Friday, January 14.

FIRST DIVISION.

[Sheriff Court at Oban.

MACPHERSON *v.* PARISH COUNCIL OF KILMORE AND KILBRIDE.

Poor—Relief—"Able-Bodied"—Application for Relief in respect of Infant Child.

A widower in middle life who managed to support himself and his three elder children applied for relief on the ground that by reason of physical infirmity he was unable to support his youngest child, then about twelve months old, and who since his birth had been maintained by the Parish Council. The applicant's usual wages were between £2 and £2, 5s. a-week, but owing to ill-health he was from time to time unable to carry on his ordinary avocations. *Held* that he was able-bodied within the meaning of the Poor Law, and not entitled to relief.

Knox v. *Hewat*, (1870) 8 Macph. 397, 7 S.L.R. 230, *commented on* and *distinguished.*

(*Poor*) Duncan Macpherson, porter, Oban, applied in the Sheriff Court at Oban for an order under section 73 of the Poor Law Act 1845 (8 and 9 Vict. cap. 83) against the Inspector of Poor of the Parish of Kilmore and Kilbride for relief for his infant child.

Answers were lodged by the Parish Council, who pleaded, *inter alia*—"1. The applicant being an able-bodied man able to support himself and his children is not entitled to relief. 3. The interim relief allowed ought to be discontinued."

The *facts* are given in the note (*infra*) of the Sheriff-Substitute (WALLACE), who on 29th October 1919 pronounced this interlocutor—"Finds in fact that the applicant Duncan Macpherson supports himself and his three elder children: Finds in law that in the sense of the Poor Law he is an able-bodied man, and that being able-bodied he is not entitled to relief in respect of his infant child, presently an inmate in the poor-house of the parish of Kilmore and Kilbride: Therefore sustains the first and third pleas-in-law stated for the Parish Council of Kilmore and Kilbride: Dismisses the application, and decerns," &c.

Note.—"This is in one sense a peculiarly hard case, and one on which one's sympathy is enlisted on behalf of the applicant. The circumstances are briefly these:—Duncan Macpherson, the applicant, is a labourer, fifty-one years of age, and a man of respectable antecedents. He was born in Glasgow, and came to Oban about fifteen months ago. He was married about eleven years ago and has four children, aged respectively nine, eight, five, and one year. His wife died very shortly after the birth of the youngest child, and as there was no woman in the house it became necessary for the Parish Council to board the infant and to look after it. Now that the child has attained the age of a year the Parish Council object to maintain it any longer, and requested the applicant to remove it to his own home. This he says he would be perfectly willing to do if it were in his power, looking to the interests of the child itself. But as he is at work during the day, and as his means are not sufficient to provide proper sustenance for a child of such tender years, he has presented this application to have it declared that the Parish Council should be held bound to maintain the child for some time longer. The case is further complicated by the applicant's contention that his health is such as to make him a proper subject of parochial relief so far as the maintenance of this infant child is concerned. In other words, he contends that although his bodily condition is not such as to render him himself a proper subject of parochial relief, the child's age and his disability to maintain and look after it are such as to make it necessary in the child's interests that the Parish Council should relieve him of a burden which through no fault of his own his shoulders are not broad enough to bear. The child itself, it will be noticed, is not suggested as being a proper subject of parochial relief, since it could not be so unless deserted by its father and left to the tender mercies of the world or the charitably disposed. The father himself is the applicant for parish relief, but the relief desired is not in his own but in the child's interest. The answer which the Parish Council make is that in the sense of the Poor Law the applicant is an able-bodied man, and that if that be so they have neither the duty nor even the right to use public funds in the maintenance of a child which is not itself entitled to relief (in respect of being deserted by its father) and which ought to be supported by him. There is no definition in the Poor Law Act either of the word 'pauper' or of the word 'poor,' but a long series of decisions have determined that a man who is 'able-bodied' is not entitled to relief; and 'A man may be able-bodied' (in the words of Lord Justice-Clerk Inglis in *Jack*, 1860, 23 D. 173) 'though not so strong as some other men, the expression being a comparative term. What the statute means by an able-bodied man is a man not labouring under any disability (bodily or mental) to work so as to earn his subsistence.' And the case of *Thomson* (1849, 2 D. 719, *affd.* (H.L.) 1 Macq. 155) decided that an able-bodied man being bound to support his children is not entitled to relief for his pupil children even although being out of employment he is unable to support them. The law presumes, as Lord Deas put it in *Hay* (1887, 19 D. 339), that every able-bodied father is capable of maintaining his family, however different the fact may be. Now upon the proof it is, I think, clear that the applicant here is in the sense of the Poor Law able-bodied. He has hitherto maintained himself and his three elder children, if not without difficulty, at anyrate without invoking parochial aid. No doubt he is not, in Lord Inglis' words, as strong as some other men, nor even so strong as the average man. He appears to suffer from some gastric trouble and some functional irregularity of his heart, which at

intervals cause him to suspend his activities for some days or even weeks at a time, and no doubt his wages are small. But while, as I have said, his case is one which calls for sympathy, I must perforce judge it according to the law, and in that view I have no difficulty whatever in holding that the applicant is able-bodied (in the Poor Law sense), and as such not entitled to relief from the parochial authorities.

"The case of *Knox* v. *Hewat* (8 Macph. 397) has, I admit, occasioned me some difficulty. In that case a man was burdened with a daughter seventeen years of age who was disabled from earning her livelihood by permanent disease, and her father while able to earn wages in good weather was entirely unable to obtain for his daughter the support which she required. He was held entitled to relief as not being able-bodied, and although he could not have claimed relief for himself, yet as the daughter could not be said to be the child of an able-bodied man in the legal sense of these words, he was held entitled to relief in respect of his daughter. But the observations of the learned Judges in *Parish Council of Old Machar* (1912 S.C. 26), and especially those of Lord Salvesen in commenting upon and distinguishing *Knox's* case, have removed the doubts I entertained. Lord Salvesen in an illuminating sentence says that 'It would be dangerous to hold that in determining whether a man is able-bodied within the meaning of the Poor Law regard should be had to anything but the physical (in which he includes mental) condition of the man himself, and it seems illogical to hold that a person supporting himself by work and paying rates, and so not entitled to parochial relief in his own right, must be treated as a pauper because of the extent of his family burdens."

The applicant appealed, and argued—It was proved that the applicant suffered from physical disability, and that he was unfit for continuous work. That being so, he was not able-bodied in the sense of the Poor Law. The following authorities were referred to:—*M'William* v. *Adams*, 1852, 1 Macq. 120; *Petrie* v. *Meek*, 1859, 21 D. 614; *Jack* v. *Thom*, 1860, 23 D. 173; *Knox* v. *Hewat*, January 12, 1870, 8 Macph. 397, 7 S.L.R. 230; *Beattie* v. *M'Culloch*, June 12, 1880, 7 R. 907, 17 S.L.R. 645; *Milne* v. *Ross*, December 11, 1883, 11 R. 273, 21 S.L.R. 207.

Argued for the respondents—The applicant being able to work so as to earn his subsistence was able-bodied in the sense of the Poor Law, and was not entitled to relief either for himself or his children—*Old Machar Parish Council* v. *Aberdeen Parish Council*, 1912 S.C. 26, 49 S.L.R. 20.

At advising—

LORD PRESIDENT—This is a case in which the appellant has taken the appropriate procedure, under section 73 of the Poor Law Act 1845, for enforcing the right of a poor person to public assistance. His circumstances are that he has recently lost his wife and is left with four children, of whom one is of very tender age, being at present about twelve months old. He is a man in middle life. He has worked for the most part in quarries, and latterly as what may be described as a porter, both on the pier at Oban and in connection with the transit of coal and fish. His ordinary wage is between £2 and £2, 5s a-week. He has for some considerable time past suffered from gastric trouble, which, as such troubles often do, affects at times his heart. This form of indisposition when it recurs from time to time causes him a good deal of pain, and I think as the result of the proof we may take it that occasionally it renders him unable to carry on continuously his ordinary avocations.

Now the question upon which his right to demand public assistance from the local authority turns is the question whether he is or is not an able-bodied man—a mixed question of fact and law.

The question of what the expression "able-bodied man" means in relation to the Poor Law has been frequently under consideration. The meaning given to it, as I read the authorities, with particular reference to what was said by Lord Justice-Clerk Inglis both in *Petrie* v. *Meek* ((1859) 21 D. 614) and in *Jack* v. *Thom* ((1860) 23 D. 173) is that a man is able-bodied for the purposes of the Poor Law provided he is a man not labouring under any disability from working so as to earn wages. It is true that within that definition there are many degrees. There are some men whose capacity for work, physical fitness, and earning power far exceed the same qualities in the case of others. The appellant does not occupy a high place in the scale. But unless and until a stage is reached at which it can be reasonably affirmed that disability results in making it impossible for a man so to work as to earn his subsistence, he remains "able-bodied." A man's condition as being "able-bodied" or not does not depend on the weight of the natural claims which his family or children may happen to make upon him. The conditions on which the right to public assistance can be enforced by applicants for relief are severe—necessarily so I am afraid. And it must be remembered that in *M'William* ((1852) 1 Macq. 120), which was quoted to us, and the later case of *Lindsay* ((1852) 1 Macq. 155), and again in *Hay* ((1859) 19 D. 332), it has been laid down that the fact that a man has children who impose a heavy burden upon his capacity to provide for them is not really material to the question of whether or not he is able-bodied. With regard to the children of an able-bodied man, it was also pointed out in those cases that although their circumstances may make them proper objects of charitable beneficence, they are not destitute within the meaning of the Poor Law so long as they have an able-bodied father whose duty it is to help them.

I agree with the Sheriff-Substitute in thinking that it is impossible in this case to say that the appellant is other than able-bodied. No doubt his case is one which must appeal to the natural sympathies of everybody before whom the circumstances are laid; but that can have no relevance to the propriety of conceding a demand made as a matter of right under a public statute.

I wish to add that I agree with the remarks which were made by Lord Dundas in the recent case of *Old Machar Parish Council* v. *Aberdeen Parish Council* (1912 S.C. 26, at p. 31) to the effect, as his Lordship put it, that some at least of the dicta in *Knox* v. *Hewat* ((1870) 8 Macph. 397) must be regarded as of doubtful accuracy. The case itself was very special, and with all respect for the eminent lawyers who took part in its decision I do not think that the judgment arrived at in it can be regarded as one having any general application.

LORD MACKENZIE—I concur. The Sheriff-Substitute in the opening sentence of his note says this—"In one sense this is a peculiarly hard case, and one in which one's sympathy is enlisted on behalf of the applicant." I entirely agree with that statement, but we are here to administer the Poor Law as it at present exists. And in my opinion we have no option but to apply the law as it was laid down by the Lord Justice-Clerk in the cases of *Petrie* v. *Meek* ((1859), 21 D. 614) and *Jack* v. *Thom* (1860), 23 D. 173. In *Petrie* v. *Meek* the Lord Justice-Clerk said that it had been "conclusively and directly determined (1) that an able-bodied man has under no circumstances whatever a legal right to parochial relief, either for himself or his family, and (2) that by an able-bodied man is meant one who suffers under no personal inability, bodily or mental, to work." In *Jack* v. *Thom* his Lordship added to that definition of able-bodied the words, "so as to earn his subsistence."

Upon the facts in this case I am unable to take any other view than that the applicant is an able-bodied man. Accordingly whatever view may be taken of the case of *Knox* v. *Hewat* ((1870), 8 Macph. 397), which was cited and urged upon us, it is an entirely different case from the present, because there is an express finding there in the interlocutor—"Find that the father of the said Mary Johnston was not an able-bodied man." Accordingly that case is quite a different case from the present, because the Court here are unable to make any such finding.

LORD SKERRINGTON—I concur.

LORD CULLEN did not hear the case.

The Court refused the appeal.

Counsel for the Appellant—Keith. Agent—G. S. G. Strachan, W.S.

Counsel for Respondents—Macphail, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Saturday, January 22.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

DAVIDSON *v.* DAVIDSON.

Husband and Wife—Marriage—Constitution—Verba de præsenti—Proof—Subsequent Conduct of Parties.

A declarator of marriage was brought by a woman after the death of her alleged husband against his representatives, founded upon an alleged interchange of matrimonial consent before witnesses twenty years prior to the raising of the action. Of those present at the ceremony only two were brought to corroborate the pursuer's story, three others, viz., her father, mother, and brother were dead, and a surviving brother was not called. The family Bible in which the writing and signatures were said to have been recorded was not produced and no satisfactory account was given of why it was not preserved. From the evidence it appeared that prior to the ceremony the pursuer had lived with her alleged husband as his mistress, that he had expressed his intention to marry her when she was free, that after the ceremony they did not take up house together, that she did not take his name or claim to be recognised as his wife, that from time to time he made visits to her house and made payments to her, and that during his last illness he did not send for her or admit that she had any claim upon him. Neither in his last will nor in his previous one did he make any mention of her, and the only letter which was produced was not consistent either in the mode of address or in the style of signature with her position as a wife.

The Court *refused* declarator, holding that although the interchange of mutual consents had been proved, the ceremony, in the absence of evidence which might have fortified it, had been so discredited by the subsequent conduct of the parties as to negative the existence of deliberate and serious matrimonial intention, and that accordingly the pursuer had failed to prove her case.

(*Poor*) Mrs Isabella Gauld or Davidson, residing at 101 Hilltown, Dundee, *pursuer*, brought an action of declarator of her marriage with the late John Davidson, wine and spirit merchant, Dundee, against George Davidson and others, the trustees, executors, and next-of-kin of the said John Davidson, *defenders*.

The defenders pleaded—"The pursuer's averments, so far as material, being unfounded in fact, the decree of declarator sought should be refused and the defenders assoilzied."

The *facts* are narrated in the opinion, *infra*, of the Lord Ordinary (ORMIDALE), who on 1st April 1920 after a proof assoilzied the defenders.