issues were adjusted on the 5th December 1865, and the trial took place on the 28th of the same month. It occupied only one day. Six witnesses were examined for the pursuer, eight for the defender, and my notes of their evidence fill only 17 pages, These facts, I think, require no comment."

WEMYSS *v.* WEMYSS.

Husband and Wife—Divorce—Adultery—Lenocinium —Condonation. Circumstances in which defences of *lenocinium* and condonation in an action of divorce held (aff. Lord Kinloch) not proved. Observations (per Lord Justice-Clerk) as to these defences.

Counsel for Pursuer—Mr Patton and Mr Dundas Grant. Agent—Mr James Barton, S.S.C.

Counsel for Defender—Mr Mackenzie and Mr Rhind. Agents—Messrs D. M. & J. Latta, S.S.C.

This is an action of divorce on the ground of adultery. Two acts of adultery were admitted by the wife; but she pleads as an answer to the action (1) *lenocinium*, (2) condonation. The fact on which these pleas were maintained, as the facts were held established by the Court, was that the husband had taken his wife up to a brothel, and had there slept with her. The explanation of that circumstance offered by the husband was that he had taken the wife to the house for the purpose of verifying suspicions which he entertained as to her conduct. The Lord Ordinary repelled the defences, and pronounced decree of divorce. To-day the Court adhered.

The LORD JUSTICE-CLERK, at advising, said—This is a peculiarly disagreeable case, both in its general nature and in the details of the evidence. But we are saved from the consideration of one part of it by the concession on the part of the defender that two acts of adultery are established against her. Her defence is confined to the special pleas of *lenocinium* and condonation. As regards the first plea, it is of great importance that we should understand exactly what the plea means, because it appears to me to have been the subject of a good deal of misconstruction. In the first place, I don't see that any light is to be derived from the cases which were cited from the law of England, where the plea of *connivance* has been stated and sustained in the consistorial courts of that country, in answer to suits of separation. That plea in the consistorial law of England is founded on the principle *volenti non fit injuria*, but the law of Scotland as to *lenocinium* is not founded upon that. I do not say that they don't resemble one another, and that practically they may attain the same end; but it is always unsafe to accept analogies of that kind. But, further, it is necessary to notice that it has been observed that the law as to *lenocinium* has changed, that under the old law it was necessary to establish that the husband had reaped gain through the adultery of his wife. That is a mistake. There is no trace of that in the old law. No doubt it is quite true that some writers mention that the argument had been maintained that *lenocinium* only holds when the husband has made *quaestum de corpore uxoris*. But they only mention it to condemn it. His Lordship then quoted from Sir George Mackenzie, remarking that the passage must be read by light of the fact that adultery in the old law was a crime, and that *lenocinium* was an answer to that. The significance of the answer was that the husband who prosecuted the wife for adultery was himself art and part in the crime. According to Sir George Mackenzie, *lenocinium* was punishable as a crime, and it was punishable as such in the Roman law under the *lex Julia*. His Lordship proceeded—That I conceive to be the law of Scotland now, and there never has been any variance. Bankton has been supposed to state an opinion in support of the proposition that the husband must make gain out of the adultery of the wife to constitute *lenocinium*. (His Lordship quoted from Bankton to show that he held the same opinion as Sir George Mackenzie.) The case of Lander in 1693 expresses the same opinion. Mackintosh *v.* Mackintosh is another authority to the same effect. These are all the authorities, and they are clear that it is not necessary to constitute the crime of *lenocinium*, or to ground the plea, that the husband should make gain from the adultery. It is not necessary to define *lenocinium*. For practical purposes in cases of this kind it is safer to keep to the general definition. But there is no doubt that when a husband is accessory to the commission of adultery, or participant in it, or the occasion of it directly by his conduct, he is obnoxious to the plea of *lenocinium*. His Lordship proceeded to apply these principles to the evidence in the case, holding that the mere fact of the husband having taken his wife to a brothel and slept with her there, did not in presence of the explanation that he had taken her there for the purpose of verifying suspicions which he himself had in regard to her conduct, set up the plea. As to condonation, his Lordship said—It is necessary for a defender in an action of divorce setting up such a plea to prove (1) that the act of condonation was subsequent to the adultery of the wife, and (2) that the act of condonation was done in the knowledge or belief that the adultery had been committed. The evidence instructs neither of these propositions, and I am therefore of opinion that both the defences fail.

Friday, Feb. 9.

BEATTIE *v.* WOOD.

Poor — Relief — Recourse — Statutory Notice — Mora. Held (1) (alt. Lord Jerviswoode) That under section 71 of the Poor Law Act it is necessary to give a statutory notice to the parish of settlement, in order to preserve recourse against it, in the case of a pauper becoming a second time an object of parochial relief, after having ceased for a considerable time to be so; and (2) (aff. Lord Jerviswoode) That the lapse of eleven years is not sufficient of itself to found a plea of *mora*.

Counsel for Pursuer—Mr Fraser and Mr Burnet. Agent—Mr John Thomson, S.S.C.

Counsel for Defender—The Solicitor-General and Mr Millar. Agents—Messrs Patrick, M'Ewen, & Carment, W.S.

This is an action by the Barony parish of Glasgow against the parish of Dailly, for repayment of advances to the wife and children of Peter Carlyle, whose settlement was in the parish of Dailly, made betwixt 1853 and 1864, and for relief from the expense of supporting them in time coming. The action was defended at first on the grounds that Peter Carlyle was not the husband and father of the paupers, and that even though he were, he had a residential settlement in the parish of Girvan. On revisal these pleas were given up and the settlement in Dailly was admitted; but it was urged that during the period from 1853 to 1864 the paupers had on several occasions ceased for some time (the longest period being twenty months) to require parochial relief, and that a new notice, in terms of section 71 of the Poor-Law Act ought to have been given to Dailly on each occasion of re-chargeability; and that this not having been done, Barony could not recover. Statutory notice was given on 24th August 1853, from which date it was sought to recover advances. The defender also pleaded that the claim was excluded by reason of *mora*.

Lord Jerviswoode repelled these defences, and decerned for payment and relief as concluded for. The pursuer had been called on to pay for the support of paupers which rightfully the defender ought all along to have borne, and must have borne, had not a ground of defence been set up and maintained which is now admitted to have no sound foundation. Dailly reclaimed, and the Court to-day altered the Lord Ordinary's interlocutor, and sustained the

defence founded upon the want of a statutory notice, but *quoad ultra* adhered.

The LORD JUSTICE-CLERK said—The aggregate sum sued for in this case by the pursuer amounts to £137, 15s. 7d. The defender pleads want of notice and *mora*. The account begins on 26th February 1853, and ends on 29th January 1864, thus extending over a period of nearly eleven years. No statutory notice was given to the defender until 24th August 1853, and the portion of the account before that date is not insisted in. The paupers continued to receive aliment from August 1853 till 23d February 1854, and if there be no good defence on the ground of *mora*, Barony is entitled to recover the advances betwixt these dates. But from February 1854 to November 1855 there is nothing charged in the account. This interval of rather more than twenty months is an important element in this question. It is averred by the defender that during this time the paupers had ceased to be proper objects of parochial relief, and that is admitted by the pursuer. In that state of the facts the question arises, whether, in February 1855, it was necessary to give another notice, under section 71 of the Poor-Law Act, in order to preserve recourse against Dailly. This is a very important question, and it has been argued to us both upon the construction of section 71, and also on the ground of expediency. I am not inclined to give very much weight to the argument *ab inconvenienti*, but I am disposed to give a fair and reasonable construction to the statute, having regard to the subject with which it is dealing. By the section, notice is required to be given by the relieving parish "of such poor person having become chargeable." The question is whether these poor persons, having been from February 1853 to February 1854 in receipt of parochial relief, having in February 1854 ceased to be objects of parochial relief, and having again in November 1855 become chargeable, this is within the meaning of the section, the occurrence a "poor person becoming chargeable." It was represented to us that to hold that it was would render a new notice necessary after every short period of cessation from receiving parochial relief. I should be very sorry to construe the section in that way. I am aware that there are *often* breaks in the continuity of paupers receiving relief without his ever getting effectually restored to the position of a person of industry, capable of acquiring an industrial settlement. It would not do to say that after such a break the pauper had *again* become chargeable. But the other extreme was also put to us. Suppose a person, after being in receipt of relief, becomes self-supporting for twenty years, and then again falls into pauperism. The pursuer's argument was, that a notice once given was a standing notice for the poor person's life. I can just as little adopt that construction of the statute. We were told that, if we were to take any middle course, the matter would always depend on the discretion of the Court, and that uncertainty would thus be introduced in the administration of the poor law. I am not in the least afraid of that. I think we may fix on a construction which will be perfectly intelligible. We cannot foresee every case which may occur, but we may lay down a general rule which will apply in most cases. Wherever it can be fairly and distinctly alleged that for a considerable period of time a person has acquired an industrial character, if that person becomes an object of parochial relief, he is a person "becoming chargeable" in the sense of section 71. I don't think such a rule will entail the slightest hardship; and I am therefore of opinion that in this case, after the period of twenty months, the chargeability of the paupers was a new chargeability, requiring a notice in order to preserve recourse against the parish of settlement. This view defeats the pursuer's claim from 1855 to 1860, when a new notice was given. As regards the aliment since 1860, and the aliment before 1855, there remains the defence of *mora*. We are told that in 1854 Dailly repudiated liability. I am not much moved by that. I don't see how the plea of *mora* could arise in any other case. If there is an admission of liability, the relieving parish becomes the agent of the parish of settlement. But in the circumstances of this case, I think there is nothing on which to found the plea of *mora*. There is nothing but the mere lapse of time, and I know of no case in which the lapse of time which occurred here has of itself been held sufficient.

The pursuer was found entitled to expenses up to the date of closing the record, and the defender to expenses since that date to the extent of three-fourths.

KIERNAN *v.* CAMPBELL'S TUTORS.

Entail—Clause—Construction. Terms of a clause in a deed of entail which held (aff. Lord Barcaple) not to confer a right on the heir in possession to burden succeeding heirs with the payment of an annuity to his widow out of the rents of the estate accruing after her death.

Counsel for Pursuer—Mr Gordon and Mr J. T. Anderson. Agents—Messrs Baxter & Mitchell, W.S.

Counsel for Defender—Mr Dundas and Mr Macpherson. Agents—Messrs Macnaughton & Finlay, W.S.

This action of declarator and payment has been instituted by the pursuer, Mr Kiernan, as executor nominate of the now deceased Mrs Mary Shearer Hemsworth or Campbell, widow of the late Lieutenant-Colonel John Campbell, some time heir in possession of the entailed estate of Blackhall, in the county of Kincardine, and administrator of her personal estate, against the tutors of Alexander Douglas Campbell, the heir of entail now in possession of that estate, in order to have it found and declared that the arrears of annuity payable to Mrs Campbell for the period from 16th April 1856 to 9th May 1860, during which she survived her husband, amounting to £445, 0s. 10d., due under a bond of annuity, dated 3d May 1832, granted by him in her favour, and periodical interest thereon, form a charge on the rents of the said estate, due and to become due; and further, that the said arrears and interest form a just debt of, and may be recovered from, the heir of entail in possession, to the extent of the rents which have been, or may yet be, drawn by him from the said estate. The action further contains a petitory conclusion for payment of such arrears and interest against the defenders.

The action is resisted by the defenders on the ground that no liability attaches to the present heir of entail in possession of the estate, or to his estate, for the arrears of annuity thus claimed; and that the security conferred by the bond of annuity was limited to the rents of the estate which fell due between the death of Colonel Campbell, the granter thereof, and the death of his widow, the annuitant, or, at all events, did not extend to rents which fell due after the death of the annuitant, or after the death of the heir in possession of the estate at the terms when the annuity became payable.

The pursuer, on the other hand, maintains that in virtue of the annuity granted and secured to Mrs Campbell under the power conferred in the deed of entail, he, as her representative, is entitled to payment of that annuity, in so far as the same is due and unpaid, from the heir at present in possession of the estate, or at least to the extent to which he has drawn the rents of the estate; and this on the ground that the annuity is a good charge on the rents of the estate, by whomsoever the estate may be possessed, and the rents may be levied and uplifted; and that the heir in possession, represented by the defenders, having intromitted with and uplifted rents to an amount greater than the sum claimed by the pursuer, they are liable to make payment of the arrears of annuity sued for.

The Lord Ordinary (Barcaple) assoilzied the defenders, and to-day the Court adhered. The following is the opinion of Lord Cowan, who delivered the leading judgment of the Court.