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.

At advising—

LORD PRESIDENT—I have not the least doubt of the soundness of the Lord Ordinary's decision in this case. I think the tenant's claim for damages was distinctly made for each year, and that being so, I think the law of *Broadwood* v. *Hunter* does not apply. In that case there was mere general grumbling and complaint. The valuations of the tenant may turn out to be of little worth; but all that we decide at present is, that he must have an opportunity of proving his case.

LORD DEAS—I was a party to the decision in *Broadwood* v. *Hunter*, and I think that we dealt with that tenant very strictly. I am not going to suggest any doubt of the soundness of the decision; but this is a very different sort of case. Looking at the correspondence, it would be out of the question to come to the conclusion that the tenant's claim is excluded.

LORD MURE concurred.

LORD SHAND—Here we have a case of a distinct claim duly given in—not mere general complaints. That makes the difference between this case and *Broadwood* v. *Hunter*.

The Court adhered.

Counsel for Defender (Reclaimer)—Balfour—Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Pursuer (Respondent)—Kinnear—J. A. Reid. Agents—J. & A. Peddie & Ivory, W.S.

Saturday, February 2.

SECOND DIVISION.

[Lord Adam, Ordinary.

BRAND'S TRUSTEES *v.* BRAND AND OTHERS.

(*Ante*, vol. xii. p. 124, and vol. xiii. p. 744; 2 R. 258, and 3 R. (H. of L.) 16.)

Heritable and Moveable—Heir and Executor—Fixtures.

In a question between the heirs and executors of the tenant of a coal-mine, *held* (1), that steam-engines bolted to log-seats, which latter rested on brick foundations, and were not fastened by any mechanical means, but were merely held thereon by their own weight, were heritable; and (2), that an underground railway was also heritable, the description of it being that "the rails were nailed to the sleepers, and the sleepers nailed to the *strata*, a little packing being occasionally required under and around the sleepers."

The original question in this case was—Whether machinery erected by a tenant of minerals under an ordinary lease was heritable or moveable as regards the tenant's succession? On 19th December 1874, the Second Division of the Court of Session (*rev.* Lord Shand, Ordinary) held that the machinery belonged to the executor and not to the heir, and was therefore moveable—12 Scot. Law Rep. 124, and 2 R. 258. On appeal the House of Lords, on 16th March 1876 (13 Scot. Law Rep. 744, 3 R. (H. of L.) 16), altered and restored the judgment of the Lord Ordinary, holding that the machinery was heritable in a question as to the tenant's succession.

The facts of the case have already been fully reported in the previous reports.

On 13th May 1876, the Second Division pronounced an interlocutor applying the judgment of the House of Lords. By that interlocutor they found, *inter alia*,—"That the machinery and plant and those parts thereof are heritable, and belong to the trustees of the late Alexander Brand, which were attached either directly or indirectly, by being joined to what is attached to the ground, for use in connection with the working and carrying away of the minerals, though they may have been fixed only in such a manner as to be capable of being removed, either in their entire state or after being taken to pieces, without material injury; including those loose articles which, though not physically attached for the fixed machinery and plant, are yet necessary for the working thereof, provided they be constructed and fitted so as to form parts of the particular machinery, and not to be equally capable of being applied in their existing state to other machinery of the kind." In terms of this interlocutor the Lord Ordinary (SHAND) remitted to Mr David Rankine, mining engineer, Glasgow, to report with reference to it—What part part of the machinery was heritable and what moveable? Mr Rankine reported, and objections were lodged to his report, and the Lord Ordinary (ADAM), on 7th February 1877, of new remitted to Mr Rankine, and a second report was prepared, to which also objections were lodged. Mr Rankine's report (to which objections were lodged), so far as it is necessary to refer to it, was as follows:—

"Group No. 1.

"The engine No. 1 is bolted to the log-seat No. 2, the logs being bolted together and laid upon brick foundations.

"An exhaust pipe is led from the engine into the brick chimney-stalk of the boiler building, and in the course of its length it passes by an 'elbow' bent into and out of an iron cistern which is embedded in the ground; the cover of the cistern being bolted to the body of the cistern and the exhaust pipe is bolted to the covers.

"The wooden engine-house No. 3 partly rests upon the brick building of the boiler No 4, and is partly nailed to the log-seat No 2; it is also attached to the brick building of the boiler by means of a wooden dowel, which has been either built into the brick building or afterwards inserted into it; one of the upright timbers of the house being now nailed to the dowel. . . .

"The horizontal engine, &c., No 8, is bolted to the log-seat, the logs being bolted together and laid upon the strata, which has been levelled to receive them, and a space enlarged for the engine. The engine is directly connected to the boiler No. 4 by the steam-pipes No. 10, some of the pipes having flange joints similar to those described as connecting the engine No. 1 with the boiler No. 4. . . . .

"Group No. 2.

"The various articles in this group form the underground railways, the rails being nailed to the sleepers, and the sleepers laid upon the strata,