

The LORD JUSTICE-CLERK having been absent at the discussion delivered no opinion.

The Court pronounced the following interlocutor:—

“Alter the interlocutor complained of to the following effect:—Repel the first plea stated in defence: Find that the pursuers, for the purpose of the present action, represent the society first instituted in 1834, as stated in the record: Find that the said society required right from time to time to the library and other property referred to in the record, and that no relevant statement has been made which can afford a defence to the action at the pursuers' instance for delivery of the said library and other property: Repel the defences so far as inconsistent with the said findings: Decern and declare to the above effect in terms of the declaratory conclusions of the action, and appoint the pursuers to lodge *quam primum* a list in terms of the interlocutor complained of: Remit the cause to the Lord Ordinary to proceed further therein as may be just, with power to him to dispose of the question of expenses attending the reclaiming note.”

Counsel for Pursuers and Respondents—Balfour, and Strachan. Agents—Macgregor & Ross, S.S.C.

Counsel for the Dick Trustees—Dean of Faculty, and M'Laren; and for Principal Fearnley, Asher. Agents—Millar, Allardice & Robson, W S.

Friday, June 25.

FIRST DIVISION.

[Lord Shand, Ordinary.

HUNTER v. CLARK.

Process—Pauper—Caution—Sist.

The pursuer of an action was with her family in receipt of parochial relief to the extent of 7s. a-week. She did not attempt to get upon the poor's-roll, but obtained counsel and agent to conduct her case. The defender pleaded that she was bound to find caution. The Court *sisted* proceedings to allow the pursuer an opportunity of being put upon the poor's roll.

This action was brought by Mrs Janet Henderson or Hunter, against Mr Andrew Clark, S.S.C., Leith, for £250 sterling, in the name of damages and solatium. The pursuer averred that being lawfully in possession of certain furniture of which she had got the use, she was violently dispossessed of it to her loss and damage, and that it was taken away and sold by the defender without any authority. It appeared that the pursuer and her family had for several years been in receipt of parochial relief to the amount of 7s. a-week.

The defender's fifth plea in law was—“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.”

On 19th March 1874, the Lord Ordinary repelled the fifth plea in law stated by the defender.

In a subjoined Note his Lordship said:—

“The question, whether the pursuer shall be ordained to find caution for expenses is one of discretion for the Court, and the Lord Ordinary does not think the case is one in which such an order should be granted. The alleged disposition *omnium bonorum* by the pursuer, dated in 1864, is not signed by her, and it is blank in the names of the disponees, and cannot be regarded as an effectual deed. The only fact on which the defender's claim to caution rests therefore is, that the pursuer is on the poor's roll; and, in the circumstances as alleged, the Lord Ordinary is of opinion that this is not a fact sufficient to warrant an order for caution being pronounced.”

The defender appealed.

Argued for him—The pursuer's proper course would have been to have applied to be put upon the poor's roll. That she had not done so raised a suspicion that she knew she could not shew a *probabilis causa*. And a pursuer who was a pauper, and suing under suspicious circumstances, was bound to find caution.

The pursuer argued that there was nothing suspicious in the pursuer not having tried to get upon the poor's roll, but the contrary, as the reason why she did not make the attempt was that counsel and agent were willing to take up her case.

Authorities—*M'Donald v. Duchess of Leeds*, May 16, 1860, 22 D. 1075; *Henderson v. Rollo and Mitchell*, Nov. 18, 1871, 10 Macph. 104; *Maxwell v. Maxwell*, March 3, 1847, 9 D. 797.

At advising—

LORD PRESIDENT—The question here is one of some importance. This pursuer is in receipt of parochial relief of 7s. a-week, and although that is not sufficient for the maintenance of herself and her children, still the allowance is considerable, and the position of this woman may be expressed by the one word “pauper.” Now it would be a strong thing to say, as a general rule, that a pauper can sue without finding caution for expenses. The pursuer has a title to be placed on the poor roll, and so as to sue advantageously; but to do that she must satisfy the reporters in *probabilis causa* that she has a *probabilis causa*. She has made no attempt, however, to do so, and one cannot help suspecting that she fears that she may not be able to satisfy the reporter. I think that at present we should proceed no further with the case, but *sist* proceedings in order to give the pursuer an opportunity of being put upon the poor's roll. If, however, she does not succeed in that, the probability is that she will have to find caution.

The other Judges concurred.

Counsel for Pursuer—Solicitor-General (Millar), and Grant. Agent—James Barton, S.S.C.

Counsel for Defender—C. Smith. Agents—Keegan & Welsh, S.S.C.

Saturday, June 26.

SECOND DIVISION.

SPECIAL CASE—MILLER AND OTHERS.

Trust-Disposition and Settlement—Deposit Receipt—
Promissory Note—Intention.

A died leaving a trust-disposition and settlement directing his means, after payment of certain legacies, &c., to be divided among his children so that the share of each son should be one half more than that of each daughter. A number of deposit-receipts and promissory-notes were found in his repositories taken in the names of his children, an equal sum being by these documents apportioned to each, except the youngest child, born two months before A's death, to whom only a very small sum was provided. *Held* (1) that these documents were not donations, not having been delivered; (2) that they were not testamentary writings, not being under the hand of the trustor; (3) that the sums of money contained in these documents formed part of the residue of the testator's estate, and as such fell to be apportioned among his children in terms of his will.

This was a Special Case presented for the opinion and judgment of the Court by Robert Hogg Miller, aged twenty; Martha Ferguson Miller, aged seventeen; Agnes Elizabeth Miller, aged fifteen; Jessie Williamina Miller, aged nine; and Isabella Eadie Miller, aged four; with the tutors and curators named by their deceased father's trust disposition, all as parties of the first part, and Mary Jane Miller, born 24th September 1873, and her tutors nominate, as parties of the second part.

Robert Miller, the testator, died on 25th November 1873, survived by his widow Agnes Hogg or Miller, and by the six children who were the parties to this case. By a trust-disposition and deed of settlement, dated 24th August 1863, to which his widow was a party, he nominated and appointed certain persons trustees and executors of his heritable and moveable estate, and tutors and curators for such of his children as should be in minority at his death. The purposes of the trust were as follows:—*first*, Payment of the testator's debts; *second*, Mrs Miller to have the use of the testator's household furniture so long as she shall remain a widow; *third*, A provision of £80 to Mrs Miller for the purchase of mournings, &c.; *fourth*, An annuity of £20 to Mrs Miller during her life, payable quarterly, and commencing at the first term of Candlemas for the quarter succeeding that term; *fifth*, provisions for the disposal of the testator's burying-ground at Sighthill; *sixth*, The testator's gold watch and appendages to be given to Robert Hogg Miller, his son; and *seventh*, the residue to be divided amongst the children of the marriage between the testator and Agnes Hogg or Miller, and the survivors or survivor of them, and the lawful issue of any of them who might predecease him leaving such issue, equally among them if such children should be all sons or all daughters; but if otherwise, then so that each of the sons should receive in the proportion of a half-share more than the share of each of the daughters, the said shares to be payable to the children on their respectively at-

taining the age of twenty-one years, and until they should attain that age the trustees were authorised to make such interim payments to account of their shares as they might consider prudent and advisable, towards their maintenance, clothing, education, or advancement in life. After Robert Miller's death there were found in his repositories undelivered deposit-receipts and promissory-notes amounting to the sum of £4270, and consisting of money which belonged exclusively to the testator. These documents are of the following tenor:—

1873.	Jan. 30. Interest-receipt, Robert Miller, Esq., and Mrs Agnes Miller, or the survivor, in trust for Robert Hogg Miller,	£800	0	0
	July 15. Do. the said Robert Miller and Agnes Miller, or either, or the survivor, in trust for Robert Hogg Miller,	40	0	0
	24. Do. the said Robert Miller, in trust for Robert Hogg Miller,	10	0	0
		£850	0	0
	Jan. 30. Interest-receipt, the said Robert Miller and Agnes Miller, or the survivor, in trust for Agnes Elizabeth Miller,	£800	0	0
	July 18. Do. the said Robert Miller in trust for the said Agnes Elizabeth Miller,	40	0	0
	24. Do. the said Robert Miller in trust for Agnes Elizabeth Miller,	10	0	0
		850	0	0
	June 30. Interest-receipt the said Robert Miller and Agnes Miller, or the survivor, in trust for Isabella Eadie Miller	£420	0	0
	July 10. Interest-receipt, the said Robert Miller, in trust for Isabella Eadie Miller,	20	0	0
	24. Do. the said Robert Miller in trust for Isabella Eadie Miller,	10	0	0
	June 30. Promissory-note at twelve months by William Darcy Conway to the said Robert Miller and Agnes Miller, trustees for Isabella Eadie Miller,	200	0	0
	July 17. Promissory-note at twelve months by William Conway to the said Robert Miller, trustee for Isabella Eadie Miller,	200	0	0
		850	0	0
	Jan. 30. Interest-receipt, the said Robert Miller and Agnes Miller, or the survivor, in trust for Jessie Williamina Miller,	£800	0	0
	July 18. Do. the said Robert Miller, in trust for Jessie Williamina Miller,	40	0	0
	24. Do. the said Robert Miller, in trust for Jessie Williamina Miller,	10	0	0
		850	0	0
	Jan. 30. Do. the said Robert Miller, and Agnes Miller, or the survivor, in trust for Martha Ferguson Miller,	£800	0	0
	July 18. Do. the said Robert Miller, in trust for Martha Ferguson Miller,	40	0	0
	July 24. Interest-receipt, the said Robert Miller in trust for the said Martha Ferguson Miller,	10	0	0
		850	0	0
	Oct. 28. Do. the said Robert Miller, in trust for Mary Jane Miller,	20	0	0
		£4270	0	0

The testator left no heritable property, and the moveable estate, other than the sums of money represented by these deposit-receipts and promissory-notes, and his household furniture and books is estimated at £1625, this consisting of his in-