not interfere with the question between the present parties. The insured say, "We are entitled to £428, because rent to that amount has been lost." On the other hand, the office say—"No, you are entitled only to so much of the loss of rent as is the proportion between the amount insured and the whole amount of your rent." In short, the insured say they are entitled to the loss of rent up to £500, within whatever period the loss occurred; while the insurers say—"No, the period of time in which the loss occurred is material, for there is a clause in the policy which makes the amount of the £500 payable proportionate to the period during which the premises were untenantable."

The whole term of the policy is twelve months, and the loss of rent is attributed to the untenantableness of the premises for a period short of twelve months; and according to the terms of the policy the £500 is to be recoverable in proportion to the time the premises were rendered untenantable. The clause on which this contention is founded has been so often read in the course of the debate that I shall not read it again. I read it to mean that the £500 is to be the full amount payable in respect of loss of rent for the whole period of twelve months, and that the insured are to be paid for loss for any less period during which the premises may remain untenantable in the proportion which that period bears to the whole term insured, namely, twelve months. And indeed these are the very words—"in the proportion which the period of untenantableness bears to the term of rent which is insured, not exceeding twelve months' rent." That is the construction which the Sheriff-Substitute has put upon it, and I think it is the right one. But not only do I think his construction is the right one, but I cannot share the difficulties he expresses in coming to it. I do not think the language used can bear the interpretation which he suggests might have been put upon it by the insured. If I thought it was misleading—if I thought it could be read by the insured as meaning that the whole amount of the insurance was to be paid without any reference to the time of untenantableness—I should have unhesitatingly decided against the insurance office, for, *in dubio*, I should construe every clause in a policy of insurance prepared by insurers in their own favour against them and in favour of the insured. But I do not think that is the case with this clause. I think the Sheriff-Substitute's construction is the clear and the only one, and I am therefore prepared to affirm his judgment.

Lord Rutherfurd Clark—I confess that I have very considerable doubts about this case, but as they are not shared by your Lordships it is not necessary for me to say much. If it had been declared by the parties that they agreed on £500 as the amount to be paid in respect of loss of rents in any case, whatever the proportional amount might be, then the pursuers must necessarily prevail; and I do not see how they can make out their case except on that ground. Now, I concur in thinking that the clause necessarily bears the construction put upon it by the company, and unless I can find that it necessarily bears it I should construe it against the company.

Lord Kinnear concurred.

The Lord Justice-Clerk and Lord Craighill were absent.

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

Counsel for Pursuers (Appellants)—Mackintosh—Guthrie. Agent—George Andrew, S.S.C.

Counsel for Defenders (Respondents)—Trayner—Graham Murray. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, July 2.

SECOND DIVISION.

YEATS AND OTHERS (PHILIP'S TRUSTEES) *v.* REID.

Sale—Sale by Auction—Conditions of Sale—Horse—Unsoundness—Warranty.

The trustees of a deceased person sold effects belonging to him by auction. One of the conditions of sale was—"Purchasers must satisfy themselves with the condition, quality, and description of the subjects previous to bidding, as no lot will be taken back or exchanged, or any other abatement made from the purchase price." One of the subjects exposed was a horse which was known to the exposers to have certain defects which were not disclosed by them but which might have been discovered by examination. They gave no warranty of soundness, and made no representation about the animal. The purchaser having after the horse was delivered to him discovered the defects, refused to keep or pay for it. *Held*, in an action by the exposers for the price, that the sale being with all faults, there was no fraud on the exposers' part in not disclosing the defects, and that the purchaser was bound to pay the price.

On 14th May 1883, James Reid, post-horse master, Royal Hotel, Peterhead, bought at a public sale by auction of certain bestial and effects on the farm of Easter Aquharney, belonging to the estate of the deceased Alexander Philip of Yonderton, and sold by his trustees, a brown horse for the price of £44, and gave a cheque for the price. Next day he sent his servant for the horse, and after examining it immediately put it into neutral custody and stopped payment of the cheque.

The trustees and executors of Philip then raised the present action in the Sheriff Court at Peterhead for payment of £44 as the price of the horse.

Reid defended the action, stating—"(Stat. 2) At the time of the sale the horse was unsound, and practically useless. He was a wind-sucker and crib-biter, and also (and this is the fault more particularly complained of) from his birth he suffered from disease of the urethra, had great difficulty in passing water, and was deformed about the sheath. All these defects were well known to the pursuers and the auctioneer. (Stat. 3) The pursuers and the auctioneers did not disclose, as they were bound to do, to the defender and other intending purchasers, the fact

that the said horse was diseased and unsound, as above stated. On the contrary, they wilfully and improperly withheld the information. The defects, particularly those affecting the urethra and the deformity mentioned, were such as could not be ascertained by the defender at the time, and the concealment of them was a *suppressio veri* on the part of the pursuers and auctioneer amounting to a fraud, to the effect of vitiating the sale and entitling the defender to reject the horse."

The pursuers did not dispute their knowledge that the horse had the faults alleged, but denied that they rendered the horse unfit for work, stating, on the contrary, that it had been regularly worked on the farm. They averred that they fully and truly answered all questions asked of them, and that it was not sold with a warranty or representation of any kind, or as fit for a specified purpose, but with all faults and at the risk of the purchaser, and relied on this condition of sale—"(2) Purchasers must satisfy themselves with the condition, quality, and description of the subjects previous to bidding, as no lot will be taken back, exchanged, nor any abatement made of the purchase price."

They pleaded, *inter alia*—"(1) The articles and conditions of sale preclude the defender from refusing payment of the purchase price of the said horse on any pretext whatever."

The defender pleaded—"(2) The pursuers having sold to the defender the horse in question while suffering under latent disease known to them, and not disclosed, the latter is entitled to repudiate the purchase, and having *tempestive* done so, and placed the horse in neutral custody pending instructions, is entitled to be assoilzied. (3) The said horse having been within the knowledge of the pursuers defective, and the defects being of such a nature as could not be ascertained by the defender at the time of the sale, the pursuers and auctioneer were bound to disclose the same, and their failure to do so amounted to fraudulent concealment vitiating the sale."

The horse was sold under the Sheriff's warrant by interlocutor in the cause on 13th July, for £21.

The Sheriff-Substitute (W. A. Brown), after debate on the relevancy of the defences, allowed a proof before answer.

"*Note.*— . . The relevancy of this defence was strongly assailed by the pursuers, who maintained, chiefly on the authority of English law and English cases, that when goods are sold at a public roup under such conditions as are founded upon in this action, the principle of *caveat emptor* is extended to mean that the seller shall not be liable for the mere failure to disclose latent defects if he was under no obligation to speak, and that he is not under such obligation when no inquiries are made, and the seller gives notice to the purchaser that he must satisfy himself as to the condition and quality of the goods. In other words, it is said that in a sale of this description something more than the implication of the Mercantile Law Amendment Act is required, that a seller having knowledge of latent defects is liable if he fails to disclose these, and that there must be some positive misrepresentation on the part of the seller—some pledge given to the purchaser that he undertook to disclose the facts before such liability can be inferred. The pursuers were not able to refer to any Scotch case that precisely met their contention, and relied almost exclusively upon English authorities. In my examination of these, however, I have not been able to discover any general rule which admits of being applied to the case in question, one way or the other, without inquiry into the facts. Whether a seller in such circumstances is protected from everything but positive misrepresentation might depend, for example, on the opportunities of examination or inspection that were afforded to the purchaser, and the character of latent defects, with reference to the probability of being able to discover that upon an ordinary inspection. No doubt the buyer of a horse under such conditions as have to be considered here is very strongly certiorated that he must look to himself for his own protection, but it is impossible to affirm as a universal rule that the seller is relieved from all obligation. In the case of *Horsfall* v. *Thomas*, 31 L.J. Ex. 322, the learned Judge (Bramwell, B.) who delivered the judgment of the Court, said that 'fraud must be committed by the affirmance of something not true within the knowledge of the affirmant, or by the suppression of something which is true, and which it is the duty of the party to make known.'"

At the proof it appeared that the horse was a crib-biter and wind-sucker, and had a defect in the urethra. This was known to the pursuers but was not mentioned, since their view was that the articles of roup imported that the sale was with all faults. Wind-sucking could have been discovered by careful examination at the time of the sale, and so could crib-biting, since the teeth showed that defect. There was conflict as to whether the other defect could be seen when the horse was in the ring, but a veterinary surgeon who examined the horse after the dispute arose did not discover it till it was pointed out. It was discoverable when the horse made water, and was of the nature of malformation. It rendered the horse more troublesome to keep, but did not prevent him from working. It was proved that the auctioneer read the conditions of sale at the beginning of the roup (which began with implements), and again before the animals were sold, but the defender was not present at the moment of reading on either occasion. It was proved that a person asked the auctioneer at the sale as to the defects complained of in the action, and that he turned off the question with a joke, and told the inquirer that he warranted nothing, and that he was to satisfy himself. The horse, if quite free from fault, would have fetched from £60 to £70. The auctioneer deponed that in answer to any inquiry made privately before the sale he would have told what he knew of the horse, and it appeared that any such inquiries would have been answered, if made, by those in charge of the animal.

The Sheriff-Substitute (Dove Wilson) pronounced this interlocutor—"Finds that the animal in question was purchased by the defender on the express provision that no warranty was to be given; Finds that although the animal was unsound, no false representation was made, and no fraud was committed by the pursuers: Therefore repels the defences, and decerns against the defender in terms of the conclusions of the petition," &c.

"*Note.*— . . Not much light is to be got from

the authorities in this case. The provisions of the Mercantile Amendment Act as to warranty do not apply, the defects having been known to the sellers. The case depends on the Scotch common law, and the rules of it as to warranties being implied when nothing is said do not apply, it having been expressly provided that there was to be no warranty. The question seems to resolve itself into one whether at Scotch common law it was lawful for the pursuers to sell an animal in which they knew there were defects under the articles of roup which were used. On this point I think there is no room for doubt. The pursuers were entitled to say to intending purchasers to make their inquiries before bidding, or else to keep quiet afterwards, and there is nothing unlawful in selling any article 'with all its faults.' Unless there be fraud tainting the transaction, such a sale deliberately entered into by both parties must stand. If the knowledge of the defects were so exclusively the possession of the sellers that neither examination nor inquiry could have disclosed them, there might be ground for saying that mere concealment was a fraud. But where a very moderate amount of inquiry would most probably have disclosed both of the defects, and an examination would certainly have disclosed one of them, mere silence on the sellers' part cannot be said to infer fraud, and it is quite explainable by a desire to avoid responsibility for the animal's soundness, and consequent disputes as to the purchases. If in such circumstances the buyer chooses to dispense with all inquiry or examination, he must be held to take his chance. In selling under such articles of roup the price is affected, and it seems that the defender purchased for about two-thirds of what the horse would have been worth if sound. Just as he would have been entitled to keep the horse had he thought his bargain good, so he must equally be content to keep it though it may be bad. If the defender had made an examination or inquiries at the time, and the examination had failed to discover the defect, and his inquiries had been met with untrue or misleading answers, the case would have been quite different, but where he chooses to take his chance without examination or inquiry, and is content to buy 'with all faults,' it seems to me that in the absence of proof of actual fraud or misrepresentation he has no remedy if his purchase turn out unsatisfactory."

The Sheriff (Guthrie Smith) adhered.

"*Note.*—In this case it is confessed that there was no warranty, and indeed no representation. On the contrary, the purchasers at the sale were expressly and distinctly warned to satisfy themselves as to the 'condition, quality, and description' of the horse before bidding. The defender bought the horse on these terms, and I cannot find any ground, in the absence of fraud, for not holding him to his bargain. It is very true that the pursuers, as well as some persons in the crowd, knew that the horse was very far from being right, but under the law which has prevailed in this country for many years—certainly at least since the passing of the Mercantile Amendment Act of 1856—there is nothing to oblige a man to tell all he knows concerning the goods which he is offering for sale, his only obligation is that he shall say nothing calculated to mislead, and do nothing to conceal or cover up the defect of which he is aware, and which it is the buyer's business to find out. To make the case of the defender intelligible we should require to assume that a mere offer of sale was an implied representation by the seller that he knew of no defect calculated to affect the apparent value of the subject. Any such rule is not required by the exigencies of commerce, and would, indeed, be productive of great public inconvenience, as was pointed out long ago by Lord Ellenborough in the case of *Baglehole* v. *Walters*, 3 Camp. 154—a judgment so directly applicable to the case in hand, and so entirely in accordance with common sense, that I cannot do better than quote the following passage:—'I may be possessed (he says) of a horse I know to have many faults, and wish to get rid of him for whatever sum he will fetch. I desire my servant to dispose of him, and instead of giving a warranty of soundness, to sell him with all faults. Having thus laboriously freed myself from responsibility, am I to be liable if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market when exposed for sale? By acceding to buy the horse with all faults he takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives.' The case of *Wind* v. *Hobbs*, December 7, 1877, 3 Q.B. Div. 150—the case of a man sending diseased pigs to the market—is to the same effect, and so standing the authorities on the question, the Sheriff-Substitute has, I think, rightly decided the case."

The defenders appealed to the Court of Session, and argued—The sale was vitiated by the elements of "latent insufficiency" and "sophistication"— Stair, i. 10, 15. The ordinary rule applied here that a sound price presumed a sound article—19 and 20 Vict. c. 60, sec. 5; Brown on Sale, 407; *Ralston* v. *Robb*, 1808, M. "Sale," App. 6.

Respondents' counsel were not called on.

At advising—

Lord Young—We do not think it necessary to call for any answer here as we are all of opinion that the judgment appealed against is right, and that the reasons for it have been quite distinctly stated by the Sheriff.

Lord Rutherfurd Clark and Lord Kinnear concurred.

The Lord Justice-Clerk and Lord Craighill were absent.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for Pursuers (Respondents)—Lang. Agents—Smith & Mason, S.S.C.

Counsel for Defender (Appellant)—Jameson—Ferguson. Agents—Boyd, Jameson, & Kelly, W.S.