

disposition in favour of the Royal Bank. The principle of that decision also shews, that here the bank never incurred any personal liability. When Gardyne sold to Duff, what he acquired was a personal right against Duff and his representatives, in all time, for payment of the ground annual; and further, a right against the land into whosoever hands it might come. But he acquired no personal right against purchasers from Duff. It was not competent to Duff to give him any such right. In the case of *Soot's Trustees*, the Court of Session held that the personal obligation passed from the party who had entered into it, and was transferred to the purchaser. But this House decided in *Millar v. Small*, that such a personal obligation, or covenant, remains still binding on the original party, and is not affected by the sale and transfer of the land.

It is hardly necessary to remark, that there is here no personal obligation whatever arising from the mere tenure of the land, independently of contract. In the case of superior and vassal, the vassal for the time being is personally liable for the feu duties, just as, in the case of landlord and tenant, the tenant for the time being is personally bound to pay the rent. That is a liability resulting from principles of tenure. In both these cases, the vassal in the one case, and the tenant in the other, is personally liable by reason of what in this country is called privity of estate. But the doctrine has no application to a case like the present, where there is no such relation subsisting. This is very distinctly laid down and commented on by Lord Wood in his opinion given in the case of *Soot's Trustees*, 3 Ross L. Ca. 69. His Lordship there explains, that according to the old forms of the deed constituting a ground annual, there was no covenant or obligation entered into by the purchaser of the land, binding himself personally to make payment. And the consequence was, that the seller—*i. e.* the owner of the ground annual—had no personal remedy. "The land alone," his Lordship says at page 78, "was directly bound in payment of the ground annual," that is, the deed in its ancient form, without a personal covenant, warranted no immediate proceeding against the proprietor. It did not give an active title to enter into possession, by a process of maills and duties. The ground annual was levied by a poinding of the ground, and so forth. Then, after stating that the form of the deed had been altered in modern practice, by making the purchaser enter into a personal covenant, he proceeds to state, that this change was introduced, not for the purpose of retaining a personal right of action against the party binding himself by the original deed, and against his representatives, but in order that this personal obligation might attach on all persons, as they should from time to time succeed to the property, and so that the owner of the ground annual might have a right of action personally against every successive owner, which, but for the original obligation, he would not have possessed.

Your Lordships decided in the case of *Millar v. Small*, that the party who had bound himself and his representatives by a personal obligation, did not cease to be liable by reason of his having parted with the land. The principles, on which that decision rests, establish also that no personal liability is transferred to a purchaser on a transfer of the land. This, therefore, decides the question now before your Lordships. The Judges below assumed the law to be such as it was held to be in the case of *Soot's Trustees*. I will take it for granted for the present that the decision now under consideration would have been right if the foundation had been sound. But, that foundation failing, the superstructure fails also. And, on this short ground, I must advise your Lordships to reverse the interlocutor of the 11th of March 1851.

Interlocutor reversed.

First Division.—Richardson, Loch and M'Laurin, *Appellants' Solicitors*.—Thos. W. Webster, *Respondent's Solicitor*.

MAY 30, 1853.

EBENEZER ADAMSON, *Appellant*, v. ROBERT BARBOUR, *Respondent*.

Poor-Law—Settlement—Parent and Child—Derivative settlement. *A man, who had no settlement but that of birth, was transported for theft, leaving a wife and children. The mother did not apply for relief from the parish for herself but only for the children, and there was no averment that she was a proper object of relief:*

HELD (reversing judgment), *that the parish of the father's birth settlement, (or that of his residential settlement, if he had acquired such,) and not that of the children's birth, was liable in their support.*¹

¹ See previous report 13 D. 1279; 23 Sc. Jur. 603. S. C. 1 Macq. Ap. 376: 25 Sc. Jur. 419.

The defender, as representing the City parish of Glasgow, appealed against the interlocutor of 2d July 1851, maintaining that it ought to be reversed on the following grounds—1. That the parish represented by him was entitled to relief from the parish of Lochwinnoch (represented by the respondent) of the past and future maintenance of M'Intyre's children, the latter being the parish of settlement;—because it is an established principle of the Scots Poor Law, that so long as legitimate children are in pupillarity, or not emancipated, their settlement was to be determined by that of the father; and, consequently, that in the event of the children falling into destitution from the inability or failure of the father to provide for them, the parish bound to afford relief is that of the father's settlement. 2. At all events, in the absence of the husband, the wife was bound to support the children; and as she was incapable of doing so, the claim for their relief was to be regarded as a claim at her instance, and, consequently, lay against the parish of her settlement, which being the same as her husband's, was the parish of Lochwinnoch.

The respondent supported the interlocutor on the following grounds—1. The only means by which children could acquire a settlement being their own birth, or the father's residence, the parish of Lochwinnoch was not liable on the ground of M'Intyre's children having a settlement in that parish, in respect they were not born in it, nor had their father resided there for the statutory period. 2. The parish of Lochwinnoch, being bound to give relief only in the case of parties holding a settlement being proper objects of relief, was not liable in the present case, in respect the parties claiming relief were not in that condition.

Rolt Q.C., and *Anderson Q.C.*, for appellant.—It is a well-established rule of law, that the settlement of legitimate children, while in pupillarity or unemancipated, is regulated by that of the father, and that whether he is dead or absent, or residing in family with such children—2 Hutch. J. P. 64 (2d ed.); Bell's Dict. "Poor," 747; Bell's Pr. §§ 2157 and 2161; Dunlop's Par. Law, 383 and 387. In *P. of Coldingham v. P. of Dunse*, M. 10,582, it was held that infant children cannot be separated from their parents in the question of settlement, but must be considered as part of the family. So *Howie v. P. Arbroath and St. Vigean's*, M. App. (Poor No. 1.) The rule applies equally to illegitimate children, the only difference being, that they follow the settlement of the mother, since, in the eye of the law, they have no father—*P. of Rescobie v. P. of Forfar*, M. 10,589; *P. of Gladsmuir v. P. of Preston and Saltoun*, M. App. (Poor No. 5.); *P. of Lasswade v. P. of St. Cuthberts*, 6 D. 637, *Per* Lord Jeffrey in *Hume v. Haliday*, 12 D. 411. The first time a contrary doctrine was promulgated, was by the Lord Justice Clerk Hope in *Thomson v. Stewart*, 12 D. 1266; but there were special circumstances there, and the only recent case hostile to us is the *Fedburgh case*—*Thomson v. Scott*, 13 D. 783, on the authority of which the present case was decided, and against which we now substantially appeal. The *Fedburgh case* is quite inconsistent with the earlier cases cited. It is true that, in those earlier cases, the settlement was residential; but that circumstance merely arose from the fact, that such is the kind of settlement which the majority of men have. The principle, however, is the same, for the residential settlement merely supersedes the settlement by birth; and in all the cases, the children are treated as accessories of the parent, and as identified with him, and that by virtue of their being children, and not by virtue of their residence with him. It is said there is no such thing in the law of Scotland as a settlement by parentage; but it matters little as to the name, if the same state of things exist, for that phrase is merely a compendious mode of describing that children in nonage, and not *forisfamiliated*, derive from their parent the right of settlement he possesses; it is the creature of legal construction, and on that footing it clearly stands in the law of England—Archbold, Poor Law, 336, (ed. 1850.) The term may have been borrowed from England, though it is to be found in 1800 in the *St. Vigean's case, supra*. The rule in England is well known, and put on the broad principle, that it is a wrong and a hardship to separate a young family, and scatter its members over the country. In desertion by the husband, the wife's settlement derived through him, subsists notwithstanding—*Gray v. Fowlie*, 9 D. 811. Why should not the child's also? Now transportation of the husband does not annul the marriage relation; and this case may be viewed strictly as one where the wife claims, for she is liable, on the husband's default, to maintain the children. Here she cannot do so; yet, inasmuch as her settlement is that of her husband, there is no reason why the children's is not that of the father also—Bankton, 1, 6, 15; Dunlop's Par. Law, 370; Hutch. J. P. 67; Bell's Pr. § 1566; *Gray v. Fowlie, supra*. So, after the husband's death, the widow retains her husband's settlement till she acquires another, both by the law of England and Scotland—Arch. Poor-Law, 337; 2 Hutch. J. P. 67; *P. of Creiff*, 4 D. 1538. She is then in the same position as if the children had been illegitimate—*P. of Rescobie, supra*; *P. of Gladsmuir, supra*; *Weepers v. P. of Kennoway*, 6 D. 1166. It is objected, that if we adopt the doctrine of derivative settlement, it will be necessary to search the pedigree of every pauper *ad infinitum*; but this could never be necessary beyond the grandfather, because the father or mother must always have been *forisfamiliated* at the time of the birth of the child. Lastly, if the children are not to have their father's settlement it is clear they must be sent to the respective parishes of their births, for the parishes will not contribute to support them when residing out of their control, since the workhouse test could not be brought to bear—Dunlop's Par. Law, 390-1; 8 and 9 Vict. c. 83, § 71. As to the ancient poor law

statutes of 1579, c. 74, and 1661, c. 38, they do not apply to the question, as to which are the settlements liable, but simply to the question, what persons are entitled to relief.

Lord Adv. Moncreiff and Sol.-Gen. Bethell, for respondent.—The sole principle on which parochial relief is given at all is this, that the person relieved has a settlement in the parish relieving. The statutes 1579, c. 74, and 1661, c. 38, regulate the subject. The object of relief must acquire a settlement, and he can only do so by birth, or the industrial residence of himself or his father. Moreover, he must be either poor, aged, or impotent, the last word being used in the sense of disease—*M'William v. Adams*, ante, p. 24; 1 Macq. Ap. 120: 24 Sc. Jur. 391. Children were first specially provided for by statute 1661, c. 38, which declares those entitled to relief to be orphans destitute of all help, and other poor children not orphans. The only question as to them is, whether the obligation of parents to maintain them is available, for, if not, the children are in the same position as if the father were dead. Now a father, if able-bodied, is always presumed able to maintain all his infant children, and they cannot be separated from him—*Lindsay v. M'Tear*, ante, p. 24: 1 Macq. Ap. 155: 24 Sc. Jur. 391. When the father becomes impotent or aged, he then becomes a proper object of relief. But as children can only acquire a settlement by birth, or by their father's industrial residence, and as the parish of Lochwinnoch is theirs neither by birth, nor by their father's industrial residence, it follows that they can have no claim upon it. The cases cited, of Coldingham, Howie, Rescobie, and Gladsmuir, settled the point, that a child does hold a settlement in the parish of their father's residence; but the principle on which the child acquires such settlement, is not clearly stated. The doctrine of Dunlop, (Parochial Law, p. 385,) that wherever the father has a settlement, whether by birth or residence, there the child has a settlement also, is unwarranted by *Pennycook*, 3d March 1813, F.C., and is expressly repudiated by Lord Justice Clerk Hope and Lord Moncreiff in the *Fedburgh case*. If we were to adopt the principle in such a case as the present, there would be no end to the computation of pedigrees, for there seems as little reason for stopping with the parish of the father, as with that of the grandfather or great-grandfather. There is no such thing in law as a family being a proper object of relief; it is the father alone, and he can only be so by reason of old age or disease. Since the father, therefore, is not a proper object to be relieved by Lochwinnoch, why should the children be so? It is of no consequence that the mother is alive, or that the father, instead of absconding, is transported. It is no hardship to decide that the respective parishes of birth must support the children, because it is not made an indispensable condition of relief, that the children should reside each respectively in its own parish. Provision may be made to support a pauper residing out of the parish, and this would be a very proper case for doing so—8 and 9 Vict. c. 83, § 72; *Weepers v. Kennoway*, supra; *Lyall v. Heritors of Leslie*, 8 D. 1251: 18 Sc. Jur. 588. In short, the great principle is, that the right to relief is a personal, and not a hereditary right, and there is no ground in the law of Scotland for what is called a derivative settlement in the law of England.

LORD CHANCELLOR CRANWORTH.—This case, although the sum immediately in dispute is very small, yet is one of considerable importance in point of principle. The material facts may be stated very shortly. In July 1846, a man named Duncan M'Intyre, who was then living with his family at Glasgow, was apprehended on a charge of theft; he was soon afterwards tried and convicted, and was transported. His family consisted of a wife and five children, the eldest nine years old—the youngest an infant a few weeks old. The two eldest children were born at Falkirk—the two youngest at Glasgow; the other child was born at Linlithgow, but died in March 1847.

The mother being unable to support the children, applied to the proper authorities at Glasgow for relief. This relief was afforded during the years 1847 and 1848, and part of 1849. But the inspector of the poor of Glasgow afterwards applied (according to the provisions of 8 and 9 Vict. c. 83, § 70) to the inspector of the poor of the parish of Lochwinnoch for reimbursement, alleging that Lochwinnoch, and not Glasgow, was the parish bound to maintain these children.

The pursuer, now appellant, is the inspector of the poor at Glasgow. The defender, the respondent, is inspector of the poor of Lochwinnoch. The case was brought in the first instance before the Sheriff of Renfrewshire. He decided in favour of the pursuer. It was then brought by advocacy to the Second Division of the Court of Session, and the Judges of that Division, by an interlocutor of the 2d of July 1851, reversed the decision of the Sheriff. That interlocutor of the 2d of July was as follows:—"The Lords having heard counsel for the parties, advocate the cause, sustain the reasons of advocacy, alter the interlocutor of the Sheriff complained of, assoilzie the defender Robert Barbour, inspector of the poor of the parish of Lochwinnoch, and decern: Find him entitled to the expenses in this Court."

The inspector of the poor of Glasgow not being satisfied with that decision, has brought the matter by way of appeal to this House, and it has been fully argued at your Lordships' bar.

It is the common case of both parties, that at the time M'Intyre was transported, his place of settlement was Lochwinnoch. He was born there, and never afterwards acquired a settlement, or, if he did, he had afterwards lost it. And the question to be determined by your Lordships is, whether Lochwinnoch, the father's place of settlement, is the place of settlement of the

children—or whether they are to be considered as settled where they were born. The Sheriff held that the liability attached on Lochwinnoch, the father's settlement. The Court of Session was of a different opinion, and held that the place of birth of each child was its place of settlement, so that no action could be sustained against the inspector of the poor of Lochwinnoch, none of the children having been born there.

The question is, what is the law of Scotland as to the settlement of a child who is driven to seek parochial relief owing to its being abandoned by its father? The appellant contends, that until the child is emancipated, as we say in England—till he is *forisfamiliated*, as it is said in Scotland—his settlement is constantly that of his father—that he is, to adopt the illustration of Lord Jeffrey, but a branch arising from, and inseparably connected with, the father as the root. And then he contends that, as a corollary to this doctrine, when from any cause, whether from the death of the father, or from his having deserted his family, or from his being transported, and so by act of law made incapable of maintaining them, his children become entitled to parochial assistance, the parish to be resorted to is that of the father, and not that in which the children were born. The respondent, on the other hand, says, that though, so long as a child is not *forisfamiliated*, but continues to be part of the father's family, if the father gains a settlement by residence, the child gains it also,—yet if the father, during the pupillarity of the child, loses the settlement so gained by residence, or if he never gains such settlement at all, the child who, from the death or desertion of his father, is compelled to seek parish relief, must seek it from the parish of its own birth, and not from that in which the father had a birth settlement.

It is to be observed, that neither in England nor in Scotland does the statute law make any provision as to derivative settlements. In Scotland there are but two original settlements—that acquired by birth, and that acquired by residence. In England, as we know, there are many, and were, till lately, more. But all the settlements which have been created by statute are original settlements, giving expressly or impliedly the right of settlement to the person himself, who, by some act of his own, gains it. No statute has ever said, in the English law, that a child shall derive a settlement from its father, or a wife from her husband. But though there is no statute on the subject, yet early in the administration of the poor laws it was held that this was necessarily to be understood. It was assumed that the wife must be with her husband—that children must remain with their father—that any settlement gained by him was gained, not for himself alone, but for all his family.

A leading case on this subject is that of *Cunmer v. Milton*, reported in 2 Salkeld, 524, but more distinctly in 3 Salk. 259. Lord Holt there says—“The place where a bastard is born is the place of his settlement, unless there is some trick to charge the parish; but the place where legitimate children are born, is not the place of their settlement, for let that be where it will, the children are settled where their parents are settled—as, for instance, if the father is settled in the parish of H, but goes to work in the parish of B, and, before he gains any settlement there, has a son born in the parish of B, and then dies, this child shall be sent to the parish of H, for it is not the birth, but the settlement of the father, that makes the settlement of the child; and if the father hath gained a new settlement for himself, (as he had done in the principal case,) he hath likewise gained a new settlement for his children, who do not go with him to his new settlement as nurse children, but as part of his family.”

This principle has been acted on ever since, and the English Courts, in so acting on it, have not hesitated to pursue it through all its consequences. The doctrine, as I have already remarked, is founded on the principle so well illustrated by Lord Jeffrey, where he speaks of the father as the root, and the children as the branches. Once ascertain in what soil the root is fixed, and you have at once the soil with which the branches are connected—and this connection, according to the doctrine of the English law, must continue, pursuing the same metaphor, how often soever and wheresoever the tree is transplanted, until the branch has been severed, and so ceases to be connected with the parent trunk.

Great difficulty must arise in the application of the principle, if it is not followed through all its consequences. Acting steadily and consistently on the rule, it is obvious, that if, during nonage, (before emancipation, as we should say in England,) a child, in consequence of being deserted by its father, is compelled to seek parish relief, it must look for it from the father's parish. The father's parish is the child's parish, and so bound to maintain it.

This is certainly the rule in England, but it is said to be different in Scotland. A child, it is said, in a state of nonage, so long as its father is alive, has, by the laws of Scotland, no right to relief. The father is bound to maintain it. If, from age or infirmity, he is unable to do so, still no right to relief accrues to the child. The father, in such a case, has a claim to relief, the extent of which will be measured by the wants of his child as well as his own, or rather by his own wants, treating the necessities of his child as a part of those wants. Still it is to him that the law gives relief, and not to the child. In such a case, obviously, the parish bound to furnish relief is the father's parish. That the child gets relief from the father's parish in such a case, is not, it is said, the consequence of any direct right in the child against that parish, but of the child's claim on its father; if, therefore, the parish of the father's settlement has, by his death,

or by his having deserted his family and absconded, or having been transported, ceased to be under the obligation of maintaining the father, it is under no obligation to maintain the child. The child, in such case, seeks relief on a new foundation—*i. e.* on its own claim as a destitute child—and so must look to the parish of its own birth, and not to the parish which was bound to maintain the father.

This is the ground on which the Court of Session has rested its decision in the present case; and the real question is, whether there are not other elements which ought to have been taken into consideration, and which would have led to a different result. I think there are. Considering the peculiar nature and object of the poor laws—the affording relief to those unable to maintain themselves—it is absolutely necessary that we should construe the provisions of the legislature so as to meet the ordinary social wants of those for whose benefit they were made.

It was acting on this principle that we in England permitted the doctrine of derivative settlements at all. The monstrous consequences which would have flowed from not adopting the doctrine, were deemed sufficient to justify the courts in holding, that it was impliedly contained in all the enactments as to settlement. I see no reason why the same principle of construction is not to be adopted in Scotland. If the father had in this case gained a settlement by residence, it is admitted that this would have enured for the benefit of his children as well as of himself. His residence would have been, for purposes of settlement, their residence; and when the children, having become poor and destitute children, were obliged to seek parochial relief, their claim would have been on the parish where they had thus acquired a settlement by means of his residence.

This was the case of *Lasswade*, which occurred in 1844.

I cannot understand why a different consequence should follow when the place of the father's settlement is not one acquired by residence, but one which he had by birth. The settlement acquired by the children, by means of the father's residence, is strictly derivative. This is plain from its being immaterial whether the child has actually resided with the father or not; and, indeed, it would be gained by a child under the age of five years, and who could not, therefore, have resided for the statutory term.

What, then, is the principle which gives this derivative settlement to the children? There is no enactment on the subject, and it is, as I conceive, merely the result of a construction which the Courts have felt warranted in putting on the statutes relating to the maintenance of the poor, namely, that for all purposes relating to settlement, the father is understood to comprise in himself all his children who are in a state of nonage. Unless this principle is admitted, the children could not acquire a settlement by the industrial residence of the father. But if the principle is admitted at all, it cannot be confined to the case of a settlement acquired by residence, but must extend also to the father's settlement, however acquired, whether by birth, or by his own residence, or by his father's residence.

I observe the Lord Justice Clerk says, that this question as to the supposed cruelty of separation is one merely of sentiment. Now I entirely agree in what is here implied, rather than expressed by the Lord Justice Clerk, namely, that it would be most unfit to allow any Court to violate or strain the law in order to avoid any supposed, or even any real hardship in its application. But the question here is, not what is the consequence of an admitted law—what are the evils or hardships which it occasions—but what is the law? And in answering that inquiry, where there is no positive statute to guide us, it is surely a legitimate element for consideration, that one interpretation avoids, while the other admits and sanctions, what is harsh and revolting to the common feelings of our nature. In the English case of *Cunmer v. Milton*, to which I have already referred, Mr. Justice Powell (a very high authority) is reported to have said—“The children's settlement shall not be divided from the father, for that would be unnatural.” He gives as a reason, and as the only reason, for what he considered to be, in the absence of positive statute, the law on the subject, that the contrary construction would be unnatural.

The same principle of reasoning is equally applicable to Scotland. I do not discover in the Scotch text writers on this branch of the law, nor in the decided cases, until very recently, anything tending to bring into question these principles. On the contrary, settlement by “parentage” is spoken of as something well known to the law of Scotland, in the treatises, as well of living as of deceased writers, on this branch of the law, and the doctrine was acted on in the case of *Coldingham v. Dunse* in 1779, *Howie v. Arbroath* in 1800, which was a case of desertion by the father, and not of his death, and in the case of *Lasswade* in 1844; and there are other authorities to the same effect. I am aware that in these cases the settlement by parentage was a settlement gained by the residence of the parent, not that of his birth; but I have already said that I am unable to discover any distinction in principle between the two cases. The moral necessity of treating the whole family as one and indivisible, is the same in both cases. The evil of dispersing the children into different parts of the kingdom, instead of keeping them together, and so giving to family affection its fair chance of operating favourably on the character, and contributing to the happiness of its objects, is as great when the parent has not, as when he has, gained a settlement by residence. I see no ground for the supposed distinction.

I am aware that, in coming to this conclusion, your Lordships will be not only overruling the decision of the Court of Session in this case, but that you will be acting in opposition to the principles on which that Court acted in the *Fedburgh case*. That is undoubtedly true. In fact, it was candidly stated that the present appeal was intended to call in question the doctrine of both cases—that of Jedburgh having been decided in February 1851, and the present case in the July following. I am fully aware that the grounds on which I am prepared to advise your Lordships to reverse this decision, would lead to a similar result in the *Fedburgh case*. It was indeed attempted to shew, that there is a distinction between them, owing to the fact that here the mother is living, whereas, in the *Fedburgh case*, she had died before the desertion of the children by the father. Whether that would have made a difference, I do not stop to inquire. It certainly can make no difference in favour of the respondent; and as I am satisfied that the parish of Lochwinnoch would be liable, on the grounds I have adverted to, even if she were dead, it is idle to inquire, whether, if I had come to a different conclusion in that state of things, the circumstance of the mother being alive would have made a difference.

I am clearly of opinion, that by the law of Scotland, as well as by that of England, legitimate children during nonage are to be considered as so far identified with their father, that it is to his place of settlement, however constituted, that they are to look for relief when they are so circumstanced as to be entitled to relief at all; and I come to this conclusion, because any other interpretation of the laws of settlement would or might lead to a harsh and violent severance of the domestic ties, in a manner which I cannot believe the legislature to have contemplated.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the view which he has taken of this case. I have had the advantage, by his courtesy, of perusing his very clear and distinct statement of the grounds upon which he has formed that opinion; and I need not trouble your Lordships further, except with a very few words respecting the state of the case in the Court below.

One should hesitate more than I am now at all disposed to do, or than my noble and learned friend has done, in reversing a decision of the Scotch Courts, however the argument might have turned, if one had found a distinct and clear unanimity in the opinions of those learned Judges. But that is very far from being the case here, although the case now before us—that of Barbour—was decided certainly by all the three Judges who heard it (Lord Medwyn being absent), Lord Justice Clerk, Lord Cockburn, and Lord Murray, having concurred in pronouncing the judgment. But we are to consider this case as intimately connected with the *Fedburgh case*; and, in truth, as my noble and learned friend has observed, the *Fedburgh case*, to all intents and purposes, may be said now to be before us. The cases are connected from the nature of them—from a near approach of the dates, one being a few months before the other—and from the identity in fact of the whole argument in both of those cases. But they are connected, moreover, in this respect, that the learned Judges who decided this case relied upon the *Fedburgh case*. It is true that the Lord Justice Clerk and Lord Cockburn give reasons to shew that their opinion remains the same as it had been a few months previously; nevertheless, it is clear that they regarded themselves as only carrying into effect the principle by them laid down in that case. Lord Murray still more distinctly relies upon the *Fedburgh case*—he not being one of the learned Judges who were present at that decision; for he says, according to the note with which we are furnished of what then passed,—“I see no reason for differing from the *Fedburgh case*.”

Now, let us look at the *Fedburgh case*, and see how it was decided. I do this merely for the purpose of supporting my position, that in this case there is anything rather than a unanimous decision of the Judges in the Court below. The *Fedburgh case* was disposed of by three most able and learned Judges, undoubtedly—the Lord Justice Clerk, Lord Cockburn, and the late Lord Moncreiff. But Lord Medwyn differed from his learned brethren in that case, and Lord Medwyn had agreeing with him the learned Lord Ordinary, Lord Dundrennan, from whom the case came to the Inner House. Consequently, your Lordships have the *Fedburgh case*, as regards the weight of authority below, decided by the narrow majority of three Judges to two. I need say nothing of the other case of *Hume v. Halliday*, in which we have the benefit of Lord Jeffrey's opinion, clearly in the same direction with that which has been now expressed by my noble and learned friend, and against the decision of the Court below.

My Lords, the text writers, up to a very late period, seem to have had no doubt upon this subject. There is the late Mr. William Bell, Mr. Hutchison, the late Professor Bell, and, I think, one or two others, probably living authors, and therefore I do not refer to them. They appear to have had no doubt whatever respecting derivative settlement being the law of the land; and I can see no difference whatever, any more than my noble and learned friend can, between derivative settlement as applied to a case where a parent has acquired it by industrial residence, as it is termed, and one in which he acquired it in any other way. I can see no ground whatever for a distinction. But I decline, after the able and distinct statement of his views on this subject by my noble and learned friend, to enter further into the argument. I merely wish to have this understood. If we had had a unanimous decision of the learned Judges below, and yet, upon a full consideration of the case, we had come to a contrary opinion to theirs, we should in

this case, as we have done—not very often, but certainly as we have in some cases done—have abided by our own opinion, and reversed the decision below, notwithstanding that unanimity. But still it is more satisfactory certainly for us to feel, that in this case there has been a very great difference of opinion upon this point among the learned Judges in the Court below.

Mr. Rolt.—With respect to costs, my Lords, your Lordships are about to affirm the interlocutors of the Sheriff. There are two interlocutors of the Sheriff, and you are about to affirm these interlocutors. They were appealed to the Court of Session, and I apprehend the principle of the decision by this House will be, that your Lordships will make the order which the Court of Session ought to have made.

LORD BROUGHAM.—You ask, that we shall do that which the Court of Session ought to have done, and give you the costs in that Court.

Mr. Rolt.—That is all I ask.

LORD BROUGHAM.—We give the judgment which they ought to have given, repelling the advocacy with costs.

Mr. Solicitor-General.—The judgment which they did give was the one which they ought to have given till they had the light of the decision of this House, by reason of the existence of the *Fedburgh case*; and it would be an extraordinary thing indeed if this House were to say to the Court of Session,—you ought, in the face of the *Fedburgh case*, to have dismissed the appeal from the Sheriff's interlocutors, with costs. It is quite clear they would be governed by that authority.

LORD BROUGHAM.—Do you mean that they were bound by the *Fedburgh case*?

Mr. Solicitor-General.—Certainly, especially having regard to what you yourselves have said, that the present appeal was brought to try the *Fedburgh case*.

Mr. Rolt.—One word upon that point. Your Lordships see that it is not as though the law had been settled by a series of decisions.

LORD BROUGHAM.—Still there was the *Fedburgh case* standing.

Mr. Rolt.—Our proceedings were commenced, I believe, before the *Fedburgh case*.

LORD BROUGHAM.—At that date the decision in the *Fedburgh case* was a binding decision upon the Court.

Mr. Rolt.—The costs in this case had been incurred before the decision in the *Fedburgh case*;—the *Fedburgh case* came to be decided, and was decided, as your Lordships have said, by a narrow majority; and I should submit, that in the Court of Session, to say nothing of the costs in this House, we should have had the costs before the Sheriff.

LORD CHANCELLOR.—Their Lordships will give no costs.

Interlocutors reversed.

Second Division.—Henry Ward, *Appellant's Solicitor*.—Deans and Rogers, *Respondent's Solicitors*.

JULY 8, 1853.

THE EDINBURGH and GLASGOW RAILWAY COMPANY, *Appellants*, v. THE STIRLING and DUNFERMLINE RAILWAY COMPANY, *Respondents*.

Railway Acts — Clause — Construction — Agreement — Completion of part of Railway — *The Edinburgh and Glasgow Railway Company having agreed to lease the line of the Stirling and Dunfermline Railway on its completion, a question arose, whether they were bound to implement, where, though a considerable portion had been completed, a part remained to be executed.*

HELD (affirming judgment), *that the words "on completion of the railway or any part thereof," meant "completion for purposes of working," and therefore the E. & G. R. Co. were bound to implement: (Lord St. Leonards dissenting).¹*

The defenders appealed against the judgments of the Court of Session, maintaining that they ought to be reversed.—1. As being inconsistent with their acts of parliament. 2. The appellants are not bound to take the line, or any portion of it, in lease, seeing that the arrangement was to be at an end in the event of failure to obtain a direct connection between the Edinburgh and Glasgow Railway and the line of the Stirling and Dunfermline Railway, and because such connection is not now obtainable. 3. The Stirling and Dunfermline Railway Company not being in a condition to give the appellants possession of the subjects for which rent was to be paid,

¹ See previous report 14 D. 747 ; 24 Sc. Jur. 325.

S. C. 25 Sc. Jur. 508.