BRIERTON *v.* ANDERSON.

Opinion delivered October 7, 1929.

1. SALES—SECOND-HAND DREDGE BOAT—INSTRUCTION.—Where a second-hand dredge boat was sold by written contract, representing it to be in good merchantable condition, with its shovel repaired so as to be in good working condition, an instruction, in the seller's action to recover the balance due on the boat, to find for the plaintiff if he complied with his contract by delivering the boat in good merchantable condition with the shovel repaired so as to be in good working condition, *held* not objectionable as misleading the jury into thinking that it was only necessary to find that the shovel was in good working condition.
2. EVIDENCE—WRITTEN CONTRACT—PAROL WARRANTY.—A warranty of the condition of property sold cannot be incorporated by parol evidence in the written contract of sale.
3. SALES—WARRANTY OF SECOND-HAND ARTICLE.—The sale of a second-hand article carries no warranty as to the quality, condition or fitness for the purpose intended of such article, especially where the property is subject to inspection at the time of the sale.
4. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict supported by substantial evidence cannot be disturbed on appeal.

Appeal from Arkansas Circuit Court, Northern District; *W. J. Waggoner,* Judge; affirmed.

STATEMENT OF FACTS.

P. L. Anderson sued F. H. E. Brierton to recover the balance alleged to be due for a second-hand dredgeboat sold by the former to the latter. The suit was defended upon the ground that the plaintiff had misrepresented the condition of the dredgeboat, and that it was not fit for the use intended.

The record shows that on the 21st day of December, 1927, a written contract was entered into between P. L. Anderson and F. H. E. Brierton, whereby the former

sold to the latter one Gade dredgeboat or excavator of caterpillar traction, in good merchantable condition, with the shovel repaired so that it would be in good working condition, and the seller agreed to work said excavator for the buyer for not exceeding two days after delivering the same to him. The purchase price was $1,000 in cash, and a second-hand Chalmers touring automobile, estimated to be worth $910:

According to the testimony of P. L. Anderson, he purchased the dredgeboat when it was new for $9,000, and sold it to Brierton as a second-hand machine, and the written contract above referred to was executed. Brierton saw the dredgeboat, and examined it before he executed the written contract for its purchase. Anderson made a few minor repairs on the dredgeboat before it was delivered to Brierton. The machine was in good working condition, and worked all right when it was delivered . The excavator was delivered at the point designated by Brierton, and Anderson worked it for two days in digging a ditch between 400 and 500 feet long. Brierton was invited to be present during the demonstration, but failed or refused to come. Anderson made no repairs on the bucket, but it was in good condition when the dredgeboat was delivered. The machine was in good working condition when it was delivered, and could move as much dirt as when it was new. Anderson described in detail the parts of the machine and their condition, showing that the machine was in good order when it was delivered. His testimony was corroborated in all essential particulars by other witnesses.

According to the evidence adduced in favor of the defendant, the dredging machine was worn out, and was not fit to use. His witnesses described in detail the defects in various parts of the machine, showing that it was in bad condition, and could not be properly operated. The evidence for the defendant showed that the digger or bucket was worn out, and that all the material parts of the machine were in a bad state of repair.

The jury returned a verdict for the plaintiff in the sum of $1,000, and from the judgment rendered the defendant has appealed.

Joseph Morrison, for appellant.

M. F. Elms, for appellee.

HART, C. J., (after stating the facts). The first assignment of error is that the court erred in giving at the request of the plaintiff instruction No. 1, which reads as follows:

"The court instructs you that, if you find from all the evidence in this case, the plaintiff met and complied with each and every obligation and condition laid on him by the contract here sued on, by delivering to defendant one Gade dredgeboat or excavator of caterpillar traction, in good, merchantable condition, with the shovel thereon repaired so as to be in good working condition, at the place specified in said contract, or at such other place as the defendant may have, after the execution of said contract, have directed or requested the delivery thereof, if you also find that he later requested its delivery to a different place than specified in the contract, within a reasonable time, and you further find it was free of liens, and was for a period of two days by plaintiff demonstrated as required by said contract, at a place specified by defendant, and you further find that on said demonstration it met with all the conditions of said contract with reference to its working condition, then you should find for the plaintiff for such amount as you find due him upon said contract."

Counsel for defendant now contends that this instruction misled the jury into thinking that it was only necessary to find that the shovel on the machine must have been in good working condition under the terms of the contract in order to warrant a recovery in favor of the plaintiff. We do not think so. The plain meaning of the instruction is that the whole machine, including the shovel, should be in good merchantable condition. If counsel for the defendant thought that the instruction

was calculated to confuse or mislead the jury in the respect now complained of, specific objection should have been made to the instruction, and doubtless the court would have changed it to meet the objection of the defendant.

It is next insisted that the evidence is not legally sufficient to support the verdict. In the first place, it may be said that the contract of sale was in writing, and a warranty of the condition of the property sold cannot be incorporated in the written contract by parol evidence. This court has also held, that the sale of a second-hand article carries no implied warranty as to the quality, condition or fitness for the purpose intended of such article, and this is especially true where the property is subject to inspection at the time of the sale. *Kull* v. *Noble,* 178 Ark. 496, 10 S. W. (2d) 992, and *Old City Iron Works* v. *Belmont,* 177 Ark. 223, 7 S. W. (2d) 772, and cases cited.

The undisputed testimony shows that Brierton saw the dredgeboat, and inspected it before he executed the written contract for the purchase of it. The testimony for the plaintiff shows that the machine was repaired, and was in good working order at the time it was delivered to the defendant. The plaintiff specifically testified that the shovel or bucket was in good working condition at the time of its delivery. According to the evidence for the defendant, he refused to pay for the dredgeboat, because of its defective condition at the time of the delivery. This disputed issue was submitted to the jury under proper instructions, and the question was settled in favor of the plaintiff by the verdict of the jury.

There being evidence of a substantial character to support the verdict, we cannot disturb it on appeal. Therefore the judgment will be affirmed.