

RIDDELL, J., delivering the judgment of the Court, after setting out the facts and portions of the evidence, said that it seemed to him clear, beyond any question, that the original contract of sale was still in existence, though the contrary was argued with great earnestness by counsel for the appellants.

The learned Judge referred to and quoted from *Head v. Tattersall* (1871), L.R. 7 Ex. 7, which was relied on by the appellants, but was really an authority against them. If the plaintiff had been distinctly told that the horse was unsound, his taking it away thereafter might be considered a waiver of the warranty, but nothing of the kind was pretended or proved.

It was made manifest that the defendant McIntyre refused to give a written warranty of soundness; and, if the real cause of action were the omission or refusal to give a written warranty, an argument might well be based on the facts. But no case of damages arising from the refusal to give a written warranty was made out; and the real cause of action was on the warranty of soundness necessarily implied in the agreement to give a written warranty. When a person agrees to give a written warranty of soundness, he necessarily (1) asserts that the animal is sound, and (2) promises to give his assurance in writing. It is of no importance that the warranty is not actually reduced to writing—Equity looks upon that as done which should have been done.

Then it was said that the horse's particular malady—a malformation of the foot—did not constitute unsoundness; and *Dickinson v. Follett* (1833), 1 Moo. & Rob. 299, was cited. Whether an abnormal condition constitutes an unsoundness must depend largely upon the ordinary use of the word, and the opinion of experts. There is nowhere any decision indicating that what was found here is not an unsoundness. See *Oliphant on Horses*, 5th ed., p. 63. The unsoundness here was existent at the time of sale.

*Appeal dismissed with costs.*