

DIVISIONAL COURT.

JANUARY 18TH, 1910.

\*MAY v. CONN.

*Sale of Horse—Warranty—Condition—Return if Horse not as Warranted—Death of Horse from Accidental Cause—Title—Risk of Loss—Evidence as to Compliance with Warranty.*

An appeal by the defendant from the judgment of DENTON, one of the Junior Judges of the County Court of York, in favour of the plaintiff in an action in that Court to recover \$165, the price of a horse sold by the agents of the plaintiff to the defendant. The horse died almost immediately after the sale, and before it left the sale stables of the plaintiff's agents.

DENTON, Co.C.J., found that the horse was sold with a warranty that it was "serviceably sound;" and that it died from accidental causes, and not from any illness or defect which would render it not "serviceably sound." The learned Judge also held that there was a memorandum in writing and a receipt of the goods to satisfy the Statute of Frauds. He then stated the other question arising in the action, in these words: "Who must bear the loss where a horse is sold subject to a warranty and with a right of return within a limited time if not found to comply with the warranty, and the horse dies while in the possession of the purchaser and before the time limited for return without any negligence on the purchaser's part, there being no evidence that the horse did not comply with the warranty, but, on the contrary, there being evidence that he did so comply?" He then referred to *Head v. Tattersall*, L.R. 7 Ex. 7; *Gunby v. Hamilton*, 12 O.W.R. 489; and concluded, with some doubt, that the purchaser, the defendant, must bear the loss. Judgment was, therefore, given for the plaintiff for \$165 and costs.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

G. M. Clark, for the defendant.

J. D. Falconbridge, for the plaintiff.

THE COURT, at the close of the argument, dismissed the appeal, referring specially to *Taylor v. Tillotson*, 16 Wend. 494, as indicating that the title (and with it the risk of loss) was in the purchaser from the time of sale, subject to be divested by the return of the horse.

\*This case will be reported in the Ontario Law Reports.