

industrial residence of M'Gerry was for eight years in Dailly. The first point which arises for consideration is, What was the effect of marriage on the wife as regards her settlement?

On this point I remain of the opinion which I have expressed in former cases, that a woman does not acquire for herself a settlement by her marriage, nor does she *stante matrimonio* acquire for herself personally a settlement by living in family with her husband while he is acquiring a residential settlement. Of her husband's settlement she gets the benefit. That benefit is hers, not in consequence of her acquiring for herself a settlement under the Poor Law Act, but in consequence of her personal status and rights being merged in that of her husband. She personally formed no relation with the parish; but to her husband she has become *eadem persona*, therefore she enjoys the benefit of his settlement.

It is important to bear in mind the distinction between a birth settlement, on the one hand, which is personal and abiding, following the person *sicut umbra sequitur*, and reviving or returning into view and effect as soon as other interposed settlements are lost; and, on the other hand, the benefit of a conjugal relation to a man who acquired a settlement—a benefit which is not personal from settlement, but derivative from marriage, and is not abiding, but available only while the woman is wife or widow of the man who has the settlement.

During the husband's life the wife has the benefit of his settlement in virtue of the social relation by which they are united. Misfortune may fall on her and her family, and evil days may come. The marriage relation, with its attendant claims on the parish, is to her, in the event of poverty, a protection. It is to her as the shadow of a great domestic rock beneath which, while marriage lasts, she dwells shielded against the evil day. Even on the death of her husband, she is during her widowhood viewed in law as retaining her right to relief in respect of the marriage relation. The law humanely continues or stretches out the protection over her and her children, so that in the benevolent construction of law she is held as continuing in her widowhood to dwell beneath the extended shadow of her husband's right.

But when her widowhood ceases, the protection of her marriage relation ceases also. She could not retain the benefit of that relation or that protection after she became the wife of another man. It does not, in my opinion, make any material difference that M'Geachy, the second husband, had no Scotch settlement. He was born in Ireland, and liable to be removed there.

If I am right in my view of the law applicable to this case, the liability of the parish of Dailly ceased, not because of the acquisition of another settlement, but because of her marriage to another man. That second marriage completely broke the tie between her and M'Gerry. But she herself had no settlement in Dailly, and no claim on Dailly except in respect of her marriage with M'Gerry; therefore, when the wife's tie and the widow's tie were both broken, the liability of Dailly was necessarily terminated.

We have nothing to do at present with any question in regard to removal to Ireland. The law has provided for it, and there is a discretion vested in the Parochial Board and the Board of Supervision to ensure the judicious and humane enforcement of the law.

Nor have we anything to do at present with the claims of the children. They are all pupils, and are not themselves in their own right the objects of parochial relief. They were, while their mother was a widow, burdens on her industry or her other means of subsistence. When she married a second time she passed with her children as burdens into the new marriage relation. Till the children emerge from pupilarity, and become,—as I hope they may not become,—paupers in their own right, there can be no separate case in regard to them for our consideration.

LORD KINLOCH concurred with the LORD PRESIDENT and LORD ARDMILLAN.

The Court accordingly answered the question in the negative.

Agents for the Parish of Govan—D. Crawford & J. Y. Guthrie, S.S.C.

Agents for the Parish of Dailly—M'Ewen & Carment, W.S.

Tuesday, March 14.

MACKINTOSH v. MOIR.

(Vide ante, p. 382.)

*Process—Jury Trial—Fixing Place of Trial—Circuit Court—1 Will. IV, c. 69, § 11.* This case being an action of declarator of a right of way at Dunoon, in the county of Argyll and within the limits of the Inverary Circuit,—notice of trial was given by the pursuers for the next Circuit Court of Justiciary at Glasgow, in terms of 1 Will. IV, c. 69 § 11, but the Court discharged the notice as incompetent, Dunoon not being within the district appropriated to the Glasgow Circuit.

Thursday, March 16.

CRAIG v. JEX BLAKE.

*Process—Jury Trial—Fixing date of Trial—Variation of Issues—Notice of motion—Competency—13 and 14 Vict., c. 36, sec. 40—31 and 32 Vict., c. 100, sec. 28.* The Lord Ordinary having pronounced an interlocutor approving of an issue to try the cause, the defender, on the following day, moved him, in terms of 13 and 14 Vict., c. 36, sec. 40, to fix the date of the trial, which was done by the Inner House upon the Lord Ordinary reporting the case to them. Thereafter the defender lodged a reclaiming note against the interlocutor approving the issue, and also moved the Court to vary it in terms of 31 and 32 Vict., c. 100, sec. 28.

*Held, 1,* That the motion was not incompetent, because the notice of it had not been in the hands of the Clerk of Court until counsel came up to move it.

*2,* That it was not incompetent because made upon the 7th day after the date of the Lord Ordinary's interlocutor, the 5th and 6th not being sederunt days.

*3,* That both the motion and the reclaiming note were incompetent, because the defender was barred from objecting to the interlocutor after having adopted it, and made its finality the basis of her motion to fix the day of trial—

which could not have been done without a settled issue.

In this action of damages for slander, the Lord Ordinary (MURK) approved of the following issue:—

“Whether the defender, in a speech which she made or read at a meeting of the contributors to the Royal Infirmary, held in Edinburgh on the 2d day of January 1871, did, in the presence and hearing of Dr Robert Christison, Professor of Materia Medica in the University of Edinburgh; David Smith, Esq., W.S.; Joseph Bell, M.D.; Christopher Douglas, Esq., W.S.; A. Halliday Douglas, M.D., and others, use and utter the words and sentences set forth in the schedule hereto annexed, or part thereof, or words and sentences to that effect; and whether the said words and sentences are, in whole or in part, of and concerning the pursuer, and are false and calumnious, to the loss, injury, and damage of the pursuer?”

His Lordship's interlocutor was as follows:—

“7th March 1871.—The Lord Ordinary having heard parties' procurators, approves of the issue, No. 13 of process, as finally adjusted and settled.

“*Note.*—There is not, in the opinion of the Lord Ordinary, any such case of privilege disclosed in the statements of the pursuer in the record as entitles the defender to insist that the word ‘maliciously’ must be inserted in the issue. But the question whether the pursuer is, in the circumstances of the case, bound to prove malice to entitle him to a verdict will depend upon whether the defender is able to instruct a case of privilege in the course of the trial; and this would be dealt with by the judge before whom the case is tried (*Macbride*, 28th January 1869).

“With reference to the question whether an inuendo, or some similar expression to that set out in the 8th article of the condescence, should be inserted in the issue, in order that the precise nature of the alleged slander may be put distinctly in issue before the jury, the Lord Ordinary, on further consideration, has come to the conclusion that the words used are in themselves sufficiently distinct and direct to render it unnecessary to insert any interpretation of them in the issue.”

The day after the interlocutor was pronounced the defender moved the Lord Ordinary, under 13 and 14 Vict., c. 36, sec. 40, to fix the time of the trial. The parties being unable to agree, the Lord Ordinary reported the matter to the Court, and on May 10th the trial was by them fixed for the 31st May following.

Thereafter, upon March 11th, the defender lodged a reclaiming note against the Lord Ordinary's interlocutor of the 7th, seeking to have the issue, as approved by him, disallowed; and upon the 14th March, being a Tuesday, she moved the Court to vary the said issue. Both the reclaiming note and the motion were lodged and made under 31 and 32 Vict., c. 100, sec. 28. They were brought up for hearing together. The defender's object was to put in issue a case of privilege.

J. M'LAREN, with him WATSON, for the defender, in support of the motion and reclaiming note.

Solicitor-General (A. R. CLARK) and PATTISON, for the pursuer, argued against the competency of both the motion and the reclaiming note, on the grounds (1) that notice of motion had not been given to the Court in time, but had merely been placed in the clerk's hands when the motion was made; (2) that the motion itself was

made upon the 14th March, being the 7th day, and not the 6th, after the date of the Lord Ordinary's interlocutor; and (3) that the defender was barred from objecting to the interlocutor of the 7th by having moved the Lord Ordinary to fix the date of the trial, and therefore necessarily adopted the decision in that interlocutor.

Reference was made to *Gordon v. Davidson*, March 3, 1865, 3 Macph. 595.

At advising—

LORD PRESIDENT—There are two objections taken to the competency of the defender's motion to vary the issue in this case, which, along with her reclaiming note against the Lord Ordinary's interlocutor approving of the issue, is now before us.

The first of these objections is, that notice of the motion was not lodged in the hands of the clerk until the 14th March, while the Lord Ordinary had approved the issue upon the 7th, and therefore both the notice and the motion itself were too late, in terms of sec. 28 of the late Court of Session Act, which gives only six days for moving the Court to vary the terms of an issue. Now, I do not think that this objection is well founded. The statute says nothing about the lodging of any paper in the case of a motion to vary issues. The case of a reclaiming note is, of course, quite different. It must be “presented”—that is, lodged in the clerk's hands. All that the statute says about these motions is, that it shall be competent to either party, within the six days, “without presenting a reclaiming note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary, specifying in the notice of motion the variation that is desired.” In the Act of Sederunt that was made subsequently to this Court of Session Act, the clause relating to this subject is a little varied in expression, but in reality it leaves the matter of notice quite in the same position. If the party appears by counsel within the six days, there being at that time in the hands of the Court a notice of motion specifying the variation wanted, and the record has been boxed to the Court, he has complied with all the requirements of the statute and the Act of Sederunt, and is entitled to have the motion entertained. That, I think, is the case here, provided the motion has been made within the six days; but there seems some little question about that. Now, when a statute says that a motion may be made or reclaiming note lodged within six days, it always means that that privilege may be exercised on the last of the days. It was competent, therefore, to move the Court upon the sixth day in this case. But it so happened that the sixth day fell on a Monday, which, not being a sederunt day, rendered it impossible that the motion should be made. I think the defender was therefore entitled to move the Court on the Tuesday, being the first sederunt day thereafter. She did so, and I therefore think that the objection that both notice and motion were too late is bad.

But there is another and very serious objection made to the competency of this motion, founded upon the proceedings which took place before the Lord Ordinary at the instance of the defender herself, after he had pronounced his interlocutor approving of the issues. This he did on the 7th March, and on the next day the Lord Ordinary was moved by the defender to fix the time and place of trial. This motion was made, I suppose,

under the Court of Session Act of 1850, sec. 40. There is no other Act with which I am acquainted under which the defender could have made this motion. Under that statute this motion is competent only when the issues are finally fixed, and where there can be no more discussion about their terms. This notion is so consistent both with the practice and theory of our Jury Court that it is hardly possible to doubt it for a moment. Before the Act of 1850 no notice of trial could be given even by the pursuer until the issues were engrossed on parchment, and lodged in the Jury Office. Before that the issues went through much procedure, which is now varied or abolished. They had first to be approved by an interlocutor of the Lord Ordinary, against which either party might apply by motion to the Inner House. If that motion was not made within the ten days the issues were held settled and fixed; they were then engrossed, and signed by the Lord Ordinary. If the motion was made, the engrossing and signing were delayed until the matter was disposed of by the Court. But until that was done no farther steps whatever could be taken in the cause; diligence could not be granted, and a great many motions could not be made. After it, all motions were made in the Inner House. The engrossing of the issues was therefore a particular turning point in the case, and was the one thing above all others which required to be done before the time and place of the trial could be fixed. The Act of 1850 introduced much change, for it dispensed with the engrossing of the issues, and provided that approval by interlocutor of the Lord Ordinary or of the Court should be equivalent to engrossing. It did not matter whether it was the interlocutor of the Lord Ordinary acquiesced in by the parties, or the order of the Inner House, on motion made to them, but it was only after one or other of these methods that the 40th section authorised the parties to take a new step altogether, and move the Lord Ordinary to fix the time and place of the trial. Now, the statute makes it abundantly clear that this step was to be just as incompetent before final approval of the issues as it had been before their engrossment. The thing sent to trial is nothing else than the issues as fixed. The office of the judge and jury is to try, and return an answer to the issues as fixed and sent to them. Before the issues are fixed there is nothing which can be sent to trial. Now, what is the alteration introduced by the new statute of 1868. It seems to me to be a very serious one, and very much like a return to the practice of 1841, whereby either party had been entitled to move the Court to alter the issues as adjusted by the Lord Ordinary. Well, then, what is the course of proceeding here. On the 7th March the Lord Ordinary pronounces an interlocutor approving the pursuer's issue, and without a counter issue, and that interlocutor being pronounced, there is then a motion made under sec. 40 of the Act 1850, for it could be under no other, that the Lord Ordinary should fix the day of trial. That clearly implies that the issues were settled. The motion to fix the trial was quite incompetent except on that understanding, and what is more, the defender having made that motion cannot now turn round and repudiate it, and say that she made an incompetent motion. The Lord Ordinary reported the case to us, and we fixed the trial for next May. The defender is now, therefore, precluded by the state of the judicial record from making the motion which is now before us. I

feel myself obliged to come to this conclusion, though I am always sorry to oppose technical difficulties in the way of any party seeking to relieve himself of the effects of a mistake, but here to take any other course would be to upset the whole theory of our procedure in this matter. I, however, the less regret this necessity in the present instance as I think it remains quite open for the defender at the trial to raise the question of privilege, which I understand is what she now wishes to put in issue.

Of course the same objection is applicable to the reclaiming note, though there is no objection to its timeousness. It is just an attempt in another way to take advantage of sec. 28 of the Act 1868, and bring under review the step upon the finality, on which the defender's whole after procedure rests.

The other Judges concurred.

The Court accordingly refused the motion, and adhered to the Lord Ordinary's interlocutor.

Agents for the Pursuer—Pattison & Rhind, W.S.

Agents for the Defender—Millar, Allardice, & Robson, W.S.

Friday, March 17.

SPECIAL CASE FOR JAMES HUTTON (ANDERSON & CO.'S TRUSTEE) AND MESSRS J. & B. FLEMING.

*Retention—Bleachers' Lien—Special Contract of Lien—Bankrupt—Statute 1696, c. 5.* Where bleachers, not content to rest upon the ordinary bleachers' lien at common law, gave notice on their receive-notes that all goods received by them were to be subject to a lien, not only for work done thereon but also for the general balance of their accounts, including not only open accounts but also acceptances and promissory notes, whether past due or current; and where manufacturers had dealt with them regularly on this footing for several years.—*Held* that a valid contract was constituted between the parties by this notice, and that this contract subsisted so long as the business relations of the parties remained unaltered, and that it would be an over refined subtlety to suppose that a fresh contract was entered into on each new delivery of goods to the bleachers. *Held*, farther, that this contract of lien must be construed in accordance with the dealings of the parties, and that, looking to them, it was clearly only intended to cover all sums due on the year's account, whether on open account, or on acceptances and promissory notes, past due or current, and not to go farther back, as might be inferred from its terms, and as such was a reasonable and perfectly legitimate contract between the parties. *Held*, lastly, that it was not struck at by the Act 1696, c. 5, provided the goods to which it was attempted to make it apply had been sent to the bleachers in the ordinary course of business.

*Question*, Whether the ordinary bleachers' lien at common law would cover bills and acceptances taken for balance on account within the year, as well as balance on open account?

The following is the statement of facts contained in the Special Case laid before the Court:—"James Hutton, accountant in Glasgow, one of the parties