Quarter Sessions with his register-book and making the proper entry. He is responsible for the accuracy of the entry, and if he can arrange with the Clerk of the Peace, who sits generally as assessor to the Quarter Sessions, to send a note of what was done, and if he corrects his register accordingly, I do not doubt that that would satisfy the requirements of the statute. But there being no provision for a separate register to be kept under the authority of the Quarter Sessions, I think that in some way the register must be completed by a statement of the disposal of the case, and this, together with the general duty imposed upon the licensing Court to cause a certificate to be delivered, points to the officer of the primary court being the proper person to issue the certificate under all circumstances. While I in common with your Lordships think that is probably the best way of working out what the statute has left incomplete, yet as this is rather a matter of inference than of express enactment, I should not have been disposed to differ from any decision which the Lord Ordinary might have given as to which of the two clerks of court is the proper person to issue the certificate. But on a balance of considerations I think there is more to be said in favour of the solution which the Lord Ordinary has proposed. Accordingly I am of opinion that his Lordship's interlocutor should be adhered to.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Reclaimer — Ure, K.C. —Deas. Agents — Simpson & Marwick, W.S.

Counsel for the Respondent — Dundas, K.C.—A. S. D. Thomson. Agents—J. & A. Hastie, Solicitors.

Counsel for the Pursuer—A. O. M. Mackenzie. Agent—James Purves, S.S.C.

Friday, February 22.

SECOND DIVISION.

[Sheriff of Perth.

KINNEAR *v.* J. & D. BRODIE.

Sale—Sale of Moveables—Sale of Horse—Warranty—Breach of Warranty—Rejection—Buyer's Obligation to Return—Death of Horse during Trial through Vice Covered by Warranty—Passing of Property—Passing of Risk—Res perit domino—Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71), *secs.* 20 *and* 53 (1).

A contractor purchased and received delivery of a horse, warranted by the seller to be "correct in wind and work." On being tried on the day of delivery it was very unruly and plunged violently, and on the following day, while being further tried, it behaved in a similar manner, and ultimately ran into a mill dam, where it was drowned. In an action brought by the seller for the price, it was held proved that the horse was not conform to the warranty, and that its death was due to a fault against which it was warranted.

Held that as the purchaser would have been entitled to reject the horse as disconform to warranty, and as his inability to return it was due to the seller's breach of warranty, he was not liable for the price.

David Kinnear, Todhills, Tealing, brought an action under the Debts Recovery Act in the Sheriff Court at Perth against John and Daniel Brodie, contractors, Coupar-Angus, for £30, 15s., being the price of a horse sold by the pursuer to the defenders.

On 17th November 1900 the Sheriff-Substitute (SYM) after a proof, pronounced the following interlocutor, in which the facts of the case are sufficiently set forth:—"Finds in fact (1) that the defenders, who are contractors, having heard that the pursuer, a farmer at Tealing, had a chestnut horse which would be suitable for their business, went to Tealing about 31st July 1900, with a view to buy said horse; (2) that said horse, which had been foaled at Tealing, and had spent all its life there, was then seven years old, and though a somewhat fractious horse when being broken in, had for some time been quiet and tractable in pursuer's hands; (3) that the pursuer on said date sold him to the defenders for £31, with 5s. of a luck penny, or £30, 15s., and gave a warranty that he was 'correct in wind and work'; (4) that on the following day the pursuer sent him to Auchterhouse Station, where he was met by Charles Ogilvy, the defenders' servant, and whence he was led by Ogilvy to the defenders' premises at Coupar-Angus; (5) that on the same day he was put into a waggon laden with a little over a ton of coal, and though carefully managed was very unruly and plunged violently; (6) that on 2nd August he was put into a stone-cart to fetch stone from Keithick Quarry to Cupar Grange, and though carefully managed by Ogilvy, was again unruly and plunged violently; (7) that on his second journey from the quarry, with about 18 cwts. of load, he stood fast, and then plunged violently and ran into a mill-dam some yards to the left of the road, where, being held down by the loaded cart, he was drowned, and that without any fault on the part of the defenders' said servant; finds in law that, until he was so drowned it was still within the power of the defenders to return him as not 'correct in work,' and that the conduct of the horse while in their possession justified his being so returned, and constituted a breach of said warranty, in respect that the defenders were entitled to expect that the horse was fit for immediate use: Therefore sustains the defences, assoilzies the defenders, and finds them entitled to of expenses, for which decerns."

The pursuer appealed to the Sheriff

(JAMESON), who on 17th January 1901 pronounced this interlocutor:—"Adheres to the findings in fact in the Sheriff-Substitute's interlocutor of date 17th November 1900; *quoad ultra* recals the said interlocutor: Finds in law (*first*) that after the sale and delivery of the horse in question by the pursuer to the defenders, the said horse was at the defenders' risk; (*second*) that the said warranty did not operate as a suspensive condition of the sale to the effect of preventing the passing of the risk from the pursuer to the defenders; (*third*) that the loss caused by the death of the horse falls on the defenders; (*fourth*) that the pursuer having sold and delivered the said horse to the defenders, is entitled to payment of the stipulated price: Therefore repels the defences, finds the defenders liable to the pursuer in the sum of £30, 15s. sterling, and decerns and ordains them to make payment of said sum to the pursuer: Further, finds the defenders liable to the pursuer in the sum of £ of expenses, for which decerns."

Note.—"The facts of this case do not admit of much dispute, but I have the misfortune to differ from the Sheriff-Substitute in point of law. While undoubtedly the defenders had a right to repudiate the contract of sale and reject the horse in question in the event of his turning out disconform to warranty, yet they never exercised that right, and at the time the said horse was drowned he was their property under a completed contract of sale, and the maxim *res perit domino* applies. I am unable to regard the present as one of that class of cases in which the transfer of the property of the thing sold is suspended until the thing sold is subjected to some trial or test. The horse in question was not sold subject to trial for a week or any other period. A condition of that kind would have suspended the passing of the property till the expiry of the period of trial. It was absolutely sold, but subject to a warranty, the breach of which entitled the buyer to dissolve the contract. The warranty may accordingly be viewed as what Professor Bell (1 Com. 260, 7th ed.) calls a dissolving condition. But the buyer had not exercised his right to dissolve the contract at the date of the death of the horse, and the loss caused by that death accordingly falls on him."

The Sale of Goods Act 1893, section 20, enacts—"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not." Section 53—"Where there is a breach of warranty by the seller . . . the buyer . . . may (*a*) set up against the seller the breach of warranty in diminution or extinction of the price . . . (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty. (3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. (5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act." Section 11 (2)—"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages." Section 62 (1) . . . "As regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract."

The defenders appealed to the Court of Session, and argued—Assuming that the horse was not conform to warranty, as both Sheriffs had rightly found, there was here no completed contract of sale. It was a sale under a suspensive condition, viz., that the horse should prove, on trial, to be conform to the warranty given. The buyers were entitled to a reasonable time in which to try the horse, and until that time had expired the property had not passed so as to impose the risk on them. This horse was proved to be disconform to the warranty, and the buyers had the right to reject it. Their position could not be worse because its restoration had become impossible, not through their fault, but in consequence of the vice against which the warranty was given, *i.e.*, through the fault of the seller—*Head* v. *Tattersall*, (1871), 7 Exch. 7, *per* Bramwell, B.; *Elphick* v. *Barnes* (1880) 5 C.P.D. 321; *Chapman* v. *Withers* (1888), 20 Q.B.D. 824. Alternatively under the Sale of Goods Act the purchaser was entitled to set up the breach of warranty in extinction of the price—sec. 53 (1) (*a*). The damage sustained was the price he had paid. On either ground the defenders were entitled to absolvitor.

Argued for the pursuer and respondent—On the assumption that the horse was disconform to warranty (which the respondent maintained was not proved) the Sheriff was right in holding that the property in the horse had passed under a completed contract of sale, and that the risk was therefore with the buyer—Sale of Goods Act, section 20. The Act did not provide otherwise where there was a breach of warranty. The case was not ruled by the authorities cited by the appellant, which were all cases of true conditional contract, the buyer having the right to reject the goods within a specified time. Here the contract was completed, and the maxim *res perit domino* applied. In any view, the damage sustained by the appellant was not the full price of the horse, but the difference between its value at the time of delivery and the value of what he bargained for—Sale of Goods Act, section 53 (3). The horse, although disconform to warranty, was worth something, and the appellant had given no proof of his actual loss.

LORD YOUNG—On the question of fact I am of opinion with both Sheriffs that this horse was not according to the warranty which was given by the seller. The purchasers were therefore entitled to return it and resist payment of the price. It is true that the purchaser of a horse under warranty may so act as to exclude him from the defence that the horse is disconform to warranty. He is at liberty to keep it although it is disconform to warranty, but if he does so he must pay the price. And if he does not exercise the right of rejection timeously he may so behave as to make him too late in rejecting the horse. But unless he has so excluded himself by his actings the defence of breach of warranty is a good defence, and in my opinion the defenders here have done nothing to exclude them from pleading it.

I quite recognise the rule of law that when an article sold is delivered to the purchaser the property passes to him. The seller is divested and the purchaser is invested with the property. But that investiture is subject to defeasance if the article turns out, within due time and after proper trial, not to be the article which the purchaser intended to buy. If the article remains extant, the condition is that he must return it. The peculiarity here is, that the horse perished by its proving not to be according to the warranty given, and consequently that condition could not be complied with.

I have no hesitation in agreeing with the Sheriff-Substitute that the buyer is entitled to resist payment, on the ground that restoration has been made impossible, not through any fault of his, but through the fault of the seller warranting the horse to be what it was not, viz., "correct in wind and work." I am therefore of opinion that the judgment of the Sheriff ought to be recalled, and that of the Sheriff-Substitute restored.

LORD TRAYNER—I am of the same opinion. I do not doubt that the maxim to which the Sheriff refers, *Res perit domino*, expresses a rule of our law, but I think it has no application in the present case. The horse in question, although delivered to the buyer, was delivered under a warranty. The purchaser's right and duty was to try the horse and see if it was conform to that warranty; if it was disconform to warranty, his right was to return it to the seller. When trying the horse in exercise of his right the horse came to its death by reason of the very vice against which the warranty was intended to insure the purchaser. That circumstance absolves the purchaser from the necessity of returning the horse as disconform to warranty. I think the case is the same as if the horse having been sold and delivered under a warranty of perfect soundness had died immediately of a mortal disease under which it laboured at the time of the sale. In such a case the buyer could not return the horse as it was dead, but he would not be liable in payment of the price. The breach of warranty absolved the buyer from his obligation under the contract here.

LORD MONCREIFF—I concur. I think it is proved that the horse was not according to the warranty given, and therefore before its death the pursuer was entitled to return it, or to retain it, and set up the breach of warranty against a demand for payment of the price (section 53 (1) (*a*) of the Sale of Goods Act 1893). The peculiarity of the case is, that the horse perished through the very fault against which it was warranted, and the question arises, whether as the horse was killed instead of merely injured, the purchaser is in a worse position than if it had only been injured. I am unable to affirm that.

The seller's plea is that because the purchaser cannot return the horse he must pay the price. It is a sufficient reply that the reason why he cannot return it is because it died in consequence of the viciousness against which the seller's warranty was given. I therefore think that the judgment of the Sheriff-Substitute is right.

I would only add, that it is not necessary to express, and I do not express, any opinion on the question which would have arisen if the horse, though not conform to warranty, had died from some cause not connected with the vice against which it was warranted. As things stand the seller is barred from founding on the non-return of the horse.

LORD JUSTICE-CLERK—The defender got delivery of the horse on a warranty. It was therefore a horse which could be rejected and the sale cancelled if after fair and proper trial it proved not to be what it was described to be in the warranty. On the facts I am satisfied that if after the two trials it was subjected to, it had been saved out of the pond, the defender would have been entitled to return it and to refuse to pay the price. The fact is that in consequence of the conduct of the horse by which its disconformity to warranty was demonstrated, it perished by being drowned in the pond into which it fell when behaving in such a manner as to entitle the defender to reject it as disconform to warranty. I asked Mr Campbell whether if what is proved constituted conduct by the horse in breach of warranty, but the horse had been saved out of the pond, and returned, the pursuer could have any claim to insist for the price. I cannot see how he could. Now, being satisfied that the conduct of the horse was such that the defender would have been entitled to return the horse, I cannot hold that its having perished in consequence of the very fault against which warranty was given, puts the defender in a worse position than he would have been in the former case supposed of the horse being got out of the water and being returned alive.

The Court recalled the interlocutor of the Sheriff of 17th January, affirmed the interlocutor of the Sheriff-Substitute of 17th

November 1900, and remitted to him of new to assoilzie the defenders.

Counsel for the Pursuer and Respondent — W. Campbell, K.C. — Lyon Mackenzie. Agent—David Milne, S.S.C.

Counsel for the Defenders and Appellants —Salvesen, K.C.—Chree. Agents—Adamson, Gulland, & Stuart, S.S.C.

Friday, February 15.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

NORTH BRITISH STEAM FISHING COMPANY, LIMITED *v.* NORTH EASTERN SHIPPING COMPANY, LIMITED ("THE ACACIA").

Shipping Law — Salvage — Remuneration for Services—Measure of Award.

A steamship of the value with her cargo and freight of about £4000, which had suffered so badly in a heavy gale that her fires had been drowned out, was rescued by a steam trawler from a position of grave but not of imminent danger off the rocky coast near Aberdeen Harbour. In an action for salvage it was admitted that salvage services had been rendered, but it was maintained that the sum claimed was excessive. It was proved that the master of the steamship showed a signal of distress, and when the trawler in response to his signal bore down to his assistance, requested to be towed to Fraserburgh, which the master of the trawler agreed to do; that the towing lines broke twice before they were made fast, and that in passing the lines the trawler ran a risk of fouling her propeller; that after they had proceeded part of the way to Fraserburgh it was thought advisable to turn back to Aberdeen on account of the heaviness of the sea; and that the time occupied in rendering the services was twenty-four hours, but that the trawler lost no time, as during that period she could not have entered the port of Aberdeen, to which she was bound, owing to the state of the sea. It was also proved that no damage had been done to the steam trawler except that her hawsers had been strained.

The Lord Ordinary (Stormonth Darling) assessed the value of the services rendered at £300.

On a reclaiming-note the Court *refused* to interfere with the Lord Ordinary's award.

The North British Steam Fishing Company, Limited, the registered owners of the screw steam trawler "Ben Alder," Aberdeen, for themselves, and as representing the master and crew of the vessel, brought an action against (1) the North Eastern Shipping Company, Limited, the registered owners of the screw steamship "Acacia," of Aberdeen, and also (2) against Macdonald & Morrison, coal merchants, Inverness, the owners of the cargo on board the "Acacia" on 17th February 1900, in which they concluded for decree ordaining the first-named defenders to make payment of £1500, and for decree ordaining the second-named defenders to make payment of £150, to the pursuers as compensation for salvage services rendered by the "Ben Alder" to the "Acacia" on 16th and 17th February 1900.

The defenders admitted that salvage services had been rendered, but pleaded that the sum sued for was excessive. Parties were agreed that at the time of the salvage the value of the "Acacia" and her freight and cargo was about £4000, and the value of the "Ben Alder," with her fishing gear and catch of fish, a little over £5000.

Proof was led, which disclosed the following facts:—The "Acacia" left Sunderland for Inverness at 2·45 p.m. on Thursday 15th February 1900, with a cargo of coal and a crew of 11. The wind increased and blew a gale about 3·30 p.m. In the course of the evening the vessel's boats were stove in or carried away, and damage was done to the deck. The gale reached its height about midnight. Thereafter the wind commenced to fall, but the sea continued rough. The pumps began to get choked, and the "Acacia" made for Aberdeen in order to get them cleared. She reached Aberdeen Bay about 11 a.m. on Friday the 16th, but the sea was too heavy for her to get over the bar. About a dozen vessels were moving about the bay waiting for the sea to go down, and the "Acacia" joined them. About 2 p.m. the engineer of the "Acacia" reported that the fires were being drowned out, and that he could not keep the vessel going much longer. The master asked two of the vessels which were waiting in the bay to tow the "Acacia" to Fraserburgh, but they declined. The wind was then S.S.E. to S.E., and the vessel was lying a mile or so off Girdleness. The master of the "Acacia" then ran up a flag as a signal of distress, and the "Ben Alder" bore down to his assistance. He asked the "Ben Alder" to tow him to Fraserburgh, which the master of the "Ben Alder" agreed to do. The tow lines broke twice before they were made fast. In passing the lines on board the "Acacia" the "Ben Alder" had to come within 3 or 4 feet of the "Acacia," and she ran a risk of fouling her propeller. After the hawsers had been made fast, the "Ben Alder" at first attempted to tow the "Acacia" northwards towards Fraserburgh, but desisted on account of the heavy seas, and took her back to Aberdeen Bay, and kept attached to her all night. At 2 a.m. the "Acacia" heeled over, and all her boats being useless she sent up rockets for a boat. The trawler "North Coast" sent a boat alongside with two men, who got on board the "Acacia." This boat was kept astern in case the "Acacia" should sink, and was towed behind till it was swamped at the entrance of Aberdeen Harbour. The sea gradually went