whether, on the other point, the subject of the multiplepoinding was ever deliberately given over to his wife's trustees, the evidence is not satisfactory. The amount of the share comprehended in the fund *in medio* is stated to be now about £600, and I think the question raised in the action can be determined by a reference to the minute of agreement of 22d November 1880. It is there set forth that "Mr Kelso stated"—[*reads ut supra.*] On these two conditions he agreed to acquiesce. The former has been complied with, but as regards the latter that has fallen through. Looking to the evidence, it is not sufficient to show that the bargain was not completed. "I asked Mr Logan if he could inform me what my legal rights were, and he said he was not certain—that he had not received the papers. I refused to sign the minute until I knew about my rights, but Mr Logan and the trustees said there was no use of a meeting unless I signed, and I did then sign. I did not think I was committing myself. I thought a proper deed would be executed by me accepting the dispositions of my wife's settlement. Mr Brown told me that I could claim the whole at the meeting in November. At that meeting I signed a minute acquiescing in my wife's settlement on two conditions. I was quite willing to accept the provisions of my wife's settlement if these conditions were carried out. The conditions were (1) that I was to get the revenue to maintain the family; and (2) that I was to get a property belonging to the Brand trust on paying £400 and granting a bond for £400. I got the income paid me in January, and have not got the house." . . . . "I wanted the back ground to be divided according to the frontage of the feus. Another condition was that I was to keep an open path at the back of the property, and was not to be allowed to fence it in. No one would have taken the property on these terms."

There was a refusal by the trustees to implement the condition about the back ground, and the condition was therefore not purified. And therefore Mr Kelso cannot be held to be bound to hand over in terms of the minute of trustees. The only difficulty is the evidence which Mr Littlejohn gives as to Mr Kelso's action. But, on the whole, I think it is not proved that Mr Kelso is bound by any agreement which prevents his upsetting the claim which he here makes. As he did not get it on fair terms, he wished to withdraw from it.

Lord Deas—I agree in the conclusion at which your Lordships have arrived, and substantially on the same grounds. It is quite clear that the money, although made the subject of the wife's deed of settlement, in point of law belonged to the husband. He could not be deprived of it except of his own consent. There must therefore be something of the nature of a gift to the trustees, and that would require to be very clearly proved. I think he was made fully aware of his legal rights, and therefore the agreement which is embodied in the minute of the 22d November 1880 does not fail upon any ground of that kind. But it was a conditional agreement, and it must therefore be clear either that he gave up his claim to the fund unconditionally, or that the conditions which he attached to it were fulfilled. The conditions are to be found in the minute, which is signed by him and by the trustees, and it is clear that if they or one of them remains unfulfilled, the agreement cannot be binding, however expressly it may be worded. They were not given up, and therefore if they remain unfulfilled the agreement cannot be binding. It is not pretended that they have been implemented; not only have they not been fulfilled, but it is further admitted that they cannot be fulfilled. This is quite sufficient to take the case out of the nature of a gift or donation. I am therefore of opinion, that, assuming Mr Kelso to have been bound under the minute of trustees which he subscribed, the fact that the conditions under which alone he agreed to become so bound have not been implemented is sufficient to entitle him to prevail in the claim which he here makes.

The Lords recalled the judgment of the Sheriff and sustained the claim for Mr Kelso.

Counsel for Kelso—Mackintosh—Ure. Agent—Alexander Morison, S.S.C.

Counsel for Kelso's Trustees — Robertson — Young. Agents — Douglas, Ker, & Smith, S.S.C.

Tuesday, March 7.

SECOND DIVISION.

CONNELLY OR MACDONALD *v.* J. & G. SIMPSON.

Process—Expenses, Caution for—Parochial Relief.

The impecuniosity of a pursuer will not entitle a defender to require that caution for the expenses of process shall be found, nor will the receipt of parochial relief by a pursuer do so in all circumstances.

A woman in receipt of 1s. 6d. per week of parochial relief raised an action against the employers of her husband, who, she averred, had been killed through their fault. The Court *held* that she was entitled to adjust issues without finding caution for the expenses of process.

Mrs Rose Connelly or Macdonald, residing in Roslin, raised this action against Messrs J. & G. Simpson, contractors there, concluding for the sum of £500 in name of damages and as *solatium* due to her on account of the death of her husband, who had been killed while in the employment and through the default of the defenders.

The pursuer was admitted to be in receipt of an allowance of 1s. 6d. a week from the Parochial Board.

The Lord Ordinary (Adam) allowed the pursuer to lodge such issue or issues as she might be advised, and appointed the cause to be enrolled for the adjustment of such issues on Wednesday the 1st June next.

The defenders reclaimed, and in the Single Bills moved for an order on the pursuer to find caution before lodging issues. They pleaded—The pursuer being a pauper in receipt of parochial relief, and not suing *in forma pauperis*, is bound to find caution for expenses before suing—*vide* Lord President's opinion in *Hunter* v. *Clark*, July 10, 1874, 1 R. 1154.

The pursuer replied that the order was oppressive, and cited the case of *Hepburn* v. *Tait*, March 12, 1874, 1 R. 875.

At advising—

Lord Justice-Clerk—I see no reason for compelling the pursuer to go on the poors-roll when she is willing to go on with her action at her own expense, and if this is sound I do not think that she need find caution because she is in a state of poverty.

I have no desire to go against the authority of the case of *Hunter* v. *Clark*, but in this case I am not of opinion that we should compel the pursuer to find caution.

Lord Young—I am of the same opinion. In a sense it is always in the discretion of the Court to order a party to find caution—whether defender or pursuer—and that discretion will be exercised wherever it may appear that justice requires it. This, however, will only occur in exceptional circumstances. It is the practice to apply this discretion where a party seeks to raise an action who is divested of his property, the reason being that he is usually seeking to recover something for himself which is included in his conveyance to another. I remember Lord Mackenzie pointing out, however, that absolute impecuniosity will never be taken as the sole ground for making a party find caution. I certainly entertained some hesitation at one time of the debate as to whether by receiving 1s. 6d. a-week there was not an implied assignation to the Parochial Board. But I dismiss this, because, after all, the allowance must be a casual one, and she is probably under no obligation to repay even if she should succeed in the present action. It may perhaps be a hard thing for one party to have to litigate with another who has no funds, but after all there are innumerable instances of it, and, I repeat, it is no ground to order the pursuer here to find caution. In regard to the judgment in the case of *Hunter* v. *Clark*, we must, I think, hold that the Court were there in possession of certain circumstances which led them to exercise their discretion in the way they did. To send this case to the reporters *probabilis causa* when the pursuer does not wish to have an agent and counsel given to her, in order to determine whether she has a probable cause of action, and if she has probable cause of action to allow her to litigate, and if not to prevent her from litigating, is a course of procedure which I do not think we can sanction. It would require a special Act of Parliament to authorise us to do so.

Lord Craighill—I concur in the result at which your Lordships have arrived. If this case had been the same as *Hunter* v. *Clark* I should have had difficulty in coming to a different conclusion from that arrived at by their Lordships of the First Division. But here there is one material point of difference, which is, that the pursuer is suing for the loss of the husband to whom she looked for support, and whose death has therefore made her a pauper. The law is very tender in making persons find caution, and even in the case to which Lord Young has alluded, where there has been divestiture, as in the case of *cessio* or a trust-deed, if the trustee refuses to take up the litigation the Court may permit the action to be raised without caution. But mere poverty is never a ground for requiring caution, and even if it were I should make an exception in the present case.

Lord Rutherfurd Clark—I must say I cannot distinguish this case from that of *Hunter* v. *Clark*, but nevertheless I concur in the result arrived at by your Lordships.

The Lords accordingly allowed the pursuer to proceed to adjust issues for the trial of the case.

Counsel for Pursuer—Strachan. Agent—W. T. Sutherland, S.S.C.

Counsel for Defenders — Dickson. Agent — Alexander Wardrop, L.A.

Tuesday, March 7.

FIRST DIVISION.

URQUHART (BAILLIE'S TRUSTEE) *v.* STEWART.

Ship—Merchant Shipping Act 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 65—*Petition to Restrain Dealing with Shares of Ship.*

Held (following *M'Phail* v. *Hamilton*, 5 R. 1017; and *Roy* v. *Hamilton & Co.*, 5 Macph. 573) that a petition presented under the above section by the trustee on the sequestrated estates of a part owner of a vessel, to have the other part owner restrained from dealing with the shares for a limited period, is *incompetent.*

The estates of Peter Baillie, shipowner and coal merchant, Inverness, were sequestrated on 1st March 1879, and David Urquhart, accountant there, was appointed trustee thereon. This petition was presented by the trustee under the 65th section of the Merchant Shipping Act 1854. He averred that "at the date of his sequestration the said Peter Baillie was, and had been for a considerable time previously, managing owner and ship's husband of the British ship 'Clachnacuddin,' of Inverness, and at that date there was due to him, as managing owner aforesaid, in account with the owners of the said ship, the sum of £1843, 19s. 11d., conform to account herewith produced and referred to. The bankrupt himself was at said date owner of 52/64th shares of the said ship, while the remaining 12/64ths stood in the register in the name of 'Mrs Phebe Jeffrey of Garmouth, in the county of Elgin, widow of the late James Jeffrey.' Accordingly, of the above sum the proportion due by Mrs Jeffrey was 12/64ths, or £345, 15s. No part of the said last-mentioned sum has been paid to the petitioner, notwithstanding that he has made frequent application for payment of the same to Mrs Jeffrey and her agents, and the same is still due and resting-owing by her to him as aforesaid. Since the date of the said sequestration neither the petitioner nor the bankrupt have had any intromissions with the said ship, or its earnings or profits, the ship having been managed by other parties in the interests of mortgagees of the bankrupt's shares and of Mrs Jeffrey. The petitioner has recently learned that in or about June 1878 the said Mrs Jeffrey was married in Elgin to John James Stewart, hotel-keeper, Gympie, Queensland, Australia, and has since left this country,