C

Supreme Court of New York.
SEIXAS AND **SEIXAS**
v.
WOODS.
May Term, 1804.

In an action on the case for selling one article for another, there must be either a warranty or fraud.FN(a) A sound price does not imply a warranty of soundness.

FN(a). The effect of a warranty on a sale of goods, being to oblige the person by whom it is made to indemnify the vendee against all losses induced by a failure of the warranty, however innocent the warrantor may be, courts of law appear to have been very cautious in subjecting to such wide extended liability. It is, therefore, a general rule, that on the sale of chattels there is not any *implied* warranty, unless as to the title. *Hermance v. Vernoy,* 6 *Johns. Rep.* 5. That to constitute a warranty it must be express, and is not raised by a sound price, or a mere affirmation of the quality or kind of the article sold; (*Defreeze v. Trumper,* 1 *Johns. Rep.* 274. *Holden v. Dakin,* 4 *Johns. Rep.* 421.) nor by a mere affirmation of the value; (*Davis v. Meeker,* 5 *Johns. Rep.* 354.) nor, according to the case in the text, by a written description; and where the subject is of dubious quality, in which common judgments might be deceived, Lord *Kenyon* has ruled the same. Therefore, where an auctioneer, on a sale of pictures, set, in the printed catalogue, opposite to each, the name of a painter, his lordship determined that it did not amount to a warranty of the picture's being the work of such ??tist. *Jendwine v. Slade,* 2 *Esp. Rep.* 572. But where a substantive fact was specified in an emphatic manner by printing in the articles of sale in italics, that an estate was "*free from encumbrances,*" the court of common pleas held that it amounted to a warranty. *Gunnis v. Erhart,* 1 *H. Bl.* 289. Where, on a sale by auction, the duty may, on the vendor's doing certain acts, be avoided, if the auctioneer say that he has taken such precautions that if the vendor's price be not bid, there will be no sale, and the duty not payable, it is a warranty against incurring the duty, though the auctioneer act in good faith, and be mistaken as to the legal effect of what he did. *Capp v. Topham,* 6 *East,* 392. The reason of this decision may perhaps be, that the auctioneer was acting in the line of his vocation. Where a servant is employed to sell a horse, he has an implied authority to warrant his soundness; (*Alexander v. Gibson,* 2 *Camp.* 555.) so a broker, authorized to advertise a general ship for any port, to warrant that she shall sail with convoy. *Rinquist v. Ditchell, Abb. on Ship.* part 2. p. 8. If it be necessary to proceed on the warranty, the action may be maintained against him who made it, though he plead partnership in abatement, provided he sold as his *separate* property, and gave the warranty *solely.* *Clark v. Holmes,* 3 *Johns. Rep.* 148. But where case was brought for a deceit by means of a *joint* warranty, on a *joint* sale of *joint* property, proof of a *separate* sale and warranty of the joint property, by *one* of the defendants, who sold it as *his own,* will not support the action. *Weal v. King,* 12 *East,* 452. If the action be for deceit in the sale, or *assumpsit* for not delivering on a sale of goods, those of a certain description, but others of a different quality and sort, fraud must be alleged and proved. *Snell and others v. Moses and Sons,* 1 *Johns. Rep.* 90. But, *after verdict,* if an affirmation be

stated in the count, which proceeds to set forth that "the plaintiff, by reason of the said affirmation of the said defendant, was fraudulently and falsely deceived," the fraud and deceit are sufficiently alleged, as has been determined in the court of errors, in *Bayard v. Malcolm,* 2 *Johns. Rep.* 550. reversing a contrary decision of the supreme court in the same case, (1 *Johns. Rep.* 345.) which seems to be the better law, though of no authority. Where the *scienter* was expressly laid, proof of knowledge in the agent beyond sea, was held sufficient in an action against the merchant, his principal, in whom the jury found there was not any actual deceit, but that it was in the agent. *Hern v. Nichols,* 1 *Salk.* 289.

The description in a bill of parcels is no warranty.

THIS was an action on the case for selling *peachum* wood for *brazilletto.*The former worth hardly any thing, the latter of considerable value.

The defendant had received the wood in question from a house in *New-Providence*, to whom he was agent, and in the invoice it was mentioned as *brazilletto.*He had also advertised it as *brazilletto*, had shown the invoice to the plaintiffs, and had made out the bill of parcels for *brazilletto.*But it was not pretended that he knew that it was *peachum,* nor did the plaintiffs suspect it to be so, as it was delivered from the vessel, and picked out from other wood by a person on their behalf. In short, neither side knew it to be other than *brazilletto,* nor was any fraud imputed. On discovery, however, of the real quality of the wood, it was offered to the defendant, and the purchase-money demanded. On his refusal to accept the one, or return the other, as he had remitted the proceeds, the present action was brought, in which a verdict was taken for the plaintiffs, subject to the opinion of the court.

West Headnotes

Sales 343 ⚿266

343 Sales
343VI Warranties
343k265 Implied Warranty of Quality, Fitness, or Condition
343k266 k. In General. Most Cited Cases
Where wood was sold and purchased as braziletto wood, which commanded a fair price, when in fact the wood was of different quality and of little or no value, but there was no express warranty, an action of case could not be maintained to recover the purchase price, as there was no implied warranty.

Hoffman, for the plaintiffs. The simple point is, whether the party who is here, though an agent, be not liable. If the credit be to the agent, he will be liable; but not if it be to the principal. This is like the case of a captain of a ship who is known to be the agent of his owners, but still, for necessaries furnished, is liable on his contract.[FN(a)] In these cases, the party has a triple remedy, the captain, owner and ship: therefore, though we may have a remedy against the principal, it is by no means an exoneration of the agent. In *Macbeath v. Haldiman,*[FNd1] it is acknowledged an agent may make himself responsible on his contract, but government being, in that case, made the debtor by the plaintiff, it was determined no credit was given to the defendant. The knowing, therefore, that there is a principal, is not giving credit to him. The bill of parcels is complete evidence that the defendant made the sale in his own name, not on account of his principal; he is, therefore, clearly answerable. Suppose a consignment sent to this country, and a purchase from the consignee, are we driven to look abroad? But it will be contended, that admitting the agent is liable, still it must be with this qualification, that he has not paid over the money. *Buller v. Harison*[FN‡] will be relied on for this. But there the money was paid by mistake, and the agent did not accelerate; here he took an active step; he sold and received profits; he was not a mere recipient of money paid to him voluntarily. But there was no remittance in this case. It is not a remittance in point of law. It was

made in *January*, 1801, a month before the note given in part payment fell due, which was not till the next month. How, then, could this return cargo, transmitted in *January*, be a remittance of money not receivable till *February?*Suppose, when the note fell due, the fact of the wood being different from that for which it was purchased had been known, payment had been refused, and the note put in suit by the defendant; would not these circumstances have been a complete defence? The description of the wood, in a bill of parcels, is as full a warranty of its quality, as a description of a vessel's being *American*, in a warranty in a policy of assurance. Though the contracts are different, the rules of construction ought to be the same. If so, and a warranty was created, then, on the principles in insurance cases, parol evidence was inadmissible. To evince the first position with which we began, *Gonsalez v. Sladen, Bull. N. P.* 130. is fully in point; for it is there laid down, that a factor beyond sea may be sued by a vendor for goods purchased on account of his principal, "because," adds the author of the *Lex Mercatoria Americana*,[FNd1] from whom the case is cited, "it would otherwise be impossible to carry on trade; for who would trust a person unknown, and a thousand miles distant?"[FN(a)]

FN(a).*Rich v. Coe, Cowp.* 636. but the doctrine is laid down rather too broad in this case. See *Farmer v. Davis*, 1 *D. & E.* 108. In a home port the ship is not liable.

FNd1. 1 *D. & E.* 181.

FN‡.*Cowp.* 566.

FN??a1. 1 *Lex Mer. Amer.* 401.

FN(a). This position of the author of that book has been subsequently confirmed in *Houghton v. Mathews*, 3 *Bos. & Pull.* 490. by *Chambre*, J. who there says, "where the principal resides abroad, he is supposed to be ignorant of the circumstances of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties."

Woods and *Harison*, contra. The remittance is with us considered as important. In addition to this we shall contend that in all cases like this, unless there be a warranty, *scienter*, or fraud, the defendant is not responsible. These three things are indispensable. As to a warranty, there is nothing like it, unless the mere representation calling it *brazilletto* be so. The plaintiffs were as capable of judging as the defendant. If otherwise, it was the plaintiffs' duty to have asked the defendant, do you warrant? The mere saying it was *brazilletto* did not warrant it, for it is not every assertion that will make a warranty. To render it so, *Buller*, J. says, in *Pasley v. Freeman*, 3 *D. & E.* 57. it must appear by evidence that it was so intended. If, then, it was not sworn to at the trial, it cannot now be supplied. The transaction on the part of the defendant was perfectly fair; every information he himself had was given; every paper and document relating to the article shipped, were laid before the plaintiff, who was left to exercise his own judgment on the article, and the communications respecting it. In *Springwell v. Allen, Aleyn*, 91. "for falsely and maliciously selling a horse to the plaintiff, as the proper horse of the defendant, *ubi re vera*, it was the horse of Sir *J. L.* because the plaintiff could not prove that the defendant knew it not to be his own horse, for the declaration must be that he did it fraudulently, or knowing it to be not his own horse, for the defendant bought the horse in *Smithfield*, but not legally tolled, the plaintiff was nonsuited." So in *Dowding v. Mortimer*, 2 *East*, 452. n. the *scienter* was held necessary to be proved. The same doctrine is to be found in 1 *Sid.* 146.[FNd1] S. C. 1 *Keb.* 522. Proof of an assertion will not maintain the action; the plaintiff must establish the *scienter*.A mere insertion in a bill of parcels can never amount to warranty; for that purpose, technical words are necessary. The contents of a bill of parcels are never obligatory. 12 *Vin.* 6 E.[FN‡] In this respect, it is the custom of trade invariably to make out the bill in the name of the agent. But the action ought to be against the

principal, unless in cases of *mala fides*, or notice. *Sadler v. Evans*, 4 *Burr.* 1986. The notice is not contended, and as to *mala fides*, the case expresses the very reverse. In all contracts for sale, every person is supposed acquainted with the subject matter. All purchasers, in presumption of law, are deemed competent judges of what they are about to buy; and if they will purchase without attention to circumstances, the maxim of *caveat emptor*[FN§] will apply. This doctrine is fully recognised in *Parkinson v. Lee*, 2 *East*, 314. The seller of a parcel of hops, with a latent defect, which he did not know of, and without warranty,[FN(a)] or fraud, held not to be answerable though they turn out unmerchantable. For the vendee is supposed to be as competent a judge of the commodity as the vendor. When he is not, and doubts his own abilities, he requires a warranty; and the reason that it is held of such force in law, is because a trust is then reposed in the seller, on the faith of which alone the buyer acts. In *Dowding v. Mortimer*, already referred to, the declaration stated "that the plaintiff bargained with the defendant, to buy of him a certain musket, as and for a sound and perfect musket, at and for a large price, to wit, 2*l.* 12*s.* 6*d.* and that the defendant then and there knowing the said musket to be unsound, broken and imperfect, then and there sold the said musket to the plaintiff, as and for a sound and perfect musket." Yet it was held there was no warranty, and being so, it must be proved that it was done *scienter* by the defendant, otherwise there can be no recovery. There is no analogy between the case put as to warranties in policies. There the subject matter of the contract is, that there shall be an *American* ship; if there is none, there is no contract. The plaintiff made his agreement with the defendant, as an agent; he, therefore, can never say he is a principal. It follows, therefore, that the present is the common case of agent and principal, in which the vendee must have his redress over. But it is insisted that the money has not been legally remitted, the return cargo being sent previous to the receipt of the cash on the note of the plaintiffs, which did not fall due till the month after the pretended remittance, as it is termed, was made. For this *Buller v. Harison* has been cited; but, if that can be attended to, it will be seen that it is strongly in our favour. For it expressly goes to prove, that when any step has been taken on the credit of the funds received by the agent, in consequence of which his situation with regard to his principal is changed, it shall be deemed to be a payment over. Here we have acted on the faith of this note, and made a large remittance, which still leaves *Young* and *Montell* in our debt; this, therefore, it is presumed, is a remittance; and, therefore, a perfect exoneration of the defendant.

FNd1.*Leakins v. Clissel.*

FN‡.*Pl.* 7. it is supposed is intended. *Degelder v. Savory.*

FN§. It has been said this maxim relates only to lands. See 1 *Lex Mer. Amer.* 372. citing a case from *Dallas.*

FN(a). There was a warranty that the hops should be of like goodness as the sample, and the bulk of them were so at the time of sale. The case seems to establish this principle, that if an article be of a quality equal to what warranted at the time of sale, the vendor is not liable for subsequent deterioration, arising from a latent defect of which he was ignorant.

Hoffman, in reply. If the facts in the case do not amount to a warranty, it will hardly be possible to create one. This court has decided similar circumstances to amount to a warranty, in a case where one drug was sold for another. The determination from 2 *East*, 314. was on a sale by sample, in which the court held the vendor not liable for a deterioration arising from the known nature of the article. And surely, as to the remittance, it is incongruous to say *that* has been sent which has not been received. It might perhaps avail between agent and principal, but not when a third person is concerned.

THOMPSON, J.

Two questions arising out of this case are presented for consideration:

1. Whether an action can be maintained to recover back the consideration money, paid under the circumstances stated in the case? and if so, then,

2. Whether the defendant, who acted only as agent or factor, can be made responsible?

From the facts stated with respect to the first point, it appears there was no *express warranty* by the defendant, or any *fraud* in the sale. The wood was sold and purchased as *brazilletto* wood, and a fair price for such wood paid, when in fact the wood was of a different quality, and of little or no value. The plaintiffs' agent, who made the purchase, saw the wood when unloaded and delivered, and did not discover or know that it was of a different quality from that described in the bills of parcels; neither did the defendant, who was only consignee of this cargo, know that the wood was not *brazilletto*.The question then arises, whether there was an implied warranty, so as to afford redress to the plaintiffs, or whether the maxim of *caveat emptor* must be applied to them. From an examination of the decisions in courts of common law, I can find no case where an action has been sustained under similar circumstances: an express warranty, or some fraud in the sale, are deemed indispensably necessary to be shown. In the case of *Chandelor v. Lopus,* FNd1 in the exchequer-chamber, it was decided, that an action of trespass on the case would not lie for selling a jewel, affirming it to be a bezoar stone, when in truth it was not, unless it be alleged that the defendant *knew* it was not a bezoar, or he *warranted* it to be such. And in the case of *Springwell v. Allen,* FN‡ it was adjudged that the *scienter* or fraud was the *gist* of the action, when there was no warranty. Mr. *Wooddeson,* in his *Lectures,* FN§ says, in the *English* law, relating to this subject, a very unconscientious maxim seems long to have prevailed, which was expressed or alluded to by the words *caveat emptor,* signifying that it was the business of the buyer to be upon his guard, and that he must abide the loss of an imprudent purchase, unless the goodness and soundness of the thing sold be warranted by the seller. But this doctrine, he says, is now exploded, and a more reasonable principle has succeeded, that a *fair price* implies a warranty, and that a man is not supposed, in the contract of sale, to part with his money without expecting an adequate compensation.

FN??a1. 2 *Cr. Rep.* 4.

FN‡. 2 *East,* 448. in note.

FN§. 2 *Woodd. Lec.* 415.

Here we find a full and complete recognition by this commentator, that the law once was as laid down in the above cases; and the modern and improved doctrine, as he calls it, however reasonable and just it may at first seem, does not appear to be fortified and sanctioned by adjudged cases. They all determine, either that there must be an express warranty, or some fraud on the part of the vendor. In the case of *Bree v. Holbech,* FNd1 *assumpsit* was brought to recover back money paid as the consideration for the assignment of a mortgage which turned out to be a forgery. The defendant being an administrator with the will annexed, and finding the mortgage among the papers of the testator, assigned it *bona fide,* not knowing it to be a forgery; and it was adjudged that he was not liable to refund, he having acted in good faith; and there being no covenant for the goodness of the title, that it was incumbent on the plaintiff to have looked to the goodness of it. And in the case of *Stewart v. Wilkins,* FN‡ it was ruled that *assumpsit* was the proper form of action where there is an express warranty; and Lord *Mansfield* there said, that selling for a sound price, without warranty, may be a ground for an *assumpsit;* but in such case it ought to be laid that the defendant knew of the unsoundness. FN§ Again, in the case of *Williamson v. Allison,* the same subject in some measure came under review; and the law, as laid down in the cases of *Springwell v. Allen,* and *Chandelor v. Lopus,* above cited, was fully recognised. *Fonblanque,* in his

valuable *Treatise of Equity*,[FNdd1] speaking of the justice and propriety of this principle, says, "To excite that diligence which is necessary to guard against imposition, and to secure that good faith which is necessary to justify a certain degree of confidence, is essential to the intercourse of society. These objects are attained by those rules of law which require the purchaser to apply his attention to those particulars, which may be supposed to be within the reach of his observation and judgment; and the vendor to communicate those particulars and defects, which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to those points, where attention would have been sufficient to protect him from surprise or imposition, the maxim *caveat emptor* ought to apply. But even against this maxim he may provide, by requiring the vendor expressly to warrant that which the law would not imply to be warranted. If the vendor be wanting in good faith, *fides servanda* is the rule of law, and may be enforced, both in equity and at law."These observations, I think, apply with peculiar force in the case before us. The agent of the plaintiffs, who made the purchase, was present at the delivery of the wood; and the defect now complained of was within the reach of his observation and judgment, had he bestowed proper attention. I am satisfied that according to the settled decisions in the *English* courts, either an express warranty, or some fraud or deceit on the part of the vendor, is necessary to be shown, in order to entitle the purchaser to the remedy sought after in the present case. I see no injustice or inconvenience resulting from this doctrine, but, on the contrary, think it is best calculated to excite that caution and attention which all prudent men ought to observe in making their contracts. I am therefore of opinion with the defendant, on the first point, which renders it unnecessary for me to examine the other question raised on the argument.

FNd1.*Doug.* 655.

FN‡.*Ib.* 13.

FN§. 2 *East*, 446.

FNdd1. 1 *Fonb.* 380. note h.

KENT, J.

This is a clear case for the defendant. If upon a sale there be neither a *warranty* nor *deceit*, the purchaser purchases at his peril. This seems to have been the ancient, and the uniform language of the *English* law, and the only writer of authority, that calls this doctrine in question, is professor *Wooddeson*, in his *Vinerian Lectures*, and he does not cite any judicial decision as the basis of his opinion. In the case of *Chandelor v. Lopus*, (*Cro. Jac.* 4.) it was determined in the exchequer, by all the judges except one, that for selling a jewel, which was affirmed to be a bezoar stone, when it was not, no action lay, unless the defendant knew it was not a bezoar stone, or had warranted it to be one. This appears to me to be a case in point and decisive. And in the case of *Parkinson v. Lee*, 2 *East*, 314. it was decided, that a fair merchantable price did not raise an implied warranty; that if there be no warranty, and the seller sell the thing, such as he believes it to be, without fraud, he will not be liable for a latent defect. These decisions are two centuries apart, and the intermediate cases are to the same effect. *Co. Litt.* 102. a. *Cro. Jac.* 197. 1 *Sid.* 146. *Yelv.* 21. 2 *Ld. Raym.* 1121. *per Holt*, Ch. J. *Doug.* 20. *Aleyn*, 91. cited 2 *East*, 498. *notis*.By the civil law, says Lord *Coke*, every man is bound to warrant the thing that he selleth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty in deed, or law. So *Fitzherbert* (*N. B.* 94. *C.*) says, that if a man sell wine that is corrupted, or a horse that is diseased, and there be no warranty, it is at the buyer's peril, and *his eyes and his taste ought to be his judges in that case*.In the case cited from 2 *East*, the judges were unanimous, that the rule applied to sales of all kinds of commodities. That without a warranty by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects, and that there is no instance in the *English* law of a contrary rule being laid down. The civil law, and the law of those countries which have adopted the civil as their

common law, is more rigorous towards the seller, and make him responsible in every case for a latent defect, (see the *Dig.* lib. 1. tit. 2. c. 13. n. 1. which gives the very case of selling vitiated wood,) and, if the question was *res integra* in our law, I confess I should be overcome by the reasoning of the *Civilians.*And yet the rule of the common law has been well and elegantly vindicated by *Fonblanque*, as most happily reconciling the claims of convenience with the duties of good faith. It requires the *purchaser* to apply his attention to those particulars which may be supposed within the reach of his observation and judgment, and the *vendor* to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. And even against his want of vigilance, the purchaser may provide, by requiring the vendor expressly to warrant the article. The mentioning the wood as *brazilletto* 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 evidence to be so *intended*, FNd1 and not to have been a mere matter of judgment and 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.

FNd1.*Buller,* J. 3 *D. & E.* 57. *Carth.* 90. *Salk.* 210.

The cases in which the ship, in a policy of insurance, has been described as *neutral* or *American*, and that description held to be a warranty, are not at all analogous to the present case. The policy is a special contract, in which the whole agreement is precisely stated, and no question was ever made in those cases, but that the assured knew, and intended to be understood to *mean*, that the vessel was of the character described. I am therefore for the defendant.

LEWIS, Ch. J. contra.
Judgment for the defendant.

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