been imprisoned on 30th August preceding at the instance of a creditor. Creditors opposed, on the ground (1) of the unsatisfactory and contradictory nature of the bankrupt's explanations; (2) of his concealment of funds and disposal of his property on the eve of bankruptcy, to the prejudice of his creditors.

The Sheriff-substitute allowed a proof of the second objection. The creditors, however, did not lead any proof. The Sheriff-substitute found the petitioner entitled to the benefit of *cessio*. The Sheriff adhered.

The creditors reclaimed. The Lord Ordinary on the Bills (CURRIEHILL) refused the reclaiming note.

F. W. CLARK for reclaiming creditors.

R. V. CAMPBELL for respondent.

The Court adhered. They held that it was the duty of the creditors to take advantage of the allowance made to them to lead counter-proof to the petitioner's averments. They had not chosen to do this, and could not be heard now. The want of clear explanation of the bankrupt's affairs was no doubt owing to his illiterate character. Expenses were given to the petitioner since the date of the Lord Ordinary's interlocutor.

CAMPBELL, for petitioner, craved the Court to grant a warrant of liberation, and to allow immediate extract thereof *ad interim*.

The LORD PRESIDENT pointed out that the Sheriff's interlocutor, reclaimed against, found the petitioner entitled to the benefit of *cessio*, and asked whether this was not equivalent to a warrant of liberation.

CAMPBELL referred to M'Laurin's Forms of Process in Sheriff-courts, p. 536, as containing, in addition to the decree for *cessio*, the form of a warrant of liberation when the insolvent is in prison.

The Court accordingly granted the petitioner's motion.

Agent for Creditors—J. Y. Pullar, S.S.C.

Agents for Respondent—Macgregor & Barclay, S.S.C.

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*Wednesday, June 5.*

## SECOND DIVISION.

### FRASER *v.* ROBERTSON.

*Poor — Residential Settlement — Forisfamiliation — Lunatic.* 1. Circumstances in which (aff. LORD KINLOCH) held that majority had not, *per se*, the effect of forisfamiliating a daughter living in family with her father, and dependent on him. 2. That absence as a patient in an asylum had not the effect of acquiring for her any other than the derivative settlement she had through her father, that the father's settlement at the date of his death enured to the pauper, and that that was still her settlement as the statutory period by which it might be lost had not expired.

The pursuer in this action (Inspector of Killearnan) sues the defender (Inspector of Edinkillie) for advances made to a lunatic pauper, who, it is maintained by him, had at the date of her chargeability a settlement in the parish of Edinkillie. The pauper was born on 6th October 1830, in the parish of Edinkillie, where her mother was then paying a visit to her brother, George Wilson. The pauper's father resided in Killearnan at the date of her birth, and he did so continuously from that period until his death in 1858. During the earlier years of the pauper's life she resided with her mother, who lived apart from her husband, in the house of George Wilson in Edinkillie. George Wilson married in 1843, and then the pauper and her mother returned to the father's house at Killearnan, and she continued to reside there till 1853, when she became a lunatic, and was taken away to an asylum. She has since then been in several asylums, all of which were out of the parish of Killearnan.

The Lord Ordinary (KINLOCH) found that, at the time of her father's death, the pauper had a settlement in Killearnan, derivatively through him, and that up to the period of her becoming chargeable, and being relieved by Killearnan (1st April 1860), she had not lost that settlement. He therefore assoilzied the defender. His Lordship observed in his note:—

"In the discussion of the question thus raised, it appears to the Lord Ordinary that the primary point for consideration is what was the pauper's settlement during the lifetime of her father; in other words, whether she had ever acquired, prior to her father's death, a settlement different from his. The Lord Ordinary is of opinion that she cannot be held to have done so. Originally, beyond all doubt, her settlement was no other than the settlement by parentage derived from her father. She was a member of her father's family, living with him and supported by him. She cannot be held to have been in any different position from that of children generally in their father's house, as to whom it is trite law that their father's settlement is theirs by derivation.

"This being her case originally, it appears to the Lord Ordinary that nothing occurred prior to her father's death to alter her legal position. Two circumstances have been relied on, as one or other, or both, effectual to do so; but it appears to the Lord Ordinary that these are not sufficient for the purpose.

"The one of these is the majority of the pauper, which occurred on 6th October 1851. But the Lord Ordinary can find no sufficient authority for holding that the bare occurrence of majority has the effect of forisfamiliating a daughter, *who continues to stay in family with her father, and to be supported by him.* Majority in a father's house is not *per se* forisfamiliation. Yet it is a case of forisfamiliation, and no other, which the pursuer must on this point make out. Unless he can show that Margaret M'Dougall became forisfamiliated by the occurrence of majority in her father's house, he has on this point no case. If she was not forisfamiliated by her arrival at twenty-one years of age, her position continued, exactly as before, that of a child in a father's house, and her father's settlement remained hers. The Lord Ordinary considers it at variance with all principle and authority to hold that the mere occurrence of majority in the father's house is forisfamiliation, in the case of a daughter of the house.

"The Lord Ordinary therefore holds that Margaret M'Dougall's settlement continued that of her father after majority as before. And the question next arises, whether an alteration took place by her removal to a lunatic asylum in September 1853? The Lord Ordinary is of opinion in the negative. Again it is to be said, that the removal of a child to a lunatic asylum cannot be accounted forisfamiliation. It is something the very reverse of what is generally involved in the idea of foris-

familiation, which is removal from the father's house for the purpose of self-support. The child in the present case still continued supported by the parent; required, indeed, the support much more than ever. She was still to be reckoned amongst the children of the father, dependent upon him. She still filled the place of a proper child, with only added helplessness. It seems to the Lord Ordinary of no sort of consequence in this question that the lunatic asylum was out of the parish. If such a removal imported forisfamiliation, the result would equally arise were the asylum in the same parish, and simply across the road. If, on the contrary, such a removal does not in itself import forisfamiliation, the result will not arise because the asylum is out of the parish. Many cases may be figured in which a child removes, for a time, from a father's house, and into a different parish, and yet does not lose the legal character of a child, or thereby sustain forisfamiliation, as the very familiar one of a daughter going to a boarding-school. It was never supposed that a young lady was forisfamiliated by going to a London boarding-school; she has only the character of a child more deeply impressed by the well-known expensiveness of that proceeding. A daughter would not be held forisfamiliated because sent at her father's expense to the baths at Buxton or Harrogate, even though her absence should unfortunately be protracted for years. The residence in a lunatic asylum—from which, doubtless, a daily hope pictured a speedy return—appears to the Lord Ordinary to supply a case *a fortiori*, for the non-occurrence of forisfamiliation.

"The conclusion at which the Lord Ordinary arrives is, that when Margaret M'Dougall's father died, in March 1858, her settlement was her father's by derivation—that is to say, was in the parish of Killearnan. And this, it must be remembered, was a residential settlement, for such is every settlement derived from residence, whether the residence be that of the party or his parent. The question which remains is, whether this settlement was lost anterior to Margaret M'Dougall becoming chargeable as a pauper in 1860? This question is made easy to answer by the very circumstance that the settlement was residential; for being so, it could only be lost in the way in which residential settlements can be lost. The Court is not called on to decide what would have been the legal result had the father's settlement been a *birth* settlement. Whatever might be said in such a case, the case is not that which actually occurs. The case is strictly that of a residential settlement, and no other. In law the case is the same as if Margaret M'Dougall had personally resided in Killearnan for more than five years immediately prior to her father's death. In such a case, it need scarcely be said, the subsequent absence of two years would not be effectual to destroy the settlement. It as little does so in the general case, in the Lord Ordinary's estimation.

"The fallacy of the pursuer's argument consists in reckoning the pauper's absence from the parish of Killearnan back from 1860 to 1853. But, in true legal computation, it can only be reckoned back to the father's death in 1858. When the arithmetic is corrected, the true legal conclusion emerges, and becomes manifest.

"The Lord Ordinary had quoted to him several decisions, alleged to bear on the question at issue. But none of these cases ran on all-fours with the present. The Lord Ordinary therefore felt himself compelled to fall back on legal principles. It is difficult, perhaps impossible, to reconcile all the decisions on the subject of settlement of paupers; and the consolatory observation is often made, that it is of more consequence that a rule is fixed than that it is abstractly right. The Lord Ordinary has endeavoured to deduce from the authorities what on the whole seems the right rule in the present case."

The pursuer reclaimed.

FRASER and JOHNSTONE for him.

SOLICITOR-GENERAL and JOHN MARSHALL in answer.

The Court unanimously adhered to the interlocutor of the Lord Ordinary, holding that as the pauper was a member of her father's family, not forisfamiliated in 1853, her settlement then was his. During the ensuing five years till his death, no change took place. Though she was absent, owing to the state of her mind, she still belonged to the family, as an infant would, and was acquiring no independent settlement; nor did she acquire any new settlement after her father's death, as the statutory period had not elapsed between that event and the date of her chargeability.

Agent for Pursuer—John Galletly, S.S.C.

Agents for Defender—Mackenzie, Innes, and Logan, W.S.

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*Thursday, June 6.*

## FIRST DIVISION.

### GORDON *v.* SCOTTISH NORTH-EASTERN RAILWAY COMPANY AND MITCHELL.

(*Ante*, vol. iii, p. 370.)

*Jury Trial—Expenses.* Circumstances in which modified expenses awarded.

The pursuer, Gordon Ettershank Gordon, of Mosstown, was injured by falling among some large stones lying on a temporary roadway made while the defenders were constructing the Denburn Valley Line. He sued the Railway Company and Adam Mitchell, their contractor, for damages. Three issues were sent to the jury. The 1st was founded on the joint liability of the defenders; the 2d was founded on the liability of the Railway Company alone; and the 3d on the liability of the contractor alone. The jury found for the defenders on the first issue of joint liability; for the defenders on the second issue directed against the Railway Company; and for the pursuer on the third issue, directed against the contractor, with £450 of damages.

H. J. MONCRIEFF for the pursuer, now moved for expenses against Mitchell.

ASHER for Mitchell objected, in so far as the motion applied to expenses caused by the appearance of the Railway Company.

BIRNIE for the Railway Company, moved for expenses against the pursuer.

H. J. MONCRIEFF for the pursuer, objected, (1) because the Railway Company had refused, prior to the raising of the action, to give him access to their contract with Mitchell, and to the other writings which had passed between them and their contractor; and (2) because, if they had any claim for expenses, it lay against Mitchell, and not against the pursuer, since, if Mitchell had admitted liability, as ultimately fixed upon him by the verdict of the jury, the other defender, the Railway Company, would not have been called.