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