not be allowed to proceed, except on condition of said pursuers finding caution for expenses, in the event of the defenders obtaining judgment of absolvitor; therefore, and in respect no different rule can be adopted in this case, adheres to the Sheriff-Substitute's interlocutor of 28th January last, and finds that his interlocutor of the 4th instant, which necessarily followed on the failure to find caution, can be recalled only if caution be yet found between this date and 6th April next, being the day of the first district Appeal Court after the recess, and continues the cause in the Sheriff's Appeal Roll till the said date, with certification."

The pursuers reclaimed.

Scott for them.

Shand in answer.

The Court (the Lord Justice-Clerk differing) recalled this interlocutor. The majority held that the case differed from the recent case of *Jenkins*, as in the present case the pursuers had the control of the action. The three pursuers were quite entitled to vindicate the rights of the public, and the fact that they were working men gave them a still greater interest in the question, as it was their own class who would probably benefit most by the road being opened. It had been pleaded that a committee of seventeen working men, which had been formed to maintain the public rights, should be sisted; but if the present pursuers were not worth anything because they were working men, it would be no use to sist seventeen others in the same condition. If every one interested required to be sisted in an *actio popularis*, the whole population would require to be made parties. In the case of *Jenkins* the pursuers were chosen on account of their poverty, which was not the present case. The case of *Jenkins* had gone very far, and the Court declined to extend the necessity for finding caution. The tendency of modern legislation was to restrict the cases where caution was required to be found. They also indicated an opinion that, if the case was properly conducted by the present pursuers, it would form a *res judicata* with all other members of the public.

The Lord Justice-Clerk held that the committee should be made to sist themselves. He held that the import of the proof was that the action had been instituted, and was now carried on, by the committee. The committee were now suing through others whose name they used. The fact that the other people subscribed towards the expenses of the action, and showed their interest in it, was of no importance. The question was, who had the control of the action?

The Court recalled the interlocutors of the Sheriffs, and remitted the case back to the Sheriff-court to be proceeded with.

Agents for the pursuers—Maconochie & Hare, W.S.

Agents for the Defenders—D. Crawford & J. Y. Guthrie, S.S.C.

Tuesday, July 19.

DUNCAN *v.* TEENAN.

Sale — Horse — Unsoundness — Express Warranty. Circumstances in which *held* that the purchaser of a horse had failed to prove an express warranty thereof by the seller.

This was an appeal at the instance of Mr Duncan, the pursuer in the action in the Inferior Court, against the judgments of both the Sheriff-Substitute and Sheriff of Dumfriesshire. The case was one in which the pursuer sued the respondent for the price of a horse which it was alleged had turned out unsound, and in regard to which it was maintained that on the day of sale there was an express warranty given as to its soundness. This was denied by the respondent, and a proof was led in the Inferior Court. The evidence led was very conflicting, and it became necessary to look narrowly into the correspondence produced in process to see if there was anything stated therein that would support the pursuer's averment of express warranty. The Sheriff-Substitute held that the pursuer had completely failed on the oral proof, his only witnesses being himself and a person of the name of Peter Elder. In his Note the Sheriff-Substitute stated on this subject, as the ground of his decision—"Both witnesses speak to a renewed guarantee the next day, when the price was paid, but they differ most materially in regard to the question of a *written* warranty, pursuer saying that defender offered one, and Elder that he refused it when asked. This throws doubt on the whole story. Pursuer's denial of connection with Elder, and his styling him a horse-dealer in Liverpool, when he had ceased to be so for eight years or so, and was living in Aberdeenshire, and occasionally assisting the pursuer, is a very suspicious circumstance, besides which, his evidence was given in anything but a straightforward manner. His case, being thus not unimpeachable when taken by itself, is insufficient to prevail against the evidence led for the defender, into which it is not necessary to enter. The only other point requiring notice is the import of the documentary evidence, which the pursuer's procurator contended is not consistent with the defence. The Sheriff-Substitute is unable to see that defender has compromised his case by anything he wrote to the pursuer himself. His letters to Bell may be read, perhaps, as if there was a fear in his mind that he would be liable to the pursuer, but they are also explainable in another way—viz., that he was angry at Bell for having misled him, and so embroiled him with a customer, and at the same time anxious to do what he could for the pursuer, even to the extent of paying something himself, although not considering himself liable." The pursuer appealed to the Principal Sheriff; but the Sheriff-Substitute's interlocutor was *simpliciter* adhered to. The present appeal was then brought to the Court of Session.

Shand and Mair for pursuer.

Millar, Q.C., and Scott in answer.

Judgment was given to-day by Lord Benholme. The Court unanimously adhered to the Sheriff's judgment, and found the respondent entitled to the additional expenses incurred by him since the date of the Sheriff-Substitute's interlocutor.

Agent for Appellant—W. Officer, S.S.C.

Agent for Respondent—W. S. Stuart, S.S.C.

Saturday, July 16.

FIRST DIVISION.

LOGAN *v.* WEIR.

Suspension—Removing—A. S. 10th July 1839, § 34 *—A. S. 14th December* 1756, § 6*—Lease—Specialties—Juratory Caution.* Special circumstances in which a note of suspension of

a decree of removing was passed on juratory caution.

The respondent had in March 1869 raised a summons of removing in the Sheriff-court of Stirlingshire against the complainer, concluding for his removal at the term of Whitsunday 1869 as a yearly tenant from a cottage, with a byre, stable, and yard and an acre and half of ground for a cow's grass, held by him of the respondent. Notwithstanding the provision contained in the A. S. of 10th July 1839, § 34, the complainer was not ordained to find caution for violent profits. Eleven months after the raising of the summons the Sheriff-Substitute decerned in the removing, and thereafter the Sheriff adhered to the judgment of his Substitute. The present note of suspension and interdict prayed for suspension of a threatened charge on the said decree without caution or consignation.

It is provided by the A. S. of 14th December 1756, § 6, that in the suspension of a decreet or process of removing "the complainer shall be obliged to find sufficient caution, not only for implement of what shall be decerned on the advocation or suspension upon discussing thereof, but also for damage and expense in case the same shall be found due." The complainer declined to amend his note to the effect of offering caution, but stated his readiness to find juratory caution, and he lodged an inventory of his effects, the alleged value of which as appeared therefrom was £70, 5s. 6d. sterling.

The Lord Ordinary (Mackenzie) held, that as there was no specialty to take the case out of the ordinary rule, the juratory caution offered was not "sufficient," and that therefore the note must be refused.

The complainer reclaimed.

Millar, Q.C., and Mair, for the reclaimer, maintained that, there being a valid and duly stamped lease in his favour, and the case being exceptional and special, he was entitled to have the note passed on juratory caution. The lease was as follows, viz., "Mugdock, 9th August 1867. I, John Weir, do hereby to let James Logan a house and stables and byre garden, £9, 10s., for a lease of to the end of my lease, I, John Weir." There was thus a specification of the subjects, a rent, and a definite ish. And certain repairs had been executed on the premises on the faith of the lease. The specialty of the case consisted in this, that both in the suspension and in the pleadings in the Inferior Court the respondent stated that the signature to the document was not his signature; while it was stated for the complainer in his condescendence in the Inferior Court that it had been reported that the respondent went about saying he was drunk when he signed the lease, and to meet this alleged statement of the respondent the complainer averred minutely the circumstances in which the lease was signed and the parties present at the time. In answer to this the respondent had replied "irrelevant and denied," but without adding any counter statement. All this, the complainer urged, made the case a peculiar one, and entitled him to the benefit of juratory caution.

Shand and Brand, for the respondent, replied that the lease was quite insufficient, in respect (1) it contained no specification of rent, the figures £9, 10s. being interlined, and, as they stood, unintelligible; (2) the lease contained no mention of the acre and half of ground occupied by the complainer, and that acre was distinct from the "garden" mentioned; therefore, the subjects occupied being different from the subjects described, these were not identified in the missive, and consequently that document was bad in law. With regard to the alleged specialty, it had no existence. The signature being denied, the respondent could not say in what circumstances, or when, or by whom, it was signed, and could not meet the detailed averment of the circumstances attending the signature in any other way than by a denial. The case of *Marshall* v. *Gartshore*, 28th May 1850, 12 D. 946 afforded a good illustration of a special case, but the present was not attended with any of the like peculiarities, and therefore the complainer must be ordained to find ordinary caution.

At advising—

The Lord President held that every question as to the meaning of the words "sufficient caution" in the A. S. of 14th December 1756 was of delicacy and importance, and that he would be sorry to lessen the stringency of the rule, but he agreed with the Judges in *Marshall's* case in saying that cases may occur where juratory caution would be "sufficient caution." In the present case he was impressed with its specialties. The complainer had produced a document said to be holograph giving a lease of the subjects in question, and if that document had been admitted it would have afforded a good defence to the process of removing. On the other hand, the respondent might say it was not his writing, and such was his case. But the complainer not only states specifically in his pleadings in the Inferior Court the object for which it was granted, but that it was signed in presence of more than one witness; and then there is this other element, that the complainer offers to prove that the respondent had stated that he was tipsy when he signed the document. If all these statements by the complainer had been met *seriatim* by the respondent the case would have been in a different position, but his answer is a mere evasion. For example, he does not say whether the statement as to his being drunk is true. His whole answer is "irrelevant and denied." The truth may be with the complainer. The validity of the document is not to be determined at present. It would, in the circumstances, be harsh and unreasonable to refuse to pass the note on juratory caution.

The other Judges concurred.

Agent for Complainer—William Officer, S.S.C.

Agents for Respondent—Morton, Whitehead & Greig, W.S.

Wednesday, July 20.

CUTHBERTSON *v.* LOWES.

Contract—Market Value—Nullity—Pactum Illicitum—*Payment—Sale.* Potatoes having been sold by the Scotch acre, the purchaser took delivery, but refused payment of the stipulated price on the ground that the contract was by statute null. *Held*, though the Court could not enforce the contract, it could give decree for the market value.

On 20th September 1869, the pursuer sold two fields of potatoes on his farm of Greendykes, in Haddingtonshire, to the defender. The price agreed to be paid by the defender to the pursuer