LEWIS L. STRAUSS *(Plaintiff)* .....APPELLANT;

AND

JOHN BOWSER *(Defendant)* .....DEFENDANT.

1951

*June 4
*Oct. 2

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of Goods—Warranty on sale of bull for breeding purposes—Whether related to time of sale or to future.

The respondent in November 1948 sold a bull to the appellant under the following written warranty: "This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you." The appellant took delivery in Ontario and transported the animal by truck to Virginia, some 800 miles. In April 1949 the appellant for the first time employed the bull for breeding purposes and found it to be suffering from a deformity rendering such use impossible. In an action by the purchaser against the vendor for damages for breach of warranty

Held: (Affirming the judgment of the Court of Appeal for Ontario), that the appeal should be dismissed.

Per Kerwin and Estey JJ.—While a warranty may expressly relate to the future, unless it is so expressly stated, the warranty relates to facts as they were at the time of the sale. *Liddard* v. *Kain,* 2 Bing. 183, 130 E.R.; *McGill* v. *Harris,* 36 N.S.R. 414; *Eden* v. *Parkison* 2 Doug. K.B. 732, 99 E.R. 468; *Chapman* v. *Gwyther* L.R. 1 Q.B. 463. *Kyle* v. *Sim* [1925] S.C. 425, distinguished. To divide the warranty into the past, present and future, as the appellant sought to do, was not the correct way in which to read it. The words "I guarantee him to be a breeder for you" were not to be viewed as anything more than a warranty that at the date of the sale there was nothing to prevent the bull being a breeder for the appellant. The rejection by the trial judge of the opinion evidence of appellant's witnesses in favour of the factual evidence and that of respondent's expert witness, was fully justified. On the proper construction of the warranty, even if the onus were upon the respondent of establishing that any injury was not suffered prior to the sale, and that there was no congenital defect, that onus was met.

Per Kellock J. The appellant's contention that the guarantee would have been effective as to the defect in question, if congenital, although becoming patent after the date of the sale, was well founded but appellant failed on the evidence to exclude the possibility of the condition having been brought about by injury subsequent to the sale.

Per Cartwright and Fauteux JJ. It was not necessary to decide whether on its true construction the warranty related to the future or whether, if it did, it extended so far into the future as April 1949. The breach of warranty which the appellant pleaded and on which he based his case at the trial was not merely that the bull was not a breeder in April 1949, but that the congenital deformity from which it was then suffering made it impossible that it could have ever have served a cow or been a breeder. The respondent met

*PRESENT: Kerwin, Kellock, Estey, Cartwright and Fauteux JJ.

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this case by evidence that the bull had served a number of cows in a normal manner and that it had sired a number of calves. There was thus ample evidence to support the finding of the trial judge that the bull conformed to the warranty when delivery was made.

APPEAL by special leave of the Court of Appeal for Ontario from the judgment of that Court (1) (Henderson and Bowlby JJ.A., Hogg J.A. dissenting) dismissing an appeal by the appellant from the judgment of Barlow J. (1).

J. D. Arnup K.C. and *A. H. Young K.C.* for the appellants—The trial judge erred in his interpretation of the warranty and did not consider whether it extended into the future. While a warranty ordinarily applies to conditions existing at the time of the sale, it may also, either by express terms or by implication from the facts, apply to a future time. *Benjamin on Sale* 7th Ed. (1931) 698; *Kyle* v. *Sim* (2); *Natrass* v. *Nightingale* (3); *Wood* v. *Anderson* (4); *Liddard* v. *Kain* (5). Since the respondent knew the purpose for which the bull was being purchased, the warranty he gave was intended to guarantee the animal's capacity as a breeder in the future. The words "I guarantee him to be a breeder for you" are not a warranty of a present condition (which was adequately covered by the words "This bull is right and sound in every way to the best of my knowledge"); they are intended to be a warranty of future performance and to relate to a future time.

The learned trial judge did not direct his mind to these implications of the warranty but was content merely to find that the bull conformed to it at the time of the sale. The appellant, having proved the warranty given, and the inability of the bull to serve cows as warranted, established a *prima facie* case and the onus then shifted to the respondent to show the bull's incapacity was due to a subsequent accident or some other supervening cause. No evidence was put in by the respondent to satisfy this onus and the trial judge's statement that "The bull may very well have suffered an injury resulting in the deformity found by the plaintiff on the long trip to Virginia", is mere conjecture. The majority in the Court of Appeal made

(1) [1951] O.R. 31.
(2) (1925) S.C. 425.
(3) (1858) 7 U.C.C.P. 266.
(4) (1915) 33 O.L.R. 143.
(5) (1824) 2 Bing. 183.

the same error in law in finding that "the case made for the plaintiff before the learned trial judge was met by the case of the defendant". The trial judge erred in finding that the bull conformed to the warranty at the time of the delivery and that the deformity might have been caused by injury.

The appellant's witnesses gave expert testimony that the deformity was not and could not have been caused by injury but that it was congenital, rendering the bull incapable of ever serving a female animal. The trial judge was unwilling to accept these statements and the only reason he gave was that they were only opinions, based on premises he did not find impressive. In preference he accepted the evidence of the defendant, his employees and neighbours as to the bull's breeding capacity, only one of whom could testify that he had ever known of a calf sired by the bull. The proper conclusion was that the bull was incapable of breeding and did not conform to the warranty even at the date of delivery. The evidence of the two veterinaries, the appellant's expert witnesses, was based on actual examination and was not shaken in cross-examination. The veterinary who gave evidence for the respondent did not see the bull but gave evidence based on certain pictures filed as exhibits and on a summary of the evidence of the two veterinaries who testified for the appellant.

A. A. Macdonald K.C. for the respondent.—The appellant's contention that the condition of the animal here in question was congenital signally failed on the evidence. The language used in the warranty is of a kind that a person such as the respondent would normally and naturally use to express a guarantee as to the then existing condition of the animal and such warranty properly interpreted is limited to such a guarantee and is not operative *in futuro*. The language should be so unequivocal in order to express a guarantee *in futuro* that the document should not be capable of any other meaning. *Chapman* v. *Gwyther* (1). The normal meaning and effect to be attached to a guarantee, subject to its expressly stipulating otherwise, is that it is limited to the condition of the animal at the time of the sale and delivery. Halsbury's Laws of England 2nd Ed. Vol. 1, 561; *Chapman* v. *Gwyther*

(1) (1866) L.R. 1 Q.B. 463 at 466-7.

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(*supra*); *Eden* v. *Parkison* (1); *McGill* v. *Harris* (2); *Cameron* v. *McIntyre* (3). On the facts and circumstances shown, it is not reasonable or equitable that the respondent should be taken to have guaranteed or intended to guarantee that the animal would be a good breeder five months after the sale and delivery despite anything that could or might happen to it, either in transit or afterwards. The onus was on the appellant to establish that any injury suffered by the bull occurred prior to the sale and delivery to the appellant, and no evidence of any such injury was adduced. *Long* v. *Byers* (4); *Westwood* v. *McMillan* (5). The order appealed from is right, and the judgment of the trial judge for the reasons given by him, and this appeal should be dismissed with costs.

J. D. Arnup K.C. in reply.

The judgment of Kerwin and Estey JJ. was delivered by:

KERWIN J.:—This is an action for damages for breach of a written warranty dated November 20, 1948, given by the respondent to the appellant on the sale, at that date, of an Aberdeen-Angus bull. The warranty is as follows:

> This is to certify that the Aberdeen-Angus bull, Blackcap of Maple Gables 23rd—85813—has sired calves on my farm. This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you.

The appellant immediately took delivery of the bull at the respondent's farm near Newmarket, Ontario, and transported it and two other animals in a truck to his farm in Virginia, a distance of 700 or 800 miles, arriving there November 27, 1948. The bull was purchased for breeding but was not used for the purpose until about April 1, 1949, when it was discovered that it then had a deformity which prevented its use as intended.

While a warranty may expressly relate to the future, as when the seller undertakes to deliver horses sound at the end of a fortnight, unless it is so expressly stated, the warranty relates to facts as they were at the time of sale: *Liddard* v. *Kain* (6). Counsel for the appellant did not deny that a warranty ordinarily applied to conditions

(1) (1781) 2 Doug. (K.B.) 732.
(2) (1903) 36 N.S.R. 414.
(3) (1915) 35 O.L.R. 206.
(4) [1927] 4 D.L.R. 223.
(5) [1920] 2 W.W.R. 857; 53 D.L.R. 317.
(6) (1824) 2 Bing. 183.

existing at the time of the sale but contended that the warranty in the present case applied to the future, relying upon the decision of the Court of Session in *Kyle* v. *Sim* (1). There the warranty upon the sale of a dairy cow read as follows:—"Dairy cattle are warranted to calve at their proper time and correct in their teats only." The cow calved at her proper time but, owing to disease which appeared in her teats, her milk supply was defective. That was an entirely different case. He also referred to *Natrass* v. *Nightingale* (2), where the defendant sold the plaintiff a stallion warranting him to be a good coverer and foal-getter, and the animal turned out useless as a foal-getter.

On the other hand, counsel for the respondent cited three cases. In *McGill* v. *Harris* (3), the Supreme Court of Nova Scotia on appeal affirmed the judgment for the defendant on an action on a warranty which warranted a horse:—

> to be sound, and without vice fault or tricks, and a good driving horse in harness for the purposes for which plaintiff desired said horse, which purposes were made known to the defendant at the time of said sale, and before said sale was completed.

There the evidence showed that for a period of eight years prior to the sale, the horse was without fault or tricks but that immediately afterwards, in the hands of the plaintiff, it balked and kicked when in harness and was useless for the purpose for which it was purchased. It was held that the warranty applied only to conditions existing at the time of the sale. In *Eden* v. *Parkison,* (4), Lord Mansfield remarked that there was no doubt that you might warrant a future event but that the question was what was the meaning of the policy of insurance there in question and he concluded that the warranty was that "things stand so at the time; not that they shall continue."

The third case is *Chapman* v. *Gwyther* (5), where the warranty read:—"Warranted sound. Warranted sound for one month," and it was held that the last sentence meant not that the horse was warranted to continue sound for a month but that the duration of the warranty was limited

(1) [1925] S.C. 425.
(2) (1856) 7 U.C.C.P. 266.
(3) (1903) 36 N.S.R. 414.
(4) (1781) 2 Doug. (K.B.) 732.
(5) (1866) L.R. 1 Q.B. 463.

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to one month, and that complaint of unsoundness must be made within one month of sale. At page 467, Blackburn J. states:—

> The words clearly admit of that construction, and taking the general rule, we are to consider what the intention is as expressed by the words used, not as used by anybody, but as used by parties dealing in transactions like the present.

He had already pointed out that the opposite construction would make the bargain a most improvident one and a very unlikely one for any one to enter into.

All of these cases recognize the general rule but were determined upon their particular circumstances. However, I think the remarks of Blackburn J. in *Chapman* v. *Gwyther* are applicable to the present case. The appellant sought to divide the warranty into three separate parts, the past, the present, and future. That is not the correct way in which to read it as I am unable to view the words "I guarantee him to be a breeder for you" as anything more than a warranty that at the date of sale there was nothing to prevent the bull being a breeder for the appellant. Read in that way, these words are not surplusage.

Two experts called by the appellant were of opinion that the deformity was congenital and that, therefore, the animal had always been incapable of penetration. On the latter point these witnesses are contradicted by the evidence of the respondent and his herdsman, and of a neighbour who kept the bull from July, 1948, to about the time of sale. From this evidence it appears that for some time prior to November 20, 1948, the bull had performed its function, and had sired calves on the respondent's farm. As a matter of fact and opinion these witnesses testified that the bull was "right and sound" as of the date of sale. These experts were clearly wrong in their opinion as to the animal's capabilities up to the time of sale and delivery, and the trial judge's rejection of their evidence in favour of the factual testimony and that of Dr. McIntosh, an expert called by the respondent, is fully justified. Although Dr. McIntosh had never seen the animal, he gave cogent reasons which the trial judge found compelling, and with which I agree. In his opinion the condition found could have been caused by an injury. In the absence of any evidence as to the conditions under which the bull was

transported from Newmarket, and in view of the mistake as to facts on the part of the appellant's experts, an injury on the trip to Virginia cannot be ruled out.

On the proper construction of the warranty, even if the onus were upon the respondent of establishing that any injury was not suffered prior to the sale and that there was no congenital defect, that onus has been met. The appeal should be dismissed with costs.

KELLOCK J.:—At the time of the sale of the animal here in question on November 20, 1948, the respondent undertook in writing with the appellant that:

"This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you."

The appellant did not have occasion to use the bull for the purpose for which he acquired it until April of 1949, when the condition of which he complained at the trial was discovered. The evidence establishes that the condition which was later seen in September 1949 and May 1950 by both the experts called on behalf of the appellant was the same as that observed in April 1949.

The case put forward by the appellant in his pleading was that at the date of the sale, the bull was not "then" sound, but was suffering from the condition complained of, which the pleadings describe as congenital. At the trial the appellant called two professional witnesses who stated that, in their view, the defect was congenital and that the animal had never been capable of siring calves. Both stated that in their opinion the defect was not the result of an injury. On the other hand, an expert called by the respondent, although he had never seen the animal in question and had never seen a condition similar to the defect in question, said that such a condition could be a congenital condition or the result of an injury. He also stated that a bull could suffer from a congenital defect which might not at first render him incapable of siring calves. Evidence called on behalf of the respondent, and accepted by the learned trial judge, established that while in the ownership of the respondent, the animal had in fact sired calves.

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The appellant's argument, as disclosed in his factum, was that on the proper construction of the document above set out, the guarantee was not confined to the date of the sale but operated for the future. Counsel contended that it should be found that the condition was not due to injury and, on the basis of Dr. McIntosh's evidence the defect was congenital even though its operation was delayed until after the appellant had acquired ownership.

In my opinion, the statement that "This bull is right and sound in every way to the best of my knowledge", means what it says, namely, that so far as the respondent knew, there was no defect in the animal. The additional words "I guarantee him to be a breeder for you", in my opinion, takes away the effect of the qualification in the earlier language and constitutes an undertaking that, regardless of the respondent's knowledge, the animal was not in fact suffering from any defect at the date of the sale which could prevent him from being a breeder for the appellant.

I think, therefore, that the contention of counsel for the appellant referred to above, would be effective but for the fact that I do not think that the evidence sufficiently excludes the possibility of the condition in question having been brought about by injury subsequent to the date of the sale.

I think, therefore, that the appeal fails and should be dismissed with costs.

The judgment of Cartwright and Fauteux JJ. was delivered by:

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario affirming the judgment of Barlow J. whereby the action was dismissed with costs.

The action is for damages for breach of a warranty given on the sale of a bull by the respondent to the appellant. The warranty is in writing. It is dated November 20, 1948, the date of the sale. It is addressed to the agent of the appellant, signed by the respondent, and reads as follows:—

> This is to certify that the Aberdeen-Angus bull, Blackcap of Maple Gables 23rd—85813—has sired calves on my farm. This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you.

The appellant's representative took delivery of the bull at the respondent's farm on or about the date of the sale and title thereupon passed to the appellant. The appellant caused the bull to be transported by truck to his farm in Virginia, a distance of between seven hundred and eight hundred miles. Two other animals were carried in the same truck. The appellant did not attempt to use the bull for breeding purposes until April 1, 1949. Commencing on that date repeated attempts were made but all were unsuccessful. On April 18, 1949, the appellant wrote to the respondent complaining that the bull was not as warranted and was useless as a breeder owing to a malformation of its penis. The respondent's solicitor replied denying any liability. His letter reads in part:—

> Any guarantee that may have been given concerned the condition of the animal at the time of the purchase by you. Almost six months have elapsed and you will appreciate the fact that much can happen to an animal during this period of time. The animal, in question, was in good condition at the time of its purchase by you. Mr. Bowser has definite evidence that the animal was satisfactory for breeding purposes immediately prior to you purchasing same. It seems to me that the animal must have been injured, either in it being transported from here to your farm or it must have received injury sometime during the past six months.

The action was commenced on February 11, 1950.

The appellant's cause of action is put as follows in the statement of claim:—

> 3. At the time of the sale the respondent gave a certificate of warranty as to the fitness of the bull for breeding purposes, in these words:
>
> This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you.
>
> 4. When purchased, the bull was in a "highly-fitted condition", i.e. fattened for the show ring, and it was necessary to reduce his weight by 300 pounds, to a normal breeding condition. As the appellant's breeding season did not begin until April, 1949, the services of the bull were not required at any time until that month.
>
> 5. On the first day of April, 1949, and every day thereafter for two weeks, cows were offered to the bull for service, without success, as the bull was unable to make entry.
>
> 6. On April 14th and September 15th, 1949, and on May 5, 1950, the bull was examined by three veterinary surgeons, all of whom stated that the bull was and had always been incapable of serving cows because of a congenital deformity.

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In the statement of defence it is alleged that the bull was sound and had no congenital defects and was a breeder at the time of the sale. The statement of defence continues:

> 5. The Defendant states that if the Aberdeen-Angus bull, which he sold to the Plaintiff, is not now sound and has congenital defects and is not a breeder, all of which the Defendant does not admit but denies, such conditions arose in the said animal after it was placed in the custody and control of the Plaintiff and consequently are not the responsibility of the Defendant.
>
> 6. The Defendant further submits that if he was notified on or about April 15, 1949 of the said bull being unsound, which the Defendant does not admit but denies, the Plaintiff had released the Defendant from any guarantee or warranty, which he may have made in consequence of the eflux of time between the purchase of the said bull and the time of such notice.

In my opinion, it is not necessary to decide whether on its true construction the warranty related to the future or whether, if it did so, it extended so far into the future as April, 1949. The breach of warranty which the appellant assigned in the pleadings and put forward at the trial was not merely that the bull was not a breeder in April, 1949 but that it was then suffering from a congenital deformity which made it impossible that it could ever have served a cow or been a breeder. It at once becomes obvious that if this proved to be the fact the bull could not have complied with the warranty at the date of the sale and could not then, or indeed ever, have been right and sound or a breeder. This was the case which the respondent was called upon to meet. He met it by the evidence of several witnesses, expressly accepted by the learned trial judge, to the effect that the bull had served a number of cows in a normal manner, that it had sired a number of calves including one born as a result of service on November 1, 1948, which was the latest occasion of service deposed to, and that its penis was "perfectly normal".

The learned trial judge found that the bull conformed to the warranty when delivery was made. There was ample evidence to support this finding and it is destructive of the theory that the bull had always been incapable of breeding on which the appellant based his case at the trial.

There was no contradiction of the evidence given on behalf of the appellant that from April 1, 1949, the bull had proved incapable of breeding. The explanation suggested by the learned trial judge is that the bull may very

well have suffered an injury on the trip by truck to Virginia or during the period between November, 1948, and April 1949. No witness suggested that the condition could have arisen spontaneously during the life of the bull. Only two possible explanations were put forward, one that the condition was congenital, the other that it was the result of injury. While the two veterinary surgeons called by the appellant were of opinion that the condition was not caused by injury and must be congenital it is clear that the learned trial judge did not accept their views. Dr. McIntosh, a veterinary surgeon called by the respondent, was of the opinion that the condition could have resulted from injury. Neither the trucker who transported the bull to Virginia nor the veterinary surgeon who examined the bull in April, 1949, and to whom reference is made in the statement of claim and in the appellant's letter of April 18, 1949, were called as witnesses. One of the veterinary surgeons called by the appellant had first examined the bull on September 15, 1949, and the other on May 5, 1950. Whatever may be the true construction of the warranty, I do not think that the respondent could be charged with a breach thereof if the bull was "right and sound in every way" and "a breeder" at the time of delivery but later ceased to be so because of an injury suffered after delivery when it was owned by and in the possession of the appellant, and this is the only theory on which its condition at the time of the trial can be reconciled with the finding of the learned trial judge that it conformed with the warranty at the time of delivery.

On conflicting evidence the learned trial judge has found that the breach of warranty which the appellant pleaded and on which he based his case at the trial has not been established. This finding has been concurred in by the Court of Appeal, and, in my opinion, it should be upheld. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. H. Young.*

Solicitor for the respondent: *L. C. Lee.*