ing their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded.

DECREE AFFIRMED.

SCHUCHARDT *v.* ALLENS.

1. If no exception have been taken below to a question asked on trial, no objection can be made to it here.
2. If the answer to a question asked may *tend* to prove the matters alleged in the *narr.*—if it be a link in the chain of proof—the question may be asked. It is not necessary that it be *sufficient* to prove them.
3. In an action for false warranty, whether the action be in assumpsit or in tort, a *scienter* need not be averred; and if averred, need not be proved.
4. Authority without restriction to an agent to sell carries with it authority to warrant.
5. Where a contract of sale is complete, the vendor cannot hold the vendee to terms not agreed on, by sending him a bill or memorandum of sale, with such terms set out upon it, as that "no claims for deficiencies or imperfections will be allowed, unless made within seven days from the receipt of goods."
6. Whenever the evidence is not legally sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. But if there be evidence from which the jury may draw an inference in the matter, the case ought not to be taken from them. It is not necessary, in order for the court properly to leave the case with the jury, that the evidence leads unavoidably to the conclusion that the plaintiff has no case. If there be evidence proper to be left to the jury it should be left; and a remedy for a wrong verdict sought in a motion for new trial.

THIS was an action on the case for false warranty, and for deceit in the sale of one hundred casks of Dutch madder; and was brought in the Circuit Court for the Southern District of New York. The declaration contained seven counts.

The first three were for *false warranty* (without any *scienter*),

1st. That it was a prime article.

2d. That it was pure and unadulterated.

3d. That it was good, merchantable Dutch madder.

The last three counts were for *deceitful representations* (with *scienter*) of the same facts. The fourth count, after stating

that *the plaintiffs were calico printers*, and *required* and were *accustomed to use Dutch madder*, avers that the defendants, *knowing this* and that *the madder was for use*, "by falsely and fraudulently representing it to be *fit and proper for use in their business*," sold the same, whereas it was not such, and so the defendants "deceived the plaintiffs."

The defendants pleaded Not Guilty to the whole declaration.

The facts were these: The madder was owned by merchants in Amsterdam, who consigned it to the defendants in New York for sale upon commission. The vessel containing the madder arrived at New York on the 6th April, 1856, previous to which the defendants had received, by a Liverpool steamer, a sample put up in the usual way in a small clear glass bottle, with a ground glass stopper, covered with bladder, and marked 1 to 100, according to the number of casks. The sample was handed to R. H. Green & Sons, who were regular brokers in drugs, &c., in New York, to be sold.

Mr. Green gave the following account: "I received from a young man in the employ of defendants a small bottle of madder, marked 1 to 100, *said to represent one hundred casks of Dutch madder*, with the injunction that it must not be opened. He left it with me. I asked him subsequently why he would not have it opened, and he replied, that it was the only sample bottle which they had, and that it would deteriorate by being opened; which is the fact. The vessel with the madder was here. They were urgent to have it taken from the wharf, and as I was about going eastward, I said I would try and sell it, but still I was told not to have it opened. It was *very handsome to look at*. I went to Providence, and called on the Allens. Mr. Allen is one of our best calico printers, and has always been in the habit of using the best madder. Young Allen went with me to the works; he wanted to see his overseer. We met his overseer, and the bottle was submitted to him; *he thought it was handsome*, and the conclusion was, they agreed to take it. The price was named. He inquired concerning the quality. I told him I knew no-

thing of it, except *that it came from one of our best houses; the standing of the house was the best guaranty.* The conversation carried the idea that it was very handsome madder. . . . The price named was 11¼ cents per pound for one hundred casks, without knowing the amount contained in them. He said he would take it, and I said he should have it. The price was fixed by the defendants. The sample bottle was in the usual form of such samples. It is usual to have one for every cask, but here there was but one. I brought the bottle back with me from Providence. Subsequently, I was applied to for the sample bottle, and sent it on; I have never seen it since. There was no objection to my giving the sample bottle to the plaintiffs after the sale; it then belonged to them. I promised to bring back the bottle from Providence. I did so, and afterwards sent it back to Providence." [This bottle, it appeared, had been lost by the Allens.]

The overseer testified as follows: "I saw the sample bottle in question in Mr. Green's hands, and was told not to open it. It was *very fair to look at*, and I said so at the time, but I told them that I could not tell anything about it *unless the bottle could be opened.* I was asked about it, and I said *it looked* very well; it could not be judged of by any one without opening the sample bottle. It is the custom to open and examine the sample bottles. There was no sand in the bottle apparent to the eye; I saw none in it. No one could have discovered adulteration from looking at the madder in the bottle. . . . . No wise man will buy madder without looking at it; this is the first I ever knew of a purchase being made where it was not examined. The madder in the bottle is always taken out, rubbed and examined. I have had an experience of forty-five years in the business. On the occasion of this purchase I told them that it was *impossible to tell what the quality of the madder was, unless I examined it;* I could only say that *it looked very well.*"

Without other examination, and without any knowledge of the quality of the sample, except as it appeared to the eye, and as inferred from "the standing of the house," the plaintiffs agreed to purchase the lot at 11¼ cents a pound. Accord-

ingly, upon his return to New York, April 17th, Mr. Green made an entry of sale in his sales book, and sent a copy to the defendants. The madder was afterwards weighed, a bill made out by the defendants, and, on the 28th of April, forwarded to the plaintiffs. This bill contained a memorandum notice, in small type, in one corner, reading thus: "*No claims for deficiencies or imperfections allowed unless made within seven days from receipt of goods.*" It appeared from the testimony of foreign witnesses that the madder in the flask was of the same quality as that in the casks. About three weeks after the madder was received by the plaintiffs at their print works, they began to use it, when they found it not equal to what they had been accustomed to use. It was "full of sand;" "they were obliged to shovel the sand out of the vats twice a day;" the quantity of sand "varied from two and a half ounces to four ounces in the pound;" "this variation took place in the same cask;" sand was found "in streaks" in it; it was "streaked through and through with sand;" it "was palpable as soon as it was opened;" "the streaks were both lengthwise and crosswise;" "they were strata."

It should be here mentioned that, as was here proved, there are different qualities of madder, such as *mull*, *little ombro*, *ombro*, and *crops*, but they are all known by the common term of Dutch madder, and also that all madder has in it more or less sand and other impurities. Even the first quality has in it from two to eight per cent.; but *this* madder "was out of all proportion, out of all character;" thirty to forty per cent. of impurity, fifteen to sixteen per cent. being sand.

The testimony being closed, the counsel for the defendants requested the court to instruct the jury as follows:

"1. The gist of the plaintiffs' action is an alleged false warranty and deceit, on the part of the defendants, in the sale of the madder in question; and to entitle them to recover against the defendants, they must establish, to the satisfaction of the jury, such alleged false warranty *and* deceit.

"2. That, in this form of action, the plaintiff cannot recover

without evidence to establish a *scienter* on the part of the defendants.

"3. That the broker had no authority or power to warrant that the bulk should correspond with the madder contained in the bottle, and thus bind the defendants. But even if he had such power, still he did not so warrant the same.

"4. That there was not such a sale by sample as in law amounts to a warranty that the bulk should correspond with the sample.

"5. That if there was any warranty, it was at most an implied one, under which the defendants are not liable for any adulteration of the bulk of the madder, unless the plaintiff have, by competent evidence, established fraud on the part of the defendant in respect thereto.

"6. If there was a warranty of any kind, still the terms stated in the bill rendered limited the defendants' liability thereon to seven days, and as no demand for damages was made by the plaintiff within that time, they are not entitled to recover in this action."

The court refused to give any one of the instructions asked for, and the counsel for the defendants thereupon excepted.

During the trial, the broker was asked by the plaintiffs' counsel what kind of madder he had been in the habit of selling the plaintiffs, to which the defendants' counsel objected. The court overruled the objection, and counsel for the defendants excepted. The witness, however, said nothing responsive to the question, until cross-examined by the defendants' counsel; and no objection appeared in the record to the testimony which he gave.

The jury rendered a verdict for the plaintiffs for $7333, being a deduction of thirty per cent. from the price paid for the madder, which reduced the same to 7⅞ cents per pound. Thereupon the defendants took a bill of exceptions.

Messrs. Owen and Stoughton, for the plaintiff in error:

1. The question about the kind of madder the broker was in the habit of selling to the plaintiffs was improperly allowed; for the defendants had never sold any madder before

the lot in question, and there is no evidence that they knew to what kind the plaintiffs had been accustomed.

2. As respects the exceptions:

The exceptions to the *first* and *second* instructions are not so strong as the others. We press them least.

The *third* is well founded.

The broker was not authorized to warrant that the madder to be sold was equal to that contained in the bottle exhibited, and of this the purchasers had notice at the time the article was offered to them. Madder, it appeared, is of several qualities; all contains sand, earthy matter, and other impurities; and in the best, these are found to the extent of from two to eight per cent. The presence or quantity of these impurities, the overseer testified, could not be ascertained from an inspection of the sample in the bottle without opening it, and he so told his employers. Thus we have notice to the buyers that the best and poorest of madder contains these impurities; and knowledge, also, that no one could tell by the inspection of the sample bottle whether it contained the best or poorest. The buyers also had notice that the sellers declined to permit the bottle to be opened, so as to allow of such an inspection as would enable them to ascertain from the sample what the bulk of the madder was to be; and from all this, it follows that the broker was not authorized, by means of the sample, to make any representation whatever of the quality of the article offered. Under these circumstances, if the buyers wished to protect themselves by a warranty, they were bound so to have informed the broker, that his principals might have exercised their own discretion on the subject, giving or withholding it as they should deem proper.*

No warranty was in fact made. The mere exhibition of the sample does not amount to a warranty that the bulk sold is like it. Representations must be superadded.† In the

* Parkinson *v.* Lee, 2 East, 314, 322; Welsh *v.* Carter, 1 Wendell, 190.

† Waring *v.* Mason, 18 Wendell, 425; Hargous *v.* Stone, 1 Selden, 73; Bradford *v.* Manley, 13 Massachusetts, 139, 145; Ormrod *v.* Huth, 14 Meeson and Welsby, 651.

present case there was no exhibition of a sample. To exhibit a sample, is so to show it that it is to be regarded as a representative of the bulk to be sold. The buyer examines the sample, as he would the bulk, if present; and in place of inspecting the whole, examines the part exhibited to show what the whole is. But in this case the sellers expressly declined to permit the madder in the bottle to be so examined that its quality could be determined, and, therefore, —as it was known to the buyers that whether it contained the best or poorest could not be ascertained without opening,—there was no measure of excellence known by either party to which a warranty could be applied, and, therefore, no agreement upon the subject.

The *fourth* exception as well as the third is disposed of by these remarks.

If it be urged that a warranty may be implied from the fact that the party buying had no opportunity to inspect the bulk, and, therefore, might rely upon an implied warranty that it should be as good as the sample *appeared to be from looking at it*, the answer is, that the buyers were told by their experienced overseer, and were bound themselves to know, that the appearance to the eye would not disclose any of the impurities known by all dealers in the article to exist in madder, even of the best quality. Hence, appearance to the eye cannot be separated from knowledge by the other senses; and, therefore, when the eye looked, the mind gave notice that imperfections existed which the eye could not discover. Whilst, therefore, to the eye, the madder looked fair, yet the ordinary dealer *knew* that it contained sand and other impurities; and that although fair to look upon, it might be of the poorest quality to be found in the market. Moreover, the law presumes every dealer in articles brought to market acquainted with the circumstances usually attendant upon such articles.*

If it should be held that a warranty existed, at the most it was but a warranty that the bulk should correspond with

* Sands *v.* Taylor, 5 Johnson, 405.

the *actual quality* of the sample produced; and this being so, it follows that there is a fatal variance between the contract as set forth and that proven. As the sample may, from the proof, have been of any quality—from the poorest to the best—the warranty could have been only, that the bulk ranged in quality between those degrees; and therefore, the delivery of any madder, merchantable within this range, would have satisfied the warranty.*

Thus, it is clear, that if a warranty of any kind was made, the plaintiffs were not entitled to recover; for there was no evidence to show what was the actual quality or value of the sample exhibited. The only evidence is the opinion of the overseer, that it was impossible to say anything about its quality. There is, therefore, no proof that the madder sold was not equal to the sample. Indeed, the rule of damages was assumed to be the difference, not between the value of the sample and bulk, but between the bulk and the very best quality of madder known. And this rule was adopted, not in view of the fact that the sellers had withheld or concealed the sample. It was forwarded by Mr. Green to the buyers, at their request, and after they had ascertained the character of the bulk by using from it. They had the means of showing whether it was of like quality or not; the burden of this proof was upon them. "The party who extinguishes the light, and precludes the other party from the means of ascertaining the truth, ought to bear the loss."

It is manifest from the rule of damages adopted, that the court below considered the warranty to have been established, and did not confine themselves to enforcing the principle that the bulk should in fact correspond with the sample exhibited.

As respects the *fifth* exception, the law is, that, if there be no warranty, the party seeking to recover must aver and prove that the seller *knew* of the defect insisted on; must accordingly, establish fraud. This is old law, as old as

* Weall *v.* King, 12 East, 452; Snell *v.* Moses, 1 Johnson, 96; Perry *v.* Aaron, Id., 129; Gardner *v.* Gray, 4 Campbell, 144; Fraley *v.* Bispham, 10 Pennsylvania State, 320.

Chandelor v. *Lopus*, reported by Croke, *temp.* 1 James I, and made familiar to all in this day by Smith in the Leading Cases.* "The defendant," says the syllabus in that case, "sold to the plaintiff a stone, which he affirmed to be a Bezoar stone, but which proved not to be so. No action lies against him, unless he either knew that it was not a Bezoar stone or warranted it to be a Bezoar stone." "For every one," says the report, "in selling his wares will *affirm* that his wares are good." Mr. Green, however, did not even do this. His conduct was very careful and upright.

As respects the *sixth* request for instructions: If the purchasers had not, in judgment of law, an opportunity to inspect the bulk at the time the contract was made at Providence, yet they had opportunity, and it was practicable to do so, while it was in New York before its delivery. At all events, they should have made such examination promptly after it was received at their print works, *and within the time specified in the notice*, and communicated the result to the defendants. Their neglect to do this operated to discharge the implied warranty, or, in other words, it estops the plaintiffs from insisting that the bulk did not so correspond.†

Mr. Strong, on the other side.

Mr. Justice SWAYNE delivered the opinion of the court:

1. As respects the question objected to and overruled. Until cross-examined by the defendants' counsel, the witness said nothing responsive to the question objected to. No objection appears in the record to the testimony which he gave. This is a sufficient answer to the exception. But if the testimony which the question sought to elicit had been given, its admission would not have been an error. The *fourth* count

* 1 Smith's Leading Cases, 238 (5th American edition, by Hare and Wallace). The American principles and authority are set forth by Judge Hare. See also Parkinson *v.* Lee, 2 East, 314; Hoe *v.* Sanborn, 21 New York, 552; Kingsbury *v.* Taylor, 29 Maine, 508; Emerton *v.* Mathews, 1 American Law Register, N. S., 231; 5 Law Times, 681.

† Vanderhorst *v.* McTaggart, 2 Bay, 498; Muller *v.* Eno, 3 Duer, 421, 425; Prosser *v.* Hooper, 1 Moore, 106; Hargous *v.* Stone, 1 Selden, 86.

averred that the plaintiffs "carried on the business of calico printers, and as such required for their use and were accustomed to use the best Dutch madder, and that the defendants, by falsely representing the madder in question to be fit for use in that business, and well knowing that it was bought by them for use in their business, sold it to the plaintiffs, whereas," &c. An answer to the question would have been directly applicable to this count. It would have tended to prove the kind of madder used by the plaintiffs. It was not necessary that it should be *sufficient* for that purpose. If such were its tendency—if it were "a link in the chain of proof," it was within the sphere of competency, while its effect was for the consideration of the jury.

2. The testimony being closed, the counsel for the defendants asked the court to instruct the jury as follows. (His Honor here stated the requests as given, *ante*, pp. 359–60.)

The exceptions to the *first two* instructions asked were properly abandoned at the argument in this court. They affirm propositions which are not legal truths.

The ancient remedy for a false warranty was an action on the case sounding in tort. *Stuart* v. *Wilkins* (1 Douglas, 18); *Williamson* v. *Allison* (2 East, 447). The remedy by assumpsit is comparatively of modern introduction. In *Williamson* v. *Allison*, Lord Ellenborough said it had "not prevailed generally above forty years." In *Stuart* v. *Wilkins*, Lord Mansfield regarded it as a novelty, and hesitated to give it the sanction of his authority. It is now well settled, both in English and American jurisprudence, that either mode of procedure may be adopted. Whether the declaration be in assumpsit or tort it need not aver a *scienter*. And if the averment be made it need not be proved.*

One of the considerations which led to the practice of declaring in assumpsit was that the money counts might be

* Williamson *v.* Allison, 2 East, 446; Gresham *v.* Postan, 2 Carrington and Payne, 540; Brown *v.* Edgington, 2 Manning and Granger, 279; Holman *v.* Dord, 12 Barbour, S. C., 336; House *v.* Fort, 4 Blackford, 293; Trice *v.* Cockran, 8 Grattan, 449; Laseter *v.* Ward, 11 Iredell, Law, 443.

added to the special counts upon the warranty.* If the declaration be in tort, counts for deceit may be added to the special counts, and a recovery may be had for the false warranty or for the deceit, according to the proof. Either will sustain the action.†

The *third* instruction affirms that the broker by whom the madder was sold had no power to give any warranty.

Authority, without restriction, to an agent to sell, carries with it authority to warrant.‡

The *sixth* instruction refers to the memorandum upon the bill of the madder transmitted by the broker who made the sale, from New York, on the 28th of April, 1856, to the plaintiffs at Providence, Rhode Island. The sale was entered on the broker's books on the 17th of that month. It was made previously to one of the defendants. The broker says in his testimony, "The price named was 11¼ cts. per pound for 100 casks, without knowing the amount contained in them; he said he would take it, and I said he should have it. The price was fixed by the defendants." The contract between the parties thus became complete, and nothing done subsequently by the defendants or their agent could affect the rights of the plaintiffs.

The *fourth* and *fifth* instructions sought in effect to take the case from the jury. A Circuit Court has "no authority to order a peremptory nonsuit against the will of the plaintiff."§ Where there is no dispute about facts, and the law arising upon them is conclusive against the right of the plaintiff to recover, it is proper for the court so to instruct the jury.‖ If the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accord-

* Williamson *v.* Allison, 2 East, 451.

† Vail *v.* Strong, 10 Vermont, 457; Brown *v.* Edgington, 2 Manning and Granger, 279.

‡ Andrews *v.* Kneeland, 6 Cowen, 354; The Monte Allegre, 9 Wheaton, 616.

§ Elmore *v.* Grymes, 1 Peters, 469; D'Wolf *v.* Rabaud, Id., 476; Crane *v.* The Lessee of Morris and Astor, 6 Id., 598.

‖ Toland *v.* Sprague, 12 Id., 300.

ingly. "This is equivalent to a demurrer to the evidence, and such an instruction ought to be given whenever the evidence is not legally sufficient to serve as the foundation of a verdict for the plaintiff."* This practice "has in many of the States superseded the ancient practice of a demurrer to evidence. It answers the same purpose and should be tested by the same rules. A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom."†

Where the evidence, or any part of it, if believed by the jury, is decisive of the case, it is proper for the court to instruct the jury to that effect.‡

In order to determine whether the court erred in refusing to give the *fourth* and *fifth* instructions, it will therefore be necessary to consider the state of the evidence before the jury.

At the time of the sale the agent produced a sample bottle. There was but one for the one hundred casks of madder. It was usual to have one for each cask. The broker was instructed by his principals not to allow the bottle to be opened, because the contact of the atmosphere would injure the appearance of the sample which it contained, and he acted accordingly. The arrival of the sample preceded the arrival of the casks from abroad. The sale was to be made and was in fact made by that sample. The agent says in his testimony, "The sample was very handsome to look at." "The conversation carried the idea that it was very handsome madder." There was no sand in the bottle. The sale was made at Providence, Rhode Island. The casks were at that time in New York, and it seems from the evidence still on shipboard. The plaintiffs had no opportunity to examine their contents. The transaction was a large one. The vendees had no means of forming a judgment of the quality of the madder in the casks but from the appearance of that in the bottle, which they were not allowed to open. From these facts we think the jury were well warranted in drawing

* Parks *v.* Ross, 11 Howard, 362. † Id., 373.

‡ Bliven *v.* New England Screw Co., 23 Id., 433.

the inference that it was the understanding of the vendees that they were buying under a warranty that the quality of the madder in the casks was equal to that of the sample in the bottle, and that the agent of the vendors intended to be understood as giving such a warranty. It is hardly credible in the presence of such facts that the understanding and intention of the parties could have been otherwise.

But it is not necessary that the state of the evidence should have been such as necessarily to lead to this conclusion. It is enough that there was evidence upon the subject proper to be left to the consideration of the jury. If the jury erred, the remedy was by a motion for a new trial, and not by a writ of error. This part of the case was argued as if such a motion were before us. The rules of law which would be applicable in that event are very different from those which apply as the case is presented. A motion for a new trial in the courts of the United States is addressed to the sound discretion of the tribunal which tried the case, and to grant or refuse it cannot be made the subject of exception.* Here the question is, whether the court erred in refusing to take the case from the jury. Upon that subject we concur in the opinion of the learned judge who tried the cause. If a motion for a new trial were before us we should overrule it. In our opinion right and justice have been done. The judgment below is

AFFIRMED WITH COSTS.

HARDY *v.* JOHNSON.

1. By the law of California, one tenant in common of real property can sue in ejectment, and recover the demanded premises entire as against all parties, except his co-tenants, and persons holding under them. But the judgment for the plaintiff in such case will be in subordination to the rights of his co-tenants.
2. According to the system of pleading and practice in common law cases which prevails in the courts of California, and which has been adopted by the Circuit Court of the United States in that State, a title acquired

* Brown *v.* Clarke, 4 Howard, 15.