law. 1. That the instrument is genuine, as well as all the attendant signatures; 2. That the indorser has a good title to the instrument; 3. That he is competent to bind himself as indorser; 4. That the maker is able to pay the note, and will do so upon due presentment at maturity; 5. If not paid when thus presented that upon notice to the indorser he will discharge it: Story on Prom. Notes, § 135.

It must follow, then, that when an indorsement is made and taken without recourse in the qualified form, as it appears upon the note in controversy, every liability, that would otherwise exist, is excluded, and no action can be maintained upon the defendant's transfer thus restricted.

For every practical purpose, such a restricted indorsement may be placed upon the same footing as a note payable to bearer, or transferred by delivery. In the latter case, the person making the transfer does not thereby become a party, nor does he incur the obligation or responsibility belonging to an indorser.

This doctrine was settled by Lord Holt in *Gov. and Co. Bank of England* v. *Newman*, 1 Lord Raym. 442, and is adopted by all the late text writers.

It has been attempted, however, to create a liability, not in virtue of any contract contained in the indorsement or delivery of the instrument, but upon a legal implication that there is in every such case a warranty that the instrument is genuine, and should it prove a forgery, he who has transferred it must refund to the proper party the money he may have received.

This assumption places notes and bills on the same footing with merchandise or any other commodity that may have been the subject of sale, and requires him who may have received an equivalent for an instrument subsequently proved to be worthless, to place the party to whom it has been delivered in "*statu quo.*"

Now it is not to every case, even between vendor and vendee, that the rule, thus ascertained, can apply; for an article of merchandise, sold without warranty, where the buyer and seller have equal opportunity to inspect it, and both are equally ignorant of inherent defects, there can be no complaint if a defect is afterwards discovered. It is only when there is concealment, misrepresentation, or fraud, that the seller becomes responsible to the buyer.

We are not surprised at the apparent confusion which exists in the statement of the question by some modern writers upon commercial law; and in the adjudications even of courts who have followed their dicta without careful examination. The difficulty in part, is found in the fact that many of these treatises, when first published, were unpretending volumes, briefly, yet clearly, stating legal principles, and referring to decisions equally brief: but edition after edition has been multiplied until the points once settled have become obscured by redundant language, announcing a former doctrine merely in a new form, and the courts have too often been content with quoting cases without tracing the principles to its origin.

They would seem to have forgotten the maxim: "*Melius est petere fontes, quam sectari rivulos.*"

And thus it is we find in the discussion of the point we are about to determine, such a variety of views; positive assertions afterwards qualified on the same page, while they impress upon the reader no definite idea of what the law is; or the statement is so broadly made, that it partakes rather of assumption than of matured opinion.

We feel at liberty, therefore, to exercise our own judgment, and we think the conclusion to which we have arrived is fully sustained upon legal principles.

There is no averment in the plaintiff's petition of the manner in which he became the owner of the note, nor yet that he paid value, or gave anything as an equivalent. We may fairly presume, then, he purchased it in the ordinary way in market, no representation being made by the defendant other than the implication that legally follows his qualified indorsement. There is no fact before us which imputes unfair dealing or fraud to the indorser; his liability is claimed simply upon the ground that his assignment was a virtual warranty of the genuineness of the note.

It is then the ordinary case of the owner of a bill sending it into the market for sale, or offering it himself to a purchaser, acting meanwhile in good faith, not concealing any knowledge he may have, proper for the buyer to know, giving no verbal opinion even that the instrument is valid.

A similar case in principle is found in *Fenn* v. *Harrison*, 3 T. R. 759, where Lord Kenyon said: "It is extremely clear that if the holder of a bill of exchange send it to market, without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he has sold it, if he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter in circulation to impose upon the world instead of the current coin."

So it was held in *Parker* v. *Kennedy*, 2 Bay S. C. 392, "that a bare assignment implies no warranty, but only an agreement to permit the assignee to receive the debt to his own use." So in *Cummings* v. *Lynn*, 1 Dallas 449, and in *Robertson* v. *Vogle*, Id. 155, where Judge Shippen decided, that an indorsement at common law amounts only to an assignment of all the property in the bill or note without making the assignor responsible.

A sale of the note, therefore, as of any other commodity, imposes no liability upon the vendor, simply by the act of sale. It is a purchase by the buyer without warranty, and the rule of "*caveat emptor*" will apply.

If, however, a note is given with a restricted indorsement, in payment of a precedent debt, the better opinion is, if the instrument is afterwards ascertained to be forged, the party receiving it shall not be the loser; he is still to be remunerated for the sum originally due. The thing received having proved to be valueless, the original claim revives.

Not so where the note is disposed of by sale. "While it may be claimed," says Judge Story, Prom. Notes, § 118, "that he who transfers a note by delivery, warrants in like manner that the instrument is genuine and not forged or fictitious, unless where it is sold as other goods and effects by delivery merely, without indorsement, in which case it has been decided that the law in respect to the sale of goods is applicable, and there is no implied warranty."