forisfamiliated. Whether she had been so or not was a question of fact—*Fraser* v. *Robertson*, June 5, 1867, 5 Macph. 819. The material considerations were (1) age; (2) whether the person in question was resident in his father's house; and (3) whether he was earning his own livelihood. In this case the pauper, when she was left by her father with the Laings, was sixteen years of age. After that she did not generally reside with her father. While she was with the Laings she was earning her own livelihood so that at least for a-year before she first received parochial relief she was self-supporting. But even if she had not been really supporting herself she would have been forisfamiliated in virtue of her separation from her father and his family. It had been so held in the case of a boy bound apprentice at fourteen and thereafter living in his master's house, although his labour was inadequate to his support—*Heritors and Kirk-Session of Cockburnspath*, June 9, 1809, F.C. The present case was *a fortiori* of that one, because the pauper here was self-supporting. Even if the father had simply deserted the girl she would have been forisfamiliated, but here the case was stronger because he had left her in a house where she was to get board and lodging free for her work. This pauper was not insane but only weak-minded. That condition of mind did not prevent forisfamiliation—*Walker* v. *Russell*, June 24, 1870, 8 Macph. 893; *Greig* v. *Ross*, February 10, 1877, 4 R. 465. A person of weak mind, not being insane, could acquire a residential settlement even if not capable of earning his own living—*Cassels* v. *Somerville & Scott*, June 24, 1885, 12 R. 1155. This pauper was therefore not incapable of forisfamiliation. She had in fact been forisfamiliated, and the parish of her birth was consequently liable.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK—I think we do not require to call for any reply, and that we are in a position to decide this case upon the facts as they have been explained to us by Mr Campbell. This child did not live with her father, but in a lodging-house at Laurencekirk. She did not take up her residence there of her own accord, but she was put there by her father who arranged that she was to return to him when either she or the lodging-house keeper desired that she should do so. In these circumstances it seems to me impossible to regard this girl as occupying an independent position, and I am of opinion that the Lord Ordinary has given the right decision in the case.

LORD YOUNG—This girl was never forisfamiliated, although she was left by her father in a lodging-house, where she got her food in return for going messages and looking after children while he was going about the country hawking. In the circumstances that was a very judicious arrangement for the father to make. His position was that he was able to support himself, but he was not able to support this girl. I think the parish of the father's settlement is liable.

LORD MONCREIFF—I am of the same opinion.

LORD TRAYNER was absent.

The Court adhered.

Counsel for the Pursuers—Ure—Dove Wilson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders, the Barony Parish of Glasgow—D.-F. Asher, Q.C.—Deas. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defenders, the Parish of Perth—W. Campbell—Craigie. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Wednesday, February 24.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

PATON *v.* M'KNIGHT.

Process—Amendment—Expenses—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

In an action raised in the Debts Recovery Court for the half-year's rent of a piece of ground, the defender denied the contract of lease, and after a proof the Sheriff-Substitute granted decree against him.

The defender appealed to the Court of Session and proposed to amend his record by adding an averment, with corresponding pleas-in-law, to the effect that, whereas the pursuer had pretended to let him a piece of ground free of all restrictions, he had ascertained in course of the exercise of his right as tenant that the pursuer's right to part of the ground was disputed, and that conterminous proprietors enjoyed certain servitudes over the rest. It was not disputed that the proposed amendment was relevant.

The Court *allowed* the defender to amend his record as proposed upon condition of his finding caution for a sum estimated to cover the expenses of the proceedings in the Sheriff Court.

James Paton, printer, Edinburgh, raised an action in the Sheriff Court of the Lothians and Peebles against John M'Knight, builder, concluding for payment of £30, being the half-year's rent of certain subjects.

The pursuer averred that by holograph letter dated 5th June 1895, written to him by Mr William Ormiston, acting on behalf of the defender, the defender offered to lease from him for a period of ten years a certain piece of ground at the annual rent of £60, and that by letter dated 7th June the pursuer accepted that offer. He

further averred that thereafter the defender took possession of the ground in question, and that he refused to pay the first half-year's rent due at Martinmas 1895.

The defender averred that it was Mr Ormiston who had first brought the ground in question under his notice; that his main object in acquiring the ground was to build stables and an office; that Mr Ormiston was aware of that; and that the defender was led by him to believe that the granting of warrant for that purpose by the Dean of Guild would be a matter of routine. He admitted that in that belief he had taken possession of the ground to the extent of depositing debris thereon, but averred that when it appeared that there would be a difficulty in getting warrant he removed it again. He further averred that after he presented his application to the Dean of Guild Court, the Court on 25th July 1895 appointed all the conterminous proprietors to be called as respondents, and that the Dean of Guild process caused him serious expense.

The defender pleaded that there was no probative writ of lease; and, [*separatim*, that there was never *consensus in idem placitum* between the parties.

In Mr Ormiston's letter to the pursuer of 5th June occurred the sentence—"The ground to be unrestricted as to the extent or character of the buildings, but no works causing nuisance to be carried on."

Upon this record, which was closed on 21st February 1896, the case went to proof in the Sheriff Court on 22nd June 1896, and on 9th July the Sheriff-Substitute (HAMILTON) found the contract of lease proved, repelled the defences, and decerned against the defender.

The defender appealed to the Court of Session, and proposed to amend his record by adding the following answer:—"Admitted that the defender refuses to pay said rent. Reference is made to said process and correspondence for their terms, beyond which no admission is made. Explained that by the terms of the said pretended let to the defender of the land in question, it was an express condition that the said land should be unrestricted as to the extent or character of the buildings that might be erected thereon, except only in so far as works causing nuisance were concerned. The land in question consists of back ground behind Lonsdale Terrace, Chalmers Crescent, and Lauriston Gardens, including a strip running from Lauriston Gardens to said back ground, which constitutes the only access thereto. The pursuer has never given and now refuses to give the defender possession of the land alleged to have been leased to him in conformity with this express stipulation. The objectors who have appeared in the Dean of Guild Court object to the defender's proposed buildings on the ground that said land is subject to restriction. It is the fact, and the pursuer has admitted, that the said land is subject to rights of passage in favour of neighbouring proprietors, which rights extend across the land comprehended in the pretended let. Moreover, it is now averred by the proprietors on the north, and it is the case, that a part of the land in question, consisting of a strip along the entire northern boundary of the same, is their property, and they accordingly dispute the defender's unrestricted right to build on said ground in the Dean of Guild Court. Further, from the objections lodged by the said last-mentioned proprietors before the Dean of Guild Court, it now appears that the whole, or at least an essential part of the foresaid strip or narrow passage from Lauriston Gardens running along said proprietors' wall, being the defender's only access to the land in question, is not the pursuer's property; and if subject in virtue of prescriptive use to any rights of passage, it is at all events not subject to any servitude or private right-of-way for carts and horse traffic. The said land is further alleged by the said objectors to be subject to a variety of restrictions under the titles to the same and to the neighbouring properties. These restrictions render it impossible for the defender to make any use of the land in question. The only appropriate site selected by the defender for his office turns out to be on the strip of ground to which the pursuer's title is directly challenged. With these restrictions the land is useless for the defender's purpose. As explained in article 3, some building materials which had been deposited on the land in question by the defender, in the belief induced by the pursuer's representations that the ground was unrestricted, were removed as soon as the defender discovered that these representations were unfounded, or at least open to serious challenge. No possession of the land as let to the defender has ever been obtained or offered to him, and he is accordingly not due any rent to the pursuer. Moreover, in consequence of the great delay which has occurred in giving possession to the defender for building purposes, the defender has been put to very great trouble and expense, and has suffered loss and damage to an extent greatly exceeding the amount sued for. To the extent of such excess the defender's claim of damages is reserved."

He also proposed to add, *inter alia*, the following pleas-in-law—"(5) The pursuer having failed to implement the said pretended let by giving the defender possession of unrestricted ground in terms of the let, has no claim to rent. (6) The pursuer having failed to give possession of the ground in terms of the let within a reasonable time, the said pretended lease is no longer binding, and the defender should be assoilzied."

The Court of Session Act 1868, sec. 29, enacts that the Court may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session upon such terms as to expenses and otherwise as to the Court shall seem proper.

The defender explained at the bar that in September 1896 he dropped the old petition, and lodged a new petition in the Dean of

Guild Court for warrant to erect stables and an office on the ground in question; and that he was ordered to call the conterminous proprietors as respondents. Thereafter these appeared and stated the objections referred to in the minute of amendment.

Argued for the defender—The defender should be allowed to amend his record as proposed unconditionally. He had a written assurance by his landlord to start with, that the ground was his and that it was unrestricted. It was no part of the defender's duty to investigate closely that statement of his landlord's; and he only became aware of the objections to the landlord's title, and of the restrictions and servitudes over the ground, when the conterminous proprietors lodged answers in the Dean of Guild Court. It was therefore no fault of his that in his original defences he did not take up his present position; the fault lay with the pursuer. The question of expenses should at all events be reserved till the event proved whether the defender's new defence was well founded.

Argued for the pursuer—The defender should be allowed to amend his record as proposed only upon condition of paying the whole expenses of the cause from the closing of the record. *Keith* v. *Outram & Company*, June 27, 1877, 4 R. 958; *Morgan, Gellibrand, & Company* v. *Dundee Gem Line Steam Shipping Company*, December 9, 1890, 18 R. 205; *Guinness, Mahon, & Company* v. *Coats Iron and Steel Company*, January 21, 1891, 18 R. 441, referred to.

LORD PRESIDENT—It was not, I think, seriously maintained by the respondent that these new statements contained in the minute of amendment are irrelevant, and accordingly counsel for the respondent very properly did not seriously resist the motion that the record should be amended in this sense. The real difficulty is as to the terms.

Now, the case made by the appellant upon this head is this. He took the ground in question on the express condition that it was unrestricted, and he says that, receiving a responsible and authoritative statement to that effect, he was not bound to make sceptical inquiry into that statement. He has only in the course of exercising his rights as tenant found out that there are restrictions, and accordingly he maintains that he is excusable for having omitted to state as his original defence what was not within his knowledge. That may turn out to be well founded in fact or it may not; and according as the one or the other event happens would seem to depend the question whether the appellant is to pay for the costs which have, according to the hypothesis, been thrown away.

Now, we might make the appellant pay the whole costs of the case as hitherto conducted. If he then turned out to be right, he would seem to be very grievously treated by our award. On the other hand, if we were to allow him to put on his amendment on nominal terms, I must say I cannot think that would be logical. It would be either too much or too little. Under the Act of Parliament we have a free hand to determine the terms on which an amendment should be allowed, and I think in the present case the proper course is to make the appellant find caution for some sum which one would estimate as being the possible amount of the expense which will have been lost. I am not an auditor, but perhaps £30 would express that view, and I would therefore propose that this course should be taken. I am conscious that there is no precedent for this, but it is certainly within the terms of the statute, and seems the most logical way for giving it effect.

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

The Court pronounced this interlocutor:—

"Open up the record, allow the proposed amendment upon the appellant's finding caution for expenses to the extent of £30 to the satisfaction of the Clerk of Court; upon such caution being found and amendment made, allow the respondent to lodge answers to such amendment."

Counsel for the Pursuer—J. Wilson—T. B. Morison. Agent—P. Morison, S.S.C.

Counsel for the Defenders—D.-F. Asher, Q.C.—Hunter. Agent—James F. Macdonald, S.S.C.

Friday, February 26.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

RAINIE *v.* MAGISTRATES OF NEWTON-ON-AYR.

(*Ante*, June 6, 1895, 32 S.L.R. 501; 22 R. 633.)

Church—Minister—Stipend—Amount of Competent and Legal Stipend.

Circumstances in which, having regard to the numbers and character of the population of the parish, the duties incumbent on the minister, and the emoluments of neighbouring ministers, the Court (*aff.* judgment of Lord Stormonth Darling) *fixed* the sum of £300 per annum as the amount of "a competent and legal stipend" with which the magistrates of a burgh were bound, under a decree of disjunction and erection, to provide the minister of a parish.

This was an action raised by the Reverend William Rainie, minister of the parish of Newton-on-Ayr, against the Magistrates, Councillors, and Freemen of the burgh of Newton-on Ayr, concluding for declarator that the defenders were bound to provide him with a competent and legal stipend, suited to the circumstances of the time and the position and duties of the benefice. There was further a petitory conclusion