Lord Shand was absent.

The Lords recalled the Lord Ordinary's interlocutor, sustained the defender's first plea-in-law, and dismissed the action.

Counsel for Pursuers—Brand. Agent—David Barclay, Solicitor.

Counsel for Defender — Trayner — Jameson. Agent—Wm. Lawson, Solicitor.

Wednesday May 18.

SECOND DIVISION.

[Sheriff of Midlothian.

CROAN *v.* VALLANCE.

Sale—Horse.

Where a horse which had been sold was returned as being unfit for the buyer's purposes to the seller, who afterwards used it to his own profit—*held* that the seller was thereby barred from maintaining an action for its price.

This was an action raised in the Sheriff Court of Midlothian by Patrick Croan, horse-dealer, against Thomas Vallance, a cab proprietor in Edinburgh. It concluded for the sum of £19, 10s. sterling, as the price of a mare which the pursuer averred he had sold to the defender. In the proof which was taken on the averments on record it appeared as follows:—As the pursuer and defender were returning from Dalkeith fair held on 13th May 1880, the former sold and delivered the same evening to the latter, for the sum of £19, 10s., a grey mare for the purpose of being driven as a cab horse; next morning the defender sent back the mare as unfitted for his purpose and as having shown vicious propensities, but the pursuer declined to take her back and returned her. The next morning (the 15th) the defender a second time returned her to the pursuer, who, although he wrote protesting against the return and intimating his intention to put the mare into neutral custody at livery at the defender's expense, nevertheless worked the animal as a cab horse, and, as he deponed in evidence, "he had worked her more since she came into his possession than most cab horses in Edinburgh are wrought—more than he worked his own."

The defender pleaded, *inter alia*, that the pursuer was barred from suing the action, inasmuch as on the return of the animal he had retained and worked and used her as his own property and failed to put her into neutral custody.

The Sheriff (Davidson), affirming the judgment of the Sheriff-Substitute (Hallard), found that as the pursuer had not said or done anything to show that he accepted back the mare, but on the contrary had insisted throughout on his rights as seller, he was entitled to recover the stipulated price.

The defender appealed, and argued—In point of law, the converse was equally sound of such cases as *Ransan* v. *Mitchell*, June 3, 1845, 7 D. 813; *Padgett & Co.* v. *M'Nair & Brand*, Nov. 24, 1852, 15 D. 76; and *M'Bey* v. *Gardiner*, June 22, 1858, 20 D. 1151; and therefore the pursuer's claim for repetition of the price was under the circumstances untenable.

At advising—

Lord Justice-Clerk—In this case we have not heard any discussion on the question whether this horse failed to answer the warranty alleged to have been given by the seller, and whether there is any conclusive proof of the vicious habits attributed to it, but I do not think that it is necessary to do so owing to the way in which the seller dealt with the horse when it was returned upon his hands by the purchaser. The day after the sale the defender brought back the horse to the pursuer, who declined to resile from the bargain, and the horse was sent back. On the next day, however, the horse was again sent to the pursuer's stable and left there. The pursuer communicated with the defender through his agent, asking him to take back the horse, but this was never done. The pursuer, when the horse was sent back to his stable, did not put it out to livery with some neutral party, but kept it at his own stables, and used it for his own behoof in his business, working it, according to his own account, "more since it was in my possession than most cab horses in Edinburgh are wrought—more than I work my own." I think that the pursuer having acted in this way when the horse was returned to his stable under an allegation that it failed to answer the warranty, the present action is untenable, and that we need not go further into the case.

Lord Young—I am entirely of the same opinion. Of course I give no opinion on the question as to whether the defender was entitled to return this horse as not being fit for the purpose for which he bought it, and not according to the warranty alleged to have been given. But it is important as a fact in the case that the defender did return the horse as not fit for his purpose, and that the pursuer accepted the return and proceeded to use the animal as his own, for his profit and in the course of his trade, and that not only for a few days before he raised this action, but, so far as we learn, down to the present time. I hold that that conduct must be held to have imported an acceptance by him of the return of the horse. He was not, I think, entitled to take these two courses at once—to raise this action and to use the animal as his own. The animal was used by the pursuer for the purposes of his trade, and that in such a manner as clearly implied that he thought the horse was well returned. In no other view is his conduct justified. On these two facts—that the defender returned the horse on the allegation it was not fit for his purpose, and that the pursuer used it for his own purposes when it was so returned—I think that this action is quite untenable.

Lord Craighill concurred.

The Lords therefore sustained the appeal and dismissed the action.

Counsel for Appellant—Hon. H. Moncreiff. Agent—Daniel Turner, S.L.

Counsel for Respondent—J. A. Reid. Agent—Charles Robb, L.A.