church on ground not within the parish, because it is first put within the parish and then the church is built. Therefore I am not prepared to give much weight to the difficulty suggested about that.

Then, again, as regards the matter of population and the proximity of other churches, I cannot think that a population of 2700 is a very small charge for any minister. It was thought a very sufficient charge in many cases that we have had before us, and looking to the character of the population in this district, and the very hard work necessary to make an impression upon such a population, I think probably the minister of the new church will find his hands pretty full if he does his duty.

The expediency which has been urged of leaving this district to be attached to other parishes adjoining, is met, in the first place, by what I have already mentioned with regard to the views of the ecclesiastical commissioners and the presbytery. But it is still further answered by this—that the respondents (the minister and kirk-session of Canongate and the heritors of Canongate) have not suggested any arrangement which they consider to be more expedient than that proposed in this petition. I think when they came here to object on the ground of inexpediency they were surely bound to tell us how to rescue from their present destitute condition those who are living in that district in the heart of the city, because that this district is in a destitute condition is beyond all question, there being no minister of the Established Church charged with the duty of superintending and visiting it. I am of opinion, although it is not necessary formally to decide this question, that if the report that we shall receive from the Teind Clerk hereafter is satisfactory the petitioners have made out their case. All we can formally do at present is to repel the objections to the competency of the proposal and remit to the Teind Clerk to make inquiries into the case and to report.

Lord Mure, Lord Gifford, Lord Shand, and Lord Rutherfurd Clark concurred.

The Court accordingly repelled the objections, and remitted to the Teind Clerk to inquire and report.

Counsel for Petitioners—Lee—J. P. B. Robertson. Agent—H. W. Cornillon, S.S.C.

Counsel for Respondents—Kinnear—Wallace. Agent—Lindsay Mackersy, W.S.

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*Wednesday, November 26.*

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## FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

## DEMPSTER (POOR INSPECTOR OF CITY PARISH, GLASGOW) *v.* M'WHANNEL (INSPECTOR OF LUSS PARISH) AND DEAS (INSPECTOR OF GREENOCK PARISH).

*Poor—Residential Settlement—Forisfamiliation of a Domestic Servant.*

*Held* that the fact that a domestic servant who remained all the day in her master's house, returned home at night to her father's, where she slept, did not prevent her being forisfamiliated from the time that she entered service.

*Poor—Acquisition of Residential Settlement—Interruption of Continuous Residence.*

Circumstances where the acquisition of a residential settlement by a domestic servant who lived in her father's house was not interrupted by the fact that in the engagements of his trade the father was for some time absent along with his family in another part of the country, to which she had also followed them for a temporary purpose.

*Poor—Acquisition of Parochial Relief.*

*Held* that an arrangement among the authorities of a town, including the parochial board, whereby upon the outbreak of an epidemic certain classes of patients were taken to the infirmary and treated, partly at the expense of the board, did not bring these classes within the category of persons who in the meaning of the 76th section of the Poor Law Act 1845 have received parochial relief.

Cecilia Watt was a daughter of the deceased Alexander Watt, a mason by trade, and was born at Luss on 14th December 1844. Her father married a second time in December 1862, and his second wife was still alive in Greenock. Cecilia Watt had lived with her parents at Luss (where she occasionally found employment) till the end of April 1866, when the whole family removed to Greenock, residing in their father's house in Salmon Street, and afterwards in Ann Street.

While at Greenock, and at the age of two and twenty, she went into domestic service, and in a joint minute of admissions her residence there was stated in the following manner:—

"*April to Martinmas* 1866.—Father's house.

"*Martinmas* 1866 *to Martinmas* 1867.—Employed and paid by the month as a domestic servant to Robert Stewart, candlemaker, Greenock. She did not sleep in Mr Stewart's house, but went to her father's house for the night, working in Mr Stewart's house all day, and also taking her meals there.

"*Martinmas* 1867 *to Whitsunday* 1868.—Father's house.

"*Whitsunday* 1868 *till about 15th August* 1868.—With Mrs Sharp, Greenock, as domestic servant, living and sleeping in her mistress' house.

"*August* 1868 *till August* 1869.—Father's house.

"*August* 1869 *until the latter part of November* 1869.—Employed by Mr Stewart as a domestic servant under the same arrangement as formerly. She left Mr Stewart's service in consequence of being pregnant of an illegitimate child."

In September 1869 her father removed to Kilmartin, Argyllshire, where he was employed as foreman in the building of a mansion-house, and on the 9th of December his wife and children (including Cecilia) followed him, taking with them only such things as were absolutely necessary. During their residence at Kilmartin the family lived in a bothy, and Watt continued to pay the rent and taxes of the house in Ann St., Greenock, where also the furniture remained, except such bedding, &c., as had been taken to Kilmartin. The key of the Ann Streeet house was kept at Kilmartin, and one of the boys was occasionally sent

with it to Ann Street for messages. While at Kilmartin Cecilia gave birth to an illegitimate child about the 25th April 1870. A few days prior to Whitsunday 1870 the whole family returned to Greenock to the Ann Street house on account of the insolvency of their father's employer while the mansion-house was in course of being built. Cecilia worked in the flax mill, Greenock, in June and July 1870, and again from January to July 1873.

In January and February 1871 the family were taken ill with fever, and were removed one after the other to the hospital. The father Alexander Watt died on the 11th March, and Cecilia Watt was a patient from 16th January till 15th February of that year, when she returned to her father's house in Ann Street.

Typhus fever was epidemic at Greenock at that time, and to meet such occurrences, and in the interests of the public health, and under authority of the 39th section of the Public Health (Scotland) Act (30 and 31 Vict. cap. 101) a tripartite arrangement had been come to between the parochial board, the infirmary directors, and the local authority, under which all patients suffering from fever or other infectious diseases were to be admitted to the infirmary, and it was provided that a proportion of the expense should be borne by the parochial board and that no order of admission whatsoever should be necessary except the usual medical certificate that the "patient is a fit and proper case for admission."

The doctor who had attended the Watts had acted under this arrangement in giving the necessary certificate, and it had been without communication with the parochial board that the whole family had been removed.

Though the family were in poor circumstances, the doctor's fees for attendance on Cecilia both before she went into and after she came out of hospital had been paid either by the family or by friends, and further the expenses of the father's funeral (he having died in the infirmary) had been paid by the family and not by the parochial board.

After her father's death Cecilia lived with her stepmother till July 1873, when she left Greenock altogether. In 1872, being unable to work, she had received relief at various times during that year. She afterwards resided in various parts of the country, and it was for the purpose of having refunded the amount of certain alimentary advances expended by the City Parish of Glasgow for her behoof from September 1875 onwards that the present action was raised. It was brought against the parish of Luss and the parish of Greenock.

Luss pleaded that she had acquired a residential settlement in Greenock, which the latter denied.

The Lord Ordinary (RUTHERFURD CLARK) found Greenock liable, and gave decree against the inspector of that parish. He added this note:—

"*Note.*—[*After stating the circumstances*]—1. It was maintained for the parish of Greenock that the pauper was not forisfamiliated until Whitsunday 1868. In the opinion of the Lord Ordinary she was forisfamiliated at an earlier date, viz., Martinmas 1866, when she was about twenty-two years of age, and when she went into domestic service. It is true that she slept in her father's house during the period between Martinmas 1866 and Martinmas 1867, when she was in the employment of Stewart. But that circumstance does not appear to be material. She was maintaining herself in a great measure, if not exclusively, by her own labour.

"2. It is maintained that her residence was not continuous. The facts on which that plea is rested are these:—In September 1869 Watt went to the parish of Kilmartin, where he was employed on a job. He continued to reside there till a few days before Whitsunday 1870. His wife and family, including the pauper, continued to live in Greenock till 9th December, when they shut up their house and joined him. They all resided together, and returned to Greenock at the same time. During their absence the house in Greenock was retained, the chief part of their furniture remained in it, and rent and taxes were paid.

"Having regard to the recent decision, the Lord Ordinary is disposed to hold that this absence does not interfere with the continuity of the residence. It was for a temporary purpose in itself, and provision was made for a return to Greenock by the retention of the house, when the purpose was finished.

"3. Lastly, it was contended for the parish of Greenock that the pauper was during the period between 16th January 1871 and 15th February 1871 in receipt of parochial relief, and that she was then a proper object of it.

"It appears that in the winter of 1870-71 Greenock was visited with a severe epidemic of typhus fever. The whole Watt family were seized with it, and were by order of the doctor removed to the infirmary.

"To meet occurrences of this kind, an arrangement was made in 1869 between the infirmary, the police board, and parochial board, that all patients suffering from fever or other infectious disease should be admitted into the infirmary on the usual medical certificate that the patient was "a fit and proper case for admission," and that the cost of these patients should be borne by the three boards in the proportion of three, five, and eight-sixteenths. Under this arrangement the parochial board paid its share of the patients, of whom the Watts formed a part.

"It is urged that the Watts were entitled to parochial relief though they never asked it, and that they received it by being sent to the infirmary. For it is said that the proportion paid by the parochial broad represented, or must be held to represent, the sum payable for those patients who were entitled to parochial relief, or, in other words, that these patients were eight-sixteenths of the whole.

"There can be no doubt that the Watts were in poor circumstances when they were received into the infirmary, and it is probable that had they applied for parochial relief they would have been entitled to receive it. But no such application was made, directly or indirectly, and no inquiry was made by the inspector into their case. They had several charitable friends, and that they were not dealt with as paupers seems to be shown from the circumstance that the family defrayed the expense of Watt's funeral. They were not sent to the infirmary at their own request, and not even for their own benefit, so much as in the interest of the public health. It seems to the Lord Ordi-

nary that they cannot be brought within the category of persons who in the meaning of the 76th section have received parochial relief. These seem to be the persons by or for whom an application for relief is made, and to whom it is given by the inspector after he has made the inquiry directed by the statute. The Court cannot, it is thought, be asked to go into a speculative question, or to determine what would have happened if an application for relief had been made."

The Inspector of Greenock reclaimed, and argued—1. Forisfamiliation did not begin till 1868, when the pauper left her father's house, entering into domestic service and residing altogether with her master, and thus the requisite five years of residence cannot be made up to fix her residence at Greenock. 2. But assuming that she was forisfamiliated at Martinmas 1866, then the continuity of her residence was interrupted (*a*) by her visit to Kilmartin, (*b*) by her becoming an inmate of the infirmary, which practically brought her within the category of persons who in the meaning of the 76th section of the Poor Law Act (8 and 9 Vict. cap. 83) received parochial relief. The decisions in *Greig* v. *Miles and Simpson*, July 19, 1867, 5 Macph. 1132; *Beattie* v. *Stark*, May 23, 1879, 6 R. 956; *Hardie* v. *Roger and Morrison* and *Simpson* v. *Kennedy*, Dec. 21, 1878, 6 R. 446; *Moncrieff* v. *Ross*, Jan. 5, 1869, 7 Macph. 331, could not be applied, for in all of them constructive residence was inferred from the fact that during the absences of the pauper he left his wife and children behind him, occasionally returning home and spending his earnings, whereas in the present case the whole family followed their father to Kilmartin. *Cf.* also Stair, i. 5, 8.

Argued for Inspector of Luss—1. Forisfamiliation began at Martinmas 1866. 2. Assuming that, there was no interruption to the continuity of the pauper's residential settlement in Greenock either (*a*) by her visit to Kilmartin—for in point of fact there were circumstances sufficient to connect her still with her settlement in Greenock, and in point of law her absence with her family at Kilmartin was not sufficient to interrupt it—or (*b*) by her reception into the infirmary, because she was removed there under the agreement, was able to pay the doctor's fees, and therefore was not in receipt of parochial relief under the 76th section of the Poor Law Act.

Authorities—*Beattie* v. *Stark*, May 23, 1879, 6 R. 956; *Watson* v. *Caie and Macdonald*, Nov. 19 1878, 6 R. 202; *Beattie* v. *Smith and Patterson*, Oct. 25, 1876, 4 R. 19.

At advising—

Lord Shand—I do not think it necessary to recapitulate the facts in this case. They are very distinctly stated in a minute of admissions which the parties have very properly adjusted, thus avoiding so far the expense of a proof. The Lord Ordinary has mentioned in his note the circumstances essential to the determination of the case, and it is only necessary now to notice the three points on which we have heard renewed argument.

The first question raised is, whether there was at Martinmas 1866 forisfamiliation of the pauper to such an extent as to put her in the position of being able from that date to acquire a settlement for herself in her own right in distinction to a derivative settlement from her father? At that date the pauper, who was born in 1844, was 22 years of age. She resided at Greenock with her father, but she then went into domestic service and remained in her situation until Martinmas 1867. During that period she left her father's house in the morning, worked all day, and returned to her father's house to sleep at night. It is not disputed that if she had slept in the house in which she was a servant there would have been such a severance from her father's family as would have amounted to forisfamiliation, but it is argued that because she continued to spend the night in her father's house there had been no such severance. I cannot agree in that view, but think, with the Lord Ordinary, that she was forisfamiliated at Martinmas 1866. Where a young man or a young woman supports himself or herself by wages earned for work in a workshop, factory, or dwelling-house of an employer not the father, there is certainly a capability for acquiring an independent settlement.

Agreeing with the Lord Ordinary on that point, we have next the fact that for five years from Martinmas 1866 the pauper resided in Greenock. Unless it is to be held that between 9th Dec. 1869 and Whitsunday 1870 there was an interruption of the necessary residence, a settlement was acquired. Now, what are the facts on which the question turns? The pauper's father resided with his family at Greenock in a house which he held from year to year, and the pauper resided with him. In September 1869 the father left Greenock for the purpose of taking part in building a mansion-house at Kilmartin, he being foreman of the works. When he went he left his wife and family in Greenock, but on Dec. 9 his wife followed him with all the children, and accompanied by the pauper. A few days prior to Whitsunday 1870 they all returned to the house in Greenock. During the residence of the family at Kilmartin they all resided in an old bothy, but the father still continued to pay the rent and taxes of the house at Greenock, where also the furniture remained, except such bedding, &c., as had been taken to Kilmartin. The key of the Greenock house was kept at Kilmartin, and one of the boys was occasionally sent there on messages. If, then, this question had arisen with regard to the settlement of the father himself, I can have no doubt that in conformity with recent decisions we must have held that this temporary absence had not the effect of interrupting that continuous residence in Greenock necessary to give him a settlement there. The absence was incidental, evidently intended to be merely temporary, and in point of fact he returned to Greenock at the end of the job. I am of opinion that the Lord Ordinary was right in thinking that there was no essential distinction between the cases of the father and the daughter. There was no doubt a difference in the circumstances. The pauper had not a house of her own at Greenock as her father had, and it is true that she had no furniture to leave behind her, but still I think that as the Ann Street house was her father's home, so in the circumstances it must be held to have been her home, and that she left it for a temporary purpose only. The absence was an incident only of the residence, and so, on the principle laid down in former cases, her con-

tinuous residence at Greenock was not interrupted.

That being so, the only remaining point has reference to the plea that the pauper had received parochial relief during a period extending from 16th January to 15th February 1871. The facts on this part of the case are contained in the minute of admissions. It appears that during that time there was an epidemic of typhus fever in Greenock, and that the whole of the Watt family, including the pauper, was suffering from it. After communication between Dr Wilson, the doctor of the family, and the local authority the pauper was removed to the fever hospital. This took place under a medical certificate by Dr Wilson, and none of the officers of the parochial board were in any way parties to what was done. The plea of the defender, the inspector of poor at Greenock, is founded on the fact that there had been an agreement entered into between the parochial board of Greenock, the infirmary directors, and the local authority, in which arrangements were made for the reception in the infirmary of cases of infectious diseases, on the footing that in such cases sent to the infirmary a proportion of the expense should be borne by the parochial board. Owing to the epidemic, numbers of patients were necessarily sent to the hospital, but paupers were not the only patients so sent, for under the Public Health Act other persons, such as domestic servants and the like, well enough able to pay for maintenance and medical attendance were sent to the hospital for the protection of the public health. It was in this way that the pauper became an inmate of the hospital. It is said that because a proportion of her board while in the infirmary was paid for by the parochial board she was in receipt of parochial relief. This cannot be accepted as a sound argument, for if given effect to it would come to this, that every person sent to the hospital in this way must, though perfectly able to pay for their board, be regarded as recipients of parochial relief within the meaning of the statute.

It is, however, further said that if we look at the circumstances of the pauper at the time she went into the hospital she would have received parochial relief if she had applied for it. Now, in the first place, I am not satisfied that this is so on the facts, as it has been pointed out that the doctor's charges for attendance on the pauper before she went to the hospital were paid by her father, and also that his fees for attendance after she came out, with the exception of one on which he did not insist, were paid for by her family or friends, and when her father died the expenses of his funeral were not paid by the parochial board but by the family. I am not aware of any case in which it has been held that where parochial relief has been given, not upon the application of a pauper or his friends, there has been an interruption of the acquisition of a settlement. There was no such application here; the relief was given under an arrangement of which the pauper was ignorant, and I think the pauper cannot be said to have been in receipt of parochial relief within the meaning of the statute, and therefore that the acquisition of a settlement was never interrupted.

I am for adhering to the interlocutor of the Lord Ordinary.

Lord Mure—There are three questions in this case, all of some nicety. On the first I have not much difficulty in concurring with the Lord Ordinary's finding that this pauper was forisfamiliated in 1866. It appears to me that when a person of the age of 22, and capable of earning a livelihood, goes to work as a factory or domestic servant for the day, and returns home at night, she is forisfamiliated to the extent of being able to acquire a residential settlement for herself.

On the second question, however, I have had considerable difficulty, and have felt that in adhering to this interlocutor we must go much further than we have ever gone on the question of constructive residence. This girl was forisfamiliated, and being in that position she leaves her situation with Mr Stewart and goes to join her father, who is resident in another parish. It has been held that when a man so removes out of the parish where he has been residing, in the prospect of getting work, and leaves his family behind him, his residence in the parish which he has left is not interrupted; but my difficulty is whether that rule applies to the case of a forisfamiliated daughter when she leaves her parish of residence merely to join her father. If we are to say that the rule does apply, then we are going further than we have ever done before. Seeing, however, that when this girl left Greenock her residence was her father's house, that she only left to join him for a short time, and that she came back shortly to Greenock with him, I think that we may hold that she has continued her residence at Greenock. I have some hesitation in coming to this conclusion, and if the case should arise that a person so situated should go away of her own accord, not to join her father, but merely for the purpose of being confined, I am not prepared to say that I should not take a different view of the case; but on that point I reserve my opinion.

On the third question I agree with Lord Shand and the Lord Ordinary, because if we were to give effect to the rule which has been contended for, it would interfere with the residential settlements of many persons who are quite entitled to them. It is clear that these parties were not paupers, when they were only removed to the hospital for sanitary purposes, and the fact that a proportion of the expense of the board of this person was paid for by the parochial board cannot put her in the position of having applied for and received parochial relief in terms of section 76 of the statute.

Lord Deas—It is not disputed that by Whitsunday 1868 this pauper had been forisfamiliated, but it is contended that there was not, as the Lord Ordinary thinks, forisfamiliation so early as Martinmas 1866. Now, the only difference between the position of the pauper during that disputed period and that which followed is, that up to 1868 the pauper slept in the house of her father, only going to her work during the day, and that after that date she slept at her master's house. I cannot see that that makes any material difference. It appears to me that when she went, a girl of 22 years of age, into service at Martinmas 1866 she was forisfamiliated from that period downwards. I think that on that question there is no room for doubt that the Lord Ordinary is right.

The next point is, whether granting that this pauper was forisfamiliated, and was in process of acquiring a residential settlement, there was such absence on the part of the pauper from 9th December 1869 till Whitsunday 1870 as can be held to have interrupted her settlement in Greenock. On 9th December the pauper left Greenock and joined her father at Kilmartin, where he had gone in consequence of having got a building job there. If, then, the question had related to interruption of the residential settlement of the father, we must have held, on the rule laid down by past decisions, including one just the other day, that though he had been absent for some time, yet that he had a constructive residence at Greenock. Now, if this pauper accompanied him as a member of his family, it is not easy to distinguish between their cases, and to hold that in her case there had been an interruption of residence while there had been none in his. It is true that she had no separate house in Greenock, but there is much in Lord Shand's remark that her father's home in Greenock was also her home, and that his furniture was never removed from it. The only thing upon which I rather differ from Lord Mure is in the case which he supposed, namely, if the father had remained at Greenock and the daughter had gone to the country to be confined, intending all the time to come back after her delivery. I confess I am inclined to think that that would not have interrupted her settlement in Greenock. The decisions on these points do not turn on the purpose of the absence further than that the purpose must be temporary. I concur, however, on the general view that there has been here no interruption to the continuity of residence.

The third question is of importance and of general interest, but on the whole I agree that this pauper was not in receipt of parochial relief when she was in the infirmary. Had she been taken there and kept there at her own expense, it is plain that she could not have been held to have been in receipt of relief, and in fact the whole question turns on the agreement between the directors of the infirmary, the parochial board, and the local authorities. That agreement was entered into for the public benefit—for the public safety—and there was an arrangement by which these different bodies were to pay certain proportions of the expense of the keep of fever patients. This pauper had some little means before she entered the infirmary, and she had neither received nor applied for parochial relief. She was obliged by the authorities to go to the infirmary, and it would be startling if we were to hold that whoever is compulsorily removed to an hospital by the local authorities because suffering under an infectious disease is reduced to the status of a pauper. It seems to me that common sense rebels against such a view. On the whole question I concur with your Lordships.

The Lord President (INGLIS) was absent.

The Court adhered.

Counsel for Pursuer—Moncrieff. Agents—W. & J. Burness, W.S.

Counsel for Defender, Inspector of Greenock (Reclaimer) — Crichton — Jameson. Agents — Duncan & Black, W.S.

Counsel for Defender, Inspector of Luss (Respondent)—Keir—Macfarlane. Agents—Tawse & Bonar, W.S.

*Thursday, November 27.*

## FIRST DIVISION.

[Lord Adam, Ordinary.

### JAMES DUNLOP & COMPANY *v.* THE STEEL COMPANY OF SCOTLAND (LIMITED).

*Agreements and Contracts—Agreement by Letter —Construction of Lease without Ish.*

The proprietors of works, for the purposes of which water-power was required, agreed by letter to take for a fixed rent per annum the surface-water which flowed from a neighbour's coal-pit. The operations for diverting the water were to be performed at the sight of the former parties and without inconvenience to them. The whole expense was to be borne by the grantees of the right, and the arrangement was to subsist as long as the water continued to be pumped from the pit. The manufacturers afterwards obtained water from another quarter, and intimated that they would discontinue the colliery supply. In an action at the instance of the latter for implement of the agreement, *held* (*diss.* Lord Mure) that the terms of the agreement made the contract one of lease, and that in respect there was no ish, which was an essential characteristic of a lease, it could not be enforced.

The pursuers in this case, James Dunlop & Co., were tenants of a coal-pit known as the No. 1 pit, Newton, in the parish of Cambuslang and county of Lanark, under a lease for thirty years from Whitsunday 1871. The defenders, the Steel Company of Scotland (Limited), were proprietors of steel works at Hallside, about half-a-mile distant from the pit, for which they required a large supply of water. In August 1872 the defenders obtained permission to supply themselves from an unused pit in the pursuers' coal-field of Hallside, on condition of paying the men's wages and coals for working the pumps, and keeping the latter in repair, no charge being made for the water itself.

In spring 1875 the defenders entered into negotiations with the pursuers with the view of getting an additional supply from another of their pits. On 4th May an offer to pay £230 per annum was made by the defenders through their manager, and on the pursuers demanding the sum of £300 per annum the defenders replied that three years before they could have given the price demanded, but as they had been put to much expense in the erection of a pumping engine for getting a supply from the Clyde, they now offered only £250 per annum. Before closing with this offer the pursuers wrote to the defenders asking under what obligations they should be in regard to the supply of water in the event of their coming to terms, and received this reply:—

"Glasgow Locomotive Works,
"Glasgow, 26th May 1875.

"Dear Sir,—In reply to your favour of 24th inst. I beg to say—All we would expect is that you give us the water from Newton pit if it is going, and from Hallside if it is going and Newton not,