

pleas stated by the defender, and allowed a proof.

The defender appealed to the Sheriff.

The pursuer afterwards appealed to the Court of Session for jury trial under section 40 of the Judicature Act 1825, the claim being for more than £40.

On the case appearing in the Single Bills the respondent objected to the competency of the appeal, and argued—The case was before the Sheriff. This was a proper case for appeal to the Sheriff under the Sheriff Courts Act 1876 (39 and 40 Vict. c. 70), sec. 27. The appeal was in proper form—sec. 28. The effect of the appeal was to submit the whole case to the Sheriff—sec. 29. There was no standing interlocutor allowing a proof.

The respondent argued—The defender was not debarred from arguing a question of relevancy on the preliminary pleas which he had stated—*Virtue v. Police Commissioners of Alloa*, December 12, 1873, 1 R. 291. It was more convenient that the preliminary pleas should be considered here rather than that they should be sent back to the Sheriff.

LORD PRESIDENT—The liberty given to either party in the Inferior Court by sec. 40 of the Judicature Act, where the sum sued for is not under £40, is to remove the process by advocacy, and, according to present practice, by note of appeal in terms of the Court of Session Act 1868, sec. 73. Now certainly the provision of the 40th section of the Judicature Act is not for the purpose of allowing review of a judgment; its purpose is that the process may be brought here in order that it may become a Court of Session process, and being brought here, the intention is that it should end here by verdict and judgment.

But the condition attached to that form of procedure is, that there should be an interlocutor in the Sheriff Court allowing a proof, and the question now is, whether we have in this case an interlocutor allowing a proof? The answer is, that there is no standing interlocutor of the sort in the Sheriff Court, because the interlocutor of the Sheriff-Substitute is under appeal to the Sheriff, and may cease to be an interlocutor allowing proof after the Sheriff's interlocutor is pronounced. And so the very ground of the application under the 40th section of the Judicature Act is removed by the appeal to the Sheriff, and I think the objection now stated to the present appeal is well founded.

LORD MURE concurred.

LORD ADAM—I am of the same opinion. I think that when the interlocutor of the Sheriff-Substitute was appealed to the Sheriff there was no longer an operative judgment in the Sheriff Court. Nothing could have been done on the interlocutor of the Sheriff-Substitute, and it cannot be brought here under the Judicature Act.

LORD SHAND was absent from illness.

The Court sustained the objection and dismissed the appeal.

Counsel for the Pursuer and Appellant—**Baxter**. Agent—**William Black, S.S.C.**

Counsel for the Defender and Respondent—**Dickson**. Agents—**Macpherson & Mackay, W.S.**

Friday, December 9.

SECOND DIVISION.

[Sheriff of Ayrshire.]

ANDERSON (INSPECTOR OF MAYBOLE) v. GLASS (INSPECTOR OF DALMELLINGTON) AND ANOTHER.

Poor—Residential Settlement—Loss of Settlement.

A husband who had a residential settlement in the parish of M., left that parish at Whitsunday 1881, together with his wife and family. They never thereafter resided in the parish. The husband died on 23d March 1885, and his widow became chargeable as a pauper on 21st September 1885. Held that, as the pauper had been absent for more than four years from the parish of M., she had lost the residential settlement she had derived from her husband, and that the parish of her birth was liable.

William Arthur, together with his wife and family, had a residential settlement in the parish of Maybole, from which they removed at Whitsunday 1881, and never afterwards resided in the parish. On 23d March 1885 William Arthur died. On 21st September 1885 his widow, Jane Arthur, became chargeable as a pauper, and obtained relief from the parish of Ayr. The parish of her birth was Stewarton.

This was an action of relief in the Sheriff Court at Ayr, at the instance of the inspector of poor for the parish of Ayr against the inspectors of poor for the parishes of Maybole, Stewarton, and Dalmellington, the birth parish of the husband.

Pleaded for the parish of Maybole—“(1) The settlement which the said Jane Anderson Murray or Arthur took on her husband's death, being a residential settlement in Maybole parish, which was lost by the absence of her husband when in life and her own absence subsequent to his death, and the said Jane Anderson Murray or Arthur having been born in the parish of Stewarton, and having in consequence a birth settlement in that parish, such birth settlement is alone responsible, and the defender, the said John Anderson, as representing the Parochial Board of the parish of Maybole, is entitled to be assolizied, with expenses.”

Pleaded for the parish of Stewarton—“(2) The pauper's husband having acquired a residential settlement in the parish of Maybole, which fell to her at his death, the sums sued for ought to be paid by the defender Anderson.”

The Sheriff-Substitute (**ORR PATERSON**) on 28th March 1887 found in law “that the widow having become a proper object of relief, and having received relief prior to the expiry of four years from the date of her husband's removal from the parish of his residential settlement, has not lost by absence her husband's residential settlement in Maybole.” The Sheriff-Substitute found in fact that the pauper had become chargeable on 7th

April 1885, but this was not maintained in the Court of Session.

The Sheriff on appeal found that the parish of Dalmellington was liable in relief.

Dalmellington appealed to the Court of Session, and at the debate it was admitted that the question was, whether Stewarton or Maybole was liable for the support of the pauper?

Maybole argued—It was admitted that at the time of her husband's death the pauper had a residential settlement in Maybole, but not having returned there before Whitsunday 1885, she had not lived there for one continuous year during the five years from Whitsunday 1881. She had accordingly lost her residential settlement. This case was directly ruled by that of *Allan v. Higgins and Others*, December 23, 1864, 3 Macph. 309.

Stewarton argued—As the pauper had a residential settlement in Maybole at the time of her husband's death, she still continued to retain it for herself. A new settlement began at the date of her husband's death, and could only be lost by her remaining away for five years. The time during which her husband had been absent from Maybole could not be added to the time she was absent so as to make her lose her residential settlement—*Hoy v. Carse*, February 24, 1860, 22 D. 872; *Kirkwood v. Wylie*, January 19, 1865, 3 Macph. 399; *Jackson v. Ireland*, January 29, 1879, 6 R. 605.

At advising—

LORD YOUNG—The facts in this case are these—The pauper is a widow, and she became a pauper first in the month of September 1885. She and her husband had resided at Maybole previously for a period sufficient to acquire a residential settlement, but they left that place for good and went to Ayr at Whitsunday 1881. In March 1885, which was very near the expiry of the four years, her husband was killed. His widow became a pauper, as I said, in September, when four years had more than elapsed since they left Maybole. Upon these facts the question is, whether the parish liable for her relief in September 1885 was Maybole, or the parish of her birth, viz., Stewarton?

We have opposing judgments by the Sheriff-Substitute and the Sheriff. The Sheriff-Substitute decided that the parish liable was Maybole, but he comes to that conclusion upon the ground that she had become a pauper in April 1885, which was within four years from her leaving Maybole. Parties, however, are agreed that she did not become a pauper until September 1885, and that the Sheriff-Substitute's ground of judgment is bad. The Sheriff was of opinion that Dalmellington was liable, but parties are also agreed that that judgment is erroneous.

The deceased had a residential settlement in Maybole at his death, and that survived to his widow and children. Therefore in March 1885 the widow and children had a residential settlement in Maybole. But in September 1885 the provisions of the Act of Parliament became applicable, because there had been absence of the whole family from Maybole for more than four years, and according to the Act of Parliament it is contended that a residential settlement would not survive a five years' absence from the parish unless the pauper had lived for

one continuous year within it. Now, in September 1885 it was impossible that within five years from Whitsunday 1881 there could be residence for one year. That would be destructive of a claim against the parish of Maybole if we take account of the time passed by the family out of the parish after the husband's death. I think that we must do so, and must join the period between March and September to the previous period.

What the Act means is this. A settlement once acquired by residence is not lost by absence unless that absence be long continued, and the period for which it must continue is specified by the statute, and we have often decided that absence for any period over four years is sufficient, as the pauper could not then reside for one continuous year out of five in the parish. As to the question of the absence of a family after the death of the person who acquired the residential settlement being held to be continuing absence, I think it ought to be allowed in principle. I think that principle was decided in *Allan v. Higgins*, although these cases always present a great variety of circumstances. In the case of *Jackson* I did not mean to say anything to the contrary of that view. If there was absence by the whole family for five years, that would destroy the residential settlement although the husband had died in the meantime. I do not think it reasonable to suppose that a new period of five years began on the death of the husband.

Upon the whole matter I am of opinion that the settlement in Maybole was lost by the pauper's absence for the time which the Act says shall be sufficient for that effect, and that the parish liable is that of her birth.

LORD CRAIGHILL—I am of the same opinion. The dispute is now between Maybole and Stewarton. Of course if the wife retained the settlement she had at her husband's death, she is chargeable to that parish, but if not, then she is chargeable to the parish of her birth. Her husband had a residential settlement at the time of his death, and it is necessary to observe that a residential settlement is only kept on one condition, viz., that for one year in five the person who has acquired the settlement should reside in the parish. Now, the period necessary had very nearly run out here at the death of the husband, and the question whether the wife was to retain her settlement in Maybole depended upon whether she returned to Maybole shortly after her husband's death or not. I think that as she did not return, the ordinary rule of the statute applies. By the statute a person is held to have lost his residential settlement if during five years he has not resided for one year within the parish. I think that the clause is absolute, and that we ought to give effect to it.

LORD RUTHERFURD CLARK—I also agree. I think that this case is ruled by *Allan v. Higgins*.

LORD JUSTICE-CLEBK—If this case had had a more important patrimonial interest I might have thought it necessary to take more time to consider my judgment, as my impression is rather in the opposite direction from that expressed by your Lordships. There are very strong opinions

expressed by the learned Judges in other cases that when a wife takes a derivative residential settlement, and her husband has not lost his settlement by being out of the parish for five years without living in it for one continuous year, she only comes within the operation of the clause if she herself remains away for more than four years. I think, however, that it is better in these cases that a decision should be given at once rather than that we should elaborate decisions on the statute when the only interest is to have the case settled. There is very little substantial interest in these cases. The pauper has little interest as to which parish is to be made chargeable, and the parish has just as little interest, because although we decide the case in one way, the fluctuating accidents of human life, especially in the class of life to which these paupers usually belong, might make what was favourable to-day quite the reverse to-morrow. The only interest is that a judgment should be given, although I could have wished that it might be worked out in a less operose manner. Your Lordships therefore sustain the appeal and recal the judgment.

The Court pronounced this interlocutor:—

“The Lords having heard counsel for the parties on the appeal, Find in fact (1) that the deceased William Arthur removed from the parish of Maybole at Whitsunday 1881, and that he and his wife and family had then a residential settlement in that parish; (2) that neither he nor any of his family ever thereafter resided in said parish of Maybole, and that he died on 23d March 1885; (3) that on 21st September in that year Jane Arthur, his widow, became chargeable as a pauper being a proper object of parochial relief, and obtained relief from the parish of Ayr; and (4) that the said Jane Arthur was born in the parish of Stewarton: Find in law that her settlement by residence in the parish of Maybole was lost by absence from that parish for more than four years, and that the defender, the inspector of poor for the parish of Stewarton, the parish of her birth, is liable in repetition to the pursuer, the inspector of poor for the parish of Ayr, of the advance sued for, and in relief as craved: Therefore sustain the appeal: Recal the interlocutor of the Sheriff-Substitute of 28th March 1887 and the interlocutor of the Sheriff of 4th June 1887: Ordain the defender, James Dunlop, inspector of poor for the parish of Stewarton, to make payment, &c.: Assoilzie the defenders, Alexander Stewart Glass, inspector of poor for the parish of Dalmellington, and John Anderson, inspector of poor for the parish of Maybole, from the conclusions of the action; Find the defender James Dunlop, as inspector of poor for the parish of Stewarton, liable to the pursuer and to the other defenders in expenses in the Inferior Court and in this Court,” &c.

Counsel for the Parish of Maybole—Guthrie Smith. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Parish of Ayr—Orr. Agents—Phillip, Laing, & Traill, S.S.C.

Counsel for the Parish of Stewarton—J. A. Reid—J. Clark. Agents—Sturrock & Graham, W.S.

Friday, December 9.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

EARL OF HOME *v.* LYELL.

EARL OF HOME *v.* JAMIESON.

Superior and Vassal—Implied Entry—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94), sec. 4—Trustees, whether Liable as Singular Successors.

By *mortis causa* trust-disposition and settlement dated in 1836 a trustor conveyed certain lands belonging to him to his children *nominatim* and the survivors or survivor of them in trust for the purposes therein specified, and upon the termination of the trust, then to his heir-at-law at that time in fee. The trustees were directed to retain and manage the estate and divide the whole rents among themselves in certain proportions until the termination of the trust. It was provided that the trust should come to an end upon the death of the last survivor of the children, or if it should happen that the last survivor was the trustor's heir-at-law, then it was declared that in that event the trust should cease and determine, and that the lands conveyed should belong to the heir-at-law. The deed contained a prohibition against selling or burdening, and the only powers conferred were those of ordinary administration. The procuratory of resignation and precept of sasine authorised the infefment of the children “in trust, and as trustees for the uses and purposes and under the conditions” specified in the deed, and also authorised infefment at the end of the trust of the heir-at-law at that time in fee. The trustor was infeft in the lands as disponee under a deed executed in 1783, and was entered by charter of confirmation. On the death of the trustor in 1852 his eldest son completed a title by infefment on a precept of *clare constat* in his favour, as heir of provision to his father, under the deed of 1783. In the same year the whole surviving children of the trustor, eight in number, took infefment as trustees upon the precept contained in the trust-disposition and settlement of 1836. The superior of part of the lands demanded from the last surviving trustee a composition of a year's rent in respect of the death in 1875 of the trustor's heir, who was the last entered vassal, and of the implied entry of the trustees under sec. 4, sub-sec. 2, of the Conveyancing Act of 1874. He maintained that the trust-disposition and settlement had altered the existing destination, and that the trustees were therefore holding for the heirs of the new destination, which was enfranchised by the implied confirmation of their infefment. *Held* that the last entered vassal was not divested