rested at the instance of one Keith. Bothwell replies that Keith and Ferguson are all one, and the arrestment was a trick to keep him out of his money, the action on which it was used having been afterwards dismissed as without foundation. Keith has thus no complaint, and assuming the *bona fides* of the arrestment, as without proof to the contrary must be done, the question as to Ferguson is whether he did enough for his own protection after receiving notice of the poinding. He appears to have brought a multiplepoinding pleading that between the creditor and the arrester he was suffering double distress. But the case of *Mitchell* v. *Strachan*, 18th November 1869, 8 Macph. 154, decides that this was wrong. A single arrestment does not constitute double distress, and a multiplepoinding brought in such an event was described by the Judges as a 'perfect abuse of the process,' the arrestee's proper course being either to interdict the poinding or 'to bring a suspension as of a threatened charge.' Any other course would obviously lead to great inconvenience. The creditor has his diligence. He can do nothing to test the validity of the arrestment. It is either for the arrester or arrestee to stop him by some judicial act—which a simple arrestment certainly is not; and until he is so stopped he is entitled to assume that he is safe to proceed with the execution of his diligence. It follows that the pursuer is seeking damages for an act which he himself has negligently allowed, and for which therefore no damages are due. The action has accordingly been dismissed with costs."

The pursuer appealed to the First Division of the Court of Session, and argued—There was here double distress, for the pursuer was interpelled by the arrestment from paying to the creditor. The sale was therefore illegal and the pursuer was entitled to damages.

Authorities—*Mitchell* v. *Strachan*, quoted in Sheriff's note; *Blair's Trustees* v. *Blair*, 12th Dec. 1863, 2 Macph. 284; *Scott* v. *Drysdale*, 22d May 1827, 5 S. 643; *Miller* v. *Ure*, 23d June 1838, 16 S. 1204; *Middleton* v. *Mitchell*, 21st Dec. 1843, 6 D. 316; *Clydesdale Bank* v. *Russell & Johnston*, 1st June 1859, 21 D. 886.

Argued for defender—The diligence was good and regular, and a multiplepoinding was not the proper way to stop it. The proper remedy of an arrestee in such circumstances was to have the matter discussed in a suspension — *Connell's Trustees* v. *Chalk*, 5 R. 735; Bell's Comm., 5th ed., vol. ii. 299, and 7th ed. 278; 2 Shand's Practice, p. 586.

At advising—

Lord President—I think that if the allegations of this pursuer are true in point of fact he is subjected to considerable hardship, and I am sorry for him. But I say that on the assumption of course that his averments are true. But even on that assumption I do not see my way to differ from the Sheriff. It is no doubt hard that a man should be compelled to pay under the diligence of poinding a debt found due by decree, and then again to pay the same amount to a party who has arrested the money before it was paid to the holder of the decree. But the mere circumstance that these *quasi* competing claims exist does not entitle the debtor to remain still and do nothing. He is bound to protect himself. The obvious way to do so is to suspend the charge and interdict the proceedings by process of suspension and interdict, in the course of which consignation of the sum may be made.

Lord Deas and Lord Mure concurred.

Lord Shand—I am of the same opinion. If we were to sustain this appeal I think we should be interfering very seriously with the efficacy of the diligence of poinding. The appellant's argument comes to this, that when a creditor is ready to realise by a sale property which will cover his debt the whole proceedings may be superseded because a creditor or alleged creditor of his lodges an arrestment with the debtor. The plain course is, if there are good grounds for not paying to the poinding creditor, to go to the Court and suspend the diligence. Then the matter can be inquired into, and the probability is that as a condition of proceeding in the suspension consignation will be required. That was the only course open to the appellant, and the existence of a multiplepoinding was no bar to the diligence being proceeded with.

The Court refused the appeal.

Counsel for Pursuer—Chisholm. Agent—R. C. Gray, S.S.C.

Counsel for Respondent — Jameson — Orr. Agents—Boyd, Macdonald, & Jamieson, W.S.

Saturday March 4.

FIRST DIVISION.

[Sheriff of Lanarkshire.

KELSO *v.* LITTLEJOHN AND ANOTHER (KELSO'S TRUSTEES).

Husband and Wife—Acquiescence—Personal Bar.

A wife during the subsistence of her marriage succeeded to certain moveable property, but died before it had been made over to her, leaving a trust-disposition and settlement conveying her whole estate in general terms, and survived by her husband. The wife's trustees made certain payments in terms of the trust-deed, and to the husband *inter alios*. The husband subsequently, being in knowledge of his legal rights, offered to abide by the terms of his wife's trust-settlement on certain conditions. These conditions were not fulfilled. *Held* that the trust-deed of the wife carried no part of the succession which had fallen to her, that it belonged to her husband *jure mariti*, and that he was not barred by his conduct from claiming it.

This was an action of multiplepoinding raised by the testamentary trustees of the late Alexander Brand, miner, Wishaw, for the purpose of determing the right to a share of heritable property held by them under a minute of agreement, after referred to, the value of which it was by joint minute agreed was £600 or thereby. There were two claimants for the fund—(1) Robert Kelso, and (2) Littlejohn and another, the testamentary trustees of Kelso's wife. The history of the fund was as follows:—Robert Brand, coalmaster,

Wishaw, died on 26th January 1873, possessed of various heritable properties situated in the parish of Wishaw, and being also lessee of a going colliery near Wishaw. He left a settlement in favour of trustees for behoof of his only son Robert Brand junior. He was survived by four brothers and one sister, Mrs Kelso. His son died in July 1873, in minority, leaving a settlement in which his aunt and uncles were, *inter alios*, beneficiaries. This settlement was ineffectual to convey heritage, which accordingly fell to his uncle Alexander Brand, as heir-at-law.

Upon the death of Robert Brand junior in July 1873, his father's brothers and sister entered into a minute of agreement, to which Mr Kelso, the sister's husband, became a party for any right he might have, whereby they all agreed "to divide their respective rights of succession-at-law or by destination in and to the estates of the deceased Robert Brand senior and Robert Brand junior equally amongst each other, share and share alike, whatever there may be, and either by selling the whole heritable properties and dividing the proceeds, or, in the event of any one of the parties wishing to be proprietor of any of the houses, by putting a valuation by a competent person upon the same, and attributing that *pro tanto* to his or her share or respective shares." The heritable properties, including the colliery lease and plant, so far as heritable, were then taken possession of by Alexander Brand, or managed for his behoof, and considerable sums of money were realised from the rents of the properties and the profits of the colliery.

Mrs Kelso died on the 6th November 1878, leaving a trust-disposition and settlement by which she conveyed "all and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description, and wheresoever situate, at present belonging and addebted or that might belong and be addebted to her at the time of her decease," to the respondents as trustees for the purposes therein mentioned. Up to that date no division had taken place under the said agreement.

Mrs Kelso was survived by her husband, and by Robert Allan, Alexander Allan, and Catherine Allan, three children of a former marriage, and by John Brand Kelso, and Thomas Kelso, a child of the marriage born after the date of said settlement. Immediately after the death of Mrs Kelso the respondents entered upon the management of her estate as trustees and executors. That estate consisted exclusively of Mrs Kelso's interest in the estates of Robert Brand, coalmaster, Wishaw, and Robert Brand junior, his son, under the minute of agreement above mentioned.

Mr Kelso attended all the meetings held by his wife's trustees after her death and subscribed the minutes thereof. He likewise on 10th November 1879 and on 5th August 1880 received payment, with their sanction, of sums of £50 and £75 respectively from Messrs Brown & Company, writers, Hamilton, who at the time acted for Mrs Kelso's trustees and Mr Alexander Brand's trustees. These payments, as well as payments of £100 made to each of his wife's two sons by a former marriage in July 1880, were entered in Messrs Brown's books in an account headed "Cash account between the trustees of the late Mrs Kelso and William Brown & Company, solicitors, Hamilton." Up to September 1880 it appeared from the proof subsequently led that Kelso was not aware that the estate which came to his wife by virtue of the minute of agreement above referred to fell under his *jus mariti*. On 11th October, however, he called on Messrs Brown & Company for the purpose of ascertaining what his rights were in regard to the said estate, when Mr Brown said that he would consider the question, but meantime, to keep matters open, he suggested to Kelso to write a letter to his firm, which Kelso accordingly did, in the following terms:—

"*Wishaw*, 11*th October* 1880.

"Dear Sirs,—As agents for the trustees of my deceased wife, I hereby intimate to you that I dispute the right of my said wife to dispose of by will the money, etc., falling to her from her brother's estates, and claim to myself payment as her husband—Yours, &c. ROBERT KELSO."

On the following day Kelso attended a meeting of his wife's trustees, the minute of which signed by him bore—"Mr Littlejohn mentioned that he had asked the meeting to be called in order to consider the position of the trust, and what position Mr Kelso intended to take up. Mr Kelso stated that he was perfectly willing to acquiesce in his late wife's settlement, and to concur in what the trustees have already done connected with the trust. The trustees agreed, so soon as they were in a position to do so, to pay to Mr Kelso the revenue of the estate falling to the children, or such part thereof as they think proper, for the purpose of upbringing and educating the children." And on the 22d day of November 1880 he attended another meeting, the minutes of which, signed by him, bore:—"Mr Brown intimated that he had called the meeting in consequence of the action of multiplepoinding being on the roll in the Court of Session to-morrow, and it was necessary to ascertain the position Mr Kelso intended to take up. Mr Kelso stated to the meeting that he was willing to accept the provisions under his late wife's settlement, provided (first) that the trustees pay him the revenue derived and to be derived from the estate since Mrs Kelso's death, for the purpose of enabling him to upbring and educate his children; (second) that the trustees take over the property in Glasgow Road, which is valued at £800, as their share of the heritage, and that in the event of their doing so he will pay £400, £370 of which will come to this trust, and the balance to the other Brand's trusts of £30, and that he will grant a bond over the property to the trustees for the balance of £400, upon the trustees granting a conveyance in his favour of the said subjects. The trustees stated that they were willing to pay over the revenue of the estate for the purpose stated, and as it would enable them to get the whole trust under their management they were willing to accede to the proposal mentioned, the value of the heritage, as per Mr M'Kinnon's report, falling to each of the trusts being (£770, 14s.) seven hundred and seventy pounds fourteen shillings sterling."

From the proof it appeared that the former of the above provisions was fulfilled, but the latter was not, on account of Alexander Brand's trustees' refusal to convey the property free of certain restrictive conditions to which Kelso would not agree.

So far as regarded the moneys which had actually

passed into the hands of his wife's trustees, Kelso made no claim; but so far as regarded the value of the share of the heritage not yet handed over to them by Alexander Brand's trustees, being the fund *in medio*, he claimed it as falling under his *jus mariti*. Mrs Kelso's trustees, on the other hand, claimed the fund as carried to them by her settlement. They pleaded—"(2) The said Robert Kelso having acquiesced in his deceased wife's settlement, and thereby made an irrevocable conveyance to the trustees for behoof of the children therein named, the said trustees of Mrs Kelso are entitled to be preferred to the fund *in medio*. (3) The said Robert Kelso having acquiesced in said settlement, and thereby agreed to accept the provision under the same, he cannot now claim his legal rights as husband of the said deceased Mrs Margaret Brand or Kelso, and the said John Littlejohn and Robert Livingstone ought therefore to be preferred to the fund *in medio*."

The Sheriff-Substitute (BIRNIE) pronounced the following interlocutor:—"Having heard parties' procurators, Finds in fact (1) That the deceased Mrs Kelso died on the 6th November 1878, leaving a trust-disposition and settlement dated 20th October 1874. (2) That by said settlement she directed her trustees to pay one-third of her estate to her husband, the claimant Robert Kelso, and to manage the residue until her youngest child was twenty-one, and then divide it, share and share alike, among her children and the survivors. (3) That Mrs Kelso's whole estate at her death consisted of her share of the trust estates of Robert Brand senior and Robert Brand junior, and that the fund *in medio* consists of her share of certain heritable property belonging to said trusts and not yet realised. (4) That Robert Brand senior died on 26th January 1873, and left a settlement in favour of his only son Robert Brand junior. That Robert Brand junior died in July following, and left a settlement which was ineffectual to convey heritage, and that by an agreement, dated 7th and 8th July 1873, Mrs Kelso and her brothers agreed to divide said trust estates, share and share alike, and that either by selling the heritable property or by valuing the same and attributing the same *pro tanto* to the share of any beneficiary accepting the same, (5) That on 7th August 1879 Mr Kelso accepted office as an assumed trustee under his wife's settlement. That on 10th November 1879 he received from Mrs Kelso's trustees £50 to account, and on 5th August 1880 £75, for the maintenance of the children. That in July 1880 two of Mrs Kelso's children, with the knowledge of Mr Kelso, and in terms of Mrs Kelso's settlement, received advances from the trust funds. That on 11th October 1880 Mr Kelso wrote to the agents for Messrs Brand's trusts that he claimed Mrs Kelso's share as falling under the *jus mariti*. That on the day following he subscribed a minute of meeting of Mrs Kelso's trustees narrating that he had accepted the provisions left him by her settlement, and on 23d November following subscribed a minute of Messrs Brand's trustees narrating that he had accepted said provisions on certain conditions acceded to by said trustees. That on 24th November 1880 Mrs Kelso's trustees were sisted as parties to an action of multiplepoinding at the instance of Brand's trustees, and the latter ordained to make payment to Mrs Kelso's trustees, and to Mr Kelso for himself, and as husband of his deceased wife, of a sum therein mentioned. That on 7th December 1880 the agents for Messrs Brand's trustees paid to Mrs Kelso's trustees and to Mr Kelso the balance of Mrs Kelso's share so far as realised. (6) That in this action Mrs Kelso's trustees and Mr Kelso each claim the whole fund *in medio*. (7) That by joint minute No. 19 of process, they renounced probation 'except as to the statement contained in article eight of the revised condescendence for the claimant Kelso,' and that it is therein, *inter alia*, stated that if it should be held that Mr Kelso had acquiesced in his wife's settlement, he did so in ignorance of his legal rights: Finds in law that Mr Kelso did acquiesce in his wife's settlement, but that it is still open to him to prove that he did so in ignorance of his legal rights: Allows to him a proof of the averments in the 6th article of his revised condescendence, and to the claimants, Mrs Kelso's trustees, a conjunct probation.

"*Note.*—I cannot reconcile Mr Kelso signing the two minutes with any other understanding than his acquiescence in the arrangements made by Mrs Kelso as to the property falling to her from the Messrs Brand's trust estates. These minutes were signed by him after he wrote to the agents for the trusts claiming the whole of that property as falling under his *jus mariti*, and the form of the interlocutor in the action of multiplepoinding and of the discharge taken by Messrs Brand's trustees only mean, as it appears to me, that these gentlemen having no interest except to obtain a full discharge, made both the trustees and Mr Kelso parties to it.

"It was ingeniously argued for Mr Kelso that as from the date of the agreement by the beneficiaries in 1873 the fund was moveable, it vested in him, so that Mrs Kelso left no property to fall under her settlement, and there is no evidence to show how the fund was dealt with prior to Mrs Kelso's death in 1878; but assuming that Mr Kelso had made no donation of this fund to his wife, that did not prevent him from coming under the agreement to divide it between himself and her children according to her desire.

"It is still open to Mr Kelso to prove that he signed the minutes in ignorance of his legal rights, and he may do so in this process—Sheriff Courts (Scotland) Act 1877, sec. 11. It was assumed at the debate that this ignorance arose from an error in law, but that may now be a ground of voiding a contract—*Mercer* v. *Anstruther's Trustees*, 6th March 1871, 9 Macph. 618.

"Two of Mrs Kelso's children who had attained majority received advances from their mother's trustees, and discharged their further claim in favour of Mr Kelso. This might have raised a question, as under Robert Brand junior's settlement they were entitled to discharge, while under Mrs Kelso's they were not entitled until her youngest child was twenty-one, but it was admitted by Mr Kelso that the claims discharged, if they did not belong to him, fell under Mrs Kelso's settlement, as the Brand trust property was almost entirely heritage, and Robert Brand junior dying in minority, his settlement could not affect it."

A proof was accordingly led (the import of which sufficiently appears from Lord Shand's opinion). Thereafter the Sheriff-Substitute pronounced the following interlocutor:—"Finds (1) that the claimant Robert Kelso has not proved

that when he acquiesced in the provisions of his wife's settlement he was ignorant of his legal rights ; (2) that his wife's trustees have fulfilled, and are willing to fulfil, the condition in the minute of 22d November last in reference to the income of the trust-estate; and (3) that he abandoned the condition as to the Glasgow Road property: Ranks and prefers the claimants Mrs Kelso's trustees to the whole fund *in medio:* Finds the claimant Kelso liable to the claimants Mrs Kelso's trustees in expenses, less the sum of £2, 2s. sterling, &c.

"*Note.*—There seems to be no doubt that Mr Kelso was aware of his legal rights before he signed the minutes of 12th October and 22d November. The meetings were called specially to see what he intended to do, and it is in evidence that his rights were explained to him by Mr Logan and Mr Brown.

"His wife's trustees have paid him the income of the estate to last January in implement of the condition of the minute of 22d November, and they are willing to continue to pay him the interest of the trust-funds.

"It is proved that he did not insist in obtaining the Glasgow Road property, and that that property is not at present worth the £800 which he was to pay for it. It is also proved that he has purchased another property. He has been found liable in expenses to his wife's trustees, less £2, 2s. sterling, being the expense of the objections by the trustees. As he is the real raiser of the multiplepoinding, no deduction falls to be made from the fund *in medio* for the expenses of raising this process."

Kelso appealed to the Sheriff, who adhered, adding the following note:—"Kelso's claim seems barred by adoption and personal exception. In consequence of his deliberate acts and conduct certain payments have been made under the trust and matters are no longer entire."

Kelso appealed to the First Division of the Court of Session, and argued—This is a pure question of donation. Confessedly the share of Brand's estate to which his wife succeeded fell under his *jus mariti,* and consequently her settlement, which was in quite general terms, carried absolutely nothing to her trustees. With regard to funds which would have belonged to him had he chosen to claim them, but which his wife's trustees had actually taken posession of and administered with his acquiescence, no claim was made, but with regard to the fund *in medio,* of which admittedly they had not yet obtained payment from the trustees of Alexander Brand, the respondents could have no right to it unless they could show that he had made a donation of it to them. The fullest acquiescence in the terms of a settlement which conveyed nothing could not be held to import a donation, and that was all that the minutes of meeting established. One of the conditions upon which, according to the minute of 27th November, he agreed to transact with his wife's trustees with reference to this fund had concededly failed through no fault of his; therefore he was free from any obligation which might be raised up against him under the terms of that minute. Further, what the trustees had to make out here was a donation by him to them of a *jus crediti* under Alexander Brand's trust. Now that they could only establish by writ or oath, and they had not done that. There was no writ, for the minutes were neither holograph nor tested, and hence not probative.

The respondents supported the Sheriff's judgment.

At advising—

Lord Shand—The parties to this litigation are the trustees of the late Mrs Kelso and Mr Robert Kelso. Mrs Kelso died in November 1878, leaving a general disposition and settlement dated in October 1874, and in this action the fund *in medio* is claimed on the footing that they have acquired right to it under Mrs Kelso's settlement, and by Mr Kelso on the footing that the succession is moveable, and that he is therefore entitled to it as in right of his wife, his *jus mariti* not being excluded, and a certain minute of agreement, to which I shall refer, not being applicable.

It is necessary to give a short explanation of the facts. During Mrs Kelso's life she succeeded to certain property which belonged first to Robert Brand, her brother, and then to Robert Brand junior, her nephew, which was partly moveable and partly heritable. The parties interested agreed, by minute of agreement entered into in July 1873, that the heritable and moveable estate should be thrown together, that the heritable should be sold or divided, and that the proceeds shall be made the subject of division between the five parties interested, viz., Mrs Kelso and her husband, and Mrs Kelso's four brothers, to be divided equally between them, share and share alike. All parties are agreed that the fund *in medio* is moveable, and as Mrs Kelso's *jus mariti* and right of administration was not excluded, the right to Mrs Kelso's share vested in her husband during Mr Kelso's life. During her life one payment was made of £500. It does not appear what was the nature of the receipt which was given for this payment. But the money was no doubt practically received by the husband. After Mrs Kelso's death in December 1880 a further payment was made of £735. That payment was made to Kelso's trustees with consent of Mr Kelso. There is no question about that, and it was thus admitted to be a fund settled in terms of Mrs Kelso's trust-deed. Thus those charged with the administration of the Brand estate have given away a certain part of it to Mr Kelso, who has elected to take it under Mrs Kelso's settlement. There remains a fund of £650, which has now to be distributed, and this forms the subject of the action.

Mrs Kelso's trustees claim it, not because Mrs Kelso had any right to it originally, but because Mr Kelso transferred the right which he had to it to them for the purpose of carrying out the terms of Mrs Kelso's settlement. On the other hand, Mr Kelso, while admitting that he has agreed to the division so far as it has been already carried out, says that he has been no party to any operative agreement carrying the remaining fund to the trustees in terms of their present contention.

Mrs Kelso's settlement conveys to trustees—"All and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description, and wheresoever situate." The purposes were that the trustees should "realise and convert into money the whole of my estate hereby conveyed, and thereafter make payment of one-third part or share

thereof to my said husband, Robert Kelso, for his own use and behoof, and with regard to the residue and remainder of my estate, to manage and preserve the same for the use and behoof of my children Robert Allan, Alexander Allan, Catherine Allan, John Brand Kelso, and Thomas Kelso, or any other child or children that may be born to me after the date hereof, until the youngest shall arrive at the age of twenty-one," with declarator "that during the minority of my said children my trustees are hereby authorised to pay and apply the rents, interests and annual profits, or so much thereof as they may consider necessary, and even to make advances out of the residue or capital stock if need be for and towards their maintenance, support, and education, when and so long as they may consider expedient, and also to make advances to my said sons, or any one of them, for placing him or them out in any business or employment."

From the narrative it will be apparent that this deed was really capable of carrying nothing. She had no estate which had not vested *jure mariti*. It is said that Kelso acquiesced in his wife's settlement, and that he had agreed to transfer to the trustees what had fallen to the family from the estate of the Brands. The Sheriff-Substitute has held "that Mr Kelso did acquiesce in his wife's settlement," and so he has only allowed proof of the averment by Kelso "that he did so in ignorance of his legal rights." After proof, the claim of the trustees was sustained. The Sheriff adhered, putting his judgment upon the ground that "Kelso's claim seems barred by adoption and personal exception. In consequence of his deliberate acts and conduct, certain payments have been made under the trust, and matters are no longer entire."

It appears to me, upon a consideration of the evidence, that both Sheriffs are right in holding that Kelso knew his legal rights. But I differ upon the other ground. I think that the trustees have failed to prove that he assigned the particular fund in question, or agreed by a binding agreement to transfer or assign it. This is not like the case of a child claiming legitim, or of a widow claiming terce, where the party is in the position of a creditor, and has an election to make, either to take under a deed or to resort to the legal rights which are competent to them. This is not like a case of election. In such a case there is a settlement, and if the provisions under it be adopted by the widow or the child, such adoption amounts to acquiescence. But here more than acquiescence is requisite. There must be something which substantially gives Kelso's property to the trustees. I do not say that an assignation is necessary, but at all events there must be a clear agreement on the part of Mr Kelso to transfer to the trustees as in right to administer under Mrs Kelso's deed. So far as regards the estate of which Mrs Kelso was possessed there is an agreement, but there is nothing beyond. On the evidence the trustees have failed to make out such an agreement. The proof is confined substantially to three minutes of the trustees. The first is dated 7th August 1879. It is of comparatively little importance. Mr Kelso's agreement to act as trustee does not go far. It is no doubt assumed that there is a fund to administer, and that certain funds are to come into the hands of the trustees, but that is all. It deals not with the fund now under consideration, but rather with the state of matters as existing at that date. The second minute is dated 12th October 1880. It is clear from it that it merely contains an expression of Mr Kelso's willingness to acquiesce in his wife's settlement—not however as to the Brand succession—and to concur in what had been already done in the trust. In anticipation of that they had already made certain payments of £100 each to two of Mrs Kelso's children by a former marriage, and had made a payment of £50 to account to Mr Kelso. That minute would therefore bind him to agree to any payments that had already been advanced. When we get to the third minute, which is dated 22d November 1880, we find it stated that Mr Kelso's actings had led to payment to him of the revenue of the estate since Mrs Kelso's death, for the purpose of enabling him to upbring his children. Mr Kelso is said to have stated "that he was willing to accept the provisions under his late wife's settlement, provided (first) that the trustees pay him the revenue derived and to be derived from the estate since Mrs Kelso's death, for the purpose of enabling him to upbring and educate his children; (second) that the trustees take over the property in Glasgow Road, which is valued at £800, as their share of the heritage, and that in the event of their doing so he will pay £400, £370 of which will come to this trust, and the balance to the other Brand's trusts of £30, and that he will grant a bond over the property to the trustees for the balance of £400, upon the trustees granting a conveyance in his favour of the said subjects." The meaning of that was, that as there was a particular property which Mr Kelso wished to acquire, he agreed to pay £370 into the trust, and give a bond for £400 to the trustees over the property, provided they granted a conveyance of it to him upon their taking it over. He afterwards declined to take the property because he was not to get the proportion of garden ground which he desired, and because the trustees declined to make the path which he wished to see made.

Mr Kelso did nothing improper. The property could not be got upon the footing on which Mr Kelso was willing to take it. The trustees say that there was an agreement to accept the provisions under Mrs Kelso's settlement. But Mr Kelso says nothing of an assignation of his rights, and the agreement fails, because it was conditional and the condition was not implemented.

I think Mr Kelso was entitled to vindicate his rights, and that he has succeeded in doing so, and that the judgment of the Sheriffs must be recalled.

Lord Mure—Under the minute of agreement it was agreed that the fund for division amongst the beneficiaries should be held to be moveable estate. The share which fell to Mrs Kelso belonged to her husband from the time when the minute of agreement was signed. In these circumstances the question is, whether Mr Kelso ever made over that money or any part of that money to his wife's trustees, with the view that it should be administered under her settlement. At the time when the minute was signed he was made aware of his legal position, so that whatever was done was done by him in the full knowledge of all the circumstances. But as to

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.