

7 Prob. Div. 207. But these cases exhibit a contrast to the present. In each the master, in a position of great peril and embarrassment, exercised his judgment calmly and to the best of his ability in deciding between two courses. In each he committed an error of judgment, as was proved by the result. But he was absolved from all blame, because he adopted what in a case of great difficulty his experience and judgment dictated to him as the better course of two.

But here the fault is no error of judgment, but a failure by the master to exercise his judgment at all—a surrender of his judgment to the influence of an unreasonable panic. This is a fault utterly unworthy of and inconsistent with the character of a British seaman. We therefore refuse the appeal.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The appeal was accordingly dismissed.

The Board of Trade moved for expenses, quoting the "*Famenoth*," *supra*, and the "*Arizona*," 5 Prov. Div. 123, but the Court refused the motion, on the ground that the expenses had been mainly incurred in investigating the charge of ship-scuttling which the Board of Trade had now departed from.

Counsel for the Appellant—Dickson—Aitken. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondent—H. Johnston. Agent—David Turnbull, W.S.

Wednesday, February 18, 1891.

## SECOND DIVISION.

[Sheriff of Dumbarton.]

M'DONALD (INSPECTOR OF POOR OF DUMBARTON) v. MACKENZIE (INSPECTOR OF POOR OF OLD KILPATRICK).

*Poor—Birth Settlement—Irregular Marriage—Desertion.*

A woman acquired a derivative settlement in the parish of D by marriage with a man whose settlement was in that parish. They left the parish, and soon after the man died without having lost his settlement in D. The widow went through an irregular marriage with an Englishman who had no settlement in Scotland. After a few months she left him on account of his bad treatment, and returned to D within two years from the time she left it. After two years more she became a pauper and was relieved by D.

The second husband denied the validity of the irregular marriage, and refused to do anything for her.

*Held*, in a question between D and K, the parish of her birth, (1) that the irregular marriage was proved; (2) that the facts above stated constituted desertion by the second husband; and (3) that the settlement in D having been lost by the irregular marriage, K, as the birth parish, was liable for her support.

*Proof—Proof of Marriage in Sheriff Court Incidentally.*

In an action between parishes as to a pauper's settlement, proof of an irregular marriage of the pauper may be led incidentally in the course of ascertaining the settlement.

On 10th September 1889 Elizabeth M'Phedran or Jenkins or White, a person of no fixed residence, and a proper subject of parochial relief, was found by the police in Dumbuck Wood in the parish of Old Kilpatrick in an extremely exhausted condition, and suffering from the effects of poison which she had taken with the intention to commit suicide. She was removed to Dumbarton Combination Poorhouse, as that was the nearest refuge. On 10th September Dumbarton parish claimed relief from Old Kilpatrick parish for the amount they had expended upon the pauper's maintenance. Old Kilpatrick denied liability, and the Inspector of Poor of Dumbarton brought an action in Sheriff Court at Dumbarton to enforce the claim, on the grounds (1) that the pauper was found destitute in Old Kilpatrick, and (2) that that parish was the parish of her birth. The birth settlement was admitted. From proof it appeared that the pauper was married first to Joseph Jenkins, sometime Chief-Constable of Dumbartonshire, and resided in Dumbarton with him for some years. He resigned his office in 1885, and went to live at Coldingham, Berwickshire. He died there the same year. The widow continued to live at Coldingham in a house of her own, but she fell into very dissipated habits, and went through an irregular marriage *per verba de presenti* with William White, a travelling basket-maker.

The pursuer set forth the irregular marriage, and alleged that White, the pauper's husband, had deserted her, and that she had therefore become chargeable to the parish of her birth, being the defender's parish.

The defender denied that there was ever any real marriage with White, and stated that the pauper still retained her derivative settlement in Dumbarton which she obtained through her marriage with Jenkins.

The defender pleaded—"Preliminary—The present action being in effect a declarator of marriage, is outwith the jurisdiction of the Sheriff Court. *Merits*—(2) The pauper having a derivative residential settlement in pursuer's parish, the pursuer has no recourse against defender. (3) The pursuer's statements of the pauper contracting an irregular marriage with William White, and of habit and repute marriage and cohabitation being unfounded in fact, the

defender is entitled to decree of absolvitor, with expenses."

The Sheriff-Substitute (GEBBIE) repelled the defender's preliminary plea and allowed a proof.

The facts relating to the alleged marriage were these—Upon 24th January 1887 Mrs Jenkins and White, along with White's brother and sister, went to Berwick, and sent for a man named Ferguson, who was in the habit of celebrating "Border" marriages; that they, along with a man named Smith, drove to Flemington Toll; there Ferguson read over portions of the English Church marriage service, and Jenkins and White accepted of each other as man and wife. They afterwards went back to Coldingham, and lived at her house there, but about a month after their return a girl Kennedy was introduced into the house as a servant, and White cohabited with both women at Coldingham in the house, and afterwards in a house at Chirnside, to which they removed. In October 1887 the pauper left White, it being, as she deponed, impossible for her to live with him any longer. They parted on apparently friendly terms, but White kept himself hidden, and had no communication with her, nor contributed to her support. He was not found until after this action was raised, when it was discovered he was living in Fife. Both he and the girl Kennedy gave evidence at the trial. He denied that there was any marriage as alleged. The defender sought to show that the alleged marriage was a mere drunken frolic.

After the pauper returned to Dumbarton she fell into great poverty, and at length attempted to commit suicide in Dumbuck Wood, which, though close to the town of Dumbarton, is in Old Kilpatrick.

Upon 18th October the Sheriff-Substitute pronounced this interlocutor:—"Finds in fact that on or about 10th September 1889 the pauper was found by the county police in Dumbuck Wood, in the defender's parish, and about a mile outside of the boundary of Dumbarton parish, in a disabled and destitute condition, and suffering from the effects of poison she had taken; that the police conveyed her to the Dumbarton Poorhouse, situated in the latter parish, the nearest place of refuge, and the pursuer at once granted the usual admission order, and sent the usual statutory notice of chargeability to the defender; that the pauper had formerly resided in Dumbarton as the wife of Mr Jenkins, Chief-Constable of Dumbartonshire, and on his relinquishing his office, accompanied him to Coldingham in Berwickshire, where he died; that after his death, and about 24th January 1887, she entered into an irregular marriage *per verba de præsenti* with William White, a travelling basket-maker, at Flemington Inn, in the county of Berwick, in Scotland; that William White was born in England, and has not, so far as shown, acquired any settlement in Scotland, and that the pauper and White continued to cohabit as husband and wife down to the end of September or beginning of October 1887, when she left him and returned to Dumbarton, where

she resided until she was discovered in Dumbuck Wood—at least it is not proved she had abandoned her residence in Dumbarton prior thereto; and that the pauper was born in Old Kilpatrick, the defender's parish: Finds in law that the pauper falls to be maintained by the parish of her birth: Therefore decerns against the defender as prayed for, and finds him also liable in expenses, &c., and decerns."

The defender appealed, and argued—It was admitted that if the pauper had no other settlement she must be supported by the parish of her birth. But it was admitted by Dumbarton that she had a derivative settlement there from her marriage with Jenkins; she had not lost it by her absence in Berwickshire for about two years. The questions therefore were—if she had married White in 1887 and so lost her derivative settlement? and (2) if he had deserted her, so that she had to resort to her birth settlement, White having admittedly acquired no settlement in Scotland? It was settled by authority that an irregular marriage could be proved to have taken place between two parties without a declaration of marriage being brought so that decree could be made available against the husband—*Beattie v. Baird* January 16, 1863, 1 Macph. 273. Even if the marriage between the parties had been proved, there had not been proved any desertion by the husband of his wife. They had parted quite amicably, and it was merely a case of parties agreeing to live apart; that was not enough to show desertion on the husband's part. As a general rule the husband was shown to have left the country—*Guthrie Smith on Poor Law*, 198. It had been decided that in a case such as this the parish which gave the relief had no claim against the parish of birth settlement—*M'Crorie v. Cowan*, March 7, 1862, 24 D. 723. As regards the marriage, the evidence all went to show that it was not a serious ceremony or believed to be so by any party, but was merely a drunken frolic. Even assuming the marriage, the parish of Dumbarton was still liable. This woman had been living in Dumbarton for the last two years, and when she was found in Old Kilpatrick she was at once taken to Dumbarton and relief given her. Dumbarton must go against the husband and not come upon Old Kilpatrick. He was in Scotland, quite easily found, and the Poor Law gave the authorities power to deal with such a case.

The pursuer argued—Old Kilpatrick was the birth parish of the pauper, as she had no other settlement; she must be maintained by it. Old Kilpatrick was also the parish bound to relieve Dumbarton for temporary relief afforded, as it was in Old Kilpatrick parish that the pauper was found in a helpless condition from want and poison, and a proper subject of parochial relief. She was taken to Dumbarton Poorhouse, but that was because she was in danger of her life, and that was the nearest place of safety, but all that Dumbarton parish did to this pauper was on the footing that Old Kilpatrick was bound to relieve

them of their expenditure. Dumbarton in fact acted merely as the hand of Old Kilpatrick in relieving her. It was not necessary for the interim relieving parish to discuss the relations of the pauper to see if she had any able-bodied person who was bound to support her; therefore if Old Kilpatrick was dissatisfied with the alleged marriage it was its duty to try the question with White and not with the parish which had only given temporary relief—*Hay v. Adams*, January 23, 1851, 3 Poor Law Mag. 173. In the case of *Austin v. Shennan*, October 30, 1874, 2 R. 68, the Court had disallowed to an interim relieving parish the cost of making inquiries as to the settlement of the pauper, and also expense incurred in prosecuting the husband for desertion. It was plain therefore that the Court thought the parish to which the pauper was ultimately found liable, was the proper party to undertake these inquiries. As regarded the marriage, that was amply proved, and the Sheriff-Substitute had so found. It was evident that the husband had deserted his wife. His conduct with this girl Kennedy rendered it impossible that she could continue to live in the same house with him, and the mere circumstance of not quarrelling at the actual moment of parting did not take away from the fact that he had really driven her out of the house. He had afterwards hidden himself away and contributed nothing to her maintenance, and he denied that he was her husband. The facts were sufficient to constitute desertion in the meaning of the Act—*Johnston v. Wallace*, June 13, 1873, 11 Macph. 699.

At advising—

LORD YOUNG—The question raised in this case regards the parochial settlement of a woman named Jenkins or White. She was married to Mr Jenkins, Chief-Constable of Dumbartonshire, and lived with him in Dumbarton till the year 1885, when he resigned his post and they went to live in Berwickshire. He seems to have died the same year leaving her his widow. Either before or after his death it appears that she became of very dissipated habits, and in the result she took up with a young man—a travelling basketmaker of the name of White. She lived with him in an illicit manner at first, and after a short time of that intercourse it is stated that he married her in 1887. After living together for some months he deserted her or she deserted him—at least they separated—he having some time before taken up with a younger woman—and she returned to Dumbarton. It was represented to us that the reason why White married her was that he might get possession of some little money she had, and that when that was exhausted he cared no more for her, but at least when she returned to Dumbarton she was impecunious and soon fell into poverty. In the autumn of 1889, after living in lodgings in Dumbarton for about two years, she was turned out of them because she could not pay the rent, and she went wandering about the country perhaps seeking for

work but in the end finding nothing to do, and in the month of September 1889 she was found lying helpless from the effects of opium in a plantation called Dumbuck Wood, a little outside the boundaries of Dumbarton, in the parish of Old Kilpatrick, which happened also to be her parish of settlement by birth. She was most properly taken to the poorhouse at Dumbarton, as that was the nearest place where she could be relieved, and the question now before us is, what is the parish of settlement?

Now, *prima facie*, and assuming that she was the widow of Mr Jenkins the late Chief-Constable, it is plain that her settlement was in Dumbarton where she had lived with him for many years as his wife, because the settlement that she had there acquired as his wife could not be lost by absence from the parish for the period between 1885 when they left it together, and the year 1887 when she returned alone. But then the authorities of Dumbarton parish say that that settlement being only a derivative settlement through the pauper's marriage with her husband Jenkins, she lost it by taking a second husband, and that some other must be looked for as the parish of settlement. Upon locking round therefore for another parish to relieve them, they found that the pauper had been born within the parish of Old Kilpatrick, and they have therefore brought this action against that parish in order to fix the burden of future maintenance upon the authorities there. The parish of Old Kilpatrick disputed the fact of the alleged marriage between the pauper Jenkins and the man White by which the settlement which she undoubtedly had at one time in Dumbarton was destroyed, and that of course led to the issue being raised between the parties, whether the pauper had been really married to White or not?

The Sheriff-Substitute, before whom the evidence was led, and who heard the whole case, was of opinion that the fact of the marriage was established, and he therefore held that the pauper's derivative settlement in Dumbarton had been destroyed, and that as her husband had no settlement in Scotland recourse must be had to her birth settlement in Old Kilpatrick.

It was alleged on record that the husband had disappeared, but it was discovered that he was living in Fife, working as a basket-seller, and he gave evidence at the trial. In that evidence he denied the fact of the marriage altogether, and stated his conviction that he was under no obligation whatever to support the pauper. Old Kilpatrick maintained in argument that if White was her husband it was the duty of the relieving parish Dumbarton to proceed against him for recovery of alimony spent upon the pauper, and not against their parish. Dumbarton replied that it was not the parish of settlement, and that if the pauper had been married and her husband had deserted her the parish of settlement was the proper one to proceed against the husband.

I am of opinion that the marriage is

established. I cannot find in the evidence sufficient reason for differing from the result which the Sheriff-Substitute has arrived at. I have some misgivings whether evidence to set up a marriage of this kind ought to have been taken in an action to which the husband was not a party, and decree in which would not be final against him. But these scruples have been overcome by the consideration that for the purposes of this case evidence may be taken in the case as between the parties to the case only. I illustrated that view to my own mind by this:—Suppose that Old Kilpatrick had admitted that the pauper had been married to White after the death of Jenkins, that admission would have been sufficient for the purposes of this case, although it could have no effect in setting up a marriage against White if he denied it. Parties having joined issue on this matter, and the case having gone to trial on that footing, I should not feel justified in saying that the Sheriff-Substitute has arrived at an erroneous conclusion. If we affirm the marriage, then we affirm also that the husband has no settlement in Scotland, and that he has deserted her. I think that a man who denies that the woman who was married to him is his wife, and declines to contribute to her maintenance, is a deserting husband. The result is that the parish of Old Kilpatrick is the parish liable for the pauper's maintenance. I think that the judgment of the Sheriff was right.

LORD RUTHERFURD CLARK—I concur.

LORD TRAYNER—I agree in the result at which your Lordships have arrived. The primary question is, whether there was a marriage between the pauper and White? and I think the evidence establishes that such a marriage took place. It is quite true that our finding that such a marriage is established would have no effect in a question with White, who is not a party to this action. The evidence of marriage was led in this case as incidental to the question of the defender's liability, and it was so led in accordance with the practice of this Court. I do not doubt the competency or propriety of leading such evidence for such a purpose, and in questions like the present the balance of convenience is in favour of such a course, rather than saying that a separate declarator of marriage should be brought against the alleged husband.

I have also come to the conclusion, although with difficulty, that the pauper has been deserted by her husband. Taking the pauper therefore as a deserted wife whose husband has no settlement in Scotland, the liability for her support falls upon the parish of her own birth, as the Sheriff-Substitute has found.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

“Recal the interlocutor of the Sheriff-Substitute appealed against: Find that the pauper, after the death of her first husband Joseph Jenkins, was married to William White, a travelling basket-

maker, at Flemington Inn, Berwickshire, on or about 24th January 1887: Find that the said William White is a native of England, and has no settlement in Scotland: Find that he deserted his wife, and that she having fallen into destitution, became a proper object of parochial relief and has been maintained by the parish of Dumbarton: Find that the pauper has no settlement in the parish of Dumbarton; but that she has a settlement in the parish of Old Kilpatrick, where she was born: Find that the pursuer's disbursements for the maintenance of the pauper to 31st May 1890 amount to £2, 16s. 5d.: Find in law that the pauper falls to be maintained by the parish of Old Kilpatrick: Therefore decern against the defenders in terms of the conclusions of the petition: Find the pursuer entitled to expenses,” &c.

Counsel for Defender—Cheyne—J. A. Reid. Agent—William Officer, S.S.C.

Counsel for Pursuer—Thomson—W. Campbell. Agent—W. S. Harris, L.A.

Friday, February 20.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.]

### LOUDON v. THE INCORPORATION OF TAILORS OF AYR.

*Burgh—Incorporation of Tailors of Ayr—Qualification for Admission to Incorporation—Amendment—Relevancy.*

A tailor in Annan, who was born and received his early education in Ayr, sought to have it declared that as the son of a former member he was entitled to be admitted into the Incorporation of the Tailors of Ayr. He failed to show on a proof that birth membership was in accordance with the constitution of the incorporation, but he maintained that as a member of the trade of tailors he was entitled to admission into this incorporation. *Held* that even if such an amendment of his action were competent—which was doubtful, as thereby the action originally brought for behoof of an individual would exist for behoof of a community—such a ground of action would be irrelevant.

David Cunningham Loudon, tailor in Annan, raised the present action of declarator against the Incorporation of Tailors of Ayr, concluding, *inter alia*, that “in terms of the constitution and regulations of the said incorporation the pursuer is entitled to be admitted a member of the said guild brotherhood of the said Incorporation of Tailors as the son of a member and guild brother thereof.” He also claimed to be admitted a member of the scheme in connection with the incorporation for the relief of widows and orphans and decayed members. He averred (Cond. 5) that his father