

there was any warranty implied or otherwise accompanying the sale. In *Wallis v. Pratt*, 1910, 2 K. B., at page 1003, Fletcher Moulton, L.J., in a judgment which met with the unanimous approval of the House of Lords, 1911, A. C. 394, points out in very clear language the difference between a condition and a warranty. This is the *Sanfoin Seed Case* and it was there decided that even where the contract provides that there is no warranty given as to the thing sold, yet if the thing sold be something different from what was agreed to be purchased and there has been a substantial failure to perform the contract at all, the purchaser who suffers damage has a right of action for breach of condition separate and distinct from a breach of warranty. A condition and a warranty are alike obligations under a contract, a breach of which entitles the other contracting party to damages, but in the case of a breach of a condition he has the option of another and higher remedy, viz., that of treating the contract as repudiated.

But where the buyer has accepted the goods or where the contract is for specific goods, the property in which has passed to the buyer, the purchaser will be deemed as a matter of law to elect to content himself with his right to damages. Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated or a warranty, a breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract.

So that if the defendants in this case had sold the plaintiff a box containing all revolver cartridges instead of rifle cartridges, the article sold would have been something entirely different and the case cited would have been authority for holding the plaintiff entitled to damages even if no warranty implied or expressed accompanied the sale. But it seems to me this is an entirely different case. This is a case where one single revolver cartridge got mixed in a box containing a great many rifle cartridges. The plaintiff in this case was never in a position to repudiate the purchase on the ground that there was a substantial failure to perform the contract. There was not in this case, as there was in the one cited, that kind of condition for a breach of which an action lies independently of warranty. The plaintiff, then, is driven to rely on an implied warranty.