rule under the statute applied, and the bond was moveable.

For the second party—It was provided in the same section of the statute that except in the excepted cases heritable securities were to be moveable and were to belong to the executors of the creditor "in the same manner and to the same extent and effect as such security would under the law and practice now in force have belonged to the heirs of such creditor"—that is to say, the bonds were to belong to the heirs as the law then was. It therefore made no difference whether the bond was actually conceived in favour of the wife or whether she succeeded to it as heir *ab intestato;* she was to succeed to it as she would have under the law and practice at the date of the Act.

The 117th clause in the Titles to Land Consolidation Act 1868, after providing that heritable securities were thereafter to form moveable estate except where conceived in favour of heirs excluding executors, proceeded, *inter alia*—"Provided that all heritable securities shall continue and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after the marriage, shall to any extent pertain to the husband *jure mariti* where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ* where the same is or shall be conceived in favour of the husband, unless the husband or relict has or shall have right and interest therein otherwise."

The opinion of the Court was delivered by

Lord Gifford—[*After stating the facts*]—So standing matters, I am of opinion that Mrs Hodge's third of the fee of the Alloa subjects and her third of the fee of the bond for £900 did not fall under the *jus mariti* of her husband, the late Peter Hodge, and did not belong to him at the date of his death on 14th July 1872, and were improperly included in the inventory of Peter Hodge's personal estate. The only part of his wife's succession to her father which fell under Mr Hodge's *jus mariti* was his wife's share of Mr Duncanson's free personalty. No doubt Mr Hodge had also right to any rents of the Alloa subjects and to any interest of the £900 bond which might fall to his wife during the subsistence of the marriage, but no more; his wife's share of the fee of the Alloa subjects and her share of the fee of the £900 bond belonged to herself alone, and did not fall under his *jus mariti*. They still belonged to Mrs Hodge in her own right, and as she is still alive, neither her husband's executor nor the child of the marriage has any right to them.

The mere circumstance that the Alloa subjects were collated by Dr Duncanson did not make them moveable in the persons of his two sisters. So long as they were unsold, unrealised, and undivided, they remained heritable *sua natura*, and the true right which has vested in each of the sisters in virtue of the contract of collation is a *pro indiviso* right to the heritable subjects as they stand. The collation is very commonly carried out and given effect to by the eldest son or heir-at-law disponing the whole heritage *pro indiviso* to himself and his younger brothers and sisters equally, but until actually sold the heritage and the *pro indiviso* shares thereof remain heritable *sua natura*, and this whether the heir-at-law be bound specifically to convey or not. By collation the heir-at-law gives his younger brothers and sisters an equal share in the heritage, and he obtains an equal share with them in the moveables. But this does not alter the nature of the right; the heritage remains heritable, and the moveables remain moveable in all questions as to the intestate succession of any of the children. Nothing but actual sale or actual payment in money of Mrs Hodge's third share of the Alloa heritage would make that heritage moveable in her person. It fellows that her third share of that heritage did not fall under her husband's *jus mariti*, but only the rents thereof if any.

Then as to the £900 bond, Mrs Hodge took one-third of it in her own right as one of the three children, subject to her mother's terce. But although bonds and dispositions in security are moveable in questions of succession under the provisions of the Titles to Lands Consolidation Act 1868, section 117, they are still declared by the statute to remain heritable *quoad fiscum* and as regards all rights of courtesy and terce. I think the provisions of the statute fairly read exclude such heritable bonds from falling under the *jus mariti* of the husband, he having only right to the accruing interest thereon. And although it was said that the clause applied only to bonds taken expressly in favour of the wife, I think that is not so, but that the clause includes bonds to which the wife succeeds. A bond in this position is in my opinion as much heritable as the other.

The result is that I am for answering the first and second questions in the case in the negative, and by these answers the third question is superseded.

The Lord Justice-Clerk and Lord Ormidale concurred.

The Court therefore answered the first and second questions in the negative.

Counsel for First Party — Rankine — Forbes. Agent—A. P. Purves, W.S.

Counsel for Second Party — Paterson. Agent —J. Gillon Fergusson, W.S.

Monday, November 24.

COURT OF TEINDS.

(Before the Lord President [Inglis], Lord Mure, Lord Gifford, Lord Shand, and Lord Rutherfurd Clark).

STEVENSON AND OTHERS *v.* MACNAIR AND OTHERS.

Church—Erection quoad sacra—*Act 7 and 8 Vict. cap.* 44 (*Disjunction and Erection Act* 1844), *sec.* 8; 23 *and* 24 *Vict. c.* 50 (*Annuity Tax Abolition Act* 1860), *sec.* 21; 33 *and* 34 *Vict. cap.* 87 (*Annuity Tax Abolition Act Amendment Act* 1870), *sec.* 19—*Competency.*

The Annuity Tax Abolition Act 1860 and the Annuity Tax Abolition Act Amendment Act 1870 did away with the Old Church Parish of Edinburgh, which then became in every respect a part of the City Parish. But

in the event of a permanent endowment being obtained from voluntary sources, the Ecclesiastical Commissioners were authorised and required under these Acts to concur in the proper proceedings before the Teind Court for disjunction and erection into a parish *quoad sacra*. Certain parties having presented a petition for such disjunction and erection, setting forth that an endowment had been provided and a site obtained, which, though in a different parish, was still close to the proposed new parish, the minister and kirk-session of the parish in which the proposed site lay objected to the petition (1) on the ground of competency, that the Act of 7 and 8 Vict. cap. 44, applied only to "populous parishes," whereas the parish in question had been extinguished under the Act of 1870; and (2) on the ground of expediency, (*a*) that the Ecclesiastical Commissioners might under certain powers given them by the Acts in question render nugatory any action by the Court, and (*b*) that the proposed erection was in the circumstances of the case uncalled for. *Objections repelled.*

This was a petition under the Act 7 and 8 Vict. cap. 44, for disjunction and erection of Old Church Parish *quoad sacra* in the Presbytery of Edinburgh. The petition set forth—"By the operation of the Act 23d and 24th Victoria, chapter 50, intituled 'An Act to abolish the Annuity Tax in Edinburgh and Montrose, and to make provision in regard to the stipends of the ministers in that city and burgh, and also to make provision for the patronage of the church of North Leith,' the Old Church Parish, Edinburgh, which had previously formed one of the parochial divisions of that city, was deprived of its ecclesiastical endowment and of all the benefits of a parochial ministry.

"That by sec. 21 of the said Statute 23 and 24 Vict. cap. 50, it was, *inter alia*, provided that it should be in the discretion of the Edinburgh Ecclesiastical Commissioners to make a presentation or appointment, either *ad interim* or permanent, to the charge of the said Old Church Parish, or to make no presentation or appointment thereto, and to allow the same to lapse and become extinct, as to the Commissioners should seem most beneficial and expedient.

"That the said Ecclesiastical Commissioners made no presentation or appointment of a minister either *ad interim* or permanent to the charge of the said Old Church Parish under the powers conferred upon them by the foresaid section of the said statute.

"That by section 19 of the Annuity Tax Abolition Amendment Act 1870, while it was declared not to be competent to the said Ecclesiastical Commissioners, or to any patron or patrons, or to any presbytery, to nominate or present a minister to the charge of the said Old Church Parish, it was provided that nothing contained in the said Act should 'prevent the Tolbooth Church, and the Old Church, or either of them, being provided with a minister or ministers of the Church of Scotland who shall be paid or endowed from voluntary sources; and in case a permanent endowment from voluntary sources shall be provided and secured to a minister or ministers for both or either of said churches, and provision made for maintaining the church or churches, all in such manner as to warrant the erection and constitution of a church and parish *quoad sacra*, according to the existing law, the said Commissioners are hereby authorised and required to concur, so far as may be necessary on their part, in the proper proceedings before the Court of Commissioners of Teinds, in order to the erection and constitution of a church and parish *quoad sacra* with respect to both or either of said churches.'

"That the district of the said Old Church Parish, which is situated on the south side of the High Street and to the east of the Tron Church Parish, has a population of 2729, consisting chiefly of the very poor, many of whom have no church connection.

"That on 19th June 1872 a petition was presented to the Court at the instance of Thomas Graham Murray, W.S., and others, for the purpose of having the district of the said Old Church Parish erected into a parish, to be called the Parish of Old Church, in connection with the church known as the Old Church. The petition was opposed by the magistrates of Edinburgh, mainly on grounds connected with the selection of that church as the parish church; and the Court on 9th February 1874 refused the prayer of the petition.

"That a portion of the vacant piece of ground lying contiguous to the eastern boundary of the district comprehending the Old Church Parish has now been acquired with a view to the erection thereon of a church to which the said district is sought to be attached *quoad sacra*, and the petitioners propose that the whole of the said vacant piece of ground, which is about 205 feet long by about 145 feet in breadth, shall be included in the district to be attached *quoad sacra* to the said church, but as the said vacant piece of ground is situated in the parish of Canongate it is necessary that it be disjoined from the said last mentioned parish.

"There is not at present, and has not been since the said Act of 1860 came into operation, any organised spiritual supervision of the said district in connection with the Church of Scotland. No redistribution of the parochial arrangements existing in the adjoining parishes would have the effect of adequately providing for the spiritual superintendence of the said district. There is no church or chapel within the district in connection with the Church of Scotland, and there is no available site within the said district which could be acquired for the purpose. The Presbytery of Edinburgh, after inquiry through a committee, adopted a report of that committee, which found that the site now suggested is an eligible one for a church for the said district, and recommended the presbytery to give it their sanction and approval.

"That the erection of the district comprehended within the said Old Church Parish into a parish *quoad sacra* under the Act 7 and 8 Vict. cap. 44, with a church in connection therewith, would be highly conducive to the moral and religious interests of the inhabitants residing in the aforesaid district.

"That the petitioners, other than the said trustees *ex officiis*, have now secured a permanent endowment from voluntary sources to a minister for the said church and parish, to the amount of upwards of £120 sterling per annum (exclusive of the sum necessary for communion elements) being

the amount of endowment required by the foresaid statute 7th and 8th Victoria, cap. 44, in the case where there is not a manse for the minister; and they have undertaken to build a church upon the said vacant piece of ground, and are ready to make due provision for the maintenance of the fabric of the church so to be erected, and for the other requirements of the said last mentioned Act, all to the satisfaction of the Court.

"That with a view to secure to the said church a constitution in accordance with the laws of the Church of Scotland, and with the requirements of the last-mentioned Act, application was made to the proper quarter for a constitution for the said church, which has now been granted under the authority of the General Assembly of the Church of Scotland, conform to the extract thereof herewith produced and referred to.

"That after inquiry and consideration the Presbytery of Edinburgh, by their deliverance of this date (Jan. 29, 1879), marked off and designated the district which they recommended should be attached *quoad sacra* to the church proposed to be erected." That district included, *inter alia*, a portion of the parish of Canongate.

The petitioners therefore prayed the Court to erect the church undertaken to be built, together with the district above specified, and the portion of land to be disjoined from the Canongate Parish, into a *quoad sacra* church and parish, to be called Old Church Parish, Edinburgh.

Answers were lodged for the Rev. James Macnair and others, the minister and kirk-session of Canongate, &c., in which, on the narrative of the refusal of the previous petition in 1872, and of the grounds of that judgment, and of the general inexpediency, in the circumstances, of the contemplated change, they opposed the prayer of the petition.

The respondents argued—(1) The application was *incompetent* under 7 and 8 Vict. cap. 44. That was an Act applicable to the disjunction and division of "populous parishes," whereas the Old Church Parish in question had been extinguished under the operation of the Act of 1870. (2) It was *inexpedient*. A decree of this Court might be upset at any future time by the Ecclesiastical Commissioners, who under the Act of 1870 had discretion to annex the Old Church Parish to any of the neighbouring parishes in the city or Canongate, should they see fit. It was usual for the Court to grant such applications as the present only when satisfied that the parish in question was so deprived of proper ordinances (by increase of population or otherwise) as to render a new parish necessary or at least expedient. The number of churches in the neighbourhood and the likelihood of the population decreasing rendered the proceedings here proposed highly inexpedient.

The petitioners replied—(1) The application was *competent*. The Old Church Parish being abolished by the Act of 1870, the land in question could not remain extra-parochial, but fell back into the Old City Parish of St Giles. (2) It was *expedient*. The Ecclesiastical Commissioners had signified by minute that after inquiry and consideration the proposals of the petitioners seemed to them the only satisfactory course to pursue; and the approval of the General Assembly and of the Presbytery of Edinburgh had also been given.

Authorities cited — *Murray and Others* v. *Magistrates of Edinburgh*, Feb. 9, 1874, 1 R. 482; *Stevenson and Others* v. *Magistrates of Edinburgh*, Mar. 7, 1855, 17 D. 592.

At advising—

LORD PRESIDENT—This case certainly presents a different aspect from the case presented to us in 1874, and one of the leading distinctions is that whereas in the former petition it was proposed to appropriate part of St Giles' Church, which was formerly occupied as the church of the Old Church Parish, to be the church of the new *quoad sacra* parish, it is now proposed to build a new church, which although not absolutely within the limits of the parish is close to it and immediately adjacent to it. That seems to me to obviate a good many of the difficulties which were made in the last case both as to the competency and the expediency of the course suggested. We were of opinion then that the petition was not within section 8 of the Statute 7 and 8 Vict. c. 44, which gives powers to the Court, upon the application of any person or persons who shall have acquired or undertaken to acquire a church, and to endow the same, to inquire into the circumstances, and after due intimation to all parties having interest, "to erect such church into a parish church in connection with the Church of Scotland, and to mark out and designate a district to be attached thereto *quoad sacra*, and to disjoin such district *quoad sacra* from the parish or parishes to which the same or any part thereof may have belonged or been attached, and to erect such district into a parish *quoad sacra* in connection with the Church of Scotland." The church which the petitioners previously proposed to appropriate was one to which they had no title of any kind whatever. That was the chief difficulty as to the competency, but what I may call the chief difficulty in the matter of expediency was connected with the same subject. The church proposed to be used as the church of the new parish was at a great distance from the proposed new parish and had no direct connection with it; and the only thing to be said in favour of it was that it was the church of the old suppressed parish. But it did not follow from that that it was expedient to erect into a *quoad sacra* parish a church and district which would be at such a distance from each other as to prevent the minister exercising proper pastoral superintendence. There were some other difficulties in the previous case also which were stated, not as by any means conclusive against the application but as requiring very serious consideration. And one of these was, that supposing the Court to proceed under that petition to disjoin and erect *quoad sacra*, there were powers vested in the Ecclesiastical Commissioners with consent of the Presbytery which might be exercised sometime hereafter in such a way as to defeat and destroy the erection made by this Court. Now, as regards that last difficulty, I think that we are very much relieved from it in the present case, because the Ecclesiastical Commissioners have stated judicially that in their opinion the spiritual interests of the church and parish will be more satisfactorily cared for by carrying out the disjunction and erection prayed for in the petition than by their annexing the said district or any portion thereof to any of the other parishes in Edinburgh or Canongate, and that accordingly, in terms of the Act 33 and

34 Vict. c. 87, sec. 19—whereby they are authorised and required to concur, "so far as may be necessary on their part, in the proper proceedings before the Court of Commissioners of Teinds, in order to the erection and constitution of a church and parish *quoad sacra* with respect to both or either of said churches"—they concur in the petition and consent to the prayer being granted. We have also the opinion of the Presbytery—the only other party interested in the exercise of these powers—to the same effect, that this proposal contained in the present petition is the best and the most expedient mode of providing for the spiritual wants of this district.

Now, unless we were to hold that a decree of disjunction and erection could never be pronounced in this Court in the case of the Old Parish because of the existence of these powers, we surely have enough before us to satisfy us in the circumstances of this case, and I am not prepared to hold that, merely because that power is given to those Commissioners, therefore it is incompetent for us to do that which the statute contemplates might be done—viz., to erect this district into a parish *quoad sacra*. And we have quite enough before us to satisfy us that the Ecclesiastical Commissioners in the exercise of their discretion are of opinion that they ought not to exercise those powers, and that the erection of the parish *quoad sacra* is the proper step to take. And seeing that we also have the concurrence of the Presbytery, I think that we are quite safe to proceed. We may conclude that these powers will never be hereafter exercised.

The former difficulty being got the better of, the question remains, whether there is any good objection to the competency of this application, and whether it is an application that ought to be sustained on its merits as presented to us? Now, as regards the matter of competency, I confess that I entertain no doubt at all. The provisions of the 8th section of the Act of 1844 (8 and 9 Vict. c. 44) are complied with; and the difficulty which has been suggested connected with the history of this district I think disappears altogether when it is rightly understood. It is said that the 8th section of that statute contemplates only the disjoining of lands from an existing parish of which they form part with the view of erecting these lands into a new parish. Now the Old Church parish was undoubtedly separated from the original parish of Edinburgh under the operation of certain statutes passed in the reigns of George the Third and George the Fourth, by which the Magistrates and the Presbytery had full powers to divide the city ecclesiastically; and many of the principal town charges stand in exactly the same position in which the Old Church parish stood before the recent statute. But the erection of these parishes, as they were called, was somewhat of a qualified erection. For various purposes the Old Parish of Edinburgh remained undivided as regarded the whole work of what may be called the session clerk's office and a variety of other things of that kind. Now the effect, as it appears to me, of the recent statute of 1870 is just to do away, so far as regards the Old Church Parish, with the effect of these previous statutes and what was done under them; and that being so, this district, which was the Old Church parish under the operation of the statutes of the last century, becomes what it was before its original erection, namely, a part of the City Parish of Edinburgh. I cannot hold this district to be extra-parochial. There is no such thing known in the law of Scotland that I am aware of, and if it is not extra-parochial, I do not know to what parish it can belong, unless to the original parish of Edinburgh. As such, if no other provision could be made for it, possibly it might be held that it would fall under the ministry of the minister of the original parish church of Edinburgh—the church of St Giles. But without inquiring particularly into that, I cannot doubt it is in law part of the original parish of Edinburgh, and therefore we are perfectly entitled to deal with it under the 8th section of the Act of 1844 as a "portion of a large and populous parish," and that being so, to find it convenient to erect it into a new parish *quoad sacra*, the other conditions of the 8th section being complied with. That seems to me to dispose of the question of competency—that being the only objection to competency I think which is seriously maintained.

But the matter of expediency stands on a different footing entirely. If the parties had come back here with such a proposal as we had formerly, to attach this district to a church at a considerable distance, or at a different part of the Old Town, or at some part of the New Town, or somewhere in the South Side district, I should have dealt with the application very much as before, but they have been striving to the utmost of their ability, as we are informed, to find a site for the new church which they have undertaken to build, within the district itself, and have only abandoned their attempt to obtain such a site because they became satisfied, listening to the best professional advice they could obtain, that there was no spot of ground in that district that could with any propriety be made a site for the church, and so they proposed to borrow from the Canongate Parish a space of ground sufficient to make a site for the new church. If there had been any good reason urged on the ground of expediency or convenience against the appropriation of this space of ground which the petitioners either had bought or had undertaken to buy—any inexpediency in disjoining it from the parish of Canongate—no doubt the minister and kirk-session there would have had good reason to complain; but it so happens that this piece of ground is confessedly vacant ground. It is therefore, so far as the ministrations of the minister of Canongate are concerned, of no moment to him at all. No part of his congregation comes from that ground, and no part of his parochial visitation is carried on upon that ground. In short, it is to him as if it were no part of his parish at all, and therefore he seems to me to have no interest in the matter. The expediency, again, of obtaining this piece of vacant ground in immediate proximity to the proposed new parish is very great, and I confess that I do not see any incompetency under the 8th section of the Act of 1844 in taking a district from one parish and erecting it into a parish *quoad sacra*, and taking a small part of another parish and combining that with the district taken from the other parish for any purpose whatever, because either there happens to be a small population there far away from their parish church or because it is a convenient site on which to build a church for the new parish. It is not as if we were giving authority to build a new

church on ground not within the parish, because it is first put within the parish and then the church is built. Therefore I am not prepared to give much weight to the difficulty suggested about that.

Then, again, as regards the matter of population and the proximity of other churches, I cannot think that a population of 2700 is a very small charge for any minister. It was thought a very sufficient charge in many cases that we have had before us, and looking to the character of the population in this district, and the very hard work necessary to make an impression upon such a population, I think probably the minister of the new church will find his hands pretty full if he does his duty.

The expediency which has been urged of leaving this district to be attached to other parishes adjoining, is met, in the first place, by what I have already mentioned with regard to the views of the ecclesiastical commissioners and the presbytery. But it is still further answered by this—that the respondents (the minister and kirk-session of Canongate and the heritors of Canongate) have not suggested any arrangement which they consider to be more expedient than that proposed in this petition. I think when they came here to object on the ground of inexpediency they were surely bound to tell us how to rescue from their present destitute condition those who are living in that district in the heart of the city, because that this district is in a destitute condition is beyond all question, there being no minister of the Established Church charged with the duty of superintending and visiting it. I am of opinion, although it is not necessary formally to decide this question, that if the report that we shall receive from the Teind Clerk hereafter is satisfactory the petitioners have made out their case. All we can formally do at present is to repel the objections to the competency of the proposal and remit to the Teind Clerk to make inquiries into the case and to report.

Lord Mure, Lord Gifford, Lord Shand, and Lord Rutherfurd Clark concurred.

The Court accordingly repelled the objections, and remitted to the Teind Clerk to inquire and report.

Counsel for Petitioners—Lee—J. P. B. Robertson. Agent—H. W. Cornillon, S.S.C.

Counsel for Respondents—Kinnear—Wallace. Agent—Lindsay Mackersy, W.S.

Wednesday, November 26.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

DEMPSTER (POOR INSPECTOR OF CITY PARISH, GLASGOW) *v.* M'WHANNEL (INSPECTOR OF LUSS PARISH) AND DEAS (INSPECTOR OF GREENOCK PARISH).

Poor—Residential Settlement—Forisfamiliation of a Domestic Servant.

Held that the fact that a domestic servant who remained all the day in her master's house, returned home at night to her father's, where she slept, did not prevent her being forisfamiliated from the time that she entered service.

Poor—Acquisition of Residential Settlement—Interruption of Continuous Residence.

Circumstances where the acquisition of a residential settlement by a domestic servant who lived in her father's house was not interrupted by the fact that in the engagements of his trade the father was for some time absent along with his family in another part of the country, to which she had also followed them for a temporary purpose.

Poor—Acquisition of Parochial Relief.

Held that an arrangement among the authorities of a town, including the parochial board, whereby upon the outbreak of an epidemic certain classes of patients were taken to the infirmary and treated, partly at the expense of the board, did not bring these classes within the category of persons who in the meaning of the 76th section of the Poor Law Act 1845 have received parochial relief.

Cecilia Watt was a daughter of the deceased Alexander Watt, a mason by trade, and was born at Luss on 14th December 1844. Her father married a second time in December 1862, and his second wife was still alive in Greenock. Cecilia Watt had lived with her parents at Luss (where she occasionally found employment) till the end of April 1866, when the whole family removed to Greenock, residing in their father's house in Salmon Street, and afterwards in Ann Street.

While at Greenock, and at the age of two and twenty, she went into domestic service, and in a joint minute of admissions her residence there was stated in the following manner:—

"*April to Martinmas* 1866.—Father's house.

"*Martinmas* 1866 *to Martinmas* 1867.—Employed and paid by the month as a domestic servant to Robert Stewart, candlemaker, Greenock. She did not sleep in Mr Stewart's house, but went to her father's house for the night, working in Mr Stewart's house all day, and also taking her meals there.

"*Martinmas* 1867 *to Whitsunday* 1868.—Father's house.

"*Whitsunday* 1868 *till about 15th August* 1868.—With Mrs Sharp, Greenock, as domestic servant, living and sleeping in her mistress' house.

"*August* 1868 *till August* 1869.—Father's house.

"*August* 1869 *until the latter part of November* 1869.—Employed by Mr Stewart as a domestic servant under the same arrangement as formerly. She left Mr Stewart's service in consequence of being pregnant of an illegitimate child."

In September 1869 her father removed to Kilmartin, Argyllshire, where he was employed as foreman in the building of a mansion-house, and on the 9th of December his wife and children (including Cecilia) followed him, taking with them only such things as were absolutely necessary. During their residence at Kilmartin the family lived in a bothy, and Watt continued to pay the rent and taxes of the house in Ann St., Greenock, where also the furniture remained, except such bedding, &c., as had been taken to Kilmartin. The key of the Ann Streeet house was kept at Kilmartin, and one of the boys was occasionally sent