

real advantage under it. The English cases referred to on the argument before us without exception consistently follow this rule, and applying such rule to the facts here it cannot, I think, be reasonably said that the plaintiff did not derive very material advantage from the use of the horse before the attempted repudiation, and in my opinion, on this branch of the case, there was nothing in dispute for a jury. The learned trial Judge, however, no doubt from abundant caution, submitted the following question to the jury:—

“Did McDonald derive any benefit from the use of the horse?”

And the jury answered: “Some benefit.”

I think the plaintiff fails on that part of the case in which he attempts rescission.

The second branch of the question is whether there was any warranty by defendant at the time of the sale respecting the age, soundness or capacity of the horse.

On this the plaintiff and defendant were in direct conflict and the point was submitted to the jury by the learned trial Judge in the following language:—

“The plaintiff says that this bargain would not bind him even if he were a grown up man and had no shelter as an infant. That is, he says, there was a representation made to him as to the condition of this horse, when it was sold to him, as to its age, as to its working qualities and that that amounted not merely to a representation of the qualities of the animal but to a condition that the purchaser, if he found the animal was not in the condition in which he was represented, would then be in a position to throw him back on the hands of the original owner, and say it was not a sale at all. That is the way the plaintiff's counsel opened the case. Well, that would involve your asking the question,—was there such an arrangement between the plaintiff and defendant? Was the arrangement such that Baxter was saying—take this horse, try this horse, it is guaranteed to have such qualities, to be of such an age, and I undertake if you find these representations are not correct that the horse is no longer yours, and the money is no longer mine, but the horse comes back to me.

If you find that this was the case you will be at liberty to give a verdict in favour of the plaintiff. You would say,