a kind which are entirely novel, and I can only say that, taking the case upon the argument we have had, I am not satisfied that a titular is liable to an action of this kind at all, or that an over-paying heritor is entitled in this way, as I may say, to trace the surplus teind, and to get beyond his own proper debtor in order that he may affix liability for a long arrear of over-payments of stipend against a titular who is not his proper debtor. On these grounds, I concur with your Lordship, both on the fact and the law, in holding that the claim here is not good against the titular, although it is good so far against the under-paying heritors, against whom your Lordship proposes to give decree to a limited extent.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the cause, with the report of Mr Roger Montgomerie, No. 270 of process, in the conjoined actions, and heard counsel—In the action at the instance of the pursuer against the Lord Advocate, assoilzie the defender from the conclusions of the summons, and decern; Find the pursuer liable to the defender in the expenses incurred by him in the said action, so far as the same remain undisposed of: And, in the conjoined actions, also find the pursuer liable in the expenses incurred by the defender the Lord Advocate, in these actions; and remit to the Auditor to tax the account of the expenses now found due and to report: And in the action at the instance of the pursuer against the United College of St Salvator and St Leonard, and against the College of St Mary, St Andrews, decern against the said defenders the United College of St Salvator and St Leonard for payment to the pursuer of £271, 9s. 0¾d., with interest thereon at 5 per cent. per annum from 5th April 1865 till payment, and against the said defender the College of St Mary for payment to the pursuer of £31, 13s. 6¼d., with interest thereon as aforesaid from 5th April 1865 till payment: Further decern against the said United Colleges of St Salvator and St Leonard for payment to the pursuer of £12, 9s. 4d. as concluded for, with interest at 5 per cent. per annum from 16th May 1866 till payment, and against the said College of St Mary for payment to the pursuer of £1, 9s., as concluded for, with interest as aforesaid from 16th May 1866 till payment: And find no expenses due to or by either of the parties last mentioned in the said last-mentioned action, or in the conjoined actions."

Counsel for Pursuer—Lee—Kinnear. Agents—Mackenzie & Kermack, W.S.

Counsel for the Colleges—Balfour — Low. Agents—W. & T. Cook, W.S.

Counsel for the Lord Advocate—Lord Advocate (Watson)— Solicitor-General (Macdonald)—T. Ivory. Agent—Donald Beith, W.S.

Saturday, February 2.

SECOND DIVISION.

[Sheriff of Inverness-shire.

ROSE *v.* JOHNSTON.

Process—Warranty—Act 31 *and* 32 *Vict. c.* 100—*Court of Session Act* 1868, *sec.* 29—*Act* 39 *and* 40 *Vict. c.* 70—*Sheriff Courts Act* 1876, *sec.* 24.

In an action for repetition of the price of a horse, on the ground that it was not conform to warranty, the action in the Sheriff Court was laid upon breach of a written warranty.—*Held*, under section 29 of the Court of Session Act 1868, and section 24 of the Sheriff Courts Act 1876, and distinguishing the case from that of *Gibson's Trustees* v. *Fraser*, July 10, 1877, 4 Rettie 1001, that it was competent for the pursuer to amend his condescendence by alleging that a verbal warranty had been given by the seller.

Horse—Warranty.

Terms of communications between seller and purchaser which were held to amount to an express verbal warranty of a horse.

Observations per Lord Justice-Clerk on the case of *Robeson* v. *Waugh*, October 30, 1874, 2 R. 63.

Writ—Subscription to a Warranty by Mark.

Observed that although a mere mark adhibited by a party unable to write to mandates or docquets has been sustained as sufficient, there is no authority to the effect that that would be sufficient to constitute an obligation of warranty.

The pursuer in this action, Major Rose of Kilravock, on 19th March 1877 bought a horse from the defender James Johnston for £46. The pursuer paid for the horse on the following day, getting a receipt therefor in the following terms —"Clephanton, 20th March 1877.—Received from Major Rose of Kilravock £46 stg. for grey horse 'Sharp,' which I hereby warrant sound and free from vice or shying. "ALEX. GRANT, witness,

"20 March 1877.

his

"JAMES X JOHNSTON."

mark.

The defender was unable to read, and stated that this receipt was never read over to him, and that he was unaware of the introduction of any warranty into the receipt.

The horse upon being tried by the pursuer was found to be vicious, and on one occasion when being driven in a dogcart shied and ran off with the pursuer and his coachman, and broke the dogcart. The pursuer intimated this to the defender, and the defender caused a letter to be written to Mr J. H. Brown, the pursuer's agent, which is quoted in the Sheriff-Substitute's note.

The pursuer thereupon placed the horse at livery, and raised the present action for repayment of the price, and for damages.

The second and fourth articles of the pursuer's condescendence, which contained the only allegations as to a warranty, were as follows—"(Cond. 2) On 20th March 1877 the pursuer paid to the defender the said price of £46, and received a receipt therefor. In said receipt there is a warranty by the defender that the said horse was sound and free from vice or shying. (Cond. 4) The pursuer duly intimated the discovery of said

traits of character to the defender, and in reply defender wrote or caused to be written to the pursuer's agent, Mr J. H. Brown, solicitor, Nairn, a letter representing that he had warranted the said horse free from vice."

The pursuer's first and second pleas were as follows—"(1) The said horse being disconform to warranty, the pursuer is entitled to repetition of the price paid by him therefor. (2) The said horse being vicious and accustomed to shying, the pursuer is entitled to repetition of the price paid by him therefor."

The defender's first, second, and fourth pleas were as follows—"(1) No express warranty having been given in respect to the quality or sufficiency of the horse in question, the defender cannot be held to have warranted its fitness or sufficiency for the purposes to which it was applied by the pursuer. (2) The defender having verbally represented to the pursuer that the horse was only accustomed to or sufficient for farm work, he is not responsible for its fitness or sufficiency for any other work, or for any other purpose to which pursuer may have applied it. (4) The document produced and founded upon as a warranty is informal and invalid, in so far as it is only subscribed by the defender adhibiting his cross thereto, which is not sufficient in a case of guarantee or warranty, and further, as there is only one witness to the defender's subscription, that witness being himself incompetent, as he was then acting as the agent or representative of the pursuer."

On 25th July 1877 the Sheriff-Substitute (BLAIR) after a proof pronounced the following interlocutor:—"The Sheriff-Substitute, ... finds that on the occasion of the sale of the horse libelled the defender gave an express verbal warranty that the animal was tractable and free from vice: Finds that the horse was not at the time of the sale and when delivered to the pursuer tractable and free from vice: Finds in law that by reason of this breach of warranty the pursuer is entitled to a repetition of the price paid by him for the said horse, and the defender is liable to the pursuer in damages on account of breach of contract." &c. . . .

He appended the following note—

"*Note*— . . . . First, as to the warranty, I have no difficulty in holding that the defender expressly warranted the horse tractable and free from vice. On Saturday, two days before the sale, while Grant, the pursuer's manager, was examining the horse at Culchunaig, the defender's farm, he told the defender that he wanted a horse for Major Rose to drive and to ride, and asked him if it was sound and quiet in all kinds of work. The defender then said, 'I will warrant the horse. He is quiet in the cart, in the plough, in the harrow, threshing-mill, and I am not the least afraid but he will be quiet enough in the machine.' On Monday Grant reported this to the pursuer, who went to Culchunaig and saw the defender. He also told the defender he wanted a horse to drive and to ride. After examining the horse the pursuer said to the defender, 'I am afraid the horse is a kicker from his having no shoes on his hind feet. Defender said, "Oh, it was perfectly quiet; those Highland garrons were often never shod on the hind feet." I then said, Let me see you take up his hind foot. Defender succeeded in doing this, but in a very careful way. I asked defender for a trial of the horse. He objected most determinedly. . . . I was at that time doubtful of the horse, and I said to defender that I would have nothing to do with it unless he warranted that the horse was tractable and free from vice. It was then that the defender said he would warrant the horse tractable and free from vice; and added, "You have seen him ridden, and can judge for yourself as to riding; and if the horse always went quietly in a cart, he'd likely go as quietly in a machine." The defender's talk and manner were so convincing that I agreed to give him the price asked, viz., £46.' The pursuer again says—'I bought the horse from the defender upon his assuring me that the horse was perfectly tractable and free from vice.'

"That is the testimony of the pursuer and his manager on the subject of the warranty, and there is no reason to doubt that they are speaking the truth. But the defender now says that the statements made by him to Grant and to the pursuer were not warranties, but only representations made by him of his opinion and judgment about the horse, for which he should not be made responsible if he was honest when expressing them.

"In determining whether a representation made at the time of a sale was intended as a warranty, a decisive test is whether the seller assumes to assert a fact of which the buyer is ignorant, or merely expresses an opinion or judgment upon a matter of which the seller has no special knowledge, and on which the buyer may be expected also to have an opinion and to form his judgment. In the former case there is a warranty; in the latter not. In the present case it appears to me that the pursuer is entitled to found on the representations made as an express warranty—as an assumed description of the horse, and as a statement inducing him to purchase—of facts of which he was ignorant. And this view is confirmed by the letter of 11th April 1877 (No. 8 of process), written by the defender's friend Mr Lachlan Forbes, in the defender's name and by his authority, to Mr Brown, the pursuer's law agent in Nairn. In that letter the defender says—'I bought the horse to be tractable for farm work and free from vice, which I will be able to prove; and I sold it to Major Rose on that condition, and on no other warrant.' See *Dods* v. *Crawford*, 27th May 1870, 7 Scot. Law Rep. 505.

"Next as to the character of the horse. A good deal of evidence was lead about the horse's habit of shying, but as this habit generally arises from defectiveness of vision, caused by natural malformation of the eye, I think that this habit, if proved, is unsoundness, and is not covered by a warranty against vices. Was the horse tractable and free from vice? After a careful consideration of the proof I consider that this question must be answered in the negative—[*The Sheriff-Substitute then quoted the evidence of several witnesses as to the viciousness of the horse*].

"As regards the evidence as to its disposition and character, then, I am of opinion that it is proved that the horse was neither tractable nor free from vice, and that the defender did not and could not really believe that the description of the horse which he gave to the pursuer was true.

"In these circumstances, the pursuer is entitled to repayment of the price which he paid for the horse.

"In relation to the measure of damages for breach of warranty, the rules are substantially the same as those which govern the case of a seller's breach of his obligation to deliver, and the buyer may recover damages for personal injury resulting to him from the quality of the horse sold, if there had been any representation made by the seller to induce the buyer to use the horse for a purpose for which it was unfit. If I am correct in holding that the defender did by his representations induce the pursuer to use the horse for the purpose of driving him in his dog-cart—a purpose for which it was unfit—then the sums of £4, 12s. paid by the pursuer for repairing the dog-cart, and of £2, 15s. for the hire of another carriage during the time his own was in the hands of the coachbuilder—in all £7, 7s.—are damages which must be held to be the necessary and immediate consequence of the defender's breach of contract, and properly recoverable by the pursuer from the defender."

Upon appeal the Sheriff (Ivory) on September 21, 1877, pronounced this interlocutor:—"The Sheriff recals the interlocutor appealed against: Finds that the present action for repetition of the price of a horse sold by the defender to the pursuer, and for damages, is founded on the written warranty and receipt No 7 of process, which is in the following terms:—'Clephanton, 20th March 1877.—Received from Major Rose of Kilravock forty-six pounds sterling for grey horse "Sharp," which I hereby warrant sound and free from vice or shying. James × Johnston, his mark. Alexr. Grant, *witness.*' Finds that the said document is in the pursuer's handwriting, and was on the 20th March 1877 presented by Alexander Grant, the pursuer's coachman, to the defender for his signature; that the defender was then unable to write or to read writing; that the contents of the said document were never read over or explained to him; and that at the time when the defender appended his cross or mark to the said document he did not know its contents, and was not aware that it contained any warranty, but believed that it was simply a receipt for the price of the horse in question: Finds, in these circumstances, that the pursuer has failed to prove that the defender warranted the horse in question to be sound and free from vice or shying in terms of the said document: Finds, in law, that the pursuer, having failed to prove the written warranty founded on by him, is not entitled to repetition of the price paid by him for the said horse, or to recover damages as craved. Therefore to the above extent and effect sustains the defences, refuses the prayer of the petition, and decerns."

The pursuer appealed.

At the discussion he proposed to add to his condescendence an allegation "that he received from the defender at the time (of the sale) a verbal warranty that the horse was free from vice."

Their Lordships allowed this amendment.

Authorities—*Baker* v. *Denny*, 8 Adolph. and Ell. 94; *Rough* v. *Moir*, March 5, 1875, 2 R. 529; *Robeson* v. *Waugh*, October 30, 1874, 2 R. 63; *Mackie* v. *Riddell*, November 20, 1874, 2 R. 115.

At advising—

Lord Justice-Clerk—The Sheriff has altered the decision of his Substitute on the ground that the case disclosed by the proof was not the one stated on record. I am of opinion that in doing so the Sheriff has gone too far in that way, although the record is far from being what it should be. But before proceeding to judgment, I am of opinion that the summons must be amended by an addition, and in these terms—"The Pursuer received from the defender at the time a verbal warranty that the horse was free from vice." Assuming this amendment to be made, there are two questions on the merits—1st, Was there a warranty? and 2d, Supposing there was a warranty, was there a breach of it? While I think the result of the proof is not clear, yet there seems to me to be plausible grounds upon which the pursuer may get a judgment. I think there was a verbal warranty, and in reference to this branch of the case I refer to the views of the Sheriff-Substitute.

With regard to the opinion of the Lord President in the case of *Robeson* v. *Waugh*, 2 R. 63—that "if an express warranty is not reduced to writing there must at least be satisfactory evidence of the words spoken—the very words spoken—which are alleged to constitute such express warranty"—I wish to say that it has been pressed in argument far beyond what it will properly bear. As to the receipt upon which the pursuer founded to prove the written warranty, it must be thrown aside entirely. The defender could not write, and the proof of a written warranty in such a state of matters would be an interesting question. But in the present case the receipt was not read over to the defender, although his mark was added to it, and therefore it can be of no avail.

With regard to the second question, viz., Whether there was a breach of warranty? I am of opinion that there was. The horse perhaps did not receive fairplay considering the different life it had entered upon, and its want of training; but, on the other hand, it is impossible to doubt or set aside the evidence of the men of skill, and they establish that it was not free from vice.

Lord Ormidale—In regard to the question whether the summons in this case is laid exclusively on a written warranty, I have found it impossible to come to any other conclusion than that it is, having regard to the second article of the condescendence. And nowhere else in the record as it stands can I find any reference to a warranty except in the 4th article of the condescendence; but obviously the statement there is not in itself an averment of warranty, but is merely an averment of a piece of written evidence, contained in a letter after the dispute had arisen, that a warranty had been given; but in order to see from the record whether the warranty alluded to is a written or verbal one, the second article of the condescendence must be recurred to, and there it is stated unmistakeably to be a written one.

The next inquiry is, Whether the alleged written warranty has been established? The receipt referred to in the second article of the condescendence is the only thing existing which the pursuer says is of the nature of a written warranty. But as that receipt is not subscribed

by the defender, I am unable to hold that in law it can be held to be a written warranty by him. It is said that not being able to write he adhibited to it his mark in the shape of a ×, but although that may be sufficient, along with the actual payment to him of the price of the horse, which is not denied, to establish that he did receive such payment, I am unable to think it can be held to be written evidence of anything more. The writ is neither attested nor probative. It is said, however, that being *in re mercatoria* it did not require to be either. But as a general rule, although a writing *in re mercatoria* does not require to be either holograph or tested, it requires at least the signature of the party who is supposed to be bound by it; or, in the words of Professor Bell in his Commentaries (vol. i. M'Laren's ed. p. 343)—"Even subscription by initials or by a mere mark, provided it be proved or admitted to be genuine, and to be the accustomed mode of the person transacting business, is sufficient." It has not, however, been either proved or admitted that subscription by a mark has been the defender's accustomed mode of transacting business. And although a mere mark adhibited to mandates or docquets as well as bills has been sustained as sufficient, there is no authority, so far as I am aware, to the effect that it is sufficient to constitute an obligation of warranty.

And although it was incompetent and could have no effect to establish a verbal agreement under a summons laid exclusively on a written one, if not amended, it is another question whether the summons may not even yet be amended so as to let in the evidence of a verbal warranty. By section 29 of the Court of Session Act of 1868 great latitude is allowed in this respect. An amendment is thereby authorised at any time that may be necessary for the purpose of determining the real question in controversy. Now, it may very well be said that the real question here is, whether a warranty was given with the horse? and not whether the warranty was verbal or written? And in this view I am not indisposed to concur in thinking that an amendment of the summons is still competent, and I understood that the defender is ready to make any amendment that is necessary. The case of *Gibson's Trustees* v. *Fraser*, July 10, 1877, 4 Rettie 1001, cited at the debate for the respondent, is, I think, distinguishable from the present, inasmuch as there the proposed amendment was disallowed, on the ground that it introduced a different question from that in the summons and record, while here it is not a different question that is to be introduced by the amendment, but the same question, viz., Was a warranty given with the horse to the effect that he was free from vice? only that this warranty was a verbal in place of a written one.

Assuming, however, that the requisite amendment—that proposed by your Lordship—is made, I am of opinion that the interlocutor of the Sheriff-Substitute is right, and as I also think that he has put it on the right grounds, which he has fully explained, it is unnecessary for me to repeat them.

Lord Gifford—The Sheriff-Principal in this case has founded his judgment solely on the ground that the appellant Major Rose has failed to prove the written warranty contained in the receipt, to which the respondent affixed his mark or cross, and that the action being laid exclusively upon this written warranty and on nothing else, the whole other proof in the case is incompetent, and the pursuer's claim for repetition of the price of the horse must fail.

Even if the Sheriff were right in this view, it would only lead to a dismissal of the action, leaving the pursuer to bring a new action founded on the whole circumstances. Instead of this the Sheriff seems to have sustained the whole defences and negatived the pursuer's claim, on whatever grounds the same may be founded. I presume this was an oversight, and I understood the respondent's counsel at the bar to maintain that the action should merely be dismissed.

But I am of opinion that the ground taken by the Sheriff-Principal is much too narrow, and that the original petition and condescendence, although very unskilfully framed, really raise the question, whether the defender and respondent in any way, whether verbally or in writing, warranted the horse sold to the appellant? and whether there has been a breach of that warranty leading to repayment of the price? I think these were the real questions raised between the parties. To these questions the whole pleas and the whole proof were directed, and very plainly this was the true controversy between the parties. No doubt in strictness the receipt with the defender's mark affixed should only have been libelled on as an adminicle of evidence, or as affording evidence that verbal warranty had been given at the time when the contract was made, or as part of the circumstances following the contract, but I cannot think that the failure to do this articulately destroys the whole process and renders useless the whole expenses which have been incurred. Even if an amendment were necessary, I should have felt bound to allow it under the recent Sheriff Courts Act 1876, sec. 24, which not only allows amendments, but which expressly enacts "all such amendments as may be necessary for the purpose of determining in the action the real question in controversy between the parties shall be so made." As I have already said, I think the real controversy between the parties was whether a binding warranty had been given in any form, and whether there had been a breach thereof, and I think it was fairly the duty both of the parties and of the Sheriffs to get this real controversy brought out and tried. I think therefore that the amendment now proposed should be made.

If the question of form had been out of the way, it does not appear that the Sheriff-Principal would have differed from the very careful and elaborate judgment of the Sheriff-Substitute. He does not say so, and his judgment is solely founded upon the incompetency of looking to any evidence except that relating to the receipt.

But I agree with the Sheriff-Substitute that it is quite amply and sufficiently proved that the defender verbally expressly warranted the horse to be "tractable and free from vice," and although the warranty expressed in the receipt is somewhat larger than this, and although I concur in thinking that that written warranty is not proved, in consequence of the defender's inability to read and write and the receipt not having been read over to him, I do not think that this failure to prove the whole terms of the

receipt negatives or destroys the other evidence in the case that an express warranty was given.

Even laying the receipt out of view altogether, I think the warranty that the horse was "tractable and free from vice" is sufficiently proved not only by the parole evidence, but by the defender's own letter—that is, the letter written for the defender by his friend and neighbour Lachlan Forbes, dated 11th April 1877. No doubt that letter is not under the defender's own hand, but it was read over to him and explained, and Forbes says—"I am sure that he understood all that was in it, and approved of it." The defender's inability to write does not entitle him to be free from everything, and I think he must be bound by the letter which he got his friend to write and sign for him, just as if he had written it himself. Now, in that letter the defender states what he did warrant, and I cannot allow him after this to plead that he granted no warrandice at all. Indeed, his general denial and his pointed contradiction of Lachlan Forbes seem to me seriously to affect the defender's credibility. I agree with the Sheriff-Substitute that there is ample evidence to establish an express warranty to the limited extent that the horse was "tractable and free from vice."

I also agree with the Sheriff-Substitute that there is quite sufficient evidence of the breach of this warranty—that is, it is satisfactorily proved that the horse was not tractable and free from vice, and I content myself with referring to the enumeration of particulars which the Sheriff-Substitute has given. The particular kind of kick to which the horse was addicted, being a very dangerous one, seems itself to amount to a very serious vice.

On the whole, and concurring as I do with both your Lordships on the merits of the case, I am for returning to the judgment of the Sheriff-Substitute.

The Court pronounced an interlocutor finding that on the occasion of the sale of the horse libelled the respondent gave an express verbal warranty that the animal was free from vice; that the horse was not at the time of the sale and when delivered to the appellant free from vice; and that the appellant was entitled to a repetition of the price paid by him for the horse; and was further entitled to recover £7, 7s. as special damages in consequence of the breach of contract, &c.; and sustaining the appeal, and decerning, &c.

Counsel for Pursuer (Appellant) — Guthrie Smith—Mackintosh. Agents—Macrae & Flett, W.S.

Counsel for Defender (Respondent)—Asher—H. Johnston. Agents—Morton, Neilson, & Smart. W.S.

Saturday, February 2.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

HARDIE *v.* DUKE OF HAMILTON.

Lease—Damages against Landlord by Tenant for Loss by Game—Where Specific Complaint made, but Rent paid without Reservation.

Where a tenant, alleging loss through game during seven successive years, had each year made a distinct and specific claim for damages, and not a mere general complaint—*held* that he was not barred from insisting in his claim for the whole period, although he had paid his rents without deduction and without reservation of his rights, which were denied by his landlord.

The pursuer in this action was tenant of the defender's farm of Borrowstounmains, Linlithgowshire, under a lease for nineteen years from Martinmas 1862. He concluded for £565 in name of damages for injury to his crops through over-preservation of game and rabbits. The damage was said to have taken place in the years 1869–70 to 1875–6 inclusive. In each of these years the pursuer complained of his losses to the defender's commissioner, and this was admitted by the defender. These complaints were both verbal and in writing. The pursuer also had the damage done to particular fields estimated by men of skill, and intimated that he held the defender liable for the damage sustained. Specific statements of damage as estimated were given to the defender each year. The pursuer was in use to deduct the estimated amount of game damage done to the year's crop, until in 1874 a new commissioner was appointed, and eventually, as he averred, under threat of sequestration, the pursuer was obliged to pay back what he had got in deduction.

The defender stated that the only deduction he had allowed was in 1874, and that that was accepted as in full of all claims of every description which the defender had. The defender had paid the rents without deduction or reservation with that sole exception.

In these circumstances the defender pleaded, *inter alia*—"In respect of the periodical settlements of rents, the rents having been paid without deduction or reservation, and the pursuer not having instituted proceedings forthwith, the present action cannot be maintained for any period prior to the said termly settlements."

The Lord Ordinary repelled this plea, and the defender reclaimed.

Argued for him—A claim for damages by game must be insisted in at once, as the means of estimating it passed rapidly away. *Broadwood* v. *Hunter* established that mere complaints would not preserve the tenant's right, but the principle above stated applied even when the claim was distinctly made, if it was not immediately followed up.

Authority—*Broadwood* v. *Hunter*, Feb. 2, 1855, 17 D. 340.

The respondent was not called on.