1915.

Present: Wood Renton C.J. and Shaw J.

FRADD *v.* BROWN & CO., LTD.

41—D. C. Colombo, 35,186

Sale of goods—Warranty—Condition—Contract in writing—Verbal warranty—Evidence—Findings of fact based on credibility of witnesses—When Appeal Court may interfere.

An affirmation made by a vendor of goods at the time of sale is a warranty only if it appears, on evidence, to be so intended.

"It has frequently been pointed out that when the question turns on the manner and demeanour of witnesses the Appellate Court should generally be guided by the impression made on the Judge who saw the witnesses; but there may obviously be other circumstances quite apart from manner and demeanour which may show whether a statement is credible or not, and those circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen. Clearly also there may be cases in which it is apparent that the Judge has misapprehended the facts in evidence before him and in which he has failed to notice, or give due weight to, other facts in evidence before him which tend to support or contradict the verbal evidence."

THE plaintiffs, Messrs. Brown & Co., Limited, sued the respondent, Mr. Percy M. Fradd, for the recovery of a sum of Rs. 6,332.56, the balance alleged to be due on an account for goods sold and delivered and work done between September, 1911, and June, 1912, and including a sum of Rs. 4,252.05, the price of a 28 brake horse power Hornsby oil engine. The defendant, although he originally denied the correctness of the amount claimed by the plaintiffs, ultimately admitted it, except as to a sum of Rs. 196.23 in respect of work and labour done. He disputed this item on the ground that the work had been rendered necessary by defects in the Hornsby oil engine which the plaintiffs had supplied to him.

The main defence, however, to the action consisted in a claim in reconvention. This claim is embodied in paragraph 6 of the answer:—

> For a further answer the defendant states that in the month of September, 1911, being in need of an engine for his desiccating and fibre machinery, he stated his requirements to the plaintiffs, viz., to work four pairs of fibre drums, one winnower, one disintegrator, and two desiccators, and was assured by the plaintiffs that a 28 horse power Hornsby oil engine, which the plaintiffs said they could supply at a cost of Rs. 4.252.10, would meet the defendant's requirements as aforesaid. Acting on the assurance so given by the plaintiffs, the defendant purchased from the plaintiffs an engine, which the plaintiffs represented to be one of 28 horse power with bulk oil and 24 horse power with liquid fuel, and which the plaintiffs said was sufficiently powerful for the defendant's needs as aforesaid. The said engine was delivered to the defendant, and the price of it appears in the said account A under date September 26, 1911. The defendant subsequently found that the said engine could not develop more than 15 horse power with liquid fuel, and that it was not sufficiently powerful for the defendant's requirements as aforesaid.

The defendant alleged that in consequence of the circumstances stated in the above paragraph he had suffered loss of profits to the extent of Rs. 8,400; that the value of the engine was only Rs. 2,832.50; and that, after deduction of his own admitted indebtedness to the plaintiffs, the latter owed him Rs. 7,565.67, which he claimed as damages. The learned Acting Additional District Judge dismissed the plaintiffs' action and gave judgment for the defendant for the sum of Rs. 1,855.54, the difference between the sum of Rs. 4,912.56 which he found to be due to the plaintiffs and the sum of Rs. 6,768.10 which he awarded to the defendant as damages. The plaintiff appealed.

Elliott and *E. W. Jayewardene*, for plaintiff, appellant.

Bawa, *K.C.*, and *Drieberg*, for defendant, respondent.

Cur. adv. vult.

June 24, 1915. Wood Renton C.J.—

[His Lordship stated the facts, and continued]:—

A large proportion of the evidence recorded in the District Court on behalf of the defendant is directed to show that the engine supplied to him by the plaintiffs in September, 1911, would not develop anything like a 24 brake horse power between April and July, 1912, and that its condition then was attributable to the fault of the plaintiffs in not having furnished the defendant with some of the accessories necessary for its working. The defendant relies, and is entitled to rely, on this body of evidence in so far as it may throw light on any question as to the comparative credibility of the witnesses in regard to other and relevant matters. But the

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defendant has not claimed damages from the plaintiffs on the ground of negligence, and even if he had done so, his failure to call the engineer by whom the engine was erected, or the mechanic by whom it was worked, at or soon after the time of its delivery, would place a serious obstacle in the way of his success. Observations of a similar character are applicable to the endeavour which the defendant's counsel has made in the argument of this appeal to support his claim in reconvention on the ground of an express warranty by the plaintiffs in page D2 of the catalogue, which they produced at the trial, that the engine was one of 28 horse power with bulk oil and 24 horse power with liquid fuel oil. The defendant did not rely upon that warranty in his answer. It is true that he says that he purchased an engine of the capacity just mentioned. But the alleged representation on which he says that he acted had to do primarily, not with the horse power of the engine, but with its ability to work certain specified machinery. The second issue framed at the trial no doubt related to both forms of capacity. But when the plaintiffs' junior counsel at a later stage stated that he proposed to rely on the document D 2 as containing the warranty sued upon, namely, a warranty that the engine would develop 28 horse brake power and 85 per cent. of such power of liquid fuel, the learned District Judge ruled that that was in the nature of an entirely new defence. An application was then made to the Court for leave to amend the answer. But at this stage the defendant's senior counsel appeared on the scene and said that he did not wish the answer to be amended, and that he relied on the document D 2 in this sense only, that the catalogue containing it had been handed to the defendant at the time when the representations set out in the answer had been made. In these circumstances I should have had great difficulty in holding, even if there had been nothing more in the case, that the defendant could now rely on the express warranty above mentioned. . . . . .

I proceed now to consider the questions, in the first place, whether that representation was, in fact, made; in the second place, whether, if made, it amounted either to a condition or to a warranty in the eye of the law; and lastly, whether if those two points should be decided in the defendant's favour the damages awarded to him by the learned District Judge are reasonable.

The answer to the first of these questions depends mainly on the evidence of Mr. Grieve on the one hand and of the defendant on the other. The learned District Judge has accepted the testimony of the defendant and rejected that of Mr. Grieve. This finding of the court of first instance is a strong asset on the defendant's side. The House of Lords in *Montgomery v. Wallace-James* [1] has pointed out the weight that is due in all matters affecting the credibility of witnesses to the decision of the tribunal which has had

[1] *(1904) A. C. 73.*

the advantage of seeing and hearing them, and there are innumerable local judgments to the same effect. But it must be remembered that the law gives to litigants in this Colony a right of appeal, in such cases as the present, against the finding of the court of first instance, even on questions of credibility, and in *Khee Sit Nob v. Lim Thean Teng* [1] the Privy Council, while affirming the general rule above mentioned, was careful to explain that it would not be applicable where, in deciding between witnesses, the trial Judge had clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or had given credence to testimony, perhaps plausibly put forward, which turned out on further analysis to be substantially inconsistent with itself or with indisputable facts. The Supreme Court of this Colony has repeatedly interfered on such grounds as these with the findings of courts of first instance on pure questions of fact, and even credibility. In the present case it is clear, and the defendant's counsel admits, that the learned District Judge in deciding between the evidence of Mr. Grieve and that of the defendant has misdirected himself in an important particular. The defendant's case in brief was that he had an interview with Mr. Grieve between August 5 and 13, 1911, that he then specified the machinery for which he required the engine, and that, as he mentioned the particulars, Mr. Grieve jotted them down piece by piece on the blotting pad before him, made a calculation, and told him that a 24 horse power engine would work that machinery. Mr. Grieve denies that any such interview took place. The learned District Judge refers to the letter P 2, written by the defendant to the plaintiffs and dated September 2, 1911, in which the former uses the following language: " Some little time ago you informed us that you expected a 24 horse power Hornsby engine very shortly."

" This letter," says the District Judge, " suggests that some correspondence or conversation had taken place at an earlier date. It might safely be assumed that correspondence there was none, for if any existed it would most certainly have been produced." He elsewhere describes P 2 as the first letter produced which has any reference to an " engine." This statement is incorrect. In the letter D 11 dated August 9, 1911, Mr. Grieve, in writing to the firm with which the defendant was associated, states that a 24 horse power engine was due in a fortnight. This letter was duly produced at the trial. It is not surprising that the learned District Judge, in the mass of *viva voce* and documentary evidence which he had to sift, should have overlooked its existence. But that he did so there can be no doubt. The assumption of fact from which he draws a strong inference against the credibility of Mr. Grieve was, therefore, unfounded. If a Judge in England in charging a jury had fallen into an error of this kind, the misdirection would

[1] *(1912) A. C. 323.*

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have formed a good ground for a new trial. No suggestion was, however, made to us by either side that this course should be adopted in the present case, and in view of the time during which the proceedings have been going on, and of the fact, mentioned by counsel in the argument, that Mr. Grieve has now retired from the plaintiffs' firm and returned to England, I think that nothing remains but that we should analyze the evidence and decide for ourselves whether or not the District Judge was justified in holding, on a point, it must be remembered, as to which the burden of proof was on the defendant, that the alleged representation was made.

[His Lordship discussed the evidence at great length, and continued]:—

For the reasons, however, that I have given, I am of opinion that the District Judge was not warranted in holding that the defendant had affirmatively proved that the representation on which he relies had in fact been made.

Strictly speaking, our finding on the question whether or not the representation sued on was made renders it unnecessary for us to consider the other points in the appeal. But as they were fully argued I will say something about each of them. I am not satisfied that either the defendant's advisers at the time when the answer was drafted, or, indeed, the learned District Judge himself, had clearly before their minds the law applicable to cases of this kind. The statement of the claim in reconvention in the answer seems to proceed on the assumption that the "assurance" or representation alleged, if made and acted upon, would *per se* be sufficient to bring home liability to the plaintiffs. But that is not so. A representation, although acted upon, gives rise to no right of action unless it is fraudulent, or, in the absence of fraud, amounts either to a condition or to a warranty.[1] In the present case fraud is not suggested. Whether a representation is a condition or a warranty depends in each case on the construction of the contract.[2] In the event of a breach of a condition, the purchaser has the right either to reject the thing purchased altogether or to treat the breach of the condition as if it had been a breach of warranty. In the event of a breach of warranty, that is, of a representation which, although it is only collateral, was intended to form part of the contract, the purchaser would have no right to reject the thing purchased altogether, but would be entitled to damages.[3] Where a contract in writing is not meant by either side to embody all the terms of their bargain, a verbal warranty may be proved by *viva voce* evidence.[4] The objection taken by the plaintiffs counsel to the

[1] *Heilburt Symons & Co. v. Buckleton (1913) Appeal Cases 30.*

[2] *Sale of Goods Ordinance, 1896 (No. 11 of 1896, s. 11 (2)).*

[3] *Gillespie Bros. & Co. v. Cheney Eggar & Co., (1896) 2 Q. B. 59 and 62.*

[4] *Chalmers Sale of Goods Act, 1893, pp. 26 and 27, and Evidence Ordinance, s. 92, proviso 2.*

admission of *viva voce* evidence for this purpose in the present case is, in my opinion, untenable. Although no issue as to the character of the representation sued on was formulated at the trial, we have before us sufficient evidence to enable us to deal with the point. I am clearly of opinion that, even if that representation was made, it does not amount either to a condition or to a warranty. Here, as elsewhere, the burden of proof is on the defendant. The representation in question is nowhere in the correspondence asserted, either in terms or in substance, to have been either a condition or a warranty. It is, to my mind, inconceivable that an engineer of the experience of Mr. Grieve should have undertaken to bind the plaintiffs in either of these ways on such materials as, on the showing of the defendant himself, he had before him. Here, again, even if a condition or a warranty had been alleged and proved, the failure of the defendant to adduce any evidence showing that the engine at and for some time after its delivery was not in proper working order, and the absence of any written complaint to that effect in the early correspondence between himself or Mr. Sands and the plaintiffs, although the latter were pressing him at the moment for payment of their account, would have told heavily against his prospects of success on the facts.

I agree with the finding of the learned District Judge on the question of damages, if any damages had been due, for the reasons given by my brother Shaw, whose judgment I have had the advantage of reading, and I concur in the formal order which he has proposed.

SHAW J.—

[His Lordship stated the facts, and continued]:—

The first and most important question arising in this appeal for our consideration is whether the District Judge is correct in his finding of fact that the alleged verbal representation was made.

An appeal to an Appellate Court from the decision of a Judge on a question of fact amounts to a re-hearing, and it is the duty of the Court to reconsider the evidence and, whilst attaching the greatest weight to the finding of the Judge, not to shrink from over-ruling it if on full consideration it comes to the conclusion that the judgment is wrong (*Coghlan v. Cumberland* [1]).

It has frequently been pointed out that when the question turns on the manner and demeanour of witnesses the Appellate Court should generally be guided by the impression made on the Judge who saw the witnesses (see, *e.g.*, *Montgomery & Co. v. Wallace-James* [2]), but there may, as was pointed out by Lindley M.R. in *Coghlan v. Cumberland*,[1] obviously be other circumstances quite apart from manner and demeanour which may show whether a statement is

[1] *(1898) 1 Ch. 704.*

[2] *(1904) Appeal Cases 73.*

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credible or not, and those circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen. Clearly, also, there may be cases in which it is apparent that the Judge has misapprehended the facts in evidence before him, and in which he has failed to notice, or give due weight to, other facts in evidence before him, which tend to support or contradict the verbal evidence. The present is, in my opinion, one of those rather rare cases in which the Appellate Court should differ from the Judge on his finding of fact, and should give effect to its opinion by reversing his finding.

[His Lordship dealt with the evidence relating to the alleged verbal representation, and continued]:—

In view of these facts I cannot understand how the Judge could have arrived at the decision he did upon this issue, and I think his finding is wrong and should be reversed.

It was suggested at the hearing of the appeal, that even should we decide that no verbal representation was made, the respondents were still entitled to recover on the guarantee in the catalogue D 2 that the engine would develop 85 per cent. of 28 horse power on liquid fuel. I cannot agree to this contention. The respondent might have amended his answer and raised the question of this guarantee on the trial, but his counsel deliberately elected not to do so, and preferred to rely solely on the alleged verbal representation, and it is now too late to withdraw from the position taken up.

In view of my opinion on this issue, it is perhaps unnecessary for me to refer to the other questions raised in the case, but as they were fully argued before us, I think I should shortly deal with them.

Even supposing it were true that Mr. Fradd in the course of negotiations stated to Mr. Grieve the machinery he wanted to work, and Mr. Grieve told him that a Hornsby engine of 24 or 28 horse power would do the work, it by no means necessarily follows that this representation would amount to a warranty. An affirmation at the time of a sale is only a warranty if it appears to be on evidence to be so intended; and the *dictum* in *Cave v. Coleman*[1] to the effect that a representation made in the course of dealing and before the bargain is complete amounts to a warranty, and that in *De Lassaile v. Guilford*,[2] that it is a decisive test in determining whether a representation is intended as a warranty or not "whether the vendor assume to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected to have an opinion and to exercise his judgment," have been specifically disapproved by the House of Lords in the recent case of *Heilburt Symons & Co. v. Buckleton*,[3] and it is now clear

[1] *8 M. & R. 2.* [2] *(1901) 2 K. B. 215.* [3] *(1913) App. Cas. 30.*

that an *animus contrahendi* on the part of the person making the representation must in all cases be proved. There ought, therefore to have been an issue raising this in the present case, and had there been one, I am by no means sure the respondent would have succeeded on it, it being very unlikely, as Mr. Grieve said in his evidence, that he would have contracted that an engine would work some particular machinery without having seen the state of the machinery and the manner in which it had been set up.

With regard to the question whether the engine in fact came up to the representation alleged to have been made, the burden of proof was upon the respondent, and I am by no means satisfied that he has sufficiently discharged it.

The engine was working for about six months before there was any complaint in writing that it was not giving satisfaction, although there were, during that time, frequent requests for payment and promises to pay. Neither Mr. Sands, who was in charge of the works at this time, nor the engineer who erected the engine for the respondent, nor the engine driver who was working it, was called to give evidence as to its running, although the two latter were in the Colony and on the respondent's list of witnesses. In the absence of any evidence of the working of the engine during that time, I do not think that the breach of the alleged representation was sufficiently proved by evidence that after that time it failed to develop the horse power or work the machinery represented.

With regard to the amount of damages, if the respondent were entitled to recover at all, I do not think that the amount found by the Judge would be improper. The amount is based on the assumption that the engine was warranted to work certain machinery, and could in fact only work less, thus restricting the output of material which could have been sold at a profit at the time. It seems reasonable that the respondent should have continued to work it during the five months in respect of which the damages were claimed without condemning it and buying a fresh engine.

For the reasons given above I would set aside the decree of the District Judge and enter judgment for the appellant for Rs. 6,140.33, being the amount of their claim less Rs. 196.23 expense of repairs and alterations to the engine, which I do not think were ever intended by either party to be charged for, and I would dismiss the respondent's claim in reconvention.

The respondent should pay the costs of the trial and appeal.

Set aside.