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-

tory period, although he has not obtained decree in his favour.

In an action for payment of a sum of money, in which the pursuers founded upon a foreign judgment which the defender averred to be inept and invalid, proof *allowed* of averments in support not only of the validity of that judgment but also of a plea that the defenders were barred from pleading the triennial prescription in respect that the pursuers had timeously pursued their claims.

This was an action raised on 2nd June 1897 by the *Stock Journal* Company of Chicago, U.S.A., against the Clydesdale Horse Company, now dissolved, carrying on business in Glasgow, and the individual partners of the said company, concluding for payment of £183.

The debt for payment of which the pursuers raised the action was alleged to have been incurred to them by the defenders, who had a place of business at Cedar Rapids, Iowa, U.S.A., during the years 1883, 1884, 1885. The pursuers averred that they had obtained decree for the sum in question against the Clydesdale Horse Company and the members thereof in the Superior Court in and for Cedar Rapids, Iowa, and that the sum decerned for had not been paid. They produced their petition against the defenders in the said court and a transcript of the judgment in their favour dated 8th September 1886, and bearing to be certified by the clerk of court. The pursuers averred—"The decree in said action is a final and valid decree, and was regularly pronounced in an action regular and legal according to the laws of the said state of Iowa."

The judgment of the court at Cedar Rapids decerned against "John Roxburg" and William Buchanan by default, for payment of the amount sued for, and on a later date decerned against the company by default for payment of the same sum, finding that the company had due and legal service. The cause was subsequently dismissed against the other partners of the company in respect of their not having been served. In the present action William Buchanan was not called and John Roxburgh did not appear.

The defenders in their statement of facts averred—"The whole of the said proceedings and the judgment following thereon are invalid and inept, and have no force against the present defenders. The Superior Court in and for Cedar Rapids, Iowa, in which the proceedings bear to have been taken, had no jurisdiction over the Clydesdale Horse Company or the present defenders or their authors, and no valid or effectual service was made or could be made upon them. Further, the proceedings being entirely in absence, do not in any way form *res judicata* against any of the parties called thereto, and, at all events, they do not in any degree prejudice the rights of the present defenders. If the pursuers have any claim against the dissolved company or the partners thereof, the same falls to be constituted in the ordinary way. As already explained, the Clydesdale Horse Company had been dissolved, and had ceased to carry on business long prior to the date at which the Court found that the said company had had due and legal service, and no legal service was or could be effected upon them."

The pursuers, in answer, explained—"That according to the provisions of the said Iowa law, service on one member of a firm, whether such firm be in existence or has been dissolved, is sufficient to warrant judgment against such firm; and service of the said action was made on the Clydesdale Horse Company by reading the original notice of action to the said John Roxburgh, and delivering a true copy of the same to him personally, at Cedar Rapids Township, Iowa, upon 23rd March 1886, on which date the said company was transacting business at Cedar Rapids. The said Clydesdale Horse Company was further subject to the jurisdiction of the said Superior Court by virtue of the said Iowa law, in respect that at the date of the service on them they were the owners of heritable or real estate within the jurisdiction, consisting of Rockford Farm, Cedar Rapids, and others."

The defenders pleaded, *inter alia*—"(4) The account sued on being prescribed, its constitution and resting-owing can only be proved by the writ or oath of the defenders."

The pursuers pleaded, *inter alia*—"(2) The said foreign judgment being *res judicata* against the defenders the Clydesdale Horse Company, decree should be granted against the whole partners and representatives of partners thereof. (5) The pursuers having timeously pursued for their claims against the defenders, the defenders are barred from pleading prescription."

On 6th April 1898 the Lord Ordinary (PEARSON) allowed the pursuers a proof of their averments in support of their second plea-in-law, found the pursuers' averments not relevant or sufficient to support their fourth, fifth, and sixth pleas-in-law, and therefore repelled said pleas.

Opinion.—. . . . . "It is urged that this debt was 'pursued within three years,' as required by the statute, to wit, in the foreign action above referred to. . . . But I do not see how the pursuers can use that action for this subordinate purpose if they fail to set up the judgment as a ground of debt. It is not like a case where the debt is claimed upon in some proceeding which, through no fault of the claimant, does not issue in decree for it. Here the pursuers obtained decree, and if the pursuers are reponed against it so as to bring up the merits of the claim, I do not see how the action in which it was obtained can be held to bar the plea of prescription."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong in repelling the pursuers' fifth plea-in-law. Even assuming that the decree of the foreign court against the company was not conclusive against the defenders, their plea of prescription would be barred if the pursuers could show that they had pursued the defenders regularly in a competent court. There was no question that the action had been raised

within the triennial period, and if so, it enabled the pursuers to prove the debt *pro ut de jure* in any subsequent process—*Dunn* v. *Lamb*, June 14, 1854, 16 D. 944; *Eddie* v. *Monkland Railways Company*, July 5, 1855, 17 D. 1041, *per* Lord Wood, 1046, and Lord Cowan, 1048. [It is unnecessary to report the argument on other questions raised in the case.]

Argued for the defenders—The Lord Ordinary was right. The action here had been dismissed against the defenders, and though, no doubt, proper pursuit during the triennium barred the plea of prescription, and though the mere lodging of a claim in a multiplepoinding, for example, was held to be tantamount to pursuit, it was a well-settled principle that an action which had failed or which was abandoned did not operate as such a bar—*Gobbi* v. *Lazzaroni*, March 19, 1859, 21 D. 801.

LORD KINNEAR—I think the Lord Ordinary is quite right in holding that the plea founded on the Act 1579, c. 83, cannot be repelled at present. It is not disputed that the debt sued for is one which falls within the scope of the statute, and it follows that it cannot be proved otherwise than by writ or oath unless the pursuers are in a position to found on the American decree either as a new constitution of the debt, or as satisfying the condition of the statute that it must be sued for within three years. In this view I think the course taken by the Lord Ordinary is perfectly right in all other respects, but I am not satisfied that his Lordship's judgment is equally well-founded, in so far as it repels the fifth plea, and decides at this stage that the averments in support of that plea are irrelevant. The way in which the Lord Ordinary deals with this plea is this—He says if the pursuers fail to set up the judgment of the American Court as a ground of debt, then they will be unable to use the judgment for any subordinate purpose, because his Lordship says if the defenders are reponed against it, so as to bring up the merits of the claim, he does not see how the action in which it was obtained can be held to bar the plea of prescription. I am not prepared, as at present advised, to affirm that view. I think it is quite settled that there may be an action in which a party may be allowed a proof *pro ut de jure* after the lapse of the statutory period of three years, provided he has made a competent claim in a previous competent action within the statutory period, although that claim shall not have been pursued to a successful issue. I think that there may be pursuit within three years in the sense of the statute so as to exclude its application altogether although the pursuer may not have obtained a decree in his favour. This is decided in *Dunn* v. *Lamb*, 16 D. 944, and that decision has been followed in subsequent cases. The claim, no doubt, must have been brought in a competent action, and one in which the creditor might have succeeded in getting judgment in his favour, but nevertheless it might turn out that his proceeding has been ineffectual, and he has not obtained a judgment in his favour, without bringing him within the terms of the statute as a creditor who had not produced his claim within the statutory period of three years. Whether that principle would or would not apply in circumstances which it may be conjectured are likely to be those of the present case I do not inquire. But I am not prepared to decide that an action in a foreign court which has ended in a decree in absence may not be a pursuit in the sense of this statute, even although it is not conclusive on the merits. Neither do I decide the contrary. I think it is enough that we cannot see at present that it is absolutely certain that the American decision, assuming it to be ineffectual as a judgment, may not be good as satisfying the condition of the Statute 1579, c. 83. For that reason I think it is premature to decide with the Lord Ordinary that no use can be made of the American judgment except on the assumption that it must be a valid and effectual decision.

In my opinion, therefore, we ought to adhere to the Lord Ordinary's judgment, except so far as he finds that the pursuers' averments are not relevant to support the fifth-plea-in-law. I go no further in proposing that we should make that exception than to say it is not at present clear to my mind that there may not be a case in which the pursuer might be able to found on this American decision, although it turns out that it was not a valid decree in all respects and for all purposes.

LORD ADAM, LORD M'LAREN, and LORD PRESIDENT concurred.

The Court adhered to the interlocutor reclaimed against, with the exception of the finding as to the relevancy and sufficiency of the pursuers' averments to support their fourth, fifth, and sixth pleas-in-law; varied the said finding by omitting therefrom the word "fifth": *Quoad ultra* adhered.

Counsel for the Pursuers—Baxter—Ralston. Agent—George A. Munro, S.S.C.

Counsel for the Defenders—Salvesen. Agents—Simpson & Marwick, W.S.

Friday, June 10.

SECOND DIVISION.

[Dean of Guild, Edinburgh.

LIDDALL *v.* DUNCAN.

Superior and Vassal — Restrictions on Building—Common Plan—Restrictions not Appearing ad longum in Register of Sasines.

A contract was entered into in 1806 between (1) the Magistrates of Edinburgh, (2) the superiors, and (3) the owners of certain lands now forming part of the New Town of Edinburgh, whereby it was agreed that these lands should be feued out for the purpose of