

SECOND DIVISIONAL COURT.

JULY 30TH, 1918.

## \*GARDNER v. MERKER.

*Sale of Goods—Action for Price—Counterclaim for Damages for Fraudulent Misrepresentation as to Value of Goods—Finding of Fact of Trial Judge—Representation Made but without Fraud—Condition or Warranty not Established—Appeal.*

The plaintiff sued in the County Court of the County of Hastings for \$760.60, the balance of a sum of \$1,500, the purchase-price of some junk sold by him to the defendants.

The defendants set up that, knowing the amount and value thereof at the current market price, the plaintiff falsely and fraudulently represented the junk as worth \$2,000 and the lowest possible price \$1,800, and that, induced by this false and fraudulent representation, they executed the agreement sued on; that they sold all the junk but a small quantity; it produced but \$800; and they counterclaimed for \$2,000 damages.

The trial Judge gave judgment for the plaintiff for \$200 and dismissed the counterclaim.

The defendants appealed.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

W. J. Elliott, for the appellants.

H. S. White, for the plaintiff, respondent.

CLUTE, J., in a written judgment, said that the trial Judge found that the representation alleged by the defendants was made by the plaintiff and that the defendants acted upon the faith of the representation, but the trial Judge did not find that it was fraudulent. The plaintiff did not appeal, although he was not awarded the full amount of the contract price.

The learned Judge referred to *Harrison v. Knowles*, [1917] 2 K.B. 606; *De Lassalle v. Guildford*, [1901] 2 K.B. 215; *Edward Lloyd Limited v. Sturgeon Falls Pulp Co. Limited* (1901), 85 L.T.R. 162; *Wallis Son & Wells v. Pratt & Haynes*, [1910] 2 K.B. 1003, [1911] A.C. 394; *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30.

The learned Judge then said that, applying the principle that an affirmation at the time of the sale is a warranty, provided it appears on evidence to be so intended, which intention is to be deduced from the whole of the evidence, he was of opinion that