

the commencement of the Act and the certification or re-certification of a scheme, and does not prevent even them contracting themselves out of the Act so soon as a new scheme shall have been certified or an old one re-certified. The terms of section 3 are quite absolute, and in my opinion they are not altered by the provisions of sub-sections 2, 3, and 4 of section 15, which are intended to save contracts current at the commencement of the Act and also under certain conditions to utilise in whole or in part schemes then in force as schemes under the 1906 Act.

LORD STORMONTH DARLING concurred.

The LORD JUSTICE-CLERK was absent.

The Court answered the first question of law in the affirmative.

Counsel for the Appellant—Craigie, K.C.—A. Mackenzie Stuart. Agents—Balfour & Manson, S.S.C.

Counsel for the Respondents—Murray—J. H. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Wednesday, March 11.

## FIRST DIVISION.

(Before Seven Judges).

### M'ARTHUR'S EXECUTORS *v.* GUILD AND OTHERS.

*Succession—Ademption—Special Legacy of Heritage—Sale of Subject under a Condition Unpurified at Testator's Death.*

A hotel proprietor in his trust-disposition gave to a daughter a specific bequest of a hotel. Shortly before his death he had executed a minute of sale of the hotel, one of the conditions thereof being that the purchaser should apply for and obtain a transfer of the licence certificate. A part of the price was consigned in joint names to await the settlement of the price. The transfer of the licence certificate was only obtained by the purchaser on the day after the seller's death, and a formal conveyance of the property was executed thereafter.

Held that the hotel being still the property of the testator at the time of his death, the specific bequest of it had not been adeemed, and consequently that his daughter was entitled to the purchase money.

*Heron v. Espie*, June 3, 1856, 18 D. 917, and *Pollok's Trustees v. Anderson*, January 22, 1902, 4 F. 455, 39 S.L.R. 324, commented on, explained, and reconciled.

Peter M'Arthur, sometime spirit dealer in Perth, died on 16th April 1906, leaving a trust-disposition and settlement dated 28th July, with codicils dated 15th August and 22nd December, 1905, whereof the third pur-

pose was—“(Thirdly) I dispoise, assign, and bequeath to my daughter Mrs Margaret Anderson M'Arthur or Guild, residing in Strathmiglo, Fifeshire, wife of James Guild, hotelkeeper there, whom failing to her child or children in equal right (*first*) the property in Strathmiglo consisting of the Royal Hotel and premises therewith connected, with the pertinents and the writs and title-deeds thereof; . . . [*here followed other properties*] . . .” and the final purpose was the appointment of his two sons John Duncan M'Arthur and James Fenton M'Arthur as his executors, with a direction to divide any residue amongst themselves and his other surviving sons and his daughter.

A question having arisen with regard to the daughter's bequest, a special case was presented, to which (1) the testator's executors were *first parties*, (2) the testator's surviving sons were *second parties*, (3) the daughter, who was the testator's only daughter, was *third party*, and (4) the widow of Alexander Simpson M'Arthur, a predeceasing son, as mother and guardian of his only child, was *fourth party*.

The *question of law* submitted to the Court was—“Was the bequest by the testator to the third party of the said heritable property known as the Royal Hotel, Strathmiglo, adeemed?”

The *facts* bearing on the question were stated in the special case thus—“By minute of sale dated 5th March 1906 the testator sold to William Steven, Kinross, the said property known as the Royal Hotel, Strathmiglo, with stabling, outhouses, garden ground, and other premises thereto belonging, together with the whole grates, gas-fittings, and bar fittings ('exclusive of the beer pumps, which belong to Mrs Guild, the present tenant') at the price of £1400 sterling, with entry at Whitsunday (15th May) 1906, at which date the price was declared to be payable. It was declared to be a condition of the agreement of sale that the said William Steven should apply for and obtain a transfer of the licence certificate for the said hotel. It was also provided that the said William Steven, the purchaser, should within seven days from the date of the minute of sale consign £400 in the Bank of Scotland in Perth on deposit-receipt in the joint names of the testator and himself in part payment of the purchase price. The said minute of sale, which is signed by the said William Steven and the testator, is . . . also held to form part of this case. The said sum of £400 was consigned in said bank upon 12th March 1906 'to await the settlement of the price of the Royal Hotel, Strathmiglo, repayable on the joint endorsement of the said William Steven, Esq., and Peter M'Arthur, Esq., residing at 61 George Street, Perth.' A transfer of the licence certificate in favour of Mr Steven was obtained at the Licensing Court held on 17th April 1906, and a formal conveyance of the property was thereafter executed in his favour.”

The first, second, and fourth parties maintained that the bequest of the said

Royal Hotel to the third party was adeemed by the sale thereof concluded between the testator and the said purchaser thereof under and by virtue of the said minute of sale and consignment of part of the price, and that the said £400 consigned in bank as aforesaid, together with the balance of the said price of £1400, formed part of the residue estate of the testator. The third party, on the other hand, contended that the said bequest was not adeemed, in respect that the testator had executed no conveyance thereof prior to his death in favour of the purchaser, and was then still feudally vested therein as proprietor thereof.

Argued for the first, second, and fourth parties—The sale of heritage operated conversion—Bell's Com. (Lord M'Laren's ed.) ii, p. 6—and a testator having sold, even though he died before a formal conveyance was executed and the price paid, left moveable, not heritable property—*Chiesley v. His Sisters*, December 22, 1704, M. 5531; *Wilson v. Wilsons*, November 29, 1803, F.C.; *Macfarlane v. Greig*, February 26, 1895, 22 R. 405, Lord M'Laren at p. 408, 32 S.L.R. 299; *Heron v. Espie*, June 3, 1856, 18 D. 917; *Ramsay v. Ramsay*, November 15, 1887, 15 R. 25, 25 S.L.R. 34. That was so even if the sale were under compulsion, not voluntary as here—*Macfarlane v. Greig (cit. sup.)*, *Heron v. Espie (cit. sup.)*; and the whole point in *Heron* was whether the compulsion made any difference, it being accepted as settled law that if the sale were voluntary conversion had operated. *Ramsay v. Ramsay (cit. sup.)* illustrated the rule, for there the estate purchased, though not paid for, went to the heir, the price remaining a debt against the executors, and it also showed that it was the completed sale, not possible intentions, which ruled, the estate remaining heritage although there had been negotiations for a re-sale of it, no contract of re-sale having been completed. The subject of bequest here was therefore gone and the legacy was adeemed. If a specific subject were bequeathed, be it money invested in a stated manner or a particular piece of property, and the subject were realised and a different investment made, the legacy was adeemed—*Jack v. Lauder*, July 27, 1742, M. 11,357; *Pagan v. Pagan*, January 26, 1838, 16 S. 383; *Chalmers v. Chalmers*, November 19, 1851, 14 D. 57; *Congreve's Trustees v. Congreve*, June 27, 1874, 1 R. 1102, 11 S.L.R. 636; *Anderson v. Thomson*, July 17, 1877, 4 R. 1101, 14 S.L.R. 654. Some ground for the contention that the intention was to be looked to might be found in *Chalmers*, which proceeded on the fact that the gift was quite specific and nothing had been done to keep the price distinct, and also in *Congreve's Trustees* (Lord Ormidale at p. 1106), but in the later case of *Anderson v. Thomson* it was quite distinctly laid down that it was the concluded act of the testator which decided. The act here was the concluded contract of sale. It made no difference that the contract had not been carried out by a conveyance—*Chiesley (cit. sup.)*, *Heron v. Espie (cit.*

*sup.)*—and that was also so by English law—*Watts v. Watts* (1873), L.R., 17 Eq. 217; *Farrar v. Earl of Winterton* (1842), 5 Beav. 1, Lord Langdale (M.R.) at 8; *Currie v. Bowyer*, 5 Beav. 6, note. The specific subject here, the hotel, after the contract of sale was no longer *in bonis* of the testator and could not be given to the legatee. After the contract the testator could not have sold it or burdened it, nor could he have resiled from the contract. All he had was a claim for a certain sum of money. It was therefore immaterial what the conditions of the sale were, and besides, the condition as to the certificate was merely resolutive, not suspensive. The case of *Pollok's Trustees v. Anderson*, January 22, 1902, 4 F. 455, 39 S.L.R. 324, upon which the third party relied, had been wrongly decided owing to the Court not realising that it was a specific and not a general legacy which was in question, and the decision could not stand with *Heron v. Espie*. The question should be answered in the affirmative.

Argued for the third party—The decision in this case should follow that in *Pollok's Trustees, cit. sup.* The only difference in the facts of the two cases was that here there were no trustees, and that the sale of the property was subject to a condition which had to be purified. Ademption was a different thing from conversion, and it was impossible to argue from the law of the one as to the law of the other. Such argument had been taken in *Pollok's Trustees* and had been set aside. Treating the case, then, as a question of ademption, for the principles of which *v. M'Laren on Wills*, p. 406, secs. 738-742, the point of time to be looked at was the testator's death, and it was the state of matters then, and not extrinsic circumstances, which were to be looked to. Now the settlement spoke a *morte testatoris*—Bell's Prin., sec. 1864; *Hyslop v. Maxwell's Trustees*, February 11, 1834, 12 S. 413, Lord Ordinary Corehouse at p. 416; *Nimmo v. Murray's Trustees*, June 3, 1864, 2 Macph. 1144, Lord Cowan at 1148; *Denholm Trustees v. Denholm*, 1908 S.C. 43, 45 S.L.R. 32, and must therefore be read as made subsequent to the minute of sale. The special subject bequeathed was still at that time in the testator's possession, the purchaser's entry not being till Whitsunday subsequent, and he could have sold it to a purchaser who might, if unaware of the previous minute, have become registered owner, or he might have granted a valid bond over it, or it might have been attached for his debts. The contract, too, was still subject to a condition which had first to be purified before it became of any effect. The state of the title, not the obligation in connection with the property, was of importance—*Elmslie v. Groat*, February 25, 1817, Hume's Dec. 197. The testator must therefore be taken to have bequeathed an existing subject, no doubt under the conditions under which he held it—that is, to have given either it or its equivalent, the purchase money. The cases cited by the other party did not apply. *Chiesley* dealt with conversion and intestate succession. *Wilson* was a question of conversion and

the testator's intention. *Ramsay* dealt with conversion and intestate succession. *Heron* and *Macfarlane* were also cases as to conversion. In *Jack v. Lauder* the legacy was of a bill which had ceased to exist. In *Chalmers v. Chalmers* the house had been conveyed away. That was also the case in *Pagan v. Pagan*. *Heron v. Espie*, treating it as a case with regard to ademption, which it was not, was not adverse to *Pollok's Trustees*. In it the transaction was much more complete than here. The former owner was barred from dealing with the land owing to the notice to treat, the price was consigned, the final award made. The railway company could get a title even if the owner refused it and were in possession; and the judgment proceeded on the ground that the only right the testator had was a claim for money—Lord J. C. Hope at 18 D. 922. There might be conversion here, but that was irrespective of the question of ademption and depended on intention—*Ersk. Inst.*, ii, 2, 14, and 17; *M'Laren on Wills*, p. 228, sec. 428; *Anderson v. Thomson*, *cit. sup.*, Lord J. C. Moncreiff at 4 R. 1110; *Bell's Trustees v. Bell*, November 8, 1884, 12 R. 85, Lord Ordinary Kinnear at 90, 22 S.L.R. 59; *Buchanan v. Angus*, 1862, 4 Macq. 374. The English cases cited did not apply, as a contract of sale in that country passed the property—*Inglis v. Mansfield*, April 10, 1835, 1 Sh. & M. 203, Lord Brougham at 338. *In re Bridle*, (1879) 4 C.P.D. 336, esp. Lord Lindley at 341, was, however, in point in showing that the question was whether the property actually existed at the testator's death. Sandars' *Justinian*, ii, xx, 12, was also referred to. The question should be answered in the negative.

At advising—

LORD PRESIDENT—The late Mr M'Arthur of Perth left a trust-disposition and settlement in which he disposed of the whole of his property, and by the third head of his will provided as follows—. . . (*quotes, supra*) . . . He afterwards went on to make other bequests and left a residuary clause. Accordingly there was no doubt that the Royal Hotel was a special bequest. Shortly before his death he executed a minute of sale with a Mr Steven of Kinross under the terms of which he sold to Steven the said hotel at the price of £1400, and by the seventh article of the deed provided that "It is to be a condition of this agreement being binding on both parties that Mr Steven applies for and obtains a transfer of the licence certificate for the said Royal Hotel, Strathmiglo." Mr Steven accordingly made the application for the transfer of the licence to the licensing authority, but the day before the Court met Mr M'Arthur died. The Court met and granted the transfer of the licence, and accordingly there is no doubt that Mr Steven is entitled to a conveyance, and he has consigned the £1400. The question arising in this special case is whether the £1400 belongs—as representing the hotel—to the special legatee, or whether it falls into residue, the special legacy having been

adeemed. At one time or another there has been a good deal of discussion as to what amounts to proof of ademption, but the leading authority is the judgment of Lord Thurlow in the case of *Ashburner v. Macguire*, 2 Br. C. C. 108, repeated in the subsequent case of *Stanley v. Potter*, 2 Cox, 180, where, after remarking that the test of ademption was whether the thing remained at the testator's death, he continued—"The idea of proceeding on the *animus adimendi* has introduced a degree of confusion into the cases which is inexplicable, and I can make out no precise rule from them upon that ground. It will be a safer and clearer way to adhere to the plain rule before mentioned, which is to inquire whether the specific thing given remains or not." That doctrine has been fully adopted in the law of Scotland, and there is no clearer proof of this than is given by the case of *Anderson v. Thomson*, July 17th, 1877, 4 R. 1101, where the late Lord Justice-Clerk Moncreiff acknowledges that doctrine and says that, although in his opinion it is utterly at variance with any principle of jurisprudence, it is so firmly established that he has no alternative but to apply it. I need scarcely say that no more striking proof can be given of the authority of a rule than its acceptance by a judge who personally is convinced that it is a bad rule. Now taking that doctrine as settled, it seems to me that the decision of this case is not doubtful. We have to look to see whether the trustees at the moment of death could find the thing in the trustor's estate. I think it is quite clear here that at the moment of death the trustor was still the proprietor of the subject. He had entered into an agreement that if a certain condition were purified he would be bound to sell the subject, but at the moment no one could know whether the condition would be purified. I think the condition was purely suspensive. Upon that simple ground I think there can be no doubt that there was no ademption of this legacy. The property accordingly when it came to be sold was the property of the legatee, and consequently the price belongs to her because it was her property that was sold.

But I do not want to stop here, although this is enough for the decision of the case, for there is no doubt that this case was taken to test whether the decision of the Second Division in *Pollok's Trustees v. Anderson*, January 22nd, 1902, 4 F. 455, really conflicts with the decision of the whole Court in *Heron v. Espie*, June 3rd, 1856, 18 D. 917. *Pollok's Trustees* was not the same as this case as it did not involve the question of a suspensive condition. It was the case of a voluntary sale, where missives had been signed but the testator had died without having executed a conveyance to the purchaser. The Second Division found that the property belonged to the testator at the time of his death and that the legacy had not been adeemed. It is argued that this decision cannot stand with *Heron v. Espie*. At the first hearing of this case I was inclined to agree with this, but I have now come to be clearly of opinion

that *Pollok's Trustees* was quite rightly decided, and that *Heron*, so far from being in opposition really supports the views upon which *Pollok's Trustees* was decided. In *Heron v. Espie* a property had been taken by means of compulsory notice by a railway company. The company had consigned a sum and entered into possession. An arbitration had taken place and the actual price fixed, and all that remained to be done was to grant a conveyance. In that position of matters the quondam owner of the property died and left a general settlement covering both his heritable and moveable property. This settlement was reduced *ex capite lecti quoad* the heritable property, and the point was whether the heir or the executor took the consigned price. Now had it been a voluntary sale there could have been no question. There would have been conversion, upon the authority of *Chiesley*, 1704, M. 5531, and all the cases that have followed since. But here there was no conversion by the act of the owner, and accordingly the doctrine was pressed that the infettment of the quondam owner was still undisturbed by any new infettment in favour of the company. The minority held that the price ought to go to the heir, and the majority only came to the opposite conclusion because they held that the effect of what had happened was to effect a statutory transference which transferred the land without infettment, and left the right in the quondam owner as not a right of property but only a right to receive the price, which being moveable *in se* could not go to the heir. As the Lord Justice-Clerk expressed it, p. 922—"I hold that to be real corporal and complete possession of the lands as much as if infettment had been taken." Lord Wood says, p. 939—"The seller was dispossessed of the lands and had no interest in them remaining in him, his right having been absolutely converted into a direct right to payment of the fixed price only." The contrary view that there was no such divestiture, and that consequently the subject remained heritable in the *hereditas* of the seller, is developed by Lord Deas. Now it matters not for the moment which of the conflicting views was right. Either it remained heritable or, if it did not, it did not, because something had occurred which transferred the property in the land itself in spite of the standing infettment in the quondam owner, a result which could not have occurred in a voluntary sale. If it had been a voluntary sale of course the property would have been moveable, but only on the principle of conversion, which depends on the will of the owner and testator. It seems to me that the moment that you settle that intention is neither here nor there in a question of ademption. *Heron v. Espie* becomes really an authority not at variance with but in favour of *Pollok's Trustees v. Anderson*.

I would further add that the English authorities quoted to us do not seem to me to touch the question, for the simple reason that by English law the contract of sale passes the property, the exact opposite

being true by the law of Scotland, and the law not having been altered as to heritable property though it has been as to moveable.

I am therefore for answering the question of law in the negative.

LORD JUSTICE-CLERK—I concur.

LORD M<sup>r</sup> LAREN—If this had been an unconditional sale I should have been disposed to say that the legacy was adeemed, for though this is heritable property I think the question properly falls to be tested by the doctrine of ademption, because that doctrine comes from the Roman law which recognised no difference between moveable and immoveable estate. Both are covered by the same principle, viz., that if the testator after making a special legacy by will has parted with the subject it is no longer in the power of the testamentary representatives to make over the property, and therefore the legacy ceases to have effect. The only difference in the case of a conditional sale is that there is no sale until the condition is purified. There might be cases in which a personal right to the land effeired to the purchaser from the moment the contract of sale was made, subject to a resolutive condition, and in such a case I might be disposed to think that the personal right was a sufficient withdrawal of the property from the testator's estate so as to lead to the conclusion that the legacy had been adeemed. But it is not necessary to consider that question, which might come to be important in reference to the peculiarity of our law as to heritable and moveable estate. For the decision of this case I think it is enough to say that it was a conditional sale, and that there was not even a personal right in the purchaser to the property at the date of the testator's death. The testator was the undivested owner of the subject of a contract, which contract his representatives would be bound to fulfil. So I think the legatee took the property, subject of course to the terms of the contract.

LORD KINNEAR—I am of the same opinion. I agree with what your Lordship has said in reference to the case of *Pollok*, which we are directly invited to reconsider. But for my own part I think that, even if that case had been decided differently, I should still have come to the same conclusion upon the question now before us, because there was a much more plausible argument for ademption in the case of *Pollok* than in the present. In *Pollok* the testator had directed his trustees to convey certain subjects to certain persons, but before his death he had sold them with entry at a certain term. He died before a conveyance was executed, but undoubtedly under an absolute obligation to convey, which neither he nor his representatives could have refused to implement. But the present testator was under no absolute obligation to convey the subjects. He had entered into a contract for the sale of the subjects, subject to a condition that the intending purchaser should apply for and obtain a

licence certificate. The testator died before the application was made, and therefore at the date of his death it was quite uncertain whether the contract would become binding or not. I think that constitutes a material distinction between the two cases. For a similar reason, I think the case of *Heron v. Espie* has no application. In that case a railway Company had taken possession of lands under statutory powers and had consigned a sum of money to meet the price. The true amount of the price had been ascertained by arbitration, and the proprietor of the land died before the disposition to the railway company had been signed. There is a great deal of learned discussion in the opinions of the judges, but I think the material point is that throughout the discussion the assumption was that the transaction of purchase and sale had come to an end and that there was no question as to any right in the lands but only with reference to the money. This is clearly brought out in the terms of the interlocutor, because the judgment of the Court "finds that the right to demand payment of the price due by the railway company for the strip of ground referred to was a personal right in the person of the deceased William Simpson, and was part of his moveable estate." The result of the whole discussion, therefore, was to find that the price of land sold was personal and not heritable property. For the actual decision of the present case I agree with your Lordship in the chair that we must look to the doctrine of ademption as laid down by Lord Thurlow in the case of *Ashburner v. Maguire* and repeated in the case of *Stanley v. Potter*. The principle is that when a particular thing has been specifically bequeathed the claim of the special legatee will be defeated if the thing in question is not in existence or not within reach of the testator's executors at his death. The reason is, as his Lordship expressed it in the second of the two cases mentioned above, that "one must consider it in the same manner as if a testator had given a particular horse to A B—if that horse died in the testator's lifetime or was disposed of by him, then there is nothing on which the bequest can operate." And then he goes on to say that the idea of proceeding upon the supposed *animus adimendi* leads to confusion, and that no rule can be safely adopted except to inquire (1) whether there is a special legacy, and (2) whether the thing bequeathed remained at the testator's death. I think that doctrine has been followed too consistently to be called in question now, and I cannot say that my reliance on it is shaken even by the criticism of so very eminent a judge as Lord Justice-Clerk Moncreiff in the case of *Anderson*. His Lordship thought the doctrine contrary to principle because it displaced what ought to be the sole rule in the construction of wills, viz., to ascertain and give effect to the intention of the testator. But I cannot see that the case of *Ashburner* throws any doubt on this cardinal rule of construction, or affects it in any way. For the doctrine comes into

operation only after the will has been construed. The first question, and the question which Lord Thurlow thought was generally the question of difficulty, is whether there is a special legacy, and that is a question of construction in which the intention of the testator is the proper subject for inquiry. The question whether the thing bequeathed remains or not is a question of fact, not a question of intention. Applying that rule in the present case, it appears to me that the testamentary gift of the hotel was a bequest of a specific subject, and the only question which we have to consider is whether that subject remained a part of the deceased's estate at his death. For the reasons given by your Lordship I think it did remain. It remained subject to a contract which bound the testator, but at the date of the death it was a contract which was still in suspense; when it did come into operation the legatee was bound also, as a gratuitous taker under her father's will, but her obligation was to complete the sale by conveying the property in return for payment of the price.

LORD STORMONTH DARLING—I concur in the opinion of your Lordship in the chair.

LORD ARDWALL—I am of opinion that the bequest of the Royal Hotel, Strathmiglo in favour of the party of the third part did not, in the circumstances set forth in the special case, suffer ademption.

Any apparent difficulties that arise on the authorities can, I think, be satisfactorily explained if care is taken to distinguish between cases of conversion and cases of ademption. *Heron v. Espie*, 18 D. 917, does not appear to me to conflict with the decision which it is proposed to pronounce, and the case of *Chalmers*, 14 D. 57, which was a case of ademption, was very different from the present, for in that case the house bequeathed to the pursuer had been taken by a railway company, the price thereof paid, and a disposition thereof in favour of the railway company granted two months before the testator's death. Accordingly at that date the testator had been absolutely divested of all right to the house in question. The case of *Pollock's Trustees v. Anderson*, 4 F. 455, is an authority directly applicable to the present case, but the present case is, I think, *a fortiori* of that one. The question whether or not ademption of a bequest of a specific subject has taken place depends solely upon this other question, whether or not the subject of the bequest was at the date of the testator's death in existence and formed part of his estate. In the present case, although a minute of sale had been entered into between the testator and a person of the name of William Steven, yet the contract thereby concluded was subject to a suspensive condition, and was not binding upon both parties unless and until (1) the purchaser applied for, and (2) obtained, a transfer of the licence for the hotel, the second of these conditions depending upon third parties for its fulfilment. The testator died on 16th April 1906, and at that date the transfer of the licence had not been granted,

and of course the price had not been paid, nor had a conveyance of the subjects been executed. Accordingly the subject of the bequest formed part of the testator's estate at the time of his death, and was carried by his settlement directly to the party of the third part, subject to her obligation to carry out the contract of sale and her right to receive the stipulated price in return for a conveyance of the property.

LORD GUTHRIE—I concur in the opinion of your Lordship in the chair.

The Court answered the question of law in the case in the negative.

Counsel for the First, Second, and Fourth Parties—The Solicitor-General (Ure, K.C.)—Wilton. Agents—Mackay & Hay, W.S.

Counsel for the Third Party—Scott Dickson, K.C.—Chree. Agent—W. J. Lewis, S.S.C.

Wednesday, March 11.

#### FIRST DIVISION.

(Before Seven Judges.)

[Sheriff of Lanarkshire.

#### PAISLEY PARISH COUNCIL v. ROW AND GLASGOW PARISH COUNCILS.

*Poor—Settlement—Deserted Wife—Derivative Residential Settlement—Husband Unheard of since Date of Desertion—Loss by Husband of Residential Settlement through Absence.*

A wife having been deserted by her husband became and remained chargeable. The parish of the husband's residential settlement admitted liability, but when three years had elapsed from the time of his leaving that parish, during which he had admittedly not been back in the parish, it repudiated further liability, on the ground that the husband had now lost his residential settlement there, and that *prima facie* the parish of his birth was now liable. Nothing was known of the husband subsequent to his desertion. *Held* that the parish of the husband's residential settlement at the date of the wife's becoming chargeable remained liable.

*Rutherglen Parish Council v. Glasgow Parish Council*, May 15, 1902, 4 F. (H.L.) 19, 39 S.L.R. 321, commented on.

On 28th October 1905 Paisley Parish Council raised an action against (1) Glasgow Parish Council and (2) Row Parish Council, to recover the sum of £11, 2s. expended by the pursuers on account of Mrs Elizabeth Logan or Wright, a pauper residing at 7 Park Avenue, Paisley. (The pursuers also craved decree for any future disbursements they might make, but afterwards restricted the summons to the amount stated above.)

The facts are given in the note of the

Sheriff-Substitute (FYFE), who on 18th December 1905 dismissed the action *quoad* the first defenders, and gave decree against the second defenders Row Parish Council.

*Note.*—"There is no occasion in this process to incur the expense of a proof, for the facts are not really in dispute, and the question at issue is a legal one. Daniel Wright was born in Glasgow in 1859, but he resided at Shandon for thirteen years prior to October 1901, thereby acquiring a residential settlement in Row parish. In October 1901 he disappeared and has not since been heard of. He left his wife and family at Shandon. The deserted wife and three dependent children went to Paisley, where they seem to have struggled along without parish aid till April 1902. The wife then applied to Paisley parish, and being a proper subject for relief, Paisley on 22nd April 1902 granted her relief. Paisley parish gave statutory relief notice to Row parish on 14th May 1902, and Row recognised liability. Row reimbursed Paisley down to January 1905. Row then declined to pay, upon the ground that the settlement of the wife in Row was only a derivative settlement following that of her husband, and that the husband's settlement in Row (which was only a residential settlement) had lapsed in October 1904—that is, when he had ceased to reside in the parish for three years, the wife's settlement lapsing with it.

"Paisley then, in January 1905, gave statutory notice of chargeability to Glasgow, the parish of the husband's birth.

"It is clear that Paisley must be relieved, and the question is whether liability rests with Row or Glasgow.

"Row has been bearing the burden all along, for Paisley was only paying on behalf of Row. It is a circumstance of importance that the chargeability has been continuous since relief was first given in April 1902. Accordingly Glasgow pleads the recognised principle that settlement cannot change during the currency of chargeability, and so that this action, so far as laid against Glasgow, is irrelevant, or at least premature. In other words, Glasgow pleads that Row cannot escape liability unless Row can either locate the deserting husband or prove that he is dead.

"The question in effect comes to be this, Which parish has the *onus* of proof as regards the whereabouts of the husband?

"It is important to note that the wife never was a pauper in her own right. Row relieved her only because at the time she became chargeable the husband (not yet being absent three years) still had a residential settlement in Row, and it is urged for Row that the principle of no change of liability during continuity of relief applies only where a pauper has a claim of relief in her own right, and does not therefore apply to the present case at all.

"There is no definite authority upon the point raised, but I think the principle is the same upon whatever ground the relieving parish originally became liable. The parish which is saddled with the liability must go on bearing it until that parish can