Thursday, October 25.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

WELSH *v.* LOWDEN.

Poor—Residential Settlement—Continuous Residence — Domestic Servant — Absence Incidental to Employment—Poor Law Amendment Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 76.

Held (*dub.* Lord Rutherfurd Clark) that a woman, who had been a domestic servant in a family for more than five years, had acquired a settlement by residence in the parish where her master's principal residence was situated, although during that time she had been absent from the parish for three periods of five or six months each, in attendance on the family at places to which they had gone for change of air.

The Poor Law Amendment (Scotland) Act 1845, sec. 76, provides — "And be it enacted that from and after the passing of this Act no person shall be held to have acquired a settlement in any parish or combination by residence therein, unless such person shall have resided for five years continuously in such parish or combination." . . .

This was an action raised by John Welsh, Inspector of Poor for the parish of Kelton, against John Lowden, Inspector of Poor for the parish of Urr, in the Sheriff Court at Kirkcudbright, for decree ordaining the defender to pay to the pursuer the amount expended by the latter on the maintenance of an insane pauper Mary Herries, who had been born in the parish of Urr, and to free and relieve the pursuer of the future expense of her maintenance.

In the Sheriff Court the parties lodged a joint-minute, by which for the purposes of the action it was admitted—"(1) That Mary Herries came to the parish of Kelton as a servant to Mr D. J. Hyslop, draper, Castle-Douglas, in August 1886. She remained in Mr Hyslop's service until Whitsunday 1888. At that term she went to Threave House, also in Kelton, as a servant to Mr Gordon, the proprietor of Threave estate. She remained in Mr Gordon's service until Whitsunday 1893. During the period of her service with Mr Gordon she was at Threave aforesaid from Whitsunday 1888 to the last week in May 1890. She then went to Rockcliff, in the parish of Colvend on the Solway, with Mrs Gordon and a portion of the family. She remained at Rockcliff aforesaid till 20th November 1890, when she returned with the family to Threave. She remained a week at Threave. She then went with a portion of the family to Ryde, in the Isle of Wight, where she remained until 20th or 21st May 1891, when she returned to Threave. She remained at Threave till the first week in June, when she again accompanied a portion of the family to Rockcliff, remaining there till the last week in November 1891. She then returned to Threave, and remained there till Whitsunday 1893. She then left Mr Gordon's service and went as a servant to Carlingwark, also in Kelton, where she remained a few weeks. Her mind having begun to give way, she left Carlingwark and went to live with her sister in Castle-Douglas, and remained with her till her removal on 3rd November 1893 to Dumfries Asylum. (2) During her service with Mr Gordon Mary Herries was upon half-yearly engagements. (3) Mr Gordon, besides owning Threave, was proprietor of a furnished house at Rockcliff aforesaid, and also at Ryde during the period Mary Herries was in his service. (4) When Mary Herries went to Rockcliff and Ryde she took with her her box and clothing, which was all she possessed. She left nothing at Threave."

On 21st May 1894 the Sheriff-Substitute (LYELL) pronounced this interlocutor — "Finds in fact (1) that Mary Herries, the pauper, was born in the parish of Urr; (2) that she has not resided continuously for five years in the parish of Kelton: Finds in law (1) that she has not acquired a settlement by residence in the parish of Kelton in terms of the 76th section of the Poor Law Act 1845 (8 and 9 Vict. c. 83); (2) that the parish of Urr is liable for her relief as a pauper: Therefore decerns against the defender in terms of the conclusions of the petition," &c.

Upon appeal the Sheriff (VARY CAMPBELL) recalled this interlocutor upon 25th June 1894, and found "that the pauper Mary Herries had, at the time when she became chargeable to the pursuer's parish of Kelton, a settlement by residence in that parish," and therefore assoilzied the defender.

"*Note.* — I take all the facts into consideration as these are presented for discussion by the parties in the admissions on record and their joint-minute of admissions. The pauper Mary Herries, though her age is not given, was admittedly forisfamiliated, and capable of acquiring a settlement for herself in the period from August 1886 to November 1893, during which she was connected with Kelton parish. From August 1886 to May 1890 there is no doubt or difficulty as to her continuous residence in that parish, and the same can be said as to the period from November 1891 till she became chargeable to Kelton as a lunatic pauper in November 1893. The difficulty arises as to her absence from Kelton on three occasions between May 1890 and November 1891. If these absences were merely temporary incidents of her service and residence in Kelton parish, then I am bound on the authorities to disregard them. If, on the other hand, she had on any one or all of these absences entirely severed her connection with Kelton parish, and had entered upon a new and perfectly distinct residence in Colvend parish or the Isle of Wight, then I am bound to hold the residence in Kelton parish as broken, and the settlement by residence there not acquired. I do not forget that it is a matter of little or no importance to the woman's welfare whether or

not Urr, as her parish of birth, or Kelton, as her parish of residence, shall be liable for her support. Nor do I forget that in such cases as in that of the sailor, the fisherman, or the commercial traveller, there is usually the element of a man leaving house and family behind him, as plainly marking out his home and headquarters while he may happen to be absent on his work. This unmarried woman's father was dead, and her mother was in a lunatic asylum, and she had therefore no home apart from her master's house. But I think that I am entitled to take into account the nature of her service and employment during the whole period of her admitted engagement with Mr Gordon of Threave in Kelton parish, from Whitsunday 1888 to Whitsunday 1893, in order to judge of the nature and character of her three absences of somewhat less than six months each between Whitsunday 1890 and November 1891. I do not think that it is a fair way to look at the matter to consider, as I am asked to do by Kelton, whether, on the arrival of the complete period of five years from August 1886, the woman could be said to be then five years continuously resident in Kelton, when in fact she was then in Colvend parish. If the question had arisen then, I should still have had to consider whether her absence was separative or incidental, and I am entitled, as I think, to take into account the subsequent return and residence at Threave as indicative of the true nature of her absence. It appears to me, on a review of the whole facts, that this woman was one of the Threave house servants sent temporarily with some of her master's family twice during the summer months to his house in Colvend parish on the Solway Firth, and once during the winter months to his house at Ryde in the Isle of Wight. On each occasion she started from Threave house with her personal belongings and returned thither, and she finally remained there from November 1891 to Whitsunday 1893 without break, actual or constructive. I see no reason to doubt that a domestic servant, accompanying her master or mistress temporarily to seaside quarters, does not thereby break the continuity of her residence, for the purpose of the law of settlement, in his ordinary or principal house. Nor is there enough to give a separative character to such residence in the fact, that her employer takes or sends her with members of his family to furnished houses not hired by him for the season, but which were his own property. Nor should I think it of any importance in this question, that, though her employment lasted in fact during five years, it consisted of a series of half-yearly engagements, at three of which she was told that she must go, and she consented to go away, temporarily from her master's ordinary dwelling-house. Her permanent residence and her permanent employment were, as I find on the facts on evidence, at Threave House, and her absences were merely incidental and temporary. The circumstance, that in the course of her five years' service at Threave House her temporary absences with some of the family at seaside or winter quarters amounted altogether to nearly, but not quite, eighteen months, and were not spread over the whole period of service, but followed in succession from May 1890 to November 1891, does not move me from my conclusion on the whole facts that her true residence was at Threave House, in the parish of Kelton. Among all the well-known authorities the nearest case to this is probably *Dempster* v. *M'Whannel & Deas*, 1879, 7 R. 276."

The pursuer appealed to the Court of Session, and argued—It was admitted that a domestic servant living in her master's house for the statutory period of five years could acquire a settlement in the parish in which her master's house was situated. In this case, however, the continuous residence necessary was broken by the three different periods of absence specified in the joint-minute of admissions, and a servant could not acquire a residence by constructive residence. All the cases in which constructive residence had been held as coming within the meaning of continuous residence had this element in them, that the pauper had had a house in the parish although he was personally absent—*Beeby* v. *Caldwell*, December 9, 1884, 12 R. 257; *Hutchison* v. *Fraser*, February 11, 1858, 20 D. 545; *Crosby* v. *Taylor and Greig*, October 21, 1869, 8 Macph. 39. The case upon which the Sheriff relied in deciding this case—*Dempster* v. *M'Whannel & Deas*, November 26, 1879, 7 R. 276—was not an exception to the rule, because, although the girl was held to be forisfamiliated, as a matter of fact she lived with her father during the time she was absent from Greenock—the parish in which she was found to have acquired a settlement by residence—and he kept a house there. It was of no importance in this case that the pauper during the periods of absence went as a servant with the family, nor that she came back to the parish of Kelton after each period, because her absence was entirely voluntary; she might have refused to go, and it was a mere accident that she returned to that parish.

The defender argued—It was admitted that the settlement of the pauper's master would not have been lost by such absence as was here spoken to, and that a servant could acquire a settlement by continuous residence in her master's house, but it was objected that there was only constructive residence for a period of a year or eighteen months. It was important to observe that that period was not continuous, but was broken into three definite periods of absence by her return to and residence for a time in the parish of Kelton, so that each absence must be viewed by itself, and the question was whether such periods of absence were enough to prevent the pauper acquiring a settlement which she would otherwise have acquired. It was to be observed that the pauper was absent with the family in which she was a servant during these periods, and in the execution of her duty, and, as her master's

principal residence continued to be in Kelton, so did hers. That was the only test to be applied as to what constituted constructive residence—*Wallace* v. *Beattie & Highet*, January 6, 1881, 8 R. 345. There was therefore no such severance of the pauper's connection with the parish of Kelton as took place in the case of *Hutchison* v. *Fraser*, cited *supra*.

At advising—

LORD JUSTICE-CLERK — The question whether a person living in the house of another loses a settlement which he or she has acquired, by being in another place for a portion of the time necessary to acquire the settlement, is one which to a certain extent must always be answered according to the circumstances of each case. If a person leaves his residence and continues away for an indefinite period, the continuity of the residence may be broken, but from the decisions in cases of this character it is plain that the owner or tenant of a house may be absent from his home for a considerable time, and that that absence will not be held as necessarily breaking the continuity of residence necessary to obtain a settlement. The strongest case of the kind, I think, is that of *Dempster* v. *M'Whannel & Deas*, 7 R. 276. In that case a person who was living in a house in Greenock shut it up, leaving the furniture in it, and went to Kilmartin, where he was employed as the foreman on certain works. He remained there with his family for five months, and at the end of that time returned to his house in Greenock. The father died before he had completed five years' residence in Greenock, but his daughter continued to live in Greenock for more than five years from the time when she became forisfamiliated by going out as a servant, and it was held that the father having gone to Kilmartin solely on account of his work, and not having given up his house in Greenock, the continuity of the daughter's residence was not broken by her going with the rest of the family to Kilmartin, and that her residential settlement was in Greenock.

That was the case of a daughter living in her father's house, but when we come to the case of a domestic servant living in her master's house other considerations come in. There is no doubt that, if a servant who is forisfamiliated lives as a domestic servant continuously for five years in the same parish, she will acquire a settlement in that parish. But in many cases the actual residence of the servant will not be continuously in one parish, because the family in which she is a servant may probably go to some place situated in another parish for purposes of health or recreation, and will take her with them. It has been held that the change of residence by the owner of a house in any parish to another parish during the holiday season will not interrupt the continuity of residence.

It is of course a question of degree to be decided according to the special facts of each case. Now, in *Dempster's* case the principle was carried to this length. It was held that, although the girl was forisfamiliated by having gone on domestic service, yet she did not, by living for five months with her father at Kilmartin, lose the settlement she had begun to acquire, as he still retained his house in Greenock. I think that is a very strong case, and it seems to me that the present case is *a fortiori* of it.

The facts in this case are, that some time after the pauper was engaged as a servant at Threave House she went with her mistress and part of the family to Colvend in another parish altogether, and that solely for change of air to the family. Her master did not leave Threave, but kept it as his permanent residence; she was away for nearly five months. She did return to Threave for a week or two, and then as it was thought advisable for the health of some of the family that they should go to a warmer climate for the winter, they went to the Isle of Wight, and she went with them as a servant, and she was again away for nearly six months. She stayed at Threave for some weeks and again went with the family to Colvend, where she again stayed for six months. Now, I think, we must treat all these absences as separate periods of absence of six and five months. There is no doubt they are long periods of absence, but it cannot, in my opinion, be said that these periods of absence make any difference in the principle which was held to rule the case of *Dempster*. In my opinion the master had not given up his residence at Threave by his occasional absences therefrom, and, as the pauper was a servant in his family, I do not think that her absences as attendant on the family broke the continuity of residence necessary for her to obtain a settlement in the parish of Kelton. Her master retained his home at Threave, and the absences, though long, were incidental. The home of the family was at Threave, and the absences were absences from home, and none of them was in any way an abandonment of Threave as the family home.

LORD YOUNG—I am of opinion that the Sheriff's judgment is right. It is, as your Lordship has said, a question of circumstances, because it is a question of fact whether there has or has not been continuous residence by a person in a parish for the specified time. The question in this case is whether there was continuous residence by this pauper in the parish of Kelton, and dealing with it as a matter of fact I am of opinion that there was continuous residence.

Of course, in one sense, if the person leave the parish at all for however short a time—a month, a week, a day—there is a break in the continuity of residence, but periods like these at anyrate are not regarded as interruptions.

The interruptions here are of longer duration. The period necessary for acquiring a settlement is residence in a parish for five years; here the pauper had been in the parish for seven years, and during these seven years the continuity of resi-

dence had been interrupted by three periods of absence. She had been absent with the family for two summer terms at Colvend in a different parish, and in the same way she had been absent with the family on one occasion during the winter months at Ryde in the Isle of Wight. The interruptions were of considerable duration, of five or six months at a time. Now, it would not, I consider, be maintainable on the decisions to say that these periods of absence would have been considered as interruptions of the continuity of residence of the master of the house. He had his home in the parish of Kelton, and the continuity of his residence was not interrupted by these absences.

The question then arises, Are they interruptions in the case of a servant in the family of the master of the house? I am disposed to think that it is part of the duty of the servant to go with the family to such places as these, to a seaside place for the summer and to a warm climate for the winter. I do not suppose that now-a-days at anyrate it is ever made matter of special contract that a servant shall go with the family to such resorts. I am disposed to think that there was a contract, that this woman should serve the family wherever they went, within some such limits as we have an example of here. At least she went as a servant with the family to these places upon a contract expressed or implied, and I am not disposed to think that these interruptions are of more importance in her case in breaking the continuity of her residence within the parish of Kelton, than they would have been in the case of one of her employer's family. I think that the continuity of residence by this pauper within the parish of Kelton was not broken by these interruptions, although I am alive to this, that there may be cases, where the absences are so long and the circumstances are such, that the absence of a servant with a family may interrupt the continuity of residence in a parish necessary to obtain a settlement. But, dealing with this question, as it ought to be dealt with, as a matter of fact, I am of opinion that the Sheriff's judgment is right and ought to be affirmed.

LORD RUTHERFURD CLARK—I confess I have some difficulty in this case, because the absences of the pauper from the parish of Kelton were of so long a duration. It is a very strong thing to say that in spite of these absences this woman had a continuous residence in Kelton, but probably your Lordships are following out the tendency of the previous decisions.

LORD TRAYNER—I think that the Sheriff is right. The pauper resided in the parish of Kelton for more than five years, and her absences from the parish during that period were in my opinion clearly incidental to her residence, and not of a character which, having regard to previous decisions of this Court, broke the continuity of her residence.

The Court pronounced this interlocutor:—

"Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore dismiss the appeal, of new assoilzie the defender from conclusions of the action, and decern."

Counsel for Appellant—C. S. Dickson—A. S. D. Thomson. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent — Jameson — Salvesen. Agent — Thomas M'Naught, S.S.C.

Thursday, October 25.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GIRDWOOD *v.* THE STANDING JOINT-COMMITTEE OF MIDLOTHIAN.

Reparation — Wrongous Acts of Police — Whether Standing Joint-Committee of County Responsible—County Police Act 1857 (20 *and* 21 *Vict. cap.* 72)—*Local Government Act* 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 18.

Held that the standing joint-committee of a county is not responsible for wrongous acts committed by police constables of the county when on duty.

This was an action of damages at the instance of Mrs Jessie Girdwood against the Standing Joint-Committee of the county of Midlothian, appointed in terms of the Local Government (Scotland) Act 1889, and the individual members of the Committee.

The pursuer averred that the Committee "employ and pay and have the administration and control of the police of the said county." She sought damages on the ground that upon 29th November 1893 two police constables "in the employment of the defenders" upon a false charge had taken her for several miles round the country for the alleged purpose of identification, and that she had suffered greatly in her character, reputation, feelings, and health. She averred that the police constables "in their reckless and oppressive conduct aforesaid acted maliciously and without probable or any cause."

The defenders averred—"The terms of the Police Act 1857 (20 and 21 Vict. cap. 72) are referred to. A police committee under that Act was not, and a standing joint-committee is not, liable for the actings of a member of the police force in the course of his employment. The committee has no power to raise money by rate or loan. It is not a body corporate, but simply a statutory board of managers, whose very limited functions are mainly advisary. The disposition and government of the members of the police force of the county are in the hands of the chief constable, subject to such lawful orders as he may receive from the sheriff, or from the justices of the peace in General or Quarter Sessions assembled, and to the rules estab-