

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 52/64ths 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 intrusions 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,

and is now resident at Gympie aforesaid with him. The petitioner is not aware whether there was any marriage-contract entered into between Mrs Jeffrey and Mr Stewart. The said 12/64th shares of the said vessel still stand in the register of the port of Inverness in name of Mrs Jeffrey." "The 'Clachnacuddin' has been valued at £1000, and on this valuation, which it is believed is a correct one, the value of the said 12/64th shares is £187, 10s. Neither the said Mrs Phebe Jeffrey or Stewart nor her husband have, so far as the petitioner is aware, any other property in this country. In these circumstances the petitioner conceives it to be his duty to make the present application to your Lordships to prevent any dealings in the said 12/64th shares of the said ship till the said debt of £345, 15s. is paid. The petitioner intends forthwith to take such steps as he may be advised towards operating payment of the said sum from the said Mrs Jeffrey or Stewart and her husband."

He therefore prayed the Court to grant an *interim* order prohibiting any dealing with the said 12/64th shares for one month, and thereafter to interdict any dealing with the shares for one year from the date of the interlocutor ordering such prohibition, unless their Lordships should see cause before the expiry of the said period to withdraw such prohibition on an application by any parties interested in the said ship.

The Lords on 23d February 1882 pronounced this interlocutor:—"The Lords appoint this petition to be intimated on the walls and in the minute-book for eight days, and to be served on Messieurs Adam & Winchester, the known law agents of Mrs Jeffrey or Stewart, mentioned in the petition, and ordain them to lodge answers, if they any have, for behoof of their said client, within eight days after said service; meantime prohibit any dealing with the 12/64th shares of the ship 'Clachnacuddin' of Inverness, presently standing in the name of 'Phebe Jeffrey of Garmonth, in the county of Elgin, widow of the late James Jeffrey,' for one month from the date of this interlocutor, and decern *ad interim*; and grant warrant for serving the registrar of the port of Inverness with a certified copy of this interlocutor."

Answers were thereafter lodged by Messrs Adam & Winchester, S.S.C., for behoof of Mrs Phebe Stewart, denying, *inter alia*, the petitioner's averments in regard to the value of the vessel, and Mrs Stewart's indebtedness on account of her shares, stating that on a proper accounting nothing would be found due by Mrs Stewart, and submitting that the application was unnecessary and incompetent under the Merchant Shipping Act.

The Merchant Shipping Act 1854 (17 and 18 Viet. c. 104), provides (sec. 65)—"It shall be lawful in England or Ireland for the Court of Chancery, in Scotland for the Court of Session, in any British possession for any Court possessing the principal civil jurisdiction within such possession, without prejudice to the exercise of any other power such Court may possess, upon the summary application of any interested person, made either by petition or otherwise, and either *ex parte* or upon service of notice on any other person as the Court may direct, to issue an order prohibiting for a time to be named in such order any dealing with such ship or share; and it shall be in the

discretion of such Court to make or refuse any such order, and to annex thereto any terms or conditions it may think fit, and to discharge such order when granted, with or without costs, and generally to act in the premises in such manner as the justice of the case requires; and every registrar without being made a party to the proceedings, upon being served with such order, or an official copy thereof, shall obey the same."

The respondents cited *Roy v. Hamilton & Company*, March 9, 1867, 5 Macph. 573; and *M'Phail v. Hamilton*, July 5, 1878, 5 R. 1017.

The Lords, without delivering opinions, refused the prayer of the petition, recalled the *interim* order made by said interlocutor of 23d February 1882, and granted warrant for intimating this interlocutor to the registrar of the port of Inverness.

Counsel for Petitioner—Jameson. Agents—Murray, Beith, & Murray, W.S.
Counsel for Respondents—Young. Agents—W. Adam & Winchester, S.S.C.

Wednesday, March 8.

FIRST DIVISION.

[Sheriff of Fifeshire.

HEGGIE V. NAIRN AND OTHERS.

Property — Water Rights — Accumulations in Mines—Lower Proprietor.

The tenants of mineral fields had been in use to carry away water accumulated in the mines by a level or tunnel to the sea, and allowed some manufacturers to divert a portion of the water to their works by means of an opening in the level at a point within the property of the owner of the minerals. In an action at the instance of a lower proprietor, through whose lands the level passed, to interdict the manufacturers from diminishing the supply which came down to him by enlarging the opening, the Court held that the pursuer had no legal title to object, in respect that the stream was artificial, and that the defenders had obtained the consent of the mineral owner and tenants to the operations complained of.

Prescription—Artificial Water-Course—Rights of Lower Proprietor in.

Question whether use for the prescriptive period would have given the lower proprietors a title to object.

John Heggie, residing at Auchtermuchty, presented a petition in the Sheriff Court of Fifeshire against Mrs Catherine Ingram or Nairn and others to have them ordained to cause the stream of water which had for time immemorial issued into the Denburn, near to the East Bridge, Kirkcaldy, and which the defenders had diverted from its ancient channel, to be returned to its ancient channel; to shut up and close the conduit or tunnel formed by them to the conduit of said stream under and across the said burn, so as to secure the flow of the water in the conduit as formerly; and to interdict them in all time coming from again interfering with the said conduit,