before us. I was at first at a loss to understand on what grounds the Sheriff-Substitute proceeded, because according to the statement in the case he had before him no evidence except the report of the medical man. But I suppose he must have proceeded, as he did in the case of the *Boase Spinning Company*, upon his own personal observation and opinion against that of the medical practitioner. He did not order further inquiry as to the workman's condition, or as to whether in point of fact the workman was fit for work and earning as high wages as before the accident, but (on what grounds does not appear) he actually reduced the allowance, although only to a small extent. The question therefore is in substance just what was put to us in the former case, viz., Whether the Sheriff was entitled to follow his own judgment against that of the reporter? We there decided that he was not.

The medical report is to the effect that the respondent, notwithstanding the injury to his right eye, is at present quite able to undertake his ordinary work as a labourer; and the only question which we can answer just now is, whether that report is conclusive as to his present condition. I am of opinion that it is. This is an application made under Schedule I., sub-section 12, of the Act, under which the question whether compensation previously awarded should be diminished or ended falls to be settled by the Sheriff as arbitrator. Now, with a view to presenting such an application, and for the purposes of the arbitration under that sub-section, the employer is entitled under section 11 of the First Schedule, before coming to the Sheriff, to get the workman examined by a medical practitioner, who may be one of the medical practitioners appointed under Schedule 2 (13), and it is provided that the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be conclusive evidence of that condition. We so held in the case of the *Boase Spinning Company*.

But if the employer makes an application under Schedule I., section 12, without having previously obtained such a certificate, the Sheriff may under the 13th sub-section of Schedule II. appoint the official medical practitioner to report upon any matter material to the question arising in the arbitration. It must be observed that the power conferred on an arbitrator under Schedule II. (13) of remitting to the official medical practitioner to report applies to all arbitrations under the Act, and therefore the scope of the particular arbitration must be kept in view in considering the scope and effect of the report. Now, in an arbitration under Schedule I., sub-section 12, the material question is the condition of the workman, and I cannot suppose that it was intended that a report made by the official medical practitioner under remit to him by the arbitrator or judge under Schedule II. (13) should carry less weight than the certificate of the same person obtained at the instance of the employer as to the condition of the workman under Schedule I. (11). The result therefore, I apprehend, is the same, viz., that such a report is equally conclusive on that matter.

Although the workman is at present able to earn as high wages as before, the injuries which he has sustained may hereafter disable him from doing so. But in that case he can apply for review under Schedule I., sub-section 12, if the compensation is not finally ended. To ensure his power to do so I agree that instead of ending the compensation we should simply reduce it to 1d. a-week.

The Court pronounced this interlocutor—

"Answer the question put in the stated case by finding that the certificate there referred to is conclusive evidence that the incapacity of the respondent arising from the injuries received by him while in the appellants' employment has ceased, to the effect of disentitling him to a continuance at present of the compensation awarded to him on 25th January 1901: Recal the interlocutor of the Sheriff-Substitute dated 10th October 1901, except in so far as it is thereby ordered that the consigned sum of £6, 18s. 5d. shall be delivered up to the respondent, and remit to him to reduce the said compensation to the sum of one penny per week from and after 16th October 1901 until further orders of Court: Find the appellants entitled to expenses, modify the same to £6, 6s., and decern."

Counsel for the Appellants—Campbell, K.C.—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Respondent—Sandeman. Agents—Galloway & Davidson, S.S.C.

Thursday, March 20.

FIRST DIVISION.

PARISH COUNCIL OF LEITH *v.* M'DONALD.

Poor—Child in Industrial School—Decree against Parish Council for Future Payments—Industrial Schools Act 1866 (29 *and* 30 *Vict. cap.* 118), *secs.* 38 *and* 40, *Sched. H.*

Held that it is not competent on a complaint against a parish council brought under section 38 of the Industrial Schools Act 1866, to grant a continuing order for expenses not already incurred.

Poor—Children Left Destitute by Father—Mother Deserted and Destitute—Chargeability of Children—Industrial Schools Act 1866 (29 *and* 30 *Vict. cap.* 118), *sec.* 38.

Two children were deserted and left destitute by their father, who had disappeared. They were sent to an industrial school on June 11, 1901. Their mother had also been left unprovided for, and had no means to support her

family or to contribute to their maintenance in an industrial school. In May 1901 she, along with some of her children, had been admitted to the poorhouse. The two children first mentioned had not been admitted to the poorhouse or placed upon the poor's roll. *Held* that they were chargeable to the parish council of their father's parish within the meaning of section 38 of the Industrial Schools Act 1866.

The Industrial Schools Act 1866 (29 and 30 Vict. cap. 118), enacts as follows:—Section 38—"In Scotland where a child sent to a certified industrial school under this Act is at the time of his being so sent or within three months then last past has been chargeable to any parish, the parochial board and inspector of the poor of the parish of the settlement of such child, if the settlement of the child is in any parish in Scotland, shall as long as he continues so chargeable be liable to repay to the Commissioners of Her Majesty's Treasury all expenses incurred in maintaining him at school under this Act to an amount not exceeding five shillings per week, and in default of payment those expenses may be recovered by the inspector of industrial schools or any agent of the inspector in a summary manner before a magistrate having jurisdiction in the place where the parish is situate. . . . Provided always that nothing in this Act shall prevent any parochial board on whose funds the cost of support of any such child has become a charge from adopting such steps for the recovery of any sums which may have been paid by such parochial board for any such child against the parish of his settlement, or for his removal, as may be competent to them under any Act for the time being in force relating to the relief of the poor in Scotland."

Section 39—"The parent, step-parent, or other person for the time being legally liable to maintain a child detained in a certified industrial school shall, if of sufficient ability, contribute to his maintenance and training therein a sum not exceeding five shillings per week."

Section 40—"On the complaint of the inspector of industrial schools . . . at any time during the detention of a child in a certified industrial school, two justices or a magistrate having jurisdiction at the place where the parent, step-parent, or other person liable as aforesaid resides, may, on summons to the parent, step-parent, or other person liable as aforesaid, examine into his ability to maintain the child, and may if they or he think fit make an order or decree on him for the payment to the inspector or his agent of such weekly sum, not exceeding five shillings per week, as to them or him seems reasonable, during the whole or any part of the time for which the child is liable to be detained in the school. Every such order or decree may specify the time during which the payment is to be made, or may direct the payment to be made until further order. In Scotland any such order or decree shall be held to be and to have the effect of an order or decree in each and every week for payment of the sum ordered or decreed to be paid for such week; and under the warrant for arrestment therein contained (which the magistrate is hereby authorised to grant if he sees fit) it shall be lawful to arrest weekly for payment of such weekly sum as aforesaid the wages of the defender due and current." . . .

Schedule H to the Act, which is styled "Order in Scotland on parent for payment towards maintenance of child," is in the following form:—"The sheriff . . . having considered the complaint of E F, the Inspector of Industrial Schools, made under the Industrial Schools Act 1866, and having heard parties thereon . . . pursuant to the said Act decerns C D complained on, weekly and every week from the day of to pay to the said E F . . . the sum of shillings for the maintenance and training of A B, son of the said C D, now detained in the certified Industrial School of , under an order by of date , until the said child attains the age of sixteen years or is lawfully discharged from the said school, and grants warrant of arrestment to be executed by any constable or messenger-at-arms. . . ."

Alexander M'Donald, agent for the Inspector of Reformatory and Industrial Schools, presented a summary complaint under the Industrial Schools Act 1866, in the Sheriff Court at Edinburgh, against the Parish Council of Leith, craving for an order upon the Parish Council to make "payment to the complainer of the sum of 5s. per week, commencing payment thereof as on the 15th day of July 1901 for the week then ensuing, and so forth weekly and in advance thereafter during the detention of James Monaghan in said industrial school."

The complainer set out that James Monaghan had been sent to the industrial school on 15th July, to be detained there till he attained the age of sixteen; that the Treasury Commissioners had contributed 5s. per week towards his maintenance in the school; and that at the date of his committal he was chargeable to the Parish Council of Leith within the meaning of section 38 of the Industrial Schools Act of 1866.

Similar complaints were lodged by Mr M'Donald with references to the cases of Francis and Peter, brothers of James Monaghan.

After sundry procedure the Sheriff-Substitute (MACONOCHIE) on 23rd November 1901 pronounced the following interlocutor in the case of James Monaghan:—"Decerns the Parish Council of Leith, and James Miles, Inspector of Poor, as representing the said Parish Council complained on, weekly and every week from the 15th day of July 1901, to pay to the said Alexander M'Donald the sum of three shillings, and amounting *in cumulo* to the sum of £2, 17s., for the custody and maintenance of James Monaghan now detained in the Leith Certified Industrial School under an order by A. Forbes Mackay, Esquire, one of the Bailies

of Edinburgh, of date 15th day of July 1901, until the said James Monaghan shall attain the age of sixteen years, or is lawfully discharged from the said school, or as long as he shall continue chargeable to said Parish Council; and grants warrant of arrestment to be executed by any constable or messenger-at-arms."

An interlocutor to the same effect was *mutatis mutandis* pronounced in the case of the other two boys.

The Parish Council gave notice of appeal in all three instances, and cases were stated by the Sheriff-Substitute.

The following facts were stated in the cases to have been proved:—"That Francis Monaghan, seaman, an able-bodied man, was, towards the end of February 1901, living in family with his wife and five children, viz., James, Frank, Peter, Stephen, and George, at No. 30 Arthur Street, Pilrig; (2) That in February 1901, Monaghan's wife (who in consequence of an assault committed upon her by him, left his house along with two of her children, James and George) went to Dundee, and that Monaghan thereafter gave up his said house in Pilrig; (3) That from the date when his wife left Monaghan down to the present date she never received any money from her husband to enable her to maintain her family; (4) that his wife returned to Edinburgh in May, and that when a day or two after her return she met her husband on the street he refused to have anything to do with her; (5) that neither the wife nor the appellants are now aware of the said Francis Monaghan's address; (6) that on 23rd May 1901, the mother with her youngest child (George), aged fifteen months, was admitted into Leith Poorhouse; (7) that on 29th May 1901, two other children, James (thirteen) and another, were admitted into the Poorhouse from the Children's Shelter, High Street, Edinburgh, to which they had been taken in consequence of their having been found destitute and wandering in the street; (8) that on 6th June 1901 the mother took the said three children away from the Poorhouse and same day returned with them, and they were again admitted into the Poorhouse; (9) that on 10th July 1901 they all left the Poorhouse, and on 13th July the mother and her two youngest children were again admitted; (10) that on June 11th two of the children, viz., Francis and Peter, aged twelve and eight respectively, were sent to Leith Industrial School by the Magistrate sitting in the Edinburgh Police Court in terms of section 14 of the Industrial Schools Act 1866; (11) that from May 21st the said Francis and Peter Monaghan were left destitute by their father, who up to that time had boarded them with the witness Charles Binnie; (12) that on July 15th another child, viz., James, aged thirteen, was also sent by the Magistrate to the said industrial school in terms of said Act; that the said children were sent to the industrial school on the petition of one of the inspectors for the Society for the Prevention of Cruelty to Children; (13) that from February downwards the wife of the said Francis Monaghan has had no means to enable her to support her family or to contribute to the maintenance of her children in the said industrial school; (14) that from February 1901 down to the present date James has not been maintained in any way by his father."

The Sheriff-Substitute held on these facts that the three boys were chargeable to the Parish Council on the respective dates of their committal, and were still chargeable, and that it was not proved that Francis and Peter did not receive any pecuniary assistance from the Council, and pronounced the interlocutor set out above.

The questions of law for the opinion of the Court were in all three cases, *mutatis mutandis*, as follows:—"(1) Whether the said decree of the Sheriff appealed against is warranted by the terms of the Statute 29 and 30 Vict. cap. 118. (2) Whether, upon the facts above stated, the said James Monaghan was 'chargeable' to the appellants within the meaning of section 38 of the said statute."

Argued for the appellants — (1) The Sheriff-Substitute was not warranted in giving decree for future payments against the Parish Council. His decree was obviously modelled upon Schedule H of the Act of 1866, which applied only to payments by a parent. Section 38, which alone sanctioned this charge being made against a parish, only authorised decree for repayment of expenses already incurred by the Treasury Commissioners in maintaining a child. It did not authorise a continuing order for future expenses. The Sheriff-Substitute had modelled his order upon that contained in Schedule H, which was applicable only to orders obtained under sections 39 and 40. Clearly those sections had no bearing on the present order, containing as they did provisions as to inquiries into ability to pay, and sanction for use of arrestments, which were altogether inappropriate in proceedings against a parish council — *Den* v. *Lumsden*, November 10, 1891, 19 R. 77, 29 S.L.R. 76; *Duncan* v. *Forbes*, February 8, 1878, 15 S.L.R. 371. There was no schedule annexed to the Act containing a form of order appropriate to proceedings under section 38, because it was not required, as the debt could be sued for when due in the ordinary fashion. (2) In the circumstances stated in the case neither Francis nor Peter were chargeable to this parish. No person could be chargeable to a parish unless he had received relief for himself or for somebody dependent on him. These children never did so, their names were never on the roll, and they did not in any way participate in the relief granted to their mother, which was indoor relief—*Turnbull* v. *Kemp*, February 27, 1858, 20 D. 703, at p. 710; *Parish Council of Falkirk* v. *Parish Councils of Govan and Stirling*, June 12, 1900, 2 F. 998, 37 S.L.R. 759; *Parish of Rutherglen* v. *Parish of Glasgow*, March 19, 1901, 3 F. 705, 38 S.L.R. 528.

Argued for the respondent — (1) The decree was good in form and substance. It had been the universal practice since

1866 to grant these continuing orders against parishes. *Prima facie* they were quite reasonable if properly fenced with conditions, as the present decree was, because the child was maintainable till he reached sixteen. *Duncan* v. *Forbes* and *Den* v. *Lumsden*, *supra*, had no application, and merely showed that at common law the Court would not grant decree for future aliment against a person who might have no continuing duty to aliment. If the Sheriff-Substitute had not used the form of decree in Schedule H, he had no other schedule to follow. Sections 40 and 52 showed that he might use this schedule and modify it as circumstances required. There was no reason for making a distinction between the two cases covered by section 38 and by sections 39 and 40. There was nothing in the statute to prohibit decree being granted in the present form. (2) It was impossible to distinguish in law the position of Francis and Peter from that of James after the desertion of their mother by their father, and they were equally chargeable on the parish—*Hay* v. *Doonan*, June 25, 1851, 13 D. 1223; *Masons* v. *Greig*, March 11, 1865, 3 Macph. 707.

LORD ADAM—This stated case relates to payments made by the Commissioners of His Majesty's Treasury for the maintenance of James Monaghan, who was sent by order of a magistrate to the Leith Industrial School on 15th July 1901. The complaint in which the case originated was brought before the Sheriff at the instance of the agent for the Inspector of Industrial Schools, who is authorised by the Industrial Schools Act 1866 to take proceedings for relief. The first question put to us is, whether the decree of the Sheriff pronounced upon the complaint is warranted by the terms of the Statute of 1866. The decree is not well expressed, but what it means is to give decree for sums expended on the maintenance of James Monaghan prior to its date amounting to £2, 17s., and in addition to give decree for payment of 3s. a-week to the inspector to meet future disbursements so long as the boy remains chargeable to the parish of Leith.

It is not disputed that, so far as the arrears are concerned, this decree is well founded, but the appellants, the Parish Council, take exception to the decree in so far as it orders payment of future expenses. Nor is it now disputed that the Parish of Leith is the parish of settlement of James Monaghan, and as such liable to repay sums actually expended in his maintenance until he ceases to be chargeable. The error in the form of the decree appears to me to have arisen from the Sheriff attempting to apply both section 38 and section 40 of the Act to the case. The objects and the effect of these sections are entirely different, and were never intended to be combined and made applicable to the same set of circumstances. But the inspector maintains that they are to be combined, and that by their joint effect he is entitled to a prospective decree. Upon this contention I would make this preliminary observation. No parish is liable apart from the Statute of 1866 to repay to the Treasury what the Treasury chooses to contribute to the maintenance of paupers in an industrial school, and it follows that unless such a liability is imposed by the statute in clear and express terms no such liability exists. It will not do to say, as the respondent says, that such a claim is not prohibited by the statute; it must be expressly authorised. This takes one to section 38, which provides—[*His Lordship read the section.*] It appears sufficiently clear that the party liable to repay the sums expended on the maintenance of the pauper is the parochial board of the parish of his settlement and not the parochial board of the parish where the child is found, the object being that relief should at once be claimed against the parish ultimately liable. This appears to me quite consistent with the proviso at the end of the section, because in looking through the statute one finds provisions to which the proviso applies, and which account for its insertion. For instance section 19 provides for the temporary detention of a pauper child in the workhouse of the parish where he is found or where he resides at the cost of that parish, and thus one object of the proviso in section 38 is to leave open to that parish any claim of relief it may have against the parish of the child's settlement.

The next question is, what is recoverable against the parish of settlement under the section? Now, the section says that the parish of settlement "shall, as long as he (the child) continues so chargeable, be liable to repay to the Treasury all expenses incurred in maintaining him at school under this Act." Now, the words "expenses incurred" cannot be read as including "expenses to be incurred," and "repay" cannot be made applicable to disbursements not yet made. The provision is thus analogous to what occurs every day where one parish claims relief against another from expenses incurred in relieving a pauper. There may be delay in receiving these expenses until the parish of settlement or other parish ultimately liable for the maintenance of the pauper is ascertained, but in no case does such a claim include prospective disbursements.

If, therefore, the claim competent against the parish of settlement is merely a claim for actual outlays, there is no need for any schedule giving a form of the decree, which will simply be a decree for a sum of money obtained in a summary application, and the absence of any schedule applicable to the section causes no difficulty. Comparing the section with section 40 it is plain that they contemplate different cases. Section 38 deals with the recovery of outlays against the parish of settlement while the child remains chargeable. Section 40 deals with claims against the parent of the child. The liability of the parish may cease at any time and is merely a temporary liability depending on the condition that the child should remain chargeable, and it would therefore not have been convenient to authorise a decree for future payments to remain in force for an indefinite time which could not be defined with precision

in the decree. But in the case of a parent the liability continues as long as the child remains in the school, and accordingly section 40 provides for a prospective decree. In fact, the provisions of sections 39 and 40 have no application whatever to the case dealt with in section 38. They are outside the region of pauperism altogether. The father is not contemplated as receiving parochial relief at all; he is merely paying for the maintenance of his child at the industrial school. The language of section 40 makes it clear that it has nothing to do with a claim against a parochial board. For instance, would it be possible to "examine into the ability" of a parochial board "to maintain the child?" or would "arrestment of the wages" of a parochial board be feasible? Thus the whole provisions of section 40 show that it has no application to the case of a parochial board, and accordingly, neither under section 38 nor section 40 is there any authority for the Sheriff's order so far as it relates to future outlays, and to this extent the answer to the first question must be in the negative.

It is not, as I understand, disputed that the second question must, in the case of James Monaghan, be answered in the affirmative.

As regards the case of Peter and Francis this was disputed, but I can see no distinction. The position as regards these two children is this:—They were deserted by their father on the 21st May 1901, and were sent to the Industrial School. They were thus destitute and paupers at the time of their admission and were thus "chargeable" upon the Parish of Leith, the parish of their settlement. Accordingly, in their case also the second question must be answered in the affirmative.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

"In answer to the first question in the case, find that the decree of the Sheriff-Substitute, dated 23rd November 1901, is not warranted by the terms of the Statute 29 and 30 Vict. cap. 118, in so far as the same contains a decerniture for future payments, but is so warranted in so far as it decerns for a principal sum: Answer the second question in the case in the affirmative: Recal the said decree to the extent foresaid, and remit to the Sheriff-Substitute to proceed as shall be just, and to decern against the appellants for payment to the respondent of such further sum, if any, as he may find to be due by them to him: Find no expenses due to or by either party."

Counsel for the Appellants—C. N. Johnston—C. D. Murray. Agents—Snody & Asher, S.S.C.

Counsel for the Respondent—Dundas, K.C.—Blackburn. Agent—George Inglis, S.S.C.

Thursday, March 20.

FIRST DIVISION.

CAMPBELL'S TRUSTEES *v.* CORPORATION OF GLASGOW.

Property—Real Burden—Servitude—Obligation not to Build on Land—Transmission of Obligation against Singular Successors—Agreement Registered in Register of Sasines but not Forming Part of Title—Importation of Real Burden by General Reference in Instrument of Sasine.

By an onerous agreement entered into in 1853 between the proprietors of a piece of ground and the committee of a town council having charge of the public streets, the proprietors, in consideration of the payment of a sum of money, agreed to keep a certain strip of ground unbuilt upon in front of a row of proposed buildings. The committee and their successors were to be "entitled at any time they think proper to throw the said unbuilt-upon ground into and to form and constitute the same part of the public street." It was further declared that the proprietors "conferred and declared a right of servitude on and in favour of the committee as representing the public" over the ground in question. The agreement was recorded in the Register of Sasines.

In 1854 a contract of ground-annual was entered into by the proprietors whereby they disponed the subjects "with and under the whole conditions, provisions, and stipulations specified in" the above minute of agreement. The date of the minute was not stated. The instrument of sasine following upon this contract narrated the clause of reference in the same terms without specifying the date of the agreement or the fact of its having been recorded. The property thereafter passed by several transmissions, which contained no specific reference to the minute of agreement, but which were declared to be subject to the conditions and obligations specified in the instrument of sasine following upon the contract of ground annual.

The corporation who succeeded the committee claimed that they were entitled to take the strip of unbuilt land for widening the street from the singular successors of the original proprietors without making any payment therefor.

Held (1) that the original agreement, although recorded in the Register of Sasines, did not by itself constitute a servitude or real burden upon the property effectual as against singular successors, and (2) that the provisions of the agreement were not validly imported into the titles, so as to bind singular successors, by the reference contained in the instrument of sasine following upon the contract of ground-annual.