

No. 5. A petition reclaiming against this interlocutor was presented by Dalrymple; but the Court, (June 28th, 1808,) “refused it without answers.”

The opinion of the majority of the Judges appeared to be, that there was sufficient reason to believe, or at least to allow a proof, that the kelp had been of bad quality originally, and not such as answered the description “of pretty good kelp at £8 per ton,” or was fit for making soap. But they thought that by receiving the article, and giving bills for the price, keeping it so long, and using part of it without objecting to its quality, the suspender had lost all right of refusing to pay the price upon any such objection; and that it would be dangerous, by admitting such exceptions, to shake the established and salutary rule of practice on that head.

Lord Ordinary, *Balmuto.*

Act. *J. A. Murray.*

Alt. *John Cunningham.*

W. Whyte and Ja. Gibson, W. S. Agents.

W. Clerk.

M.

Fac. Coll. No. 63. p. 233.

1808. July 9. JAMES RALSTON *against* ROBERT ROBB.

No. 6.

The disease called the Running-thrush, affecting the feet of a horse, constitutes unsoundness.

ON Saturday 5th September 1805, the pursuer, a horse-dealer in Edinburgh, sold to the defender, a farmer at Meadowhead, a young gray horse, warranted sound, at the price of 51 guineas. Before concluding the purchase, the defender gave the horse a short trial, and employed a farrier to inspect him.

The defender, after taking home the horse, discovered that its feet were affected with the disease called the *running-thrush*, which rendered it unsound. The animal remained in the possession of the purchaser during the intervening Sunday; and was returned on the morning of Monday the 7th September to the pursuer's stables. The defender having thus declined to keep the horse, and refusing to pay the price, the pursuer instituted an action to recover it.

On the 24th October 1805, the defender, on being served with the summons, applied to the Sheriff for a warrant to sell the horse by public roup. The warrant was granted accordingly; the horse was exposed to sale; and was purchased by a Mr. Craig, merchant in Edinburgh, at the price of £36 Sterling.

The action came before the Lord Justice-Clerk, Ordinary. The pursuer offered to prove that the horse was sound at the time of sale, had been sound from the period of its birth, never had been known to be lame while in the possession of the various individuals to whom in succession he had previously belonged, and was at that moment the property of a gentleman who considered him to be perfectly sound.—On the other hand, the defender offered to prove that the animal was unsound at the time of the sale, in consequence of being affected with the disease in his feet called the *running-thrush*.

A proof was accordingly taken; on considering which, the Lord Ordinary found as follows:—

‘ Finds it proved that the grey horse had running thrushes in his feet, particularly in the far fore foot, at the time when he was sold by the pursuer Ralston to the defender Robb: Finds, that the disease called running thrushes, although capable of being cured, and sometimes easily and speedily cured, does at the time render a horse unfit for travelling on the high road, therefore, without pretending to understand whether such a horse can be considered as a sound horse, finds that a horse which cannot travel on the high road is not a marketable commodity, fit for the purpose for which he is intended: Finds, that every seller is bound in law to warrant that his goods are marketable, fit for the immediate use for which they are usually intended: Finds, that the circumstance proved that the defender Robb did employ the ferrier Kinnell, to examine the horse at the time of the bargain, is not relevant; as any such examination by a purchaser either of horses, or of any other commodity, does not prevent his claim of warrandice against the seller that his goods shall be marketable, and fit for sale, unless warrandice be expressly waved; therefore assoilzies the defender, and decerns; finds expenses due, and allows an account to be given in.’

The cause came before the Court by petition and answers.

In point of fact, the Court was satisfied from the proof that the horse at the time of the sale was affected by the *running-thrush*. The legal effect of this circumstance was debated.

Argument of the pursuer.

The disease of running thrushes does not of itself constitute unsoundness. This disease exhibits itself in an infinite variety of degrees, from a mild stage, in which it produces no inconvenience, to that acrimonious stage in which it causes absolute corruption and destruction of the frog. It arises frequently from carelessness and inattention to cleanliness, and is prevented or removed by regular diet, cleanliness, and exercise. This habit, too, is not unfrequently reckoned by skilful persons to be useful to horses of a particular temperament. It operates as an evacuation and relief to foul and gross constitutions, and prevents the occurrence of various diseases. Such is the opinion of scientific farriers. (Taplin, Vol. 2. p. 394.)

In the understanding and practice of those concerned in the trade of horse-selling, and in that of gentlemen of the turf, this disease is not accounted unsoundness, unless it produce actual lameness.

Argument for the defender.

The defender purchased a *sound* horse, and to this effect received warrandice. ‘ The general acceptation of the word *sound* has ever been and still is intended to convey an honourable and unequivocal assurance of the perfect state both of the frame and bodily health of the subject, without exception or ambiguity.’ (Taplin, vol. 1. p. 15.) That running thrushes is a disease is

No. 6. admitted; and to argue that it is easily cured, is to acknowledge the previous existence of disease. At any rate, it is treated of as a disease in all works of farriery (Taplin, Vol. 1. p. 94; Blane's Outline, Vol. 2. p. 718; D. Laintet, p. 140.) Whether the disease may originate in an imperfection in the general habit of body; whether it may arise from an injury induced on the feet from accident or carelessness; whether it may exist in a mild or virulent degree; and whether it may admit of an easy and expeditious, or of a difficult and tedious cure; all these questions are totally irrelevant. The purchaser means to buy a sound horse, fit for the present purpose of the road, or field, and not requiring care and attention beyond that which is to be expected from a servant of ordinary skill.

This point has already been decided by the Court in a recent instance, involving circumstances much more unfavourable to the seller than those which accompany the present case, (See NOTE I. below.)

Some of the Judges were of opinion, that a running thrush in its early stage, and in its mildest and most innocent form, and where it did not produce actual lameness, did not, in the contemplation of law, render a horse unsound; and ought to be numbered among those slighter and more immaterial imperfections of which the concealment did not void the sale, and to which warrandice did not apply.

A majority of the Judges, however, were of a different opinion, adopted the principles of which the interlocutor of the Lord Ordinary contains a summary, and observed—Under the warrandice of the sale, whether derived from the payment of the market price of a sound and unblemished horse, or from the express stipulation of the parties, the purchaser is entitled to have a horse immediately fit for its purpose. He is not understood in law to go to market with the view of purchasing a commodity of which he cannot have the immediate use,—which may require a course of medicine, and care to render it fit for its purpose,—and which demands the exhibition of more than ordinary skill and expense to preserve it in a state of usefulness, or perhaps from utterly perishing. If, as alleged by the pursuer, the disease is so insignificant as to produce no inconvenience, or lameness, the communication of the fact to the purchaser will not reduce the price of the commodity in the market. If, on the other hand, it is a disease which, being known, diminishes the value and consequently the price, which is intimately and necessarily connected with lameness, of which a course of medicine and attention is required to accomplish the cure, and extraordinary skill to prevent the recurrence—the concealment of it must and ought to void the sale.

The peculiar principles of concealment which are vulgarly believed to obtain in transactions in the trade of horses, cannot receive any sanction in a court of justice. If such are really admitted and acted upon, they ought to be reprobated. The legal warrandice in the purchase of a horse must have the same extent as in the purchase of any other commodity, and cannot be cut

down by distinctions which are more nice than honest. The prevention or abolition of concealments may tend in no slight degree to increase or restore the respectability of that department of trade.

Running thrushes are a disease which, whether considered as arising from a local injury or from a vicious habit, it requires a certain degree of extraordinary care to prevent, alleviate, or remove; and while the disorder exists, the soundness of the animal, or its freedom from lameness, can not be depended upon for a day or an hour.

The Court (25th June 1808,) pronounced the following interlocutor: "The Lords having resumed consideration of this petition, and advised the same with the answers thereto, they refuse the desire of the petition, and adhere to the interlocutor complained against."

And, on advising a reclaiming petition, (5th July 1808,) without answers, the Lords adhered. (See NOTE II. below.)

Lord Ordinary, *Justice-Clerk.* Act. *F. Jaffrey.*
Rob. Grahame, W. S. and Alex. Ponton. Agents.

Alt. *David Monypenny.*
W. Clerk.

J. W.

Fac. Coll. No. 69. p. 251.

Note I.—Mr. Jardine, W. S. against Major Campbell, 15th January 1806. This case is not reported; but the following are the facts:

On the 29th of April 1804, Mr. Jardine, writer to the Signet, Major of the First Regiment of Edinburgh Volunteers, purchased from Major Campbell of the 27th regiment of foot, a horse, intended for a charger, at the price of £57. 15s. under an express warrandice of soundness.

Mr. Jardine, before concluding the purchase, rode the horse; and upon this trial expressed himself perfectly satisfied, and paid the price.

After the horse had been in his possession for ten days (till the 9th May) it became lame; and on examination it was discovered that the animal had running thrushes.

Major Campbell refused to take back the horse, conceiving that, in the circumstances of the case, there could not be in law any recourse against him.

Mr. Jardine raised an action, concluding for restitution of the price; and the cause was discussed before Lord Dunsinnan, Ordinary.

A proof was taken, wherein it was established, to the satisfaction of the Lord Ordinary and the Court, that previous to the sale, the horse had running thrushes.

In the mean time, the horse was sold by mutual consent; and was purchased by Colonel Fullarton at the price of L.39 Sterling.

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The Lord Ordinary pronounced the following interlocutor (14th May 1805.) “ Finds that the horse in question, when purchased by the pursuer, “ as warranted sound, and paid for as such, was affected with an ailment in “ his feet, known by the name of running thrushes; which in a certain de- “ gree does impair the soundness of a horse, and consequently ought “ to have been, but was not made known to the pursuer; therefore, “ finds the pursuer entitled to repayment of the price which he paid to the de- “ fender, with interest thereof from the term of payment, and the expense “ of keeping him until the horse was sold by mutual consent, together with “ the expense of process: Finds the defender entitled to receive the price “ which was paid for the horse by Colonel Fullarton, and decerns.”

The defender reclaimed to the Court; and, besides an argument on the import of the proof, maintained, 1st, That running thrushes, unless causing actual and present lameness, do not constitute unsoundness. In support of this proposition was adduced the evidence of many persons familiar with the treatment, and acquainted with the peculiar maxims and principles which obtain in the sale of horses. Many very respectable persons deponed, that in their opinion, and in the understanding of the trade, running thrushes, not producing present lameness, did not constitute unsoundness, and was reckoned among those qualities or imperfections of a horse which might, or might not, affect the price, according to the caprice of the purchaser, and of which the concealment was honest and justifiable: 2dly, That there could be no recourse, as the horse had been kept by the pursuer for ten days, and was not therefore returned *debito tempore*.

The Court, however, on advising the petition, without answers, refused the desire thereof, and adhered to the interlocutor reclaimed against.

And on advising a second reclaiming petition, with answers, the Lords adhered.

Note II.—On the same day, a seemingly opposite judgment was ultimately pronounced in another case; but the Court proceeded, in that case, on the specialty that the horse had not been returned *debito tempore*, and that the right of recourse had thereby been lost; 25th May 1808, Elliot against Douglas.