Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of McMaster v. *McPhillamy, from the Supreme Court of New South Wales; delivered the 26th July* 1905.

Present at the Hearing:

LORD DAVEY.
LORD JAMES OF HEREFORD.
LORD ROBERTSON.
SIR ANDREW SCOBLE.

[*Delivered by Lord James of Hereford.*]

This is an Appeal from an Order of the Supreme Court of New South Wales made in a suit instituted by the above-named Appellant.

In that suit the Plaintiff—the Appellant—sought to recover damages for alleged breaches of a contract of sale of certain sheep by the Defendant to him.

In the Declaration five causes of action were alleged, but at the trial three of the counts were abandoned, and two causes of action only, as stated in the second and fifth counts, were relied on.

The second count alleged that the Defendant having sold ten thousand ewes of a certain description to the Plaintiff, did not deliver such ewes, but delivered other and inferior ewes.

The cause of action set out in the fifth count was that the Defendant, by warranting certain ewes to be not in lamb and fit to travel, sold them to the Plaintiff, whereas the said ewes were in lamb and unfit to travel.

The trial took place in June 1903 before Mr. Justice Pring, lasting five days, during

38611. 100.—7/1905. [44]

which much evidence was given upon the issues raised in respect of the second and fifth counts. By leaving the two questions set out in the Judge's notes to the jury the learned Judge appears to have had doubts whether any evidence had been given sufficient to support the fifth count. The jury did not answer the questions, one of which was, "Was there a warranty that "the ewes were not in lamb?" and found a general verdict for the Plaintiff for 3,731*l.* 10*s.*

Inasmuch as this verdict may include damages in respect of the breach alleged in the fifth count, it is essential to the validity of the verdict that sufficient evidence should have been given at the trial to support the allegations in that count. On the ground that there was no such evidence the Defendant applied to the Supreme Court to set aside the verdict and to direct a new trial. A majority of the Judges of the Supreme Court gave judgment in favour of this view, and directed a new trial in respect of the amount of damages to be recovered under the second count.

From that judgment this Appeal has been brought, and under it the Board has now to determine whether sufficient evidence of a warranty as alleged in the fifth count was given.

In the Court below the Defendant mainly relied upon three grounds in support of the contention that there was no such evidence.

1st. That the actual contract of sale was made on a Tuesday—the date seems uncertain—and that the conversation said to amount to a warranty took place on the previous Saturday, and was not induced into the contract.

2nd. That the documents dated 19th December 1901 contained the terms of the contract, and that as no warranty was mentioned in these documents no oral evidence of any term of the contract could be given.

3rd. That the oral evidence given in support of the fifth count did not establish that the alleged warranty was given.

In respect of the first point, this Board is of opinion that evidence of what was said on the days before the contract was made was admissible. The transactions were sufficiently continuous and connected to entitle the Plaintiff to rely upon what was said in respect of warranty on the first day as much as if it had been said on the second or third.

This Board is also of opinion that the documents of 19th December do not purport to record a contract in all its terms. They are memoranda showing the number and price of the sheep to be delivered. The purposes of these memoranda were that the drover should know what sheep he had to receive, and that the amounts paid and to be paid by the Plaintiff should be ascertained and stated.

But the third and the principal question, viz., did the evidence establish a warranty that none of the ewes were in lamb? has to be dealt with.

Before the conversations which took place on the subject, communications had passed between the Plaintiff and Defendant. On 4th December the Defendant telegraphed to the Plaintiff: "Do you wish the rams joined or not? "some have rams joined but can manage to "leave most of them out." The reply of the same day was, "Do not put in any rams."

The oral evidence given in support of the alleged warranty is very brief. The Plaintiff's (the only) evidence in support of it is as follows: "Defendant said to McDougall" (the Defendant's manager) "'I wired McMaster to see if he "'wished the rams put in, and I received the "'wire not to put them in.' McDougal "said: 'That is all right. I can arrange not to

" ' give McMaster any of those sheep in which " ' the rams have been in for a day or two.' "

Now, it is quite correct, as stated by the Chief Justice Jervis in *Hopkins* v. *Tanqueray* (23 L.J., C.P., p. 161) that in order to constitute a warranty it is not necessary that the word " promise " or " warranty " should be used. But it is equally true that such words must be used that the intention of the person using them to warrant can be plainly gathered.

Accepting the evidence of the Plaintiff as correct—although it is contradicted by McDougall —their Lordships are of opinion that the words used by McDougall cannot be held to constitute a warranty. If it were intended that such warranty should be given it would apparently have been more natural for the Defendant himself to have given it. He had communicated with the Plaintiff on the subject of the rams being joined, and yet at none of the interviews is the subject of warranty ever mentioned between him personally and the Plaintiff. And although their Lordships are of the opinion they have expressed that the written memoranda do not exclude the oral evidence, yet it is a fact to be considered when dealing with the question of the intention of the words spoken that those documents contain no reference to any warranty that the ewes delivered should not be in lamb.

Under these circumstances their Lordships are of opinion that there was no sufficient evidence upon which a jury could reasonably act to support the allegation of warranty averred in the fifth count. The result is that their Lordships will humbly advise His Majesty that the result of the judgment of the majority of the Judges of the Supreme Court is correct, and that therefore this Appeal should be dismissed. The Appellant will pay the costs of the Appeal.