only authorities referred to being precisely of the class cited to us in the discussion here. The end of the case was that the Second Division adhered to the interlocutor of Lord Fullerton, and the Lord Justice-Clerk observed—"The ground of recall pressed is not to be sustained in the abstract. Here the sequestration has gone on, and a trustee has been appointed. Along with the petition there was produced a vouched debt and an affidavit. This claim may be found bad, but this would not be a ground for annulling the sequestration."

Now, undoubtedly, two circumstances referred to there as weighing with the Court occur here also. The sequestration has been adopted by the general body of creditors, and the sole reason for which the petitioner for recall takes action is that he may acquire a preference over the other creditors. This seems a strong and apt illustration of the principle I have already enounced, that it would require something more than a mere allegation to entitle the Court to recall a sequestration. I am therefore for adhering.

Lord Mure—I concur. In this case the promissory-notes are *ex facie* quite right, and all the requisites of the statute have been complied with in the sequestration. Now, in these circumstances no objection could have been taken *ex facie* of the proceedings, but within the statutory period a creditor of the bankrupt has applied for recall on the ground that the concurring creditor was not, strictly speaking, a creditor at all, and that in fact the alleged debt was not really due. That is the ground of his application as stated in the petition. It appears, however, to be one of the facts of the case that at the dates of granting these promissory-notes the concurring creditor stands as creditor for their amount in the books of the bankrupt. These are the facts, together with the important addition that all the other creditors are satisfied that the sequestration should go on. In these circumstances I think the case of *M'Nab* is in point, and has been properly interpreted. I am quite satisfied that we have no ground here set forth to entitle the petitioner to get behind these bills and the affidavit which the concurring creditor produced.

Lord Shand—I am of the same opinion. The petitioner on his own statement is in about as unfavourable a position for making this proposal as can well be conceived. He avers that the bankrupt is absolutely insolvent, and is therefore in those circumstances in which his estate should be divided among all his creditors. His purpose is simply to get a preference in the sequestration and defeat the other creditors. In the next place, looking at this objection to the claim of the concurring creditor, it appears to me that although the petitioner's statement may be true that these documents of debt were all made out at the same time, nevertheless it appears from the bankrupt's books that on several occasions in 1880, 1881, and 1882 there are entered at their appropriate dates sums due by the bankrupt to M'Connen corresponding to the debts set forth in the affidavits. In these circumstances I think we have no alternative but to refuse the petition. The petitioner's averment comes merely to this, that these particular documents of debt were all made out at one date. But suppose that to be the case, if they were granted by the bankrupt for a subsisting debt which he was bound to acknowledge, then there is an end of the objection, for the bankrupt was entitled to grant them.

On the general case I am not prepared to go the length of saying that even if a sequestration has proceeded so far regularly on documents of debt *ex facie* right, it may not be made the subject of inquiry on very special grounds. If sequestration is applied for, and all the statutory requirements have been attended to, the Judge has no alternative but to grant it; but if subsequently allegations are made that the documents founded on were forged, that there has been a fraudulent scheme, and that there is no ground whatever for saying that the debt was due, I think that the Court might allow an inquiry into the facts. But I agree that the petitioner must give a detailed account of his objection, and of his means of the knowledge of the truth of his objection. I concur in thinking that no relevant averment has here been made to entitle us to recall this sequestration, especially with reference to the statements made by the trustee as to his knowledge of the bankrupt's books.

Lord Deas was absent

The Court adhered.

Counsel for Petitioner — Campbell Smith—Nevay. Agent—Robert Broatch, L.A.

Counsel for Respondent — Rhind — Lang. Agents—M'Caskie & Brown, S.S.C.

Wednesday, November 1.

SECOND DIVISION.

[Sheriff of Lanarkshire.

RANKIN *v.* CALEDONIAN RAILWAY COY.

Sale—Horse—Retention of Subject by Purchaser after Discovery that it is Disconform to Warranty—Personal Bar.

A horse was sold with an express warranty of soundness. The purchaser discovered him to be unsound, and intimated the fact to the seller, who after some delay came to see the horse in the purchaser's stables. The horse was then suffering from a cold, and it was difficult to examine him for the alleged unsoundness. The seller accordingly requested the purchaser to keep him till he recovered from the cold, by which time it would be more easy to determine the question of his soundness. The purchaser agreed to keep him for a week, but eventually kept him as requested by the seller for more than a month after the seller's visit, after which, and about two months subsequent to the original sale, he was sold by warrant of the Sheriff obtained by the purchaser, and the price consigned. In an action for repetition of the original price, *held* (1), on the facts, that the horse was unsound at the date of sale; and (2) that the purchaser having kept the horse in his

stables at the seller's own request, was not in the circumstances of the case barred by *mora*, in returning him, or by not having placed him in neutral custody, from claiming repetition of the price.

On 15th April 1881 the defender John Rankin, Gallowgate Square, Largs, sold to George Robb, acting on behalf of the pursuers the Caledonian Railway Company (whose carting superintendent he was), at the Cattle Market, Glasgow, a bay horse, under an express warranty in the following terms:—"I have this day sold you a bay horse rising four years old, for the sum of £68 sterling. I warrant said horse to be sound in every respect and a good worker." On 20th April Robb wrote to the defender that the horse was unsound, being a "roarer," and would therefore have to be returned, and requested to know where the defender would take delivery of him. To this communication the defender paid no attention. On 29th April Robb again wrote to the defender, complaining of having received no reply, and intimating that if he did not hear from him on Monday next thereafter he should apply for a Sheriff's warrant to sell the horse, and that in the meantime it stood in the company's stables at the defender's risk and expense. To this the defender replied on the following day by letter, in which he said—"I will look up and see him if he is not going to please. I trust he will do all right yet." He, however, did not come till written to again by Robb to the effect that the horse was still unsound, and that Robb declined to keep him, and would insist on repetition of the price. On 5th May, after receipt of this second letter, the defender visited the company's stables and saw the horse, which was brought there for him to see from the company's "infirmary" stables, whither it had been removed some days before. There was some doubt whether the horse had a cold before being sent to the "infirmary" (in which horses which were in perfect health were often kept), but it was suffering from cold when the defender saw it. The horse was tried in his presence to see whether it was a roarer, but owing to this cold it was found impossible to judge. The defender gave the following account of what passed between Robb and himself on this occasion—"I told Mr Robb the horse could not be removed. I was asked to take him away, and I said he would have to keep him till Whitsun-Monday, and make him better of the cold, and we would see what he was like by that time. It was agreed to let the horse stand there, and I said I would come back and see him when he was free of the cold." On 7th May Robb wrote to the defender agreeing, with reference to this conversation, to keep the horse for one week, at the expiry of which the defender was to remove him, but receiving no reply he again wrote on 16th May for instructions as to what the defender wished done with regard to the horse. The defender still took no steps for the removal of the horse, and on 2d June the law-agent of the company wrote to him that if he did not hear from him (defender) on the Monday following it would be assumed that he refused to take the horse back, and that (as had been stated in Robb's letter of 29th April above referred to) a petition would be presented to the Sheriff for warrant to sell the horse. Eventually on 9th June the company presented a petition to the Sheriff for warrant to sell the horse and consign the price in Court. This petition was opposed by the defender. Between the receipt of the agent's letter and the 9th of June the defender paid a second visit to the company's stables, and again saw the horse, which was still suffering from cold. He then, according to his own evidence, offered, in order to avoid litigation, to take back the horse on receiving some compensation for the condition in which he was from cold, to which cold he attributed any unsoundness from which the horse might be now labouring. Warrant to sell was ultimately granted on 27th June, and at the sale on 5th July the horse was bought by the company themselves for a sum (after deducting expenses) of £33, 1s. 9d., which sum was consigned in the hands of the Clerk of Court.

This action was then raised by the railway company for £68, the original price of the horse, and £11, 11s. of charge for its keep during the time it was in their custody.

The defender pleaded—"(2) The pursuers having kept the horse in their own possession for a period of sixty days without placing it in neutral custody, and being still in possession of it, are barred by *mora* from insisting in repetition of the price thereof, and the defender falls to be assoilzied."

The Sheriff-Substitute (ERSKINE MURRAY) conjoined with this action the petition previously pending between the parties, and after a proof, from which the unsoundness of the horse at the date of sale clearly appeared, and from which the facts above narrated also appeared, found—"(1) That the horse, though guaranteed sound by defender, was unsound at the date of sale by defender to pursuers; (2) that in the circumstances the conduct of pursuers subsequent to the sale was not such as to free defender from his liability under the guarantee; (3) that in the circumstances the pursuers are not entitled to charge for the keep of the horse;" and therefore found the defender liable in repetition of the price of the horse, under deduction of the price received at the judicial sale and of the expenses of sale."

He added the following note:—"No one who reads the evidence carefully can have a shadow of a doubt as to the fact that the horse must have been a roarer, and consequently unsound at the date of sale. It is useless to argue that roaring may originally arise from cold, when it is clear from the evidence of five or six witnesses that the horse was found to be unmistakeably a roarer three or four days after it was bought, and long before it caught cold. The evidence that the defender brings against this is not even absolutely negative, but only to the effect that nothing of the sort had been noticed. It is certain from the evidence that the horse was a roarer before its cold began, and remained and remains a roarer after the cold has passed away.

"The second defence raises a more serious question. Undoubtedly, in the absence of explanatory circumstances, the fact that the pursuers after their purchase kept the horse two months in their own stables (in fact up to the date of the judicial sale) without putting it into neutral custody would have brought them under the case of *M'Bey* v. *Gardner*, and barred their right to recover. But here the pursuers' reten-

tion of the horse, instead of putting it into neutral custody, was manifestly at the express desire of the defender himself. As has been noticed, Robb wrote on 20th April to defender, who is resident in Largs, asking him where the horse should be returned to, and receiving no reply, wrote on the 29th, warning that if he did not hear from him by the Monday a warrant would be applied for. Defender's letter on the 30th throughout deprecates Mr Robb's objections, saying that he knew of nothing wrong, that if there was anything it must be very slight, that he hoped the horse would yet please, and in fact just asks Robb to try it a little longer in the hope that if he did so the objections would ultimately be waived. Robb, however, insisting on his objections by letter on the 3d May, defender came up and saw the horse on the 5th. By this time it had caught cold, and roaring was undoubtedly not so easily to be distinguished from the effects of the cold. It was agreed therefore between defender and Robb that the horse should remain sometime with pursuers; defender says till about Whitsun-Monday, 30th May. Robb's view of the delay arranged, as shown by his letters of the 7th and 16th, was that it was for a shorter period, but the time passed, and he took no step till a few days after Whitsun-Monday, the time defender had asked, when he put the matter in the hands of Mr Kerr, the Caledonian Railway Company's agent, who wrote to defender on 2d June. Another meeting took place, and then on 9th June the petition for warrant of sale was raised, on which the horse was sold about 5th July. Clearly, therefore, up to the final meeting between 2d and 9th June the pursuers' retention of the horse was at defender's own request, and he cannot plead that against pursuers. The retention of the horse by pursuers for the time that remained till the judicial sale is a more doubtful proceeding, but, on the whole, considering that the former retention had been at the request of the defender, the Sheriff-Substitute thinks that the pursuers were justified in concluding that he preferred that they should retain the animal in their custody rather than it should be placed out at livery incurring extra expense. The view the Sheriff-Substitute takes of the footing on which it was originally remaining at pursuers' stables was, that it might have time to get rid of its cold before the question of the roaring could be definitely settled, and that the pursuers were not going to charge for its keep. This of course would be an extra motive for defender preferring that the horse should remain with pursuers rather than go to livery."

On appeal the Sheriff (CLARK) adhered on the same grounds.

The defender appealed to the Court of Session, and argued—The pursuers had failed to prove the horse unsound, and even if they had, they were barred from suing the action by having retained it in their custody; for when a purchaser rejects an article his duty is to offer it back to the seller, and on the latter's refusing to take it back to put it at once into neutral custody.

Replied for respondents—The horse was proved unsound, and in such circumstances as occurred here the defender must show prejudice, or at least a possibility of prejudice, to himself from the retention of the horse in the purchasers' custody; and, at all events, in this instance it had remained in the purchasers' custody by consent of the seller, and at his special request, and he was barred from founding on the general rule of law that a purchaser who is dissatisfied with goods sent him is bound to return them with all reasonable despatch as a condition of claiming repetition of the price.

Authorities—*M'Bey* v. *Gardner*, June 22, 1858, 20 D. 1151; *Croan* v. *Vallance*, May 18, 1881, 8 R. 700; *Chapman* v. *Couston, Thomson, & Co.*, March 10, 1871, 9 Macph. 675.

At advising—

LORD JUSTICE-CLERK—This case has been very well argued, and it raises some views of legal importance, but on the case as presented, both on the evidence and on the interlocutor of the Sheriff-Substitute, I really entertain no doubt at all. In regard to the question whether the horse was sound or unsound, I accept the Sheriff-Substitute's opinion on that matter, not only that the horse was unsound when sold, but that there could not be a shadow of doubt on that matter. Therefore I do not go into the evidence on that. I have read it all, and I entirely concur in that result of it which is brought out in the interlocutors under review. The other question is undoubtedly a more subtle and difficult one, and the difficulty of the case is very much owing to the conduct of the seller himself. He never made up his mind as to whether he was to stand at arm's length or no down to the very end; and I am inclined to think that any duty or obligation on the part of the purchaser to put this horse in neutral custody when he discovered it was not conform to warranty was superseded, and superseded entirely, by the actions and communications of the seller himself. And that goes a very long way. I do not differ from Mr Mackintosh's view of the general principle. I think he stated it quite soundly, that when a person holds that an article is disconform to warranty, or is not the article which he was led to believe it to be, he is bound, instead of keeping it in his own custody, to put it into neutral custody if the seller refuses to take it back; for he is bound to tender it back, and if the seller refuses to take it, he is not entitled to expose it to any risk which it might suffer in his own custody. He is bound for his own safety and for the protection of the seller to put it into neutral custody. Neither do I think that between the opinions of Lord Cowan and Lord Wood, as reported in the case of *M'Bey* v. *Gardner*, there is any substantial or material difference. The rule is an equitable one, resting entirely on equitable principles, and the true reason of it is that there are risks of which the seller cannot be cognisant to which the article is necessarily exposed if it remains in the hands of the purchaser. Besides that, keeping it in the usual case means using it as his own, and a purchaser is not entitled both to reject the article and repudiate the contract and also to use the article as his own.

But I take it that this case is entirely out of that category. And I say so for this simple reason, that from first to last the seller never refused to take the article back. His attitude was, "Wait a little and see whether the horse won't recover—see whether he is really a roarer, or has only got a cold." And we have his own evidence that he was willing to have received the horse back rather than litigate.

And then your Lordships see the way in which

this question arises as matter of legal principle. It is admitted that the obligation was not binding at the time the roaring was found out; there was no obligation, according to the argument, upon the purchaser to put the horse into neutral custody when the unsoundness was first found out. That was on the 20th April, and it is admitted that down to the 2d of June he was under no such obligation. I do not know that I have ever seen a case exactly in these circumstances. And after all it is only the delay between the 2d and the 9th of June that anything could be founded on. And when I couple that with the fact that even during that interval the seller never refused to take the horse back if it turned out to be unsound, and never carried his denial of unsoundness to any great length, I must say that this plea is not well founded in the circumstances of this case; and, besides, I think it would be hard if, the purchaser having retained the horse from the 20th April till the 2d June at the request of the seller, he is now to be strictly dealt with, and that because he did not present his petition within seven days of the time of intimation to the seller he is to be altogether excluded from his remedy. I am therefore of opinion that the interlocutors should be affirmed and the appeal dismissed.

Lord Young—I am of the same opinion. The second question argued to us (that raised by the second plea-in-law) is really the first—"The pursuers having kept the horse in their own possession for a period of sixty days without placing it in neutral custody, and being still in possession of it, are barred by *mora* from insisting in repetition of the price thereof, and the defender falls to be assoilzied." If that question were answered in favour of the defender, the first question of soundness or unsoundness which was argued to us would not arise. And it is important to attend to that, because it throws some light on the nature of the question itself. But I do not think the law is at all doubtful. The only difficulty is in applying it to the facts of particular cases, it being a law eminently founded on considerations of good sense and a regard for the legitimate interests of parties to contracts of sale. There is no difficulty in stating a rule of that kind—in stating the principle—the only difficulty being in applying it according to the varying circumstances of individual cases. The law is this—If the purchaser of a horse or anything else objects to what is sent to him by the seller in implement of the contract of sale—objects to it as not according to bargain,—his duty is to intimate his rejection timeously, for that is only fair to the seller. What is timeous intimation of his rejection is a question of circumstances in individual cases; and the nature of the article sold, and the character of the objections, and the possibility or probability of discovering them, must all be taken into account, but there must be timeous intimation of the rejection of the article as not according to contract, as otherwise there will be no remedy, and the article must be accepted as according to contract. Further, if at last the seller take it back without dispute there is an end to the question, but if he intimates that he will not, the buyer is not then just to cross his hands and remain still and silent as long as he will. He must take action in the matter, and will not be permitted to do what the Court held the buyer did in the case of *M'Bey*,—to retain the article silently for such a period as to give the seller reasonable grounds to suppose that the objection which had been intimated had been departed from. I think there were two intimations of objection in that case, one of which was made on 18th June, the other on 6th July, and the seller's answer to both was an emphatic rejection.—"The horse was sound according to contract, and I decline to take it back." It was on the 6th July that an answer was sent to a second request—"No, I won't; I maintain that that horse is according to contract, and I won't take it back." Well, after that the buyer kept the horse till 11th August, and then applied for a warrant to sell it, and it was sold under the warrant *ex parte*, and an action afterwards brought by him for repetition of the price. The Court held that the action was barred.

Now, the only question there was, not about the law, but about the application of it to the particular case. I suppose nobody would have doubted that if he had kept quiet for a year, for example, he could not thereafter have brought his action, and that precisely upon the ground that the seller was thrown entirely off his guard, and was left to conclude, and reasonably would conclude, that the objection intimated, and denied to exist, had been departed from. That is the way Lord Wood puts it, and it is a common-sense thing. A year is a long time, but six months, or even three months, would have made as clear a case. But the Court had to consider there whether the period between the 6th July and the 11th August was sufficient. That was a nice enough question, but they were applying a rule of law founded upon considerations of good sense and convenience and legitimate regard for the interests of both parties to the contract of sale, and they held that the buyer retaining the article in his own possession for that period without any intimation to the seller — intimation to put him upon his guard, as the Sheriff puts it, and as Lord Ardmillan and Lord Wood put it—was quite sufficient to lead him reasonably to believe and conclude, "Well, the sale of this horse is all right"—sufficient to put him off his guard—sufficient to entitle him to resist being made defender in an action in which the soundness or unsoundness of the article at the time of sale was to be tried.

Now, in regard to the law about neutral custody, the expression "neutral custody" enters into the opinions of the Judges in that case more than once; but I think the matter of neutral custody is itself one of circumstances. It is admitted to be so here. So far as the character or class of the goods is concerned, neutral custody would not be required in the case of plate, pictures, or books. It might be in the case of wine. But, on the whole, it is, I am of opinion, a question of circumstances, more having to be regarded than merely the nature of the article. If a horse is sent to my stable, for example, and I reject it as unsound, and they send and take it back, and we get into a correspondence about it, and I say to the seller, or he to me, "Well, the horse is possibly as well in my stable in the meantime until we see how our dispute turns out—until we see whether you are to take it back without any litigation; but if you desire it to be sent elsewhere, let it be so,"—if that, I say, appears to be the understanding or

agreement of parties, then the question of neutral custody is at an end. If a dealer sent a horse to the Duke of Buccleuch's stables at Dalkeith, and if a rejection of the horse as being unsound is intimated to him, and he says, "Well, the horse is as likely to be well taken care of there, and certainly more economically for me in the event of my proving to be in the wrong, and I do not object to it being there,"—his merely not objecting might be enough, but if the circumstances were such as to show that that was the understanding of the parties, and that they both assented to it, I should hold the question of neutral custody to be at an end in any case.

Here the seller was at least very sluggish, and when he did come forward he requested that the horse might remain where it was. Cold was then upon it, and he said it could not be removed. This was in the beginning or about the third of May. He says in his evidence—"I told Mr Robb the horse could not be removed. That was from the state of health in which it was. I was asked to take him away, and I said he would have to keep him until Whitsun-Monday and make him better of the cold, and we would see what he was like by that time. He asked how long it was, and I told him Whitsun-Monday is some time in the latter end of May, and sometimes it comes in in June, It was sometime about the 27th or 28th of May last year. It was agreed to let the horse stand there, and I said I would come back and see him when he was free of the cold." And there was the assent—certainly an agreement—of both parties that the horse should remain there. I think that makes an end of neutral custody, in the meantime at least. Well, he (the defender) comes back, according to agreement, to see the horse in the place where the pursuers had agreed to keep it for him until he did come back. He comes back between the 2d and 9th of June, and he looks at the horse and goes away again without saying a word—his counsel now explaining that by saying that when he went away on the 3d of May and said he would come back it was his intention to take the horse back when he returned if it was in a fit state of health to enable him to judge whether it was a roarer or not, it not being in such a state of health on the 3d of May from the cold. But when he came back between the 2d and 9th of June it was still in such a state from cold that he could not judge whether it was a roarer or not, and accordingly without saying anything he just went away again, and the horse is continued in the same place until it was brought to sale through an application to the Sheriff. The defender growing tired of the delay, a petition was presented on the 9th of June, and intimated two or three days thereafter. And I take it for granted that as between the 2d and 9th of June the horse was suffering from such a heavy load of cold that it could not be judged whether he was a roarer or not by people examining it, so it was sold just as soon as, looking to the state of its health, it could be sold. But the objection is narrowed then to the question of neutral custody as applicable to the time between the 2d and 9th of June and the time when it was sold. But even here I rather think the parties are agreed that the infirmary, where it was with the assent of the defender, was the proper place for its treatment, and I do not think the defender can found upon the rule as to neutral custody in these circumstances, because the reason and policy upon which the rule is founded—the consideration of regard for the defender's interest upon which the rule is founded—has no application. And the reason of the rule failing in the circumstances of the particular case is that the rule itself does not apply. I repeat, therefore, that I think there is no difficulty about the rule of law. It is clear enough, but there is all that difficulty, as I have explained, in the application of it which occurs in cases which present themselves with an infinite variety of circumstances.

I have said enough—more than enough—to signify my own view of the rule of law and its application to the particular case. I daresay I have done so somewhat superfluously, because the result after all is that I concur in your Lordship's judgment, and on the grounds which your Lordship has stated.

Lord Craighill—On the first of the two questions which have been presented for decision it appears to me to be unnecessary to say more than that I concur in the opinion of the Sheriff-Substitute and of the Sheriff. The Sheriff-Substitute heard the evidence as it was given. The Sheriff concurred in the conclusion at which his Substitute had arrived, and nothing in the proof or in the argument has suggested any doubt as to the propriety of the judgment.

The second question is more complex, but in the circumstances of this case does not appear to me to be more difficult. What is maintained by the defenders is, that even if the horse was unsound, and even if notice was given by the pursuers that the horse was to be returned because of unsoundness at the time of sale, the pursuers are barred from relief because the horse had been retained in their stables instead of being put to livery, which undoubtedly it might have been. The case of the defender is not that circumstances were such as led to the conclusion that there had been a waiver of objection and an acceptance of the horse as disconform to warranty. Nor is it, that the horse having been kept in the stables of the pursuers, the defender had suffered prejudice in any way. The plea as presented was nothing but a technicality, and it was this, that though notice had been given that the horse was disconform to warranty, the pursuers could not recover, because it had not been put out to livery but kept in their own stables. I am of opinion that there is no warrant for such a plea as that on which the case of the defender is rested. If the conduct of the buyer has been such as leads reasonably to the conclusion that whatever may have been said the horse was to be accepted, or that the position of the seller had been prejudiced, the keeping of the horse may reasonably be thought to bar an action for repayment of the price. The solitary circumstance that the article has not been returned—in this case, that the horse has been kept in the stables of the buyer—will not defeat the right of the buyer to the benefit of the warranty. The case of *M'Bey* has been referred to, but neither in the decision nor in the opinions of the Judges is there anything which warrants the contention now maintained by the defender. Every case of the kind comes to be a case of circumstances, and on the present occasion I am of opinion that the circumstances are such as conclusively show that the defender's

contention is unfounded, the horse having been kept in the pursuers' stables at the request and for the accommodation of the defender. According to my reading of the proof, there was no limitation of the time during which the horse might be kept; and even though that were more doubtful than it appears to me to be, the pursuers ought to have been made aware that the keeping of the horse beyond a particular period might be made the basis of such a plea as that which is now maintained. No such warning was given, and there being no suggestion that the pursuers acted in bad faith, or that the defender suffered by what was done, the defence which has been set up up must, as well in law as in justice, be overruled.

I have no difficulty in agreeing in the judgment which your Lordship has proposed, that the appeal be dismissed.

Lord Rutherfurd Clark—As far as I am concerned, I wish to abstain from any discussion of the legal principles which were argued, although they are not improbably involved in the decision of the case. I agree, however, that the judgment of the Sheriff should be affirmed. But I do so simply upon the facts of the case as they have been explained to us. It seems to me very clear that the horse was retained in the custody of the pursuers at the request, or at least with the consent, of the defender. That being so, I think it impossible for the defender to maintain that the pursuers were in breach of their agreement in so retaining the custody of the animal. I do not enter further into the facts, because they were fully explained in the very clear and able speech of Mr Mackenzie, with which I entirely concur.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Appellant (Defender)—Mackintosh—Lang. Agent—J. Drummond, W.S.

Counsel for Respondents (Pursuers)—R. Johnstone—C. K. Mackenzie. Agents—Hope, Mann, & Kirk, W.S.

Thursday, November 2.

FIRST DIVISION.

[Lord Adam, Ordinary.

FULLARTON *v.* CALEDONIAN RAILWAY COMPANY.

Process—Expenses—Judicial Tender—Jury Trial—Motion for New Trial on Ground that a New Trial is Essential to the Justice of the Case—Act 55 Geo. III. c. 42, sec. 6—Reparation.

In an action of damages for bodily injury sustained by an accident for which the defenders were admittedly responsible, the verdict was for the pursuer, but the sum awarded by the jury fell considerably below the amount of a judicial tender made by the defenders previously to the trial. The pursuer thereafter moved for a rule on the defenders to show cause why a new trial should not be granted, on the ground that the jury had given their verdict under a mistaken impression that their verdict would necessarily carry expenses in his favour, and he produced an affidavit by the foreman of the jury to the effect that the jury intended that expenses should be carried by the verdict. The Court, on the ground that the question of right to expenses was one outwith the province of the jury in assessing damages, *refused* the rule.

The Act 55 Geo. III. c. 42, by which jury trial in civil cases was introduced in Scotland, enacted by sec. 6—"That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue for a new trial on the ground of the verdict being contrary to evidence, on the ground of misdirection of the judge, on the ground of undue admission or rejection of evidence, on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case: Provided also that such interlocutor granting or refusing a new trial shall not be subject to review by reclaiming petition or by appeal to the House of Lords."

Alexander Chalmers Fullarton, certificated teacher, Greenock, raised an action against the Caledonian Railway Company concluding for £5000 as damages for injuries sustained by him in a collision on the defenders' line of railway at Pennilee, near Paisley, on the 8th September 1880. The case was tried before Lord Adam and a jury on the 12th, 13th, 14th, and 15th of July 1882, when a verdict was returned for the pursuer assessing the damages at £600. Previously to the trial the defenders had made a judicial tender of £750, and in respect of this tender they were according to the ordinary rule of practice entitled to the expenses of the trial.

The pursuer now moved for a rule on the defenders to show cause why the verdict should not be set aside and a new trial granted.

The motion was grounded on the words of the section of 55 Geo. III. c. 42, sec. 6, just cited, "Such other cause as is essential to the justice of the case;" and it was maintained that the verdict as it stood was not the verdict of the jury at all, and that justice had not been done, owing to the deliberation of the jury having proceeded upon a materially erroneous view of the case.

Authorities—*Ewing* v. *Chalmers*, Nov. 26, 1835, 14 S. 69; *Dick* v. *Stewart*, Jan. 16, 1836, 14 S. 218 and 478; *Shields* v. *North British Railway Company*, Nov. 24, 1874, 2 R. 126.

The following affidavit by the foreman of the jury was produced by the pursuer—"I was foreman of the jury who tried this case before the Honourable Lord Adam on the 12th, 13th, 14th, and 15th days of July 1882. That the verdict arrived at in the jury-room by the jury was that the pursuer should get £600, and all expenses to be paid by the defenders, and this was written on a pencil memorandum by me, as foreman, which I afterwards handed to the defenders' agents. That in delivering the verdict in open Court I simply stated £600, having been led to understand that the verdict would carry expenses, and that I did not therefore require to mention the finding as to the expenses. As foreman I affirm that it was the clear and deliberate intention of the jury that the pursuer's expenses