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.

At advising—

Lord Ormidale—In this appeal the question to be decided is, whether the mare in dispute was or was not sound when purchased for £50 by the appellant from the respondent on 1st July 1878? The Sheriff-Substitute has found in the proof that the appellant has proved that the mare was unsound, but the Sheriff-Principal has come to the opposite conclusion.

A written warranty appears to have been given along with the mare to the effect that she was "sound, free from vice, steady in single and double harness," and so far there is no dispute. I think it also proved that at the time of the sale the mare had a cough, which was represented by the seller as being nothing more than the remnant of a slight cold, which was of no moment. Unfortunately, however, the mare, although treated with the greatest care under the advice of veterinary surgeons, very soon after she came into the keeping of the appellant became alarmingly worse, insomuch so indeed as not only to render her quite unfit for work but to reduce her to such a state as to be in imminent danger of her life. Repeated notices of her condition were duly sent by the appellant to the respondent, and intimation was also made to him that he was to be held answerable for the consequences of a breach of warrandice. And on the 22d July it was intimated to the respondent that the mare was so far recovered as to be fit for removal to a livery-stable, where she would be kept till re-sold at the respondent's expense. The respondent, however, neither went himself nor sent anyone else to see her; nor did he give any instructions regarding her. She was therefore re-sold under a warrant obtained from the Sheriff on 6th September 1878 at the price of £43, 10s.; and it was for the difference between that sum and the price of £50 which the appellant had paid to the respondent, and the charges which the appellant incurred in relation to the mare, that the present action was brought in the Sheriff Court.

Although according to some of the evidence in the case it would appear that the mare had bog-spavin and a splint on one of her legs, which, if sufficiently proved, would undoubtedly amount to unsoundness, it is unnecessary to consider that matter, as it was not pressed at the debate, presumably from the proof being scarcely sufficient to support it. The only unsoundness relied on by the appellant was the severe cold, accompanied by most serious symptoms approaching to pleurisy, endangering the animal's life, and rendering her quite unfit for work during a period of between three and four weeks. This was the unsoundness upon which the Sheriff-Substitute rested his judgment, and which, holding it to be proved as matter of fact, I concur with him in thinking constituted unsoundness, and consequently a breach of warranty on the part of the respondent. The Sheriff-Principal, however, being of opinion that mere ordinary cold, which he seems to have thought was all that affected the mare, did not constitute unsoundness, reversed his Substitute's decision and assoilzied the respondent.

Now, if the learned Sheriff really thought the evidence in this case showed that the mare when purchased by the appellant from the respondent had a mere common cold from which she would have speedily recovered if properly treated, I must take leave entirely to differ from him. I think it is clearly proved that the cold which the mare had when bought from the respondent was, in place of being an ordinary one of little or no moment, a very serious one, and continued so for a considerable time, during which she was unfit for work. The case of *Dykes* v. *Hill* (20th July 1860, 22 D. 1523), cited in support of his judgment by the Sheriff-Principal, does not appear to me to be applicable, for there, in striking contrast to the present case, it was found to be proved—"5th, That" after the horse came into the custody and possession of the purchaser, and had manifested symptoms of disease, he "was worked in the plough for ten hours, with an interval for dinner, on the 28th day of May, and the next day for at least six hours, till he was unyoked on the representation of a witness who observed his distressed condition; 6th, that the working of the horse was without the knowledge and sanction of the defender, who received no notice till he got the letter of the 30th of May;" and further, "that the working of the horse in his state of disease and weakness from want of food was injudicious and improper, and calculated materially to aggravate his complaints and to increase the risk of his death, which followed.' It is not surprising, therefore, that in such circumstances the judgment in that case should have been for the defender, and that a *dictum* should have fallen from Lord Benholme to the effect that a cold of itself does not constitute unsoundness, for there the horse was not only for some time fit for work, but did work till the ill-usage he received from the purchaser not only rendered him unable to continue to do so but resulted in his death. But there being no allegation, and certainly no proof, that the mare in question here received any ill-usage whatever from the appellant, but, on the contrary, it being indisputable that his treatment of her was in all respects unobjectionable, and yet that for a period of between three and four weeks she was wholly unfit for work, and indeed in danger of her life, the question, and the only question, in the case is, whether she must be held to have been unsound when purchased, and whether the respondent is liable to the appellant as for breach of warranty?

There can be no doubt that according to the law of England, as illustrated by the numerous cases which were cited at the debate—and, in particular, the cases of *Ellon* v. *Jordan*, 1 Starkie 127; *Elton* v. *Brogden*, 4 Campbell 281; and *Coates* v. *Stevens*, 2 Moodie & Robinson 157,—the mare in question was at the time she was purchased, or, at anyrate, on the fourth day thereafter, when notice was given to the respondent, and an intimation given to him that he would be held liable in the consequences, unsound, and that the respondent is liable as for breach of warranty, on the principle that she was then from disease less fit in a reasonable sense for the work which might be expected from her. It was said, however, that the law of England was different from that of Scotland in regard to this matter, inasmuch as that while in England the only remedy competent to the buyer of a horse that turns out not to be conformable to warranty is an action for the damages thereby sustained, the remedy by the law of Scotland is, immediately on the breach of the warranty becoming known,

to offer to return the horse to the seller on repayment of its price, and failing that offer being accepted, to re-sell the animal and claim the difference with relative charges from the seller. But this, so far as I can discover, is just the course that in circumstances such as we have here would be followed in England, for I observe it is stated in Oliphant on the Law of Horses (3d ed., 166–7) that "Where a breach of warranty has taken place, it is prudent for the buyer, in an ordinary case, to tender the horse back to the seller immediately on discovering such breach, and so entitle him to be repaid the expenses he has been put to in keeping him, and if the seller receive him back there will be a mutual rescission of the original contract. But where the seller refuses to take back the horse, he should be sold as soon as possible for the best price that can be procured. And perhaps the best course to be pursued under such circumstances is to sell him by public auction, for in that way the true market value, which is the proper measure of damages, can best be discovered." This is precisely the course which the appellant has followed in the present instance. And that he was entitled to adopt such a course on the ground that there had been on the part of the respondent a breach of his warranty of soundness is, I think, undoubted, according as well to the law of England (Benjamin on Sale, last ed., 504–5) as to the law and practice of Scotland. In the case of *Ralston* v. *Robb*, July 9, 1808, Mor. No. 6 of App. to Sale, it was laid down by a majority of the Court that "Under the warrandice of the sale, whether derived from the payment of the market price of a sound and unblemished horse, or from the express stipulation of the parties, the purchaser is entitled to have a horse immediately fit for its purpose. He is not understood in law to go to market with the view to purchasing a commodity of which he cannot have the immediate use, which may require a course of medicine and care to render it fit for its purpose, and which demands the exhibition of more than ordinary skill and expense to preserve it in a state of usefulness, or perhaps from utterly perishing." Nothing could be more applicable to the circumstances of the present case, and nothing could show more satisfactorily that the law relative to what amounts to a breach of the warranty of the soundness of a horse is essentially the same in Scotland as in England, although the remedy to the buyer may, according to circumstances, be somewhat different.

I am therefore, and without any difficulty, of opinion that the judgment of the Sheriff-Substitute in this case was substantially right, and ought to be reverted to.

Lord Gifford—In this case I prefer the judgment of the Sheriff-Substitute. I think it is sufficiently proved that the mare in question was not sound at the date of the purchase on 1st July 1878, and that she was duly rejected by the pursuer as disconform to the written warranty granted by the defender.

[*After stating the facts ut supra*]—Now, keeping in view the absolute and unqualified written warranty granted by the defender on 1st July 1878 (the date of the sale), it appears to me that the only question in the case is, whether the mare was at that date sound in the legal sense of the word, or whether she was at that date labouring under the disease which so shortly afterwards exhibited symptoms so dangerous and caused such imminent risk to her life? If the mare had died on 4th July, within three days after the sale, or within a few days thereafter—and the evidence seems to show that she might have done so, and that there was a great risk of her death for some considerable time—then the only question would have been, Was the animal labouring under the disease of which it died at the time of the sale, and at the date of the written warranty? If a disease existed at the date of the sale, which ultimately ran its course and resulted in death, then the risk was the seller's under his warranty, and it is of no consequence that the more serious symptoms of the disease developed themselves after the mare had been delivered to the purchaser. The existence of a mortal disease—that is, of a disease which ultimately proved mortal—is certainly covered by the defender's warranty. It makes no difference whatever that in the present case the mare, instead of dying of the disease, ultimately recovered, though with great risk and by means of skilful and expensive treatment. The ultimate issue of the disease, which no one could foresee or foretell, does not vary the nature of the question, which must I think be determined as if it had come up for decision on 4th July 1878, when the mare was swimming for its life.

Now, I am of opinion upon the evidence that when the sale took place, and when the warranty was given, on 1st July 1878, the mare was labouring under the disease which a few days thereafter became dangerous to its life, and therefore that it was unsound at the date of the sale. There was accordingly a breach of warranty—the pursuer was entitled to reject it, and it was thereafter treated and recovered at the defender's risk. I think it is sufficiently proved that the cold under which it was admittedly suffering was the same disease which afterwards developed itself or showed itself to be the pleurisy, congestion, and bronchitis which involved so much risk and danger. There is no evidence—there is not even a suggestion—of any supervening cold or supervening disease coming upon the animal after the sale. It would require very clear proof indeed to establish this, but unless this were established or made probable, the defender has really no case. The mare broke down within an hour or two of the sale. The cold under which she had been labouring is a sufficient explanation of this, and the pleurisy and bronchitis are only necessary consequences of which there is always a risk, and against which risk every purchaser is well entitled to guard himself by an express or absolute warranty. Now, I think that against all such risks this defender had granted absolute warrandice.

The defender himself in his evidence seems to feel conscious of the weakness of his case. He denies that he granted absolute warrandice. He said he agreed to give warranty "with the exception of the cold that the pursuer saw;" and this defence was argued at the bar, for it was maintained ingeniously, though I think quite hopelessly, that as the cold was seen and known by both parties, it must be held as excepted from the warranty, and that the pursuer must be held to have taken upon himself the risk of that cold and all its consequences. I cannot so read in law the written warranty. It is absolute, and contains no excep-

tion, and it would be contrary to every principle to read the warrandice as if it had contained the words "excepting always the cold under which the mare is labouring." This would be to make a totally new bargain for the parties, entirely different from that which they have made for themselves. If the defender meant to except anything from his warranty, he should have said so. For aught that appears, and in every probability, the visible cold on the mare was one of the things which made the pursuer insist upon absolute warranty; as if he had said—I see "she has a cold, which may or may not get better, but you will guarantee that that cold will go off as a common cold does;" and the defender did so. Thus only can I read the document. The defender himself almost admits that the cold which the mare had caught in coming from Ireland was the cause of her ultimate danger, which nobody denies when at its height to have been unsoundness. He says—"The mare would have been quite recovered" (that is, from the cold) "in two or three days if she had not taken a relapse, which all horses are subject to." But then unfortunately for the defender she did take a relapse, of which the pursuer was not bound to take the risk, and it was just against this possible relapse, "which all horses are subject to," that the pursuer secured himself by the defender's absolute warranty. I think this is the legal and the necessary effect of the written warrandice. And this seems to me to be the whole case.

In the course of the argument some questions of nicety and difficulty were discussed as to the exact legal meaning of the word "soundness" in such a warranty as this, and also whether the word "soundness" has a different legal meaning in Scotland from that which it receives in England, arising from the different remedy which is given in the two countries when a breach of warranty occurs. In Scotland the only remedy which the law gives to a purchaser under a breach of warranty is to reject or return the horse or the goods, or place them at the seller's risk and disposal. In England, after the property passes, the buyer's remedy where there is breach of warranty is a mere claim of damages in respect thereof. It was argued from this that unsoundness has come to have a wider meaning in England, where it merely gives a claim of damages, than in Scotland, where it rescinds the the sale. There may be room for this distinction, although I am not aware of any case in which it has been expressly recognised, but I think no question of this kind arises in the present action, for I think it quite clear that by the law of both countries, where warranty of soundness is given, and where there exists at the date of the warranty a disease which renders the horse unfit for work for weeks or months, which exposes its life to imminent danger, and which is only ultimately cured by skilful, protracted, and expensive medical treatment, that disease amounts to unsoundness. I am therefore for returning to the judgment of the Sheriff-Substitute.

Lord Justice-Clerk—I should have been glad to have limited myself to a concurrence in the judgment which your Lordships propose, on a simple and short ground, which in my opinion is the only ground on which that judgment can be supported.

This is a case in which unsoundness is maintained on a ground of a temporary and curable ailment—a point on which we have very little authority. I should be disposed to say that Lord Benholme's *dictum* in *Dykes* v. *Hill*, 22 D. 1523, is substantially sound in the ordinary case—in other words, that a temporary and curable ailment known to the purchaser will not constitute unsoundness so as to amount to a breach of warranty. In the present case, however, although the malady was in itself curable, it is plain that the animal's constitution was unable to bear its effects without danger to its life. When the horse was bought it was suffering from a cold. If this had been cured within two or three days, in my opinion it would not have been possible to say according to our law that the horse was unsound, or that there was any breach of warranty, but it is quite plain that here there was something deeper than an ordinary cold, which was not consistent with the warranty of soundness, and on that ground I concur with your Lordships.

I beg leave to say that the English authorities which were quoted to us have not, in my opinion, the very slightest application to this case, but, on the contrary, are essentially misleading. The law and practice in England are totally different from ours in this respect—that there a purchaser may recover damages on account of the failure of a horse to come up to description, without the whole contract being rescinded; there is no such remedy in our practice, and there could be none; we do not allow an *actio quanti minoris*—with us the contract must be wholly rescinded or else stand good. As I have already stated, however, I agree with your Lordships on the other point, which is sufficient for the decision of the case.

The Court therefore pronounced the following interlocutor:—

> "Find it proved that the mare in question was sold by the respondent (defender) to the appellant (pursuer) for £50 under a warranty of soundness, and that at the time of sale the animal was unsound, and the appellant was therefore entitled to return, and the respondent was bound to receive, it back; that the respondent having failed to do so, the appellant was entitled after notice to sell the mare and to recover from the respondent the price paid, with the expenses incurred in the treatment, custody, and sale of the animal, under deduction of the sum realised by the sale; that the animal was sold under a warrant of the Sheriff for £43, 10s.; that the expense incurred by the appellant in the treatment of the animal was £13, 7s., also £6, 16s. for keeping her afterwards at livery, and £2, 9s. attending the sale;" and they therefore decerned against the respondent for £29, 2s., &c.

Counsel for Pursuer (Appellant) — Balfour — Young. Agents—Drummond & Reid, W.S.

Counsel for Defender (Respondent)—Dean of Faculty (Fraser) — Rhind. Agents — Begg & Murray, S.S.C.