stances, and accordingly the household latterly came not to be a happy one. But I am not of opinion to any degree that there was harshness or ill-usage, in the proper sense of the word, on the part of the husband; on the contrary, the impression on my mind was that his wife had been treated with great forbearance. She was rather Bohemian in her habits, which her husband was not. He was anxious to rise in the social scale; she had no such desire, and was regardless of such things, and therefore from month to month, and year to year, they went on getting further apart as to their tastes and temperament. I think the husband was forbearing to the last degree; as I have said, he showed very great forbearance on the whole. No doubt there were things—must be in such households—of which the wife might have had reason to complain, and which she might have found hard to bear, but I think she treated him much worse than he did her. I think that her desertion was obstinate, and heartless besides, and was a malicious leaving of her family. Under such circumstances as those described, I have to concur with your Lordships in the result of adhering to the Lord Ordinary's interlocutor, though I would have gladly seen the case disappear by the parties going together again.

The Court adhered to the interlocutors of the Lord Ordinary in both actions.

Counsel for Reclaimer (Mrs Kinnear)—Campbell Smith—Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondent—J. P. B. Robertson—Watt. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Friday, November 3.

SECOND DIVISION.

[Sheriff of Fife.

MACDONALD & FRASER *v.* HENDERSON.

Sale—Horse—Sale by Auction—Special Warranty in Sale Catalogue—General and Special Conditions of Sale—Obligation of Buyer to Pay Price to Auctioneer.

A person bought a horse at a sale by auction. The sale catalogue disclosed the seller, and contained a special warranty of soundness. On the face of the catalogue was the heading, "Special conditions of sale (in addition to those under which these sales are held)." Printed bills were posted up in conspicuous places on the walls of the saleroom containing the general conditions referred to in this heading, one of which was that in the event of the auctioneer giving delivery of any lot without payment of the price he should be entitled to recover payment by action at law without consent of the seller or consigner, and that no defence should be competent against such action on the ground of any alleged defect or disconformity to warranty of the lot sold, the buyer having no claim in respect of such against the auctioneer, but only against the owner or consigner. The auctioneer took the buyer's cheque in payment of the price, and gave delivery of the horse on the day of the sale. Next day the buyer returned it as unsound, and stopped payment of the cheque. The horse died the same evening. *Held* that the general conditions in the printed bills formed part of the contract between purchaser and auctioneer, and that the former having obtained delivery on the footing of these conditions was bound to the latter individually to fulfil his part of the bargain, and was not entitled to stop payment of the cheque on any question of warranty, whatever might be his recourse against the seller.

Observations (*per* Lord Justice-Clerk) on the case of *Henderson* v. *Stevenson*, June 1, 1875, 2 R. (H. of L.) 71.

Macdonald & Fraser, the pursuers of this action, were auctioneers in Perth, and conducted weekly sales of cattle, horses, &c., there. During all sales, and on the day of the sale after mentioned, they exhibited in their sale-hall their general conditions of sale. One of these conditions was to the following effect:—"It is declared that no warranty is given by the auctioneers personally, and that with every desire on their part to describe accurately each lot, such description or particulars as given at the time of sale is solely for the guidance of buyers, who shall be held to have satisfied themselves as to the state, quality, and sufficiency of the lot offered for, and shall not be entitled to object thereto or withhold the price on any ground whatever; also, that this shall not be held as depriving the buyer of any legal claim competent against the consigner, whose name will in every instance be disclosed, but in no case shall the auctioneers be liable; further, that all purchases must be paid for in cash to the auctioneers when called down if demanded, and removed at the conclusion of the sale, and that the lots will be at the sole risk of the respective buyers on being knocked down; further, in the event of the auctioneers giving delivery of any lot without payment of the price, they shall be entitled to recover full payment from the buyer by action at law at their own instance without consent of the owner or consigner of the lot, and no defence against such action will be competent on the ground of any defect, actual or alleged, of the lot sold, or of the same being disconform to description or warranty or otherwise, the buyer having no claim against the auctioneers, but only against the owner or consigner of the lot." The said conditions of sale further contained the stipulation that the foregoing were the terms on which the pursuers did business, and that both consigners and purchasers were to be held as agreeing to, and should be bound to abide by, these conditions. These conditions were printed on bills, four or five of which were posted up in conspicuous places—the lower ends of the bills being about four and a-half feet from the ground—on the walls of the hall, one being near the entrance, and one on each side of the auctioneer's chair, and they were clean and legible.

A sale of horses took place at the pursuers' mart on 4th July 1881, and among those exposed for sale on that occasion was a horse described in the sale catalogue as follows:—"No. 44. Mr

Owen Sullivan, Mullingar, chestnut cob, 5-year-old, warranted quiet and steady in single and double harness and saddle, free from vice, and warranted sound; very fast." On the face of the catalogue there was printed—"Special conditions of sale (in addition to those under which these sales are held)," under which title followed certain special conditions, one of which was—"Unless a special warranty is given as to soundness, buyers will be held as satisfying themselves in respect as to soundness in lithe and limb. This, however, shall not be held as applying to any radical defect in constitution or wind which may not be visible, but which unfits the animal for the purpose for which it is sold. The sale of any horse so deficient shall be void unless due intimation by the seller is given." Henderson, the defender of this action, who had on several previous ocasions attended sales in Macdonald & Fraser's premises and made bids, but had never purchased a horse, was present at the sale, and had in his hands a copy of the catalogue containing these "special conditions." He bade for the cob No. 44, and it was knocked down to him. In payment of the price Henderson tendered, and the pursuers accepted, a cheque, and he thereupon obtained delivery of the cob, and had it conveyed by rail to Cupar-Fife the same day. The same evening he took it out for a drive of about six miles. It seemed then to have a cold. Next morning the horse was observed to be running at the nose, and to exhibit all the other symptoms of a severe cold. In consequence the defender sent it back that day to the pursuers, and stopped payment of the cheque which he had granted them for the price, intimating to them by telegraph that he had stopped the cheque and returned the horse. On its arrival they refused to take it, and it was put into a livery by the railway officials, where it died a few hours later. The next day the pursuers had a *post-mortem* examination of the cob made, which was conducted by two veterinary surgeons in Perth. Henderson attended the examination, accompanied by a veterinary surgeon from Cupar. The two surgeons employed by Macdonald & Fraser gave each a separate certificate that the cob died from congestion of the lungs and pleurisy. Subsequently, in the proof led in this action, they stated their belief that the disease had come on after the sale.

The defender having declined to pay the amount of the cheque to the pursuers, they raised this action against him in the Sheriff Court of Fife for payment of £27, 10s., the price of the horse. They founded on the conditions of sale exhibited in their sale-yard as showing that any claim to refuse payment the defender might have in respect of the horse being disconform to warranty could not be competently made against them, but only against Sullivan, the owner and consigner of the horse.

They pleaded, *inter alia*—"(6) The defender is bound to pay the pursuers the price of the cob although the cob may not have been according to the warranty given in the catalogue, in respect the conditions of sale provide (1) that the pursuers are not liable personally, and in no case liable; (2) that no defence is competent against the pursuers on the ground of the lot being disconform to warranty, the remedy of the defender, if he has any, being against the owner, whose name was disclosed at and previous to the sale."

The defender averred that the horse was unsound at the time of sale, and therefore disconform to the warranty in the pursuers' catalogue. He averred that he had never seen the pursuers' general conditions of sale till this action was raised.

He pleaded, *inter alia* — "(1) No title to sue; and (2) the pursuers' alleged conditions of sale cannot qualify the special warranty contained in the catalogue referred to. (3) The defender having purchased the cob on the faith of the special warranty contained in the said catalogue, and not under the pursuers' alleged conditions of sale, and the cob being disconform to said special warranty, the defender was entitled to return the cob and refuse payment of the price. (6) The pursuers in selling the cob in question were acting merely as agents for the owner, and the animal being unsound the owner is not entitled to recover through his agents payment of the price, and thus necessitate the defender to seek his remedy and sue for repayment in another country."

The Sheriff-Substitute (LAMOND), without taking proof, found in law—"That under the pursuers' conditions of sale the defender is barred from objecting to their right to sue, and that he is barred from setting up any plea against them in respect of defect or breach of warranty;" and therefore repelled the defences, and found the defender liable in payment of the price. He added this note—"When a person goes into a well-known auction-mart to make purchases, he is held to have satisfied himself as to the conditions under which the sales are conducted. In this case the defender admits having for some years attended the pursuers' sales, and on this occasion obtained a catalogue of the subjects to be sold. That catalogue expressly calls attention to the 'special conditions of sale (in addition to those under which these sales are held).' He bought and took delivery; he cannot therefore ignore the conditions under which he bought and took delivery, but must implement them, and that he must do by paying the price to the pursuers. His remedy, if he has any, lies against Mr Owen Sullivan of Mullingar."

The defender appealed to the Sheriff (CRICHTON), who recalled this interlocutor *in hoc statu* and remitted to the Sheriff-Substitute to allow a proof, which having been taken was transmitted to him. Thereafter he pronounced this interlocutor:—"The Sheriff having heard parties, and considered the record, proof, and whole cause, Finds that on Monday, 4th July 1881, the defender William Henderson purchased at the auction-mart of the pursuers, at Perth, at the price of £27, 10s., the chestnut cob, No. 44 of the catalogue, under the warranty mentioned therein; that at the time of the said sale the said cob was unsound: Finds that the defender is not bound to make payment of the said price: Therefore assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses."

He added this note:—"The question whether at the time of the sale on 4th July 1881 the cob in question was sound or not is in the opinion of the Sheriff one of much difficulty. The Sheriff, however, after consideration of the evidence, has come to be of opinion that the cob was unsound at the time of the sale. He thinks that it was

then labouring under a cold, which a few hours thereafter developed into pleurisy and congestion of the lungs, and resulted in the death of the cob on Tuesday the 5th, between seven and eight o'clock in the evening. No doubt the veterinary surgeons examined on the part of the pursuers express with much confidence the opinion that the disease had not begun on the morning of the sale, and they say that had pleurisy or congestion of the lungs then existed it must have been noticed by any ordinary observer. The Sheriff does not doubt that when these diseases are present the symptoms are so marked that they can be easily observed. The difficulty in the present case is whether at the time of the sale the cob was suffering from a cold which developed into these diseases. Barney Murray, who had charge of the horse for some days previous to the sale, and who could have given the best evidence as to its condition, has not been examined. David Sinclair, however, who was with the defender at the time of the sale, and who saw the cob two hours afterwards, when it was being removed to the Perth station to be taken to Cupar, says—'I saw Mr Henderson give the horse a drink, and I noticed matter coming down from the nostrils. It was a sort of mucous. My idea was that the horse was unsound, and that it was colded. It coughed several times on the way to the station.' This was the first time the cold was observed. It however rapidly developed, and there can be no doubt that when the cob reached Cupar the symptoms of cold were quite distinct. That cold, in the opinion of the Sheriff, existed at the time of sale. It was said that the cob was not properly treated by the defender at Cupar, and that he ought not to have driven it out in the evening of the 4th. Although at the time the horse was driven out it was obvious that it was suffering from cold, still it does not appear to have been rapidly driven or treated improperly.

"It was, however, very urgently pleaded for the pursuers, in conformity with their sixth plea-in-law, that 'the defender is bound to pay the pursuers the price of the cob, although the cob may not have been according to the warranty given in the catalogue, in respect the conditions of sale provide (1) that the pursuers are not liable personally, and in no case liable; (2) that no defence is competent against the pursuers on the ground of the lot being disconform to warranty, the remedy of the defender, if he has any, being against the owner, whose name was disclosed at and previous to the sale.' The conditions of sale here referred to are the conditions of sale a copy of which is No. 3 of process, and to which the pursuers say the defender's attention was directed by the notice on the first page of the catalogue No. 7 of process, which is in these terms, 'Special conditions of sale (in addition to those under which these sales are held).' The conditions contained in No. 3 of process set forth that 'no warranty is given by the auctioneers personally,' and 'in the event of the auctioneers giving delivery of any lot without payment of the price, they shall be entitled to recover full payment from the buyer by action at law at their own instance, without consent of the owner or consignor of a lot; and no defence against such action shall be competent on the ground of any defect, actual or alleged, of the lot sold, or of the same being disconform to description, or warranty, or otherwise, —the buyer having no claim against the auctioneers, but only against the owner or consignor of the lot.' Now, it appears to the Sheriff that it is not proved that the conditions contained in No. 3 of process were brought under the defender's notice in such a way as to form part of the contract of sale between the pursuers and defender. The witnesses for the pursuers say that it has been the practice to put up notices similar to No. 3 of process, and that these have always been displayed at the pursuers' mart. Mr Wotherspoon, one of the assistants of the pursuers, says that there are four or five of these bills posted up at different parts of the hall, but he cannot tell when they were last put up. He thinks that it would certainly be after February 1880. Mr Fullerton, another assistant of the pursuers, says there were only three copies posted up, but he cannot tell whether any were posted up subsequent to February 1880. On the other hand, several of the witnesses who have been examined on the part of the defender, and who have frequently attended sales at the pursuers' mart, state that they never saw any conditions such as those contained in No. 3 posted up on the walls. The Sheriff thinks that the pursuers have failed to prove that these conditions, which are somewhat unusual, and not altogether consistent with the conditions in No. 7 of process, were brought under the defender's notice at the time of the sale."

The pursuers appealed to the Court of Session, and argued — Such general conditions as were here founded on, by a uniform course of decision, form part of the contract. The case of *Henderson* is the only one which appears to conflict with this doctrine, and it is special. These general conditions are not derogated from by the special ones in the catalogue, for they are there expressly referred to and imported.

Authorities—Bell's Prin. 132; *Hain* v. *Laing*, May 21, 1853, 15 D. 667; *Young* v. *South-Eastern Railway Company*, L.R., 4 Q.B. 544; *Rough* v. *Moir & Son*, March 5, 1875, 2 R. 529; *Robinson* v. *Rutter*, 4 Ellis & Blackburn, 954; *Ferrier* v. *Dods*, February 23, 1865, 3 Macph. 561; *Mesnard* v. *Alridge*, 3 Esp. 271; *Bywater* v. *Richardson*, 1 Ad. & E. 508; Addison on Contracts, pp. 59 and 391.

Argued for the defender—The cob being unsound at the time of sale, the defender under the warranty was entitled to withhold payment of the price, and the general conditions in the posters, even granting them to have been brought home to the defender's knowledge, which they were not, could not be imported into the contract. The only valid conditions here are those in the catalogue, and these being made by the pursuers are binding on them. Only the seller here has a title to sue. If the auctioneer has a title to sue for the price, he must also have a title to warrant, and if so, the defender's plea of disconformity to warranty is good against the pursuers.

Authorities—*Henderson* v. *Stevenson*, June 1, 1875, 2 R. (H. of L.) 71; *Gilmer* v. *Galloway*, January 29, 1830, 8 S. 420; *Fulton* v. *Watt*, June 21, 1850, 22 Jur. 648; *Payne* v. *Lord Leconfield*, June 19, 1882, Q.B.—Weekly Notes, June 24, 1882.

At advising—

Lord Justice-Clerk — This is an action

brought by a firm of auctioneers at Perth against the defender, who bade for and bought a horse sold at their auction rooms on the 4th of July 1881. The pursuers allege that they allowed the defender to take delivery of the animal without paying the price in cash, on condition of his giving a cheque for the amount; that the horse was accordingly delivered and the cheque granted, but payment of it was stopped by the defender. The pursuers now sue for the amount on the ground of this arrangement, and on the conditions of the sale. In defence the defender pleads that he bought the horse with an express warranty of soundness; that the horse was in point of fact unsound at the date of the sale, and died within two days thereafter of a disease under which it laboured when it was delivered.

Two questions have mainly arisen for judgment, and on these the Sheriffs in the Court below have differed. The Sheriff-Substitute came to the conclusion that under the condition of sale contained in the printed catalogue, as well as in handbills exhibited on the walls of the auction-room, the defence was excluded, and decerned for the amount sued for. The Sheriff has recalled this judgment and assoilzied the defender, holding, first, that the horse was unsound at the date of the sale, and secondly, that the contract of sale was not qualified by the conditions expressed in the handbills, as these were not proved to have been communicated to the defender.

We have now to decide on these conflicting opinions.

It is necessary, in the first instance, to keep clearly in mind the nature of the demand made in this action, and the relative positions occupied by the parties in it. This is not a suit between seller and purchaser. The pursuers were not the owners of the horse, but only the agents who sold it on account of the owner; and as the owner was disclosed in the catalogue, the agent only bound his principal, and did not bind himself in the contract of sale.

The present action is founded, not directly on the contract of sale, although the auctioneers, who gave delivery of the horse, might have had a title to sue for the price, but on the specific though incidental contract made between the purchaser and the auctioneer, on which the former obtained delivery of the horse without paying for it in cash. This was an indulgence to which the buyer was not entitled under the contract of sale, and which at common law was beyond the auctioneers' power in a question with their employer. A sale by auction is presumed to be for cash, unless it be otherwise stipulated, and the auctioneer is not entitled to deliver the article on credit. The auctioneers did it at their own risk, and on the buyer's implied obligation that the cheque should be as good as cash to them. I think that the buyer having obtained delivery from the auctioneers on this footing, was bound to them individually to fulfil his part of the bargain, and was not entitled to stop payment of the cheque on any question of warranty, whatever might be his recourse against the seller.

I should have thought so, although the case would have been narrower, apart from the conditions expressed in the handbill or placards exhibited in the auction room. The purchaser obtained from the auctioneers a privilege or advantage to which otherwise he was not at common law entitled, and the consideration he gave for this advantage was the promised payment of the cheque which he drew. As it turned out, the alteration which the delivery of the horse made on the position of parties was material, for it left the custody and treatment of the animal with the defender without payment of the price, and certainly deprived the seller of the chance of saving it.

On the question, however, of whether the contract of sale and purchase was qualified by the alleged conditions, I entertain no doubt at all if it be held as proved that these were exhibited in the auction-room. The Sheriff-Substitute has found that these conditions of sale were exhibited on the walls of the auction room. The Sheriff thinks this not proved. I concur with the Sheriff-Substitute, and without difficulty. I do not go into the evidence in detail. I only remark, first, that the evidence of any witness who saw these placards exhibited, if believed, is of course worth that of many who did not see them; and secondly, that the reference made in the catalogue to other conditions strongly indicates—I may say conclusively indicates—that they must have been so exhibited.

This catalogue, it is admitted, was in the defender's hands because he pleads on it. Now, in the front of the catalogue is this notandum—[*reads it*]. Then, under No. 44, there is this description of the horse bought by the defender—[*reads it*]. The notice in the commencement of the catalogue proves two very important facts. It proves, first, that there were other conditions of which buyers might be cognisant; and secondly, that the buyer in this instance was aware that there were such conditions, and had due notice of them. Holding, therefore, that these rules were exhibited in the sale-room, let us see how far, if binding, they regulate the question in the present dispute, and then consider if the buyer is bound by them.

On the first of these questions the conditions contained in the handbills are conclusive. These handbills profess to regulate mainly the relations of buyer and auctioneer, those between owner and buyer being determined by the conditions of sale contained in the catalogue. Among the other conditions in the handbill we have—"In the event of the auctioneers giving delivery of any lot without payment of the price, they shall be entitled to recover full payment from the buyer by action at law at their own instance without consent of the owner or consigner of the lot, and no defence against such action will be competent on the ground of any defect, actual or alleged, of the lot sold, or of the same being disconform to description or warranty or otherwise, the buyer having no claim against the auctioneers, but only against the owner or consigner of the lot." Now, if this condition qualified the contract of sale, it is conclusive of the present case, and I have heard no argument to the contrary.

The case is thus reduced to the plea raised by the defender that there is no evidence that the defender ever agreed to be bound by the conditions in the handbill; and the case of *Henderson* v. *The Steam Packet Co.*, and the opinions of the learned Lords in that case, have been relied on as giving support to the contention.

I am, however, of opinion that the contracts made by bidders at an auction may be effectively qualified by general rules set out in published

notices, provided the publication of these notices be such as will lead to the inference that the customer acted on the faith of them. What amount and kind of publication is sufficient to raise this inference is a jury question, and may vary with the circumstances, and with the nature of the subject-matter of the contract, and with the rules or conditions which it is desired to enforce. That rules so published may affect contracts made in an auction-room was expressly decided in the case of *Hain*, 15 D. 667, and the same law was laid down in the case of *Mesnard* v. *Aldridge* in the English Courts, cited by Mr Bell in his Illustrations, vol. i. p. 121 (*supra cit.*), also Bell's Prin. sec. 132.

The present case, however, is clearer, for the existence of other conditions was brought home to the knowledge of the buyer by the terms printed in the catalogue to which I have already referred. The customer was thus put on his inquiry, and cannot allege ignorance; and as his defence is wholly founded on the warranty contained in the catalogue, he cannot deny that he was cognisant of its terms.

I have shown that the condition now in question is in no respect repugnant to the nature of the contract, but, on the contrary, is quite in harmony with it. In that respect the case is illustrated by contrast, not by analogy, by the case of *Henderson* v. *The Steam Packet Co.* In that case *The Steam Packet Co.* being common carriers, had endeavoured, by a memorandum printed in very small letters on the back of a ticket delivered to a passenger in return for the payment of the fare, to engraft a stipulation on the contract of carriage that the carriers should not be liable for neglect. It was held in this Court and in the House of Lords that this ticket was not evidence of a contract, but was only a voucher for the payment of the fare; that the tender of the fare being unconditional, the voucher for it was equally so, unless it could be shown that the passenger was aware of and assented to these conditions; and that the conditions themselves were at variance with the nature of the contract of carriage.

Without, therefore, entering on the question whether the horse when sold was sound or unsound, I am of opinion that the pursuers must prevail. The right of the defender to recover the money may be tried with the owner who warranted the soundness of the horse, but it forms no defence to this action.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court recalled the Sheriff's judgment, and decerned against the defender in terms of the conclusions of the petition.

Counsel for Pursuer (Appellant)—Mackintosh—C. N. Johnston. Agents—Duncan, Archibald, & Cuningham, W.S.

Counsel for Defender (Respondent)—Campbell Smith—G. Burnet. Agents—Boyd, Macdonald, & Jameson, W.S.

Friday, November 3.

SECOND DIVISON.

[Sheriff of Lanarkshire.

CLYDESDALE BANK *v.* BEATSON.

Master and Servant—Negligence—"Spondet peritiam artis"—*Diligence Prestable by One who accepts Office of Trust and Remuneration therefor.*

A bank-teller who by mistake gave away to a person who presented a £100 note of another bank for change into £20 notes, a parcel of ten £100 notes instead of a parcel of five £20 notes, *held* liable to the bank for the amount of the loss of £900 so caused, on the ground that he had been wanting in the reasonable care and skill which by the acceptance of the duties of his post he undertook to exhibit.

William Addison Beatson, the defender in this action, entered the service of the Clydesdale Banking Company as an apprentice in the year 1874, and from October 1878 till the circumstances occurred which led to the present action had been employed as teller in a branch office, first in Ingram Street, and thereafter in George Street, Glasgow. Shortly after entering into the service of the bank he addressed the following letter, as usual with those entering the service of the bank, to the manager:—"I, William Beatson, presently apprentice to the Clydesdale Banking Company at Anderston, Glasgow, have received copies of the rules and regulations of the Officers' Guarantee Fund of the Clydesdale Banking Company, and which are engrossed in the minutes of the directors of the 16th day of June 1854 and 15th day of June 1870; I hereby, with the special advice and consent of my father, Andrew Beatson, Hope Street, Lanark, as my curator and administrator-in-law, agree to become a contributor to the said fund, and to be rated on the sum of £500 sterling, and express my approval and adoption of these rules and regulations, and agree to abide by and implement the same in every particular,"—along with a separate letter from his father, in which as his curator and administrator-in-law he expressly consented to and concurred in his son's obligation. His salary when he entered the branch office was £40 a-year, afterwards raised to £50, and ultimately from January 1881 to £60.

It was part of the defender's duty to give to Mr William Dickson White, the agent of the branch, on each Saturday, at the close of business, a statement of his transactions for the past week. On Monday the 27th February 1882 he began work as usual for the week with his accounts clear, and with the proper number and amount of notes and cash in his possession. He acted as teller during the whole of that week, and at the end of it, on Saturday 4th March, when his accounts were checked by the agent of the branch, they were found to show a deficiency of £901. Amongst his notes was one of the Commercial Bank for £100. The explanation he gave of this deficiency, according to the subsequent deposition of the agent, as well as in his own evidence, was substantially that contained in Statement VI. of his defences in this action, as follows: