ships. One of them is about the effect of the widow taking the one course or taking the other course. It was represented to her at that time in the way of a contrast. She was informed that £1700 a-year less would come to her if she took her legal rights than would be received by her if she chose her conventional provisions. But she was not told that if she took her legal rights she would also be entitled to an allowance for the upbringing of the children. Mr Keiller, who was urging the matter, and Mr Stephen, were both trustees, and that matter should have been brought clearly before her by them. It certainly must have come rather as a shock to this lady in the midst of her grief to be told—"If you do not take what your husband has given you you will get £300 a-year, and if you take it you will get £2000 a-year," which were not the actual facts of the case.

I cannot help referring to what is a matter of great importance in considering as to whether this lady was fairly advised—I do not mean in the sense of honestly—but in the sense of fully and properly. There is no doubt that Mr J. M. Keiller was a very dominant party in the whole of this matter. Mr Keiller's condition of mind is carefully noted in Mr Stephen's memorandum of his visit — "Surprised and displeased that there should have been any hesitancy." I do not say that Mr Stephen told this widow that. He may not have told her that, but I have not a doubt in my own mind that it was conveyed very clearly to the widow that Mr Keiller was very anxious about the matter, and that one cause of her electing as she did was her belief in the tremendous power of Mr Keiller, who was practically master in this valuable company in which she had such large assets, and that she was thus influenced in a way that she ought not to have been influenced. I happened to come across a passage which I think clearly brings that out, for the clergyman whom she consulted says in regard to the result of the interview—"Yes, she seemed to be in an intimidated state, not just knowing how Mr Keiller might act." Now, considering that here there could be no prejudice to others whatever through delay, and looking to the whole circumstances of the case, I come to the conclusion at which your Lordships have arrived.

There is only one other matter I would like to mention, and that is, that I entirely concur in the opinion expressed by Lord Moncreiff, that the trustees might well have been content to take the decision of the Court of first instance in a matter of this kind.

The Court pronounced the following interlocutor:—

"Refuse the reclaiming-note: Adhere to the interlocutor reclaimed against: Remit the cause to the said Lord Ordinary to proceed therein as accords: Find the pursuer entitled to expenses from the date of closing the record to this date; and remit the same to the Auditor to tax and to report to the said Lord Ordinary, to whom grant power to decern for the taxed amount thereof."

Counsel for the Pursuer—Balfour, Q.C. —Salvesen. Agents—J. & D. Smith Clark, W.S.

Counsel for the Defenders—Ure, Q.C.—W. C. Smith. Agents—Buchan & Buchan, S.S.C.

Thursday, June 9.

SECOND DIVISION.

[Sheriff-Substitute of Inverness, &c.

MALCOLM *v.* CROSS.

Sale—Horse—Warranty—Words of Warranty Used but No Sale Concluded till Subsequent Occasion—Rejection—Duties of Buyer after Rejection.

In an action for recovery of the price of a horse rejected by the buyer as disconform to warranty, it appeared that the buyer and seller met and had some conversation about the horse, in the course of which, as alleged by the buyer, the horse was warranted sound by the seller. Nothing further was done on that occasion, but some time afterwards the seller took the horse to the buyer and left it with him on trial. Some weeks later, the seller not having heard from the buyer, wrote inquiring whether the buyer was to keep the horse, to which the buyer replied that he was, and the following day wrote enclosing a deposit-receipt for a sum less than the price originally asked, saying that he had no doubt the seller would be satisfied with the enclosed amount. In this letter nothing was said about a warranty. The seller accepted the sum sent as the price of the horse. About six weeks later the horse was discovered to be unsound, and intimation of rejection was sent to the seller, but he refused to take it back, and it remained with the buyer until it was sold by warrant of the Sheriff more than three months after. *Held* that, even assuming words to have been used at the first interview which would have amounted to a warranty if a sale had been there and then concluded, this did not, in the circumstances, constitute the subsequent sale a sale upon warranty, and that consequently the buyer was not entitled to repetition of the price.

Question whether on the evidence words amounting in law to a warranty were proved to have been used at any time by the defender.

Observations (*per* Lord Justice-Clerk and Lord Young) (1) upon the question whether in the circumstances of this case the rejection was timeous; and (2) upon the duty incumbent upon the buyer after rejection if the seller

refuses to take the horse back to apply immediately for warrant to sell.

This was an action brought in the Sheriff Court at Fort William by George Malcolm, factor, Invergarry, against Ewen Cross, shepherd, Glen Turret, Roy Bridge, in which the pursuer craved (1) repetition of the sum of £29, being the price paid by the pursuer for a horse purchased by him from the defender on 1st June 1897; and (2) decree for the expense of the keep of this horse from 16th July 1897, when it was discovered to be unsound, and intimation of rejection was sent to the defender, until it should be sold under judicial sale, less the free proceeds of such sale.

The pursuer averred, *inter alia*—"(Cond. 1) On or about 10th May 1897 the pursuer met defender at Spean Bridge where the horse in question was shown and examined with a view to a purchase. The pursuer intimated that the horse was wanted for Mrs Ellice of Invergarry, his constituent, as a carriage horse, and the defender warranted it as suitable for her purpose and sound in the legs and in all other respects. (Cond. 2) On the strength of, and relying on, the warranty given by the defender at Spean Bridge, and subsequently repeated at Invergarry in presence of William Hislop, groom there, and the pursuer, the pursuer on 1st June 1897 agreed to purchase the horse for Mrs Ellice, and did purchase it, and paid the sum of £29 as the price thereof out of his own funds, and repayment has not been made to him by Mrs Ellice."

The defenders denied that the horse was warranted sound. It was ultimately admitted that it was unsound when sold to the pursuer. The pursuer did not maintain that the defender knew the horse to be unsound at the date of the sale.

The pursuer pleaded—"(1) The said horse being disconform to warranty the pursuer is entitled to repetition of the price paid by him as craved. (2) The pursuer having had to pay the expense of the keep of the said horse from the 16th day of July 1897 is entitled to payment therefor by defender."

The defender pleaded—"(1) The defender having given no warranty as to the soundness or otherwise of the horse in question, is entitled to be assoilzied from the conclusions of the summons with expenses. (2) The sale having been one of sale 'on approval,' the pursuer should be held to have satisfied himself as to the soundness and fitness of the horse before paying the price. (4) *Mora.* In any event, the horse not having been timeously rejected, the present action is incompetent and unfounded."

A proof was allowed. The facts may be summarised as follows:—In April 1897 the pursuer met the defender by arrangement for the purpose of looking at a horse which the defender had for sale. No sale was effected upon this occasion, but the horse was examined by the pursuer and by an innkeeper called Wilkinson, and some conversation with regard to it took place between the parties. Referring to this interview, the pursuer deponed—"He (Wilkinson) said he had suspicion as to one of the hocks being unsound. He asked defender why the hock was so thick and unsound looking, and he replied that what appeared wrong with the horse arose from bad shoeing on the last occasion. Defender stated that he guaranteed the horse to be a proper horse, sound in every way, except that it had not been broken to carriage harness. Notwithstanding Mr Wilkinson's opinion I trusted to Mr Cross's representation, as I had had previous dealings with him of a satisfactory kind."

The defender deponed—"Mr Malcolm did not ask me to warrant it sound. . . . While in the hotel Mr Malcolm did not ask me to warrant the horse for any purpose or for soundness. . . . Mr Wilkinson remarked that he thought there was something wrong with the horse's leg, and I said that so far as I was aware there was nothing wrong. I told Mr Wilkinson that if I thought there was anything wrong with the horse I would not sell it to Mr Malcolm. . . . Mr Wilkinson said nothing to me about the horse being lame, nor did he advise me not to warrant the horse as sound. I am sure that I did not tell Mr Wilkinson that I was to warrant the horse sound."

Wilkinson deponed—"When the horse was put into the stable I asked defender if he warranted it as thoroughly sound, and he said he did. I cannot remember that I heard the defender give to pursuer a warranty in any terms. Mr Cross said to me in the stable that he was going to give a warranty of soundness to Mr Malcolm. I told Mr Malcolm that I thought the horse was not sound. He replied that he had every confidence in the defender, and I did not press my opinion upon pursuer. I warned defender that, as Mr Malcolm was a great friend of his, he should be careful not to warrant a horse sound which was not so."

The price which the defender asked was £31.

Some weeks later the defender having received no communication about the horse from the pursuer took it to Invergarry himself, and ultimately left it there with the pursuer's consent, on approval. Referring to this occasion the pursuer deponed—"Defender brought the horse, and in the presence of William Hislop, groom at Invergarry, he repeated the warranty of soundness in much the same words as used by him at Spean Bridge." Hislop deponed—"At the door pursuer and defender had some talk about the horse, when the defender said he would guarantee the pony to be a quiet pony in all kinds of work except carriage harness work, which it had not been used to. I did not hear him guarantee the horse in any other respect. I did not hear pursuer ask for a guarantee in any other respect. That was all I had heard mentioned with regard to a guarantee." The defender said that when he met Mr Malcolm with the groom in charge of the horse he did not warrant its soundness.

Thereafter the horse was given light exercise by Hislop with a view to its being

fit for carriage work when Mrs Ellice arrived from the south.

Some weeks later, the defender having heard nothing further from the pursuer, wrote to him asking whether he meant to keep the horse. Mr Malcolm replied saying that he was going to keep the horse, and on the following day (2nd June) he wrote to the defender—"Referring to my note of yesterday, I now send you deposit-receipt with the Caledonian Bank here for £29 in your favour in payment of the price of the black pony which you left here for Mrs Ellice. This amount is slightly under the price which you asked for the pony, but as I am informed by the most competent judges that the selling value of the horse would not have been more than from £26 to £28, I have no doubt you will feel yourself well satisfied with the enclosed amount. I also send you a receipt for the same, which please sign and return."

The defender accepted the sum mentioned although smaller than what he had originally asked, but no letter from him in answer to the pursuer's letter of 2nd June was brought under the notice of the Court. On record he admitted (Ans. 2) that "on 1st June 1897 the pursuer purchased the horse which had been left in his custody on 24th April 1897 for approval."

From this time until Mrs Ellice arrived the horse did no heavy work, but was merely exercised. When Mrs Ellice came to Invergarry about the middle of July it was put into double harness. Mrs Ellice's coachman then pronounced it to be unsound from spavin in both hocks. The pursuer thereupon, of date 16th July, wrote to the defender—"I have to inform you that the black pony which I bought from you for Mrs Ellice, and which you represented and sold as sound, has broken down in both hocks as soon as it was put to regular work. Mrs Ellice, who has come here, wont use it, as it is quite lame, and she is displeased with me for buying it. I hope you will take it back. It was really bought on that footing. Mrs Ellice is willing to allow you £5 for the time she had it. Let me know, please, at once, whether you accept this offer. If you do not, I will call in a veterinary surgeon to prove the animal's unsoundness, which must have been of long standing, and then I will have the matter put right in another way." In answer to this letter the defender on 23rd July wrote to the pursuer as follows—"I have received your letter stating that the pony which I sold to you is unsound and lame, whereas he was sound in limb and wind and very promising when I sold it to you, otherwise I would not have given it to you. You had the horse for about four weeks to see if it would suit you, and then paid it. I am not supposed to be responsible for it at any time that an accident might happen, and therefore I am under the belief that it is against right and reason to ask me to take the horse back." The pursuer replied on 28th July 1897—"I have received your letter of 23rd inst. in reference to the black pony which you sold to me. I must say your letter is very unsatisfactory, and I have no other course to follow than to call in a V.S., and to sell the pony for what it will fetch after receiving his certificate. I will then raise an action at Fort William against you for any deficiency in the price obtained. No accident befel the pony. It was simply that the unsoundness in his hocks began to show as soon as he was put to regular work. You surely remember Mr Wilkinson having alluded to one of his hocks when you were showing him to me at Spean Bridge."

A veterinary surgeon was accordingly called in, who examined the horse and certified that it had spavins on both hocks, and was therefore unsound.

Thereafter the horse remained in the pursuer's possession until 22nd October, when it was sold by warrant of the Sheriff, and realised £10, 17s. 6d. The delay in applying for warrant to sell was not explained in the proof, and this ground of defence apparently was not discussed in the Sheriff Court.

The pursuer deponed that after paying the expenses of the petition and sale, and charging keep of the horse from 16th July until sold, he was out of pocket £5, 0s. 5d.

During the period between 16th July and 22nd October the horse did not receive any treatment for the cure of its ailment.

It appeared that in the district horses of this description were depreciated in value in autumn owing to the coaching season being over by that time.

In reference to the question whether the horse was timeously rejected the pursuer deponed—"I regarded the period during which the horse was at Invergarry as within the terms 'on approval,' which were terms agreed on between myself and defender. The horse having been sent before I expected or desired it makes the time during which it was in my possession look longer. I regarded the time that the horse was in my possession as quite reasonable for testing its fitness for the purpose for which it was bought." . . . "When defender and I spoke of the horse being on trial, I had in view that the time should extend until Mrs Ellice came to the country."

On 23rd February 1898 the Sheriff-Substitute (DAVIDSON) issued the following interlocutor:—"Finds in point of fact (1) that in April 1897 the pursuer and defender met by arrangement at Spean Bridge Hotel that the defender might show a horse belonging to him to the pursuer to whom he wished to sell it; (2) that on said occasion the defender gave an express verbal warranty that the horse was sound in all respects, but a sale was not then completed, and the defender took the horse home with him, the pursuer promising to write him when he could receive the horse; (3) that in the end of April or early in May the defender, not hearing from the pursuer, took the horse to Invergarry, and at the pursuer's request, and with the sanction and approval of the defender, it was put into the stables there belonging to Mrs Ellice of Glengarry, in charge of her groom William Hislop, that it might be exercised and tried

as to its suitableness as a carriage horse for Mrs Ellice; (4) that on 1st June the pursuer intimated to defender that being satisfied with the progress of the horse in harness, he would on the following day pay to his credit in bank the sum of £29 as its price; that he did so, and that defender accepted said price, and the sale was concluded; (5) that between the meeting of the parties at Spean Bridge Hotel and the date of sale no written or verbal communication appears to have passed between them in regard to said warranty of soundness; (6) that from the time the horse was placed in charge of the groom until the arrival of Mrs Ellice at Invergarry about the middle of July, the horse was not put to any work or use by the pursuer for his own behoof as his own property, and that it received only moderate and gentle exercise, and was well cared for, to fit it for the carriage work to Mrs Ellice for which pursuer bought it; (7) that on Mrs Ellice's arrival the horse was put to regular work by her coachman, and he discovered that it was unsound in both hocks and quite unsuitable for its purpose; that on 16th July the pursuer wrote to the defender that the horse had broken down on both hocks, and requesting him to take it back, and that the defender refused to do so by letter addressed to the pursuer dated 23rd July, and the horse has since been sold by judicial warrant on the pursuer's application; (8) that the horse was unsound by reason of spavin when left by the defender at the Invergarry stables, and at the date of the sale to the pursuer, and that the unsoundness was not apparent and not known to the parties at either date, and might not be readily detected by them, being persons without skill and knowledge of spavin: Finds in law that in respect of said unsoundness and consequent breach of warranty, the pursuer is entitled to repetition of the price paid by him for the said horse: Therefore repels the defences, decerns against the defender for the sum of £29, reserving to him any claim he may have in connection with the sale of the horse under judicial warrant: Finds the defender liable in expenses," &c.

The defender appealed to the Court of Session, and argued—(1) Where an express verbal warranty was alleged, the very words used must be proved so that the Court might be in a position to judge whether they amounted to a warranty in law—*Robeson* v. *Waugh*, October 30, 1874, 2 R. 63; *Rose* v. *Johnston*, February 2, 1878, 5 R. 600. It could not be maintained that any particular words, of such a kind as to constitute an express verbal warranty, had been proved to have been uttered by the defender at any time. (2) Apart from that, however, even supposing that words were used at the first interview, or when the horse was left on trial, which, if a sale had been concluded on either of these occasions, would have amounted to a warranty, yet as no sale was concluded till some time afterwards, these words could not be imported into the subsequent bargain so as to make it a sale upon warranty, there being no mention made of a warranty at the time when the purchase was made—*Hopkins* v. *Tanqueray* (1854), 15 C.B. 130—more especially in view of the fact (*a*) that the price ultimately offered by the buyer and accepted by the seller was less than the price asked when the warranty was said to have been given, and (*b*) that the horse had been out of the seller's custody for a considerable time at the date of the sale. The terms of the bargain were embodied in the pursuer's written offer, which said nothing about warranty, and the previous communings could not be considered. (3) Even assuming that the horse was sold with a warranty, the pursuer was barred, because (*a*) his intimation of rejection was too late; and (*b*) he failed timeously, after intimation of rejection, either to sell the horse by judicial warrant or to place it in neutral custody. A purchaser, who intimates rejection, if the seller refuses to take back the horse, was bound at once to resort to judicial proceedings, or to place it in neutral custody—*M'Bey* v. *Gardiner*, June 22, 1858, 20 D. 1151; *Caledonian Railway Company* v. *Rankin*, November 1, 1882, 10 R. 63, *per* Lord Young at p. 66. The only relevant excuse for not doing so would be a communication from the seller authorising the buyer to retain the horse in his custody after intimation of rejection. Here no such communication passed between the parties. Sufficient notice of the defence founded upon the pursuer's inaction after intimation of rejection was given by the plea of *mora*, which was the plea in *M'Bey* and in *Caledonian Railway Company*, *cit.*

Argued for the pursuer and respondent—(1) A warranty of soundness was given. Whether an express verbal warranty was proved or not was a jury question, and the proof required was just the same as in the case of any other verbal contract—*Rose* v. *Johnson*, *cit.*, *per* L.J.C. Moncreiff, at p. 603, where there were some observations which must be taken to be a comment on the *dicta* of L.P. Inglis in *Robeson* v. *Waugh*, *cit.*, at p. 66 (foot). Here, moreover, the defence was not that the words used did not amount to a warranty but that nothing was said about a warranty of soundness at all. The exact words used were not therefore of such importance as in the cases cited. If the evidence of the pursuer and Wilkinson was believed, then there could be no doubt that a warranty of soundness was given. (2) From the time when the first interview took place till the horse was sold the transaction was continuous. The defender's offer to sell with a warranty as originally given remained open for the pursuer's acceptance all the time until it was finally accepted by him, for his letter was not a fresh offer, but an acceptance subject to a small modification which was acquiesced in by the defender. This acceptance did not show that the warranty embodied in the defender's offer was dispensed with. The sale as ultimately concluded, therefore, was a sale on warranty. (3) The rejection was timeous. The horse was bought for Mrs Ellice, and subject to trial by her; it

could not be fully tried at once, as it was young and not in condition, and it could not be properly tried till Mrs Ellice came. As soon as she came and it was fully tried its unsoundness was discovered, and intimation of rejection was given. The defender was well aware of all this. In these circumstances—and this was always a question of circumstances—the rejection was timeous. (4) As to the subsequent delay in applying for warrant to sell, that was accounted for by the remoteness of the locality and the Court being in vacation. As regards neutral custody, it was extremely improbable that in such a district there was any other place within a reasonable distance where the horse would have been as well stabled as it was. But further there was no notice given of this defence, and if proper notice had been given, evidence might have been led to explain the delay.

LORD JUSTICE-CLERK—We have had a full and excellent debate in this case, and the argument for the pursuer could not have been better stated than it was by Mr Malcolm. Having considered the case with care, I do not think the judgment of the Sheriff-Substitute can stand. This case is not of much importance as regards the sum at issue between the parties, but such cases are always of some importance, and require careful consideration, because it is essential that the law on this subject should not get into a loose state.

In April or May the parties met at Spean Bridge, and it is alleged that on that occasion a guarantee of soundness was given. I am not going to enter into the question whether anything amounting to a warranty of soundness was given at that time such as would have been binding had a sale then taken place, for I am satisfied that no bargain for the sale of the horse was then concluded. The Sheriff-Substitute finds—[*His Lordship read the 3rd and 4th findings in fact in the Sheriff-Substitute's interlocutor*]. That was a price never mentioned before. The defender had offered to sell the horse for £31. The defender's offer was not accepted, but a fresh offer was made by the pursuer at a later date which the defender accepted. I see no ground for holding that the sale which was ultimately concluded was a sale upon warranty. The horse was delivered in May upon trial. It was sold in June in terms of the pursuer's letter of 2nd June, and in terms of that letter it was purchased without any warranty. That is sufficient for the disposal of the case, but I must say that the subsequent proceedings are most unfavourable to the success of the pursuer's case. Notwithstanding that he was proposing to reject the horse in July, he retained it in his own custody till it was sold by warrant in October. When he intimated rejection of the horse he was bound to put it in such neutral custody as it required in the condition in which it then was. It was supposed to be suffering from an acute disease. Notwithstanding that he kept it for three months without giving it any treatment or placing it in charge of any competent person. It was not treated till it was sold in October.

The second point is as to the delay in obtaining warrant to sell the horse. When a horse is to be sold because rejection has been intimated, and the seller refuses to take the horse back, a warrant ought to be applied for as soon as possible, because delay in doing so may prejudice the seller. The time for applying for a warrant is immediately after rejection has been intimated and not accepted. It is said that possibly a Sheriff could not be found at that time to grant a warrant. That appears to me to be an extravagant suggestion. I shall say nothing more about this part of the case however, as the pursuer complains of want of notice that any such objection was to be taken. Apart from the delay in obtaining warrant to sell, if I had held that the horse was sold with a warranty, I should have been prepared to hold that it was not timeously rejected.

I think the interlocutor under appeal must be recalled, and the defender assoilzied.

LORD YOUNG—When I first read them I was struck with the pursuer's averments in this case. He avers—[*His Lordship read articles* 1 *and* 2 *of the pursuer's condescendence*]. There is no other averment of warrandice. Now warrandice is a contract. In the case of a sale it is part of the contract of sale. Here it is averred that a warranty was given on the 10th of May. There could be no warranty on 10th May for there was no sale. The Sheriff-Substitute finds—[*His Lordship read the first and second findings in fact in the Sheriff-Substitute's interlocutor*]. It is out of the question to say that a horse was warranted when there was no sale. But it appears that the parties met at Spean Bridge and did negotiate about a possible sale of the horse, the defender saying that the price he wanted was £31. Looking to the evidence of what passed, I should have doubted whether there was any evidence of words amounting to a warranty having been uttered by the defender upon that occasion. But it is not necessary to decide that question. The Sheriff has found that such words were used by the defender. It is not necessary to decide as to that, but I repeat that I think it doubtful whether, even if there had been a sale on 10th May, any warranty was given which would have entitled the pursuer to reject on discovering that the horse was unsound.

But let me assume that language importing warranty was used by the defender. Even if that were so, they did not conclude a sale on that footing. What was proposed by the pursuer and assented to by the defender was not that the pursuer should take the horse with a warranty at the price of £31, but that he should take the horse and try it, judge whether it was suitable, and take the advice of others about it, and let the defender know what he proposed to do, and whether he proposed to purchase it, and if so, on what

terms. There was no concluded bargain. To take a horse as sold under a concluded bargain, and to take a horse on trial to see whether it is suitable, and promising to let the owner know what it is proposed to do, are two very different things.

The pursuer after having had the horse in his possession till June was disposed to deal for its purchase, and he intimated the conclusion at which he had arrived, a conclusion arrived at not only as the result of his own opinion but on the advice of others on whose opinion he relied, in his letter dated 2nd June. [*His Lordship read the letter.*] The defender might have rejected that proposal. He did not do so, and I take it that he accepted it by allowing the horse to remain with the pursuer. But what was the contract between the parties? It is expressed in the letter, and there is no warranty there. If it is not there, there is no warranty anywhere on which the pursuer can found. That is conclusive of the case in favour of the defender.

I do not go into the other questions as to whether, if there was warrandice, the pursuer was entitled to reject in July when he found out the defect in the horse, or whether he was entitled to delay applying for a warrant to sell it till October. My opinion is against the pursuer upon these points. I think he was not. But it is not necessary to decide these questions. Perhaps it is not desirable to express an opinion upon them.

LORD TRAYNER—This is an action for breach of warranty. I think the pursuer has failed to prove that the warranty on which he founds was ever given, and that consequently his case fails.

LORD MONCREIFF—I think that the contract of 2nd June was not a sale under a warranty. I think, in the first place, that no warranty is satisfactorily proved. I must say that if the defender's offer at Spean Bridge in April had been accepted by the pursuer at once, or within a short time thereafter, I think that there is evidence on which we might have held that the giving of the warranty was proved, and I should have been slow to alter the Sheriff-Substitute's judgment on that point. But the case does not stand there. The Sheriff-Substitute finds "that between the meeting of the parties at Spean Bridge Hotel and the date of sale no written or verbal communication appears to have passed between them in regard to the said warranty of soundness." That is not so. What the pursuer avers on this point is this—"On the strength of and relying on the warranty given by the defender at Spean Bridge, and subsequently repeated at Invergarry in presence of William Hislop, groom there, the pursuer on 1st June agreed to purchase the horse for Mrs Ellice." Now when we turn to the evidence we find that the pursuer says this—"Defender brought the horse, and in the presence of William Hislop, groom at Invergarry, he repeated the soundness in much the same words as used by him at Spean Bridge." That is very meagre evidence of a warranty. The pursuer does not say what the words used by the defender were. Then when we turn to the evidence of Hislop, who was present on the occasion, all he says is this—"At the door pursuer and defender had some talk about the horse, when the pursuer said he would guarantee the pony in all kinds of work except carriage harness work, which it had not been used to." "I did not hear him guarantee the horse in any other respect. I did not hear pursuer ask for a guarantee in any other respect. That was all I heard mentioned with regard to a guarantee." This evidence does not bear out the pursuer's averment that the guarantee was repeated in May. I have some doubt whether a guarantee was given at all, but even if it was, I do not think that it was repeated in May. Apart from this, however, if an offer of warranty of a horse is given but is not thereupon accepted, I think that it would require a very special case to entitle us to hold that the offer of warranty held good for a period of two months. The original offer by the defender, however, was not accepted—indeed the offer which was accepted was an offer by the pursuer which was accepted by the defender. But I prefer to put my judgment on the ground that it is not clearly proved that a warranty was given.

The Court pronounced the following interlocutor;—

"Sustain the appeal, and recal the interlocutor appealed against: Find in fact that the pursuer has failed to prove that the defender gave any warranty as to the soundness of the horse in question: Therefore sustain the first plea-in-law for the defender and assoilzie him from the conclusion of the action, and decern: Find the defender entitled to expenses in this and in the Inferior Court, and remit," &c.

Counsel for Pursuer—Balfour, Q.C.—Malcolm. Agents—Carmichael & Miller, W.S.

Counsel for Defender—C. K. Mackenzie—T. B. Morison. Agents—Macpherson & Mackay, S.S.C.

Wednesday, June 15.

FIRST DIVISION.

[Lord Pearson, Ordinary.

THE "STOCK JOURNAL" COMPANY OF CHICAGO *v.* THE CLYDESDALE HORSE COMPANY AND OTHERS.

Prescription — Triennial Prescription — Statute 1579, *c.* 83—*Pursuit—Bar.*

It is well settled that the application of the Statute 1579, cap. 83, may be excluded by the fact that the pursuer has made a competent claim in a previous competent action within the statu-