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

the date of sale all correct. This would, I think, be a difficult question to determine, and in the view which I take of the case it is unnecessary to decide it.

"The evidence of the defender goes to shew that immediately after getting delivery of the mare symptoms of cold manifested themselves on her. No veterinary surgeon was called in, but at pursuer's own hands the mare was blistered the day after she arrived at pursuer's stables. The day after that again the pursuer proceeded to inflict upon the mare the painful operation of 'docking.' It is open to argument that by the pursuer at his own hands permitting such operation, so that the mare could not be restored in such a state as received, *per se* any right to return the mare was barred. There is always a certain element of risk attaching to docking, and I am inclined to think that it is a sound contention in point of law that the 'docking' of the mare's tail *per se* bars return or otherwise repetition of the price. But I am at present dealing with this matter with reference to the treatment which the mare received as aggravating, or tending to aggravate, any ailment from which she was suffering. It is obvious to common sense, but the skilled evidence points in the same direction, that it was an inadvisable thing, to say the least of it, to dock a mare which had been blistered the previous day, and which at the time of docking was still labouring under symptoms of cold. Further, it appears that the mare, subsequent to the date she came to the pursuer's stables shewed symptoms of lameness. A reasonable explanation of this lameness may be afforded by the conjecture that it was due to injury received either at the time when the operation was effected, or through nervous excitement subsequent thereto. It is, I think, obviously plain in the circumstances 'docking' would not have been sanctioned by any veterinary surgeon who had been consulted. Subsequent, however, to the docking, according to the pursuer's own account, the mare gradually got worse, but in spite of this no veterinary surgeon was called in till the very last moment, when the case was perfectly hopeless. It is, I think, impossible to say whether, if skilled assistance had been summoned at an earlier date, the mare would have pulled through or not, but the pursuer is not to reap the benefit of any dubiety upon that point. If he was looking to his warranty, or intending to act upon it in any way, it was his plain duty to the warranter to call in, long before he did, skilled assistance. Whether the mare died from inflammation of the lungs, or whether death was due to the fever induced by inflammation, it is not necessary to determine. But I consider it plain, first, that it was improper treatment of a mare labouring under a cold, and blistered the previous day, to dock her tail; and second, that there was neglect of an ordinary and reasonable duty on the part of pursuer in not calling in skilled assistance at a much earlier date than he did. I therefore think the mare was improperly treated in pursuer's stables, and as matter of law I have no hesitation in holding that improper treatment bars the claim for repetition."

On appeal the Sheriff (CLARK) pronounced this interlocutor—"Finds that the mare in question was sold under a warranty of being sound and a good feeder: Finds that breach of that warranty has not been established: But finds that, in any view, the pursuer is barred from pleading breach of warranty by his own conduct, inasmuch as he did not return the mare, or communicate with the defender as soon as he had reason to suspect unsoundness, but instead thereof did, without any communication with the defender, and without even calling in veterinary aid, proceed to treat the mare by blistering and otherwise, and did further subject her to the operation of docking while labouring under indisposition: Therefore adheres to the interlocutor appealed against: Finds the pursuer liable in the expenses of the appeal, and decerns."

The pursuer appealed to the Court of Session, and argued — The horse was unsound at the date of sale; it was suffering from a cold, which developed into the complaint of which it subsequently died. The pursuer had a practical knowledge of horses, and treated the mare properly. No allegation of unsuitable treatment was made on record. In a case like the present, cold was unsoundness, and the mare was disconform to warranty at the date of sale. The pursuer was in the circumstances entitled to repetition.

Authorities—*Gardiner* v. *M'Leavy*, February 24, 1880, 7 R. 612; *Dykes* v. *Hill*, July 20, 1860, 22 D. 1523; *Coates* v. *Stevens*, 2 Moody and Robinson, 157; Benjamin on Sales, 612; Brown on Sale, 307; *Ralston* v. *Robb*, M. App., Sale, 6, p. 10.

Replied for defender—The evidence showed that the mare caught cold after she left the defender's stables. The cause of her death was undoubtedly inflammation and shock to her system caused by the docking of her tail. The pursuer was barred by his actings from claiming repetition.

At advising—

LORD MURE—In this question of warranty there is not, I understand, any dispute between the parties as to the main facts.

The mare in question was purchased by the pursuer upon the 5th January 1884. He obtained delivery of her on the following day, a Saturday, and it was after her removal to his stables upon the Saturday that she was first heard to cough. The pursuer himself saw the mare upon the Sunday, and he then ordered her to be blistered, which accordingly appears to have been done on the Monday, but it seems that the same day, Young, the pursuer's assistant, docked the mare's tail. On the Wednesday she was worse, and on the Thursday, when the pursuer returned from one of the short journeys which he appears to have been in the habit frequently of making, he was informed by Young that the mare was suffering from cold and lameness, and was not feeding. The pursuer and Young went on treating the mare, who appears to have been getting daily worse, but no medical assistance was called in until Tuesday the 15th, ten days after the mare had been brought to the pursuer's stables, on which day Robb, the veterinary surgeon, was called in. On the following day the pursuer made a demand on the defender, intimating to him his intention of returning the mare, and the next day, the 17th, she died.

Now, the question in these circumstances comes to be, was the mare unsound at the date of purchase? The pursuer says in article 3 of

the condescendence that the mare was at and prior to the date of sale disconform to warranty, as she was labouring under a severe cold, and was not a good feeder, and that the defender knew this. Now, there is not a word of evidence in support of this allegation that the mare was a bad feeder while she was in the defender's stables. She had only been in his possession four or five days when the pursuer purchased her, and there is an entire want of evidence that during that time she did not feed well, while there are several witnesses who speak to her being fresh and quite up to her work while she was in the defender's possession.

There is a good deal of evidence about the mare having been clipped by the defender after she came into his hands upon the 29th of December 1883, but it does not appear to me that the cold which subsequently showed itself can be attributed to this clipping, or that she was in any way the worse of it. One circumstance, however, is quite clear, and that is, that she began to cough upon the evening of the Saturday on which she was removed to the pursuer's stables, and that she continued to cough down to the date of her death upon the 17th January.

Now, a mere cough is not, according to the authorities, unsoundness, yet a cough may entitle a purchaser to return a horse if it should render the animal unfit for use. There are numerous authorities cited by Youatt in his treatise on "The Horse" in support of the doctrine that a purchaser would in such circumstances be entitled to return the horse, or to put it into neutral custody.

It could not be said that during the time this mare was in the pursuer's stables she was fit for use, and the defender could not reasonably have refused to take her back had she been returned to him. That was not the course which the pursuer followed; he continued to treat her himself, and it was not until shortly before the death that a veterinary surgeon was called in; and accordingly the question comes to be, whether in these circumstances he can now recover the price of the mare from the defender?

But not only did the pursuer not return the mare to the defender when he found her suffering from cold and unfit for work, but he proceeded to deal with her as his own property, and had her tail docked by his servant Young. Looking to the condition in which, according to the pursuer, the mare was at this time, his treatment of her in docking her tail was rash, I might almost say foolish. He, no doubt, tries to make out that docking is a simple matter, but one of his own witnesses, Brock, the veterinary surgeon, says that occasionally lockjaw sets in after the operation, and Pollock, one of the witnesses for the defender, considered the docking most injudicious, looking to the condition of the animal at the time.

Upon the whole matter, and looking to the actings of the pursuer, I think that the Sheriffs have taken the proper view of this case, and that the pursuer is not entitled to recover the price of the mare from the defender.

I am therefore for affirming the interlocutor appealed against.

The LORD PRESIDENT, LORD MURE, and LORD ADAM concurred.

The Court found that the pursuer had failed to prove any breach of warranty, therefore refused the appeal.

Counsel for Pursuer—Guthrie Smith—Lang. Agents—John Gill, S.S.C.

Counsel for Defender—Mackintosh—Murray. Agent—J. Stewart Gellatly, S.S.C.

Friday, March 13.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

BRITISH LINEN COMPANY *v.* HAY & ROBERTSON AND BROWN (G. W. RAINEY, KNOX, & COMPANY'S TRUSTEE).

Bill—Assignation—Acceptance Payable at Bank—Bankers' Lien—Specific Appropriation.

Where the customer of a bank accepts a bill as payable at the bank, such acceptance is a mandate to the banker to pay it out of the funds at the customer's credit, and the presentation of the bill constitutes intimation of the assignation.

A trader accepted a bill for valuable consideration, payable at the bank where he had his account, and before it came due advised the bank of fact. He had funds more than sufficient to meet the bill when the holder presented it, but the banker refused to pay it because of the liability of the customer to him in respect of other bills not matured. Thereafter the customer became insolvent and executed a trust for creditors. In a question between the trustee, who claimed the proceeds of the bill on behalf of the general creditors, and the holder of the bill, *held* that the acceptance payable at the bank, and the subsequent presentation, operated an intimated assignation, and that the holder of the bill was therefore entitled to its contents.

Messrs G. W. Rainey, Knox, & Company, linen manufacturers, Glasgow, of which firm G. W. Rainey was sole partner, had in the beginning of May 1884 an account-current with the British Linen Company at Glasgow.

On 3d May 1884 there was at the credit of the account £519, 0s. 7d. On that day the bank received from G. W. Rainey, Knox, & Company a memorandum (according to the usual custom of the firm when their trade bills payable at the bank were about to fall due) as follows—"Please debit our account with undernoted acceptances due at your office—5th, John Boath jun. & Co., £345, 12s. 4d.; 7th, Hay & Robertson, £186, 3s. 0d."

The latter of these bills had been drawn by Hay & Robertson on G. W. Rainey, Knox, & Company on 4th March 1884, accepted by them payable to the British Linen Company's office in Glasgow, and was payable on 7th May.

On 6th May the former bill (Boath jun. & Co.) was presented at and paid by the bank. On the same day G. W. Rainey, Knox, & Company, by an ordinary "paid-in slip," paid in to the credit of their account at the bank £321, leaving a balance at their credit on that day of £494, 8s. 3d.