



powered by



A Freely Accessible Repository
of Digitized California
Newspapers from 1846 to the
Present

Daily Alta California, Volume 4, Number 229, 29 August 1853 — MONDAY MORNING, AUGUST 29.
[ARTICLE]

MONDAY MORNING, AUGUST 29.

A decision lately rendered in one of our Courts, is so novel to our legal conceptions and so interesting as a precedent of mercatorial law, that we are induced to give it some consideration.

In the case of *Flint, Peabody & Co. vs. Lyon*, suing for damages for breach of contract of a sale of flour, and tried in the District Court, his Honor overruled the offer of the defendant to prove that in his acceptance of part of the lot of flour, he was not aware of the variance of the brands from the warranty in the note of sale. His Honor said that such testimony was immaterial to the the issues of this case, and that it would not establish any right in the defendant to decline the contract. With the merits of this particular case we have nothing to do; and we establish a proper subject of argument and criticism by stating the decision of his Honor generally. The proposition is, then, that in the case of a contract with a warranty, the acceptance by the defendant of a portion of the goods, even if he was not aware of their variance from the warranty, would bind him to accept the whole, and he could only sue for damages.

Now, our idea and reading of the law, with all respect for his Honor, and without, of course, any reference to the evidences of the particular case, is that a warranty always gives to the contractor the alternative privilege of suing for damages or declining the contract. It is true that the Statute of Frauds, which is an essential part of the American law, declares that the acceptance of a portion of goods binds to the acceptance of the whole and entire purchase; but the doctrine of warranty is not within this statute, and is entirely of a distinct and separate consideration. Our persuasion is that a warranty gives

to a purchaser the right to have his action for damages, or (almost using the language of the law) to decline his purchase *within a reasonable time after the discovery of a variance*. His Honor maintains that a warrantee cannot decline after the discovery of variance, if he has already accepted a portion or earnest of the goods, and is driven to the necessity of an action for damages. These two statements of law are in a difference, not only interesting to the profession, but of great practical importance. The discovery of a variance from a warranty often naturally takes place some time after the acceptance, and in these cases his Honor's decision could not give the party the speedy and effectual, and, therefore, more important, remedy of declining his purchase. In this commercial age, we have long conceived it to be a settled principle of the courts in this country and in England to construe with severity any attempt to diminish the number or scope of the remedies in mercatorial law.

The only case incident to our memory or ideas, where the law would hold a warrantee to his purchase, on the moment of mere *acceptance*, is where the property is sold *in sight*, and where the variance is a *plain object of the senses*. But this would be matter of course, and would not invade the doctrine of warranties.

We may illustrate the innovation of his Honor's decision by drawing one out of many probabilities: A merchant buys, with a warranty, a lot of goods out of sight, and tranships them; but, after this usual transaction of commerce, discovers a material variance from the warranty. His Honor appears to contend, against the ideas of law and the important securities of commerce, that the purchaser, in this case, accepting without a discovery, cannot decline, has no right of self-redress, and can only take advantage of a variance, in an action on the case for damages. This decision is, surely, beyond the assent of all well regulated systems of mercatorial law and custom.

It may, however, be suggested, that it is the duty of purchasers to make discoveries of all variances or defects before acceptance. It is answered that this

duty, known to gentlemen of the bar as that of "*caveat emptor*," does not apply at all to warranties, and that the very convenience and security of a warranty is to facilitate and protect sales without the troubles

of examination and inspection. His Honor's decision has no refuge from criticism, and, with its entire opposition to any array of law or any consideration of the securities and facilities of commerce, must fail of support and establishment.

Within the last fortnight, difficulties of a serious nature have been fomented between the whites and the Indians of Rogue River valley. The Indians of this territory appear to be capable of some organization and strategy, and, on the two occasions of the surprise of an advanced party in Elk Valley, and of the late engagement near Jacksonville, have repulsed the whites with considerable loss. Any alliance which they might effect with the Klamath and Shasta tribes would render them really formidable, in view of the evidences of their exasperation and our ignorance of their interior country and force. About three or four hundred whites are already in the field, are constantly receiving reinforcements from the settlements, and appear to be actuated by the most excited sentiments of revenge, on account of the ruthless massacres and depredations of these Indians.

With the particular facts that have originally called out this expedition of war we are not acquainted; and we should be mortified to have any proof of the surmise which we have heard, that its origin is a mere speculative and heartless attempt to repeat those politico-Indian wars which have been a burden to our treasury, and a disgrace to the literal humanity of our government. But, apart from any particular facts, we are well convinced that wars must be the continued moral relation between the white and the Indian, and that this is but the succession of the evidence of the incorrigible antipathy of the two races. Occasions of war, we admit, are most frequently taken by the whites without justification and by virtue of their own violence; while the Indians are sometimes the party to be exclusively blamed. The nomadic habits and idle necessities of the aborigines

nomadic habits and idle necessities of the aborigines not unfrequently induce them to the outrages of our frontier, while the settler, with a base and cowardly sense of their unprotectedness, and in the malice of antipathy, often gives them cause for revenge and reprisal.

We sincerely trust that the present hostilities are not of that class where a few particular troubles, that would doubtless have soon subsided, or certainly would have been avenged with more discrimination and quietness, have been made occasions of warlike expeditions. We are, however, persuaded that the generality of the Indian depredations do not justify that indiscriminate and excessive punishment which attains no other end than the gratification of passion, and tends eventually to multiply and enlarge our Indian troubles.

The present difficulties in the North were considered so exigent, that Gen. Hitcock, we learn, has seen proper, without any official information of the state of affairs, but from the reports in the newspapers, and from having seen in a letter from Crescent City, published yesterday, notice of official dispatches having been forwarded to him, requiring assistance, to order sixty men from the Benecia Barracks to be held in readiness to embark for Fort Reading, and reinforce the command at that post. These are all the available men at present to be had from the U. S. troops in this territory, though if troubles should continue, other posts will doubtless contribute a few men each to the force in the field. The above detachment will take with them all the arms to be spared, and about two hundred extra rounds of ammunition. They will be conveyed to the seat of difficulty in a day or two.

We cannot suppress a suspicion that, although there may be an inception of a serious war on the Rogue River, that the accounts from the North are to be received with some grains of allowance. Some of the Indians of that region, whom we know to be the most abjectly spiritless and cowardly of the human form, are represented to be uniting in coalitions which we know they do not dare even to contemplate. It can easily be imagined that the situation of affairs is wholly liable to the exaggerations of fear and misapprehension.

