

W. N. Tilley and W. D. M. Shorey, for the plaintiff.

E. G. Porter, K.C., and W. Carnew, for the defendants.

FALCONBRIDGE, C.J.K.B.:—*Ponderantur testes, non numerantur*. Mere numerical comparison is not a consideration of decisive importance. Vide Starkie on Evidence, 4th ed., p. 832; Best on Evidence, 11th ed., p. 580.

The Scotch authorities perhaps put the maxim better, as it is clearly not confined to verbal evidence. They say: *Testimonia ponderanda sunt, non numeranda*: Halk. Max. 174; Ersk. Inst., bk. IV., tit. 2, para. 26.

I find here the testimony of the plaintiff, backed by the clear and incisive evidence of John Bright, the president of the Clydesdale Association, and of H. S. Clapp, V.S., more convincing than that of the cloud of witnesses called by the defendants.

There is also the evidence of Shelley and William G. Anderson, cousins of the defendants, as to the deformity of the horse before he was shipped.

I am quite satisfied, on the whole evidence, that the horse's defects existed from his birth, and were not the result of any improper treatment or want of proper treatment by the plaintiff.

The defendants must have known, and I find as a fact that they did know, that the plaintiff wanted the stallion for breeding purposes.

I find that his defects would be perpetuated in at least a large percentage of his offspring, and that he was unfit for breeding purposes.

There was both an express and an implied warranty. They may co-exist unless they are inconsistent: Benjamin on Sale, 5th ed., p. 622; Oliphant on Horses, 6th ed., pp. 119-121. There was breach of both. The horse was useless for the plaintiff's purposes, and he is entitled to recover back the purchase-money .....

money .....	\$800.00
Freight .....	34.60
Insurance .....	15.00
Expenses at Maple Cut.....	12.00

---

\$861.60

I think the expected profit from the service of mares is too speculative and remote. And I think the plaintiff ought to have minimised the other items which he claims, for board of horse, etc., by return of the horse or sale after notice.

Judgment for the plaintiff for \$861.60 and costs.