

irrespective of any question of age, irrespective of any other question you would have to say that the horse was sold under a condition and the condition was not complied with, and the bargain is rescinded and the horse goes back to the defendant and the money to McDonald.

But the man who purchases a horse under such conditions must not keep him a year and then take him back, and the moment he goes beyond a mere trial, the moment he treats the horse as his own and does with him beyond what is necessary to make a trial of the property, then the property becomes his own. It is too late for him to throw the property back upon the original owner after that. What was a condition in the inception of it becomes what is called in law a mere warranty and the purchaser must keep the horse, and if there has been a warranty then he may sue for damages as to the difference in value of the horse as warranted and the value of the horse as it actually is. The condition sinks to the level of a warranty in that case, and the purchaser has no right to throw the horse back on the hands of the original owner or vendor, but he must keep the horse and simply sue for damages he has sustained by the breach of the warranty under which the horse was sold.

In that case you will have to find whether there really was any warranty or not. You have conflicting evidence on that. Evidence of the boy on the one side and of the defendant on the other, the boy saying that the horse was warranted to him to be of a certain age, and Baxter saying he never represented the horse as being any particular age at all; he sold it to the boy only as it had been represented to him. I am simply stating what the defendant and plaintiff say in regard to this and any corroborating circumstances I am not going into for fear I should state something in favour of either party and not state something equivalent in value on the part of the other party.

If you find you are not able to believe one more than the other you will have to find against the plaintiff, because the burden of proof rests upon him. Unless you believe him and disbelieve the other man, or have no reason for believing one more than the other, why of course you will have to give the benefit of that issue to the defendant, because the burden of it is upon the plaintiff. The plaintiff says that the warranty was given and it is his business to prove