The LORD JUSTICE-CLERK was absent.

The Court answered the question of law in the affirmative.

Counsel for First Party — Gloag — Graham Murray. Agents—Mackenzie & Black, W.S.

Counsel for Second Party—Dundas. Agents —J. & F. Anderson, W.S.

Thursday, March 12.

FIRST DIVISION.

SPENCE *v.* BANFF TOWN AND COUNTY CLUB.

Sale—Sale of Heritage—Objection to Title—Fee and Liferent—Expenses of Objection to Title.

William Frazer Johnston purchased certain heritable subjects in Banff, and took a disposition from the seller in the following terms: —"To and in favour of the said William Frazer Johnston and Mrs Alexandra Augustina De Marchie or Johnston, his spouse, in liferent for her liferent use allenarly, and Mary Elizabeth Kerr Johnston and Alice Kerr Johnston, and the other children to be begotten of the marriage betwixt the saids William Frazer Johnston and Mistress Alexandra Augustina De Marchie or Johnston, share and share alike, in fee." The disposition bore that the purchase price had been paid by Johnston. The disposition was recorded in the Register of Sasines, the warrant of registration being in these terms — "Register on behalf of William Frazer Johnston and Mistress Alexandra Augustina De Marchie or Johnston, his spouse, for their respective rights and interests in the register of the burgh of Banff." Johnston sold these subjects to Spence. The disposition in favour of Spence was granted" by "the said William Frazer Johnston, with consent of the said Mistress Alexandra Augustina de Marchie or Johnston, his spouse, for all right of liferent, conjunct fee, terce, or other right which she had or could claim therein, or to any annual rent or annuity payable furth thereof, and by the said Alexandra Augustina de Marchie or Johnston for herself, her own right and interest, with the special advice and consent of the said William Frazer Johnston, her husband, and by them both with joint consent and assent." Spence sold the subjects to the Banff Town and County Club, who objected to the title he offered on the ground that the fee of the subjects was not in Johnston or his wife, but in the children named in the first-mentioned disposition, for behoof of themselves and the other children of the marriage. This Special Case was stated accordingly. *Held* that the fee of the subjects was in William Frazer Johnston, and that the title was good. The Court gave expenses against the Banff Town and County Club in respect that the question was free from any doubt.

Counsel for Spence—Darling—Shaw. Agent —George Andrew, S.S.C.

Counsel for Banff Town and County Club—Begg. Agent—Alexander Morison, S.S.C.

Friday, March 13.

FIRST DIVISION.

THE BOARD OF POLICE OF GREENOCK *v.* THE GREENOCK PROPERTY INVESTMENT SOCIETY IN LIQUIDATION.

Police Assessment for Streets and Sewers—Heritable Creditor — Preference — Greenock Police Act 1877 (40 and 41 *Vict. c. cxciii.*), *secs.* 407, 408, 441.

The Greenock Police Act 1877, by section 408, provides that the "expense of streets and sewers payable under the Act by the proprietor of any lands or heritages shall be a real burden and charge on such lands or heritages, in priority to any incumbrance or charge on or affecting the same and created subsequently to the date when the petition for authority to execute the work on account whereof the expenses are payable was presented." Section 441 provides that "when the proprietor of any lands or heritages shall be liable to the board in any sum due in pursuance of the provisions of this Act, it shall be lawful for the board to recover the amount from the occupier of such land or heritage to the extent of the rent due by such occupier at the date when notice of the claim is given, and the occupier shall after such notice be bound to retain and account to the board for any rent due by him, and shall be entitled to an abatement from his landlord corresponding to the sum so retained and accounted for." By the interpretation clause the word proprietor includes "heritable creditors, or other persons who shall be in the actual enjoyment of or who shall take the rents and profits or produce of the lands or heritages."

The Police Board made a claim under this Act against the liquidator of a Property Investment Society who had entered into possession of certain heritable properties in the burgh over which the society held bonds, for the sums due by and chargeable on the properties as their share of the expense of streets and sewers. The Board maintained that these assessments should be treated as charges upon the rents after deducting feuduties, taxes, repairs, &c., but in priority to the interest on the bonds. The liquidator founded on section 408 and maintained that there was no preference, as the society's bonds were prior in date to the petitions for authority to execute the work. *Held* that the terms of section 441 were so inconsistent with the construction which the liquidator sought to put upon section 408, that his argument, rested as it was merely on an implication, could not receive effect, and that therefore he was bound to pay the past-due assessments

out of the rents, after deducting feu-duties, taxes, repairs, &c., but in priority to the interest on the bonds.

This was a note presented by the Board of Police of Greenock in the liquidation of the Greenock Property Investment Society, claiming a preference over the rents of certain heritable properties in Greenock. The liquidator, as representing the society, was in possession of these properties, over which the society held bonds, and was in receipt of the rents. The Police Board required the liquidator to make payment to them of the sums due and chargeable from the properties as their share of the expense incurred under the Greenock Police Act 1877, in levelling, forming, and sewering certain new streets in which the properties were built. They claimed that all the past-due proportions of assessment for the streets and sewers should be treated as charges upon the rents intromitted with by the society, and should be paid therefrom, after deducting feu-duties, taxes, repairs, and other similar charges, and in priority to the interest on the bonds affecting the subjects. The liquidator refused to recognise the claim, except to the extent of any surplus rents which might remain in his hands after satisfying not only feu-duties and necessary repairs, but also the interest on the prior bonds, and the society's bonds which were executed over the subjects before the date when the petition of the Police Board for warrant to execute the improvements was presented to the Dean of Guild Court.

The sections of the Greenock Police Act 1877 (40 and 41 Vict. cap. 193) which bear upon the question are quoted in the opinion of the Lord President *infra*.

The amount of past-due special assessments for which the Police Board claimed was £170, 9s. 10d., but in the course of the proceedings this was restricted to £140, 13s., the deductions being £22, 15s., the sum in arrear of special assessments imposed for years prior to the year in which the society entered into possession of the properties to which they applied, and £7, 1s. 10d. which had already been paid by the factor for the first bondholders.

The Police Board argued that the word "proprietor" in the statute was declared by the interpretation clause to apply to "heritable creditors or other persons who shall be in the actual enjoyment of, or who shall take the rents and profits or produce of, such lands and heritages;" that having regard to the case of *M'Knight* v. *Omond's Trustees*, November 29, 1872, 11 Macph. 154, and without resorting to the assessing clauses, the liquidator was liable as owner; that under section 407, declaring such special assessments to be a real burden on the lands, meaning thereby not a feudal burden but a charge running with the land, the condition of a heritable creditor, trustee in bankruptcy, or a liquidator taking possession, was that the assessments due and exigible from the property under the statute should be paid.

The liquidator argued that under section 408 the expense of streets and sewers was constituted a real burden or charge only in priority to any incumbrance or charge which was created subsequently to the date when the petition for authority to execute the work was presented; that the bonds were prior in date to the respective petitions for authority to execute the work, and that accordingly the society was entitled to charge the interest of the bonds, subject to said exceptions, against the rents before paying any part of the Board's claims.

At advising—

Lord President—This is a question which has arisen in the liquidation of the Greenock Property Investment Society (Limited). It appears that the Society is in possession of certain heritable properties in Greenock under bonds which they hold over the properties, and are in receipt of the rents, and the Police Commissioners of Greenock have made a claim against the Society, through its liquidator, to pay out of these rents certain assessments which have been imposed upon the properties. The liquidator has declined to recognise that claim except to the extent of any surplus rents that may remain in his hands after satisfying not only feu-duties and necessary repairs, but also all interest on bonds over the subjects prior in date to the bonds in the hands of this society, all of them being not only dated before the date when the assessment was laid on, and before the date of the winding-up of the company, but also prior to the date when the petition was presented to the Dean of Guild Court for warrant to execute the improvements in respect of which this assessment is imposed.

Now, the Police Commissioners, on the other hand, submit that the bondholders in possession should be allowed to deduct from the rents the feu-duties, taxes, repairs, and other necessary charges, but they object to the liquidator being allowed deduction of the interest on these bonds over the properties, in priority to these assessments. The case was a little complicated at first by reason of some specialties, but these have now been removed by the amendment made upon their claim by the Police Commissioners, and I think the question, as I have now stated it, is the only one that remains for decision.

Now, this question depends entirely upon the construction of a certain Act of Parliament obtained by the Police Commissioners, and the contention of the liquidator is that under a certain section of that Act of Parliament—section 408—the expense to cover which this assessment has been laid on is, as he states it in his answers, "constituted a real burden or charge only in priority to any incumbrance or charge which was created subsequently to the date when the petition for authority to execute the work was presented," and he states that the bonds in respect of the interest on which he claims a preference are all prior in date to the petition for authority to execute the work. Now, if the 408th section of this statute bears the meaning which is contended for by the liquidator, without any doubt he is entitled to prevail. But that raises a question upon the construction of this statute, which I must say is one of no little difficulty, and to explain the grounds upon which my judgment is to proceed I am afraid will render it necessary to examine a number of the clauses of this statute.

The Property Investment Company being heritable creditors in possession are within the meaning of this statute the proprietors of the subjects for the time, because in the interpretation clause it is provided that the word "proprietor" shall

mean not only "the proprietor of the lands or heritages" in the ordinary sense, but shall apply to a great many other persons, and among others to "heritable creditors or other persons who shall be in the actual enjoyment of, or who shall take the rents and profits and produce of, such lands and heritages"—a description which precisely answers to the position of these bondholders. The expense which is intended to be recovered by means of this assessment is the expense of the formation of streets and roadways and also of sewers, the first section relating to it being the 346th, which provides that the streets shall be made and completed at the expense of the proprietors of lands and heritages in such street, or such portions of a street, which shall include the expense of making foot-pavements, kerbs, and so forth.

The 350th section provides, again, specially that the board shall be relieved of all these expenses by the proprietors.

Then there are some sections which provide for the way in which application is to be made to the Dean of Guild, and the way in which the expense is to be dealt with. And the next section which has any bearing upon the matter is one relating to the case of constructing sewers—section 375—which seems to me to place that subject just in the same category as expenses of making streets.

Now, it being made perfectly clear, I think, by these clauses that this is an expense which the Police Commissioners are entitled to recover from all persons who answer to the description of proprietors of the subjects, and the mode of recovery being prescribed clearly enough, we come to the 400th section, which has special reference to the assessments which we are now dealing with, because this is an expense which is not to be recovered all at once from the proprietor of the subjects, but is to be extended over a certain number of years in order to make it fall more lightly upon the proprietor for the time. Section 400 provides—"In all cases where the expense of streets and sewers due and payable by individual proprietors shall exceed the sum of ten pounds, the board shall, within such time as they shall think proper, resolve that the board shall be recouped and repaid such expense and all interest which may grow due thereon or on the portion of such expense which may from time to time remain unpaid till repaid, as well as the cost of borrowing money to pay the said expense and interest, and the cost of imposing, levying, and recovering the same, by means of an annual special assessment to be levied in just and equal portions for the period of ten years, and which shall be imposed upon and levied and recovered from the proprietors from time to time of the several lands and heritages, on both sides of the street, as specified in said certificate by said assessor, and which resolution shall specify the annual amount of such special assessment." Now, the assessment in this case was laid on under the authority of this section. It is to endure for ten years, and the amount which is sought to be recovered is not objected to as being beyond what the Commissioners are entitled to recover in virtue of this section.

But then it is farther provided by section 402 that "upon the same special assessment roll being made up, it shall be signed by the provost and one of the magistrates, and thereupon the collector shall proceed to levy and recover the said special assessments from said proprietors, all as near as may be in the same manner, and subject to the same conditions and provisions as are contained in this Act with respect to the imposition, intimation, and recovery of the said police assessments, which conditions and provisions shall, in so far as the circumstances will admit, apply to the imposition, intimation, and recovery of the said special assessment." It is not necessary to refer to the clauses directing the mode in which the police assessment is to be recovered, because they are very much in the ordinary terms, and the police assessment under this Act I doubt not is just like any other local rate which is to be recovered by summary warrant, and it need hardly be added that it is like the police assessment, but nothing like the private debts of the proprietor, or burdens imposed upon subjects by voluntary acts of the proprietors, or by the diligence of creditors. In short, it just belongs to those local rates which like public taxes form a primary charge upon heritable property in this sense, that they are recoverable from the proprietor in preference to anything else.

Then it is provided further by section 407 that "such special assessments shall, with the legal interest thereof from the time when the same shall be declared payable, together with all expenses incurred in the recovery thereof, continue real burdens on the lands and heritages liable for the same, and in respect of the proprietorship of which the same shall be payable, but that only for ten years from the date when the same shall be respectively payable as against *bona fide* singular successors or heritable creditors: Provided always that the said assessments shall not form real burdens on unfeued lands until the same shall be feued out," and so forth. Now, the statute here speaks of the assessments forming real burdens on the lands. It is not very easy for anyone who is accustomed to speak of real burdens with accuracy of language to understand what is meant when it is said that this assessment shall form a real burden on the lands. There is no mode of constituting it a real burden on the lands, and therefore it is plain that this is just an inaccurate mode of speaking of such assessments. Although in popular language they are called burdens upon lands, they are not in their nature real burdens at all in the proper sense. They are personal debts of the proprietor. They are payable in respect of the lands and according to the value of the lands, but they are truly the personal debts of the proprietor; and although no doubt they may be recovered out of the rents, or from anybody who intromits with the rents, that does not by any means constitute them real burdens, and the language of this section therefore seems to me to mean nothing more than that as regards singular successors and heritable creditors the charge against them in the character of proprietors shall not endure for a longer period than ten years, meaning thereby, as I understand, that supposing any part of the ten years' assessments to remain unpaid and recovered till after the expiry of the ten years, then the persons who come in, whether as *bona fide* singular successors or heritable creditors, are not to be liable for that portion of the burdens.

But the next section is one upon which the

liquidator as representing these heritable creditors takes his stand. It is the 408th, and it provides that "all expense of streets and sewers, and other expenses by this Act, or any bye-law thereunder made payable by or recoverable from the feuar or proprietor of any lands or heritages, with such interest thereon as by this Act or any such bye-law is provided for, shall be a real burden and charge on such lands or heritages in priority of any incumbrance or charge on or affecting the same, and created subsequently to the date when the petition for authority to execute the work on account whereof the expenses are payable was presented." Now, the liquidator says that this clearly implies that any incumbrance or charge affecting the lands which was created or existed prior to the date when the petition for authority to execute the work for which the assessment was laid on was presented is preferable to this assessment—that is to say, the interest of such incumbrances or charges are preferable. That appears, at first sight at least, to be an implication justified by the words of this section. But it must be kept in view that it is only an implication. It is not expressly provided in this section that the interest upon securities or incumbrances, or charges existing prior to the presentation of the petition, shall be preferable to the assessments, but what it provides is that the assessments shall be preferable to these incumbrances which are created subsequent to the presentation of the petition. The implication, as I have said, is pretty clear, at first sight at least, but still it must be kept in view that it is but an implication, and that there is no express provision in the statute to the effect contended for, and if the contention of the liquidator is well founded, this assessment is certainly placed in a position in which no other assessment that I have heard of is placed by Act of Parliament. It is just a local rate laid on and recoverable for public purposes within the burgh by what may fairly be called a Municipal Act, and yet, according to this construction, heritable creditors, provided only their securities are dated prior to the time when the petition to the Dean of Guild was presented, are free, and the interest of their debt is to be preferable to the local rate. This is extraordinary, and I should certainly say unprecedented. Surely nothing is more clear in practice than this, that when any security is about to be created over land in favour of a creditor advancing his money, the creditor in estimating the rental of the property which he looks to for his security, takes not only the public taxes but all local rates into view, and deducts them, and he never assumes for one moment that the interest of his bond will come into competition with either the one or the other. But still if the liquidator's contention is sound, the heritable creditor will secure a priority for his interest over this assessment, provided only the heritable bond is prior in date to the date of the presentation of the petition to the Dean of Guild.

But I find another section in this statute, which seems to me to be perfectly impossible to reconcile with that construction of the 408th section, and that is what renders so important the observation which I have already made that the liquidators' contention depends not upon the express words of the 408th section but upon an implication from them. The section to which I now refer is the 441st, and it provides this—"Where the proprietor of any lands or heritages shall be liable to the board, or to any officer on behalf of the board, in any sum due in pursuance of the provisions of this Act, it shall be lawful for the board or for such officer to recover the amount from the occupier of such lands or heritages, to the extent of the rent due by such occupier at the date when notice of the said claim shall be given in manner hereinbefore provided, or which thereafter from time to time shall become due by him to such proprietor, and the occupier shall after such notice be bound to retain and account to the board or to such officer for any rent due by him, and shall be entitled to an abatement from his landlord corresponding to the sums so retained and accounted for, without prejudice to the other rights, powers, and securities conferred upon the board by this Act." Now the meaning of that section so far is quite clear. It gives a new mode of securing and recovering of assessments among others in addition to those already given to the Police Commissioners. It provides that they or their collector may go to the tenant or occupier of the subjects in respect of which the assessment is laid on and demand from him out of the rent which he is due payment of the assessment or expense, and the occupier is bound to pay and is entitled to retain so much of his rent for the purpose of enabling him to pay this expense or assessment. It is odd enough,—but perhaps I should not say that anything is very odd in this statute, considering what anomalies we have got to deal with,—that there is a new term introduced here, which we have not met with in the statute before, and that is the word "landlord." The occupier is to be entitled to an abatement from his landlord corresponding to the amount so retained and accounted for by him. Now, does that word "landlord" have a parallel and equally comprehensive meaning with the word "proprietor?" If not, then it might be possible to reconcile this 441st section with the construction of the 408th section contended for by the liquidator, because it might then mean that the tenant or occupier—the person paying the rent—is bound to pay to the collector of the board all the rent that he has freedom to dispose of—all the rent that would go to the proper landlord—that is, to the radical owner of the property—but not the rent that he is bound to pay to such classes of proprietors as heritable creditors and the like. But then I do not think it is possible to give that meaning to the word "landlord" here, because it will be observed that the term "proprietor" is used in this section also, and obviously used for the purpose of this section identical with the term "landlord." He is to pay so much of his rent as is due—"so much thereof from time to time as shall become due by him to said proprietor,"—and then he is to be entitled in accounting for his rent to a corresponding abatement from his landlord. I think that shews clearly that the word landlord in this section, although it is not stated in the interpretation clause to be so, is used in the same sense as proprietor, and proprietor includes heritable creditor. Now then, if the person who pays rent for the subject is bound to pay out of the rent the expense or assess-

ment demanded by the board or their collector, and is entitled to retain from the heritable creditor in possession so much of his rent as he has so paid away, how is it possible to reconcile that with the construction which has been put upon the 408th section by the liquidator. The two are utterly irreconcilable, and therefore we are driven by absolute necessity to endeavour to find some other construction for the 408th section than that which is contended for by the liquidator. It is not very easy I must say, because the implication upon which the liquidator founds his argument is a very strong one, and if there had been nothing against it in any other section of the statute I think it must have received effect. But, in the first place, to go back to the 408th section, there are some words used there which have no fixed meaning in this statute—I mean the words "incumbrances or charges," and of course everything will depend here upon what the meaning of the words "incumbrances or charges" is. Does it or does it not embrace a heritable bond, and the interest accruing on it? If it does not, then there is an end to the value of the 408th section for the liquidator's case. The section would not then apply in its implication to the case that we are dealing with. Now, all I can say is that I find it much easier to hold that the words "Incumbrances or charges" are not intended to include heritable securities and the interest accruing upon them, than to hold that the 441st section is to receive no effect at all. And that is the dilemma in which I find myself in construing this statute, and that is the only solution that occurs to my mind as possible. I am therefore of opinion that the apparent implication arising from the 408th section cannot be given effect to, because it is absolutely inconsistent with the express provision of section 441, and therefore I think that the Board of Police are entitled to have their claim as now restricted given effect to.

Lord Mure—I have come to the same conclusion as your Lordship, and I have really little to add to what has been so well expressed by your Lordship.

This application is made in the circumstances set forth by the Police Commissioners, that the Greenock Property Investment Society (now represented by their liquidator) are in possession of certain heritable properties in Greenock over which the society held bonds, and being in receipt of the rents, has been required by the claimants to make payment to them of the sums due and chargeable on said properties as their share of the expense incurred under the claimants' Act of Parliament in levelling, forming, and sewering certain new streets on which the properties have been built. Then they say that the liquidator has declined to recognise the claim, except to the extent of any surplus rents which may remain in his hands after satisfying not only feu-duties and necessary repairs, but also the interest on the prior bonds and the society's bonds which were executed over the subjects before the date when the petition was presented to the Dean of Guild Court for the warrant to execute the improvements.

Now, it seems to me that the practical effect of our sustaining that claim on the part of the liquidator would be that it would put the Police Commissioners in the position of not being able to recover any of the assessments imposed by them for the expense of forming and sewering the streets, and making them fit for the occupation of the parties in possession of the properties in these streets to whom the society had advanced large sums of money, as we know they did, upon buildings of this sort, or at any rate so much of that expense as might remain in the hands of the liquidator in the shape of surplus rents after providing for the interest on the bonds over these properties, and some other charges for feu-duties, repairs, and the like. And in support of his contention the liquidator founds on the Police Commissioners' Act of Parliament. I can only say that it would appear to me to be a very strange thing if that were the result of the Act. We have been referred to various sections of the Act in support of that view, and these have been very fully gone over by your Lordship. In the 408th section there is a kind of implication to the effect contended for, but there is no express provision that the interest on these bonds shall be preferable to the expense of making the streets in which the properties which form the subjects of the securities are situated. I cannot hold that to be consistent with the other clauses in the Act. I am therefore of opinion, following your Lordship, that this claim of the liquidator is unfounded, and that he is not entitled to deal with the matter in the way he desires.

Lord Shand—I am entirely of the same opinion.

There can be no doubt that if the argument of the liquidator were followed to its true consequences there would be no knowing where it would lead to, and in this case probably it would lead, as your Lordship has said, to an unprecedented and most unreasonable result.

The statute in one of its sections provides that where the assessment extends to the sum of £10 it shall be distributed over ten years after the date of the imposition of the assessment, and by a subsequent clause it is provided that after these ten years during which the assessment falls to be levied shall elapse, singular successors or others coming into the property shall be free from any responsibility for the rate. And the argument of the liquidator practically comes to this, that if a proprietor can only arrange to have a sufficient number of securities over his property so that he shall steep the rents—if I may use such an expression—in the payment of interest on bonds, the result would be that during the ten years to which I have referred there would be no assessment in respect of the expense of the sewers or streets which had been made, and the proprietor would be entirely relieved of any obligation to pay such assessment, or, to put it in other words, it would simply come to this, that proprietors would put a sufficient number of heritable securities over their properties, or charges by way of interest, so as to enable them to get their properties enhanced in value by the municipal authorities to the extent of the streets in the immediate vicinity of these properties and the sewers for the drainage of these properties, because the works would all have to be executed at the expense of the municipality without any claim for relief, or, in other words, that the other proprietors shall have the privilege of paying for the

sewers, streets, &c., which were constructed and intended for the benefit of all the proprietors. If that was the meaning and intention of these clauses, of course I should hold myself bound to give effect to them, however extraordinary and unreasonable the result of that might be. And very extraordinary the literal result of some of these clauses would be. Look at section 408. It is framed so as to give rise to difficulties that the framer did not contemplate or ever fancy. I find another section—441—which in express terms indicates that such assessments as we are here dealing with shall be a first charge upon the ground. That, I think, is substantially what section 441 comes to, because the collector is entitled to go to the occupier and say, "Out of your rent give me my assessment." In this position of matters, and looking to the fact that this last section 441 is later than the bungled section, as I must call it, I come to the same conclusion as your Lordship, and laying aside, as your Lordship does, the implication founded on the words of the 408th section, I come to the conclusion that this assessment is preferable to the interest of the bonds, and that the liquidator is not entitled to uplift these rents except upon the footing of providing for this assessment along with the feu-duties, taxes, and similar charges.

Lord Adam not having heard the argument, gave no opinion.

The Court pronounced this interlocutor:—

"Ordain the liquidator to pay to the Board of Police of Greenock the amount of their claims as now restricted, out of the rents of the subjects of which the Society are in possession as heritable creditors, in preference to the interest on the bonds secured over the said subjects by disposition in security or otherwise, and decern: Find the liquidator liable in expenses," &c.

Counsel for Greenock Police Board—Guthrie Smith—Begg. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Liquidator—R. V. Campbell. Agent—W. B. Glen, S.S.C.

Friday, March 13.

FIRST DIVISION.

[Sheriff of Lanarkshire.

NEWLANDS *v.* LEGGATT.

Sale—Sale of Horse—Warranty—Soundness—Treatment by Purchaser—Personal Bar.

A horse was bought under a warranty of soundness. The day after the sale a cold showed itself. The purchaser continued to treat the horse, and in the course of its illness he had its tail docked. He called in no veterinary surgeon till two days before the animal's death, which occurred twelve days after the sale, and he said nothing to the seller till the day before the death. *Held* that no breach of warranty was proved, and that in any view he was barred by his actings from seeking repayment of the price.

William Newlands, horse dealer, Glasgow, on 5th January 1884 purchased from William Leggatt, horse dealer, a chestnut mare which was warranted sound. The price paid was £39, 15s. Newlands took delivery of the mare and placed her in his stables. The mare died on the 17th January. This was an action raised by Newlands against Leggatt to obtain repayment of the sum of £39, 15s., the price of the mare.

The pursuer averred that at the date of the sale the mare was not conform to warranty, as she was labouring under a severe cold and was not a good feeder, of which the defender was well aware.

He further averred that he took the greatest care of the mare while she was in his stables, but that she refused to feed, and died on the 17th January.

The defender averred that while warranting the mare sound at the date of sale, he only, as regarded her feeding, represented to the pursuer that she had always fed well with him. He denied that she had any cold when delivered to the pursuer. He further averred that upon the fourth day after he got delivery of the mare, the pursuer docked her rump or tail, and he alleged that her death was caused by excessive fever brought about by neglect of a slight cold which she had caught after she left his (the defender's) stables, and by the docking of her tail.

He pleaded, *inter alia* — "(2) The mare in question having been at the date of delivery sound, the action should be dismissed. (3) The mare having died through the pursuer's own neglect and act, the defender is entitled to absolvitor. (4) In any case, the action is barred by the pursuer having, without defender's authority, docked the rump or tail of the mare in question."

The Sheriff-Substitute (Spens) pronounced the following interlocutor, from which the facts fully appear—"Finds the defender, on or about 5th January 1884, sold the pursuer a chestnut mare at the price of £40; Finds it was sold with a warranty that it was sound, all correct, and a good feeder: Finds the said mare was taken delivery of by pursuer on or about said date: Finds, under reference to note, that while with the pursuer said mare was not properly treated: And finds, as matter of law in these circumstances, that the pursuer is barred from making any claim of repetition for the price of said mare, which died in the defender's hands on or about the 17th day of said month of January: Sustains accordingly the defences, and assoilzies the defender: Finds him entitled to expenses, &c.

"*Note.*—There is some conflicting evidence as to the precise terms of the warranty granted. I think there is no doubt the mare was warranted to be sound and a good feeder, and I also incline to believe that it was warranted all correct. I do not think it is proved that when she left defender's stables the mare was unsound, or had manifested any signs of anything being the matter with her. She was sound and a good feeder, therefore, when she left the stables. It is open to argument that she must, when she left the stables, have had the seeds of the cold in her which ultimately developed into inflammation of the lungs, through which, or the fever caused by which, she died. If this argument were sound, the further argument would then follow that the mare was not at