it to any nominee of his debtor on receiving payment of the amount due to him, provided that such an assignation was not to his own prejudice. No such prejudice is here pretended. Mr Macdonald was therefore bound to assign. I think there is an essential difference between the case of an inhibited person going into the market to realise part of his estate by assigning it to a purchaser and the case we have before us of a creditor assigning a debt and its security on payment by his debtor who asks an assignation rather than a discharge.

I must say it is new to me to hear it suggested that a debtor ready to pay his creditor (heritably secured) required before paying him a search against his creditor in the personal registers.

LORD MONCREIFF—At first I had some doubt on the point argued by Mr Kennedy, but I have now come to be satisfied that the judgment of the Lord Ordinary is right. I think that the case must be taken exactly as if the debtor in the bond, Elfert, had paid up his debt and got a discharge from the creditor, and as if this action were a reduction of the discharge. The fact that the bond was assigned and not discharged is immaterial. Now, I think that at common law inhibition does not apply to a transaction such as we have here. It does not apply to the discharge of a debt for which a heritable security has been granted, whether that discharge is made on the initiative of the creditor or the debtor. The question really is in this case whether through the inhibition the debtor was put in bad faith to pay his creditor and obtain a discharge. Now, at common law there is no authority to the effect that inhibition applies to that transaction at all. A discharge is regarded not as an alienation but as a deed which the creditor is bound to grant on payment if he is called upon by the debtor to do so.

Now, if that is the common law on the subject, the only question is whether it has been altered either by Act of Parliament or Act of Sederunt. I think that the Act of Sederunt of 19th February 1680 was intended to make and does make an alteration on the matter. The inhibiting creditor is entitled under that Act of Sederunt by following certain specific procedure giving special and personal intimation to the debtor in the bond to put the debtor in bad faith in paying to the creditor in the bond. But that requires to be done notarially, and admittedly no such intimation was given in this case.

I am of opinion that section 18 of the Act of 1868 did not supersede the procedure enjoined by the Act of Sederunt of 1680. If an inhibiting creditor wishes to prevent the debtor in a heritable bond from making payment of his debt he must still adopt the procedure enjoined by the Act of Sederunt of 1680.

LORD JUSTICE-CLERK—I am of the same opinion. I think that the case must be taken as at the time the defender Elfert tendered payment of his debt, and that payment by the debtor to the creditor was not struck at under the common law by the inhibition which had been put on by the pursuers. If all that had passed had been payment of the money and a receipt for it taken, which would have entitled the debtor to demand a formal discharge of the bond, there could be no question. Does it make any difference that the debtor says that it will suit him better to get an assignation of the bond? I do not think that it does. I think that in equity he had right to demand an assignation.

Lastly, as regards the question of notice, I do not think that the Act of 1868 in any way supersedes what was provided by the Act of Sederunt 1680, to the effect that notarial notice must be given in order to effectual taking up of a position such as the pursuers here desire to maintain.

I therefore agree that we should adhere to the interlocutor of the Lord Ordinary.

The Court adhered.

Counsel for Pursuers — The Solicitor General—Kennedy. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders—H. Johnston, Q.C. —John Wilson. Agents—Morton, Smart, & Macdonald, W.S.

Friday, February 18.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

ROBERTSON *v.* SUBURBAN DISTRICT COMMITTEE OF MIDLOTHIAN COUNTY COUNCIL AND ANOTHER.

Process — Caution for Expenses — Poor's Roll—Pauper Pursuer.

Held that a pursuer in receipt of parochial relief must sue *in forma pauperis*, or find caution for expenses. *Hunter* v. *Clark*, July 10, 1874, 1 R. 1154, *followed.*

James Robertson raised an action against the Suburban District Committee of the County Council of Midlothian and J. W. Inglis, concluding for payment of £500 damages for personal injury.

On 21st December 1897 the Sheriff-Substitute (MACONOCHIE) allowed parties a proof of their averments, and on 4th January 1898 the pursuer appealed for jury trial to the Court of Session.

The Suburban District Committee presented a note in the First Division setting forth that "the pursuer has been since 1895 and still is a pauper in receipt of parochial relief from the Parish Council of Liberton," and craving the Court to allow the pursuer an opportunity of applying for the benefit of the poor's roll, and failing his doing so or obtaining admission to the said roll, to ordain him to find caution for expenses.

The defenders relied upon *Hunter* v. *Clark*, July 10, 1874, 1 R. 1154.

The pursuer did not deny that he was in receipt of parochial relief, and founded on *Macdonald* v. *Simpsons*, March 7, 1882, 9 R. 696, and *Johnstone* v. *Dryden*, December 6, 1890, 18 R. 191.

LORD PRESIDENT—The case of *Hunter* is a decision in this Division, and admittedly directly applicable. The more recent cases in the other Division seem to have been determined with regard to specialities, and here there is nothing to assimilate this case to those special cases, and to distinguish it from the general rule laid down in *Hunter*.

LORD ADAM—I am of the same opinion. I think the case of *Hunter* is directly in point, and I am prepared to follow it.

LORD M'LAREN—As long as a pursuer is maintaining himself by his own labour, however poor he may be, he cannot be required to find security for expenses. But I think such a case may be distinguished from that of the declared pauper who is supported by public funds, and I see no reason for departing from the judgment which seems to have been very carefully considered in this Division, and which is to the effect that a man who is a declared pauper must submit to the condition of going upon the poor's roll, or otherwise of finding caution.

LORD KINNEAR— I agree that we are bound by the decision in *Hunter*. It lays down the general rule that a pursuer who is in receipt of parochial relief must sue *in forma pauperis*. I therefore agree with your Lordships that we must grant the motion and allow the pursuer an opportunity of applying for the benefit of the poor's roll in deference to that decision.

The Court pronounced the following interlocutor:—

"Sist process *hoc statu* in order that the pursuer may have an opportunity, if so advised, of applying for the benefit of the poor's roll, or finding caution for expenses."

Counsel for the Pursuer—Trotter. Agent—John N. Rae, S.S.C.

Counsel for the Defenders — Cullen. Agent—A. G. G. Asher, W. S.

Friday, February 18.

FIRST DIVISION.

[Sheriff of Lanarkshire.

COCHRAN AND OTHERS (COCHRAN'S TRUSTEES) *v.* CALEDONIAN RAILWAY COMPANY.

Interdict—Encroachment—Retaining-Wall—Construction of Agreement.

By agreement between a railway company and the proprietor of lands adjoining those of the company it was agreed that the company should erect a retaining-wall along the boundary of the said lands, and that the proprietor should have right in perpetuity to make openings in the said retaining-wall and to build upon it in so far as the wall was on his side of the boundary line. The agreement proceeded on the narrative that it had been mutually arranged that the retaining-wall should throughout its entire length extend for 3 feet 3 inches on the proprietor's side of the boundary line. The wall was 6 feet 6 inches thick, and the ground on the company's side was 25 feet lower than on the proprietor's side.

In an action raised to interdict the company from forming openings in the retaining-wall on their own side of the boundary line, *held* that the common law of mutual walls in urban tenements had no application to the wall in question, that the rights of parties in the wall must be determined by the agreement, and that there was nothing therein to disentitle the company to form such openings as long as the strength of the retaining-wall was not impaired thereby.

In 1890 the Caledonian Railway Company, in the exercise of their statutory powers, acquired from the trustees of the late Robert Cochran a plot of ground on the east side of Finnieston Street and south side of Stobcross Street, Glasgow. The said plot of ground formed part of a larger portion of ground belonging to the same trustees.

In the same year a minute of agreement (dated 11th, 29th, and 30th September and 3rd October 1890) was entered into between the said trustees of the first part and the Railway Company of the second part, in the following terms — "Whereas [*here the sale of the plot of ground was recited*], and whereas the second party intend to excavate the said plot of ground so that the level thereof will be considerably lower than the level of the remaining ground belonging to the first party, and the second party intend to construct along the southern boundary of the said plot of ground acquired by them a retaining-wall for the purpose of preventing the ground and buildings on the said remaining ground from subsiding and falling upon the said plot of ground; and it has been mutually arranged that such retaining wall shall, subject to the conditions hereinafter mentioned, be erected in such manner that it may extend throughout its entire length for a distance of 3 feet 3 inches or thereby southward from the boundary line between the said plot of ground and the said remaining ground, but so that no part of the said retaining-wall shall come above the surface of said remaining ground, and the southern side of the fence wall to be erected on the top of the said retaining-wall shall be coincident with the said boundary line: Therefore these presents witness that the parties hereto have agreed, and they hereby agree, as follows, videlicet—(*First*) The second