13th May 1986

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IN THE ROYAL COURT OF JERSEY

Before: Mr. V.A. Tomes, Deputy Bailiff
Jurat L.A. Picot
Jurat Mrs. B. Myles

Between:	**Patricia Susan Prince, wife of Terence James Newman,**	Plaintiff
And:	**Elizabeth Ann Parris widow of Anthony John Marks, and former wife of Edward James Arnold,**	First Defendant
And:	**Leros Limited, trading as Sorrel Stables.**	Second Defendant

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Advocate F.J. Benest for Plaintiff
Advocate G. Le V. Fiott for First and Second Defendants.

This action arises from the purchase by the plaintiff, on the 12th March, 1983, from the first defendant, the proprietress of Sorrel Stables, at Mont Fallu, in the Parish of St. Peter, of a skewbald mare named "Coffee Royale" ("Coffee") for the sum of £800, together with tack for the said horse to the value of £552.

Although the first defendant is a director and beneficial owner of the second defendant it was admitted in the Answer to the plaintiff's Order of Justice that the first defendant sold the horse and tack; thus the plaintiff sought redress against the first defendant alone and the hearing of the action proceeded on that basis. We refer to the first defendant, therefore, as "the defendant".

Coffee had been advertised for sale on the notice board at Sorrel Stables in the following terms: "Coffee Royale. 14.2 skewbald mare. 13 yrs. Super schoolmaster. Perfect to handle, lovely jump, will teach novice rider".

Another card was exhibited in the office of Sorrel Stables, listing the several horses that were for sale, the relevant entry of which read: "Coffee Royale, Skewbald Mare 14.2 Aged".

The Order of Justice brought by the plaintiff alleged misrepresentation and breach of warranty, in reliance on an allegation that the defendant orally represented to the plaintiff and thereby warranted that the horse was: (a) thirteen years of age; (b) a schoolmaster; (c) safe and sound in all respects; and (d) fit for the purpose for which the plaintiff wanted it. The alleged purpose for which the plaintiff required the horse, was that she wanted a schoolmaster for at least five years until her own colt was ready

to be broken and compete and that as the plaintiff was a beginner the horse should be suitable for this purpose and safe and sound in all respects. The Order of Justice claimed that the respresentations and warranties were fortified by the terms of the advertisement on the notice board at Sorrel Stables and that, in reliance on the said representations and warranties made by the defendant and contained in the said advertisement, and acting on the faith and truth of the facts stated, the plaintiff was induced to and did enter into the contract of sale and purchase with the defendant. The plaintiff's Order of Justice further alleged that each of the representations made by the defendant were untrue and that the defendant was in breach of the said warranties. The plaintiff sought the recession of the contract and the immediate return of the sum of £1,352 in exchange for which she would return the horse together with the tack purchased or, in the alternative, damages for the misrepresentation and breach of warranty.

The Court heard evidence at considerable length over three days on the 3rd, 4th and 5th March and again throughout the 12th March. When the Court re-convened on the 13th March Mr. Benest conceded, very properly and somewhat belatedly in our view, that the plaintiff could not prove the alleged misrepresentations concerning the qualities of Coffee other than that relating to age and that the trial should now proceed only upon the alleged breach of warranty as to Coffee's age.

This makes it unnecessary for us to review a great deal of the evidence that we heard over a period of four days and we go on to consider only the alleged misrepresentation and warranty as to Coffee's age.

The evidence

Assessment of age

We heard two expert witnesses, Mr. Charles Edward Gruchy and Mr. Iain MacLeod, both veterinary surgeons of considerable experience and expertise. On the 21st March, 1973, when Coffee was owned by a previous owner, Mrs. Vera Le Cras, Mr. McLeod had completed an official "Measurement Form", over his signature, in which he said: "I hereby certify that the animal named Coffee Royale ..... was officially measured ..... on 21st March, 1973, and that the height of the animal is certified as 14 hands 2 inches, without shoes on, and that the animal is six years old or over". In summary, Mr. MacLeod's evidence cast doubt upon his own certificate of 21st March, 1973 -

he explained that the certificate meant that it was reasonable to say that Coffee would have reached the age of 6 years by the end of 1973. However, he called in aid an article by Colin Vogel M.R.C.V.S., which appeared in the 'Horse and Hound' journal of the 7th September, 1984, which contained the following paragraph: "it is possible to give a reasonably accurate estimation of a horse's age up to seven or eight years old, but this is only accurate to within a year either way. In some exceptional circumstances the error may be two years". As an expert, Mr. MacLeod agreed with and supported that article. In the light of a recent inspection of Coffee's mouth he considered that his estimate of 6 years in 1973 could certainly have been wrong. Mr. MacLeod also quoted from Miller and Robertson's Practical Animal Husbandry 1979 edition - which he described as one of the 'Bibles' of his profession - and showed and explained slides of Coffee's mouth and illustrations from that text book. On the angle of the teeth he put Coffee's present age at between 13 and 17 years. An assessment of an anatomical feature known as Galvayne's Groove on the lower incisor teeth indicated an age now of about 15. Infundibulum, which disappears between 11 and 13 years was still present. To sum-up all the available evidence Mr. MacLeod expressed the opinion that Coffee must be 14 years old now, with possibility of error of up to 3 years either way. It was inconceivable that any unbiased and knowledgable opinion could disagree by more than one year. A 3 year margin of error was reasonable for a horse of more than 12 years of age. The absolute minimum age in 1973 could be 4 1/2 and the maximum 6. However, if he had felt that Coffee was substantially under 6 years of age in 1973 he would not have issued his certificate. Ageing Coffee now, on the teeth alone, he would still say 15 years with a 3 year margin of error. A present age of 17 1/2 was not indicated by the criteria of the teeth alone at the present day. Under cross-examination, Mr. MacLeod said that Coffee had a young mouth and that on recent examination he would have said 14 years with a 3 year margin of error. He would not agree with an assessment of 16 or 17 years in August 1983; he found it incredible.

Mr. Gruchy had aged Coffee on the plaintiff's behalf on the 19th August, 1983. On the 23rd August, 1983, he certified that: "In my opinion upon examination of its incisor teeth this pony is 16 to 17 years of age". He had not been given a reason why he was asked to do so. He had expressed the opinion that Coffee was at least sixteen years old. The plaintiff had remarked - "That's a lot older than 12" to which he had

replied "Yes". Mr. Gruchy too assisted us with a detailed and scientific explanation of the methods employed to determine the age of a horse and explained and interpreted the various illustrations. Upon his recent examination, on the basis of "Galvayne's Groove" he estimated the present age at 18 or 19 years. He accepted that one cannot be accurate within 2 years when the animal is over 12 years old. On the basis of his 1983 certificate, Coffee could have been between 15 and 18 years (2 years deducted from his higher figure and two added to the lower). When he saw the 1973 certificate he had "patted himself on the back" because of the difficulty of being accurate with an older horse. The 1973 certificate was "for life"; it gave Coffee a passport to success; Coffee was certified as being in excess of 6 years of age when measured. The certificate should be accurate within 1 year at 6 years or the certificate should not be issued; otherwise the door would be open to fraudulent use of the certificate. He believed that the age had been accurately judged as 6 in 1973.

To the extent that we have to prefer the evidence of either of the expert witnesses we prefer that of Mr. Gruchy. We cannot ignore the fact that his opinion is supported by Mr. MacLeod's own certificate of 1973. If Coffee was 6 in 1973, then she was 16 in 1983, at the time of sale by the defendant to the plaintiff.

Mrs. Therese Anne Le Claire who was involved with the conduct of livery stables for 20 years until 1985 had known Coffee at shows and jumping for some 14 years. Coffee was then at least 5 years old. This would mean a present age of 19 and the age of 16 years in 1983.

The evidence of Mrs. Jane Sebire, the proprietress of Bon Air Riding School, was less definite. She knew that Coffee was around 15 years of age because she had seen her around for some 10 years and she must have been 5 or 6 then. She thought that Coffee might be 15 now, rather than in 1983 but when it was put to her that the description of 13 years in 1983 cannot have been right she thought that Coffee might have been a year or two older then; however people made mistakes; after the age of 7 one could not really tell; a horse was then "aged".

The defendant, when she had decided to sell Coffee, had herself examined the teeth and had assessed the age at 13 years, but informed the plaintiff that Coffee could be older.

We are satisfied, on the balance of probabilities, that Coffee was older than 13 years when she was sold by the defendant to the plaintiff on the 12th March, 1983. It is unnecessary for us to decide Coffee's age at that time - it is sufficient that we are satisfied that she was some years older, probably 16; thus there was a mis-statement on the advertisement on the notice board that stated Coffee's age as 13.

Representations.

There is a direct conflict of evidence between the plaintiff and the defendant on the question of the representations as to Coffee's age alleged to have been made by the defendant to the plaintiff.

We have already said that there were two advertisements; one, a list of horses for sale at the stables, merely stated "aged"; the other, on the notice board, was intended to provide more detail and stated "13 yrs".

According to the plaintiff a professional relationship existed between her and the defendant in 1983. The plaintiff had been a customer of the defendant's livery shop. The plaintiff had then acquired a pony - Goldie - and employed the defendant professionally to "school" the pony. For reasons that are not relevant, the plaintiff was advised not to ride Goldie and the defendant suggested that she should have riding lessons at Sorrel Stables. As a result she was introduced to Coffee, described as a 12 year old schoolmaster and she agreed to have lessons on Coffee. Before the 12th March, 1983, she had had three lessons at the stables, two being on Coffee and one on Rosie, described by the plaintiff as a "great big horse". On the 12th March, 1983, she received a further lesson, which went normally, and during the lesson, the defendant said how well she had been doing; and that it was a shame because Coffee was being sold that afternoon. The plaintiff asked what she would do then and was told that nothing else was available. The plaintiff was in a predicament; the defendant had exerted pressure on her to sell Goldie; everything she had done would be wasted; the idea was put to her that she should purchase Coffee; her first thought was about what to say to her husband; but according to the defendant she had to have a schoolmaster, which Coffee was, and Coffee would last for at least five years; the defendant told her that Coffee was safe and sound, would look after her, and would be suitable for every purpose she could want. The defendant knew from earlier conversations that the plaintiff wanted to jump and compete with Dante, a colt that she had also pur-

chased, and which would not be ready for some four to five years. When the lesson was finished they were still talking and the plaintiff took Coffee into the livery yard where she untacked her. The plaintiff and defendant then went into the livery shop where the defendant gave her the card advertising Coffee for sale. When the plaintiff saw the card she said that she thought Coffee was 12 years old. The defendant explained that she would be 13 by the 1st January next. The conversation ended because the plaintiff's husband had arrived and was impatient. The plaintiff said that she would discuss the matter with her husband and come back. She did so and subsequently telephoned the defendant to say she would buy Coffee and would see the defendant later that evening.

The plaintiff said that she certainly would not have bought an old horse and would not have been able to insure her after the age of 15 years; she did not believe third party liability insurance to be adequate and had fully comprehensive insurance. She would not want an old horse because the risk of injury was greater than in a young horse; horses were retired at 18 years; if she had been told that Coffee was 16 or 17 she would not have bought her; she would not even have considered it.

Early in the evening of the same day the plaintiff had returned to Sorrell Stables; she met the defendant in the shop and gave her a cheque for £800. Subsequently, on the advice of the defendant, the plaintiff had purchased a whole set of tack. An employee of the defendant, Val (Miss Valerie Le Vavasseur dit Durell) was present and she had written "Sold" on the card which was handed to the plaintiff with the words "There's a souvenir".

The plaintiff did not have Coffee "vetted" because she relied on the defendant as a professional and expert person and believed that if anything was wrong she would have been told.

For insurance purposes the plaintiff declared Coffee's age as 12 because she believed that her official 13th birthday would be on the following 1st January.

In due course the plaintiff was unhappy with Coffee - we do not need to go into the reasons for her unhappiness because she has conceded that Coffee was a schoolmaster, safe and sound in all respects and fit for the purpose for which she required her.

Matters came to a head following an incident on the 10th August, 1983 - again we do not need to deal with the details of the incident - as a result of which the plaintiff "had had enough" and did not want to see Coffee again. She telephoned Sorrel Stables and spoke with the defendant. She asked the defendant to take Coffee back; the defendant refused; the conversation degenerated into abuse; there was no reference to Coffee's age on that occasion.

The plaintiff decided to sell Coffee and inserted an advertisement in the Jersey Evening Post in the following terms:- "14.2 H.H. skewbald mare, 13 years, schoolmaster, will teach novice rider. Tel 63467 after 7 p.m." She explained that she had copied the words from the card given to her when she bought Coffee, with the removal of the words "perfect to handle". She received several telephone calls and explained that she did not have much knowledge about horses and suggested an enquiry to Sorrel Stables. She did this without previous permission from the defendant; she received about half a dozen telephone calls and thought it strange that no-one called back. She received a further telephone call from other stables, as a result of which she contacted Mr. Gruchy's surgery to ask him to examine and age Coffee. When she received Mr. Gruchy's certificate she was very upset and advised the insurance company. She also took legal advice. She had no further contact with the defendant.

Under cross-examination the plaintiff conceded that she had had a free choice whether or not to buy Coffee but the circumstances were such and the facts were put to her in such a way that she "felt under pressure" to buy her.

Also under cross-examination, the plaintiff admitted that she did not discuss the question of insurance with the defendant. Whilst we accept the evidence of Mr. Hugh McCormick Martin, insurance broker, that the age limit for horses is limited to 15 for full insurance cover, we do not consider the question of insurance to be relevant since no representation is alleged to have been made by the defendant to the effect that full insurance cover would be available for Coffee. We propose, therefore, to disregard the evidence concerning insurance.

Needless to say, the evidence of the defendant conflicts with that of the plaintiff on all material points. The defendant bought Coffee from Mrs. Vera Le Cras in August, 1973, and kept her until the 12th March, 1983, when she sold her to the defendant. When she purchased Coffee the defendant was not particularly interested in her age.

Coffee had a very sweet and very calm temperament. Mrs. Le Cras did not have time to ride her. The defendant tried her out and bought her. She did not have Coffee "vetted".

The defendant admitted that she put "13 years" on the card on her notice-board. She did not keep files on the horses in her ownership. Normally she put down the details of the horses as she knew them. Insofar as age was concerned she looked at a horse's mouth and put the age as best she could. By custom of the trade it is for the purchaser to have a horse "vetted". There is no obligation on the part of the vendor who states the age as best he or she is able to. She had never before - in what we accept as wide experience - had difficulty of this kind; it was the first problem of its type. Age was not important in the case of a beginner (novice rider) and she would not put a beginner on a 4 or 5 year old horse. She was always very careful to match the client to the horse. Even at 16 years this particular horse (Coffee), schooled to a high degree, was, subject to being kept fit, ideal for the plaintiff's purpose; age made no difference and, indeed, an aged horse was preferable for a novice rider. We were given examples of horses between the ages of 16 and 25 years taking part in events, and, indeed, winning trophies.

In the case of Coffee the defendant was more concerned with finding a satisfactory buyer than with age. The horse was still doing everything - there was no secrecy - the defendant gave to the plaintiff the notice board card as a keepsake or souvenir because she had nothing to hide.

As to the sale of Coffee to the plaintiff the defendant said that on the morning of the day in question she told the plaintiff that prospective purchasers from Guernsey were to visit in order to inspect Coffee and "Rosie". The plaintiff asked which horses she would ride if Coffee was sold. The defendant said "Rosie" and "Lucy", another pony. The plaintiff said she wanted to ride only Coffee; she was the only horse that she had confidence in; she wanted to buy Coffee in order to keep on riding her. The defendant was not at all keen to sell Coffee to her; the plaintiff would want to take Coffee home and she would not cope. The defendant told her that she needed more instruction. The plaintiff was adamant in her decision to purchase; therefore the defendant said it could be done provided the plaintiff kept the horse at stables where she could receive regular instruction, preferably with the defendant for the time being.

The plaintiff promised that she would keep Coffee for life; when finished riding she would probably put her in foal.

The defendant put Coffee away and the plaintiff came to the livery shop. She saw the list of horses for sale and the notice board cards. She looked at them and spoke about the horse. As she was leaving, Coffee's age was the subject of discussion in the yard. The plaintiff questioned the defendant as to age. The defendant told her 13 but that Coffee could be older; the defendant had never had Coffee "vetted"; she advised the plaintiff that it would be better to have the horse vetted; she always gave that advice; it was part of regular procedure. They also discussed saddlery and tack, and the plaintiff wanted an estimate to discuss with her husband. The plaintiff left.

Just before lunch time that same day, 12th March, 1983, the plaintiff telephoned to say she would have Coffee; she called at Sorrel Stables later that day to hand over her cheque. The defendant enquired about arrangements to have the horse 'vetted' but the plaintiff said she would not bother, she knew the horse.

No aspect of insurance was discussed.

There was a card on the notice-board to say that all horses on offer were open to vetting. Age was not relevant to a horse required for the purposes of the plaintiff. She made no stipulation about age.

The sale and purchase having been completed, Coffee remained at Sorrel Stables until June, 1983, when the plaintiff removed her. Subsequently, the plaintiff telephoned on two occasions. She was very pleased indeed with Coffee - "over the moon" as the defendant put it. The defendant was sure that she had a contented purchaser.

On the evening of the 10th August, 1983, the plaintiff telephoned the defendant. She was in a furious temper; Coffee would not "box", she hated the sight of the horse. The plaintiff wanted the defendant to take the horse back; she wanted her money back; she said that she had spoken to somebody who had said that Coffee was at least 18 years of age. She made that allegation towards the end of the conversation; she was shouting and swearing; she said that she would make sure that the defendant would never sell another horse; she would see her solicitors and would see the defendant in court. The defendant considered the suggestion that Coffee was 18 to be ridiculous and the plaintiff refused to disclose the name of her alleged informant.

On the 16th August, 1983, the defendant saw an advertisement in the Jersey Evening Post whereunder the plaintiff was advertising Coffee for sale as "14.2 H.H. skewbald mare, 13 years, schoolmaster, will teach novice rider". The plaintiff had told her on the 10th August that Coffee was 18.

The defendant was insistent that the principle of "caveat emptor" operates with horses and that the custom of the trade is that it is for the purchaser to have "vetting" done. She so advised the plaintiff but was under no obligation to her. The defendant simply did not remember what had happened ten years' earlier (the measuring certificate) and had aged Coffee as best she could.

The defendant's evidence was corroborated in an important respect by that of her late husband, Mr. Anthony John Marks. He was present when, on the 10th or 11th August, 1983, the plaintiff telephoned his wife. He overheard one side of the conversation. He heard his wife ask "Who told you that the horse was 18 years old?" and a heated discussion followed. He saw the advertisement by the plaintiff in the Jersey Evening Post offering Coffee as "13 years old". This was subsequent to the conversation.

Miss Valerie Le Vavasseur dit Durell, employed by the defendant, also corroborated her evidence. She confirmed that the defendant had inspected Coffee's mouth and had thus calculated her age. The plaintiff's decision to purchase had been her own; she did not act under persuasion. Miss Durell heard part of the conversation in the yard at the stables; the plaintiff asked the defendant if she was sure of Coffee's age and the defendant said she was not sure, that Coffee could be older, but that the plaintiff should have the horse "vetted" if she was thinking of buying her. The plaintiff and Miss Durell often had conversations; on one occasion, about one week after the sale, the plaintiff asked Miss Durell if she knew definitely how old Coffee was; Miss Durell replied that she thought between 13 and 15. The plaintiff replied that it did not matter to her how old Coffee was. She only wanted Coffee to improve her riding until she was able to cope with her own young horse and then she would put Coffee in foal and keep her for the rest of her life. In subsequent conversations, the plaintiff said how pleased she was with her purchase. Miss Durell, too, overheard the conversation on the telephone when the defendant referred to the fact that the plaintiff had said that Coffee was aged 18; the defendant said "Who told you?" Miss Durell, too, was certain that the advertisement appeared after the telephone conversation.

We have to say that where there is conflict between the evidence of the plaintiff and that of the defendant, we prefer that of the defendant. The evidence of the plaintiff, on the allegations, now withdrawn, that Coffee was not a schoolmaster, was not safe and sound and was not fit for the purpose for which the plaintiff required her was substantially discredited, even by her own witnesses. We consider that the evidence of the plaintiff was unreliable.

The Law.

We do not propose to review all the legal authorities that were placed before us by counsel. We have to decide whether there was a misrepresentation.

The law of Jersey with regard to misrepresentation is well set out in Scarfe and others -v- Walton 1964 J.J. p.387 which reviewed Terrien, Poingdestre and Domat, and contained, at page 393, the following:-

> "It has been the practice of the Court for many years, in extension of the principles enunciated by Terrien and Poingdestre, to have regard also to the law of England in cases where no clear precedent is to be drawn from the law of Jersey, and it can be said that the principles enunciated by Domat, which cover not only error induced by misrepresentation but also error not so induced, have much in common with the law of England relating to misrepresentation and mistake. The allegation in this action is error induced by misrepresentation and, in arriving at our judgment, we have had regard both to the civil law and to the law of England".

We, too, have had regard both to the civil law and to the law of England in arriving at our judgment, as indeed we were invited by both counsel to do. We have also had regard to the Jersey cases of McIlroy -v- Hustler 1969 J.J. 1181, Channel Hotels and Properties Limited -v- Rice 1977 J.J. 111, and Kwanza Hotels Ltd. -v- Sogeo Company Limited 1981 J.J. 59, and on appeal (as yet unreported).

In McIlroy -v- Hustler at page 1185 the Court accepted the following definition of a representation: "a statement made by one party to the other, before or at the time of contracting, with regard to some existing fact or to some past event, which is one of the causes that induces the contract".

We have to ask ourselves - (1) what representations (if any) were made by the defendant to the plaintiff as to the age of Coffee (2) If such were made, were they false (3) If false representations were made, did they constitute one or more of the causes that induced the plaintiff to buy Coffee.

The representations made were (a) that Coffee was 13 years old - the advertisement on the notice board (b) that Coffee was aged - the list of horses offered for sale (c) that the defendant thought that Coffee was 13 but she was not sure and Coffee could be older, coupled with the advice to the plaintiff to have the horse "vetted".

To the extent that the advertisement on the notice board stated "13 years" with no qualification, it was false, albeit innocently false. But, of course, it was qualified by the conversation between the plaintiff and the defendant prior to the contract being entered into.

True or false, we are satisfied that the representations about age did not constitute one of the causes that induced the plaintiff to buy the horse. The causes that did induce the plaintiff to purchase were the fact that she had already been having lessons on Coffee and the possibility that Coffee would be sold elsewhere, and the fact that Coffee was a good schoolmaster and was able to teach a novice rider. We believe that age was not a material factor in the decision to purchase - the plaintiff, only a short time after the purchase told Miss Durell that it did not matter how old Coffee was - we accept the evidence of Miss Durell as demonstrating the plaintiff's state of mind at the time of contracting and afterwards as to Coffee's age - it was only much later when she became disenchanted with Coffee for other reasons that age became a material factor in her mind.

We have had to consider Dalloz - new edition 1863, Art 3 "Vices redhibitoires" p.92 para 213 which, in translation, reads as follows:-

> "Furthermore, whilst the stipulation inserted in the contract relating to such a quality, is so precise that it is evident that this quality is the determining factor in the consent of the buyer and the condition sine qua non of the contract, the right of the buyer, to demand the cancellation of the sale because of the non-fulfilment of the condition seems to us to be exercisable not only by means of redhibitory action, but also by means of an action ex. empto. (See Vente no. 632).

In effect, the condition stated gives the animal a well determined type, and the delivery of any other animal gives rise to a dispute which concerns much less the vices and qualities than the actual identity of the thing. Such is the case where, instead of a horse of one breed which formed the object of the contract, the vendor delivered a horse of a different breed; or still more the case where, instead of a filly not having yet been mated, and which the buyer had only bought with a view to mating her with a stallion of pure stock, the seller had delivered a brood-mare already in foal but not visibly so, and therefore with no hope of fulfilling the stipulated condition. What has been said in the case of stipulation by the purchaser can be applied equally to a case where the start of the sale had been made with statements attributing to the animal a distinct type. In the case where a horse is bought as a horse of six years old on the faith of the statements pronounced and with the prospectus put in circulation by the vendor, having been recognised in reality as a horse of nine years, it was decided that the sale was liable to cancellation because of the difference between the thing sold and the thing delivered. (Trib. com. de la Seine. 19 Jan. 1858)."

We do not, of course, know the facts relating to the sale of the nine year old horse bought as a horse of six years. We know, from the evidence we heard, that the age of six years in a horse's life is an important one. We note, too, the reference to "statements pronounced" and "prospectus put in circulation". But we must have regard to the opening sentence of paragraph 213 - " .... whilst the stipulation inserted in the contract .... is so precise that it is evident that this quality is the determining factor in the consent of the buyer and the condition sine qua non of the contract". We are satisfied that no similar situation existed in the contract between the plaintiff and the defendant.

Mr. Benest also referred us to the ancient case of Buchanan -v- Parnshaw, English Reports 2 T.R. 745 as follows:-

"If a horse sold at a public auction be warranted sound, and six years old, and it be one of the conditions of sale that he shall be deemed sound unless returned in two days, this condition applies only to the warranty of soundness. Therefore where a horse sold with such a warranty was discovered to be 12 years old ten days after the sale, and was then offered to the seller, who refused to take him,

it was holden that an action might be maintained by the buyer against the seller, and his right to recover is not affected by his having sold the horse after offering him to the defendant. - See Fielder -v- Stazkin, H. Bl. Rep. C. B. 17, that where a horse has been sold warranted sound, which was unsound at the time of the sale, the seller is liable to an action on the warranty, without either the horse being returned, or notice given of the unsoundness.

This was an action on the warranty of a horse against the seller, tried before Grose, J. at the sittings after last term. The circumstances of the case were these; The horse was sold at a public auction, warranted six years old and sound, and one of the conditions of the sale at the auction was that the purchaser of any horse warranted sound, who should conceive the same to be unsound, should return him within two days, otherwise he should be deemed sound. Ten days after the sale the plaintiff discovered that the horse in question was twelve years old, and then the defendant refused to receive him; and the plaintiff sold him. It was proved that the horse was twelve years old: but the jury were of opinion that the plaintiff, by not returning the horse sooner, had made him his own, and gave a verdict for the defendant. And a rule having been obtained to set aside that verdict,

Erskine now shewed cause, and observed that the plaintiff had precluded himself from rescinding the contract by selling the horse. Besides, by one of the conditions of sale the horse should have been returned in two days: and though, strictly speaking soundness did not apply to this case, yet the spirit of the condition was that, if a purchaser found any objection to the horse, he should return him within the time limited.

Bearcroft, in support of the rule, insisted that the condition of sale was not applicable to a case like the present. Where a horse is objected to as unsound, it is extremely material that he should be returned within a certain time, to prevent all disputes respecting the time when the horse became unsound; because if no objection were to be made on that account till a long interval had elapsed, the unsoundness might perhaps be occasioned in that interval. And it is for that

reason that it is made a condition of sale at all public auctions that the horse if objected to as unsound shall be returned within a short limited time. But neither the terms, nor the spirit, of the condition extend to a case like the present. And with respect to the plaintiff's selling the horse; he was discharged from the obligation of keeping him by the defendant's refusing to receive him.

Lord Kenyon, Ch.J. There is no doubt but that the defendant ought to have taken the horse again. The question turns on the meaning of this condition of sale; and I am of opinion that it must be confined solely to the circumstances of unsoundness. There is good sense in making such a condition at public sales; because, notwithstanding all the care that can be taken, many accidents may happen to the horse between the time of sale and the time when the horse may be returned, if no time were limited. But the circumstance of the age of the horse is not open to the same difficulty. This is therefore a verdict against evidence.

Per Curiam, rule absolute."

However, we are satisfied, on the evidence, that the defendant did not warrant that Coffee was thirteen years of age and that no warranty to that effect is to be implied. It is interesting to note that in Buchanan -v- Parnshaw the age involved in the warranty is again six years and that the horse was in fact double that age. The situation with an aged schoolmaster is clearly quite different.

We should also comment on another case submitted to us. It was Dick Bentley Productions Ltd & anr. -v- Harold Smith (Motors) Ltd. 1965 2 All ER 65 CA., a case involving the sale of a Bentley motor car with a representation of mileage that was untrue. It was held that the representation amounted prima facie to a warranty and the inference of a warranty was not rebutted - accordingly the plaintiff was entitled to damages. Lord Denning MR, at page 67 said this:-

"The first point is whether this representation, namely that the car had done twenty thousand miles only since it had been fitted with a replacement engine and gearbox, was an innocent misrepresentation (which does not give rise to damages), or whether it was a warranty. It was said by HOLT, C.J., and reported in Heilbut, Symons & Co. -v- Buckleton:

"An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended."

But that word "intended" has given rise to difficulties. I endeavoured to explain in Oscar Chess, Ltd. -v- Williams that the question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice. What conduct, then? What words and behaviour, lead to the inference of a warranty?.

Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it. In the Oscar Chess case the inference was rebutted. There a man had bought a second-hand car and received with it a log-book, which stated the year of the car, 1948. He afterwards resold the car. When he resold it he simply repeated what was in the log-book and passed it on to the buyer. He honestly believed on reasonable grounds that it was true. He was completely innocent of any fault. There was no warranty by him but only an innocent misrepresentation. Whereas in the present case it is very different. The inference is not rebutted. Here we have a dealer, Mr. Smith, who was in a position to know, or at least to find out, the history of the car. He could get it by writing to the makers. He did not do so. Indeed it was done later. When the history of this car was examined, his statement turned out to be quite wrong. He ought to have known better. There was no reasonable foundation for it."

We were invited to find that the defendant, a dealer in horses, was in a position to know, or at least to find out, the history of Coffee. She could get it by searching for and finding the original certificate of measurement which she did later find. When Coffee's history was examined, her statement as to age turned out to be quite wrong. She ought to have known better. There was no reasonable foundation for it.

It is true that the defendant was careless. She relied on an examination of Coffee's mouth. No doubt she should have searched her files. However, we are satisfied that no warranty as to age was intended. The statement as to Coffee's age was not made "for the very purpose of inducing the other party to act on it"; nor did it induce the plaintiff to act on it by entering into the contract.

Similarly, we distinguish the present case from Esso Petroleum Co. Ltd. -v- Marden [1976] 2 All ER 5 CA. In that case Esso acquired a site for development as a petrol filling station on the basis of calculations of estimated annual consumption. However, restrictions were imposed by the local planning authority and there was a change of plan which falsified the calculations, but through lack of care Esso failed to revise the original estimate of consumption. We quote from the headnote:-

"Subsequently Esso opened negotiations with the defendant for the grant to him of a tenancy of the station. During the negotiations L, an Esso representative who had had 40 years' experience in the petrol trade, told the defendant in good faith that Esso had estimated that the throughput of petrol would reach 200,000 gallons a year in the third year of operation of the station. The defendant was aware of the deficiencies of the station and suggested that a lower estimate would be more realistic, but L's greater expertise quelled his doubts, and on the basis of L's representation as to the potential throughput the defendant was induced to enter into a tenancy agreement in April 1963".

"**Held** - the appeal would be allowed and the decision of the judge varied for the following reasons -

(i) Where, during the course of pre-contractual negotiations, one party, who had special knowledge and expertise concerning the subject-matter of the negotiations, made a forecast based on that knowledge and expertise with the intention of inducing the other party to enter into the contract, and in reliance on the forecast the other party did enter into the contract, it was open to the court to construe the forecast as being not merely an expression of opinion but as con-

stituting a warranty that the forecast was reliable, i.e. that it had been made with reasonable care and skill. Since the forecast made by Esso of the throughput of petrol was based on their wide experience of the petrol trade and had induced the defendant to enter into the tenancy agreement, the forecast was to be construed as constituting a warranty that it was sound. Accordingly, since the estimate had been made negligently and was therefore unsound, Esso were liable to the defendant for breach of that warranty.

(ii) There was no ground for excluding liability for negligence in relation to statements made in the course of negotiations which culminated in the making of a contract. Accordingly, where a person who had special knowledge or skill made representations to another by way of advice, information or opinion, with the intention of including the other to enter into a contract with him, he was under a duty to use reasonable care to see that the advice, information or opinion was reliable; furthermore (per Ormrod LJ), the duty of care was not limited to persons who carried on the business or profession of giving advice. In the circumstances, the relationship between Esso and the defendant was such as to give rise to a duty on the part of Esso to take care since they had special knowledge and skill in estimating the throughput of a filling station. It followed that Esso were in breach of that duty since the forecast had been made negligently and therefore they were also liable to the defendant in damages for negligence".

However, the plaintiff in the present case faces the same insurmountable hurdle to which we have already referred. We are satisfied, on the evidence, that even if the defendant was negligent she did not make a representation as to Coffee's age with the intention of inducing the plaintiff to enter into the contract nor did the plaintiff enter into the contract in reliance upon the statement as to age; she knew before she entered into the contract that Coffee could be older than thirteen years.

We consider that the plaintiff could have reasonably made herself more certain as to Coffee's age, if it was material to her. She could have done by having the horse "vetted" but failed to do so and cannot now complain. Domat, "Les Loix Civiles" (nouvelle edition) Tome I, book I, Section XI page 51 paragraph XI (in translation) says that: "If the defects of the thing sold are such as the buyer might have easily known, and been certain of, as if a field is subject to be overflowed; if a house is old; if the beams are rotten; if it is ill built; the buyer cannot complain of these sort of defects,

nor of others of like nature. For the thing is sold to him, such as he sees it". In Kwanza Hotels Limited -v- Sogeo Company Limited, already cited, Sir Frank Ereaut, Bailiff, applying that paragraph of Domat and some English and Jersey cases, said that the action should be dismissed because the Plaintiff Company did not take the precautions which a prudent purchaser would have taken to verify the information given. The plaintiff, having been advised that Coffee could be older than the stated age, failed to act upon the advice given to have the horse "vetted". On this ground alone, she cannot now complain.

Because we have found that there was no warranty as to age it is unnecessary for us to consider the question of lapse of time which occurred between the sale and the plaintiff's first attempt to rescind the contract.

Domat at page 50 has references to the sale of horses, in translation, as follows:-

> "Since it is not possible to restrain all the perfidious dealings of sellers and that the inconveniences would be too great to dissolve, or call in question sales, for all manner of defects in the things sold; we consider therefore only those defects which render the things altogether unfit for the use for which they are bought and sold, or which diminish that use in such a manner, or render it so inconvenient that if they had been known to the buyer, he would have either not bought them at all, or at least not given so great a price for them. Thus, for example, a beam that is rotten, is unfit for the use for which it is designed. Thus a broken-winded horse does less service and it is too troublesome to make use of him. And these defects are sufficient to dissolve a sale. But if a horse is only dull in answering the spur, this defect will make no manner of change. And in general, it depends on the custom of the place, if there is any such touching this matter; or on the prudence of the Judge, to discern by the quality of the defects, whether the sale ought to be dissolved, or the price lessened, or whether any regard at all ought to be had to the defect".

Conclusion: It is clear that under Civil Law, the Judge had a wide discretion to decide whether the contract should be rescinded, or the price lessened, or damages paid, or whether any regard at all ought to be had to the complaint.

The burden of proof is on the plaintiff and the standard of proof is the balance of probabilities.

She has failed to satisfy us that there was either misrepresentation or breach of warranty for which she would be entitled to relief. Accordingly, the plaintiff's action is dismissed.

Mr. Fiott sought to persuade us that costs should be awarded on a full indemnity basis. It is only rarely that costs are so awarded. It is true that this action was time wasting and expensive because certain complaints were pursued when they were without the remotest chance of success. At the same time, it must be said that if the defendant had kept proper records and had referred to those records she would have been in a position to certify the age of Coffee. In the circumstances we see no sufficient reason to depart from the normal rule that taxed costs "follow the event". The plaintiff will pay the defendant's taxed costs.