real estate is under no obligation to record his conveyance, save as to "*subsequent* purchasers for value, without notice and creditors." He owes no such duty to *prior* purchasers. Thus, if A should buy on January 1, 1895, and fail to record his conveyance; then B should buy the same property from the same grantor, for value and without notice, on July 1, 1895, and should likewise fail to record; then on December 1, 1895, A should record his conveyance—B would have priority, even though his conveyance should never be recorded. The moment B completed his purchase, A's conveyance became, by express provision of the statute, absolutely void as to B; nor will subsequent recordation by A, or a failure to record by B, restore validity to A's invalid deed. The only penalty which the statute inflicts upon B for his failure to record, is that his deed shall be void as to *subsequent* purchasers (and creditors); A is not a subsequent purchaser, and having by his negligence induced B to rely upon the title of their common grantor, and not having been himself injured by B's failure to record, the statute very justly gives the latter priority over him.—*Davis v. Beazley*, 75 Va. 491, 496. Prof. Minor reaches the same conclusion, without the citation of authority: 2 Minor's Inst. (2d Ed.) 877; Ib. (4th Ed.) 968.

In many, if not most, of the states, in order to be protected, the subsequent purchaser or incumbrancer is required not only to have his deed recorded, but this must be done before the recordation of the competing conveyance. Hence, in such states, priority of right depends upon priority of recordation. See 1 Devlin on Deeds, sec. 626 *et seq.* W. M. L.

USURY—*Interest on deferred payments of purchase money.*—Where property is sold *bona fide*, and not as a shift to cover a loan, the deferred payments, by agreement at the time of sale, may be made to bear any rate of interest that the parties may agree upon, without infringing the statute against usury. What is called "interest" is as much a part of the purchase price as the principal sum, and, though it exceed the legal rate, the transaction is not usurious: *Graeme v. Adams*, 23 Gratt. 225, 234—s. c. 14 Am. Rep. 130; *Reger v. O'Neal* (W. Va.), 10 S. E. Rep. 375; 27 Am. and Eng. Enc. Law, 1000. See also *Kraker v. Shields*, 20 Gratt. 377, 398. W. M. L.

IMPLIED WARRANTY OF QUALITY WHERE GOODS ARE SOLD BY SAMPLE.—It is an established rule that upon an executory contract of sale, where goods are ordered for a particular use or purpose made known to the seller, the latter impliedly undertakes that they shall be reasonably fit for the use or purpose for which they are intended. See *Jones v. Just*, L. R., 3 Q. B. 197; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *Gerst v. Jones*, 32 Gratt. 518. The reason of this exception to the maxim *caveat emptor* is that the buyer has no opportunity of inspection, and relies upon the judgment of the seller. But what is the law where a sale is *by sample*, and the bulk supplied is exactly like the sample, but the sample itself, through some secret defect of material or manufacture, is unfit for the purpose designated by the buyer? This question was considered in *Mody v. Gregson*, L. R. 4 Ex. 49, where shirtings sold by sample were like the sample, but the requisite weight had been given to the goods by the introduction of fifteen *per cent.* of clay into the fabric, as had also been done in the sample, thus render-

ing the shirtings unmerchantable. The case was decided against the manufacturer; but the decision was on the ground that there was fraud, either on his part, or by his servants, for which he was responsible. And see *Heilbutt v. Hickson*, L. R. 7 C. P. 438, where the sample shoe had paper in the sole. But how would it be as to an *honest* sample, where the bulk corresponds with the sample, but proves unfit for the buyer's purpose, owing to a secret defect of manufacture, of which manufacturer and buyer were equally ignorant? Does the sale by sample *exclude* the implied warranty of fitness for the buyer's purpose, or does such warranty continue notwithstanding the sample, so that the manufacturer is liable for its breach?

This interesting question was decided in England by the House of Lords in 1887, in the important case of *Drummond v. Van Ingen*, 12 App. Cas. 284, in favor of the buyer. In this case, Van Ingen & Co., cloth merchants, ordered of James Drummond & Sons, cloth manufacturers, worsted coatings, known in the trade as "corkscrew twills," which were to be shipped to the United States and sold there to tailors, to be turned into coats and other garments, the manufacturers knowing the use for which the cloth was intended by the buyers. The coatings were to be in quality and weight equal to samples furnished by the manufacturers. The coatings supplied corresponded in every particular with the samples; but there was a secret defect of manufacture in both sample and bulk, which made the coatings unfit for the purpose for which they were designed. This defect was "slipperiness," *i. e.*, a want of sufficient connection or cohesion in the texture of the cloth between the warp and weft. The result was that when the cloth was made into garments in the ordinary manner the seams gave way with no more than ordinary tension, and the braid became detached from the cloth. In consequence of this defect, many purchasers from Van Ingen & Co. returned the cloth to them, or compelled them to make allowances, for which they, when sued by Drummond & Sons, sought compensation by way of counter claim.

It was decided by the House of Lords that the manufacturers were liable, the Earl of Selborne, Lord Herschell and Lord McNaghten delivering opinions. The ground of the decision is thus stated by Lord McNaghten (p. 296): "Then it was argued, defect or no defect, the sale was a sale by sample; the goods correspond with the sample, and there is an end to the matter; the seller has fulfilled his bargain. I think the sale was strictly a sale by sample. Certainly the goods corresponded with the sample only too well. But does this exact correspondence, when it is found to involve an unforeseen and unsuspected defect, relieve the seller from his obligation to supply goods fit for the purpose for which they were intended? After all, the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract, which, owing to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way, and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country. Some confidence there must be

between merchant and manufacturer. In matters exclusively within the province of the manufacturer the merchant relies on the manufacturer's skill, and he does so all the more readily when, as in this case, he has had the benefit of that skill before." . . . "It appears to me, therefore, that the sample must be treated as wholly silent in regard to this defect, and I come to the conclusion that if every scrap of information which the sample can fairly be taken to have disclosed were written out at length, and embodied in writing in the order itself, nothing would be found there which could relieve the manufacturer from the obligation implied by the transaction," *i. e.*, reasonable fitness for the designated purpose. See, also, *Jones v. Padgett*, 24 Q. B. D. 650.

It will be observed that *Drummond v. Van Ingen* is a case of sale by a *manufacturer*, and that the "slipperiness" was caused by a secret defect of *manufacture*. In such a case, where the sale is by sample, it is said to be still unsettled in the United States whether a manufacturer is liable for a latent defect in both bulk and sample, in the absence of fraud or an express warranty (see 2 Schouler's Pers. Prop. [2d ed.], sec. 365), though it is probable that our judges would follow *Drummond v. Van Ingen*.

But when the seller by sample is not a manufacturer, but a dealer in goods made by others, it is held in the United States that he does not impliedly warrant against a secret defect in both bulk and sample. Here the buyer inspects the sample, and relies on his own judgment, and the seller had no means of preventing the defect, and no better means of discovering it than the buyer. Story on Sales, sec. 376; 2 Sch. Pers. Prop., sec. 365; *Dickinson v. Gay*, 7 Allen (Mass.) 29 (83 Am. Dec. 656).

An intermediate case may be suggested where the seller by sample is a manufacturer, but the secret defect in both bulk and sample is not due to the process of manufacture, but to the character of the *material* used. Now, assuming that the manufacturer was ignorant of the defect in the material, and that he used every proper precaution to guard against it, is he liable to the buyer for the breach of an implied warranty that the chattel should be fit for a designated purpose, where the sale is by sample, and the sample is made of the defective material as well as the bulk which corresponds therewith? On this question we find no decision, and space forbids its discussion here. See, as bearing upon the point, what is said by Staples, J., in *Gerst v. Jones*, 32 Gratt. 522 and 523; and the English case of *Randall v. Newson*, in the Court of Appeal, 2 Q. B. D. 102, where it is held that on the sale of a chattel for a specific purpose there is a warranty by a manufacturer that it is reasonably fit for the purpose, and that there is no exception as to latent and undiscoverable defects in the material used (in that case for a carriage pole). But neither *Gerst v. Jones* nor *Randall v. Newson* was a sale by sample. See *Randall v. Newson*, commented on in 2 Sch. Pers. Prop., sec. 358. And see *Hoe v. Sanborn*, 21 N. Y. 552 (78 Am. Dec. 163.) C. A. G.

ATTACHMENTS—*Sufficient cause—probable cause.*—Unless our junior is careful, he is likely to be tripped by the stumbling blocks of "sufficient cause" and "probable cause," in connection with attachments.

(1) *Sufficient Cause*—Sufficient cause is essential to maintain the attachment proceeding itself. On a motion to abate the attachment, the burden of proof is