So in Chitty on Bills 246, "Where a transfer by mere *delivery* is made only by way of *sale* of the bill or note, as sometimes occurs, or in exchange for other bills, or *by way of discount*, and not as a *security* for money lent, or when the assignee expressly agrees to take it in payment, and run all risks; he has, in general, no right of action against the assignor, if the bill turns out to be of no value."

This view of the question relieves it of all real difficulty, and places the liability of the indorser or assignor upon a satisfactory ground. And we thus find the law determined in the very thoroughly considered case of *Baxter* v. *Durand*, 29 Maine 434, where Judge Shepley, giving the opinion of the whole court, held that "One who sells a promissory note, by delivery, upon which the names of indorsers have been forged, is not liable upon an implied promise to refund the money received therefor, if he sold the same as property and not in payment of a precedent debt, and did not know of the forgery." The learned Chief Justice carefully examined the conflicting cases, and distinguishes very clearly the real question in controversy. He admits the authority of *Jones* v. *Ryde*, 5 Taunt. 488; *Fuller* v. *Smith*, 1 Car. and Payne 197; *Cammidge* v. *Allenby*, 6 B. & C. 373; *Collyer* v. *Brigham*, 1 Meto. 546; but properly confines them to the case of payment for a previously subsisting debt.

This case is quoted with approbation by Judge Story, Prom. Notes, § 188, and relied on as the leading authority by Judge Eccleston, in the case of *Rinenan* v. *Fisher*, 12 Maryland 197, where the same point is directly decided, following out not only the ruling of Judge Shepley, but adopting the greater part of his argument. It is also referred to by Professor Parsons, in his late work on Bills and Notes, vol. 2, 589, 590, to support the same doctrine, which is stated in the text of his work very fully and without any reservation.

In a former part of the same volume, page 38, in a note, it is said, the distinction taken in the case in Maine does not seem to have been well founded; but whether the author is responsible for this note or not, we cannot say; we should rather believe his unqualified approval of the same case, after he had composed nearly six hundred pages in addition to what he then had written, expresses his true opinion, more especially as he again reiterates the doctrine in the same volume, page 601. The case *Wheeler* v. *Fowle*, 2 Hardy, 149, decided by our late brother Spencer, does not conflict with the rule we find so well established; it was determined upon its peculiar circumstances, the whole evidence being heard, from which a representation, other than the sale and delivery of the note, might have been inferred.

We are all of opinion that the pleadings in this case present no cause of action against the defendant, upon his indorsement. There is no fraud alleged in the transfer; no prior debt existing, for which the note was taken; no representation made beyond the fact of indorsement, without which we hold there could be no recovery by the plaintiff.

The demurrer will be sustained, and the cause remanded.

(Note by Editor of *American Law Register*)

The importance of the question involved in the foregoing case, and the want of entire uniformity in the decisions in regard to it, seem to justify the space which we have devoted to the very able and carefully reasoned opinion of the learned judge and we should not feel called to add anything more, if we did not consider that the tendency in regard to the subject which the case encourages was in the wrong direction.

The weight of authority still is, unquestionably, in favor of the early doctrine of the books, that one who passes a note or bill by mere delivery assumes an implied obligation, in all cases, unless there is something to show a different purpose, that the same is genuine and what it purports to be upon its face, and that he has the legal right to transfer the title to the instrument. This is nothing more than the vendor of goods, without express warranty, assumes, by implication of law.

It is distinctly affirmed in the case of *Gurney* v. *Womersley*, 28 Eng. L. & Eq. 256, s. c. 4 Ell. & Bl. 132, that the vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness; and, if it turns out that the name of one of the parties is forged, and the bill becomes valueless, he is liable to the vendee, as upon a failure of consideration. In this case the name of the acceptor upon whose credit the bill was discounted by the plaintiffs proved to have been forged by the drawer, the defendant having procured the discount, but declined to give any guarantee in regard to the bill, but had no knowledge of the defect in the bill.

The same, or a similar, question is discussed in *Gamperts* v. *Bartlett*, 24 Eng. L. & Eq. 156, where the bill purported to be a foreign bill, and was unstamped. It proved to have been made in London, and was therefore void, for want of a stamp. The Court of Queen's Bench held, that the vendor of a bill of exchange impliedly warrants that it is of the kind and description that it purports to be on its face, and that the vendee might recover back the price of the bill, as upon a failure of consideration.

These decisions were made as late as 1854, and have never been questioned in England, as far as we know. There is no question, we think, that they are in strict analogy with other portions of the law of contracts applicable to sales of personal property and of choses in action, and that they will be maintained in England. There should therefore, as it seems to us, be some very persuasive reason to justify a departure from them and establishing a different rule in this country. The main current of American authority seems to be strong in the same direction.

It is so declared by the most approved text-writers. Mr. Justice STORY, Promissory Notes, § 118, says: "In the next place he (the vendor of a note, without express guaranty) warrants in the like manner, that the instrument is genuine, and not forged or fictitious," citing Bayley on Bills, ch. 5, § 3, p. 179, 5th ed.; Chitty on Bills, 269-271; Id. ch. 6, p. 244. 9th ed.; Id. p. 364, 336; and many decisions, English and American. The law is stated in the same terms in Parsons on Notes and Bills, vol. 2, p. 37.

The learned judge in the principal case seems to infer that, because the case of *Baxter* v. *Duren*, 29 Me. Rep. 434, is referred to by these text-writers, that he may fairly count upon the weight of their testimony in favor of the soundness of that case. But Mr. Justice STORY deceased many years before the date of that decision; and Professor Parsons does not attempt to settle the law upon the point, but contents himself, as most text-writers do, by giving the present state of the authority, which is sufficiently illustrated by the learned judge in the principle case. Professor Parsons did as we should have done; he gave all the decisions, and then gave his adherence to the preponderating side.

The question is examined in *Cabot Bank* v. *Morton*, 4 Gray 156, by a learned jurist, to the weight of whose authority we have all been long accustomed to refer with unhesitating confidence. This distinguished judge states the rule much in the same terms before quoted from Mr. Justice STORY: "It seems to fall under a general rule of law, that, in every sale of personal property, the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title or right to transfer it."

The rule is stated by an eminent jurist in Connecticut, Mr. Justice ELLSWORTH, in *Terry* v. *Bissell*, 26 Conn. Rep. 23, much in the same terms, quoting the very language of Chief Justice SHAW, as stated above.

In *Thrall* v. *Newell*, 19 Vermont Rep. 202, the rule is laid down in mdoh the same terms by Judge HALL.

And in *Aldrich* v. *Jackson*, 5 R. I. Rep. 218, Chief Justice AMES says: "The vendor of a bill or note, by the very act of sale, impliedly warrants the genuineness of the signatures of the parties to it."

And in New York, since the early case of *Markle* v. *Hatfield*, 2 Johns. 455, it seems to have been regarded as settled, that a payment in forged paper is no payment, upon the ground of an implied warranty of genuineness. But in the