

Wednesday, January 29.

SECOND DIVISION.

[Sheriff of Fife.

IRELAND (INSPECTOR OF ORWELL PARISH)
v. JACKSON (INSPECTOR OF ABBOTSHALL PARISH).

Poor—Continuity of Residential Settlement by Widow where Acquired by Deceased Husband.

The husband who acquires a residential settlement is the person to whose presence during his life the law looks for its retention, and on his death it enures to his widow until displaced by the acquisition of a new one.

This was an appeal against the interlocutor of the Sheriff of Fife (Crichton) in a claim for relief of a pauper by the Inspector of Poor of the parish of Orwell, in the county of Kinross, against the Inspector of Poor of the parish of Abbotshall, in the county of Fife.

Alexander Hepburn, the husband of the pauper, was born in the parish of Abbotshall, and with the exception of the period between 11th August 1871 and Whitsunday 1873, resided there till his death on 9th January 1874. After his death his widow, the pauper, continued to reside in Abbotshall till Whitsunday 1874. She then left that parish, and went from place to place till in November 1876 she came to Orwell, the parish of her own birth. On 16th December 1876 she applied to the parish of Orwell for and obtained relief, which she continued to receive till 14th June 1877. She again applied for relief to that parish on 28th March 1878. Payment of the alimient then given and relief from future payment was what was now sued for.

The pursuer pleaded—"The pauper's industrial parochial settlement being in the parish of Abbotshall, the defender is liable to refund and pay to the pursuer the parochial advances sued for, with interest and expenses; and he is further liable to relieve the pursuer of all further parochial advances which he may make while the said settlement exists and the pauper continues to be entitled to parochial relief."

The defender pleaded—" (1) The pursuer not having set forth any facts relevant or sufficient to warrant the conclusions of the action, the defender should be assolizied, with expenses. (2) The said Margaret Low or Hepburn not having had on 28th March 1878 a settlement in the parish of Abbotshall, the defender ought to be assolizied, with expenses."

The Sheriff-Substitute (BEATSON BELL) on 8th October 1878 pronounced an interlocutor finding in point of law (1) that at the date of the death of Alexander Hepburn (9th January 1874) he possessed a residential settlement in the parish of Abbotshall, and that his widow thereupon acquired a derivative residential settlement in said parish as her proper and only settlement; (2) that on said widow becoming chargeable on 28th March 1878 she still retained her said settlement in Abbotshall, inasmuch as she had left that parish only on 15th May 1874, and therefore had not lost her settlement by failing to reside for upwards of four years; and therefore decerning against the defender.

The Sheriff (CRICHTON) on appeal pronounced the following interlocutor:—

" Recals the interlocutor of the Sheriff-Substitute: Finds (1) that at the date of his death on 9th January 1874 Alexander Hepburn had his settlement in the parish of Abbotshall; (2) that that settlement inured to his widow the pauper Margaret Low or Hepburn; (3) that the said Margaret Low or Hepburn still retains the said settlement: Therefore decerns against the defender in terms of the prayer of the petition," &c.

"*Note.*— There are two grounds on which it appears to the Sheriff that this case may be decided in favour of the pursuer. At the date of Alexander Hepburn's death (9th January 1874) he had his settlement in Abbotshall either by virtue of his birth in that parish or by his residence therein. On his death the settlement that then belonged to him inured to his widow the pauper. If that settlement was a settlement in respect of her husband's birth in Abbotshall, it inured to her until it was displaced by the acquisition of a new one. Admittedly the pauper has never acquired another settlement

"On the other hand, if the settlement which Alexander Hepburn had at the time of his death was a residential settlement in the parish of Abbotshall, the Sheriff is of opinion that his widow did not lose that settlement till she had been absent from Abbotshall for a period of upwards of four years subsequent to Whitsunday 1874. This she had not been when she became chargeable in March 1878.

"It was contended, on the authority of the case of *Allan v. Higgins and Others*, December 23, 1864, 3 Macph. 309, that as neither Alexander Hepburn nor his widow, the pauper, had resided in the parish of Abbotshall for a period of one year subsequent to 1871, the residential settlement in that parish had not been retained. It appears to the Sheriff that the principle laid down in the case of *Allan v. Higgins* is not applicable to the present case, because there the father and his daughter after leaving the parish where the father had his residential settlement never returned, while in the present case Alexander Hepburn returned to the parish of Abbotshall at Whitsunday 1873, and continued to reside there till his death on 9th January 1874. His widow continued to reside in Abbotshall till Whitsunday 1874."

The defender reclaimed.

Authorities cited—*Greig v. Curse*, 24th Feb. 1860, 22 D. 872; *Crawford v. Petrie*, 28th Jan. 1862, 24 D. 357; *Allan & Watson v. Higgins*, 23d Dec. 1864, 3 Macph. 309 (and Lord Justice-Clerk there); *Kirkwood v. Wyllie*, 19th Jan. 1865, 3 Macph. 398.

At advising—

LORD YOUNG—I see that Lord Benholme in his opinion in *Allan v. Higgins* says—"Is it the father's absence or the daughter's? Such cases may occur, for the one may be absent and not the other. In such a case my own impression is (but I state it merely as an impression) that the father who acquires is the party to whose absence the law will look during his life in the event of losing the settlement, and on his death the child who inherits his settlement, if it remains absent, would be held to carry on the absence begun by its father."

Now, if for father and child we substitute husband and widow, and for absence presence,

and so on, I think there will be enough in that opinion so altered for the solution of this case. It would then read—"That the husband who acquires is the party to whose presence the law will look during his life in the event of retaining the settlement, and on his death the widow who inherits his settlement, if she remains resident, would be held to carry on the presence begun by her husband." That is sufficient for this case if we follow Lord Benholme's opinion. The husband was born in Abbotshall, and resided there all his life with the exception of a temporary absence from August 1871 till Whitsunday 1873. He died on 12th January 1874, but his wife (the pauper) continued to reside in the parish till Whitsunday 1874, and so prolonged to the period of a full year the residence in the parish from the time of her husband's (and her own) return to it at Whitsunday 1873. She became chargeable in December 1876, and at that date there was no period of five years in the course of which she had not lived for a year continuously in Abbotshall. But, apart from this view, the husband had undoubtedly a residential settlement in Abbotshall at his death in January 1874, for his absence from August 1871 to Whitsunday 1873 did not forfeit or disturb it, and even if his widow had then left she would not have lost the settlement at the time when she became chargeable, which was within three years thereafter.

LORD GIFFORD—I am of the same opinion. I think that the settlement of the pauper, the widow, is the settlement which her husband had at the time of his death. It is contended that the husband being absent from the parish of his settlement at the time of his death was in the course of losing his settlement by non-residence, and it was pressed upon us that as the widow after her husband's death continued absent from the parish, the absence of the widow should be added to the absence of her deceased husband in order that such united absences might produce the loss of the settlement. Now, I doubt whether it is competent on such a question to add the widow's absence after widowhood to the previous absence of her husband. But it is a sufficient answer to this case to say that if the widow's absence is to be added to that of her husband then the converse must hold, and the residence of the widow after her widowhood in the parish of her husband's settlement must be added to the husband's own residence in order to preserve the settlement from being lost. This by itself would be sufficient for the decision of the present case. In other respects I concur with the observations of your Lordships.

LORD ORMDALE—I concur. I am not, however, to be considered as concurring in the view that the separate periods of absence of the husband and wife can be added together so as to lose a settlement any more than their separate periods of presence can be added together to acquire one. Here there was an end to the continuity by the death of the husband. The judgment of the Sheriff-Principal appears to me to be quite right.

The Court adhered.

Counsel for Pursuer (Respondent)—Rutherford—Mackay. Agents—Frasers, Stodart, & Mackenzie, W.S.

Counsel for Defender (Appellant)—Johnstone—Henderson. Agent—Charles Henderson, S.S.C.

* Wednesday, January 29.

FIRST DIVISION.

[Lord Rutherford-Clark, Ordinary.]

JACK'S TRUSTEES v. MARSHALL.

Succession—Fee and Liferent—Legitim—Where a Father was to Liferent a Fund of which his Children were Fiars and he Claimed Legitim instead.

A testator left in trust "for behoof of my grandchildren Mary, Eliza, and Alexander, the children of my son Robert Jack, and any children that may yet be born to him, the like sum of £3500 sterling equally between them, payable on the death of their father the said Robert Jack; and until the decease of the said Robert Jack, I direct my trustees and executors to pay over to him the income of the said sum of £3500 sterling, monthly, quarterly, or otherwise, as they may deem expedient, for the maintenance of himself and the maintenance and education of his said children; and I desire my trustees to secure that the said children receive a good education suitable to their station in life—it being my express desire that the education of my grandson Alexander Jack (son of the said Robert Jack) shall also be such as specially to qualify him for a partnership in my business." The liferent was declared to be strictly alimentary. The father claimed his legitim. Held that income of the money during the father's life was payable to those whose interests were prejudiced by the payment of the legitim, but that the capital was a separate estate in the children, which was not affected by their father's repudiation of the settlement.

Observations upon the case of Fisher v. Dixon, Nov. 24, 1831, 10 S. 55, and July 1, 1833, 6 W. and S. 431.

The pursuers and real raisers in this multipointing were the trustees and executors of the late Robert Jack, agricultural instrument maker, Maybole, acting under his trust-disposition and settlement dated 4th July 1876.

By the fourth purpose of his trust-disposition and settlement the testator directed his trustees, upon the sale of his works and the realisation of his share and interest in the property and assets of the said firm or copartnership carried on by him along with John Marshall, "to set aside and invest in their own names in trust, in terms of the powers of investment after conferred, and subject to the condition as to the same and as to the residue of my estate stated in the last purpose hereof, the following legacies, viz., . . . for behoof of my grandchildren Mary, Eliza, and Alexander, the children of my son Robert Jack, and any children that may yet be born to him, the like sum of £3500 sterling equally between them, payable on the death of their father the said Robert Jack; and until the decease of the said Robert Jack, I direct my trustees and executors to pay over to him the income of the said sum of £3500 sterling, monthly, quarterly, or otherwise, as they may deem expedient, for the maintenance of himself and the maintenance and education of his said children; and I desire my

* Decided January 21, 1879.