of his successors; and therefore I think that if the Court of Session did then decide the 81 acres were teind free, this was *res judicata*.

But in the question whether the proceedings in the Court of Session did sufficiently prove that there was a decision, there was a great difference of judicial opinion below. Three elaborate opinions were given on each side. The seventh Judge did not write an opinion of his own.

After reading these six opinions more than once, the state of my mind was that I could not say either side was right, and certainly could not say that either side was wrong. I think if I had had to decide in the first instance, I should have given judgment against the *res judicata*, on the ground that I could not see that it was made out that there had been a decision on the point. If I had been sitting alone to decide in a Court of Appeal, I should have affirmed the decision below, whichever way it was, on the ground that I could not say it was wrong. This would not have been satisfactory. I am glad that I am not alone, and that the noble and learned Lords who heard the argument are able to come to a decision.

I need hardly say that, in such a state of mind as I have described, I do not dissent from the result to which they have come.

Interlocutor appealed from reversed, and plea of *res judicata* stated for Mr Dundas sustained with costs.

Counsel for Appellant--Lord Advocate (Watson) — Kay, Q.C. — Moncrieff. Agents — Connell, Hope, & Spens, Solicitors.

Counsel for Respondent—Benjamin, Q.C.—Balfour. Agents--Grahames, Wardlaw, & Currey, Solicitors.

COURT OF SESSION.

Friday, February 20.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

NISBET AND OTHERS *v.* MITCHELL-INNES.

Sale—Heritable and Moveable—Fixtures in a Sale of a House.

In a question arising under the sale of a mansion-house and grounds, *held* (1) that tile-hearths which were laid on the hearthstone and bedded in cement, &c., and plants growing in the kitchen garden, were fixtures, and passed along with the house; but (2) that grates and gas-brackets fastened in the ordinary way, and fireclay vases in the gardens, attached by stucco to stone parapet walls, and plants in pots which were bedded in the ground, were not fixtures, as they could be removed without injury to themselves or to the heritable property.

Consuetude—Proof of Custom of what are Fixtures in a Sale of Heritage.

A proof of local usage or custom that articles were usually or universally considered to be moveables, and so did not pass with a sale of heritage, *refused*.

The estate of Parsons Green, near Edinburgh, the property of W. S. Mitchell-Innes, and at the time in his occupation, was advertised for sale in September 1877, and on the 25th September an offer of £25,000 was made for it by Messrs Curror & Cowper, S.S.C., on behalf of John Nisbet and others, who were the complainers in this action. The offer was made for the estate as advertised, including "vineries, greenhouses, and fernery." It was accepted on behalf of Mr Mitchell-Innes upon various conditions, the 3d of which was "That all plants in the fernery, greenhouses, and forcing-houses, and also all iron railings about the grounds, be excepted from the disposition."

A dispute afterwards arose as to certain articles in the house and grounds which the purchasers claimed as being of the nature of fixtures, and the purpose of the present suspension and interdict was to prevent Mr Mitchell-Innes from selling or removing "any of the grates, hearth and fireplace tiles, gasfittings, gas lustres and brackets, and picture rods, situated within the said mansion-house, or in any of the offices, conservatories, fernery, greenhouses, or lodges in connection therewith; as also from selling, removing, or taking away any portion of the stock or plants within the kitchen garden, or any of the ferns within the fern-house, or from selling or removing the trellis-work within the said fernery; and further, to ordain the respondent to restore to the said mansion-house and offices the following articles which may already have been removed from the said mansion-house or others, viz., dining-room and lobby lustres, dining-room wall gas-brackets, the two brackets in the boudoir, the drawing-room grate, and two stone lions, the ferns and other plants which were in the vineries at the time of the sale," &c.

The complainers averred, *inter alia*—"(Stat. 5) The whole grates and tile-hearths or linings of the fireplaces in any of the houses or buildings upon the estate, in so far as the same are built in by cement, lime, stucco, or putty, or other similar adhesive substance, also the gas cooking-stove in kitchen, and all the lustres and gas-brackets which are affixed to any of the walls or other parts of the building, together with the picture-rods, and also all the vases throughout the grounds, which are also fixed to buildings in the grounds by cement, stucco, putty, lime, or other adhesive substance, together with the two stone lions, are all of the nature of fixtures, and were included in and passed with the said subjects sold as aforesaid by the respondent to the complainers in terms of the missive before narrated. (Stat. 6) The complainers also maintain that there were sold to them, along with the estate and pertinents, the whole produce of the kitchen garden, together with the whole plants, shrubs, and trees of every description which were not contained in the fernery, greenhouses, and forcing-houses, and so excepted from the sale to the complainers."

The respondent averred, *inter alia*—"(Stat. 1) By the universal usage in Edinburgh, which usage was well known to the complainers and their agents, articles of the nature of those against the removal of which the complainers sought interdict, are not held, without special mention, to be included

in a disposition of lands and house property. (Stat. 2) The articles whose removal was sought to be prohibited are all either unattached to the ground or house, or can be easily removed without injury either to themselves or to the subjects whereto they are attached."

A remit was made to Mr W. Watherston "with instructions to consider particularly the articles mentioned in the record, and thereafter to take all proper means, by inspection or otherwise, for satisfying himself as to the precise nature, character, and construction of the different articles, and how far and in what manner the same are attached to the ground, or used in connection with the houses on, or grounds of, the estate of Parsons Green, with instructions to the said William Watherston to report all other facts and circumstances which may appear to him to be material for ascertaining and determining the character of the different articles as heritable and moveable."

Mr Watherston's report bore that in his opinion all the articles claimed were of the nature of moveables, excepting certain "ordinary kitchen garden stuffs planted for use in the course of the season, and such as are usually left for an incoming tenant or a purchaser of the subject." On a further more specific report it appeared that all the other plants claimed were in pots, some sunk in the earth for protection, and some on the floors of the different houses. The vases, stone lions, &c., were fixed upon pedestals with cement or stucco. The grates, gas-brackets, &c., were fixed in the ordinary way. In regard to the tile-hearths and vases Mr Watherston made the following detailed report:—"By order of the Court . . . . . I have to-day carefully examined the tile-hearths as to their mode of attachment to the original or permanent stone hearths, and have to report that each tile-hearth is bordered or enclosed by an iron hoop $1\frac{1}{4}$ inch broad by $\frac{1}{4}$ inch thick; this hoop is set on edge; the fixing of this to the stone hearth is by small iron pins or bats (five in number for each hearth) one quarter of an inch square—or round; these bats or pins are rivetted to the iron hoop, and project about $\frac{3}{4}$ inch; the stone hearths are bored or cut to receive the projecting pins, which are run up with molden lead, and thereby secured to stone hearths. The tiles are bedded in cement, the iron border is fixed to the hearth to prevent the tiles shifting laterally, and do not secure or fix the tiles down to the hearths. The fireclay vases placed on tops of stone parapet walls and stone pedestals are there for ornament. They form no part of the design or construction, as the stone work is complete in itself, and moulded on top to produce the proper architectural effect exclusive of the vases. Three of these vases are loosened since my last visit, through, I have no doubt, the effect of the recent rains and frosts."

The respondent was refused proof of the averments quoted above in regard to the custom in the case of sales in Edinburgh with reference to articles of the nature of those in question.

The Lord Ordinary (Rutherfurd Clark) on January 26, 1880, pronounced an interlocutor finding, *inter alia*—"That the articles mentioned in the list of articles claimed by the complainers were not sold by the respondent to them along with the estate of Parsons Green, with the exception of (1) the articles in the kitchen garden; (2) the tile-hearths therein mentioned; and (3) the smoke-jack in the under flat: Interdicts, prohibits, and discharges the respondent from removing the said enumerated articles in the kitchen garden—the tile-hearths and the smoke-jack: *Quoad ultra* refuses the prayer of the note of suspension and interdict." He added the following note:—

"*Note.*—(1) The complainers contended that under the sale of the estate of Parsons Green they were entitled to claim certain moveables, because by the contract certain moveables were excepted from the sale. The exception is thus expressed—'All plants in the fernery, greenhouses, and forcing-houses;' and it was argued that all other plants, though not *partes soli*, passed to the purchaser. The Lord Ordinary is not able to adopt that view. The vineries, greenhouses, and fernery were enumerated in the subjects sold, and it may have been thought prudent to show by a special stipulation that the plants were not sold. But whatever may have been the reason for introducing the exception, nothing was sold but the estate of Parsons Green, and no moveables could pass to the purchaser.

"(2) The complainers claimed certain potted plants, on the ground that they formed part of the estate. The plants grew in the pots and had no attachment to the ground. It is true that the pots were sunk, but in the opinion of the Lord Ordinary this fact does not make the plants *partes soli*.

"(3) The next claim of the complainers was directed to grates, vases, mirrors, and other articles of that kind, which they averred to be fixtures.

"With respect to this claim the respondent makes a special averment, of which he desired a proof. It is that 'by the universal usage in Edinburgh, articles of the nature claimed by the complainers are not held, without special mention, to be included in a disposition of land and house property.' The Lord Ordinary refused to allow a proof.

"The averment of a local custom which has the effect of displacing the general law must be precise, so as to show the law which is displaced, and how it is displaced. Here it is not so. Indeed the Lord Ordinary has found a good deal of difficulty in ascertaining what the respondent means by the averment, and he is not sure that he has been successful. The Lord Ordinary understood him to mean no more than that articles of the class claimed by the complainers were usually or universally considered to be moveables, and that in consequence they were not included in a sale of a house. He declined to aver that such articles, though heritable in law, were by custom excepted from the sale; accordingly the Lord Ordinary conceives that the alleged usage is nothing more than an understanding or misunderstanding of the law—that the contracts are intended to be carried out in accordance with law, and that the articles in question are retained by the seller because they are considered moveable. There is thus an appeal to the law, and to the law only, to settle the transactions, and though it may be that the settlement is universally one way, that does not form a custom or usage which can affect the law. If the settlement be right, the law and custom do not conflict, or, in other words, there is no custom. If it be universally

wrong, there is nothing more than a *communis* error. See *Anderson*, 4 Macph. 765.

"To notice the special articles which were the subject of discussion—

"(1) Tile-hearths. These were formed of encaustic tiles, laid on and cemented to the original hearthstone, and enclosed by an iron border, which is fixed to the hearthstone by 'bats,' or iron pins sunk in it and fastened by melted lead. In the opinion of the Lord Ordinary, these tile-hearths form part of the house. They seem to him to be permanently affixed to it, although it is true that the attachment might be broken and the tiles removed one by one. So affixed they seem to the Lord Ordinary to be the hearths of the house.

"(2) The other articles were articles of furniture, such as grates, or of ornament, such as vases or mirrors, and which, though attached to the house or ground to some slight extent, could be removed without injury to themselves or to the heritable property.

"A good deal of discussion took place with respect to certain vases which were set on certain parapet walls or pedestals, and which were claimed as part of walls or pedestals. But the last report of Mr Watherston shows that the fact is against the complainers."

The complainers reclaimed, but the Court adhered with additional expenses.

Counsel for Complainers — Guthrie Smith. Agent—J. Duncan Smith, S.S.C.

Counsel for Respondent—The Vice-Dean (Crichton)—Graham Murray. Agents—Waddell & M'Intosh, W.S.

Tuesday, February 24.

SECOND DIVISION.

[Sheriff of Perthshire.

GARDINER *v.* M'LEAVY.

Sale—Sale of Horse—Warranty—Unsoundness—Where only Temporary.

A warranty of soundness in the sale of a horse, whether implied from the fact that the market price was given for it, or guaranteed by express stipulation, entitles the purchaser to have an animal which shall be immediately fit for the purpose for which it is sold.

Circumstances in which it was *held* that a horse which when sold with an absolute warranty of soundness was in the knowledge of both seller and purchaser suffering from cold, and which afterwards nearly died from pleurisy and bronchitis, the result of the cold, and was for long quite incapable of work, was unsound to the effect of entitling the purchaser to rescind the contract though the horse afterwards completely recovered.

Observations on the law and practice of England as contrasted with that of Scotland in regard to the rights of a purchaser of a horse where there has been a breach of warranty by the seller.

Robert Gardiner, a farmer near Perth, bought on 1st July 1878 from Terence M'Leavy, a horse-dealer in Perth, a dark brown mare at the price of £50. Delivery was taken and the money paid at once. The following receipt, with warranty attached, was given:—

"*Perth*, 1*st July* 1878.

"Received from Mr Gardiner the sum of £50 sterling for a dark-brown mare, coming five years old. Warranted sound, free from vice, steady in single and double harness."

When sold the mare was admittedly suffering from cold, and this was evident to both parties, and stated by the seller to the purchaser. Gardiner proceeded to ride the mare home to his farm at once, a distance of seven miles, but after going two miles she became so much exhausted, and was obviously in such a state of debility, that he got off her back and led her. Next day he gave the mare no work, and as she appeared no better he consulted Mr Robertson, a veterinary surgeon, who gave a prescription, which was used. The next day, the 3d July, Mr Lawson, farrier, saw her, and gave the same prescription. Mr Lawson thought her very ill, and that she was suffering from bronchitis and pleurisy, and that her lungs were affected. He advised that Mr Robertson should be sent for. When he came next day (4th July), he and Lawson found the animal very ill, suffering from the above ailments. The same day Gardiner wrote to M'Leavy informing him of the mare's condition. The next day they met in Perth, when M'Leavy promised to come to see the mare the day after, which, however, he did not do, as he was obliged to go to Ireland. On the 13th July Gardiner wrote to M'Leavy that the mare was little or no better, and that she was unsound and disconform to warranty, and that she was to be placed at livery as soon as she could be moved. On the 22d July M'Leavy was written to to the same effect, and also that the mare was suffering from bog-spavin on both hocks, and a splint on one of the forelegs. In this letter Gardiner offered to settle for £12 with M'Leavy. On the 26th July the latter answered that if the mare had bog-spavin he would take her back. After various other intimations Gardiner on 3d August sent the mare to a livery stable in Perth, where she remained till 6th September, when she was sold for £43, 10s. Two causes of unsoundness were alleged—(1) Bronchitis or some constitutional infirmity of that nature; and (2) bog-spavin in both hocks.

This action was brought by Gardiner against M'Leavy for payment of £50, the price of the mare, and of charges for her keep, less the amount realised by her sale, deducting attendant costs.

M'Leavy averred that he knew nothing of Stevenson's dealings with the mare after the end of July, when he left Scotland, and did not return for nine months.

The Sheriff-Substitute (BARCLAY), after a proof, the result of which sufficiently appears below, found the pursuer entitled to payment of £29, 2s. He found the first ground of unsoundness proved, but not the allegations regarding the bog-spavin (the mare's ailments being what have already been detailed—pleurisy, &c., the result of cold).

On appeal, the Sheriff (LEE) recalled the Sheriff-Substitute's interlocutor, and assoilzied the defender, holding the unsoundness not proved.

The pursuer appealed.