

clusion that, though the defender was perfectly justified in causing the holes and sits, yet "in not filling up or securing the sits or holes his operations were not usual, reasonable, or proper." There is no doubt that if a duty was cast on the defender to fill up or secure these holes or sits, he has neglected it.

My Lords, I do not stop to inquire how far the practice of miners could cast an obligation on the owner of the upper mine, which would not otherwise exist; but it is unnecessary to determine anything on this point, as I think your Lordships will agree with me in thinking that the evidence goes no further than to shew that generally the owner of the surface made it matter of bargain, for the benefit of the surface, that when mines are worked out the surface should be restored. Where such a stipulation exists the owner or occupier of the surface has a right to complain if it be not restored, but that gives no claim to anyone else. And in the present case the owner of the surface preferred that it should remain unrestored.

My Lords, for these reasons I am of opinion that the judgment complained of should be affirmed, and that the appeal should be dismissed with costs.

LORD CHANCELLOR—My Lords, at the close of the argument of the appellants in this case, your Lordships intimated that you would consider whether you would desire to hear the respondents. The result of that consideration has been that there is no doubt in the mind of any of your Lordships as to the course which should be taken with regard to this appeal. I have had the advantage as in the former case of considering the observations which have just been made by my noble and learned friend, and I have only to say that I entirely agree in the course which he has proposed.

LORD PENZANCE—My Lords, I will only say that I entirely concur with the opinions which have been expressed.

LORD GORDON—My Lords, I also entirely concur.

Interlocutor complained of affirmed, and appeal dismissed, with costs.

COURT OF SESSION.

Wednesday, January 10.

SECOND DIVISION.

[Sheriff-Substitute of Aberdeen
and Kincardine.

CRUICKSHANK *v.* GREIG.

Poor—Residential Settlement—Statute 8 & 9 Vict.
c. 83, sec. 76.

Circumstances in which held that habitual working on half-yearly engagements in neighbouring parishes, and sleeping at the places of work, did not destroy a residential settlement previously acquired—a house and

family being maintained by the pauper in the parish of residential settlement, and these being periodically visited by the pauper.

This was an appeal from the Sheriff Court of Aberdeenshire and Kincardineshire in an action at the instance of Greig, inspector of poor of the parish of St Fergus, against Cruickshank, inspector of poor of the parish of Lonmay, for the sum of £3, 4s. sterling, the amount of alimony advanced by St Fergus to a pauper named Gordon Webster, whose birth settlement was in Lonmay, between 12th April 1875, when notice of chargeability was sent to Lonmay, and 18th September 1875. The summons contained the usual conclusion with respect to future advances. The pauper was 56 years old. He was disabled by disease of the limbs. His second wife, and two children aged respectively 10 years and 16 months, were dependent on him. It was not disputed that from 1842 to 1866 Webster had resided in St Fergus, where he supported a family by his first wife, who died in 1860. His sister then took charge of house and family—the youngest child being then 5 years old—until 1873, when Webster married again. His second wife then took charge down to the date of chargeability, when the household consisted of an illegitimate child and one child of the second marriage. It was not disputed that in 1866 Webster had a residential settlement in St Fergus, but the pursuer averred that he had lost this, because from Whitsunday 1866 to 12th April 1875 he had not resided in St Fergus continuously for a year, or at least had not resided there continuously for a year during the 5 years immediately subsequent to Whitsunday 1866, and had not since then resided 5 years in any parish. The pursuer further averred, and it appeared from the proof led in the Sheriff Court, that during the period from 1866 to 1875 (with the exception of three periods of six months each, in 1867–8, 1871, and 1873–4, which were spent at farms at St Fergus) Webster had been working as a farm-servant on six-monthly engagements at farms in various parishes adjacent to St Fergus, none of them more than 5 miles distant from the house containing his children, and latterly also his wife, to whom he continued to give the necessary support. The children of the first marriage went out to service as they grew up.

The defender explained that during the whole period in question (except during the first period of six months mentioned above, when, being employed in St Fergus as a day-labourer, he lived with his children) Webster continued to pay weekly or fortnightly visits to his household, spending there Saturday night, or Saturday and Sunday night. In these circumstances the defender averred that Webster had not been 4 years continuously out of St Fergus, and had therefore not lost his residential settlement there. A proof was allowed, in the course of which the pauper stated—"With the various masters named I made no stipulation about getting home to see my wife, as I knew it was a customary thing for me to get home at certain times. . . . I never required to go back to my house. I kept the house just to accommodate my family, but in all other respects I resided in the parishes where I was engaged. There were no houses for married men on any of the farms. Had there been houses, I would have preferred to have lived there, provided I could have made a suitable arrangement with the far-

mer." Much of the proof related to the question whether farm-servants in the position of the pauper had a customary right to get home for the Sunday. This appeared to be the invariable practice for both single and married servants.

The Sheriff-Substitute (DOVE WILSON), on 14th July 1876, found that during the period subsequent to Whitsunday 1866 the pauper did not reside in St Fergus continuously for one year at least, and found as matter of law that the pauper could not be held to have retained his settlement in St Fergus. He added the following note:—

"Note.—The question at issue in this case is, Whether the pauper resided continuously for at least a year in the parish of St Fergus after Whitsunday 1866? This is a simple question of fact, and when it has been determined, the law applicable to the case follows at once from the 76th section of the Poor Law Act.

"It is conceded that the year's continuous residence which is requisite cannot be made up without counting one or more periods of six months, during which the pauper's residence was only what has been called 'constructive.'

"The pauper's usual mode of life was this:— He had a house which was occupied at first by his first wife and family. After that his sister and his family occupied it; and then his sister was succeeded in its occupation by a second wife. This house for many years back was taken in St Fergus. Sometimes the pauper lived at home, working as a labourer; but much more frequently the pauper was hired out for periods of six months as a farm-servant. During these engagements he lived at the farm, visiting his home from the Saturday night to the Sunday night or Monday morning as frequently as he could. This seems to have been always once a fortnight, and sometimes two weeks out of every three. He did not follow this unenviable style of life because of any preference for a house in St Fergus, but simply from hard necessity, the farms on which he worked having no accommodation for his family. Prior to 1866 he had employment in St Fergus, and thus the periods he lived at the farm and those he lived at his house taken together made continuous residence. After 1866 it happened that the farms were not in St Fergus, and in order to make up 'continuous residence' in that parish it is contended that during the times he lived at the farms in other parishes he must be held to have 'constructively resided' at his house.

"I do not think there is any authority in the decisions for carrying the doctrine of constructive residence to this extent. In *Greig v. Miles* (5 M. 1132) and *Moncrieff v. Ross* (7 M. 330) it was held that in order to continuous residence the continuous bodily presence of the pauper was not always to be required; but these cases were special, and, according to the subsequent case of *Jackson v. Robertson* (1 R. 342), are not to be taken as laying down principles applicable in different circumstances. There is no case which goes so far as to say that a person who is continuously or almost continuously at one place is to be held to have continuously resided at another because he had a house and family there whom he occasionally visited.

"Under the Poor Law Act there are just two words whose applicability has got to be ascertained. In the first place, Was the stay of the pauper at any place or places continuous? and if it was, was

the stay, in the second place, of such a character that it can appropriately be held to be residence? I think that the pauper was continuously at the farms and not at his house. He went to the farms for periods of six months at a time, and the intervals he was away from them were so few and short compared with the times during which he stayed at them, as to make no breach of continuity. On the other hand, it is plain that it would be an abuse of language to say that he was continuously at his house. The view is possible that he was not continuously either at the farms or at his house, but must be rejected, because perfect continuity is not to be expected in any case, and the periods at the farm were as continuous as any stay at any place can ever be expected to be. If it be held as settled, then, that he was continuously at the farms, can it be doubted that his staying there was 'residence?' If he had only worked there, and had his meals there, it would not have been enough, but when a person works, eats, and sleeps on the premises, I do not see what more he could do in order to reside upon them. He was not on the farm, moreover, fortuitously or casually, but on terms which gave him a right to a residence there.

"The circumstances of the present case seem widely different from those of *Greig* and *Moncrieff*. There is little analogy between a sailor or a fisherman going from home in their respective vocations and a farm-labourer leaving his home in order to reside at the farm where he has to work. This case comes nearer to that of *M'Gregor v. Watson* (22 D. 965)."

The defender appealed to the Court of Session.

Authorities cited—*Milne and Ramsay*, 23d May 1872, 10 Macph. 731; *Beattie v. Smith and Paterson*, 25th October 1876; *M'Gregor v. Watson and Shanks*, 7th March 1860, 22 D. 965; *Greig v. Miles*, and *Simpson*, 19th July 1867, 5 Macph. 1132; *Allan v. Shaw and King*, 24th February 1876, 2 Rettie 463; *Moncrieff v. Ross*, 5th January 1869, 7 Macph. 331; *Jackson v. Robertson*, 7th July 1874.

At advising—

LORD JUSTICE-CLERK—The difficulty of these cases consists in this, that there is no legal principle applicable, but we are left to apply the rule which common sense may suggest, and which is consistent with the precedents. The true question is not whether the pauper has gained anything, but whether a particular parish is liable for his relief. Now, I cannot throw out of view in this case the length of time during which the pauper remained in the parish in which he had acquired a residential settlement; for the question is, Has he lost that settlement? On the principles laid down in the cases of *Greig v. Miles*, *Moncrieff v. Ross*, and *Jackson v. Robertson*, I am clearly of opinion that the settlement in St Fergus was not lost. The mere fact of work outside a parish comes to nothing, for a man may work outside the parish and sleep every night in his original home. In the same way, since constructive residence is sufficient, a man, though personally absent, may devote the proceeds of his labour to the support of his original home, and may thus continue an already acquired settlement, even though the constructive residence might not be held sufficient to create a new residential

settlement. I am of opinion that the Sheriff-Substitute's interlocutor should be recalled.

LORD ORMDALE—I concur, but with some difficulty. In the case of *Greig v. Miles*, I quoted the opinion of Lord Chancellor Cranworth in *Adamson v. Barbour*, and I quote it again here—"Considering the peculiar nature and object of the Poor Laws—the affording relief to those unable to maintain themselves—it is absolutely necessary we should construe the provisions of the Legislature so as to meet the ordinary social wants of those for whose benefit they were made." In this case, clearly all the pauper's social ties were with the parish of St Fergus, where he had lived so long, where his two families had come into existence, where he still spent his earnings to support his wife and child, and where in all probability he would come to die. A humane and just interpretation of the Poor Law Act will not sever so close a connection as this is. Certainly the mere fact of these termly engagements having been entered into in closely-adjointing parishes will not have that effect.

LORD GIFFORD—I concur, although I think each fresh case under the Poor Law Act is narrower than its predecessors. There was here no true interruption of Webster's residence in St Fergus. During the whole period he paid rent and taxes (if taxes were due) for the same house where his domestic establishment was. He does not settle down for work in one outside parish, but he wanders from one parish to another, and sometimes back to St Fergus, and accepts work on the usual terms. The fact that he could only get the accommodation of a bothy explains why he never changed his home.

The Court pronounced the following interlocutor:—

"Find that the pauper had resided in the parish of St. Fergus for upwards of twenty-years prior to 1866, and had acquired a residential settlement in that parish: Find that the pauper after that date worked in several adjoining parishes, but retained possession of his house in St. Fergus, to which he returned at intervals of a week or a fortnight, and in which his family resided: Find that these periods of absence on the part of the pauper did not interrupt the continuity of his residence in the parish of St Fergus, or affect the retention of his settlement in that parish: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute; assolzie the defender from the conclusions of the summons, and decern; and find the appellant entitled to expenses both in this Court and in the Sheriff-Court, and decern: Remit to the Auditor to tax the expenses now found due, and to report."

Counsel for Pursuer—Pearson—Asher. Agent—Alexander Morison, S.S.C.

Counsel for Defender—Moncrieff—Balfour. Agents—Pearson, Robertson & Finlay, W.S.

Friday, January 11.

SECOND DIVISION.

[Lord Curriehill.

M'DONALD v. HIMSELF AND OTHERS.

Succession—Marriage-Contract—Entail—Reserved Power—Jus Crediti.

By antenuptial marriage-contract a husband disposed certain lands in conjunct fee and liferent to the spouses, but for liferent use allenerly to the wife, and to the heirs-male of the marriage, whom failing to the heirs-male of any subsequent marriage, whom failing to the husband's brothers and their respective heirs-male, whom failing to his nearest heirs whomsoever; and reserved a power to himself to execute an entail of the lands on the condition of calling first the heirs mentioned in the marriage-contract, but with power to add what heirs he pleased. The husband executed an entail which introduced the heirs-female of the marriage and the heirs-male of their bodies, whom failing to the heirs-female of the bodies of the sons of the marriage, whom failing the heirs-female of the bodies of the daughters of the marriage, immediately after the heirs-male of the marriage. On the entailor's death his eldest son took as institute of entail.—*Held* that the *jus crediti* being confined to the heirs-male of the marriage, the institute could not challenge the entail as not being a competent exercise of the reserved power.

This was an action of reduction and declarator, brought by Colonel Alastair M'Tain M'Donald of Dalchosnie and Kinloch Rannoch, eldest son of the late General Sir John M'Donald, against himself and John Alan M'Donald, second and only other surviving son of General M'Donald, and Elizabeth Moore Menzies M'Donald, Adriana M'Donald, and Jemima M'Donald, the only three daughters of General M'Donald, concluding for reduction of the deed of entail after mentioned, and the writs of infetment and investiture following thereon in favour of the pursuer in fee and his parents in liferent, either totally or in so far as they contained the lands of Dalchosnie. There was also a conclusion for declarator that the whole lands contained in the entail, viz., Dalchosnie, Loch Garry, and Kinloch Rannoch, or at least the lands of Dalchosnie, belonged to the pursuer in fee-simple. The defender lodged preliminary defences, and the facts of the case, so far as material to the judgments pronounced, sufficiently appear from the following interlocutor and note of the Lord Ordinary (CURRIEHILL):—
• "10th March 1876.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and whole process, Finds that the pursuer has neither title nor interest to maintain the pleas stated, or to insist in the conclusions of this action: Therefore sustains the preliminary defences of want of title stated by the several defenders: Dismisses the action, and decerns: Finds the pursuer liable in expenses to the said defenders—reserving for consideration the question whether and how far the defenders are entitled to the full expenses of separate appearance after the date of closing the record: appoints