

plaintiff put it in his rifle, and, when aiming at a deer, snapped the rifle, but the cartridge, because of its unsuitable character, failed to explode. Thereupon he opened the breech, looked into the barrel, and, not seeing the shell, endeavoured to put in another cartridge; but, in doing so, the latter exploded and caused him injury, and for the damage thus sustained this action is brought.

For the plaintiff it was contended that the defendants were liable for breach of an implied warranty that each cartridge was suitable for the plaintiff's rifle; also that it was a sale of goods by description, and that there was an implied condition that each cartridge corresponded with the description.

The first question to determine is, what was the contract between the parties? Did the plaintiff buy a number of cartridges contained in a sealed box, relying on an implied warranty on the part of the defendant company that they were each of a certain kind, or did he buy a specific article, viz., a sealed box, supposed to contain cartridges all of a certain kind, on his own judgment, not relying upon the defendants as to the contents of the box?

The onus is on the plaintiff to establish the implied warranty or condition, and such implication must rest on the presumed intention of the parties: *The Moorcock* (1889), 14 P.D. 68; or, as put in another way by Meredith, J.A., in *Barbeau v. Piggott* (1907), 10 O.W.R. 715: "Contracts are to be implied according to, not counter to, the intention of the parties."

Where it is a question of implied warranty, surrounding circumstances may be shewn in evidence in order to aid the Court in discovering the intention of the parties: *Behn v. Burness* (1863), 3 B. & S. 751; and those circumstances, together with the plaintiff's evidence, make it, in my opinion, abundantly clear that what the plaintiff wished to buy, and did buy, was a sealed box of a certain design and description, and bearing on it a printed guarantee of the manufacturers (who are not the defendant company), and supposed to contain cartridges of the kind desired by the plaintiff. . . .

[References to and quotations from the evidence.]

The plaintiff did not rely upon the defendants as to the quality of the contents of the box; he was aware that, when in their possession, it was sealed; and he, doubtless, assumed, as the fact probably is, that it came into their hands from the manufacturer in a sealed condition, and that they had no more knowledge than he as to its actual contents. That he was buying on his own judgment, based on his experience of the goods in