interest that the town council and magistrates of a growing city should have power to maintain such roads as the one in question, which form the main arteries and accesses to the city from the adjoining country (or as they are called in the Act of 1800 the "outlets" of the town), of a greater width and freer from the proximity of high buildings than the streets of the more strictly urban part of the city. I see nothing inconsistent in their having wider powers in regard to the former class of roads than in regard to the latter.

It is to be observed that what are made over to the Town Council and magistrates under the vesting clause, section 27, are the existing roads which formerly were vested in the County Council; and it is only reasonable in regard to these existing roads that it should at least be in the power of the city authorities to continue to maintain and administer them subject to the powers which were formerly possessed by the County Council. They need not necessarily keep them at their present width or restrain building at the former limit unless they think it for the public interest to do so; they can always consent, on sufficient cause shown, to the adjoining proprietor building within the limit of 25 feet.

On the whole matter I am for affirming the interlocutor of the Lord Ordinary.

The Court adhered.

Counsel for the Pursuer — Salvesen — Hunter. Agents — Dalgleish & Dobbie, W.S.

Counsel for the Defenders—Balfour, Q.C. —Kennedy. Agents—Gordon, Falconer, & Fairweather, W.S.

Tuesday, March 7.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GREEN *v.* GRANT.

Process—Caution for Expenses—Bankrupt —Slander—Mora—Relevancy.

On 29th November 1898 the wife of a a bankrupt, with consent of her husband as her curator and administrator-in-law, raised an action of damages in which she alleged that the defender, while acting as trustee on her husband's sequestrated estate, had in May 1894 indecently assaulted her.

The Court (1) (*rev.* judgment of Lord Ordinary) *ordained* the pursuer to find caution for expenses, and (2) *held* the case to be relevant and not barred by *mora—diss.* Lord Young, who refused to consider these questions till caution had been found.

On 29th November 1898 Mrs Annabella Duncan or Green, wife of Peter Green, farmer, Aberlour, with consent of her husband, raised an action of damages for £500 against William Grant, bank agent, Elgin.

The pursuer averred—"(Cond. 2) In or about the month of May 1893 the estates of the pursuer's husband, the said Peter Green, who was then a farmer at Delmore, Aberlour, were sequestrated, and the defender was appointed trustee on the sequestrated estates. The defender was discharged from the said office of trustee in 1894. (Cond. 3) The value of the farm stocking on the said farm of Delmore was valued by the said Peter Green in the state of his affairs at the sum of £71, 18s. 9d. The pursuer paid this sum to Messrs Sutor & Scott, solicitors, Elgin, as acting for the trustee, and the said farm was subsequently carried on by her under the supervision of the defender as trustee foresaid. In these circumstances the pursuer had frequently to call upon the defender on business connected with the farm. (Cond. 4) On or about the end of April or beginning of May 1894, the day of the week being Thursday, the pursuer had occasion to visit the defender at his office in Elgin for the purpose of getting grass seeds for the said farm. She called at the defender's office in the afternoon, and was shown into his business room. She explained to him what she wanted, and he went with her to Messrs Matheson Brothers, seed merchants, Elgin, and ordered the seeds. At the defender's request the pursuer returned with him to his office to discuss some business matters connected with the farm. They again went to the defender's business room. The pursuer sat on a chair, and defender stood with his back against the fireplace. After some talk about the farm, the defender suddenly went to the door of the room and locked it. He then returned and seized hold of the pursuer, pulled her from the chair on which she had been sitting, pushed her backwards against the wall, and forcibly put his hand up under her clothes. The pursuer struggled and screamed, and caught the defender by the hair of the head. She threatened to tell the defender's wife, and he then released her, and unlocked the door, and she left the office. The pursuer has never called on the defender since then, save in her husband's company. (Cond. 5) The pursuer was very much shocked at the defender's said conduct, and went home in a very nervous condition. Immediately on her return home she informed her husband, who expressed his determination of at once having amends. On consideration, however, it was thought better to avoid scandal, the pursuer and her husband being of opinion that if they kept silence on the subject nothing more would be heard of it. Shortly after the occurrence of said incident the pursuer also informed her husband's uncle and mother of what had taken place. (Cond. 6) In November 1898 the Caledonian Banking Company, acting on the advice of the defender and other creditors of the said Peter Green, took proceedings to have his sequestration revived and a new trustee appointed therein. Since these proceedings were instituted the pursuer has

learned that the occurrence which took place in 1894, and which she thought was known only to the defender and members of her husband's family, has become public property, and has been and is being misinterpreted to the discredit of the pursuer. She has, since becoming aware of these facts, suffered much in her feelings. Her reputation has also suffered, and her friends and neighbours insist upon her taking steps to clear her character. The present action has thus been rendered necessary."

The pursuer pleaded—"(1) The pursuer having been assaulted by the defender as condescended on, is entitled to reparation therefor."

The defender pleaded—"(1) The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the action. (2) The averments of the pursuer, so far as material, being unfounded in fact, the defender should be assoilzied, with expenses. (3) The action is barred by *mora*, taciturnity, and acquiescence. (5) The pursuer, in the circumstances, ought to be ordained to find caution for expenses."

The pursuer proposed the following issue for the trial of the cause:—"Whether, on or about the end of April or beginning of May 1894, and in the defender's office in Elgin, the defender assaulted the pursuer, to her loss, injury, and damage? Damages laid at £500 sterling."

On 25th January 1899 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Having heard counsel for the parties on the motion of the defender that the pursuer be ordained to find caution before proceeding further with the cause, Refuses said motion; further, approves of the issue No. 10 of process as adjusted and settled as now authenticated; and appoints the same to be the issue for the trial of the cause."

The defender reclaimed, and argued—The husband of the pursuer had been sequestrated, and was still an undischarged bankrupt, and from the pursuer's statements it was plain that the action had no foundation, and was raised in consequence of spite. There was no relevant ground of damage stated on record, and the action should therefore be dismissed as irrelevant. In any event, the circumstances were such that the Court ought not to allow the pursuer to proceed with the action without finding caution. The matter of finding caution was entirely in the discretion of the Court, and if the Court were unfavourably impressed with the nature of the pursuer's case, they were entitled to ordain her to find caution—*Maxwell* v. *Maxwell*, March 3, 1847, 9 D. 797; *Macdonald* v. *Simpson*, March 7, 1882, 9 R. 696, opinion of Lord Young, 697; *Teulon* v. *Seaton*, May 27, 1885, 12 R. 971. The reasonableness of the demand that the pursuer should find caution was emphasised by the fact that the action had not been raised till four years after the alleged assault. Such a lapse of time amounted to *mora*—*Jenkins* v. *Robertson*, March 20, 1869, 7 Macph. 739; *Cook* v. *North British Railway Co.*, March 1872, 10 Macph. 513; *Collier* v. *John Ritchie & Co.*, November 4, 1884, 12 R. 47; *Scott* v. *Roy*, July 15, 1886, 13 R. 1173.

Argued for pursuer—The case of *Horn* v. *Saunderson and Muirhead*, January 9, 1872, 10 Macph. 295, ruled the present. In that case the pursuer's husband was a bankrupt, and yet the pursuer was found entitled to raise an action of damages without finding caution. The only case in which a pursuer who was not himself a bankrupt was not permitted to proceed with the action without finding caution was *Teulon, supra*. That was a very special case. The pursuer in that case was a married woman out of the jurisdiction of the Court and suing without the consent of her husband in a point concerning which certain trustees, who were the proper parties to sue, had refused to sue. Where the pursuer as in the present case was solvent, the mere fact of delay in raising the action was not a circumstance on which the Court would base the finding of caution. In *Collier* and *Scott* there were three circumstances which the Court founded on in requiring caution, viz., (1) bankruptcy, (2) delay, and (3) the fact that there was no explanation as to why so much time had been permitted to lapse before bringing the action. Here the pursuer was not bankrupt, and the reason of the delay had been properly explained. The case of *Jenkins* was an *actio popularis* in which men of straw were put forward, and that was the reason of the Court requiring caution to be found.

LORD JUSTICE-CLERK—This is certainly a most astounding action, but on the case as it stands I am unable to say that there is any good ground for throwing it out as irrelevant or barred by *mora*. But the case is a most remarkable one in its circumstances, and if in any action such as this a decision was come to that the pursuer should find caution, I think it should be applied in this case. Such cases have been quoted to us, and I am of opinion therefore that the pursuer must find caution before proceeding with the action.

LORD YOUNG—I am of opinion with your Lordship, differing from the Lord Ordinary, that this case is one in which the pursuer ought to be ordained to find caution for expenses as a condition of proceeding with the action. If this motion had been made when the case first came into Court, then if the view which I hold had been adopted by the Lord Ordinary, it would have been his duty to ordain the pursuer to find caution before proceeding with the action, and he would not have been proceeding regularly if he had heard the case debated before he had made the order to find caution, and seen that it was implemented. If at the beginning of the argument to-day the motion that the pursuer should find caution had been made on behalf of the defender, and we had considered it to be justified, we would not have heard any other point in the case debated. The only question, therefore, is the one about caution. I think it is irregular to find that the pursuer has a case on which to proceed to

trial, or to decide anything until we see whether the condition that she should find caution is complied with or not. I therefore refrain from expressing an opinion on the nice and important question whether, caution having been found, this action can be proceeded with. If our order to find caution is not complied with there will be no further proceedings; if caution is found, I would require time to consider whether the action is one which ought to be sent to trial.

LORD TRAYNER—I think that the course proposed by your Lordship in the chair is quite regular. If I thought the pursuer's case irrelevant, or one in which she could not insist by reason of *mora*, I should be for giving effect to that view now. But I think there is no good ground for throwing out this action, and that the pursuer is entitled to an issue. At the same time I think that there are circumstances in the case which warrant the Court in ordering caution to be found as a condition of proceeding.

LORD MONCREIFF—I agree in the course proposed by your Lordship in the chair. I concur with all your Lordships that the case is one in which the pursuer should find caution. With regard to the other point as to relevancy, I think we should dispose of it now. In dealing with this question it is important to notice the stage which the case has reached. The present action is on the verge of trial. In the circumstances I think it would be scarcely fair to the pursuer to make her find caution, and then perhaps after all throw out the case. We have heard a full argument, and have ample means of judging as to the relevancy, and I am of opinion that the case, although not very satisfactorily stated, is sufficiently relevant to be sent to trial.

The Court pronounced this interlocutor:—

"Recal the said interlocutor in so far as it refuses the defender's motion that the pursuer be ordained to find caution for expenses: Ordain the pursuer to find caution for expenses within eight days: *Quoad ultra* adhere to the said interlocutor reclaimed against, and remit to the said Lord Ordinary with power to him to dispose of the expenses of the reclaiming-note."

Counsel for the Pursuer — Anderson. Agents—M'Nab & Machardy, S.S.C.

Counsel for the Defender—C. D. Murray. Agent—Alex. Mustard, S.S.C.

Tuesday, March 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

STUART'S TRUSTEES *v.* STUART AND OTHERS.

Succession—Conditional Institution—Revocation.

A testator bequeathed one-tenth share of the residue of his estate to his niece A, declaring that in the event of her dying without lawful issue at the time of the division of his estate her share should fall and devolve on B. By a codicil executed after A's death he recalled the bequest of one-tenth part of the residue to her, declaring at the same time that the codicil should not infer a revocation of his trust-disposition and settlement, but that the same should stand in full force.

In a question between B and the residuary legatees, *held* that the conditional institution of B was not recalled by the codicil.

By his trust-disposition and settlement Alexander Stuart, builder, Peterhead, conveyed to trustees his whole heritable and moveable estate for certain purposes. With regard to the residue of his estate, he directed his trustees "to hold, apply, and divide the same between and among the persons hereinafter named or referred to, being my own relations, whom I do hereby appoint to be my residuary legatees—[Here followed an enumeration of certain of the testator's nephews and their children with their respective shares]. . . . (*Fifth*) To my niece Mrs Isabella Stuart or Wyness . . . one just and equal tenth part thereof . . . Declaring always, that in the event of any of my said last-named nephews and niece, namely, the said John Stuart, the said Alexander Stuart, and the said Isabella Stuart or Wyness, or any of them, dying without leaving lawful issue at the time of the division of the capital or stock of my said means and estates under these presents, then the share or shares to which they or any of them would have been entitled (had he, she, or they survived the said time) shall fall to and devolve on the said children of the said Peter Stuart equally between and among them." The testator also declared that in the event of any of his nephews or nieces dying without leaving lawful issue alive at the said period of division, then his, her, or their share or shares should become part of his general trust-estate falling for division among the other beneficiaries in terms of his settlement.

By codicil executed after the death of Mrs Wyness, the testator made sundry alterations on his settlement, and on the narrative of her having predeceased him, proceeded—"I recal the bequest of one just and equal tenth part of the residue of my estate . . . conveyed to" her. There followed the declaration "that these presents