

Such was the position of matters and such were the conflicting considerations when the Act of 1923 was passed. I interpret section 14 of the Act stated in the form of a direction to the employer as follows (I leave out of account partial disability which would only confuse the statement):—“Where you, the employer, assert that the workman has recovered, but that is not agreed to by him or determined by arbitration, you are not to make yourself the judge of the matter and stop the payments unless indeed the man has actually returned to his work. The course you must follow is to get a medical certificate of recovery and serve this certificate upon the workman with a notice that after ten days you will stop payment of compensation. In that case if within the ten days you do not receive a counter medical certificate from the workman that he has not recovered you may cease to make the payments, but if you do receive such a certificate the whole matter may be determined by the medical referee. In this last case, however, in order that you may not be prejudiced by the risk of not recovering what you pay to the workman, instead of continuing the payments you may consign the amount of the payments in Court to await the ultimate determination of the matter.”

That appears to me to be the fair import of the section. The appellants contend that by implication the section though expressed negatively confers upon the employer a new right to terminate the compensation finally. In the light of the history of the matter I should have great difficulty in accepting this view. But in any case it seems to be excluded by the consideration that one of the cases where cesser of payment is sanctioned is where the workman has “actually returned to work.” That might be temporary and tentative, and the workman might after a day or two be found to be quite unable to continue the work owing to the injury which he had suffered.

“The general saving clause (iii) was not very satisfactorily elucidated in argument, but its terms appear to me to be inconsistent with the general arguments submitted by the appellants.

I agree with your Lordship in the chair that the argument submitted does not enable us satisfactorily to deal with a question of the competency of an interim award.

The Court answered the question of law in the affirmative and dismissed the appeal.

Counsel for the Appellants—Dean of Faculty (Sandeman, K.C.)—Marshall. Agents—W. & J. Burness, W.S.

Counsel for the Respondents O'Hare, Hassan, Fitzpatrick, Scullion, and Collins—Solicitor-General (Fenton, K.C.)—Keith. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent Barkausas—Aitchison, K.C.—Gibson. Agents—W. G. Leechman & Company, Solicitors.

Thursday, July 3.

FIRST DIVISION.

[Lord Murray, Ordinary.

GLASGOW PARISH COUNCIL v. CROMDALE PARISH COUNCIL AND DUNDEE COMBINATION PARISH COUNCIL.

Poor—Settlement—Residential Settlement—Constructive Residence—Computation of Three Years' Residence—House Acquired but not ready for Occupation at Commencement of Period—Poor Law (Scotland) Act 1898 (61 and 62 Vict. cap. 21), sec. 1.

The father of a pauper vacated his house in the parish of A a week or ten days prior to 28th May 1895 with the intention of removing to the parish of B, where he had taken a house with entry at 28th May 1895. By that date the eldest daughter and two of the younger children had removed to the parish of B, where the eldest daughter took over the keys and was preparing the new house for occupation, she and the two children residing meanwhile with relatives there. A few days after the 28th May 1895 the house was ready for occupation, and the father with his wife and the other children removed from the parish of A to the parish of B, where he and his family then took up residence. On 28th May 1898 he removed with his family from the parish of B to Glasgow, where he died in October 1898. *Held* that the father had not acquired a residential settlement in the parish of B.

Poor—Settlement—Derivative Settlement—Death of Father without Residential Settlement—Derivative Settlement from Widowed Mother.

Where the father of a pauper had died without having acquired a residential settlement and the surviving mother had acquired by residence a settlement for herself, *held* that the pauper on reaching puberty had a residential settlement derived from his mother. *Crieff v. Fowles Wester*, 1842, 4 D. 1538, *followed*.

The Parish Council of Glasgow raised an action against the Parish Council of Cromdale and the Parish Council of Dundee Combination concluding for declarator, *inter alia*, that Frederick Meldrum, then an inmate of Woodilee Asylum, Glasgow, had a subsisting parochial settlement in the parish of Cromdale, and for decree against the said parish for payment of £187, 11s. 2d. expended for behoof of the said Frederick Meldrum. Alternatively the summons concluded for declarator that the said Frederick Meldrum had, when he became chargeable to the pursuers, a parochial settlement in the parish of Dundee Combination, and for decree against the said parish for the said sum.

The following narrative is taken from the opinion of the Lord Ordinary:—“In this action the Parish Council of the Parish of

Glasgow seeks to obtain repayment from the Parish Council of the Parish of Cromdale, or, in the alternative, from the Parish Council of Dundee, of certain sums expended by way of parochial relief. The question concerns the settlement of a pauper named Frederick Meldrum.

"The pauper, who is now a certified lunatic, was born in 1894, and is the lawful son of the now deceased John Meldrum and his wife, who survived her husband, but who is also now deceased.

"Of the three parish Councils in the field Cromdale is at once the parish of the father's birth, of the admitted (former) residential settlement of the father, and of the pauper's birth; Dundee is the parish of the alleged second residential settlement of the father; Glasgow is the parish of the admitted residential settlement of the mother.

"The following are the material facts and dates in the history of the case—(1) The pauper was born on 2nd June 1894, the family being then resident in Grantown, where the father carried on business as a baker; (2) that in the end of May or beginning of June 1895 the family removed to Dundee and there remained till 28th May 1898; (3) that on 28th May 1898 the family removed to Glasgow, where the father died in October 1898, the pauper being then a child, being four years of age; (4) that the mother and children thereafter resided in Glasgow, and were so resident on 2nd June 1908 when the pauper attained puberty; (5) that the mother died in July 1910; and (6) that the pauper first became chargeable in Glasgow on 10th May 1911 for a period of some three days. He again became chargeable in Glasgow for a few months in 1912, and finally and permanently chargeable in January 1913 when he was certified, but it is agreed that if the element of chargeability falls to be considered in the case everything turns on the few days' chargeability in May 1911.

"The following express admissions were given by parties at the hearing as the basis of the discussion in the procedure roll—(1) That the facts as to the removal of the family at about Whitsunday 1895 from Grantown-on-Spey in Cromdale to Dundee are correctly set forth in answer 7 [*vide infra*] for the Parish Council of Cromdale; (2) that the pauper is for the purposes of this case to be taken as having been at the material dates under no mental disability; and (3) that he is to be taken as having been in fact and in law forisfamiliarated on 2nd June 1908 when he attained puberty."

The parties averred—"(Cond. 5) The said pauper has not and never had any settlement in the parish of Glasgow. His parochial settlement at the dates of his respective chargeability as above mentioned was in the parish of Cromdale by reason of his birth there, or alternatively in the event of his not having been forisfamiliarated at puberty, and his father not having a residential settlement as after mentioned, by reason of the birth and settlement of his father in that parish, and the pursuers have pressed their claim on the defenders, the Parish Council of Cromdale, on these

alternative grounds. The Parish Council of Cromdale have repudiated liability as after mentioned. (*Ans. 5 for the Parish Council of the Parish of Cromdale*) Admitted that the pursuers have claimed against these defenders in respect that the pauper's settlement is alleged by them to be in these defenders' parish. *Quoad ultra* denied. Explained that the pauper's settlement at the respective dates of chargeability was and still is in the parish of Dundee, or alternatively in the parish of Glasgow as after mentioned. (*Ans. 5 for the Parish Council of Dundee Combination*) Denied that the said pauper has not and never had any settlement in the parish of Glasgow. *Quoad ultra* admitted. (Cond. 6) The defenders, the Parish Council of Cromdale, while admitting that the pauper was born in the said parish, have denied all liability to the pursuers on the ground that the said pauper was a congenital defective who had now been certified insane, that he was never forisfamiliarated, and that he followed the settlement of his father as it existed at the latter's death in 1898. They further maintain and allege that the pauper's settlement was in the parish of Dundee on the ground that the pauper's said father removed his residence to Dundee in 1895 and resided there until shortly before his death in 1898, and thus acquired a residential settlement by residence for three years in the parish of Dundee Combination, which had not been lost by the necessary absence in terms of the Poor Law (Scotland) Act 1898. In the event of the pauper's said father having acquired a residential settlement in the circumstances stated the said pauper has a derivative residential settlement in the parish of Dundee Combination. Denied that the pauper has any derivative settlement in Glasgow parish. The contention that the pauper has a residential settlement in Glasgow derived from his widowed mother's residential settlement there has been put forward for the first time in the course of this action. (*Ans. 6 for the Parish Council of the Parish of Cromdale*) Admitted that these defenders have denied liability to the pursuers. *Quoad ultra* denied subject to the explanation following. Explained that when the pauper attained puberty, on 2nd June 1908, he either took a derivative settlement in the parish of Dundee in respect that his father the said John Meldrum had acquired a residential settlement in the said parish by residence there for the space of three years ending 28th May 1898 and had not lost his said settlement at the date of his death, or he took a derivative settlement in the parish of Glasgow in respect that his mother's residential settlement was in the said parish at the date when the pauper attained puberty. The pauper still retains his settlement in the parish of Dundee, or alternatively in the parish of Glasgow as aforesaid. (*Ans. 6 for the Parish Council of Dundee Combination*) The contention submitted by the Parish Council of Cromdale is referred to. Denied that the contention that the pauper acquired a derivative settlement in

the parish of Dundee is well founded. Explained that the pauper's father did not reside in Dundee for the full three years necessary for the acquisition of a residential settlement. He arrived in Dundee in the first week of June 1895 and left on 28th May 1898. These defenders adopt the contention for the Parish Council of Cromdale that the pauper's settlement is in Glasgow parish. *Quoad ultra* denied. (Cond. 7) The pursuers have now ascertained and they aver that the pauper's said father removed with his family to 1 Gowrie Street, Dundee, on or about 23rd May 1895, and that he thereafter resided at 2 Peddie Street, Dundee, until 28th May 1898, when he removed to Glasgow, where he died the same year. Reference is made to the statements in answer for the Parish Council of Cromdale regarding the circumstances of the said John Meldrum's residence in Dundee, which statements the pursuers admit and adopt. They further adopt the contentions of the Parish Council of Cromdale that the pauper has a settlement in Dundee which he has never lost by absence as an alternative to the contention that his settlement is in Cromdale as averred in condescence 5. They accordingly on 11th September 1919 intimated a claim upon the defenders the Parish Council of Dundee. These defenders, however, deny liability to reimburse the pursuers for their said outlays. (Ans. 7 for the Parish Council of the Parish of Cromdale) Admitted that the pauper's father the said John Meldrum removed with his family from these defenders' parish to Dundee. Explained that some weeks before 28th May 1895 the said John Meldrum sold the business which he had carried on for many years in Granttown-on-Spey to Mr Frank M'Cook as he intended to remove to Dundee where he had taken a house at 1 Gowrie Street with entry at Whitsunday (28th May) 1895, but to which he got entry prior to that date as after mentioned. The said John Meldrum vacated his house and shop in Granttown-on-Spey, and gave entry and occupation thereto to the purchaser of his said business a week or ten days before 28th May 1895. His eldest daughter and two of the younger members of the family then proceeded to Dundee. John Meldrum's said daughter did not take up residence in said house, No. 1 Gowrie Street, immediately on her arrival in Dundee, but she obtained the keys of the house, which was standing empty, and took possession of it for her father a few days before the removal term (28th May 1895). She resided close by in the house of an aunt, and was daily at 1 Gowrie Street for the purpose of cleaning the said house and preparing it for the reception of John Meldrum and the rest of the family. She also purchased articles of furniture in Dundee which she placed in the said house in readiness for their arrival. John Meldrum remained in Granttown-on-Spey for a few days after 28th May 1895 arranging for the disposal of part of his furniture. After vacating his own house in Granttown-on-Spey the said John Meldrum and his wife resided in the house of his father-in-law. A day or two after 28th May 1895 and not

later than 4th June 1895, however, the said John Meldrum and his wife and other children left Granttown-on-Spey and proceeded to Dundee. Previously to his departure he had despatched the remainder of his furniture to Dundee, and on his arrival there he at once took up residence with his family in his said house, 1 Gowrie Street, where he lived until Whitsunday 1896. At that time he removed to 3 Peddie Street, Dundee, where he resided until 28th May 1898, when he removed to Glasgow. Admitted further that the pursuers have claimed against the defenders the Parish Council of Dundee. Explained that the pursuers' said claim is well founded in respect that the said John Meldrum had acquired and retained at the date of his death on 5th October 1898 a residential settlement in Dundee, and that the pauper has a derivative settlement in the said parish through his said father. As above mentioned due notice of chargeability was given by the pursuers to the parish of Dundee in respect of the chargeability in May 1911, May 1912, and January 1913, and the pauper accordingly has never lost his said settlement in the parish of Dundee by absence therefrom for the statutory period. (Ans. 7 for the Parish Council of Dundee Combination) These defenders adopt the averments for the Parish Council of Cromdale but deny their contentions. *Quoad ultra* denied."

The pursuers pleaded, *inter alia*—"1. The pursuers are entitled to repayment of the sums concluded for, with expenses, from one or other of the defenders, and to decree of declarator in terms of one or other of the alternative conclusions of the summons, in respect that the pauper had no settlement in Glasgow but has a settlement in one or other of the defenders' parishes. 2. The Parish Council of the Parish of Cromdale as the parish of the pauper's birth settlement, or alternatively of the settlement of the pauper's father, are in the circumstances condescended on liable to the pursuers in payment of the sums concluded for, and the pursuers are entitled to decree in terms of the declaratory and petitory conclusions directed against these defenders; or 3. in the event of its being established by the Parish Council of Cromdale or otherwise that the pauper's settlement is in the parish of Dundee Combination in respect of the residence there of the pauper's father as condescended on, the pursuers are entitled to decree against the Parish Council of the Parish of Dundee Combination in terms of the petitory and declaratory conclusions directed against them."

The defenders the Parish Council of Cromdale pleaded, *inter alia*—"2. The pauper's father having had a residential settlement in the parish of Dundee, and the pauper on attaining puberty having taken a derivative settlement in said parish through his father and never having lost same, the settlement of the pauper is in the parish of Dundee, and these defenders should be assoltized. 3. Alternatively the pauper's settlement being in the parish of Glasgow in respect of his mother's residential settlement in said parish, these

defenders are entitled to absolvitor."

The defenders the Parish Council of Dundee Combination pleaded, *inter alia*—
"3. These defenders are entitled to absolvitor in respect (1) that the pauper's father never acquired a residential settlement in Dundee; (2) that the pauper's widow mother had at the date of his forisfiliation a residential settlement in Glasgow, and that the pauper then derived that settlement from her; (3) that in any event, if the pauper on his forisfiliation derived a residential settlement in Dundee from his father, that settlement was thereafter lost by the pauper's continuous absence."

On 22nd June 1923 the Lord Ordinary assolizied both defenders.

Opinion.—[After the above-quoted narrative]—"The liability of Dundee is not disputed if (1) the father acquired a residential settlement in Dundee, and further, (2) this residential settlement has not been lost by the pauper's absence since he became forisfiliated.

"I accordingly turn at once to consider the facts above referred to which are set forth in answer 7. The material facts are these—The father sometime prior to 28th May 1895 sold his business in Grantown, vacated his house intending to remove (as he in fact did) to Dundee, where he had taken a house with entry at 28th May 1895. As at the crucial date, 28th May 1895, the family position was as follows:—The father, mother, and one or more children were *de facto* in Grantown residing with relations, the purchaser of his business having then obtained entry to the father's shop and house. The eldest daughter and two of the younger children as an 'advance guard' of the family were *de facto* in Dundee, also resident with relations, the eldest daughter being then engaged in preparing the Dundee house which was vacant and of which the keys had been handed over, and to which entry had been obtained a few days before the term. Within a few days of the 28th May, and not later than 4th June 1895, the father, mother, and other children and their Grantown furniture followed to Dundee where the united family thereafter resided.

"In these circumstances it is maintained that the father must in law be deemed to have been constructively resident in Dundee as from 28th May 1895, and to have therefore completed his statutory three years' residence in Dundee when he on 28th May 1898 removed himself and family to Glasgow.

"I am of opinion that this contention is not well founded. As at 28th May 1898, while the father's intention to remove to and to take up residence in Dundee is manifest, that intention had not been in fact carried out, and the actual presence of certain of the children in Dundee plus the occupation by them as alleged of the intended house cannot in my judgment prevail against the fact that actual residence of the father and the family as a whole only commenced a few days later.

"I had a very full citation of the numerous cases in which under varying circumstances a man has been held to be 'residing' or 'continuously residing' in a parish although

de facto absent from it. None of these, however, appear to me to apply to the present facts.

"It is true that eminent judges have expressed, reluctantly or not, the view that the doctrine of 'constructive residence' once admitted involves the conclusion that, should circumstances demand such a decision, the statutory condition of residence, and that from start to finish, may be held to be constructively satisfied, and that a man may thus be held to have been 'resident' in a place in which throughout his life he has never been personally resident—Lord President Inglis in *Beattie v. Stark*, 1879, 6 R. at 959.

"But even assuming this to be the logical result of the decisions, and giving the doctrine of 'constructive residence' its fullest application, this at least seems necessary as an irreducible minimum that as at the crucial date, viz., the *terminus a quo* the residence is to count, the man's home must be shown to have been definitely established in the given parish. I use the term 'home' in the connotation of the decisions of the law of domicile which appears to have been accepted as affording at least an analogy if not a test in cases of settlement. On the above facts I am unable to affirm that as at 28th May 1895, the father's home was so established in Dundee. That it was so established a few days later is of no moment in applying what is after all an arbitrary statutory rule. The answer is that on the essential date he was merely in the course of carrying out and had not completed his unquestioned intention to take up a new residence. Accordingly I think the present case fails on the facts to bring itself within the doctrine.

"As the matter, however, was fully debated I should add that in my view there is room for distinguishing between a case in which the question is as to whether the facts suffice to initiate a residence, and a case in which the question is as to whether the facts suffice to maintain or continue an existing residence.

"It is with the latter question that the decisions upon constructive residence are almost exclusively concerned.

"Inasmuch as the statutory conditions require not merely residence for the prescribed period, but that such residence should be 'continuous,' it was clearly necessary to construe continuity in a reasonable sense, and so as to conform to the ordinary social needs and habits of mankind. To hold that mere absence itself constituted a break in continuity would have rendered the statutory condition impossible of fulfilment. This being so the character and quality of the absence, and not merely its duration, naturally fell to be considered, and in this connection the conception of a person's 'home' assumed importance, especially in cases of married and family life. It was on the above necessity for some such workable interpretation of the statute that the doctrine of constructive residence in its origin and development rests. But as has often been stated, no fiction need be carried beyond the necessity which is its

warrant. The test adopted in earlier case law was whether the absence in its character and duration was incidental to and consistent with the idea of general residence. In short, as was pointed out by Lord Justice-Clerk Inglis in his judgment in the case of *Greig v. Miles* (1867, 5 Macph. at 1141), the earlier decisions turned on the question of 'continuity' and not on a vicarious residence constituted by means of the presence in the parish of wife and children in the 'home' provided by an absentee. But the view so protested against must now be taken as settled. But while this is so it should be noted how largely the element of continuity figures in the subsequent decisions. I am not aware of nor was I referred to any decision in which the factor of 'initial' residence by the father was absent, that is to say, where the father was not personally present in the parish of the alleged settlement at the date on which the statutory period of residence was alleged to have commenced. This element was present in the whole court case of *Greig v. Miles*—the case of a sailor—though admittedly the initial residence was of very short duration, and the real issue was just one as to continuity, or as it was put by Lord President M'Neill in *Mackenzie v. Cameron* (1853, 21 D. 93) the bridging of 'gaps in the currency.' This was pointed out by Lord Deas—one of the majority judges in the case of *Greig*—in the succeeding case of *Moncreiff v. Ross*, 1867, 7 Macph. 331. In the series of cases which have followed on *Greig*, the cases of *Moncreiff*, *Beattie v. Smith* (4 R. 19), *Milne* (10 Macph. 731), *Harvey v. Roger* (6 R. 446), and *Wallace* (8 R. 345), were cases in which the sole question was whether continuity of an admitted residence of the father had been interrupted during the currency of the statutory period by the father's absence, his wife and family remaining in occupation of the home he had established. In the cases of *Cruickshank* (4 R. 267), *Beattie v. Stark* (6 R. 957), and *Deas v. Nixon* (11 R. 945) the same question of continuity arose in relation to the retainer during absence of the father of a residential settlement already fully acquired by him.

"In each and all these cases the residence under discussion had been initiated by the personal presence of the father.

"Similarly in those cases in which continuity of residence has been held to have been broken or interrupted, the father's personal residence in the new home established by him (be it only during week-ends and in the intervals when his employment permitted) has always been present as supporting the change of residence founded on. This was so in the case of *Kilmarnock v. Leith* (1898, 1 F. 105), and I know of no case in which interruption of residence has been decided in the absence of this element. On the contrary, the cases of *Beattie v. Smith* (4 R. 19), *Greig v. Simpson* (1888, 16 R. 18), and *West Calder v. Bonness* (1905, 8 F. 57) show that the situation of the father as the head of the home, notwithstanding full acceptance of the doctrine of constructive residence, is still the paramount consideration, and that his actual absence in

circumstances which disclose a definite intention to change his residence, or an intention which is adverse to the continuation or retainer of the former residence, will prevail over the fact that wife, family, and furniture remain in the former home. The value of these cases, of course, only consists in this, that they accent the importance which still attaches to the personal presence of the father—Lord Dunedin, 8 F. at page 63.

"Accordingly it is, I think, still an open question as to whether the actual presence of the father may not be an essential element to the commencement of a new residence. As at present advised I am of opinion that different considerations apply to such a case, and the cases which have arisen in which the real issue as explained by Lord Kinnear in the *Kilmarnock* case (1 F. at 109) is as to 'continuity,' and I incline to the view that in such cases the new 'residence' is not perfected as a basis for a new residential settlement unless and until some period of actual presence of the father can be invoked. I prefer, however, to rest my judgment on this, that the facts show that in the present case the new home (apart altogether from the element of the mere absence of the father) had not been established. On the facts the case of *Cavers v. Smailholm* (1909 S.C. 195) most nearly approaches the present. In that case the father had taken a house in Smailholm as at 28th May. His wife and family arrived there but did not take possession of the house until the father's arrival on 29th May. It was held that the *terminus a quo* for the new residence was the 29th and not the 28th of May. It is implicit in the judgments, although no express reference is made to the point, that the presence of the wife and family, as also the tenancy of a house of which possession had not in fact been taken, were insufficient to constitute a starting point for residence. The present case is stronger, inasmuch as access had been obtained to the Dundee house by the daughter on behalf of her father, and the house was in course of being got ready for occupation.

"I am accordingly of opinion that the case as against Dundee fails. Had a contrary conclusion been reached, it is common ground among parties Dundee would have been fixed with liability, for the residential settlement of the father so acquired would have 'enured' to the forisfamiliarized son on attainment of puberty.

"The next question argued before me was whether on the assumption that a residential settlement had been acquired in Dundee, that settlement had not been lost by the pauper's absence. In the view which I have taken this question does not arise for decision. But it may be convenient that I should express my opinion on the argument submitted. As before noted the crucial dates are these. The pauper (*ex concessis* forisfamiliarized and of normal capacity) attained puberty and started life on 2nd June 1908 with a residential settlement in Dundee. As he never thereafter returned to Dundee that settle-

ment was admittedly lost by absence unless this was interrupted by his becoming chargeable in Glasgow for a period of three days on 10th May 1911, some three weeks before the statutory period of 'three years' absence' was fulfilled. On this occasion Glasgow issued the usual notice of chargeability to Cromdale and Dundee, but beyond this nothing happened. In particular neither Cromdale nor Dundee gave any admission of liability.

"In this situation it was maintained in argument (a) that the pauper's absence was interrupted, and (b) that on the pauper's discharge from the Glasgow poorhouse on 13th May 1911 he became rehabilitated and a fresh period of three years commenced to run. If this argument was well founded there was no dispute but that the Dundee settlement was retained with consequent liability on Dundee to relieve Glasgow.

"The argument was based on the case of *Johnston v. Black*, 1859, 21 D. 1294. In that case a pauper with a residential settlement in the parish of A went to reside in the parish of C. After the lapse of about three years he applied for and obtained during two months relief in C. The parish of A admitted liability to C in respect of the relief given. The pauper on rehabilitation in February 1852 continued to reside in C, and after the lapse of a further period of three and a-half years again became chargeable in C in August 1855. The parish of A denied liability on this occasion, but was held liable in relief to C in respect that the statutory period of absence from A since 1852 (four years) had not elapsed. The case accordingly expressly decides that the condition of chargeability may not only prevent the acquisition of a new residential settlement, but may, if liability be admitted by the parish concerned, interrupt the prescription of a former residential settlement in the latter parish, as also that in these circumstances a new period commences to run on the rehabilitation of the pauper. The ratio of the decision appears to be that the admission of the parish of A is in law equivalent to placing him on the roll of A as an admitted resident in that parish. Lord President M'Neill (at p. 1297) who delivered the judgment of the Court thus put the position—'The pauper became by virtue of this admission a pauper settled in the parish of A, recognised as such . . . and in the position of exercising and enjoying the benefit of his settlement. If he is afterwards rehabilitated he may lose that settlement; if he is not rehabilitated he will not lose it. If rehabilitated he may by an absence of five (*quaere* four) years lose his settlement. There is a new element in this case . . . the fact of (his) being established in the parish as a pauper and his coming back in law claiming a settlement, and resettling himself there. He has the status there of a parishioner and of a pauper. It may or may not be that he will be rehabilitated. But in the meantime he is placed there as before.' This in effect imports that the parish giving such an admission is barred from claiming that at that date the pauper is 'absent' from it, and that he is

taken as being resident in that parish just as if he had returned to and was being relieved in its own poor house.

"It was argued that the same legal result should follow in the present case. In the first place it was suggested that inasmuch as Dundee had not replied to the notice its silence should be taken as consent, that is, as the equivalent of express admission. I reject this argument (*Jack v. Simpson*, 1864, 2 Macph. 1221, *per* Lord Justice-Clerk Inglis at p. 1225). But the broader ground was strenuously maintained that the sending of a notice, whether it be ignored or repudiated, should be attended with the like effect as an express admission in the case of *Johnston v. Black*, providing always it be ultimately determined that the parish receiving the notice is the true parish of settlement. Accepting as I am bound to do the decision in *Johnston's* case which, though much criticised, (see *Cochrane v. Kyd*, 1871, 9 Macph. 836; *Inverkip* case, 21 R. 64) has never been overruled, the above argument appears to me to derive no aid from that decision. The whole virtue of the decision in *Johnston* lay in the admission given, and the case appears to me to have no application to a mere notice or claim. Short of some personal exception I see no reason why effect should not be given to the terms of the statute, and the admitted absence of the pauper from Dundee in and after 1908 should not entail loss of his settlement. The contrary conclusion would, I think, run counter to the principle laid down by Lord Kinnear in the *Inverkip* case (*vide supra* at p. 75) that the fact that a person receives relief in one parish is not sufficient to arrest the loss of a residential settlement in another, and would thus attach to the mere giving of a notice an effect upon the law of settlement which has repeatedly been denied to it.—*Beattie v. Adamson*, 1866, 5 Macph. 47, at p. 57.

"Accordingly I am of opinion that the giving of the notice in 1911 effected no interruption of the prescription of the pauper's Dundee settlement assuming, contrary to my opinion, that he had such a settlement. The parish of Dundee accordingly disappears from the competition.

"There remains only for consideration the competition between Cromdale, as the parish of the pauper's birth, and Glasgow, as the parish of the widow's residential settlement, for it is not disputed that after the father's death the widow did acquire such a residential settlement in Glasgow, and that she had such a settlement in 1908 when the pauper attained puberty. The case for Cromdale is based on the *Wester Fowlis* case, 1842, 4 D. 1588. In that case a legitimate posthumous child was born in Little Dunkeld, and shortly afterwards mother and child removed to Fowlis Wester where the mother acquired and died possessed of a residential settlement. The father had no residential settlement at the date of his death. The pauper lived with her mother till she was about fourteen years of age, when she went into service in various places, including Crieff. Her mother died when the pauper was about

nineteen, and some ten years later the pauper became lunatic and chargeable to Monzievairst.

“Monzievairst called into the field (1) Crieff, as the parish of an alleged residential settlement acquired by the pauper herself (a contention that was negated on the facts and need not be further noticed), (2) Little Dunkeld, as the parish of the pauper's birth, and (3) Fowlis Wester as the parish of the mother's residential settlement. In a competition between these latter two parishes liability was held to attach to the parish of the mother's settlement. It may be noticed that the parish of the father's birth, if known, was not convened. The grounds of this decision, which was to some extent based on the old case of *Coldinghame* (the case of an illegitimate child) appears *quoad ultra* to rest rather upon policy than upon law. But the decision appears to me to apply to the present case. Here, as in *Wester Fowlis*, the competition is between the parish of the pauper's birth and the parish of the widow's residential settlement, alleged to be derivatively acquired by the pauper. The only added feature is that here the parish of the father's birth is also in the field. But this does not, I think, make any real difference to the conclusion in the present competition. For it is settled that in priority of liability the pauper's own birth parish takes precedence of the parish of the father's birth although postponed to the parish of the father's residential settlement, and the only effect of Lord Stormonth Darling's and Lord Low's criticism of the *Wester Fowlis* case in *Rutherglen v. Kilmarnock* (1907 S.C. 1053) would, if accepted, be to postpone the liability of the parish of the widow's settlement even to the parish of the father's birth settlement, and thus make the former the last resort of all.

“If I had felt myself free to form an independent view I should have held liability to attach to the parish of the pauper's birth, and I respectfully doubt whether the same decision would have been reached had the *Wester Fowlis* case fallen to be decided after the exposition of the law contained in the judgments of the majority judges in the case of *Craig v. Greig*, 1863, 1 Macph. 1172. In that case a father with a birth settlement only died leaving a pupil son, who lived until and after attaining puberty with his mother. On attaining seventeen years of age he became chargeable, not having acquired any residential settlement on his own account. In a competition between the parish of the pauper's and the parish of the father's birth, convened as defenders by the relieving parish, the former was held liable. It appears from the facts that when the pauper attained puberty (which was the critical date) the widow had acquired no residential settlement of her own and had no other settlement than that derived from her husband. The grounds of judgment of Lord Justice-Clerk Inglis and Lords Benholme and Mackenzie, who were with the majority, were these (1st) that the son being forisfamiliated on attaining puberty, then took his own settlement, which in the

absence of a residential settlement derived from the father was his own birth settlement, and that his residence with his mother after puberty was irrelevant. The survivance of the widow and the fact that the son lived with her in family was ruled out as not being in law capable of affecting the position of a minor pubes. The reasoning on which the judgment proceeds appears to me to be inconsistent with the idea that a mother is capable, as a father is, of transmitting a derivative settlement to her child. For at common law the child is not within the *potestas* of the mother, and the ground upon which a father is deemed to ‘earn’ a residential settlement not only for himself but on behalf of his children is lacking.

“No such question arises in the case of pupil children who are dependent upon the widowed mother, for the mother in such cases is herself the pauper, and her settlement alone requires to be considered, but it may be that in certain cases, on grounds of family policy and the desire to keep the family together, the law may have regarded the mother in poor law questions as to some extent the source of derivative right of her pupil children. In principle, however, the situation of a forisfamiliated minor pubes, which is the case in hand, is quite different from that of a pupil child. The child then becomes *sui juris*, and takes a settlement in his own right. That settlement is the parish of his own birth, unless indeed his father has earned for him a residential settlement, in which case he takes that in preference, but this again in his own right, the sounder opinion being that the father in so acquiring a settlement earns it not only for himself but for his children—*Hume v. Pringle*, 12 D. 411; *Allan v. Higgins*, 3 Macph. 309; Lord Justice-Clerk Moncreiff in *St Cuthberts v. Cramond*, 1873, 1 R. 174, at 176. Accordingly it would in my opinion be more consonant with legal principle to hold that in the present case liability should attach to Cromdale as the parish of the pauper's birth, than to Glasgow as the parish of the widow's residential settlement, but in deference to the *Wester Fowlis* decision, which is binding upon me, I hold that liability attaches to the latter.”

The pursuers reclaimed, and argued—1. The father of the pauper having vacated his house at Grantown and taken a house in Dundee from 28th May 1895 was constructively resident in the latter parish during the few days prior to his taking up actual residence there—*Greig v. Miles*, 1867, 5 Macph. 1132; *Moncreiff v. Ross*, 1869, 7 Macph. 331; *Milne v. Ramsay*, 1872, 10 Macph. 731; *Beattie v. Smith*, 4 R. 19, 14 S.L.R. 22; *Cruickshank v. Greig*, 4 R. 267, 14 S.L.R. 204; *Beattie v. Stark*, 6 R. 956, 16 S.L.R. 544; *Wallace v. Beattie*, 8 R. 345, 18 S.L.R. 289; *Deas v. Nixon*, 11 R. 945, 21 S.L.R. 637; *Kilmarnock Parish Council v. Leith Parish Council*, 1898, 1 F. 103, 36 S.L.R. 107; *Cavers Parish Council v. Smailholm Parish Council*, 1909 S.C. 195, 46 S.L.R. 170. Thus the father had acquired a residential settlement in Dundee which the pauper derived from him. 2. Assuming that the pauper had lost his settlement in Dundee by absence,

he did not take a derivative settlement in Glasgow from his mother, and accordingly he reverted to his own birth settlement in the parish of Cromdale. The case of *Crieff v. Fowlis Wester*, which was to the contrary effect, was unsound, and had been impliedly overruled by the trend of subsequent decisions. A child whose father was dead took a derivative settlement from its mother during pupillarity only in order to prevent the dispersal of the family—*Coldingham v. Dunse*, 1779, M. 10,582; *Hume v. Pringle*, 1849, 12 D. 411; *Grant v. Reid*, 1860, 22 D. 1110; *Adamson v. Barbour*, 1853, 1 Macq. 376; *Craig v. Greig*, 1863, 1 Macph. 1172; *M'Lennan v. Waite*, 1872, 10 Macph. 908; *St Cuthbert's Inspector of Poor v. Cramond Inspector of Poor*, 1 R. 174; *Greenock Parish Council v. Govan Combination Parish Council*, 1905, 7 F. 884, 42 S.L.R. 682; *Rutherglen Parish Council v. New Monkland Parish Council*, 1907 S.C. 1053, 44 S.L.R. 757; *Greenock Parish Council v. Kilmarnock and Stirling Parish Councils*, 1911 S.C. 570, 48 S.L.R. 444.

Counsel for defenders were not called on.

LORD PRESIDENT (CLYDE)—The first question in this case Mr Garrett correctly formulated as a question of fact. It is this—On the facts of the case did the pauper's father acquire constructively a residential settlement in Dundee and transmit it to the pauper? It has long been settled that residence (in the constructive sense) in a home of some kind may be consistent with personal sojourn elsewhere. The claimers could not desire a wider admission with regard to the ambit of this doctrine than is to be found in the Lord President's opinion in the case of *Beattie v. Stark*, 1879, 6 R. 956, at p. 959. But if the existence of a home is to carry with it the implication of residence in it by the owner of the home, it is in my opinion essential that it should be an actual or established home. I mean that the owner of it must either have actually taken up his residence in it or at any rate that the home must have been made ready and open for his occupation as such. It is not possible on the facts of this case to say that the home in Dundee complied with either of these descriptions. The pauper's father did not actually take up his residence in it until some days after 28th May 1895, and it was only in course of preparation as a home during those days. Nobody was living in it. It was being cleaned, and—while some articles of furniture were being placed in it—the pauper's father only brought his Grantown furniture to it when he personally removed to Dundee. If that conclusion be sound, it is unnecessary to deal with the second question which Mr Garrett formulated, namely, assuming that the pauper's father had acquired a constructive residential settlement in Dundee which transmitted to the pauper, did the pauper lose it by absence for the statutory period?

The third question which Mr Garrett put to us was this—Had the pauper a residential settlement derived from his widowed mother in Glasgow? Now that question

undoubtedly raises a highly arguable point in the somewhat extensive tract of case law which is concerned with the interpretation of the Acts relative to the relief of the poor, and for myself, and I believe for my brethren too, I should like to say how much I owe to Mr Garrett's very clear and very able exposition of the authorities on this subject. The question we have to answer narrows itself to this—Is the case of *Crieff v. Fowlis Wester* (4 D. 1538), which applies in terms to the facts of the present case, to be followed? or on the other hand is that case shown to be so ill-decided, or so contrary to the principle of the body of the authorities to which I have referred, that we should remit to Seven Judges with a view to its reconsideration and, if thought proper, to its being overruled. As I understand *Crieff v. Fowlis Wester* it settles nothing but this, that if the father has died without a residential settlement, and if the surviving mother has acquired a residential settlement of her own, the child when forisfamiliated starts life with the mother's residential settlement. That is a rule of clear if of very limited application. The case has stood on the books for eighty-two years. It has been often referred to. It has been several times distinguished, but it has never been adversely observed upon. In the highly artificial department to which the case belongs it is necessary to remember that the certainty of a rule is at least as important as the perfect reconciliation of it to what may be thought to be the principle of other decisions belonging to the same department. It may be—I express no opinion either way—that Mr Garrett is right when he says that the decision is not satisfactorily reconcilable with what he describes as the drift of later decisions. But while, like the Lord Ordinary, I think it is possible that *Crieff v. Fowlis Wester* if it had arisen at a later date might have been decided otherwise than it was, there does not appear to me in the circumstances any sufficient justification for submitting to reconsideration by seven Judges a rule of such old standing and of such definite and restricted application.

On the whole matter therefore I arrive at the same result as the Lord Ordinary.

LORD SKERRINGTON—We had an able discussion of the authorities in regard to what is called constructive residence. I am glad to say, however, that no decision was cited which makes it necessary for us to affirm that the pauper's father resided for three years continuously in the parish of Dundee when it is plain on the known facts that he did nothing of the kind, and that his residence fell short of the statutory period by three or four days.

As regards the second point, if the question could be regarded as an open one, much might be said by way of criticism of the case of *Crieff v. Fowlis Wester*, 4 D. 1538. In poor law cases, however, certainty is more important than logical consistency or principle, and I agree that it is not necessary for us to consider whether a decision

to the same effect would have been pronounced if the question had arisen for the first time at the present day.

LORD CULLEN—As regards the question whether the father acquired a residential settlement in Dundee, the doctrine of constructive residence is well established, but in any particular case there must, I think, be a justification for resorting to it through the absence of actual personal residence elsewhere which is qualified to count for the purposes of poor law settlement. Here during the few days which immediately preceded the going of the father to Dundee in 1895, he *de facto* continued to stay along with his wife and part of his family in the parish of Cromdale, where he had previously resided for many years. I am unable to see why this actual personal and family residence in Cromdale should be ruled out and ignored in favour of a supposed constructive residence in Dundee. I see no necessity for resorting to the doctrine of constructive residence in the circumstances. I think that during the few days in question the father's residence for the purposes of the poor law was Cromdale, and that if the question had been whether he had resided long enough in that parish to acquire a residential settlement there these days would have fallen to be counted in.

The second question as to the loss of the Dundee settlement on that view does not arise.

As regards Mr Garrett's challenge of the decision in the case of *Crieff v. Fowlis Wester* (4 D. 1538) I agree with what has been said by your Lordship in the chair.

LORD SANDS—I agree that the first question is one of fact and does not require us to pronounce any opinion upon this branch of the law.

The second question argued challenges a rule of positive law which has stood for over three-quarters of a century, and I agree that in view of the somewhat arbitrary character of this branch of the law it is not proper that we should now reconsider that rule.

The Court adhered.

Counsel for the Pursuers—Robertson, K.C.—Garrett. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defenders the Parish Council of Cromdale—C. H. Brown, K.C.—Burnet. Agents—R. Addison Smith & Company, W.S.

Counsel for the Defenders the Parish Council of Dundee Combination—Henderson, K.C.—Cooper. Agents—Macpherson & Mackay, W.S.

Thursday, July 10.

FIRST DIVISION.

WADDELL'S JUDICIAL FACTOR *v.*
WADDELL AND OTHERS.

Succession—Vesting—Object of Gift—Direction to Convey Estate on Expiry of Life-tenant to "the Parties Legally Entitled thereto"—Period at which Parties to be Ascertained.

Succession—Collatio inter hæredes—Testate Succession—Heir-at-law Taking Heritage under Bequest "to the Parties Legally Entitled thereto."

Succession—Collatio inter hæredes—Collation by General Disponee of Heir-at-law.

Succession—Collatio inter hæredes—Collation of Ancestor's Heritage by General Disponee of Heir-at-law—Whether Heritage Remains Heritable in Heir's Succession.

A testator directed his trustees, on the death of his wife to whom he had left the life-tenant of his whole estate, to "hold, manage, realise, divide, or convey over to the parties legally entitled thereto" the whole free rent and residue of his estate. He left no issue but was survived by his wife and by a brother and sister, who were his next-of-kin, the brother being his heir-at-law. The brother predeceased the widow, leaving a will by which he conveyed to his eldest son his whole estate, heritable and moveable, possessed by or due to him at the time of his death. He was survived by his eldest son and by five other children, by whom or by whose representatives legitimum was claimed. The testator's estate was partly heritable and partly moveable. The testator's sister survived his widow and was at the date of the widow's death the testator's sole next-of-kin. *Held* (1) that the testator's brother took a vested interest in the brother's estate *a morte testatoris*; (2) that the testator's estate fell to be distributed in the same manner as if he had died intestate, the brother having a right to demand a share of the moveables on condition of collating the heritage; (3) (the Lord President *dissenting*) that in the absence of election by the brother to collate or not to collate, his eldest son was entitled as his general disponee to demand a share of the testator's moveable estate on collating the testator's heritage; and (4) (*per* Lords Skerrington, Cullen, and Sands) that in a question between the brother's eldest son and his other children, if the eldest son collated the testator's heritage, one-half of it would remain heritable in the brother's succession.

Thomas Gibson, Writer to the Signet, Falkirk, judicial factor on the trust estate of the late James Buchanan Waddell under his trust-disposition and settlement dated 1st October 1902, *first party*; George Wad-