nary has here alone to deal. For there the question arose under a suspension of a charge, and as in the matter of summary diligence, it was not surprising that the Court should interfere to arrest the diligence of the law, as the Lord Ordinary would certainly have been inclined to do, had the question with which he has to deal been presented in circumstances like to those which there existed.

"But if there be any point here which is at all affected by the views expressed by the Court in the case of *Winter*, it would seem to be that which falls within the matter of the reservation carefully made by Lord Mackenzie, in the course of his opinion, in relation to the right of the ministers themselves to insist for recovery of the arrears, and it is with reference to, and as having regard to that right alone, that the Lord Ordinary has here proceeded in sustaining the present ordinary actions against the defenders in this, and against those in the kindred actions now before him.

"These parties are, in respect of their occupation of premises within the city, burdened by statute with this payment, and it would require the statement of a strong case indeed on their behalf which would lead to the conclusion that they have obtained absolute immunity from payment of the impost now in question, through the failure in the statutory machinery which was created with a view to secure its collection by summary process.

"On the whole the opinion of the Lord Ordinary is, that in the present case, and in the other cases of the same class now before him, the defences must be repelled.

"But he trusts that, in arriving at that conclusion, he is giving no countenance to any doctrine which would go to support looseness or irregularity in the use of diligence, which must always proceed strictly in conformity with the rules under which it is authorised."

The defenders reclaimed, but did not insist in their reclaiming notes, which were accordingly, on 20th October 1868, refused (in Second Division as a transferred cause), with additional expenses.

Agents for Pursuer—G. & H. Cairns, W.S.
Agent for Defenders—J. D. Wormald, W.S.

Saturday, March 20.

FIRST DIVISION.

JENKINS AND OTHERS *v.* ROBERTSON AND OTHERS.

Caution for Expenses—Right of Way—Dominus litis—*Nominal Pursuer.* Pursuers of declarator of right of way ordered to find caution for expenses as a condition of the action proceeding, it being proved that these pursuers had no means of their own, and were put forward by other parties who desired to escape from liability for costs.

This was an action brought by William Jenkins, shoemaker in Elgin; William Halket, gardener there; and Alexander Youngson and Alexander Simpson, labourers in Lossiemouth, for the purpose of establishing a public right of footpath along the banks of the Lossie, through the lands of the defenders. The case has been repeatedly before the public, the House of Lords having repelled a plea of *res judicata*, founded on the proceedings in a similar case at the instance of the Magistrates of Elgin; and the points now before the Court were two pleas stated by the defenders, and amounting substantially to this—(1) That the present pursuers were not the true *domini litis*, and that the cause should be sisted until the true *domini litis* were called; and (2) that, at least in the circumstances, the pursuers ought not to be allowed to proceed without finding caution for expenses. The last defence was principally insisted in. The Court, recalling the judgment of Lord Jerviswoode, allowed a proof of certain of the defenders' averments. It appeared that one of the pursuers had withdrawn from the action, and that two of the others did not know whether they were still pursuers or not.

DUNCAN and RUTHERFURD for reclaimer.

SCOTT for respondents.

The following authorities were cited:—*Ball* v. *Ross*, 1 Scott. New Rep. C. P. 217; *Evans* v. *Reid*, 2 Adolph. and Ell. Q. B. 334; *M'Ghee* v. *Donaldson*, 1 June 1831, 10 S. 604; *Fraser* v. *Dunbar*, 6 June 1839, 1 D. 882; *Walker* v. *Wotherspoon*, 23 March 1843, 2 Bell Ap. 57.

The LORD PRESIDENT said that the pursuers were all in the position of working men, having no means but what they earned by manual labour. They sued a public right, and they had an undoubted title to do so. Jenkins, the pursuer, not only had a theoretically good title, but was practically, being a resident in Elgin, interested in the matter. There was no patrimonial interest on the part of the pursuers involved here. Now, it was completely established by the evidence that the pursuers did not furnish the funds for the litigation. The funds were raised by subscription, and the pursuers had been selected by this club of subscribers simply because they were poor men, and because, in the event of their failing in the action, the defenders would not get their expenses from them. Now, if the subscribers of the funds had themselves become pursuers, there would probably have been no room for the defenders' motion. But it was a very serious question when these subscribers proposed to put forward men with no means at all, in order to save their own pockets in the event of the defenders getting absolvitor,—and this apart from the peculiarities of the case, though this was undoubtedly a very hard case for the defenders. They had substantially succeeded in the former action, though unfortunately, owing to the way in which it had been ended, the matter was not *res judicata*. Formerly the pursuers were substantial; but here, unless the defenders' motion was granted, they, if successful in the end, would never get any of their expenses. In these circumstances it was just and equitable that the pursuers should find caution. There must be a power in every Court to give such an order, because the absence of it would lead to the most unjust and improper results.

LORD DEAS and LORD ARDMILLAN concurred.

LORD KINLOCH—There cannot be any doubt that the Court has power to order security to be found for costs, as the condition of a litigation being allowed to proceed. The power is one which must be exercised with great discretion and care. But the possession of it is undoubted. An equitable arrangement as to expenses, either by payment or security, and either in whole or in part, as a condition of judicial procedure, pervades the whole of our practical jurisprudence.

At the same time, it is important that it should be clearly understood that poverty in a ligitant is, by itself, no ground whatever for obliging him to find security for expenses. Some additional ele-

ment, such as divestiture by bankruptcy, or the like, has always been held indispensable. The poorest man in the country is entitled to be admitted to the Court without let or hindrance. By the institution of the Poor's-roll, there are established facilities for the case of the very poorest being heard and decided. If nothing had appeared in the present case except that four common working men were pursuing an action for enforcement of a public right of way, being an action which the law holds them entitled to pursue, the Court, I may venture to say, would not have listened to any proposal to have them ordained to find caution for expenses, as a condition of the action proceeding.

The peculiarity of the case is, that it has been clearly proved that the pursuers are not spontaneously pursuing this action on their own resources, but have been set forward by others, who remain in the background. And some of these are persons who were engaged in previous proceedings of the same kind, and who, being then foiled in their purpose, were desirous to have the proceedings which they themselves could not now raise, instituted in the name of new ostensible pursuers. The parties have been selected as pursuers for the express reason that they are so poor that they cannot be made worse than they are by any judgment against them for expenses, because such expenses they have no means to pay. William Jenkins, the only one of whom it is quite certain that he continues a pursuer, is not indeed a pauper in the strict legal sense, but he is only one shade above, having at the utmost nothing more than suffices for the sustenance of himself and his wife. It is proved that the action is carried on, not by any funds of the pursuers (for they have none), but by subscriptions derived from various parties desirous of maintaining the suit. What these parties substantially do is, to carry on the action in the name of the pursuers, with no liability (as is supposed) for expenses on their own part; and with the consequence to the defenders of being obliged to lay out large sums in litigation, without the prospect, if they are successful, of recovering any part of them from the nominal pursuers. The plan of so carrying on this action involves a state of things, as regards the defenders, than which nothing can be more unjust or unfair. I think the case loudly calls for such remedy as the Court can apply. There is great reason to doubt whether any other remedy be competent, during the progress of the suit, than that of ordaining the pursuers to find security for costs; and this remedy I think as fully competent as it is equitable and appropriate. If the more substantial parties who are lurking behind the pursuers are sincere in their desire to have the question brought to issue, and have a good opinion of the case, they, or one or more of them, will come forward and become security for the expenses. If they do not so come forward, the fact will form the strongest justification of the order now proposed to be made.

Agents for Pursuers—D. Crawford and J. Y. Guthrie, S.S.C.

Agents for Defenders—Gibson-Craig, Dalziel, & Brodies, W.S.

Saturday, March 20.

SECOND DIVISION.

WALKER *v.* WATERLOW.

Expenses—Auditor's Report—Election Petition. Circumstances in which the Court refused to interfere with the auditor's taxation of the expenses of an election petition.

On the withdrawal of the petition in this case, Lord Cowan, the election judge, on the 22d January, found the petitioner liable in expenses, and remitted to the auditor to tax as between agent and client, in terms of the 34th section of the statute. The account amounted to £383, 4s. 1d., and included, besides the fees of county and London agent, fees to four counsel and fees to a junior counsel for preparing memorials for English counsel, precognoscing, &c. The account was first taxed as between party and party, with the view of ascertaining the amount in which Major Walker was liable to Sir Sydney Waterlow. In this taxation the auditor disallowed £199, 3s. 11d., reducing the account as a charge against the petitioner from £383, 4s. 1d. to £184, 0s. 2d. The account was afterwards taxed as between agent and client, with the view of ascertaining the amount which Sir Sydney Waterlow had to pay to his own agent. Many charges that were disallowed in the first taxation were admitted in the second. Sir Sydney Waterlow now said, that in respect of the provision of the statute providing that the expenses should be taxed as between agent and client, everything that formed a good charge against him by his own agent was a good charge against his opponent. He also said, in a note of objections to the auditor's report, that notwithstanding the terms of the remit, the auditor had not taxed the account as between agent and client, "but had proceeded upon a totally different principle fixed by himself."

The auditor further allowed certain charges which were objected to by Major Walker. Both parties lodged objections.

GORDON, Q.C. and JOHNSTONE for petitioner.

CLARK, GIFFORD, and M'KIE for respondent.

The Court adhered to the auditor's taxation.

The LORD JUSTICE-CLERK referred at considerable length to the points of law in the case. In the course of his remarks he alluded to the fact that the respondent had not only four counsel but nine gentlemen to aid him in his proceedings in the county, some of them committee men, who employed themselves in calling the people together. In the matter of appointing agents, was it to be said that an agent should have power to appoint sub-agents as he might choose to parcel out the county of Dumfries, and then to saddle his opponents with the costs? He thought there was no good ground for such a course. In so far as related to the expenses incurred, he was unable to put his hand upon anything in which the respondent had not been properly restricted by the auditor. In regard to the appearance of the respondent before Lord Cowan with four counsel, to get a matter dismissed which the other party wished dismissed, there was an account incurred of £184, which seemed to be tolerably ample. Then it was plain that the third counsel was not employed for the purpose of a third counsel in an ordinary case. The writing of the memorials, the precognitions, &c., was the function which he had performed. On the whole, his Lordship was of opinion that