

Act." Now, assuming that a junction with a siding is to be regarded as a station, the Railway Company have not closed Low Mill siding; they are still delivering other goods there, and they are bound to continue to give facilities at it as before, and are not entitled to exclude any particular class of goods.

But further, private sidings, or rather the junctions of the sidings with the company's line, are not stations belonging to the company which they can open or close at their pleasure, and the only question is in what way shall the traffic which the traders are entitled to give and receive at their sidings be regulated. We are not here dealing with an extreme case. It is not, in my opinion, necessary to consider what would be the rights of the Railway Company or the powers of the Commissioners if the Railway Company decided to discontinue in all cases and as to all goods their present system of dealing with siding traffic, or even if a trader proposed to make a new connection with the company's line. We have to deal with the existing state of matters on the Penicuik line. We find that the Railway Company have been in use since the formation of the line to give and take delivery at all the sidings upon it. These are the facilities which they have been in use to give and are giving, except in the case of the applicants as to one commodity, and it is in their power to continue to give such facilities. They have deliberately ignored the alternative mode of dealing with siding traffic, viz., letting the traders bring their own engines on to the main line. I therefore think that the Commissioners were called on to deal with an existing practice and existing facilities, and that therefore they had jurisdiction to consider whether those facilities should be continued or not.

In regard to the *Darlaston* case, it is sufficient to say that although at one time there was a station at Darlaston, it was closed and demolished five years before an application for its restoration was made. The case therefore decides no more than this, that where there is no existing station, and the railway company do not profess at the time of the application to receive passengers or goods at the place where members of the public desire that a station should be placed, it is beyond the jurisdiction of the Commissioners to interfere with the discretion of the railway company by making an order upon them to establish a station at such a place.

On these grounds I am of opinion with Lord Young that the first order of the Commissioners was within their powers.

The Court pronounced the following interlocutor:—

"The Lords of the Second Division of the Court, along with three Judges of the First Division, having heard counsel for the parties in this appeal, in conformity with the opinion of the majority of the Judges present at the hearing, sustain the appeal to the effect of recalling, and hereby recal, the

deliverance or order of the Railway and Canal Commissioners, dated 6th August 1900—(1) in so far as the said deliverance or order finds that the Railway Company in refusing to deliver coal at the junction of their railway with the Low Mill siding have not afforded to the applicants all due and reasonable facilities for the delivery of their coal traffic at the Low Mill siding; (2) in so far as said deliverance or order declares that the facilities given by the Railway Company, up to the 22nd day of March 1900, for delivery of the applicants' coal traffic at the Low Mill siding were reasonable, and such as ought to be afforded by the Railway Company to the applicants; and (3) in so far as the Railway and Canal Commissioners by said order and deliverance did order and enjoin the Railway Company, their servants and agents, to afford all reasonable facilities for the delivery of the applicants' coal traffic at the Low Mill siding: *Quoad ultra* dismiss the appeal, and find no expenses due to or by either party."

Counsel for the Applicants, Alexander Cowan & Sons—Ure, K.C.—Clyde. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Respondents, The North British Railway Company—Dean of Faculty (Asher, K.C.)—Solicitor-General (Dickson, K.C.)—Grierson. Agent—James Watson, S.S.C.

Tuesday, March 19.

## SECOND DIVISION

With the LORD PRESIDENT, LORD ADAM, and LORD KINNEAR.

[Sheriff Court at Glasgow.]

PARISH OF RUTHERGLEN v. PARISH OF GLASGOW.

*Poor—Settlement—Residential Settlement—Acquisition of Residential Settlement by Deserted Wife—Children Maintained by Husband's Parish.*

*Held*, by a majority of Seven Judges, consisting of the Lord President, Lord Justice-Clerk, Lord Adam, Lord Kinnear, and Lord Trayner—*diss.* Lord Young and Lord Moncreiff—that a wife whose husband had deserted her and their children was not prevented from acquiring a residential settlement for herself because the parish of the settlement of her husband at the time of his desertion had meanwhile supported the children of the marriage as paupers without calling upon her to support them.

On 16th October 1893 Alexander Faulds, whose settlement was then in Barony Parish, Glasgow, deserted his wife Catherine Mechan or Faulds and their five children, Catherine, Robert, Mary, William, and Alexander. Mrs Faulds and the children were on that date taken to the Barony

Parish Poorhouse, and were maintained there till 31st January 1894.

On 24th October 1893 Faulds was arrested under section 80 of the Poor Law Act 1845, and was sentenced to sixty days' imprisonment.

On 17th January 1894 Faulds, after his liberation from prison, signed an obligation to the Barony Parish Council in the following terms:—"I, Alexander Faulds, c/o Edward Quin, 18 Brick Lane, West Murrayston, by Baillieston, miner, on consideration that the Inspector of Poor of the Barony Parish relieve me of the responsibility of providing for my four children, named respectively Catherine (11), Robert (9), Mary Ann (7), and William (5), do hereby bind and oblige myself to pay the sum of five shillings weekly, first payment to be made on Monday, 29th January 1894. This I promise faithfully to implement and make regular payment, as witness my hand this 17th January 1894.—ALEX. FAULDS. Wm. Cumming, *witness*; John Morison, *witness*."

On 31st January Mrs Faulds left the Barony Parish Poorhouse with her eldest child Catherine. The four younger children, Robert, Mary, William, and Alexander were thereafter maintained as paupers by boarding them out in the country, first by the Barony Parish and afterwards by the parish of Glasgow, with which the Barony Parish was incorporated in November 1898 by the Secretary of Scotland under the Local Government Acts. Faulds made certain payments in partial fulfilment of his obligation until 12th May 1896. From 16th October 1893 he made no contribution for the maintenance of his wife. From 12th May 1896 he made no contribution for the maintenance of his children. It was not known whether he was now alive. He was last heard of in Paisley about 25th August 1896, since which date his whereabouts and circumstances had been and were still unknown to the parish of Glasgow, their predecessors the Barony Parish, the Parish of Rutherglen, and his wife, although every endeavour had been made to trace him.

From May 1895 to 13th March 1899 Mrs Faulds continuously resided in the parish of Rutherglen, and during said period had not recourse to common begging, and made no applications to the Inspector of Poor, Rutherglen, for parochial relief for herself or her daughter Catherine, and her other children were during said period supported as paupers by the Parish of Glasgow. During that period the woman did not appear as a pauper upon the roll of paupers either for the parish of Rutherglen or the Parish of Glasgow.

On 13th March 1899 Mrs Faulds was found by the Rutherglen poor law authorities to be in ill-health, destitute, and without sufficient means of support, and being thus a proper object of parochial relief she received parochial relief from the Parish of Rutherglen. Down to 17th July 1899 the amount of said relief so received by her was £4, 10s., and the relief was continued thereafter at the rate of 5s. per week.

The Parish Council of the Parish of Rutherglen sent notice of chargeability on the 13th March 1899 to the Parish Council of the Parish of Glasgow, and this notice was followed on 20th March by a statement of particulars and claim. The parish of Glasgow, however, contended that not they but the Parish of Rutherglen were liable, as prior to her chargeability Mrs Faulds had acquired a settlement in the parish of Rutherglen under the Poor Law (Scotland) Act 1898.

Thereafter the Parish Council of the Parish of Rutherglen raised an action in the Sheriff Court at Glasgow against the Parish Council of the Parish of Glasgow, in which they prayed the Court to ordain the defenders to free and relieve them of the advances made and to be made by them to and on account of Mrs Faulds so long as she required parochial relief and her parochial settlement continued to be in the Parish of Glasgow, and that by paying to the pursuers (1) £4, 10s. with interest till paid, and (2) all further sums which the pursuers might have to pay subsequent to 17th July 1899 to and on account of Mrs Faulds as aforesaid, with interest from the dates of payment till paid.

The pursuers pleaded—"(1) The pursuers are entitled to decree as craved, as the parochial settlement of the said Catherine Mechan or Faulds is in defenders' parish, in respect that (1) her husband's settlement was at the time of desertion in that parish, and has not been lost; and (2) her husband's settlement was at the time of desertion in that parish, and her children having since continually been relieved, she could not acquire another settlement."

The defenders pleaded—"(1) Mrs Faulds being at the date of her chargeability a deserted wife, and the children being dependents of their father, she was capable of acquiring, and did so acquire, a settlement for herself in Rutherglen Parish by continuous residence therein for the statutory period. (2) Mrs Faulds having continuously resided as a deserted wife in Rutherglen Parish for the statutory period without having applied for or received parochial relief or having had recourse to common begging, thereby acquired for herself a residential settlement in Rutherglen Parish, and the defenders fall to be assolizied, with expenses."

The defenders produced excerpts from their books containing lists of children boarded out by the Barony Parish for 1895, 1896, 1897, and 1898. These excerpts were admitted by the pursuers. The four children—Robert, Mary, William, and Alexander Faulds appeared in these lists with the following remarks opposite their names—"Father living in cohabitation with another woman—mother unfit to support."

On 13th November 1899 the Sheriff-Substitute (STRACHAN) pronounced the following interlocutor:—"Having heard parties' procurators on the closed record, Finds that Alexander Faulds deserted his wife Mrs Catherine Mechan or Faulds and their five children on or about the 16th October 1893, and was convicted on or

about the 26th October 1893 under section 80 of the Poor Law Act, and sentenced to sixty days' imprisonment: Finds that he had then his settlement in the Barony Parish of Glasgow, the predecessors of the defenders: Finds that on being liberated from prison an arrangement was entered into between him and the Barony Parish whereby, on consideration of said parish relieving him of the responsibility of providing for four of the children, he bound himself to pay to them the sum of 5s. weekly: Finds that from 16th October 1893 the said parish has maintained four of the children, and are still maintaining them by boarding them out in the country: Finds that the said Alexander Faulds made certain payments in partial fulfilment of the said obligation until 12th May 1896, since which date he has failed to contribute anything, and his whereabouts since then have been unknown: Finds that the said Mrs Catherine Mechan or Faulds received no support from her said husband, and has been deserted by him since October 1893: Finds that she left the defenders' poorhouse in the month of January 1894, and went thereafter to the pursuers' parish, and has continued to reside there until she became chargeable as a pauper on 17th July 1899: Finds that she continuously resided in the said parish, and supported herself by her own industry there for a period of three years and ten months prior to her becoming a pauper: Finds that during her residence in the pursuers' parish she was not burdened with the support of the said children, and never applied for or obtained parochial relief either for herself or them, and was not on the roll of paupers: Finds at the date of becoming chargeable as a pauper she had lost her husband's settlement in the defenders' parish, and had acquired a residential settlement in the pursuers' parish in her own right: Finds that the pursuers' parish and not the defenders' is liable for her support: Therefore assoilzies the defenders from the conclusions of the action, and decerns."

The pursuers appealed to the Court of Session. Thereafter the parties lodged a joint minute of admissions, from which and the admitted facts on record the foregoing narrative has been compiled.

It was not averred by either party that the defenders or their predecessors had ever called upon Mrs Faulds to maintain or contribute towards the maintenance of her four younger children. It was not admitted in the minute of admissions that they had not done so, but there was nothing in the correspondence or other documents produced and admitted to show that they had, and the arguments and the opinions of the Judges proceeded upon the assumption that they had not.

After having heard counsel their Lordships of the Second Division on 20th February 1901 appointed the cause to be argued before the Judges of the Division, with the assistance of three Judges of the First Division. The cause was accordingly argued before the Judges of the Second

Division and the Lord President, Lord Adam, and Lord Kinnear.

Argued for the pursuers—In a question of parochial relief the desertion by the husband was equivalent to his death as long as the desertion lasted—*Greig v. Simpson & Craig*, May 6, 1876, 3 R. 642. On the husband's desertion the liability of the wife to support the family emerged. By reason of the husband's desertion she became the head of the family and was bound to support the family—*Greig v. Adamson & Craig*, March 2, 1865, 3 Macph. 575. It was impossible to find that a mother in such circumstances, whose children had been receiving parochial relief during the period she had been residing in Rutherglen Parish, was not in receipt of parochial relief. She was bound to support her children, and any relief that they received necessarily assisted to lighten her burden. She, through the children, was in receipt of relief. The defenders themselves admitted in their books that this was so, because they inserted as a reason for continuing to support the children, "Mother unfit to support." In such circumstances the mother could not acquire a residential settlement.

Argued for the defenders and respondents—No amount of distress would make a pauper. The only proof of pauperism was actual admission to the roll and receipt of parochial relief—*Turnbull v. Kemp*, February 27, 1858, 20 D., opinion of Lord Justice-Clerk Hope, 710; *Parish Council of Falkirk v. Parish Council of Govan and Stirling*, June 12, 1900, 2 F. 998. The *de facto* state of the family must be considered. If the children were not *de facto* maintained as members of the mother's family the mother could acquire a settlement irrespective of them—*Greig v. Adamson & Craig*, *supra*, opinion of Lord Deas, 3 Macph. 579. In the present case the four children never resided with their mother; she was never burdened with their maintenance; she never made any application for their relief, and no intimation was ever made to her by the defenders that the husband had ceased to fulfil his obligation to maintain the children. A husband after he had deserted his wife could acquire a residential settlement although his wife had meanwhile been receiving relief from another parish—*Wallace v. Turnbull*, March 20, 1872, 10 R. 675. In the same way a wife put into a position of independence by reason of being deserted by her husband could acquire a residential settlement notwithstanding the pauperism of children whom she had never been called on to support. The present case was in the same position as if the children had been supported by a private charity. That would not have prevented the wife from acquiring a residential settlement. The wife in the present case presumably knew of the arrangement come to between her husband and the Barony Parish, and she was entitled to assume that this arrangement was being carried out until she received intimation to the contrary and a call was made on her to support

the children. As regards the entry in the roll, that was probably put on the roll by way of remark when the children first entered the poorhouse, and was continued from year to year in order to show the circumstances under which the children were on the roll. It could not affect the present question. The judgment of the Sheriff-Substitute was right, and should be affirmed.

At advising—

LORD TRAYNER—The facts of this case are somewhat peculiar, and I know of no case which can be cited as a direct authority or precedent for its decision. There are, however, some principles well settled in reference to cases under the poor law, which, applied to the facts we have here to deal with, aid in the determination of the question now to be decided. The principles I refer to are these—(1) that a deserted wife during desertion is in the same position as a widow; (2) that consequently during the desertion she is *sui juris*; and (3) that during desertion she may acquire for herself a residential settlement if she complies with or fulfils the statutory requirements, namely, resides in a parish for the statutory period (now three years) without applying for or receiving parochial assistance, and does not during that time have recourse to common begging.

The pauper in this case was deserted; she resided in the pursuers' parish for more than three years, during which time she neither asked nor got parochial relief, and did not beg, and consequently (if there was nothing more in the case) it would follow necessarily that she had acquired a residential settlement in the pursuers' parish. It would follow also that when the pauper became a proper object of parochial relief it was the pursuers' parish that was bound to give it. The pursuers, however, object to the conclusion I have drawn from the premises stated, on the ground that the minor premise is not true. They say that during the three years' residence of the pauper in their parish she was obtaining parochial relief, in respect that four of her children were at that time being supported by the defenders' parish (in which their father had his settlement), and that such relief to the children was in fact and law relief to her, she being bound during desertion to maintain her children. Now, I admit the obligation on the part of a widow or deserted wife to maintain her pupil children in family with her, and that if she cannot do so without parochial relief she becomes a pauper. The law on this matter cannot be better stated than in the words of Lord Deas in the case of *Greig v. Adamson*—"The principle is not to be gone back upon, that when a widow left with pupil children does her best to maintain them as members of her family, but finds her efforts inadequate, the burden of their maintenance (different from the case of an able-bodied man) constitutes her disability, and entitles her to relief as a pauper, although but for the burden thus resting upon her she could not have

been regarded as a pauper at all." I understand the pursuers to refer to the passage I have just read as supporting their contention, but I do not think it does. The conditions to which Lord Deas refers and on which his opinion proceeds are not the conditions of the present case. Just mark the difference. In the case supposed by Lord Deas there is a widow (1) with her pupil children in family with her; (2) she is unable to support them, and in consequence (3) is entitled to parochial relief as a pauper. In this case (1) the children are not in family with their mother; (2) she is not *de facto* called on to maintain them, and her ability to do so without relief is not therefore tested, and her inability to do so certainly not established; and (3) therefore she was not in the circumstances entitled to parochial relief as a pauper. In short, the basis of Lord Deas' opinion that the widow in the case dealt with by him was not a pauper was the fact that she was not only entitled, but had asked and got parochial relief. That essential fact is wanting here. I say essential fact, because in the case of *Turnbull* it was so described by the Lord Justice-Clerk. He said—"I cannot take any proof of pauperism except actual admission to the roll. The question, in my opinion, always is, Did the person *de facto* get relief?" Now, that question must here (according to admission) be answered in the negative. The view of the Lord Justice-Clerk just quoted has been followed ever since it was expressed, and was treated as a settled rule in the *Falkirk* case in June last year (2 Fr. 998).

The pursuers further urge that the mother being under obligation to maintain her children, and having allowed them to be maintained by the defenders, thereby accepted parochial relief for them, which must be regarded (according to the law laid down in *Greig v. Adamson*) as relief given to herself. This conclusion appears to me to be erroneous. The facts do not support it. The children were not maintained after October 1893 by the defenders at their mother's request or on her application. They were so maintained under an arrangement with the father of the children, who was primarily liable for their support, directly made by him with the defenders, and, so far as appears, the mother never was informed that the father had failed to obtemper the arrangement he had made. It is certain that the mother never was called on, in respect of her husband's failure, to support or alimant the children herself, and if she was unaware that such an obligation had devolved upon her, how could she be pauperised by an unfulfilled obligation, the existence of which was never brought to her knowledge?

Again, the mother never having been asked to support her children, how can it be said that if called upon to do so she could not have done it? She and her one daughter living in family with her certainly supported themselves; they might for anything that appears have been able to support the others. To say that they

could not be only a gratuitous assumption. And it is deserving of remark, in passing, that what reduced the mother ultimately to pauperism was not the burden of children she could not support, but the destitution which followed upon ill-health.

Upon the grounds I have stated I am of opinion that the pauper acquired a residential settlement in the pursuers' parish, that the pursuers are themselves liable for the relief afforded to her, and have no claim to be relieved thereof by the defenders.

I think therefore the appeal should be dismissed.

The LORD PRESIDENT and LORD JUSTICE-CLERK concurred.

LORD YOUNG—The question which we have to decide regards the parochial settlement of a woman called Catherine Faulds. She was born in the parish of Glasgow, and in 1882 was married to Alexander Faulds, a miner, who was also born there. They lived together till October 1893, when their family consisted of five children. On the 26th of that month he was convicted by the Sheriff at Glasgow under section 80 of the Poor Law Act 1845, and sentenced to sixty days' imprisonment, which he underwent in Glasgow Jail. The offence under the Act of which he was convicted was—that being a husband and father he did, on 16th October 1893, “desert or neglect to maintain” his wife and children, “being able so to do,” “whereby” they became “chargeable” to the parish of Glasgow, whose Inspector of Poor was the statutory prosecutor. The wife and children who thus became chargeable to Glasgow on 16th October were then received by the parish authorities into their poorhouse and maintained there out of the rates. Faulds was liberated on 25th December 1893, when the sixty days terminated, and the Glasgow authorities seem to have lost no time in making inquiry, as was their duty, about his ability to relieve the parish of the burden which his misconduct had thrown upon it. The result of this inquiry (and some personal communication with himself) was the agreement of 17th January 1894 between him and the Inspector of Poor, as representing the parish, cited on record. The terms of it import that the parish was satisfied that Faulds was then unable to relieve it of the burden of maintaining the children, or to contribute more to their support than 5s. a week. It makes special mention of the four children then in the poorhouse, including Catherine the eldest, but no mention of their mother, who was then also in the poorhouse, maintained as a pauper along with the children.

On 31st January 1894 the mother left the poorhouse taking her daughter Catherine with her. Neither of them thereafter received parochial relief from Glasgow. Where they went, or where or how they lived from that time till the year 1895, we have no information. The children, other than Catherine, were removed from the poorhouse on 31st January 1894, and thereafter boarded with guardians chosen by

the parish authorities, who continued to maintain them as paupers (see joint-minute of admissions, art. 3), their father contributing to their support as agreed on (or substantially so) till 12th May 1896. Between 29th January 1894 and 12th May 1896 the Glasgow Inspector of Poor received sixty post office orders from him, generally, though not quite regularly, weekly. The list of these post office orders (as given in appendix to joint-minute of admissions) may be important as noting where they came from, and taken in connection with the sender's letters given in the same appendix, showing where he was living and working.

The concluding information regarding Faulds is in the second article of the same minute of admissions, and is to the effect (*first*) that since 16th October 1893 he made no contribution towards the maintenance of his wife, or since 12th May 1896 of his children; and (*second*) that he was last heard of in Paisley about 25th August 1896, and that it is unknown whether or not he is now alive.

Regarding his wife and eldest daughter, from 31st January 1894, when they left the Glasgow Poorhouse till they went to Rutherglen in 1895, we have, as I have stated, no information. The first and indeed only information we have about them after January 1894, we get in the admission (article 1 joint-minute) to the effect that the wife “continuously resided in Rutherglen for three years and ten months prior to 18th March 1899” (*i.e.* from 13th May 1895), “and during said period had not recourse to common begging, and made no application to the Inspector of Poor, Rutherglen, for parochial relief for herself or her daughter Catherine.” That on 13th March 1899 she became chargeable as a pauper and received relief from Rutherglen is the common case of both parties.

I have stated the facts of the case, I trust accurately and as fully as needful, on which the questions of law in dispute must be determined. The ultimate question of law to which any others can only (more or less usefully for its decision) lead up, is whether or not Mrs Faulds acquired a settlement in Rutherglen by her admitted residence there from 13th May 1895 till 13th March 1899, when she became chargeable. Rutherglen maintains that being a married woman she could not so acquire a settlement. Glasgow answers that although a married woman “once” she lost her husband and became in legal estimation a widow on 16th October 1893, this being by the common law of Scotland the effect or consequence of the offence which her husband then committed, or if not, that his conduct subsequently in living apart from his wife without contributing to her maintenance, and ultimately absconding, as he did in August 1896, imported in legal estimation his decease and her widowhood.

The judgment of the Sheriff before us on appeal is—“that at the date of becoming chargeable as a pauper she (Mrs Faulds) had lost her husband's settlement in the

defenders' parish (Glasgow) and had acquired a residential settlement in the pursuers' parish (Rutherglen)." The Sheriff's findings in point of fact are necessarily founded on what he thought the record showed to be agreed upon by the parties—for he had absolutely nothing else before him. The joint minute of admissions to which I have made reference was arranged and lodged when the case was in this Court on appeal, so that we have it (and its appendix) as well as the record to proceed upon, but nothing else as regards facts.

It is the case of both parties that on 16th October 1893 Alexander Faulds had a settlement in Glasgow (cond. 7 and answer). Both parties on the record, when referring to his conduct on that day, use the word "desert," which is used in section 80 of the statute on which he was prosecuted—"desert or neglect to maintain" being the expression there used. I read the words "or neglect to maintain" as exegetical of "desert," so that nothing more was required to constitute the offence than neglect to maintain "being able so to do," whereby a burden was thrown on the prosecuting parish. The statutory offence is nothing more than this. There is no admission, or indeed averment, of any desertion or neglect to maintain before 16th October. If this is an omission—and it looks rather like it, the wife and children having become chargeable to the parish and been received into the poorhouse on that day—the omission cannot be supplied now. But even on the supposition that the culpable neglect of which Faulds was convicted commenced some days, or even weeks or months, before 16th October, I could not hold that Faulds' settlement in Glasgow ended on that day, either for himself or others taking their settlement derivatively through him. Accordingly on that very day his destitute wife and family admittedly became chargeable to Glasgow as the parish of his settlement and theirs derivatively through him. The question, then, comes to be, whether anything occurred subsequent to 16th October 1893 to relieve Glasgow of this burden and put it on another parish. Taking it to be conceded, or too clear to be disputed, that as regards the children nothing occurred to relieve Glasgow and burden another parish, the question is, did anything occur which so operated as regards the wife, and if so, when and what was it. No transgression is imputed to Faulds committed subsequent to his liberation from prison and prior to his alleged (and it may be reasonably presumable) absconding in August 1896, for although he did not during that period maintain his wife and family, it is not admitted or otherwise proved that he was "able so to do." The bare fact that he and his wife did not after his liberation live together—and we have no more than the bare fact—is not sufficient ground for imputing blame to him. For a period of six weeks after his liberation the wife remained in the parish poorhouse with the children. She was indeed their proper guardian, and might have insisted on remaining with

them though requiring and receiving maintenance from the parish while neither their father nor herself was able to support them. She was destitute and chargeable exactly as the children were, and to the same parish, from 16th October to 31st January, and during that period nothing occurred to affect her right or the duty of the parish to satisfy it. She was, of course, at liberty to go away, taking one of the children with her, leaving the others in charge of the parish authorities, but she did so of her own free will. I infer from the letters of the inspector of poor that he approved of her leaving. On 29th March 1894 he wrote that he thought it advisable to withhold from her the address of the people with whom he had boarded the children, and on 12th May 1894 he declined to inform her whether her husband was still paying for them. I also infer from the inspector's letters that he knew when she left that she had no intention of going to live with her husband. We have no facts admitted or proved on which we can judicially affirm that she was desirous or even willing to live with him, joining her fortune with his, and contributing her own and Catherine's services or earnings for the common support and comfort, or that he was not as willing and desirous as she was. We cannot, in my opinion, affirm as a fact admitted or proved that after the wife voluntarily left her children on 31st January 1894 one of the spouses, specifying which of them, deserted the other.

I trust that what I have said sufficiently expresses and explains the grounds of my opinion that down to 25th August 1896 Alexander Faulds retained his settlement in Glasgow, available to himself if he became chargeable as a pauper at or prior to that date, and to his wife derivatively through him if she became chargeable.

But the question remains, what is the effect of what occurred on or immediately after 25th August 1896. From the facts agreed on by the parties, as stated in article 2 of the joint minute, I think it reasonable to infer that Faulds then absconded by going into hiding, from which he has not emerged, and that this amounts to desertion, which must be attended with all the consequences thereby resulting to his deserted wife, including the right, or rather capacity, to acquire a residential settlement for herself—if that be one of them. Whether or not it is one of them may be a difficult question. Before expressing my opinion upon it I think it is desirable to call attention to the fact that Mrs Faulds became chargeable on 13th March 1899, and that the period from 25th August 1896 to 13th March 1899 is five months short of three years, and therefore insufficient for the acquisition of a residential settlement. It is essential to the respondents' (Glasgow's) case, as presented and argued, to show that the pauper's widowhood commenced at least three years before 13th March 1899, when her industrial residence in Rutherglen ended, that is to say, not later than 13th March 1896.

The respondents (Glasgow) must there-

fore, as the condition of success, establish these propositions:—1st, that by a rule of the common law a deserted wife is capable of acquiring for herself a settlement by residence although her husband not merely may have been, but certainly and admittedly was, resident in Scotland during a part or even the whole period of such residence by her; and 2nd, that the wife, whose settlement is here in question, was so deserted as to make this rule applicable to her residence in the Parish of Rutherglen.

After stating what I thought the import of the facts agreed on by the parties as stated in article 2 of the joint minute of admissions, regarding Fauld's disappearance in August 1896, I observed that the question whether or not capacity to acquire a residential settlement for herself was one of the rights resulting to a wife in consequence of desertion by her husband—might be a difficult one, I should rather have said was found to be so, and dealt with accordingly when it was first presented to this Court for judgment. That was in the case of *Gray v. Fowlis*, March 5, 1847, 9 D. 811. The rubric of the report is—*Held* “that though a husband desert his wife and go abroad, she cannot, until the dissolution of the marriage, acquire a settlement in any parish different from that in which his settlement was at the time he left the country.” The action was one of declarator in this Court. The Lord Ordinary decided in favour of the capacity, and the Judges of the First Division, where the case went by reclaiming-note, being equally divided in opinion, sent it to the whole other Judges for their opinions, with the result that of the consulted Judges two agreed with and seven differed from the Lord Ordinary, and the Judges of the First Division adhering to their opinions, the consequence was the judgment stated in the rubric carried by a majority of nine to four.

Lord Moncreiff, one of the minority, says at the commencement of his opinion, that the case appeared to be, “as far as I have observed, in a great measure if not entirely new. The question raised in it does not appear to have been settled by any former decision, and I do not think that it is precisely reached by any principles correctly deduced or authoritatively delivered in judgment.” I quote this only to show that the question was in 1847 regarded as new by this observant and experienced Judge. I will not quote from any of the very interesting and instructive opinions of the Judges, whether of the majority or minority, but only state that I concur in the opinions expressed by the nine Judges who constituted the majority, and refer to them as in my judgment assigning satisfactory, indeed strong, reasons for the answer which they give to the question then for the first time presented for decision. I would only further observe, that none of the Judges, either majority or minority, state any practice in the matter in question as having come anyhow to their knowledge or under their observation. Of course such knowledge or observation would be valuable only

if positive, *i.e.*, of actual recognition of settlements as having been acquired by deserted wives. So far as I know there is no instance down to this year 1901 of the recognition of a settlement so acquired. In the case of *Carmichael v. Adamson*, February 23, 1863 (1 Macph. 452), Lord President Inglis (then Lord Justice-Clerk) thus notices the decision in *Gray v. Fowlis*,—“I think there is,” his Lordship observes (p. 460 of the report), “very high authority for saying that desertion by the husband will not give the wife any capacity in the matter of settlement; for in the case of *Gray v. Fowlis*, 9 D. 811, which was considered by the whole Court, it was deliberately adjudged that when a husband with a Scotch settlement by birth deserts his wife and goes abroad she cannot while the marriage remains undissolved acquire a settlement by industrial residence for herself, but necessarily follows or retains her husband's settlement.” I take this as a distinct expression of Lord President Inglis' opinion in 1863 that this question was well decided in *Gray v. Fowlis*, and that up to that time (1863) there had been no decision to the contrary. Certainly we have been referred to none such of either prior or subsequent date. The question in *Carmichael v. Adamson* regarded the settlement of a four-year-old child, to be determined on the facts, which are distinctly and accurately stated by Lord Cowan thus—“That Michael Philips, an Englishman, with no parochial settlement in Scotland, deserted his wife and child in March 1855; that she supported herself and child until September 1857, when she was seized with small-pox; that she became chargeable on Kilpatrick parish, to which she had removed on 28th September, and died there on the 3rd October 1857; and that, subsequent to the death of the mother, the child was put on the roll of paupers in January 1858. The pursuer, as inspector of Kilpatrick, claims relief from one or other of the defenders as representing the parishes respectively of the birth of the mother and of the child.”

The question on these facts was, whether the child should be burdened on the parish of its own birth or on that of its mother. It was not suggested that the mother had (and the child could not possibly have) a residential settlement. It is at all events clear that the mother could not have acquired one between her husband's desertion in 1855 and her chargeability and death in 1857, *i.e.*, by a residence of two years. There was, indeed, so far as I can see, no question in the case, the decision of which could be influenced by the judgment in *Gray v. Fowlis* as a precedent in point, or the decision of which either way could either increase or diminish the authority of *Gray v. Fowlis* on the question there decided, or the value of the expression by Lord President Inglis (although it may be thought superfluous) of his estimation of it as a leading and subsisting authority on the question there decided.

The counsel for the respondent referred to the case of *Greig v. Simpson*, May 16,

1876, 3 R. 642, not for any thing there decided, but for some *obiter dicta* to the effect that (I quote from the opinion of Lord President Inglis)—“It has been decided that in a question as to parochial relief of the wife and family, the desertion of the husband is equivalent to his death.” I think it may be taken that this has been decided in the sense and to the effect that on the desertion of the husband at any date, parochial relief for the wife and family is to be taken derivatively through him from the same parish as it would have been had he died at that date. There is no decision which goes beyond this, and in the only case in which the Court was asked to go further and decide that a deserted wife was *sui juris* with capacity to acquire a residential settlement, the request was refused and the contrary “deliberately adjudged,” to use the Lord President’s language.

The report of this case of *Greig v. Simpson* bears that in the course of the argument by counsel, when the return of the deserting husband was suggested as possible, the Lord President interposed with the question, “Has it not been settled that a wife deserted by her husband is in the same position as if he were dead?” The only point of the question, so far as I can see, is the suggestion which it implies that if there be a rule of law which in disregard of fact holds that a deserting husband is dead, the same rule of law to be consistent must with similar, certainly not greater, disregard of fact hold that he cannot return, so that an argument, on the assumption that he possibly may, must be rejected. In delivering judgment the Lord President says that the deserting husband may return, and with important legal consequences, which indicates some difference in law as well as fact between desertion and death. I will not pursue this topic further, but think it proper to notice the case of *Beattie v. Greig*, July 9, 1875, 2 R. 923, which the Lord President is reported to have cited as deciding “that a wife deserted by her husband is in the same position as if he were dead.” In that case the deserting husband was an Englishman who never had a settlement in Scotland. The deserted wife was a native of Edinburgh City Parish, who never had a residential settlement in any parish. Her husband on 5th February 1869 deserted her in Barony Parish, leaving her there destitute, and from that date till her death on 18th November 1871 she received relief from Barony Parish. The only specialties in the case were (1st) that in May 1869 the husband returned to his wife in that parish, and lived with her there till his death on 19th January 1870; and (2nd) that notice of the husband’s death was not sent to Edinburgh till 24th August 1870. The question in the case was whether Barony Parish had a good claim against Edinburgh City Parish for repayment of the aliment supplied by it during the whole period of the wife’s chargeability. The decision was that the claim was good for the period between the husband’s desertion on 5th February 1869

and his return in the following May, and again from 24th August 1870, when the Barony sent notice to Edinburgh of his death, till the pauper’s death in November 1871. I see no reason to doubt the soundness of this decision, but neither do I see anything in it bearing on the question whether there is any, and if so, what distinction between the death and desertion of a husband with respect to the parish bound to support his wife when she becomes destitute, or her capacity to acquire a settlement by residence.

I have thought it proper to refer as I have done to the case of *Greig v. Simpson* only because the *obiter dicta* made in it were so much founded on in the argument, and to the case of *Beattie v. Greig* only because of the reference which was made to it by the Lord President as establishing a general proposition. The other decided cases to which we were referred by the respondent’s counsel I think it unnecessary to notice, for reasons which I hope what I have already said will sufficiently suggest.

In the case of *Adamson v. Barbour*, 1 Macq. 381, Lord Cranworth states and explains very instructively the principle of the common law of “derivative” as distinguished from “original” settlement in parishes, viz., that as regards parochial relief “the wife must be with her husband, that the children must remain with their father, and that any settlement gained by him was gained not for himself alone but for all his family;” and also points out “that great difficulty must arise in the application of the principle if it is not followed through all its consequences.” This common law principle of derivative settlement influenced and indeed guided the majority of the Judges in the case of *Gray v. Fowlis* in 1847 exactly as it did Lord Cranworth in *Adamson v. Barbour* in 1853. It was the same, and applicable and applied in the same way in both cases, though the one related to derivation by marriage and the other to derivation by parentage, and in both there was the same necessity of following it through all its consequences, the principle, as stated by Lord Cranworth, being that “the wife must be with her husband,” that is, be a burden on his parish of settlement, should she ever become chargeable, and “that children must remain with their father,” that is, be a burden on his parish of settlement, should they ever become chargeable. It was in both cases obvious to the Judges that (as Lord Cranworth expressed it) “great difficulty must arise in the application of the principle if it is not followed through all its consequences.”

I hope to be excused for dwelling a few moments longer on derivative as distinguished from original settlement. The former applies only to a family and its members so long as they continue so. The wife continues a member certainly while the marriage subsists undissolved—and I should think after its dissolution if she remains unmarried—and each child does so till forisfamiated. The common law



of derivative settlement gives one and the same settlement, viz., that of the head of the family to each member of it, and rests on the principle that this unity is expedient and has long existed with the approbation of the country. The principle includes the necessity of rejecting the law of original settlement as applicable either to a wife or to children not forisfamiliarated, as this Court recognised in the case of a wife in *Gray v. Fowles*, and the House of Lords in the case of children in *Adamson v. Barbour*, reversing the judgment of this Court, which had put the burden of each child upon its original settlement—that is to say, on the parish in which it happened to be born. That a widow is *sui juris* with capacity to acquire an original settlement for herself separate from that of her children (not forisfamiliarated) is a proposition unsupported, so far as I know, by any authority.

It seems to me that the case we are now dealing with, having regard to the facts of it, illustrates very strikingly indeed the difficulties that must arise in the application of this principle of derivative settlement if not followed through all its consequences.

From his birth till 25th August 1896, Faulds, the husband, lived in Scotland. Assume nevertheless that in October 1893 he deserted his wife and family, and has ever since remained in desertion in the sense that he has not lived with them or maintained them. Assume also that so long as his children were maintained as paupers by the parish of his settlement at the date of his desertion he was incapable of acquiring a residential settlement in another parish. On these assumptions his wife also (the mother of the pauper children) was I think incapable of acquiring a residential settlement in another parish. The proposition that a wife is *sui juris* with capacity to acquire a settlement when her husband (a resident Scotchman) is not, is startling. The consequence of affirming it would of course be to allow her to destroy the derivative settlement she had in Glasgow parish (probably quite unintentionally, having no interest to do so), and thereby to relieve that parish of the burden of maintaining her if she became chargeable, and impose it on Rutherglen or any other parish, while her husband and children remained burdens on Glasgow, and could resort to no other parish for relief should they become chargeable.

One of my assumptions was that the husband was pauperised in consequence of the relief given to his destitute children by the parish of his settlement, and so incapable of acquiring a settlement in another parish, and I think this is the sound view. But assume that Faulds was not thus incapacitated, and that he could and did acquire a settlement in another parish—not Rutherglen. On this assumption, would the children remain burdened on Glasgow, or be transferred to their father's newly acquired parish of settlement? In the one view the family would, with respect to settlement be divided into three parts (1, husband; 2, wife; 3, children), and in the

other into two parts, each with a different settlement from the others. And the possibility of such results is suggested by the fact that a settlement can be acquired in three years by mere "haunting and resorting" without public begging or receiving parochial relief. I have pointed out these possible and indeed probable results as illustrating the soundness of the views, and the principles on which they were founded, of the majority of the Judges in the case of *Gray v. Fowles*, also of the opinion expressed by Lord President Inglis in the case of *Carmichael v. Adamson*, that there is "no principle of the common law which will justify the position that a married woman deserted by her husband is by reason of her desertion restored to the legal capacity of an unmarried woman," and the necessity in the application of the principle of derivative settlement of following it through all its consequences.

With the opinion which I have, I trust, intelligibly expressed and explained, I have doubted whether I ought to state my views regarding the validity of an argument against the respondents' case urged by the appellants on the assumption (not admission) that the respondent had satisfactorily established these propositions—(*first*) That Faulds on 16th October 1893 so deserted his wife as in law to import his death and her widowhood; (*second*) that this desertion and consequent widowhood continued down to 13th March 1896, so that during the time she resided in Rutherglen she was in legal estimation not a wife but a widow; and (*third*) that a widow, though only so in legal estimation by her husband's desertion, is *sui juris* and capable of acquiring a settlement. My opinion, and the authorities to which I have referred, being distinctly adverse to these propositions, I have, I say, felt doubtful whether I ought to state my views regarding the argument in answer made on the assumption that they have been established. It is perhaps best that I should, and I will endeavour to do so briefly.

The argument is that the whole case of the respondents (Glasgow) being based on the soundness of the propositions which I have just stated, without which it has, indeed, admittedly, no basis, it is only reasonable to consider whether there is not a good answer to the case on the assumption (not admission) that they are sound. The argument is, *esto* that the propositions are sound, it follows that on 16th October 1893, when Mrs Faulds and her pupil children became chargeable to the respondent's parish, she was in legal estimation a widow and the surviving parent of her fatherless children. Who, then, the argument proceeds, was, in legal estimation, the pauper to whom relief was given by the maintenance provided by the parish to the destitute widow and children from 16th October onward so long as it was continued?—the answer in the argument being, of course, the widow. The conclusion of the argument is—that so long as either she or her children were continued on the roll and received parochial relief from Glasgow, she was a

pauper and incapable of acquiring a settlement in another parish.

I think the argument is sound. Two answers were made to it. The first was that Mrs Faulds could not be made a pauper otherwise than by actual admission to the roll or actual receipt of relief, and that there is no evidence of such admission or receipt. But this is inaccurate in fact. The excerpts from the defenders' (the respondents') books printed in the appendix to the joint minute, and the admission of their accuracy in article 2 of the minute prove that mother and children were on 16th October 1893 entered in the "register of poor of Barony Parish who have been ordered into the poorhouse," and that they remained in the poorhouse till 31st January 1894. The mother's history thereafter I have already noticed and need not repeat. I have also referred to the admitted facts regarding the boarding out and continued maintenance of the children by the respondents, and need not repeat them. The only other answer was to the effect that Mrs Faulds was never called upon by the respondents to relieve them of the burden of supporting her children by taking it upon herself, and that, for anything that appears, she was able to support them, and would have done so had she been asked. This seems a strange answer to be made on behalf of the respondents (Glasgow), whose duty undoubtedly was to make from time to time due inquiry as to the condition of a parent on whose behalf, as being the legal pauper, they were maintaining her children, and her ability to relieve them of the burden by taking it on herself, and is only made a little more extravagant by the remark in their list of children boarded with guardians for 1893, recorded opposite the names of Mrs Fauld's children—"Mother unfit to support."

I therefore repeat that I think the appellants' argument with which I have been dealing is sound, and the answers to it not so.

I desire, however, to be understood as putting my judgment in the case on an absolute negation of the soundness of the respondents' propositions, and not upon the argument of the appellants on the supposition or *esto* that they are sound, favourably as I regard it.

LORD ADAM concurred with Lord Trayner.

LORD KINNEAR—I also concur in the opinion of Lord Trayner, and I should only desire to add, that in proceeding upon the footing his Lordship explains, that Mrs Faulds is to be regarded as a wife who was deserted by her husband, I proceed upon the admissions on record, and on those only, although I add that I find nothing in the minute of admissions to suggest any modification of the explicit statements and admissions on record.

The fourth article of the concodence says—"Alexander Faulds deserted Catherine Faulds on or about 16th October 1893," and the answer is "Admitted." I therefore take it that this man deserted his wife at that date, and there is nothing on record or

in the minute of admissions to suggest that he ever returned to his wife or family or supported her from that time onwards.

The parties do not know whether he is now dead or alive, but however that may be, there is nothing to suggest that he has ever returned or that he is alive. I take it, therefore, upon the footing that our judgment is asked by both parties on the ground that the woman was deserted on 16th October 1893 and has continued in desertion ever since. If that be adopted, I concur with Lord Trayner in holding that it is settled now in law that the desertion by a husband of his wife is the death of the husband, and that the desertion by the husband puts the wife in the position of earning a residential settlement for herself, because it enables her or compels her to earn her own living, and to earn her own living as if she were an unmarried woman or a widow. In this case it is admitted that the woman lived in the parish of Rutherglen for the statutory period and earned her own living, and that accordingly she acquired a residential settlement in that parish, unless it could be shown against her that she obtained parochial relief or obtained relief by begging during that time, and, again, I take it to be admitted that was not alleged against her, and she obtained no parochial relief for herself.

I must say, if the question were whether it has been proved that she was able to support the whole family, I might have come to the conclusion that she was not in any sense able to support the children who were in Glasgow, but that is not the question. She did not herself obtain parochial relief, and I take it to be settled in *Turnbull v. Kemp* that the poor roll is conclusive on the question whether a particular person is a pauper or not. I do not think that the conduct of the defenders' Parish of Glasgow can raise any plea in bar which will enable them to make a pauper of the woman who is now in Rutherglen. I do not think their treatment of the children, whether with or without the mother's knowledge, can pauperise her. They made no claim upon the mother to support the children. I think it is an extremely important thing in a case of this kind, where the question is, which of two parishes is to bear a particular burden, that we should follow rules which have been once laid down and fixed by decision. That is of more importance, because it tends to a more just distribution of liabilities that a rule once fixed should be uniformly adhered to, than that it should on its own original ground commend itself to one's own mind as being in accordance with principle. I think the case of *Turnbull v. Kemp* is a perfectly sound decision, but if it were not we should be bound to follow it, because perpetual variation of rules on which questions of relief are to be settled is much more injurious to competing parishes than any particular decision can possibly be.

LORD MONCREIFF—I am of opinion that the pursuers are entitled to decree. The broad outlines of the case, which, in my

opinion, are conclusive, can be shortly stated. The defence to the action on the part of the Parish of Glasgow is that when the pauper, a deserted wife (whose settlement when deserted was in Glasgow), became chargeable to the pursuers' Parish of Rutherglen on 13th March 1899, she had acquired a residential settlement in the pursuers' parish by continuous residence there for upwards of three years prior to that date, during which she had "maintained herself without having recourse to common begging, either by herself or her family, and without having received or applied for parochial relief"—61 and 62 Vict. cap. 21, sec. 1.

Being a deserted wife, the pauper could have acquired a residential settlement provided that the statutory requisites were complied with. But, in point of fact, during the whole of the three years in question, although she maintained herself and one child in the pursuers' parish, four of her children were maintained as proper objects of parochial relief by the defenders' parish. Therefore in the absence of exceptional circumstances in the case it necessarily follows that she was incapable of acquiring a settlement in the pursuers' parish.

There is no dispute as to the general law that when a husband deserts his wife and family, desertion, in a question as to parochial relief is equivalent to death—*Greig v. Simpson & Craig*, 3 R. 642. As long as desertion continues, the deserted wife is regarded as the head of the family, and the children as burdens upon her; and if regular parochial relief is given either to them or to herself she is thereby pauperised and incapable of acquiring another settlement by residence. The only peculiarity of this case is that although the husband in 1893 deserted his wife and family who (that is, the wife and five children) were all admitted to the defenders' poorhouse, he was shortly thereafter compelled by the defenders' parish to enter into an arrangement to contribute to the support of four of his children whom the Glasgow Parochial Board agreed to continue to maintain. He continued to contribute small sums under this arrangement until the beginning of 1896, and thus up to that time these four children may be held not to have been burdens upon the deserted wife.

But in 1896 the husband finally ceased to contribute, and disappeared; and it is matter of admission that "since 25th August 1896 his whereabouts and circumstances have been and are still unknown to the defenders, their predecessors, the pursuers, and his said wife, although every endeavour has been made to trace him." Thus the temporary arrangement came finally to an end. That being so, matters stood thus—The Parish of Glasgow knew at latest in 1896 that the husband had deserted his wife and family. I do not do them the injustice to suggest that they did not know the legal consequences of desertion, viz., that the children were burdens upon the deserted wife, and that she was bound to support them if she could. They continued, nevertheless, to maintain the

four children as before, admittedly on the footing that they were proper objects of parochial relief; and, again, I do not do the defenders the injustice to suppose that they would have done so had they not been satisfied that the deserted wife, whose residence they knew, was unable to support them. There is not a suggestion in the case that she was able to support them, and, in point of fact, as the event proved, she was not in the end able to support herself and one child.

It is pleaded, on the authority of *Turnbull v. Kemp*, 20 D. 703, that the mother cannot be held to have been the pauper, because she was not entered in the defenders' roll as such. But in my opinion this is not a defence which is open to the defenders. The four children were all entered in the roll throughout, and the defenders well knew that, being pupils, the children could not be paupers in their own right, and that they being proper objects of parochial relief, the mother in the eye of the law was the pauper—*Greig v. Adamson & Craig*, 3 Macph. 579, per Lord Deas and the majority of the Court. In my opinion they cannot be heard to say that she was not on the roll. If the defenders are successful in the present case, the result will not only be that they will not be liable for the support of the pauper and the child who lives with her, but they will be freed from liability in future for the support of the four children whom they are at present maintaining. There is therefore all the more reason for looking with some jealousy on the defence which is now urged on their behalf. Now, the relief which they gave to the children was not temporary or casual relief such as was given in *Turnbull v. Kemp*. The children were entered and kept on the roll for years as paupers entitled to permanent relief, and if the mode in which their names were entered in the defenders' books was erroneous (which in the circumstances is by no means clear), the defenders are not entitled to found on their own mistake for the purpose of throwing the burden on another parish. The same remark applies to the defenders' refusal to let the mother see her children. It is not unimportant to observe in passing that she took them to the defenders herself in 1893, and therefore, of course, knew the footing on which they were supported.

I therefore cannot agree with the Sheriff-Substitute. His view is, that during the three years' residence in the pursuers' parish the pauper was not burdened with the four children because they did not reside in family with and were not supported by her. He would have been right if they had been supported by a friend or relative out of charity; but, as I have shown, this was not so. They were maintained by the defenders simply on the legal ground that the mother's settlement was in the defenders' parish, and that in the defenders' opinion she was unable to support them. This, accordingly, was relief "received" by the mother, which prevented a change of settlement.

The case of *Palmer v. Russell*, 10 Macph. 185, is not in point, because relief given to a lunatic child is regarded as exceptional and does not pauperise the parent.

On these grounds I am of opinion that the appeal should be sustained and judgment given for the pursuers.

The Court pronounced this interlocutor:—

“The Lords of the Second Division of the Court (along with three Judges of the First Division) having heard counsel for the parties in the appeal, in conformity with the opinion of the majority of the Judges present at the hearing, Dismiss the appeal; find in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute of Lanark, dated 13th November 1899, appealed against: Therefore of new assoilzie the defenders from the conclusions of the action, and decern.”

Counsel for the Pursuers and Appellants—  
 C. K. Mackenzie, K.C. — Deas. Agents —  
 H. B. & F. J. Dewar, W.S.

Counsel for the Defenders and Respondents —  
 Shaw, K.C. — Pearson. Agents —  
 Charles George, S.S.C.

## HIGH COURT OF JUSTICIARY.

Friday, March 15.

(Before the Lord Justice-General, Lord  
 Kyllachy, and Lord Low.)

### GARDNER v. BREMRIDGE.

*Justiciary Cases—Suspension—Sentence—Penalty—Contravention of Pharmacy Acts—Imprisonment—Imprisonment in Default of Recovery by Poining and Sale—No Warrant for Recovery by Arrestment—Pharmacy Act 1852 (15 and 16 Vict. cap. 56), sec. 12—Pharmacy Act 1868 (31 and 32 Vict. cap. 121), sec. 15—Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), sec. 18, sub-sec. 6, and Schedule K, Form 6—Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. cap. 33), sec. 8, sub-sec. 1.*

In a sentence proceeding upon a conviction on a complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, for a contravention of the Pharmacy Acts, which neither specially authorise nor specially exclude imprisonment, the Sheriff adjudged the accused to pay a modified penalty and expenses, and in default of immediate payment granted warrant for recovery by poining and sale, under certification of imprisonment for the period of three days in default of payment or recovery. The sentence contained no warrant for recovery by arrestment.

In a suspension brought upon the ground (1) that it was not competent in such proceedings to grant warrant

for imprisonment, and (2) that imprisonment, if competent at all, was only competent on failure to recover by arrestment as well as by poining and sale, and that the sentence contained no warrant for recovery by arrestment, *held* that the sentence was competent, and suspension *refused*.

Section 12 of the Pharmacy Act 1852 (15 and 16 Vict. cap. 56) enacts, *inter alia*, that the statutory penalties may be recovered by the registrar to be appointed under the Act in the name and by the authority of the Council of the Pharmaceutical Society in manner following:—“In Scotland, by action before the Court of Session in ordinary form or by summary action before the sheriff of the county, or in the royal burghs before the magistrates of the burgh where the offence may be committed or the offender resides, who, upon proof of the offence, . . . shall convict the offender and find him liable in the penalty or penalties aforesaid, as also in expenses; and it shall be lawful for the sheriff or magistrate in pronouncing such judgment for the penalty or penalties and costs to insert in such judgment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by poining.”

Section 15 of the Pharmacy Act 1868 (31 and 32 Vict. cap. 121) enacts as follows:—“Any person who shall sell . . . poisons, . . . not being a duly registered pharmaceutical chemist, . . . shall for every such offence be liable to pay a penalty or sum of five pounds, and the same may be sued for, recovered, and dealt with in the manner provided by the Pharmacy Act for the recovery of penalties under that Act.”

Section 18, sub-section 6, of the Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53) enacts as follows:—“In complaints for the contravention of any Act of Parliament under which the accused is or shall be liable to a penalty, . . . and in all cases where, under the authority of any Act of Parliament, such penalty is or shall be recoverable by action and process or diligence, the judgment of the Court shall authorise execution by arrestment, poining and sale, and imprisonment (unless imprisonment is excluded by the terms of the Act), and may be in the Form No. 6 in Schedule K; . . . and in all cases where, under the authority of any Act of Parliament, such penalty is or shall be declared to be recoverable by arrestment, poining, or distress and sale or imprisonment, or by any combination of these forms of diligence other than as above provided for, the judgment of the Court may be expressed in the said Form No. 6, so far as applicable, and no warrant of imprisonment shall be issued upon a judgment in such form until after the period allowed for execution by arrestment or poining except in the event mentioned in the said Form No. 6.”

Section 4 of the Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34) enacts—“With the exceptions hereinafter mentioned, no person shall after the commencement of