as institute to have been free from the fetters of the entail. That lady being dead, the question is not a general one affecting all the heirs of entail, but only arises to the effect of settling the present controversy; and the same difficulty as to pronouncing on it does not arise as in the other case. I think myself permitted, therefore, to say that I am of opinion that Miss Xaveria Glendonwyn was clearly institute in the entail. She is direct disponee in the disposition. The disposition is indeed granted only "in the event of my decease without heirs of my own body." But this only made her conditional institute, and placed her in a well-known legal category. I consider it fixed by the opinions in the case of *Fogo* that not merely is a direct disposition in favour of such a conditional institute valid, but that infeftment may at once be taken on it without the necessity of an intermediate declarator, or any other form of proceeding. Xaveria Glendonwyn being thus institute in the entail, I am of opinion, and that without any doubt, that the fetters in the entail are not effectually directed against her in that character.

This assumes that, notwithstanding the entail, she had all the powers of a proprietor in fee-simple in the way of alienating the lands of Cowgarth. The question still remains whether she did actually alienate these lands?—in other words, whether they are to be held included in, or excluded from, the general disposition of all lands and heritages in favour of the pursuer's father?

This is a question of evidence in regard to her intention when executing the general disposition. For here, again, the case wholly differs from that of *Thoms*, in which there was nothing before the Court but an absolute and unqualified general conveyance, and, in addition, the mere fact of the granter having been infeft on a defective entail, as to which there was no evidence of intention to exclude the lands from the unlimited scope of the conveyance.

The evidence in the present case is perhaps not so strong as is that in *Catton* v. *Mackenzie*, but it is sufficient to produce in my mind the same full conviction that Miss Xaveria Glendonwyn never for a moment intended to include the entailed lands of Cowgarth in her general disposition, but, on the contrary, intended their exclusion. The case simply stands here—Miss Xaveria Glendonwyn was proprietor of entailed lands, her successor in which was a nephew, the son of an elder sister. She was also possessed of certain unentailed lands called Parton Place and others, which she was desirous of settling on another nephew, the pursuer's father, the son of a younger sister. The question is, whether by her *mortis causa* settlement she not only settled Parton Place on the one nephew, but deliberately and of set purpose took from the other nephew the entailed lands which otherwise descended to him?

I am of opinion that the evidence wholly negatives any intention of doing so. There is no mention made in the general disposition of the entailed lands of Cowgarth. Undoubtedly the deed begins with a general conveyance of all her lands and heritages; but this is followed up by a special conveyance of the unentailed property; and of no other heritages; which presumably would not have happened had she intended the lands of Cowgarth to be comprehended. There is a mass of evidence, altogether conclusive, that down to the day of her death she believed the lands of Cowgarth to be held by her under fetters which she could not break. And from this arises the strong presumption that what she thought she could not do she did not intend to attempt. She dealt with the estate as validly entailed, particularly under the pressure of pecuniary exigencies, which would have made it extremely convenient for her to deal with it as held in fee-simple. She borrowed money on the estate, at the great additional cost which such a transaction imposes on an entailed proprietor; and in the bonds she granted she set forth her fettered condition in very distinct and emphatic terms. In that to Major M'Laren, in 1851, she expressly stated, "I hold the said lands and heritages above described under settlements of strict entail, whereby I am prohibited from alienating and encumbering the same to the prejudice of the subsequent heirs of tailzie." In that to Colonel Scott, of 25th December 1855, she repeated, "I hold the said lands and others under settlements of strict entail, whereby I am prohibited from alienating and encumbering the same to the prejudice of the subsequent heirs of tailzie." This expression of present incapacity fully implies, retrospectively, a non-existence of past purpose. She further appears in several ways to have transacted with the next heir of entail as having that character vested in him undoubtedly and indefeasibly.

I draw from these circumstances the unhesitating conclusion that Miss Xaveria Glendonwyn, believing to the day of her death that she had no power to alienate the entailed lands, did not intend them to be included in her general conveyance of 1834; on the contrary, intended them to be excluded from that conveyance, and reserved to her nephew and the other heirs of entail called in the deed of entail. And on this ground I am of opinion that the Lord Ordinary's interlocutor should be altered, and decree of absolvitor pronounced.

LORD PRESIDENT—Then we recall the interlocutor; sustain the fifth plea in law for defender; and in respect thereof assoilzie and decern.

Agents for Pursuer—Macdonald & Roger, W.S.
Agents for Defender—H. & H. Tod, W.S.

Tuesday, July 19.

SECOND DIVISION.

POTTER AND OTHERS *v.* HAMILTON AND OTHERS.

Actio Popularis—*Liability to pay Costs*—Domini Litis—*Caution*—Res Judicata. *Held* (Lord Justice-Clerk diss.) in an *actio popularis*, the object of which was to obtain the removal of certain obstructions placed upon a statute labour road, and to maintain the right of free passage for the public, that three members of the public whose daily wages averaged 4s. 3d. a day, who had an interest to pursue the action, and who had the control of the action, were entitled, notwithstanding the judgment in the case of *Jenkins*, to pursue without finding caution.

Opinion indicated that in such an action final judgment would be *res judicata* as to the rest of the public.

Observations on the case of *Jenkins*.

A petition was presented in the Sheriff-court of Hamilton by John Potter and two others against Mr and Mrs Hamilton, Fairholm House, Lanarkshire, craving that the respondents should be ordained to remove certain gates near Orchard and Langholm Park, also craving interdict against the respondent obstructing the free passage along an alleged statute labour road and bridge. The petitioners were all working men, and the respondents maintained that they were not the real *domini litis*, and ought to be ordained to find caution for the expenses of process.

The Sheriff-Substitute (VEITCH) disposed of this plea by the following interlocutor:—"The Sheriff-Substitute having heard parties' procurators on the preliminary pleas and made avizandum therewith: Finds it stated in support of the second of these pleas (which is, that the nominal pursuers not being the true *domini hujus litis* are not entitled to insist in the prayer of the petition, at least they are not entitled to do so without first finding caution for the expenses of process) that the pursuers are without means themselves, and are carrying on this action with the assistance of a number of other persons, inhabitants of Larkhall and neighbourhood and adjoining villages, who are the real *domini litis;* and that the pursuers have been put forward by these parties with a view to avoid costs in the event of the action being dismissed; before answer, and on the authority of the case *Jenkins and Others* v. *Robertson and Others*, March 20, 1869, Scottish Jurist, p. 386, Allows the defenders a proof of their averments in support of this plea, and to the pursuers a conjunct probation, and reserves the other preliminary pleas for disposal along with the second preliminary plea, after the proof which is allowed has been led: Grants diligence against witnesses and havers, and appoints the cause to be put to the roll on this interlocutor becoming final, in order that a diet of proof may be final.

"*Note.*—The pursuers' procurator maintained that the case founded on had reference only to proceedings before the Court of Session, where the expenses were so great; but the Lord President at the end of his opinion says—'I do not think it necessary to say more upon the principle or rule upon which this decision depends, but I think it runs through the whole of the practice of our law, and that there must reside in every Court of Justice a discretionary power of making such an order as this, because the absence of such a power would lead to most unjust and improper results.'

"After the proof has been led, it remains to be seen whether the facts of this case warrant such a judgment as was pronounced in the decision referred to, but it is quite clear that if the pursuers themselves have no means to pay expenses in the event of decree of absolvitor being pronounced, the defenders can have no recourse against the public of Larkhall or the other parties referred to by the pursuer."

Both parties appealed to the Sheriff (BELL) who pronounced the following interlocutor:—"Having heard parties' procurators on their respective appeals and reviewed the process; Finds that this is an *actio popularis* of a character very similar to the recent case of *Jenkins and Others*, March 20, 1869, in which it was held that where pursuers were not seeking to vindicate any private or patrimonial claim, but were asserting an alleged public right, and were put forward by a number of persons who were interested to at least an equal extent in the result, but who kept in the back ground so as to avoid liability for costs, it was reasonable that such pursuers, being themselves in indigent circumstances, should be required to find caution for the defenders' expenses as a condition of the litigation being allowed to proceed; finds that in the very first article of the pursuers' condescendence in the present action they state broadly that as inhabitants respectively of the three villages there mentioned, they 'were, at a public meeting of the inhabitants of said villages and surrounding districts held in August 1869, instructed, requested, authorised and nominated to take proceedings to vindicate rights as after craved, not only as for themselves individually, but also as representing and for behoof of the inhabitants of foresaid villages and surrounding districts, and the public generally;' finds that it is therefore unnecessary to allow the defenders any proof of their facts, and the only averment which it is necessary the defenders should prove to bring the case in as far as this point is concerned into precise conformity with that of *Jenkins* is, that the pursuers are not in circumstances to pay the defenders' costs if found liable therein: Therefore so far alters the interlocutor appealed against, and restricts the proof allowed to the last mentioned averment, but *quoad ultra* adheres to said interlocutor, and dismisses both appeals."

After a proof had been led, the Sheriff-Substitute found that the only remaining pursuers of the action, John Potter and William Potter, had sworn that their wages average were 4s. 2d. and 4s. 6d. per day, and that they had no other means of any kind, and found, therefore, that the defenders had established their averment admitted to probation, viz., that the pursuers were not in circumstances to pay the defenders' costs if found liable therein, and therefore ordered the pursuers to find caution for expenses within ten days. The Sheriff allowed another pursuer to be sisted, and, on the import of the proof, pronounced this interlocutor:—"Having heard parties' procurators on the pursuers' appeal, and reviewed the process, in respect it is instructed by the extract decree dative produced with the minute No. 17, that John Prentice therein designed has been decerned executor-dative of the deceased pursuer James Prentice, sists said John Prentice as a pursuer in room of the said James Prentice; but adheres to the Sheriff-Substitute's interlocutor of 25th January last, refusing to allow a new party to be sisted as a pursuer as proposed in the minute No. 16: Finds, as regards the other two interlocutors appealed against, that the proof establishes that the pursuers are miners or colliers, with wives and families, and it is admitted that the pursuer John Prentice is in much the same circumstances as the deceased James Prentice; that the wages of each pursuer average about 4s. 3d. per day of working days, and they have no other means whatever; that, besides maintaining themselves, their wives and families, they have house rent to pay; that the funds for carrying on the action are being raised by subscription, towards which one of the pursuers has contributed a shilling, and the other two nothing: Finds that the above facts instruct that the pursuers here are very nearly in the same position, patrimonially and otherways, as the pursuers were in the case of *Jenkins*, formerly referred to, the pursuers in which were earning about 15s. a-week, and in which the Court unanimously found that the action could

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