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WARRANTIES IMPLIED IN SALES OF PERSONAL PROPERTY IN THE UNITED STATES AND CANADA.

(Continued from February No., page 98.)

II. IMPLIED CONDITION OF EXISTENCE.

As is pointed out by Mr. Benjamin, in his Treatise on Sales, book 1, part 1, ch. 9, what is often called an implied warranty of existence is really not a warranty or agreement collateral to the contract at all, but is in reality a condition precedent to any contract; for unless the subject-matter exist at the time stipulated for the transfer the contract can never become executed. Therefore nothing more need here be said about it. See, however, *Terry v. Bissell*, 26 Conn. 23, remarks of ELLSWORTH, J.

III. SALE OF GOODS BY DESCRIPTION.

(a) *Sale of Chattels.*

Where an article is sold by any description or particular designation there is always an implied condition that the article delivered shall correspond strictly with the description. This is often, particularly in America, called an implied warranty. In reality, however, it is obvious that it is no warranty at all, but one of the conditions precedent to the contract of sale. The distinction is very clearly pointed out by Lord ABINGER, in

Chanter v. Hopkins, 4 M. & W. 399, quoted by Mr. Benjamin in his book on Sales: "A good deal of confusion has arisen," said he, "in many of the cases upon this subject, from the unfortunate use made of the word warranty. Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and, though part of the contract, *collateral to the express object of it*. But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as if a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him peas; the *contract* is to sell him peas, and if he sells him anything else in their stead it is a non-performance of it."

In America the distinction between a warranty and this condition in the contract does not appear to have been very carefully regarded by the judges in their opinions, but they have usually confounded this condition with an implied warranty. The consequence is, there is much confusion of the law on this subject.

In New York, however, in *Reed v. Randal* (21 N. Y. 358), WRIGHT, J., in a lengthy opinion took this distinction. The case was an action for the breach of a contract to sell and deliver a crop of tobacco growing on the land of the defendant. The contract called for good tobacco, well cured and boxed in good condition—and when delivered it was bad, ill cured, shrunk, rotten and sweaty. The plaintiffs accepted the tobacco, and retained it without notifying the defendants of its defects, and, seventeen months after converting it, brought an action for breach of contract. The court held the action not to lie, as there was no offer to return by the vendee, and evidence of an intention to accept, &c. WRIGHT, J., said: "The stipulation in respect to the quality and condition of the article, when delivered, constituted no express warranty. The contract was executory, for the sale of a growing crop of tobacco, to be delivered the spring following, well cured and in good condition. The article bargained for, and to be furnished in the future, was a *merchantable* crop of tobacco. This was what the vendor agreed to sell and the vendee to purchase. It was the

sale of a particular thing by its proper description merely; and the descriptive words used for defining the thing agreed to be sold were of the substance of the contract, not collateral to the main object of it. * * * A warranty, then, cannot be predicated upon the contract alleged in the complaint; and the rules of law by which the rights of the parties in respect to warranties are regulated are inapplicable. A breach of the contract was not a breach of warranty, but a mere non-compliance with the contract that the defendant had agreed to fulfil. * * * The delivery of property corresponding with the contract is a condition precedent to the vesting of the title in the vendee. The parties understand that the vendee is not bound to accept the property tendered, except upon this condition."

As we have said, however, the cases on this point usually have gone on the theory of an implied warranty.

Thus in *Winsor v. Lombard*, 18 Pick. (Mass.) 59, SHAW, C. J., said: "The old rule upon this subject was well settled, that upon a sale of goods, if there be no express warranty of the quality of the goods sold, and no actual fraud, by a wilful misrepresentation, the maxim *caveat emptor* applies. Without going at large into the doctrine upon this subject, or attempting to reconcile all the cases, which would certainly be very difficult, it may be sufficient to say that, in this Commonwealth, the law has undergone some modifications, and it is now held, that without express warranty or actual fraud, every person who sells goods of a certain denomination or description, undertakes as part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the species, kind and quality thus expressed in the contract of sale. * * * The rule being, that upon a sale of goods by a written memorandum or bill of parcels, the vendor undertakes, in the nature of warranting, that the thing sold and delivered is that which is described; this rule applies whether the description be more or less particular and exact in enumerating the qualities of the goods sold."

The following cases are illustrations of the general doctrine in America:

In *Seixas v. Wood*, 2. Caines (N. Y.) 48 (1804), a contract was made for the delivery of *braziletto* wood, and it was so advertised and described in the invoice. A delivery was made of *peachum* wood, much inferior in quality. There was no evidence of fraud or

an express warranty, and it was held that an action on the case would not lie, "for selling one wood for the other." KENT, Chancellor, said: "If upon a sale, there be neither a warranty nor *deceit*, the purchaser purchases at his peril. * * * The mentioning the wood as *braziletto* wood in the bill of parcels, and in the advertisement some days previous to the sale, did not amount to a warranty to the plaintiffs. To make an affirmation at the time of the sale a warranty, it must appear by the evidence to be so *intended*, and not to have been a mere matter of judgment or opinion, and of which the defendant had no particular knowledge. Here it is admitted the defendant was equally ignorant with the plaintiffs, and could have had no such intention."

In *Sweet v. Colgate*, 20 Johns. (N. Y.) 196 (1822), goods were sent from England to Boston invoiced as *barilla*—*barilla* being a substance found in the Mediterranean Sea, near there manufactured, and containing soda or alkali, which is its only value, being used in the manufacture of soap. On using part of the so-called *barilla* it was found to be a substance called *kelp*, which greatly resembles *barilla*, but contains a very small quantity of alkali. *Kelp* is made in Great Britain and cannot be distinguished from *barilla* but by analysis. *Barilla* contains fifty per cent. of alkali, and *kelp* but five per cent. Assumpsit was brought for goods sold and delivered, and the court held the action would not lie, there being no express warranty or bond. WOODWORTH, J., said: "By the common law, where there is no fraud or agreement to the contrary, if the article turns out not to be that which it was supposed, the purchaser sustains the loss; the rule is *caveat emptor*," and followed *Seixas v. Wood*, with approval.

It is submitted, however, that the law, though correctly stated in *Seixas v. Wood*, was incorrectly applied to that case as well as the case just referred to, and KENT, Chancellor, who delivered the opinion in *Seixas v. Wood*, in his Commentaries, expresses a doubt whether the maxim of *caveat emptor* was there correctly applied, inasmuch as there was a description in writing of the article sold, and we may add the doctrine of *Seixas v. Wood*, *supra*, and *Sweet v. Colgate*, *supra*, has since frequently been doubted in New York. See *Hawkins v. Pemberton*, 51 N. Y. 198; *Dounce v. Dow*, 64 N. Y. 411; and finally overruled in *White v. Miller*, 71 N. Y. 129.

In the last case plaintiffs, being gardeners, purchased of defend-

ants, for market cabbage, a certain variety of seed known as "Large Bristol Cabbage." The seed sent was raised on "Bristol cabbage stocks," and, being of a different character, was rendered impure by the crossing of the varieties, and the plants raised were worthless: *Held*, an action lay for breach of contract, as there was an implied contract that the seller was bound to deliver in such a case exactly what he had agreed to sell. ANDREWS, J., said: "The doctrine that a bargain and sale of a chattel, of a particular description, imports a contract or warranty that the article sold is of that description, is sustained by a great mass of authority. The cases of *Seixas v. Wood*, *supra*, and *Swett v. Colgate*, *supra*, based mainly upon the authority of the case of *Chandelor v. Lopus*, Cro. Jac. 4, are, it must be admitted, adverse to this view. The case of *Chandelor v. Lopus* has been overruled in England, and the cases in this state referred to have been often questioned; and Chancellor KENT, who took part in deciding *Seixas v. Wood*, intimates in his Commentaries a doubt whether the case was correctly decided: 2 Kent Com. 479. The case of *Hawkins v. Pemberton*, 51 N. Y. 198, adopts as the law in this state the doctrine upon this subject now prevailing elsewhere, that a sale of a chattel by a particular description is a warranty that the article sold is of the kind specified; and this case was recognised in *Dounce v. Dow*, 64 N. Y. 411, as modifying the doctrine of *Seixas v. Wood*, and *Swett v. Colgate*. We think the modern doctrine upon the subject is reasonable, and proceeds upon a just interpretation of the contract of sale."

In *Woleott v. Mount*, 7 Vroom (N. J.) 262, seed was stated to be "early strap-leafed red-top turnip seed," and so sold. The seed turned out not to be the kind sold, and of an inferior quality. *Held*, if the statement expressed by the seller was part of the contract (as found), and not mere matter of opinion, an action lay for breach of contract. DEPUE, J., said: "The doctrine that on the sale of a chattel, as being of a particular kind or description, a contract is implied that the article is of that kind or description, is also sustained by the following English cases: *Powell v. Horton*, 2 Bing. N. C. 668; *Barr v. Gibson*, 3 M. & W. 390; *Chanter v. Hopkins*, 4 Id. 399; *Nichol v. Godts*, 10 Exch. 191; *Gompertz v. Bartlett*, 2 E. & B. 849; *Azemar v. Casella*, Law Rep., 2 C. P. 431; and has been approved by some decisions in the courts of this country. * * * The right to repudiate the pur-

chase for the non-conformity of the article delivered to the description under which it was sold, is universally conceded. That right is founded on the engagement of the vendor, by such description, that the article delivered shall correspond with the description. The obligation rests upon the contract. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions, in order to afford the purchaser a more enlarged remedy by rescission than he would have on a simple warranty; but when his situation has been changed, and the remedy by repudiation has become impossible, no reason supported by principle can be adduced, why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs the only available means of redress is a legal action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial." Here, *Seixas v. Wood* and *Swett v. Colgate* were commented on.

In *Hardy et al. v. Farbanks et al.*, James (Nova Scotia) 432, it was held that the sale of No. 1 salmon, without express warranty, amounts to a warranty that the fish is in the condition prescribed by law for the fish of that brand.

In *Baker et al. v. Lyman*, 38 Upper Canada Q. B. 498, an order was sent by plaintiffs, potters, in England, to the defendants, at Toronto, for "stone spar such as potters use." The order was entered on the books for stone, but defendant's manager erased it, and put "ground flint," thinking that was what was meant. It appeared that spar was used in the United States for the same purposes as the stone in England. The flint was sent in a barrel, and said by defendants to be marked "one barrel flint," but, at all events, was entered by a station master in England as "one barrel fluid." There was nothing to distinguish the flint from the stone on mere inspection, and plaintiffs, using it, thereby suffered a loss in their ware. In an action by them, the court below directed the jury that defendants were liable if the order sent by plaintiffs should have been understood by defendants as an order for stone, and if the plaintiffs were justified in believing that the article sent was such stone; but that if defendants were justified in sending ground flint on the order received, they were not liable. The jury found for the plaintiffs. A nonsuit was afterwards ordered, but on

appeal it was held the direction to the jury was right, and that the verdict should have been upheld.

In *Henshaw v. Robins*, 9 Metc. (Mass.) 83, the sale was, *inter alia*, of "two cases of Manilla indigo, of superior quality," previous to the sale the goods being opened and inspected. *Held*, the bill may be considered as a warranty that the goods sold are as described in it, and this is so, whether the goods are inspected or not, if the buyer cannot tell from their appearance whether they are what he intended to buy or not. WILDE, J., said: "From a review of these authorities, we think the weight of authority is manifestly in favor of the law as established in this Commonwealth; and it seems to us to be founded on sound principles. The plaintiff, therefore, is entitled to recover, unless, by the examination of the article purchased, he is to be considered as having waived his right to indemnity under the warranty. * * * But we are of opinion that the examination of the article by the plaintiff, at the time of the sale, is no evidence of his intention to waive any legal right. If the spurious nature of the article might have been detected on inspection, it might have been otherwise." *Osgood v. Lewis*, 2 Har. & G. (Md.) 495; *Borrekins v. Bevan*, 3 Rawle (Pa.) 23; *Hastings v. Lovering*, 2 Pick. (Mass.) 214, were cited with approval, and *Swett v. Colgate*, 20 Johns. (N. Y.) 196, and *Seixas v. Wood*, 2 Caines (N. Y.) 48, were commented upon.

In *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, oil was described in the bill of parcels as "winter-pressed sperm oil," but on delivery it turned out to be "summer-pressed" and not "winter-pressed," and of an inferior description. It was held on appeal, reversing the court below, that an action lay for a breach of the contract; here *Seixas v. Wood* and *Swett v. Colgate* were disapproved.

In *Foos v. Sabin*, 84 Ill. 564, the contract of sale was for "fat cattle," to be shipped for delivery at a future day. *Held*, where a party contracts to sell "fat cattle," to be shipped for the market at a future day, he will be bound to pasture them, &c., so that they will, at the expiration of the time agreed on for delivery, be in a suitable condition for sale as "fat cattle" in the market.

In *Flint v. Lyon*, 4 Cal. 17, there was a contract to deliver two thousand barrels, described in the sold note as "Haxall flour," and it was alleged to be performed by a delivery of "Gallego flour." There was apparently no difference between the values of the two kinds, at that time. *Held*, an action lay for breach of

contract. MURRAY, J., said: "It is a matter of no consequence that there was at the time little or no difference between the prices of Haxall and Gallego flour. What the inducement was to the defendant to purchase, we know not; but having purchased that particular brand, he was entitled to it, and could not be compelled to accept any other as a substitute. The use of the word 'Haxall' in the sold note amounted to a warranty that the flour was 'Haxall.'" See also, *Richmond Trading, &c., Co. v. Farquar*, 8 Blackf. (Ind.) 89; *Hogins v. Plympton*, 11 Pick. 97; *Bradford v. Manly*, 13 Mass. 139; *Hastings v. Lovering*, 2 Pick. 214; *Mader v. Jones*, 1 R. & C. (Nova Scotia) 82; *Wier v. Bissett*, 2 Thomp. (Ib.) 178; *Hyatt v. Boyle*, 5 G. & J. (Md.) 110; *Bryant v. Sears*, 49 Iowa 373; *Lamb v. Crafts*, 12 Metc. (Mass.) 355; *Bunnell v. Whitlaw*, 14 Upper Canada Q. B. 241.

In Pennsylvania, the authorities on this subject are not entirely harmonious.

The earliest case, we are aware of, where the subject was elaborately discussed, is that of *Borrekins v. Bevan et al.*, 3 Rawle (Pa.) 23. It appeared that defendants had contracted to sell to the plaintiffs, *inter alia*, a cask of "blue paint," and the bill of sale offered in evidence ran: "Bought of Bevan & Porter, 4 casks paint viz.: 1 cask blue wt.," &c., the paint was delivered, and about a year afterwards was opened and found to be a different article, and not merchantable as blue paint. On an action to recover back the purchase-money, the lower court charged the jury, the law was, that the plaintiff could not recover, unless an express warranty or fraud were proven; that a description in a bill of parcels of an article sold, as *blue paint*, does not amount to a warranty that it is so; and that in order to support his action, it is incumbent on the plaintiff to show, that before bringing suit, he tendered or redelivered the article to the defendants. After the case had been elaborately argued on appeal, the court below was reversed, ROGERS, J., saying: "According to the modern cases, warranties are divided into two kinds; express warranties, where there is a direct stipulation, or something equivalent to it, and implied warranties, which are conclusions and inferences of law, from facts, which are admitted, or proved before the jury. If the learned judge intended to say, that there can be no warranty, without an express agreement, or stipulation, or there be fraud, then his opinion is in opposition to the whole current of modern decisions. It must now be taken

to be the law (for they have conceded this in England, and even in New York, where the cases of *Chandelor v. Lopus*, and *Seixas v. Wood*, were decided), that where property is sold by sample, there is an implied warranty, that the article corresponds with the sample, although it has at the same time been held, it is sufficient if the bulk corresponds with the sample. * * * From a critical examination of all the cases, it may be safely ruled, that a sample, or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty, that the goods are what they are described or represented to be by the vendor. In the absence of proof to rebut the presumption, it is of equal efficacy to charge the vendor, as if the seller had expressly said 'I warrant them to correspond with the description or representation.' * * * To fix the precise meaning of the judge, in this part of his charge, has been attended with some difficulty. I understand him, in effect to say, that even if the defendants sold, and the plaintiffs purchased, the article for blue paint, it does not amount to a warranty if, on delivery, it turns out to be an entirely different commodity. * * * In all cases where it does not correspond in kind, the purchaser has a right to say this is not the article I contracted for, *non in haec foedera veni*, and this, whether he complains at the time of delivery or after, unless his conduct amounts to a waiver of his right to indemnity. * * * As a general rule I do not mean to impugn the doctrine, that in sales of personal property the vendor is not answerable for any defects in the quality of the article sold, without an express warranty or fraud. But it must be admitted that the rule is qualified with many exceptions, * * * in addition to those to which I have particularly adverted. * * * It has been said that the doctrine only applies to executory contracts, but it will be observed that all the cases are actions on the implied warranty, where the contract has been executed, either at the time or afterwards, by payment of the money and delivery. * * * In all sales, therefore, there is an implied warranty that the article corresponds in specie with the commodity sold, unless there are some facts and circumstances existing in the cases, of which the jury under the direction of the court are to judge, which clearly show that the purchaser took upon himself the risk of determining not only the quality of the goods, but the kind he purchased, or where he may waive his right. * * * The court further instructed the jury that in order to sup-

port the action it is incumbent on the plaintiff to show, that before bringing suit he tendered or redelivered the article to the defendants. If this had been an action to rescind there would be no doubt the charge would have been right in this particular. And this was formerly so on an express warranty; but it has been since ruled that an action will lie without a return or offer to return the property. And in this respect I see no difference between an express and implied warranty." In this case *Swett v. Colgate*, *supra*, *Seixas v. Wood*, *supra*, and *Chandelor v. Lopus*, Cro. Jac. 4, were disapproved. GIBSON, C. J., and KENNEDY, J., dissented.

This case was followed by *Jennings v. Gratz*, 3 Rawle 168. There plaintiffs, auctioneers, exposed for sale certain teas, described as "Young Hyson Tea." On delivery it was discovered the tea was adulterated, and defendants declined to pay, and refused to receive them. *Held*, that if the tea, by adulteration, had not lost its distinctive character as "Young Hyson Tea," an action lay for the price. The court said: "In the case at bar the teas were proved to be adulterated with certain leaves which it is believed do not belong to the tea family. But it was also shown, that no teas of the same denomination are entirely free from adulteration by admixture of these same leaves; and if a small degree of adulteration were permitted to affect the question of specific character, there would seldom be a binding sale. * * * Adulteration may, however, be carried so far as to destroy the distinctive character of the thing altogether; and in doubtful cases there is perhaps no practical test but that of its being merchantable under the denomination affixed to it by the seller. The application of this test to the case at bar produces a result decisively unfavorable to the defendant. The teas were resold at prices not greatly reduced, to dealers, although put on their guard it may be presumed by the defendant's repudiation of the article."

In *Fraley v. Bispham*, 10 Penn. St. 320, "it seemed from the charges for the boxes of samples," says the reporter, "that the sale in this case was made by sample." At all events it appears that, by the bill of sale, Fraley bought of Bispham "50 hhds. Superior Sweet-scented Kent'y Leaf Tobacco," which on examination turned out to be Kentucky leaf of exceedingly bad quality—low, heated, faded, rotten—not superior sweet-scented Kentucky leaf, and unfit for the consumption in England, where it was ordered to be sent. An action was brought for money had and received, and plaintiff

was nonsuited. On appeal the action of the court below was confirmed. COULTER, J., said: "The cause seems to be conclusively governed by the case of *Borrekins v. Bevan*, 3 Rawle 23, * * * where "the rule established that in all sales of goods by bills of parcels, samples, &c., there is an implied warranty that the article delivered shall correspond in *specie* with the commodity sold, unless there are facts and circumstances to show that the purchaser took upon himself the risk of the *kind* as well as the *quality* of the commodity purchased. If that case means anything it means this, that where the thing is sold by sample, and without express warranty, the purchaser takes it at his own risk, unless it should prove to be an article different in kind; all gradations in quality are at the hazard of the buyer. But if an article was sold as a diamond, and turned out to be glass, or where the thing was sold as tea, and was in fact chaff, the vendor would be responsible. * * * The sale by the bill of parcels, with which the sample perhaps corresponded, was of sweet-scented Kentucky leaf tobacco. It is not pretended that the article delivered was not tobacco, nor that it was anything else than Kentucky leaf tobacco. The gist of the whole case on the part of the plaintiffs is that the tobacco delivered was not of a quality equal to the sample, but of inferior flavor, taste and quality. It was in *specie* Kentucky leaf tobacco, in *kind* the same as the article sold."

In *Dailey v. Green*, 15 Penn. St. 118, a contract was made for the delivery of timber of a particular quality, &c., for building boats. The court said: "By his agreement to deliver in accordance with the order, the plaintiff in effect warranted the timber delivered should be accordant with that described in the order; for in a sale of goods by sample, or upon a written contract of articles of a particular description, which the purchaser had no opportunity of inspecting, the law implies a warranty that the article shall answer the description in the written contract." *Fraley v. Bispham*, *supra*, was not cited.

Carson v. McKnight, 19 Penn. St. 375, was the sale of a specific article ascertained before the sale by the purchaser.

Wetherill v. Neilson, 20 Penn. St. 448, and *Whitaker v. Eastwick*, 75 Id. 229, will be found difficult to reconcile with Pennsylvania or other cases. The former was an action on a note given for a bill of goods, which ran as follows: "Bought of Thomas Neilson, 35 casks of Soda Ash, 48 pr. ct., weighing as follows

304 to 338 (inclusive), each cask having its weight set down, &c.” On the trial it was proved that Neilson’s broker got a specification from him of 35 casks of soda ash, afloat, of 48 degrees strength, English test; that the sale was made by the broker on the distinct understanding that the soda was 48 degrees English test; that he was authorized to represent the soda as of that test. The defendants offered further to prove that the soda ash was far below the 48 pr. ct. agreed upon in the contract, and was unmerchantable, not being what it was sold for. This was rejected by the court. They further offered to show that it was so far below the English test as to be useless for what it is usually sold, and that there was a custom of the trade at the place of contract, to the effect that soda ash is sold upon the representation of the seller as to the percentage of alkali contained in it, without sample or warranty, and that the soda in question was sold on such representation. All this the court rejected, and on appeal was affirmed.

In *Whitaker v. Eastwick, supra*, plaintiffs purchased a cargo of coal, without seeing it, on the representation of the defendant that it was “good coal well adapted for generating steam.” On a suit to recover back the price, the plaintiff offered to show that there was at least twenty per cent. of slate and dirt in it, and that it was unmerchantable, which offer was admitted by the court. On appeal the action of the lower court was reversed, MERCUR, J., saying: “It is well settled as a general rule that the purchaser takes the risk of the quality of an article purchased, unless there be fraud or warranty. In this case no fraud is alleged, and there was no express warranty. The action is *assumpsit* on an implied warranty. There is an implied warranty of title, and generally of species, in a sale, but not of quality. * * * They got the kind of coal for which they bargained. * * * The fact that it was represented as being well adapted for generating steam, and that by reason of its impure quality a larger quantity is required to generate a given amount of steam, are all insufficient to raise an implied *assumpsit*.”

In *Warren v. Philadelphia Coal Co.*, 3 Weekly Notes of Cases (Phila.) 525, C., having previously sold coal to W., offered him a lot at a certain price, and on W.’s inquiring of the quality, informed him it was as good as the former lot; thereupon W. purchased it. *Held*, evidence was admissible to show the coal was not so good as the former.

In *Schepers v. Stewart*, 11 Weekly Notes of Cases (Phila.) 106, an action to recover the price of a reed-making machine, the defendant in his affidavit of defence set up that the machine when shown him was in a dark room, and he was unable to examine it thoroughly, but was obliged to rely on the representations of the plaintiff's salesman, which proved to be untrue in many specified particulars, and that the machine had not been delivered. The court below allowed the case to go to the jury, and the court, on appeal, upheld their action.

In *Havemeyer v. Wright*, not yet reported, tried during the current year in the Circuit Court of the United States for the Eastern District of Pennsylvania, plaintiffs contracted to deliver to defendants a certain quantity of "*old rails*," and in fulfilment of their contract offered to deliver a quantity of "*new rails*," which, proving worthless, defendants declined to receive, and rescinded the contract. In an action for the price, plaintiffs contended that "*old rails*" were substantially the same commodity as "*new rails*," and that a contract for "*old rails*" was satisfied by a delivery of "*new rails*." It was shown, however, that "*old rails*" had a special signification in the trade, and were principally of value because, having been used, their quality had been tested; that "*old rails*" were, in short, a particular commodity, different from "*new rails*." MCKENNAN, C. J., substantially charged the jury that there were two questions to consider: The first was, whether, assuming that "*old rails*" had a special value from having been used, the term "*old rails*," in a commercial sense, included "*new rails*," and the two things were substantially the same commodity; and, secondly, even if the two were the same commodity, were these "*new rails*" delivered merchantable, or were they so worthless as to be unmerchantable as "*old rails*." Verdict and judgment for defendants. BUTLER, D. J., concurred.

The rule deducible from these cases may then be thus stated: *Where goods are sold by a particular description or designation, the goods delivered must strictly correspond with that designation or description.* In England this is put, as we have stated, on the ground that the identity of the goods described and bargained for, with those delivered, is a *condition precedent* to the contract. In America it is usually on that of an implied warranty. In both countries the result reached is the same. It is true that there are some cases in Pennsylvania which are in antagonism with this rule, but

the cases in that state cannot all be reconciled with each other, as we have seen with respect to *Neilson v. Wetherill*, *supra*, and *Whitaker v. Eastwick*, *supra*, and the other Pennsylvania cases quoted by us, and it would not be safe to say what the law in that state on this subject is.

(b) *Sale of Negotiable Instruments, &c.*

In the same category of cases as those we have just discussed fall those in which the courts have said, that in a sale of securities, maps, books, &c., by prospectuses, the seller is bound to deliver an article strictly corresponding to the description; and these authorities, like those we have just reviewed, are usually put, in America, on the ground of an implied warranty, and not generally on that of a condition precedent.

Thus in *Merriam v. Wolcott*, 3 Allen (Mass.) 258, the plaintiff had purchased of the defendant two promissory notes, for a sum less than their face value, both of which, without the knowledge of the parties, had forged endorsements. *Held*, an action would lie to recover back the money.

In *Lobdell v. Baker*, 1 Metc. (Mass.) 193, the note was endorsed by a minor, and it was held that upon the sale there was an implied warranty that the endorsement was by one capable of binding himself by a valid contract.

In *Terry v. Bissell*, 26 Conn. 23, defendants sold the plaintiffs a note not then due purporting to be signed by A., and endorsed by G. & S. The signature of A. was genuine, but those of G. & S. forged. Both parties were ignorant of the forgery. On the discovery of the forgery, plaintiffs offered to return the note, which defendants declined to receive. *Held*, an action lay for money had and received. ELLSWORTH, J., said: "In the first place, there was no sale, because the subject-matter of the sale had no existence * * * the existence of the thing to be sold, or the subject-matter of the contract, is essential to the validity of the contract. If a horse which has died, a fact unknown by the parties, is sold at the present time, or goods which have been burned, the sale is not good, for the very basis of the negotiation and transfer is wanting. Indeed it is clear law that if a substantial part of the thing sold be non-existent, there is no sale. * * * The signatures of Mr. Gorton and Mr. Smith, which alone gave value and credit to the note, not being legally attached to the note, it is not the thing which was negotiated for between the parties, any more than the dead

horse can be said to be the horse sold, because the lifeless body remains, and the hide and shoes are of some little value. The names of Mr. Gerton and Mr. Smith are no more on the note than if nothing was written on it at all, and without these names the thing is substantially worthless. * * * We think the purchaser was entitled to have a thing of the kind and description which the thing sold purported and was understood to be." See also *Ross v. Terry*, 63 N. Y. 613; *Ellis v. Grooms*, 1 Stewart (N. J.) 47; *Faulks et al. v. Kamp*, 3 Fed. Rep. 898. Whether, however, the thing is or is not what it really purports to be is undoubtedly a question of fact for the jury to decide.

(c) *Merchantability implied in a sale of Goods by Description.*

In a sale of goods by description, where the goods have not been inspected by the buyer, there is always, in addition to the condition precedent above discussed, an implied warranty that they are merchantable, under the designation or description mentioned in the sale. Thus in *Gaylord Manf. Co. v. Allen*, 53 N. Y. 518, ALLEN, J., said: "A contract to manufacture and deliver an article at a future day, carries with it an obligation that the article shall be merchantable, or, if sold for a particular purpose, that it shall be suitable and proper for such purpose," quoting *Hargous v. Stone*, 1 Selden 73; *Reed v. Randall*, 29 N. Y. 318; *Dutchess v. Harding*, 49 Id. 321. The same rule was laid down in *McClung v. Kelley*, 21 Iowa 509, viz.: "The contract always carries with it an obligation that the article shall be merchantable, at least not have any remarkable defect." See also *Hyatt v. Boyle*, 5 Gill & J. (Md.) 110.

In *Hargous v. Stone*, 1 Selden (N. Y.) 73, PAIGE, J., reviewed at considerable length the cases in which were involved the principle of implied warranties in sales, and in speaking on this point said, "executory sales do not depend on the same principle as executed contracts of sale. The doctrine of implied warranty has properly no application to the former. Whether a contract is executory, that is, to deliver an article not defined at the time, on a future day, whether the vendor has at the time an article of the kind on hand, or it is afterwards to be procured or manufactured, the contract carries with it an obligation that the article shall be merchantable, at least of medium quality or goodness. If it comes short of this the vendee may rescind the contract and return the article after he has had a reasonable time to inspect it. He is not