (1885) 109 Pa. 443; *Jones v. George* (1884) 61 Tex. 345; *Ferguson v. Johnson* (1918, Tex. Civ. App.) 205 S. W. 512.

⁴⁹ *Reed v. Randall* (1864) 29 N. Y. 358.

⁵⁰ Sec. 14.

⁵¹ *De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & Iron Co.* (1907) 2 Ga. App. 493, 58 S. E. 790; *Henshaw v. Robins* (1845, Mass.) 9 Metc. 83; *Edgar v. Breck & Sons Corp.* (1899) 172 Mass. 581, 52 N. E. 1083; *Putnam-Hooker Co. v. Hewins* (1910) 204 Mass. 426, 90 N. E. 983; *Cavanaugh v. Ranlet Co.* (1918) 229 Mass. 366, 118 N. E. 650; *Leonard v. Carleton & Hovey Co.* (1918) 230 Mass. 262, 119 N. E. 674; *Osgood v. Lewis*, *supra* note 38; *Alvin Fruit & Truck Ass'n v. Hartman* (1909) 146 Mo. App. 155, 123 S. W. 957; *Wolcott v. Mount* (1875) 38 N. J. L. 496; *Unadilla Silo Co. v. Hull & Son* (1916) 90 Vt. 134, 96 Atl. 535; *Hoffman v. Dixon* (1900) 105 Wis. 315, 81 N. W. 491. In New

Express warranty and other transactions distinguished. Certain other transactions should be distinguished from the express warranty. (1) Dealer's talk of puffs which have no legal effect.⁵² (2) Expressions of opinion by the seller, which are likewise of no binding force.⁵³ (3) Statements of fact made by the seller on subjects other than the title, quality, identity, or capacity of the goods, as, for example, concerning the ability of the seller to deliver the goods at a certain time. These latter statements if made preliminarily, and not as a part of the contract, are "representations," and may of course be false or innocent.⁵⁴ (4) Implied warranties, obligations which the law deems the seller to have undertaken implicitly, although they were not directly stated,⁵⁵ are of course to be distinguished from express warranties, even though under the Sales Act their effect is identical.⁵⁶ Under the common law they often produced different results.⁵⁷ (5) The right to inspect and reject or accept is not the right to hold the seller liable for a defect in quality, and so not an express warranty. It is not a promise that the goods will be such that the buyer should accept them.⁵⁸ (6) Where there is a sale on approval there is no express warranty. The buyer has a right to test the goods and decide whether they suit him, but the seller does not agree that they will suit the buyer.⁵⁹

Warranty may consist of a promise. Although in the early common law it was contended that a warranty must be a statement of a fact or a warranty that a fact was true, and could not consist of a promise that an event would come to pass or that the goods would possess certain

York the early cases and a few of the later ones declare that descriptive matter does not amount to an express warranty. *Seixas v. Woods*, *supra* note 3; *Swett v. Colgate* (1822, N. Y. Sup. Ct.) 20 Johns. 196; *Depew v. Peck Hardware Co.* (1907) 121 App. Div. 28, 105 N. Y. Supp. 390; *Levy v. Kornreich* (1910, App. Term.) 121 N.Y. Supp. 346. But the later and controlling decisions at common law were to the effect that terms of description were to be treated as express warranties: *Hawkins v. Pemberton* (1872) 51 N. Y. 198; *White v. Miller* (1877) 71 N. Y. 118; *Fairbank Canning Co. v. Metzger* (1890) 118 N. Y. 260, 23 N. E. 372; *Egbert v. Hanford Produce Co.* (1904) 92 App. Div. 252, 86 N. Y. Supp. 1118; *Coleman v. Simpson Hendee & Co.* (1914) 162 App. Div. 335, 147 N. Y. Supp. 865.

⁵² *Stumpp & Walker Co. v. Lynber* (1903, App. Term.) 84 N. Y. Supp. 912, and cases cited *infra* note 121.

⁵³ *Lawton v. Keil* (1867, N. Y. Sup. Ct.) 61 Barb. 558, and cases cited *infra* note 122.

⁵⁴ See *infra* notes 68-70. In *Griswold v. Morrison* (1921) 53 Calif. App. 93, 200 Pac. 62, a statement that hogs were sound, made in advance of the making of the contract, and for the purpose of inducing the buyer to buy, was said to be a mere representation and not a warranty, because it was not a part of the contract, but was merely made to induce the contract. This seems unsound.

⁵⁵ Uniform Sales Act, secs. 13-16.

⁵⁶ Uniform Sales Act, sec. 69.

⁵⁷ *Coplay Iron Co. v. Pope* (1888) 108 N. Y. 232, 15 N. E. 335; *Fairbank Canning Co. v. Metzger*, *supra* note 51.

⁵⁸ *Hurley-Mason Co. v. Stebbins* (1914) 79 Wash. 366, 140 Pac. 381.

⁵⁹ *Childs v. O'Donnell* (1891) 84 Mich. 533, 47 N. W. 1108.

qualities or capacities in the future,⁶⁰ this distinction has long since been abandoned. There are numerous common law cases in which promises about the future capacity, qualities, or conduct of the goods have been held to constitute express warranties.⁶¹ The Sales Act clearly recognizes that an express warranty may be statement of fact or a promise.

The time when the warranty is required to be true, if no time is expressly stated, has been held to be the time of delivery of the goods or passage of the property in them.⁶²

"Relating to the goods." Not every statement or promise made at the time of the sale was called a warranty according to the common law. The statement or promise must pertain to the character or identity of the goods,⁶³ their age,⁶⁴ title,⁶⁵ quality,⁶⁶ or, according to some authori-

⁶⁰ 3 Blackstone, *Commentaries*, *165.

⁶¹ *Osborn v. Nicholson* (1871, U. S.) 13 Wall. 654 (that slave sold would be slave for life); *Birmingham Motor Co. v. Norwood* (1918) 16 Ala. App. 572, 80 So. 146 (that auto chassis would run 30,000 miles); *Indiana Silo Co. v. Harris* (1918) 134 Ark. 218, 203 S. W. 581 (that silo would preserve ensilage); *Coats v. Hord* (1915) 29 Calif. App. 115, 154 Pac. 491 (that jack would produce colts); *Hackett v. Lewis* (1918) 36 Calif. App. 687, 173 Pac. 111 (that truck would carry three tons); *Modern Mach. Co. v. Perkins* (1911, Del. Super. Ct.) 80 Atl. 1060 (that pumps would have certain pressure); *Houghton & Co. v. Alpha Process Co.* (1915, Del. Super. Ct.) 93 Atl. 669 (that belting would transmit power desired by buyer); *Iroquois Furnace Co. v. Wilkin Mfg. Co.* (1899) 181 Ill. 582, 54 N. E. 987 (that engine would be equal to any in market); *Smith v. Borden* (1903) 160 Ind. 223, 66 N. E. 681 (that windmill would do certain work); *Hitz v. Warner* (1911) 47 Ind. App. 612, 93 N. E. 1005 (that potatoes would keep); *Smith v. Hale* (1893) 158 Mass. 178, 33 N. E. 493 (that wagon would carry certain weight); *Skoog v. Mayer Bros. & Co.* (1913) 122 Minn. 209, 142 N. W. 193 (that dredge would have certain capacity); *Miller v. Patch Mfg. Co.* (1905) 101 App. Div. 22, 91 N. Y. Supp. 870 (that derrick would hold load up to 250 tons); *Ralph Carter Co. v. Fischer* (1910, App. Term.) 121 N. Y. Supp. 614 (that engine would perform work for which buyer wanted it); *Hazelton Boiler Co. v. Frago Gas & Elec. Co.* (1894) 4 N. D. 365, 61 N. W. 151 (that boiler would save 20% in fuel); *International Harv. Co. v. Lawyer* (1916) 56 Okla. 207, 155 Pac. 617 (that auto would operate over roads around buyer's town); *Williams v. Ingle* (1921) 99 Or. 358, 195 Pac. 570 (that hotel furniture and equipment would be in good condition on delivery); *Smith & Furbush Co. v. Johnston* (1915) 102 S. C. 130, 86 S. E. 489 (that machine would do certain work); *Richardson v. Grandy* (1876) 49 Vt. 22 (that machine would be equal in all respects to a new machine); *Huntington v. Lombard* (1900) 22 Wash. 202, 60 Pac. 414 (would do work buyer required); *Congar v. Chamberlain*, *supra* note 33 (trees sold would not be injured by the frost).

⁶² *American Syrup & Preserv. Co. v. Roberts* (1910) 112 Md. 18, 76 Atl. 589. In *Pierson v. Hoag* (1866, N. Y. Sup. Ct.) 47 Barb. 243, it was held that where delivery and payment were to occur at a day after the making of the warranty, the truth or falsity of the warranty was to be judged as of the time when the warranty was made.

⁶³ *Hawkins v. Pemberton* (1872) 51 N. Y. 198.

⁶⁴ *Pennock v. Stygles* (1886) 54 Vt. 226.

⁶⁵ *Davis v. Cramer* (1915) 188 Mo. App. 718, 176 S. W. 468.

⁶⁶ *Gay Oil Co. v. Roach*, *supra* note 25 (that barrels, on a sale of barrels and oil therein, would not leak).

ties, the quantity of them.⁶⁷ Thus, where goods are being sold on the basis of original cost, a statement made by the seller that the marks on the goods show the original cost is not a warranty but rather a representation.⁶⁸ It was a statement which undoubtedly tended to induce the sale, but it did not relate to identity, quality or title of the goods. It had to do with the price which the seller had originally paid for the goods.

There may be in connection with a sale contract a promise on the part of the seller to perform some act regarding the goods, as for example, to overhaul an automobile after a trip,⁶⁹ or to take back the goods, under certain circumstances.⁷⁰ These are not warranties, but rather special and additional contracts made at the same time as the sale contract. They do not relate to the character, quality or title of the goods, but to some act which the seller agrees to perform with respect to the goods.

In some states there existed, prior to the Sales Act, a statutory definition of express warranty apparently broader than that of the Act.⁷¹ It read: "A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present or future." According to this definition the affirmation or promise need not necessarily refer to the quality or title of the goods, but might relate to the financial standing of the seller or the output of his factory.

Although the law of warranty in the field of sales properly applies only to goods, similar principles have been followed in treating transfers of incorporeal personal property, as, for example, notes,⁷² accounts,⁷³ and judgments.⁷⁴

Natural tendency to induce purchase: intent. The instruction of juries concerning the state of mind which the seller must have possessed when he made a statement, if such affirmation is to be regarded as a warranty, has caused the courts much trouble. Some courts have held that the seller must have *intended to warrant*, must have made an offer to bind himself for the truth of his assertion, and that unless he agreed expressly and actually to respond in damages if his statement proved

⁶⁷ *Ruff v. Jarrett*, *supra* note 44; *Reval v. Miller* (1913) 178 Ill. App. 208.

⁶⁸ *Mason v. Thornton* (1905) 74 Ark. 46, 84 S. W. 1048.

⁶⁹ *Warren v. Renault Frères Selling Branch* (1915) 195 Ill. App. 117.

⁷⁰ *Elliott Supply Co. v. Hanson* (1917) 39 S. D. 570, 165 N. W. 991. But in *State Nat. Bank v. Roseberry* (1915) 46 Okla. 708, 148 Pac. 1034, an agreement to make diamonds right if they were not satisfactory was held a warranty.

⁷¹ N. D. Comp. Laws, 1913, sec. 5973, as construed in *McCurdy v. Aylor* (1918) 41 N. D. 187, 170 N. W. 523, and similar statute construed in *Elliott Supply Co. v. Hanson*, *supra* note 70.

⁷² *Giffert v. West* (1873) 33 Wis. 617.

⁷³ *Curtis v. Northwestern Bedding Co.* (1913) 121 Minn. 288, 141 N. W. 161.

⁷⁴ *Bennett v. Buchan* (1879) 76 N. Y. 386.

untrue, he did not warrant.⁷⁵ The classic statement of this doctrine appears in the language of Gibson, C. J., in *McFarland v. Newman*,⁷⁶ as follows:

"Naked averment of a fact is neither a warranty, nor evidence of it. In connection with other circumstances, it certainly may be taken into consideration; but the jury must be satisfied from the whole, that the vendor actually, and not constructively, consented to be bound for the truth of his representation."

This doctrine seems likely to continue to prevail in Pennsylvania,⁷⁷ notwithstanding the adoption of the Sales Act in that commonwealth and the fact that the Act requires merely justifiable reliance by the buyer on the seller's statement. The adoption of the Sales Act in states which have announced this doctrine ought to work a decided change in the instruction of juries in express warranty cases.

Other courts have perhaps meant much the same thing when they have held that the seller must have *intended* the statement to be a *warranty* "and not to have been the expression of mere matter of *opinion*."⁷⁸

⁷⁵ *Hopkins v. Tanqueray*, *supra* note 30; *Stucley v. Baily* (1862, Exch.) 1 H. & C. 405; *Hartin Con'n. Co. v. Pelt* (1905) 76 Ark. 177, 88 S. W. 929 (*semble*); *Sauerman v. Simmons* (1905) 74 Ark. 563, 86 S. W. 429 (*semble*); but see *Cornish v. Friedman* [1910] 92 Ark. 242, 126 S. W. 1079; *Luitweiler Pumping Engine Co. v. Ukiah Water & Imp. Co.* (1911) 16 Calif. App. 198, 116 Pac. 707; *Coats v. Hord*, *supra* note 61; *Morris v. Fiat Motors Sales Co.* (1916) 32 Calif. App. 315, 162 Pac. 663; *Denver Suburban Homes & Water Co. v. Fugate* (1917) 63 Colo. 423, 168 Pac. 33; *Tyre v. Causey* (1846, Del. Super. Ct.) 4 Harr. 425; *Turner Bros. v. Clarke* (1915) 143 Ga. 44, 84 S. E. 116 (*semble*); *Adams v. Johnson* (1845) 15 Ill. 345; *Phillips v. Vermillion*, *supra* note 46; *Central Commercial Co. v. The Lehon Co.* (1861) 173 Ill. App. 27; *House v. Fort*, *supra* note 18; *Jones v. Quick* (1867) 28 Ind. 125; *Bowman v. Clemmer* (1875) 50 Ind. 10; *Jackson v. Wetherill* (1822, Pa.) 7 Serg. & R. 480; *Wetherill v. Neilson* (1853) 20 Pa. 448; *Holmes v. Tyson* (1892) 147 Pa. 305, 23 Atl. 564; *Wilkinson v. Stettler* (1911) 46 Pa. Super. Ct. 407 (statement that horse was sound, solid, all right and would work any place as matter of law not a warranty).

⁷⁶ (1839, Pa.) 9 Watts, 55, 60.

⁷⁷ *Walker v. Kirk* (1919) 72 Pa. Super. Ct. 534, a case apparently decided under the Sales Act. A statement that a mare was sound was held as a matter of law not to be a warranty. But apparently the use of the word "warrant" is not necessary under the Pennsylvania rule. *Armstrong v. Descalzi* (1911) 48 Pa. Super. Ct. 171.

⁷⁸ *Matlock v. Meyers* (1877) 64 Mo. 531, 533 (*italics ours*); *Anihony v. Potts* (1895) 63 Mo. App. 517; *Boston v. Alexander* (1914) 185 Mo. App. 16, 171 S. W. 582; *Unland v. Garton*, *supra* note 39; *Phillips v. Crosby* (1904) 70 N. J. L. 785, 59 Atl. 142; *Swett v. Colgate*, *supra* note 51; *Whitney v. Suito*, *supra* note 39; *Titus v. Poole* (1895) 145 N. Y. 414, 40 N. E. 228; *Money v. Fisher* (1895, Sup. Ct.) 92 Hun, 347, 36 N. Y. Supp. 862; *Beeman v. Buck*, *supra* note 3; *Foster v. Caldwell*, *supra* note 5; *Bond v. Clark* (1863) 35 Vt. 577; *Houghton v. Carpenter* (1868) 40 Vt. 588; *Beals v. Olmstead*, *supra* note 5; *Drew v. Ellison* (1888) 60 Vt. 401, 15 Atl. 100 (statement must have been intended by parties as basis of the sale); *Enger & Co. v. Dawley & Co.* (1890) 62 Vt. 164, 19 Atl. 478 (parties must have intended that representations be warranties, or a part of the contract, or the basis of the contract).

The views of the courts in this class of cases are illustrated by a statement from an opinion of Kent, as follows: "To make an affirmation at the time of a sale, a warranty, it must appear by evidence to be so intended, and not to have been a mere matter of judgment and opinion."⁷⁹

In still other decisions the courts have stated the requirement to be that the seller *intend to state a fact and not merely to give an opinion*.⁸⁰

In yet other cases it has been said that the seller must have *intended to induce the sale* by his statement,⁸¹ or must have made his affirmation with the *intent that the buyer rely* upon it in making the purchase.⁸²

As contrasted with these cases which place emphasis on the state of the seller's mind at the time he made the assertion about the goods, are

⁷⁹ *Seixas v. Woods*, *supra* note 3, at p. 55.

⁸⁰ *Ransberger v. Ing*, *supra* note 30; *Chapman v. Murch*, *supra* note 5; *Erwin v. Maxwell* (1819) 7 N. C. 241; *Foggart v. Blackweller* (1844) 26 N. C. 238 (notion that justifiable belief of buyer is sufficient, not approved); *Beasley v. Surlis* (1906) 140 N. C. 605, 53 S. E. 360 (intent of seller and understanding of buyer both important); *Hodges v. Smith* (1912) 158 N. C. 256, 259, 73 S. E. 807, 808 ("This is but the statement of the general rule that in order to make a contract the minds of the parties must agree upon the same thing, the intention or belief of one only not being sufficient for the purpose. The intention of both must be the same"); see also *Tomlinson & Co. v. Morgan* (1914) 166 N. C. 557, 82 S. E. 953, but see *Wrenn v. Morgan* (1908) 148 N. C. 101, 61 S. E. 641, where the intent of the seller which the buyer was reasonably entitled to presume existed is said to be the important question. *Crescent Cotton Oil Co. v. Union Gin & Lumber Co.*, *supra* note 45; *Cole v. Carter* (1900) 22 Tex. Civ. App. 457, 54 S. W. 914; *Harrell v. McDuffie*, *supra* note 45; *Hobart v. Young*, *supra* note 29; *Mason v. Chappell* (1860, Va.) 15 Gratt. 572.

⁸¹ *American Fruit Product Co. v. Davenport Vinegar & Pickling Wks.* (1915) 172 Iowa, 683, 154 N. W. 1031; *Stanley v. Day* (1919) 185 Ky. 362, 215 S. W. 175; *Osgood v. Lewis*, *supra* note 38 (*semble*); *Crenshaw v. Slye* (1879) 52 Md. 140, 146 (and "intended as an assurance of the fact stated"); *Potomac Steamboat Co. v. Harlan* (1886) 66 Md. 42, 46, 4 Atl. 903, 905 ("intended to operate on the mind of a vendee as an inducement to make a purchase"); *White Automobile Co. v. Dorsey*, *supra* note 22; *Greer v. Whalen*, *supra* note 47; *Siegel v. Riebolt*, *supra* note 45; *Young v. Van Natta*, *supra* note 40; *Wertheimer-Swartz Shoe Co. v. McDonald*, *supra* note 45; *Woolsey v. Ziegler*, *supra* note 45; *Madden v. Graham*, *supra* note 18; *Frey v. Failes* (1913) 37 Okla. 297, 132 Pac. 342; *Iler v. Jennings* (1910) 87 S. C. 87, 68 S. E. 1041; *Waterbury v. Russell* (1874, Tenn.) 8 Baxt. 159. But in *St. Louis Cordage Mills v. Western Supply Co.* (1916) 54 Okla. 757, 154 Pac. 646, it was held that it was necessary only that the seller make a positive representation relating to a matter of fact and that it be relied upon; and in *International Harv. Co. v. Lawyer*, *supra* note 61, it was held that the only intent required was that of the seller to assert a fact of which the buyer is ignorant.

⁸² *Four Traction Auto Co. v. Hurni* (1912) 156 Iowa, 725, 137 N. W. 1014; *Lamme v. Gregg*, *supra* note 45; *Alvin Fruit & Truck Ass'n v. Hartman*, *supra* note 51; *Laumeier v. Dolph* (1910) 130 S. W. 360, 145 Mo. App. 78; *Detjen v. Moerschel Brewing Co.*, *supra* note 45; *Chappell v. Boram*, *supra* note 19; *Blair v. Hall*, *supra* note 20; *Holman v. West*, *supra* note 22; *Tenney v. Cowles* (1887) 67 Wis. 594, 31 N. W. 221.

a number of cases in which it is denied that the seller's intent is germane. The important question is, say the courts in these decisions, What was the buyer justified in believing? That this statement was mere chaffing or personal opinion, or that it was put forward as an assertion of fact which the buyer might depend upon in promising to take title and pay the price?⁸³ Earle, C., in *Hawkins v. Pemberton*,⁸⁴ stated the case as follows:

"It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understand it as a warranty and he relies upon it and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee."

The Sales Act adopts the view put forth in these latter cases and stresses the natural tendency of the seller's statements, and the actual

⁸³ *Van Horn v. Stautz*, *supra* note 39 (intention to warrant or justifiable belief by buyer that seller intended to warrant necessary. Sale occurred in September, 1918, but Sales Act not mentioned by court); *Conkling v. Standard Oil Co.*, *supra* note 24; *Footte v. Wilson*, *supra* note 45; *McClintock v. Emick, Stoner & Co.*, *supra* note 45, at p. 166, 7 S. W. at p. 905 ("It does not depend upon whether the vendor intends to be bound by his warranty or not, but upon whether he made an affirmation as to the condition of the article or merely expressed an opinion as to it"); *Stroud v. Pierce* (1863, Mass.) 6 Allen, 413; *Spencer Heater Co. v. Abbott* (1918) 91 N. J. L. 594, 596, 104 Atl. 91, 92 ("Now, the question whether or not a statement or affirmation accompanying a sale is a warranty depends upon whether the conditions were such that the vendee had a right to understand, and did understand, that what was said by the vendor was meant as a warranty"); *Ingraham v. Union Railroad Co.*, *supra* note 5; *Reese v. Bates* (1897) 94 Va. 321, 330, 26 S. E. 865, 869 ("It is true that there can be no warranty, unless the parties intend to warrant; that is to say, in the contract of warranty there must be an agreement of the minds of the contracting parties as in all other contracts, . . . Every man is presumed to intend the consequences of his own act. When, therefore, a vendor in negotiating a sale makes an affirmation of quality as an assurance of fact which is relied on by the buyer it constitutes a warranty, for the vendor will be presumed to have so intended"); *Huntington v. Lombard*, *supra* note 61; *Northwestern Lumber Co. v. Callendar* (1904) 36 Wash. 492, 79 Pac. 30; *Smith v. Justice*, *supra* note 45, at p. 603 ("It is true, the question to be arrived at in construing every agreement is the intention of the parties. But each party is bound by such intention as his language in making the agreement indicates. And he cannot use language there showing one intention, and then avoid its effect by leaving to the jury the question whether he really intended it or not").

⁸⁴ *Supra* note 63, at p. 202. *Accord: Fairbank Canning Co. v. Metzger*, *supra* note 51; *Fiss, Doerr & Carroll Horse Co. v. Schwartzchild* (1910, App. Term.) 121 N. Y. Supp. 292.

effect on the buyer. Both natural tendency and actual effect must exist. Even if the seller's statement would lead an ordinary man into reliance in making the purchase, the statement is not a warranty, unless the buyer in question actually relied. And actual reliance by this particular buyer on what the seller said will not make the affirmation a warranty, unless the natural tendency of the statement in question was to lead the buyer into the purchase. The buyer may have been unreasonable in his conduct and foolishly trusted to a mere puff as an assurance of the quality of the goods.

In cases where the seller's intent has been stressed there are some discussions regarding the evidence necessary to show that the seller had the requisite intent. The use of the word "warrant" by the seller has been held sufficient proof of an intent to warrant.⁸⁵ An affirmation regarding the title to goods has been held to be conclusively presumed to be intended as a statement of fact and not an opinion.⁸⁶ Where the buyer states the purpose for which he is buying the article and the seller then makes a remark regarding the fitness of the article for that purpose, intent to warrant has been found,⁸⁷ especially if there is no opportunity for inspection and the seller has personal knowledge about the goods and the buyer has no knowledge.⁸⁸ If the seller strikes out the warranty clause from a bill of sale, it is of course strong evidence of an intent not to warrant.⁸⁹ Even in the common law cases which required that the seller intend to warrant, it has been said occasionally that presumed or constructive intent to warrant was enough. "If a party uses language which imports a warranty, the presumption is that he intends it as such."⁹⁰ It seems better to abandon all discussion of what the seller thought and intended, leave the realm of fiction and construction, and rest the decision on what the buyer was justified in thinking.

Purchase of goods in reliance on warranty. The common-law cases lay down the rule that, in order to obligate the seller, there must be reliance by the buyer on the warranty.⁹¹ If the buyer relied wholly on

⁸⁵ *Davis v. Berkheimer* (1911) 152 Iowa, 270, 132 N. W. 377.

⁸⁶ *Davis v. Cramer*, *supra* note 65.

⁸⁷ *Burns v. Limerick* (1914) 178 Mo. App. 145, 151, 165 S. W. 1166, 1169 ("It is not the secret intent the seller may have in his mind that governs, but it is the legal intent, or the intention which the law affixes to what is said and done, that determines the question of warranty or no warranty").

⁸⁸ *Beals v. Olmstead*, *supra* note 5. And so, too, where the buyer tells the seller he intends to rely on the seller's statements in making the purchase. *Drew v. Ellison*, *supra* note 78.

⁸⁹ *Smith v. Bank of South Carolina* (1837, S. C.) Riley Ch. 113.

⁹⁰ *Bryant v. Crosby* (1855) 40 Me. 9, 19.

⁹¹ *Landman v. Bloomer* (1897) 117 Ala. 312, 23 So. 75; *Hackett v. Lewis* (1918) 36 Calif. App. 687, 173 Pac. 111; *Dietrich v. Badders* (1913, Del. Super. Ct.) 90 Atl. 47; *Hawkins v. Berry* (1848) 10 Ill. 36 (but see *Phillips v. Vermillion*, *supra* note 46); *Stanley v. Day*, *supra* note 81. The Indiana cases seem to lay little stress on reliance. *Shordan v. Kyler* (1882) 87 Ind. 38; *McCarty v. Wil-*

his own judgment or that of someone else than the seller, then the buyer can scarcely be said to have paid or agreed to pay for the seller's warranty of the quality or title, and there cannot be said to have been a contract that the seller would respond in damages if the goods failed in quality or title.

But it is not necessary that the warranty of the seller was the sole inducement to the purchase, or that the buyer trusted entirely to the seller's warranty in taking the goods. The buyer may have inspected as well as he could and formed an opinion and relied partly on his own judgment and partly on the affirmation of the seller.⁹²

Reliance should be pleaded by the buyer who sets up a warranty,⁹³ but it has been said that its existence will be presumed where the warranty is part of the contract of sale.⁹⁴ The buyer may testify directly that he relied on the seller's statement as a warranty,⁹⁵ but this is not necessary; the jury may find reliance from all the facts of the case, without testimony of the buyer that he relied.⁹⁶ An important fact in determining reliance is the amount of knowledge regarding the goods possessed by both parties.⁹⁷ If the buyer knows as much of the goods as does the seller, and the buyer does not testify that he relied on the seller's statements, the jury will be justified in finding no reliance.⁹⁸ That the goods were second-hand, and therefore might be expected to be somewhat worn or defective, does not necessarily show that there was no reliance by the buyer.⁹⁹ Statements by the seller to third parties about the goods are not warranties.¹⁰⁰ Not only is there no justifiable reliance by the buyer on them as warranties, but it is not their natural tendency to induce a purchase by another than the persons to whom the remarks were made.

Lack of reliance is shown where the buyer states that he is buying a second-hand plow "for what it is worth;"¹⁰¹ or affirms that he knows of

liams, supra note 45. In *Smith v. Reed* (1910) 141 Wis. 483, 124 N. W. 489, it was held that if the warranty is in express terms, it is not necessary to show reliance.

⁹² *Keely v. Turbeville* (1883, Tenn.) 11 Lea, 339.

⁹³ *Feeney & Bremer Co. v. Stone* (1918) 89 Or. 360, 171 Pac. 569. But in *Williams v. Ingle, supra* note 61, it was held that if the warranty was a promise regarding the future condition of the goods, and not the statement of a present fact, reliance need not be pleaded. This seems unsound.

⁹⁴ *Merkle-Hines Mach. Co. v. Gaynor, supra* note 45.

⁹⁵ *Milwaukee-Rice Mach. Co. v. Hamacek, supra* note 45.

⁹⁶ *Smith v. Hale, supra* note 61; *Case Threshing Mach. Co. v. McKimmon* (1900) 82 Minn. 75, 84 N. W. 646.

⁹⁷ *Schmidt v. Jutting* (1913) 31 S. D. 69, 139 N. W. 769.

⁹⁸ *Baker v. Henderson* (1869) 24 Wis. 509.

⁹⁹ *Walker, Evans & Cogswell Co. v. Ayer* (1908) 80 S. C. 292, 61 S. E. 557.

¹⁰⁰ *Lindsey v. Lindsey* (1857) 34 Miss. 432; *William Wurdack Elect. Mfg. Co. v. Elliott & Barry Eng. Co.* (1919, Mo. App.) 207 S. W. 877.

¹⁰¹ *Jones v. Armstrong* (1915) 50 Mont. 168, 145 Pac. 949.

his own knowledge that the goods are sound;¹⁰² or investigates for himself;¹⁰³ or tests a horse himself and employs a veterinarian to do likewise.¹⁰⁴

Inspection or opportunity for inspection: reliance. If the buyer receives a warranty of the title or quality of the goods he is under no duty to inspect the goods or make an investigation regarding them, for the purpose of finding out whether the warranty is true or false.¹⁰⁵ One of the objects of taking the warranty is to save the buyer the trouble of making such inspection or investigation and the risk of relying wholly upon the information thus obtained. The seller is not relieved from his warranty because the buyer might, by diligent search, have discovered that the warranty was false and ought not to be relied upon.

Neither the opportunity for inspection,¹⁰⁶ nor actual inspection,¹⁰⁷ necessarily shows that the buyer did not rely in part or wholly on the seller's statements; but of course, as previously indicated, an inspection by the buyer, especially if he be a competent judge of the goods, is evidence tending to show lack of reliance.¹⁰⁸

Defect visible: reliance. A "visible defect" in the law of express warranties means one which would be observed by an ordinary observer, possessing no particular skill, and therefore presumed to have come to the attention of the buyer; or a defect which was shown actually to have come to the notice of the buyer before the making of the contract, no matter how easy or difficult to detect it might be.¹⁰⁹ A defect is not

¹⁰² *Lindsey v. Lindsey*, *supra* note 100.

¹⁰³ *Crocker-Wheeler Co. v. Johns-Pratt Co.* (1898) 29 App. Div. 300, 51 N. Y. Supp. 793, *affirmed* (1900) 164 N. Y. 593, 58 N. E. 1086.

¹⁰⁴ *Smith v. Reed*, *supra* note 91.

¹⁰⁵ *Morris v. Fiat Motors Sales Co.* (1916) 32 Calif. App. 315, 162 Pac. 663; *Raft River Land & Livestock Co. v. Laird*, *supra* note 18; *First Nat. Bank v. Grindstaff* (1873) 45 Ind. 158; *Meicklely v. Parsons* (1885) 66 Iowa, 63, 23 N. W. 265; *Vaupel v. Lamplly*, *supra* note 45.

¹⁰⁶ *Hitz v. Warner*, *supra* note 61; *Lichtenstein v. Rabolinsky* (1904) 98 App. Div. 516, 90 N. Y. Supp. 247; *Woolsey v. Ziegler*, *supra* note 45; *Klock v. Newbury* (1911) 63 Wash. 153, 114 Pac. 1032.

¹⁰⁷ *Smith v. Hale*, *supra* note 96; *Young v. Van Natta*, *supra* note 40; *Woods v. Thompson* (1905) 114 Mo. App. 38, 88 S. W. 1126; *Oak Lawn Sugar Co. v. Sparks Bros. Mule Co.* (1911) 159 Mo. App. 496, 141 S. W. 698; *Frey v. Failes*, *supra* note 81; *Crescent Cotton Oil Co. v. Union Gin & Lumber Co.*, *supra* note 45.

¹⁰⁸ *Barnett v. Stanton* (1841) 2 Ala. 181; *Stanley v. Day*, *supra* note 81.

¹⁰⁹ *Birdseye v. Frost* (1861, N. Y. Sup. Ct.) 34 Barb. 367. Hairlines, checks and discolorations of the keys of a piano were held not to be visible defects in *Risser v. Cox* (1919) 187 Iowa, 990, 174 N. W. 701. In *Degenhardt v. Billings* (1910) 33 Ohio C. C. 232, a defect discovered after delivery and the passage of property and the giving of the warranty seems to have been regarded as a "visible defect," so as to prevent the buyer from recovering damages for injuries sustained in using the goods after such discovery. This seems erroneous. The time of the making of the contract determines the visibility of the defect.

visible if an unusual process of investigation is necessary to discover it, as, for example, the stripping of a slave.¹¹⁰ Nor is the defect visible where the seller creates conditions which render it impossible to observe the defect, as where the seller keeps the horse in a dark stable, with his ankles buried in straw.¹¹¹

It is a well known common law doctrine in the law of warranty that a general warranty does not cover obvious defects.¹¹² If the seller states that the horse is sound, and both parties have observed and talked about the blindness of the horse in one eye, the law assumes that they intended to make an exception of this known defect, and that the warranty meant sound, except for the blindness in one eye. It is a natural and reasonable conclusion that the buyer did not rely on this general warranty as a statement by the seller that the horse had two good eyes, but rather consented to take the horse with the defective eye and with a corresponding deduction in the purchase price.

If, however, a quality or condition of the goods is noted, the effect or nature of which is uncertain, a general warranty of soundness will cover this condition.¹¹³ Here it is not known whether the characteristic is a defect of a permanent character or not, and thus there is a reliance by the buyer and the natural tendency of the statement is to induce a purchase. Thus, where blemishes of an uncertain nature are observed by the parties on the legs of a horse, a general warranty will protect the buyer.¹¹⁴ In the last cited case the court said:¹¹⁵

"The rule excluding from a warranty such defects as are known to the purchaser, only applies to such as are perfectly obvious to the senses, and the effects and consequences of which may be accurately estimated, so that no purchaser would expect the seller to warrant against them."

If the seller gives a particular warranty against some specific defect, obviously the buyer has no protection (unless by implied warranty) against another particular defect, whether known or unknown. Thus, if a seller warrants a horse as good for driving, but states that she will

¹¹⁰ *Thompson v. Bertrand* (1862) 23 Ark. 730.

¹¹¹ *Kenner v. Harding* (1877) 85 Ill. 264.

¹¹² *Marshall v. Drawhorn* (1859) 27 Ga. 275; *President of Connersville v. Wadleigh* (1844, Ind.) 7 Blackf. 102; *Dean v. Morey* (1871) 33 Iowa, 120; *McCormick v. Kelly* (1881) 28 Minn. 135, 9 N. W. 675; *Doyle v. Parish* (1905) 110 Mo. App. 470, 85 S. W. 646; *Leavitt v. Fletcher* (1880) 60 N. H. 182; *Schwylar v. Russ*, *supra* note 3; *Mulvaney v. Rosenberger* (1852) 18 Pa. 203; *Long v. Hicks* (1841, Tenn.) 2 Humph. 305; *Williams v. Ingram* (1858) 21 Tex. 300. But see *Butterfield v. Burroughs* (1705, Q. B.) 1 Salk. 211.

¹¹³ *Thompson v. Harvey* (1889) 86 Ala. 519, 5 So. 825; *Brown & Co. v. Mathews* (1915) 14 Ala. App. 428, 70 So. 287; *Huston v. Plato* (1877) 3 Colo. 402; *Chadsey v. Greene* (1856) 24 Conn. 562; *Storrs v. Emerson* (1887) 72 Iowa, 390, 34 N. W. 176; *Brown v. Bigelow*, *supra* note 38; *Fisher v. Pollard* (1859, Tenn.) 2 Head, 314.

¹¹⁴ *Hill v. North* (1861) 34 Vt. 604.

¹¹⁵ *Ibid.* at p. 615.

not stand hitched, the latter specific defect is not covered by the particular warranty given.¹¹⁶

If the goods have a known defect, the seller may specifically warrant the goods against the effects of this defect, and this particular warranty will of course give the buyer a cause of action if the defect proves different from that guaranteed.¹¹⁷ Thus, if a buyer observes a puff on a horse's leg and the seller assures him that it is a temporary condition and will soon disappear, there is a warranty against serious, permanent weakness of the leg and such warranty is broken when the horse is proved to have a spavin.¹¹⁸ Here very clearly the buyer relies on the seller's statement that an uncertain or equivocal condition will not be detrimental to the goods. The seller's engagement is practically that the observed condition is not a defect.

Affirmations of value. The Sales Act provides that affirmations of value shall, as a matter of law, be regarded as expressions of opinion only and not as warranties. This seems to be out of accord with the common law rule, which was that statements regarding the value of the goods sold *might* be warranties, and that it was for the trier of facts to determine whether the buyer justifiably relied on the statement as one of fact. In some cases the jury or court found that the assertion about how much the goods were worth was meant and understood as an expression of opinion only,¹¹⁹ while in other cases the buyer was held to have been justified in believing that the seller was asserting a fact on which the buyer might rely in making the purchase and hence that the statement was a warranty.¹²⁰ The value of goods, what they will bring on sale or what they are worth for use, is, of course, in many cases a

¹¹⁶ *Knoepker v. Ahman* (1903) 99 Mo. App. 30, 72 S. W. 483.

¹¹⁷ *Perdue v. Harwell* (1888) 80 Ga. 150, 4 S. E. 877; *Hansen v. Gaar* (1895) 63 Minn. 94, 65 N. W. 254; *Branson v. Turner* (1883) 77 Mo. 489; *Samuels v. Gunn's Estate* (1892) 49 Mo. App. 8; *Watson v. Roode* (1890) 30 Neb. 264, 46 N. W. 491; *Whitney v. Sutton*, *supra* note 39; *McAfee v. Meadows* (1903) 32 Tex. Civ. App. 105, 75 S. W. 813; *Norris v. Parker* (1896) 15 Tex. Civ. App. 117, 38 S. W. 259; *Hill v. North*, *supra* note 114.

¹¹⁸ *Fitzgerald v. Evans* (1892) 49 Minn. 541, 52 N. W. 143.

¹¹⁹ *Nissen v. Applebaum* (1913, App. Term.) 142 N. Y. Supp. 303 (that business would do \$1,000 worth of business a month); *Tenney v. Cowles*, *supra* note 82 (statement regarding the cost, value and amount of a stock of goods). In *Linn v. Gunn* (1885) 56 Mich. 447, 23 N. W. 84, it was held that statements regarding the value of a stock of goods are not warranties, in the absence of an express or implied promise to make good such representations. In *Polan v. Brownell* (1881) 131 Mass. 138, statements regarding value were held not to be a basis for an action of deceit. In *ONeal v. Weisman* (1905) 39 Tex. Civ. App. 592, 88 S. W. 290, statements relating to the value of land were treated as mere opinions.

¹²⁰ *Footte v. Wilson*, *supra* note 45 (that goods would invoice at \$9,000 to \$10,000); *Titus v. Poole* (1895) 145 N. Y. 414, 40 N. E. 228 (that stock was worth par); *McKinmon v. McIntosh* (1887) 98 N. C. 89, 3 S. E. 840 (that fertilizer was worth \$38 a ton). In *Crenshaw v. Slye*, *supra* note 81, a statement that a fertilizer was a "valuable fertilizer" was treated as a warranty.

matter of personal judgment about which one party can form an opinion as well as the other; but, on the other hand, the facts which give the goods value may be peculiarly within the knowledge of the seller so that his assertions regarding value may well be relied on by the buyer. But such assertions do not relate to the character, quality or title of the goods. They relate to the price which could be obtained on a resale, or the benefit which will be derived from the goods if consumed or used. For this latter reason they might reasonably be regarded as representations, and not as warranties, if they were in fact anything more than expressions of opinion, guesses, or dealer's talk.

Puffs and opinions. Two classes of statements are clearly not warranties, either at common law or under the Act. The first of these classes consists of that vague, enticing chatter indulged in by some salesmen in order to get the prospective buyer into a purchasing frame of mind. The buyer is told that the goods are "the best in the market," "the finest thing there is for the money," "the greatest bargain I have offered in months," and so forth. These statements are patently not assertions of facts, or even expressions of opinion, but merely "puffs" or "dealer's talk." No one would be justified in relying on them as having any legal effect, and the common law cases treat them as of no consequence.¹²¹

The second class of statements which do not bind the seller or make him a guarantor of their truth are opinions. If the trier of facts finds that the assertion in question was given and understood, or was given and should have been understood, as an expression of the seller's judgment or opinion only, it will necessarily find that there was no warranty and no responsibility by the seller for the falsity of judgment or opinion. There are numerous examples among the common law cases of holdings that statements of opinion by the seller are not warranties.¹²²

¹²¹ *Texas Star Flour Mills Co. v. Moore* (1910, C. C. W. D. Mo.) 177 Fed. 744 ("good wheat"); *Berman v. Woods & Co.* (1881) 38 Ark. 351; *James & Co. v. Bocage & Co.* (1885) 45 Ark. 284 (machine nearly as good as new and in good working order); *Alexander v. Stone* (1916) 29 Calif. App. 488, 156 Pac. 998 (woolen goods "first class," both parties experts); *Washburn-Crosby Co. v. Kindervatter* (1911) 147 App. Div. 114, 131 N. Y. Supp. 871 (that flour previously used would not be "in it" with that sold); *Worrell v. Kinnear Co.* (1905) 103 Va. 719, 49 S. E. 499 (that bid for manufacturing doors was as low as the work could be done). In *Morley v. Consolidated Mfg. Co.* (1907) 196 Mass. 257, 81 N. E. 993, the fact that the automobile sold was disposed of at half the price of a new car was given weight in leading the court to the conclusion that the seller's statement that the machine was in "first class condition" was one of opinion only.

¹²² *Jendwine v. Slade* (1797, N. P.) 2 Espin. 572 (name of artist in catalogue as affirmation regarding authorship of painting. But see *Power v. Barham* [1836, K. B.] 4 Ad. & E. 473, where an opposite decision was reached on similar facts); *Schroeder v. Trubee* (1888, C. C. D. Conn.) 35 Fed. 652 (that dividends had been earned and stock was all right); *Crosby v. Emerson* (1913, C. C. A. 3d) 142 Fed. 713 (regarding the value and prospects of mining property); *Farrow v.*

The Sales Act states the common law rule regarding opinions, but makes no mention of "dealer's talk," either upon the theory that its lack of legal effect is too obvious for mention, or because "puffs" are regarded as the weakest form of opinions and so covered by the rule regarding opinions.¹²³

Andrews & Co. (1881) 69 Ala. 96 (that subject of sale was good fertilizer); *Shiretzki v. Kessler & Co.* (1904, Ala.) 37 So. 422 (that goods would meet the requirements of buyer's trade); *Ragsdale v. Shipp* (1899) 108 Ga. 817, 34 S. E. 167 (that mule had shipping cold and would be all right in few days); *Roberts v. Applegate* (1894) 153 Ill. 210, 38 N. E. 676 (that young and untried stallion would make his mark as a foal-getter); *Towell v. Gatewood* (1840) 3 Ill. 22 (that tobacco was "good first and second rate tobacco"); *Carondelet Iron Works v. Moore* (1875) 78 Ill. 65 (that iron was "mill iron"); *Farris v. Alfred* (1912) 171 Ill. App. 172 (that auto sold to mail-carrier would give swifter and better service than horse); *De Zeeuw v. Fox Chem. Co.*, *supra* note 40 (that worm powder would improve physical condition of hogs); *Bryant v. Crosby*, *supra* note 90 (that sheep would shear certain quantity of wool); *Worth v. McConnell* (1880) 42 Mich. 473, 4 N. W. 198 (threshing machine a very good machine and would do very nice work); *Littlejohn v. Sample* (1912) 173 Mich. 419, 139 N. W. 38 (that mare was with foal when was impossible to tell but was ground to believe she was); *Matlock v. Meyers*, *supra* note 78 ("a good mare"); *Bates County Bank v. Anderson* (1900) 85 Mo. App. 351 ("jack is bound to be a good breeder"); *Washburn-Crosby Co. v. Kindervatter*, *supra* note 121 ("flour would be as good as any flour made"); *St. Hubert Guild v. Quinn* (1909, App. Term.) 64 Misc. 336, 118 N. Y. Supp. 582 (books very fine reading matter and fit for everybody to read); *League Cycle Co. v. Abrahams* (1899, App. Term.) 27 Misc. 548, 58 N. Y. Supp. 306 (article "unsurpassed and unsurpassable"); *Fiss, Doerr & Carroll Horse Co. v. Schwartzchild*, *supra* note 84 (horse well broken, single or double, and would fill the bill); *Ginsberg v. Lawrence* (1910, App. Term.) 121 N. Y. Supp. 337 (that second hand sewing machine was in very good condition); *Osborne v. McCoy* (1890) 107 N. C. 726, 12 S. E. 383 (horse sound as far as seller knew); *Sockman v. Keim* (1909) 19 N. D. 317, 124 N. W. 64 (for all that I know mare is as healthy as the others); *Carver-Shadbolt Co. v. Loch* (1915) 87 Wash. 453, 151 Pac. 787 (that hay-stacker would stack hay at fifty cents a ton cheaper than another definite stacker); *Smith v. Bolster* (1912) 70 Wash. 1, 125 Pac. 1022 (that second hand auto, being sold at 79% cost of new machine, would run eleven miles on a gallon of gasoline, was in first class condition and as good as any new car). Where the fact asserted is obviously not possible of accurate knowledge, an opinion only is obviously understood. *White v. Stelloh* (1889) 74 Wis. 435, 43 N. W. 99 (seller represented three months old bull calf to be good for breeding purposes). Statements made by a seller after he has expressly asserted that he would not warrant the goods have been held as a matter of law to be mere opinions (*Lynch v. Curfman* [1896] 65 Minn. 170, 68 N. W. 5); but in another case in a similar situation the question of warranty was left to the jury (*Moorhead v. Minneapolis Seed Co.* [1917] 139 Minn. 11, 165 N. W. 484), where the seller's letterhead contained a statement that no warranties would be made, but the seller expressly said that the seed sold would germinate.

¹²³ In *Worrell v. Kinnear Co.*, *supra* note 121, for example, opinions and dealer's talk seem to be regarded as equivalent.