was paid to the construction of section 40 of the Judicature Act it had always been construed as contended for the respondent, and that he was entitled to have the case sent back for proof to the Sheriff Court as the tribunal which he had selected.

The following opinion was returned by the consulted Judges:—"We are of opinion that the proof can competently be taken in the Court of Session. We think that by the appeal the case is removed from the Sheriff Court, and that it may be dealt with in the same manner as if it had originated in the Court of Session."

Lord Adam was absent.

At advising—

Lord President—This decision will put an end to a diversity of practice as to appeals under the 40th section of the Judicature Act. I should not have been unwilling to be guided by the opinion of the great majority of my colleagues without further comment, except for the first sentence of the judgment. With reference to that I must say, speaking for myself, and I think I can say on this point I represent the opinion of the other Judges who have agreed with me—none of us put our opinion on the ground of incompetence, but rather, we thought, to allow a proof in such circumstances was contrary to the spirit and intention of the 40th section of the statute. The result on the whole matter is that so far as I am concerned I am quite willing to adopt the opinion of the consulted Judges.

Lord Deas—Referring to the case of *Dennistoun* v. *Rainey & Co.*, I observe I expressed myself very much in the same way as your Lordship did—not on the ground of its being incompetent to allow a proof in this Court, but that the course we there pursue was more in accordance with the fair construction of the clause. It is our duty to give fair interpretation to this section of the Judicature Act. It is intended to shorten litigation. It just comes to this, that either one course or the other may be taken to be quite competent, according to circumstances. Either Division can take the course that that Division thinks best.

Lord Mure—My opinion is that the decision of the consulted Judges should be given effect to. Jury trial has been to a certain extent modified by recent statutes and proof substituted for it. It seems fair that the procedure suited for jury trials should be applied to proofs which have been to some extent substituted for them.

Lord Shand—The opinion which has been given by the consulted Judges expresses exactly and shortly the view that I entertain and have always entertained on this question.

The Court pronounced this interlocutor:—

"Having resumed consideration of the cause with the opinions of the consulted judges, remit to Lord M'Laren Ordinary to allow the parties a proof of their averments in terms of "The Evidence (Scotland) Act 1866," and to proceed further as shall seem just: Reserve all questions of expenses."

Counsel for Appellant—M'Kechnie. Agents—Smith & Mason, S.S.C.

Counsel for Respondent—Jameson. Agents—J. & J. Ross, W.S.

Friday, July 20.

SECOND DIVISION.

(Before Whole Court).

CALDWELL (INSPECTOR OF POOR OF PARISH OF AYR) *v.* DEMPSTER (INSPECTOR OF POOR OF CITY PARISH OF GLASGOW).

Poor—Settlement—Desertion by Parent of Pauper Pupil Child.

Held by a majority of the whole Court (*diss.* Lords Justice-Clerk, Young, Craighill, and Fraser — Lord Adam being absent), that an illegitimate pupil child born in Scotland, and deserted and left destitute by its mother (who had no settlement in Scotland) in another parish than that of its birth, was chargeable during its pupillarity to the parish in which it was found destitute, and not to that of its birth—*the minority holding* that the birth parish was liable.

In this case David Caldwell, Inspector of Poor of the parish of Ayr, sued Archibald Dempster, Inspector of Poor of the City Parish of Glasgow, in the Sheriff Court at Glasgow for a sum of £11, 15s. for past, and a further sum of £58, 13s. 4d. for future, aliment of a pupil child, William M'Culloch or M'Pherson, who had become chargeable to the parish of Ayr, and of liability for whose support that parish contended that the City Parish of Glasgow was bound to relieve it.

The admitted facts were as follows—The child in question was born in the City Parish of Glasgow on the 29th day of April 1874. It was the illegitimate child of a woman named Janet M'Culloch, who was born in the year 1845 in Ballymuir Parish, in Larne Union, County Armagh, Ireland. Janet M'Culloch never had a settlement in Scotland. On 21st January 1882 she deserted the child, and left it destitute (along with two others) in a dwelling-house in the parish of Ayr. Her place of residence at the time of this action was unknown. Since the date of its mother's desertion the child had been maintained at the expense of the parish of Ayr, and the question was whether that parish, as the parish where the child was found destitute, or the City Parish, as the parish of its birth, was liable.

The Parish of Ayr pleaded—"(2) Neither the child nor his mother having a settlement in the parish of Ayr, the pursuer is entitled to be relieved of the past and future maintenance of the child as claimed. (3) The child being illegitimate, his mother having no settlement in Scotland, and having deserted him, the defender, as representing the parish of the child's birth settlement, is bound to relieve the pursuer, and to make payment of the sums craved in name of past and future aliment."

The City Parish pleaded—"(3) The pauper's mother being alive and having a settlement in Ireland, and the pauper being an illegitimate pupil, the defender is entitled to absolvitor with expenses; or alternatively, (4) The pauper having a derivative birth settlement in Ireland, the defender is entitled to absolvitor with expenses."

The Sheriff-Substitute (Guthrie) pronounced

this interlocutor:—"Finds that it is admitted on record that the pauper, a pupil of whose aliment the pursuer seeks relief, was born in 1874 within the defender's parish, the City Parish of Glasgow, and that he is the illegitimate child of Janet M'Culloch, an Irishwoman by birth, who has no settlement in Scotland: Finds that it is alleged that the said pupil became chargeable along with the younger children of the said Janet M'Culloch, through her deserting them within the pursuer's parish on the 21st January 1882: Finds that in these circumstances the City Parish of Glasgow is not liable as the parish of the said child's birth in repayment of the advances made by the pursuer for his aliment: Therefore assoilzies the defender," &c.

"*Note.*— This case cannot be distinguished from *Greig* v. *Young*, 1878, 5 R. 977. It must now be held, as the result of that case, and of *M'Rorie* v. *Cowan*, 1862, 24 D. 723, that a parish relieving one whose settlement is in England or Ireland, has no remedy except by removal, so that if removal under the statutes be impracticable, as in the case of a lunatic wife whose husband is not a pauper, it must just submit to the misfortune. Here the question is, whether on the assumption that the pauper's mother has deserted him, the child has a settlement in the parish in Scotland in which he was born. In *Greig* v. *Young* the circumstances were the same, with this difference, that the bastard's mother was then undergoing a sentence of penal servitude during the period when relief was given, while in the present instance the mother is said to have voluntarily deserted her children. Although the reasoning in *Greig* v. *Young*, as in some other recent cases in this branch of the law, is by defect in the report, or for some other cause, not free from obscurity, I think that the difference which I have mentioned is not material, and that this case must be decided in the same way, both upon that authority and upon principle.

"A pupil has only a derivative settlement, and takes his birth settlement only on reaching puberty—*Craig* v. *Greig and M'Donald*, 1863, 1 Macph. 1172; *M'Lennan* v. *Waite*, 1872, 10 Macph. 908; *Ferrier* v. *Kennedy*, 1873, 11 Macph. 402; *Gibson* v. *Murray*, 1854, 16 D. 926. This rule rests not only on the legal incapacity of the pupil, but on the principle established in *Barbour* v. *Adamson*, that the unity of the family is as far as possible to be maintained in questions of settlement. As a rule a pupil takes his father's settlement whether it be founded on residence or birth, and the exceptions to the rule occur only when, in order to maintain the unity of the family after the father's death, the settlement which pupils derive from their father is suspended, and they follow that of their mother when she is an object of parochial relief—*Greig* v. *Adamson*, 1865, 3 Macph. 575; *Carmichael* v. *Adamson*, 1863, 1 Macph. 453; *M'Lennan* v. *Waite cit.* *Beattie* v. *M'Kenna*, 1878, 5 Macph. 737; *Hendry* v. *Makison*, 1880, 7 R. 458.

"There is not an exact analogy between the case of a deserted pupil whose parent has no settlement in Scotland, and that of the deserted Scotch wife of an Englishman or Irishman who has no settlement in Scotland, and it may be that any confusion and difficulty which surround this question partly arise from the notion that the cases are precisely alike. In the latter case the husband's desertion is equivalent to his death—*Beattie* v. *Greig*, 1875, 2 R. 923; *Greig* v. *Simpson*, 1876, 5 R. 977; *Hay* v. *Skene*, 1850, 12 D. 1019. The obvious reason for this is found in the hardship of relegating a Scotswoman to the distant and possibly doubtful settlement of a foreign husband, and the effect is that the wife becomes *sui juris*, takes her own maiden settlement, and becomes capable of acquiring another by residence, not only for herself but for the children in family with her. But the effect of the desertion of pupil children is entirely different. A wife's person is sunk only by reason of her marriage, but a pupil has no legal person and no legal settlement in his own right by reason of sheer incapacity, so that, even if in his case the desertion and the death of the parent be held to be equivalent, the legal result is not the same, but on the desertion, as on the death of the parent, the existing derivative settlement must be held to survive to the pupil. It is still more important to observe that the rule settled in regard to the wife has the effect of maintaining the unity of the family, while if pupil children are allowed to have a birth-settlement in Scotland, the result will in very many instances be to break up families and deprive pauper children of the advantage, whatever it may be, of being brought up in the society or neighbourhood of their brothers and sisters.

"I am satisfied for these reasons that I am bound to regard the case of *Greig* v. *Young* as ruling this case, and as laying down a principle of considerable importance, and one which overrules the doctrine stated in Mr Guthrie Smith's book at p. 299. On the authority of two Outer House cases, and an *obiter dictum* of the Lord President, that doctrine is apparently irreconcilable with the principles of the case referred to above, and with many of the later opinions of the Lord President. It is founded only on the terms of the older Scots Acts—*e.g.*, 1663, c. 16; 1672, c. 18. These Acts undoubtedly impose liabilities upon the parishes in which poor persons or vagabonds and idle persons were born. But since that time the law of settlement has been largely developed by judicial decisions and by the Act of 1845, and there does not appear to be any stronger reason for resorting to the birth-settlement of a pupil where he has none by residence or 'haunting' (to use the language of that age), than there is for applying these statutes strictly to the case of a married woman or lunatic, or of children whose Scots parents have died. In these cases judicial construction has limited and defined the effect of the statutes establishing the principle of birth-settlement, and it would seem that the principles so established and acted upon for generations ought to be carried out in this case also. The Act 1661, c. 38 (Instructions to Justices, &c.), is rather more explicit, as it directs the Justices of Peace to appoint overseers who are 'to make due trial and examination of the condition and number of, *inter alia*, all orphans and other poor children within the said parish who are left destitute of all help.'

"This, however, is simply a direction regarding the administration of the Poor Law, similar to that which we find in the 70th section of the Act 8 and 9 Vict. c. 83, and it is by no means necessary to regard it as laying down a rule as

to settlement altogether at variance with the principles upon which modern decisions and practice are founded."

The pursuer appealed to the Court of Session.

Their Lordships of the Second Division "in respect of its general importance, appointed the parties to prepare minutes of debate on the question—"Whether an illegitimate pupil child born in Scotland of a mother who has no settlement in Scotland, and becoming a pauper within a parish in Scotland in consequence of the desertion of the mother, is chargeable to the parish of its birth?"

The pursuer, in his minute of debate, argued —The judgment appealed against rested on two entirely distinct grounds, (1) that the question at issue was settled by the principle established by *M'Crorie* v. *Cowan*, March 7, 1862, 24 D. 723 and *Greig* v. *Young*, Jan. 21, 1878, 5 R. 977; (2) that motives of social expediency, as illustrated in *Barbour* v. *Adamson*, May 30, 1852, 1 Macq. 376, dictated here a judgment against the relieving parish. On the first ground, the two decisions referred to were not conclusive. In *M'Crorie* v. *Cowan* the sole ground of judgment was that, *stante matrimonio*, a wife could have no settlement apart from her husband. *Greig* v. *Young* was an extension and application of that principle to the case of the illegitimate pupil child of an Irishwoman who had acquired no settlement in Scotland, and who was enduring a term of penal servitude at the time when the child was relieved. And as in *M'Crorie* v. *Cowan* the wife's fate was held to be linked to her husband's, so in *Greig* v. *Young* the bastard pupil's fate was held to be linked to its mother's. If the mother's confinement in prison were to be held equivalent to her desertion, then doubtless *Greig* v. *Young* ruled the present case. But it had never yet been so decided. The only form in which such a question had been raised was in an action for divorce—*Young* v. *Young*, November 16, 1882, 10 R. 184—where it was held that confinement in prison was not equivalent to wilful and malicious desertion in the sense of the Act 1573, c. 55. On principle it was impossible to hold imprisonment equivalent to death or to desertion. In the case of death the severance is involuntary and perpetual; in the case of desertion, voluntary and for an uncertain period. The severance caused by imprisonment is not voluntary, and it is of a fixed and known duration; and so, whilst it has for long been settled that in questions of poor-law desertion is equivalent to death, there was neither principle nor authority for the extension of the equation to imprisonment, though certain expression were reported to have fallen from Lord Deas and Lord Mure in *Greig* v. *Young* which might seem to favour such extension. Their observations were founded on the case of *Barbour* v. *Adamson*. In that case the Court held that the father being in penal servitude the children were so circumstanced as to be entitled to relief. Being an able-bodied man, if he had been living with his children they would not have been entitled to relief. Had he been dead or in desertion they would have been entitled to relief, and hence in a question of title to relief it certainly established the principle that imprisonment is equivalent to death or desertion. But it did not establish that the children's fate is linked to the father's where the father has no settlement at all in Scotland. And hence if *Greig* v. *Young* were decided on the understanding that *Barbour* v. *Adamson* settled that question, then *Greig* v. *Young* must have been wrong, and the all-important fact must have been overlooked that in *Greig's* case the mother had not, whilst in *Barbour's* case the father had, a Scotch settlement. If, then, the parents' imprisonment in these two cases were held as equivalent to death only to the effect of determining the question of the title of an able-bodied person's child to demand parochial relief at all, then to have decided *Greig* v. *Young* differently would have been to run counter to the judgment of the whole Court in *M'Crorie* v. *Cowan*. And so in the present case, to affirm the judgment of the Sheriff-Substitute would be to run counter to the still earlier case of *Hay* v. *Skene*, June 13, 1850, 12 D. 1019. If this decision were sound law, then it ruled the present case just as *M'Crorie* v. *Cowan* ruled *Greig* v. *Young*. In questions of poor law an analogy obtained between pupils and married women. But it had been maintained that *Hay* v. *Skene* cannot be considered authoritative since *M'Crorie* v. *Cowan*, and this contention received considerable support from the views expressed by the Lord Justice-Clerk (Inglis) in the latter case, as well as in the case of *Carmichael* v. *Adamson*, February 28, 1863, 1 Macph. 452. But these views were not shared by any of the other Judges in these two cases. But it was now authoritatively settled that desertion was equivalent to death in all questions of parochial relief—*Greig* v. *Simpson*, May 16, 1876, 3 R. 642. The most conclusive answer, however, to the contention that the authority of *Hay* v. *Skene* was destroyed by *M'Crorie* v. *Cowan* was to be found in the fact that the principle of the former case has been since followed and applied, once in the case of *Gibson* v. *Murray*, June 13, 1854, 16 D. 926, and again in *Johnston* v. *Wallace*, 11 Macph. 699. The principle which the cases referred to seemed to establish—viz., that when the head of the family was dead, or in desertion, and had no settlement in Scotland, the dependent branches of the family took their own birth settlement—had in two instances been applied by Lords Ordinary to cases where the object of relief was, not as in decisions referred to, a wife, but a pupil child—*Greig* v. *Hay*, May 18, 1858, 1 Poor Law Mag. 37; *Muir* v. *Thomson*, November 7, 1873, 2 Poor Law Mag. (N.S.) 95. But the Sheriff-Substitute found a reason for not applying the principles settled in the case of husband and wife to a case like the present, of parent and child, because of the essential difference between the status of a married woman and of a pupil child. There was both principle and authority against this proposition—*Carmichael* v. *Adamson*, 1 Macph. 462. Every Scotch born person had a settlement in the parish of birth by the mere fact of having been brought into the world therein, and such birth settlement, which was the only one originally known to the law (1579, c. 74) could never be lost or extinguished, however it might be superseded or suspended by another effectual settlement having been obtained — *Carmichael* v. *Adamson*, 1 Macph. 461, 465; *Gibson* v. *Murray*, 16 D. 929, 930—and this doctrine, that the birth settlement of a pupil child remains always available, has been repeatedly acted upon, the latest

instance being the case of *Russell* v. *Greig*, 8 R. 440. The law being that where a man has no settlement in this country, his deserted wife becoming a pauper is chargeable to her own birth parish in Scotland; and it being erroneous to say that a pupil "by sheer incapacity" could have no legal settlement, the only feature of difference between the status of a married woman and of a pupil suggested by the Sheriff-Substitute disappeared; the analogy for purposes of parochial law between the two classes of persons was exact, and the pupil—equally with the married woman—when pauperised by the desertion of the person upon whom it was dependent became chargeable to its own birth parish. (2) There only remained for consideration the second ground upon which the Sheriff-Substitute based his judgment—viz., social expediency—the maintenance of the family unity. Undoubtedly *Barbour* v. *Adamson*, on which the Sheriff-Substitute relied, did establish the principle that where, consistently with the rules of law, it could be done, the unity of the family ought to be preserved. In laying down the principle, however, the Lord Chancellor had carefully guarded his opinion so as to prevent its ever being used as a sanction for the breach of any settled rule of law. If the pursuer's argument upon the first ground of judgment were sound, then to apply the principle in the present case would certainly be a violation of well settled law. This second ground of judgment, was, however, open to the more serious objection that it really was not applicable to cases like the present at all. The children of Janet M'Culloch were, no doubt, born in different parishes and deserted in the same parish; but they might all have been born in the same parish and left by their vagrant mother one by one in the different parishes she passed through. If the rule applied by the Sheriff-Substitute in one set of circumstances were applied, as it must, in the other, the result would be a complete breaking up of the supposed family unity. This illustrated the danger of proceeding on any purely sentimental ground, the applicability of which to questions of disputed settlement had been so frequently of late years deprecated. Uniformity and simplicity should be the principal aim in determining such questions, and it was far more in accordance with the rules as to parochial settlements already laid down by the Court that the birth settlement which was undoubtedly in actual existence should be made chargeable than that the liability should be thrown on a parish with which the pauper's only connection was that he chanced to be there left destitute.

The defender argued—There could be no doubt as to the primary obligation imposed by statute on the parish in which the child has become destitute (8 and 9 Vict. c. 83, sec. 70). The duty of relieving the destitute found within its bounds thus imposed upon every parish, irrespective of any consideration as to the true settlement of the person relieved, could only be terminated (1) by the cessation of the state of destitution; (2) the removal of the destitute person in terms of the statutory powers to that effect; or (3) the discovery by the relieving parish of the pauper's parish of settlement, or of some individual legally bound to maintain him—*Gray* v. *Fowlie*, March 5, 1847, 9 D. 811; *Beattie* v. *Wilson*, January 25, 1861, 23 D. 412; *Hopkins* v. *Ironside*, January 27, 1865, 3 Macph. 424. In the present case no relation legally liable to maintain the pauper had been found, and if the remedy of removal were competent it was not sought to put it in force. It was therefore incumbent on the relieving parish, if it were to escape from its present liability, to establish affirmatively that the City Parish of Glasgow was, in respect of its being the parish of his birth, the parish of the child's settlement. But for the fact that the child in question had been deserted by its mother, the case for the pursuer would be plainly irrelevant. The nonage of the person relieved had a material bearing on the case. When the pauper was not subject to any such legal disqualification, much, if not all, incumbent on the relieving parish was accomplished when the parish of the pauper's birth was discovered. The remedy, then, was either (where that parish were in Scotland) an action for reimbursement and relief from future maintenance, or (when in England or Ireland, and the pauper had no settlement in Scotland), if that remedy were not available, the loss rested on the relieving parish—*M'Crorie* v. *Cowan*, March 7, 1862, 24 D. 723; and *Greig* v. *Young*, January 21, 1878, 5 R. 977. But where the person relieved was in pupillarity, the question was no longer—What is the parish of the destitute person's birth? but—What was the settlement of the head of the family to which he belonged? *Hume* v. *Halliday*, December 22, 1849, 12 D. 411. This child being a bastard, his primary settlement during pupillarity was that of his mother, whether constituted by birth, industrial residence, or marriage—*Hay* v. *Thomson*, February 6, 1856, 18 D. 510. It was therefore clear that, unless the fact of desertion had operated a material change in that respect, the settlement of the pupil in question, being the illegitimate son of a woman whose only settlement was Irish, was in Ireland, and not in the parish of his own birth. Where the relieving parish was Scottish and the parish bound to maintain in either England or Ireland, the remedy open to the former was removal under the 77th section of the Poor Law Act of 1845, and now regulated by sections 1 and 2 of the Poor Law Amendment Act of 1862. This statutory right of removal of English or Irish paupers was the counterpart of the direct claim for reimbursement competent against the parish of settlement when that was in Scotland—*Leslie* v. *Gibson*, June 15, 1852, P. L. Mag., June 1861. Nor did it concern the parish of birth to inquire whether it were competent or possible to carry out the removal. The remedy was open to the relieving parish; difficulties preventing the removal would not strengthen a claim against another parish and on a different ground. The relief must be continued till the statutory limit of the period during which it was to be given had been reached. The question was, What was the parish of settlement? and if the birth parish were not the parish of settlement, it could not be made liable on any other ground. This was expressly determined in *M'Crorie* v. *Cowan*. But it was maintained that the desertion of the child by its mother was equivalent to her death, and that in consequence the parish of its own birth was now its true settlement. In answer to this the defender submitted (1st) that the

doctrine that desertion was equivalent to death was not of universal application; and (2d) that even assuming it to be applicable to the case of a pupil child deserted by the parent from whom it had derived a settlement, it by no means followed that the settlement so derived was lost to the child, to the effect of making the parish of its birth liable for its maintenance. The cases in which desertion had been held equivalent to death had been uniformly cases of wives deserted by their husbands. In such cases it was now settled law that the usual consequences of a husband's death supervened—*Greig* v. *Simpson and Craig*, May 16, 1876, 3 R. 642. But this rule had not yet been applied to the case of pupil children deserted by the head of their family. While there was an undoubted analogy between the cases, there were certain broad lines of distinction. The wife's legal incapacity, or rather the suspension of her settlement, flowed from and ceased with the marriage. But the incapacity of the pupil was absolute. Destitute of legal personality, he had no identity, so far at least as parochial settlement was concerned, separate from that of his parent. He never had an operative settlement capable of being suspended. A married woman had a radical right to what had been called her maiden settlement—the radical settlement in the parish of her birth which was not obliterated by marriage, but remained ready to come into operation whenever the superinduced derivative settlement from her husband should cease to be available. This right to a settlement differed not only in degree but in kind from what might be called the potential settlement of a pupil which never had an active existence. She may then either retain the settlement of her husband or lose it by non-residence. Her birth settlement would then revive, and would become that of her children, or she might acquire a new one. But not so the pupil, whose absolute incapacity continued and rendered him as then completely dependent on his mother as during his life he was upon his father.

By the operation of the rule in the case of a deserted wife the unity of the family was preserved. The preservation of the unity of the family was a cardinal consideration—*Barbour* v. *Adamson*. The family circle, deprived of its central figure, found a new rallying point in the deserted wife and mother. But to apply the rule to motherless children deserted by their father, or to bastards deserted by her who in the eye of the law is their only parent, would be in many cases to defeat this intention and to bring about the dispersion of the family. Especially if it were to receive the effect of relegating the pupils each to the parish of his own birth, it would defeat one of the chief purposes for which in the case of deserted wives it was called into existence. But even assuming that the rule was to be applied to the case of deserted children, as to that of deserted wives it did not follow that the liability of the parishes of the births of the respective children emerged *ipso facto* of the desertion. Deserted pupil children who had no surviving parent whose fortunes they might follow were of two classes—(1) Children whose mother had predeceased the date of their father's desertion; and (2) bastards deserted by their mother. In each of these cases the children had at the date of desertion a derivative settlement—the legitimate children that of their father, the bastards that of their mother. But they were incapable of acquiring a new settlement. In this condition they continued till puberty. On what principle could it be said that before that period they had lost the derivative settlement in right of which they stood at the date of desertion? If that settlement were within the United Kingdom, surely during pupillarity it, and not the parish in which the pupil was born, was liable for his maintenance. It followed that the derivative settlement which enured to the pupil child whose parent died or deserted it, continued to be its settlement during the whole period of pupillarity. The liability of the parish of the pupil's birth was latent until puberty. If not, at what period did it come into operation? According to the pursuer's argument, immediately on the occurrence of the death or desertion, and it might be conceded that the choice lies between these two periods. The result in certain cases would be dispersion of the family. The contention that a pupil retains during the whole period of his pupillarity the settlement of its parent is not only sound in principle, but has already received judicial approval in various aspects—*Barbour* v. *Adamson*, May 30, 1853, 1 Macq. 376; *Gibson* v. *Murray*, June 10, 1854, 16 D. 926; *Craig* v. *Greig and M'Donald*, July 18, 1863, 1 Macph. 1172; *M'Lennan* v. *Waite*, June 28, 1872, 10 Macph. 908; *Ferrier* v. *Kennedy*, Feb. 8, 1873, 11 Macph. 402. In the law of England a similar principle would seem to be applied. The rule as to the settlement of children, both legitimate and illegitimate, was fixed by the statute 4 and 5 Will. IV. c. 76. So far as bastard children were concerned, the matter was regulated by the 71st section of that Act, by which such child had the settlement of its mother until it attained the age of sixteen or acquired a settlement in its own right. A decision had been pronounced under this section similar to that of *Craig* v. *Greig* (*Bodenham* v. *St Andrews, Worcester*, Jan. 19, 1853, 1 El. and Black 465). It was similarly decided in other cases—*The Queen* v. *Sutton le Brailes*, Jan. 16, 1856, 5 El. and Black, 814; *The Queen* v. *St Mary Newington*, April 29, 1843, 4 Ad. and El. Q.B. 581. From the principles which underlie the opinions expressed by the Judges by whom these cases were decided, it would seem to be clear that the settlement of a pupil being always that of its guardian, the parish of its own birth cannot under any circumstances be liable for its maintenance during pupillarity if the guardian's settlement be within the United Kingdom. In the recent case of *Greig* v. *Young*, June 21, 1878, 5 R. 977, this rule was applied under circumstances which were nearly identical with those of the present case, the only distinction between them being that in *Greig's* case the immediate cause of the chargeability of the pupil was the fact of the mother's undergoing a sentence of penal servitude, while in the present case it was the mother's voluntary desertion. Even if desertion by a parent were to be held equivalent to death, upon what principle was voluntary desertion to be distinguished from that which was the result of punishment for misconduct? If no sound distinction could be drawn, *Greig* v. *Young* was conclusive, in deciding which the Court proceeded upon the judgment of *M'Crorie* v. *Cowan*, March 7, 1862, 24 D. 723.

If, then, the cases of *M'Crorie* and *Greig* were well decided, and if the argument submitted upon the effect of desertion were well founded, it necessarily followed that the birth parish of the pupil child of a parent whose settlement is in the United Kingdom could not under any circumstances be made liable to support him during pupillarity. Only two cases (both decided in the Outer House) conflicted with this contention—*Greig* v. *Hay and Maclaine*, May 18, 1858, 1 Poor Law Mag. 37; *Muir* v. *Thomson*, November 7, 1873, 2 Poor Law Mag. (N.S.) 95. The argument that the burden of supporting destitute children whose parents have had no settlement in Scotland is still regulated by the Poor Law Statutes of the sixteenth and seventeenth centuries—1535, c. 22, 1579, c. 74, 1661, c. 38—and which seemed to have received some sanction in the opinion of the Lord President in *Carmichael* v. *Adamson*, Feb. 28, 1863, 1 Macph. 452, was untenable, since (1) these statutes were not intended to apply to the case of children the settlement of whose parents was known or capable of being ascertained, and (2) since they are now practically superseded by the construction placed on the Act of 1845. These statutes in question were Scots Acts, and could only deal effectively with settlement in Scotland. When they were passed there was no remedy by removal out of Scotland. The effect of the contention founded on them would be to bring about in many instances the disruption of the family and the dispersal of its members during their pupillarity. In conclusion, he submitted the following propositions:—(1) That the child in question being illegitimate, took at its birth the settlement of its mother; (2) that such derivative settlement would have enured to the child if its mother had died during its pupillarity, and *a fortiori* it had not been lost by desertion; (3) that assuming the mother to have acquired no residential or derivative settlement, her present settlement was in the parish of her birth in Ireland; (4) that the remedy of the relieving parish was removal of the pauper to Ireland; (5) that if for any reason that remedy were not available, the liability of the relieving parish continued, and that, in any view, the difficulty or impossibility of effecting such removal could not have the effect of subjecting in liability the parish of the pauper's birth if it were not otherwise liable.

The defender also referred to the following authorities:—Stair i., 3, 5, and 13; *Gibson* v. *Murray*, June 13, 1854, 16 D. 926; *Carmichael* v. *Adamson*, Feb. 28, 1863, 1 Macph. 452; *Greig* v. *Adamson*, March 2, 1865, 3 Macph. 575; *Craig* v. *Greig and M'Donald*, July 18, 1863, 1 Macph. 1172; *Hopkins* v. *Ironside and Wallace*, Jan. 27, 1865, 3 Macph. 424; *Barbour* v. *Adamson*, May 30, 1853, 1 Macq. 376; *Thomson* v. *Muir*, July 19, 1850, 12 D. 1266; *Thomson* v. *Scott and Aitchison*, Feb. 26, 1851, 13 D. 783; *Hay* v. *Scott*, Nov. 23, 1852, 15 D. 62; *Hay* v. *Skene*, June 13, 1850, 12 D. 1019.

The Lord President, Lords Deas, Mure, Shand, Lee, and Kinnear returned his opinion—

We are of opinion that the judgment of the Sheriff-Substitute is right.

It cannot be disputed that the child in question having been found destitute in Ayr is entitled to relief from that parish; and it is equally clear that the parish of Ayr can have no claim to be reimbursed by any other parish in Scotland excepting the parish of the child's settlement. We are of opinion that the parish of the child's birth is not during its pupillarity the parish of settlement, and therefore that the City Parish of Glasgow is under no present liability to relieve Ayr.

We conceive it to be settled law that the parish of settlement of a pupil child is to be determined, not by the place of its own birth, but by the parish of settlement of its parents. If it be a legitimate child, it follows the settlement of its father. If, as in the present case, it be illegitimate, it follows the settlement of its mother. The question for consideration is, Whether the general rule is excluded in the present case by reason of the pauper being the illegitimate child of a mother who has no settlement in Scotland, and of its having become a pauper within a parish in Scotland in consequence of the desertion of the mother?

1. The desertion of the child by its mother is, in our opinion, no ground for holding that the mother's settlement is not still the settlement of the child. We think this is conclusively established by the decision of the House of Lords in *Barbour* v. *Adamson*. It can make no difference, in the application of that decision, that the parent has not been separated from the children by sentence of transportation, but has voluntarily deserted them. For not only is the reasoning of the Lord Chancellor equally applicable to the one case as to the other, but his Lordship expressly stated that it was so intended; for he pointed out that the judgment of the House must be taken as overruling the previous decision of the Court in the Jedburgh case, as well as the decision under appeal. In the Jedburgh case (13 D. 783) the Court had held that when a father had deserted his family, each of the destitute children had a claim of relief in his own right, apart altogether from the father, and that such claim must attach against the parish of the children's birth, and not against that of the father's settlement. But these views were expressly overruled by the House of Lords; and the case of *Barbour* v. *Adamson* has accordingly been considered (and we think rightly) as finally determining that children in pupillarity, whether they are living in family with their parents or not, have no independent settlement apart from their father, but that they must be considered "as so far identified with their father," even if he has deserted them, "that it is to his place of settlement that they are to look for relief when they are so circumstanced as to be entitled to relief at all."

2. Neither does it afford a tenable ground of distinction that the pauper child is illegitimate. The true settlement of the child during its pupillarity is the derivative settlement which it takes from its parent in the one case just as in the other—the illegitimate child being, in the language of the Lord Chancellor, "identified" with the mother, just as the legitimate child is with the father. The law is so laid down by Lord Colonsay in the case of *Hay* v. *Thomson* (18 D 531), where he says that "the sound principle is that in law an illegitimate child is part and parcel of the mother, just as a legitimate child is part and parcel of the father;" and accordingly it was held in that case that it is to the

settlement of the mother, in whatever way it may have been constituted, that an illegitimate child is to look for relief. It is argued for the appellant that the general views of policy and good feeling to which the House of Lords gave so great effect in *Barbour* v. *Adamson* are of very little practical force in their application to the circumstances of the present case. But these views were not brought forward by the learned Lords who took part in the judgment as a criterion for determining particular questions of settlement, but as justifying and explaining a general rule of law. And accordingly the Lord Chancellor lays it down that the general rule must be fixed with reference to the ordinary social wants of those for whose benefit it is intended, but that, being so fixed, it must be followed through all its consequences.

The grounds on which the House proceeded appear to us to be just as applicable in the general case to a settlement derived through the mother as to a settlement derived through the father; and we conceive it, therefore, to be settled as a general rule of law that the settlement of children in pupillarity is the settlement of their parents,—the father or mother, as the case may be; and the rule being so fixed, must be uniformly and equally applied in all cases where pupil children become chargeable, notwithstanding that the circumstances of many such children may be different from those which originally suggested the considerations of policy on which the general rule was based.

3. The only remaining question is, Whether the parish of the children's birth can be made liable by reason of the mother being an Irishwoman, and having no settlement in Scotland? and we think this question ruled by the decision of the whole Court in *M'Crorie* v. *Young*, 24 D. 724. The pauper child has a derivative settlement through its mother, which must be presumed to be a parish in Ireland. It is the misfortune of the relieving parish that the parish of settlement is in Ireland. But under the law established in the case of *M'Crorie*, that is a misfortune which cannot be thrown upon the parish of birth, because there can be no recourse against any other parish in Scotland except the parish of settlement, and the parish of birth is not the parish of the child's settlement.

We have only to add that the case is, in our opinion, undistinguishable from that of *Greig* v. *Young*, 5 R. 977. We think that case was rightly decided, that it ought to be followed in the decision of the present, and that there is no class of cases in which it is of greater consequence to adhere to rules and principles once settled than those affecting the administration of the Poor Law in the matter of settlement.

Lord Fraser—The Sheriff-Substitute states in his interlocutor that the pauper is the pupil boy; and I concur with him in this. But I dissent from the conclusion at which he has arrived in regard to the parish liable for that pauper's maintenance. The pauper is the illegitimate son of a woman who has had two other bastard children, whom along with the pauper she deserted in the parish of Ayr. She is an Irishwoman with no settlement in Scotland, but the pauper has a birth settlement there,—having been born in Glasgow.

The simple question then is—Shall that pauper go to his settlement by birth in Scotland, or shall he go elsewhere to a place where he has no settlement, but where he was accidentally found? It is said that because he is a pupil he takes the settlement or no settlement of his mother; and she having none, he must be supported by the parish where she left him.

Now, it is no doubt the rule that children have the parents' settlement during nonage. This rule is based upon the assumption that the father or the mother, as the case may be, has a settlement that he or she can communicate to the child. If they have no such settlement, what is to be the consequence? Has the child no rights by reason of its birth in Scotland? The child here in question has no rights through its mother in Scotland, because its mother had no settlement here; and it cannot be removed to Ireland where its mother's settlement is. Is the consequence of this that the parish where the mother left the child is to be fixed down with permanent liability, or at least till the boy attain puberty, while the child itself has in this country a settlement by birth?

I cannot come to this conclusion. It appears to me that such a conclusion tends to create a new kind of settlement for paupers which the Poor Law Acts never intended and do not sanction. The 70th section of the Act of 1845 ordered the inspector of the poor of a parish where any destitute person was found to give relief at once, and to continue that relief until liability could be imposed upon some individual or parish primarily liable. There never was intended under this section to impose permanent liability upon the parish where the casual vagrant came, if there were any other possible solution of the difficulty. There may be a necessity which dictates a restricted choice of alternatives. But if there be an alternative at all, that one should not be adopted which imposes a liability not arising out of the law of settlement but from a simple accident. The clause in the Act was suggested in the course of the preliminary investigation which preceded the enactment of the Poor Law Act. It was intended to relieve immediately urgent distress. It was never intended, and it is a perversion of its object, to carve out of it a permanent liability, if there be any other mode, according to the law of settlement, of avoiding such a result.

It is said, however, that a pupil can have no legal settlement in his own right by reason of "sheer incapacity." What the precise meaning attached by the Sheriff-Substitute to these words is I cannot make out. No doubt a pupil is incapable of managing his own affairs, and the law provides help for him in regard to the management of them. But it is only when the pupil has to act that he is regarded as *incapax*. Where he is passive, the law holds him to be a person capable of receiving and of inheriting estates and honours. He cannot exercise all the privileges of a peer till he be twenty-one; but if he be his father's eldest son he inherits the peerage from the moment of his father's death. The title is made up in his name to his father's estates, and he is the owner of the lands, although the tutor must grant the leases. If such be the case, it seems to me to be incomprehensible why he cannot have the benefit and privilege of the

settlement of his own birth. If he has no incapacity to be infeft in his estate, or to assume the honours of his house, why should he have sheer incapacity to take and have the benefit of the settlement of his birth? No doubt while his father was living and had a settlement, the pupil child had the same settlement, and this for very obvious reasons; and if the father died during pupillarity, the child continued during his nonage the settlement which his father had bequeathed to him. But if there be no settlement obtainable through parentage, the reason ceases for refusing to recognise the fact that the child has a settlement in its own right, and which undoubtedly he takes when he arrives at puberty.

It is argued, however, that there are to be found in the case of *Barbour* v. *Adamson* views of the law of settlement which conflict with the idea of a pupil child who has no settlement through his parents being entitled to the benefit of his birth settlement. The "unity of the family" argument derived from that case was never more misapplied than in regard to a case like the present. The woman has three bastard children, possibly each having a different father—at all events, there must be two fathers, for the children have different names. What particular family affection could subsist between these bastard children if they were all kept in one poorhouse together may be a matter of conjecture. But the argument founded upon the case of *Barbour* is simply met by the fact that under the administration of the Poor Law a more wise and sagacious system has been adopted than the compulsory keeping together of bastard children the offspring of different fathers, or of legitimate children the offspring of one father. That case merely sanctioned this, that if the head of the household had a settlement in Scotland the children should be kept as belonging to his or her parish notwithstanding their birth in different parishes. It said nothing as to the case where the head of the family had no settlement to give to the children. In regard to such a case the parochial boards were left to their own wisdom, guided by the Board of Supervision. That Board did devise a scheme twenty years ago, which it has consistently carried out, which has produced the greatest practical benefits, and which is now being gradually adopted in England, viz., the system of boarding out children. The three bastard children of the woman whose eldest son is now the pauper would have been taken charge of by the parochial boards to whose parishes they belonged. They would have been emancipated from the gloom and seclusion of the poorhouse—would have been boarded out with some cottar or small farmer, and have grown up as sons of the household. The parochial board would not necessarily have sent two children to the same cottar's house, because a cottar's house is often insufficient to entertain two whilst it might entertain one; the second child would in such a case be sent to a second cottar's house. The result of this scheme of administration has been entirely successful; the children left destitute by their parents have been brought up in habits of industry and accustomed to family life, have been educated in the parish schools, and have revisited often with gratitude and affection their foster fathers and mothers who had brought them up. All the dissertations, therefore, about keeping together brothers and sisters after their parents are dead entirely ignore the practical working of the Poor Law. How the scheme is carried out, and the history of its success, are narrated in the interesting volume on the subject written by Mr Skelton.

Let it be observed how this doctrine of the preservation of the union of families would operate in circumstances very likely to happen. Suppose that the mother of the pauper boy had got wearied with the burden of supporting her three children—had determined to get rid of a portion at least of this burden—and so dropped one of the children in a village as she passed along; and in a few days afterwards, experiencing the relief thus obtained, she is tempted to, and does drop another child in another village in another parish; and being thereby cheered with the further diminution of her burden, she in a few days thereafter drops the third child in another village in a third parish. Now, the legal consequence of the doctrine from which I dissent would be this, that each of the parishes in which each of the children was left would have liability imposed upon it for its maintenance, although all the children born in Scotland could be sent to their own parishes. The unity of the family in such a case would not exist, because each parish would deal with its own pauper. There would be the same disintegration as there would be were each of the children sent to its own birth parish. But it is unnecessary to dwell longer on this matter of the preservation of the unity of the family, which bulks so largely in discussions upon the law of settlement, and which have pushed the doctrine of the House of Lords in *Barbour* v. *Adamson* to the most anomalous results.

There are two decisions of the Court, and only two, that need be referred to in connection with this discussion. The first of these is *M'Crorie* v. *Cowan*, 24 D. 723. This was a judgment of the whole Court, and therefore if it applies to the present case it is binding now. But it appears to me that that decision has no bearing upon the question we have here to answer. It simply settled that the wife of an Irishman who himself had no settlement in Scotland had not a claim for maintenance against her own birth parish in Scotland. All that this case determined was a repetition of a doctrine long before settled, that the settlement or non-settlement of a married woman is that of her husband (*Gray* v. *Fowlie*, 9 D. 811). It is said that this is an illustration of the doctrine that a parish may have permanent liability laid upon it, simply from the accidental circumstance of the destitution there occurring. This was not the judgment of the Court. All that was determined was that the birth parish of the wife was not liable seeing that she was a wife; that her claim lay against her husband's parish in Ireland; and that the remedy of the parish that had to afford immediate relief (if the remedy existed) was the removal of the pauper under the Poor and Removal Acts to Ireland. It was not determined in that case that the right of removal did not exist. No doubt the husband was able-bodied, and the pauperism was caused in consequence of the lunacy of the wife. But I do not admit that the right to remove both husband and wife, or at least the wife, was not competent under the Removal Acts. The terms of the 77th section of the Poor Law Act (not repealed by the Removal

Acts) are broad enough to meet the case. It authorises justices of the peace, upon complaint of an inspector of poor that a person born in England, Ireland, or the Isle of Man "has become chargeable to such parish or combination, by himself or his family," to examine into the matter, and if no settlement exist in Scotland, then the justices are authorised, by an order of removal, "to cause such poor person, his wife, and such of his children as may not have gained a settlement in Scotland, to be removed by sea or land" to England, Ireland, or the Isle of Man. The words "chargeable by himself or his family" contemplate a case where a man may be held the pauper liable to removal in consequence not of his own destitution but of the lunacy of his wife. That point, however, was not determined by the Court, and it is not necessary to offer any opinion upon the subject further than to say that it is a point still to be argued and decided.

The next case, however, of *Greig* v. *Young*, 5 Ret. 977, is more to the point, and being the judgment of a Division of the Court, may be reviewed, and if thought wrong be overruled. The mother of the bastard in that case had not deserted it, but she had been imprisoned; and so the child was left destitute, and the question came to be whether the parish where the destitution arose, or the parish of the child's birth, should bear the burden of its maintenance, and the former was held liable. I consider the imprisonment to have been the same as if it had been desertion, and I must therefore regard this decision as being an authority against the views that I am endeavouring to maintain. With all respect for the learned Judges who pronounced that judgment, I think that they have arrived at an erroneous conclusion by giving an interpretation to the case of *M'Crorie* which it will not bear. The only reason assigned for the judgment is, that because the Court had determined in *M'Crorie's* case that a married woman's settlement was that of her husband, therefore it must be held that the settlement of a pupil bastard child must be that of its mother; and as the mother had no settlement in Scotland, and as neither she nor the child could be removed to Ireland, therefore the parish where the destitution arose must provide the maintenance. It is a misapplication of the rule of *Barbour* v. *Adamson* to hold that it settled that there was the same union between a mother and a child in regard to settlement as there exists between husband and wife. Husband and wife are, according to the law of all countries, to be considered as one person; they certainly are so by the law of Scotland. If the parent had a settlement in Scotland, then the decision in *Barbour* v. *Adamson* said this and nothing more, that all the children should be sent to it. And if the rule as to husband and wife, as settled in the case of *M'Crorie*, be applicable in the present case, then the parish of accidental destitution must be liable till a new settlement be acquired by residence. But this is not the law; for it is fixed by judgment of the whole Court that the pauper child when it reaches the age of fourteen must go, if it be destitute at that age, to its own birth parish—*Craig* v. *Greig*, 1 Macph. 1172. During the whole of those fourteen years, however, the parish where the destitution occurred must be made liable, according to the judgment under review and the decision in *Greig* v. *Young*. I confess I do not see the necessity for arriving at this conclusion—nor the soundness of it, consistently with the law in regard to analogous cases as to the rights of pupils; and I question altogether the expediency of introducing into the already perplexed field of the law of settlement a new kind of settlement, which belongs to none of the classes known to the law.

Lord M'Laren—I concur in the opinion of the majority of the consulted Judges, and in the reasoning on which it is founded. I will only add that—as it appears to me—the result of the decisions is that the settlement of birth always remains latent, or in suspense during pupillarity, by reason of the incapacity of the pupil to acquire an independent settlement. There can be no stronger illustration of this rule than the case of an orphan child, where, notwithstanding the dissolution by death of the relation of parent and child, the child's claim to relief lies against the parish of his father's settlement until pupillarity, and thereafter against the parish of his own birth settlement. Now, if the death of the parent does not bring the child's birth settlement into operation, it is difficult to see how the desertion of the parent to a foreign country can have a different effect. In the present case I conceive that the pupil is entitled to relief from the parish of his father's settlement in Ireland, if that parish would acknowledge liability. Meantime the child must be relieved by the parish of Ayr. The notion of the pupil's incapacity to acquire an independent settlement is, like some other propositions in this branch of the law, purely arbitrary and artificial. But it reconciles all the cases; and it is, in my opinion, undesirable to disturb the theoretical propositions from which the law of settlement has been developed.

Lord Adam being absent from illness returned no opinion.

At advising—

Lord Justice-Clerk—In this case we have now the opinions of the consulted Judges—that is to say, of the whole Court—and the case is already conclusively decided by the opinions which have been lodged. The question which we sent for their Lordships' consideration was—[*reads question quoted above*]. The consulted Judges have answered this question categorically, for in the opinion of the majority it is said—"It cannot be disputed that the child in question having been found destitute in Ayr is entitled to relief from that parish; and it is equally clear that the parish of Ayr can have no claim to be reimbursed by any other parish in Scotland excepting the parish of the child's settlement. We are of opinion that the parish of the child's birth is not during its pupillarity the parish of settlement, and therefore that the City Parish of Glasgow is under no present liability to relieve Ayr."

The result of their opinion substantially is that there is no parish in Scotland liable to support this pauper child which was born in Scotland, and that either in the meantime or permanently—because the consulted Judges do not inform us which of these results is to happen—the parish where by accident this pauper child became destitute must bear the expense. The question is decided, and of course we regard the opinion of the majority with the greatest possible respect.

There is only one dissentient, Lord Fraser, and I am bound to say that I entirely and clearly agree with the opinion that Lord Fraser has returned and the result at which he has arrived. Holding their opinions in great respect, I venture to differ from the result at which the majority of the Court has arrived. I think this is an important matter with reference to what is called the law of settlement—or miscalled I think, because the whole doctrine of settlement appears to me to proceed —the phraseology and nomenclature of it—on a misconception. The question is—What is the parish the ratepayers of which are liable to relieve or provide for the necessities of this child? Settlement implies something of the nature of a right on the part of the pauper who is said to acquire the settlement. Here it is passive and not active at all, but the question rather is—Where does he become chargeable? The word "chargeable" very properly expresses the relation, and the question is—Is he chargeable to the ratepayers of the one parish, or to the ratepayers of the other? The expression "acquisition of a settlement" is metaphorical or rhetorical. A child at his birth does not acquire anything, but the fact of his being born does establish that parish as the radical and original parish of settlement. It is not acquired by anything done by the unfortunate creature that is born. On the other hand, the liability is not incurred by any delict of the ratepayers of the parish or anything else they have done. But I hold it to be settled law that although the parish of birth may be superseded by an industrial settlement in another parish, or by a derivative settlement derived from the settlement of their parents, the radical settlement is the parish of birth, and the liability of the ratepayers of that parish does not proceed from anything done by the pauper, but from the mere fact that in their midst the child has been born, and if he does not become chargeable in any other parish he is chargeable to that one.

The next question is, Why should he not be in this instance chargeable to the parish of birth? He is a pauper and he is destitute, but it is said he was incapable of acquiring a settlement. I must fairly own I do not understand what these words mean. The acquisition of a settlement of birth is not the act of the pauper, and yet the settlement is well acquired. It is said that during pupillarity he cannot acquire a settlement. I entirely differ from that proposition, and think there is not the slightest foundation for it in any statute or in any other authority which can be applied to this matter. Saying that he is not capable of acquiring a settlement means that he is not capable of being destitute or of starving, for that is what is required to make the ratepayers of the parish, wherever he may be, liable for his maintenance. I understand the idea is that in the case of *Barbour* and some of these cases an opinion was expressed, and has been acted on since, that pupils take the settlement of their parent, and that an illegitimate pupil takes the settlement of its mother. But the notion of deducing a kind of impossibility for a pupil child to become chargeable to the parish of birth is hardly a stateable proposition. The analogy of a tree and its branches, and some other, I may say without offence, rather sentimental and metaphorical expressions, were used in the consideration of that case. But the points put to us in that way are all matters of expediency and nothing else. A family ought to be kept together, and it is held in such circumstances that such children are not to be thrown back on the parish of birth, their parents being alive and having a settlement. But that has nothing to do with a case like this, where there is no industrial settlement of the parents, where there is no settlement of the father, where the child is illegitimate, and there is no settlement of the mother, for she does not belong to Scotland, is now it is believed in Ireland, and has no claim on any parish here, and this child is left as completely without any settlement—as far as derivative settlement is concerned—as if its mother were dead, and yet it is said, not that the ratepayers of the parish of birth shall be liable, but that those of the parish where the pauper is found destitute are to be liable to support it. I am entirely of opinion that the parish of birth here is liable.

Lord Young—I agree with your Lordship that the logic of the case leads to the conclusion that the child has a birth settlement, not acquired, but attaching to it by the fact of birth. Nobody can be said literally to acquire a birth settlement. To say that a child acquires a settlement is to use erroneous language. It is capable not of acquiring—it is capable only, so to speak, of being born in a particular place, and the law gives it a settlement in that place. It has, by another law, original sin from the fact of its birth, and by the law of Scotland it has an original settlement in the parish where it was born. That is the logic of the matter; it has that settlement unless it is superseded by another which may be available to it under a variety of circumstances. There are decisions which are perplexing enough, although I should not myself have been disposed to yield to them, so as to lead to this somewhat anomalous result that a child left destitute by the desertion of its parent is to be supported as if it had a settlement in the parish where it is found destitute until it is fourteen years of age, and that then the settlement and liability are to be transferred to another parish. There is some inconvenience in that, and it savours a little of absurdity to say that the parish where it is found destitute shall support it until it is fourteen years of age—to say that in infancy it shall not acquire a settlement for itself, or be capable of doing so, and that after that period its birth settlement shall attach to it if it does not acquire any other. Apart from that inconvenience to which I have referred, which is not very much—it is only a little ridiculous,—it does not seem to me to signify a straw which way the case is decided. For it is the same thing to the ratepayers of Scotland overhead whether the rule be that the parish where the bastard is accidentally born shall be liable for its maintenance if it falls into destitution without having any settlement of the parish to have recourse to, or whether that liability shall attach to the parish where it is equally accidentally found destitute. There is just as much uncertainty in the place of destitution overtaking it as there is in the place of birth overtaking it. Although it is not very accurate language, yet one may say they are both accidental. Where the ratepayers by one accident are to support it if it is destitute in its earlier years is a matter of no moment as a rule to the ratepayers of Scotland. It is sufficient

for me to say that I should myself have decided the case the other way on the reason and consistency of the thing.

LORD CRAIGHILL—I agree with your Lordship and with Lord Young. I think the birth parish should be found liable. Of course that cannot be accomplished, because the opinion of the majority is the opposite way. I have considered all that they have said with the greatest consideration and respect, and it rather appears to me that not only the logic but the law of the case are against the view they support, and in favour of that which your Lordship has presented. If I were to say more I would only be repeating what your Lordship and Lord Young have already said, and especially that which has been set forth in what I regard as the very reasonable and satisfactory opinion of Lord Fraser.

LORD RUTHERFURD CLARK—I think in a question of this kind it is of great importance to adhere to anything that has been fixed by law, and for that reason I agree with the opinion of the majority of the Court.

LORD JUSTICE-CLERK—I wish to make only one addition to the remarks already made. I agree with Lord Young that there is no great interest on the part of the ratepayers how the question may be decided, and no interest on the part of the pauper; but there is a great interest on the part of the ratepayers to see all these matters put on a proper footing. For I suppose both sides here have spent a good deal more than the whole aliment of this pupil, at least if he is to come on the parish of birth when he arrives at minority, and it would be desirable if some less cumbrous mode of dealing with such questions could be devised, for these questions only require to be settled to determine on which side liability goes.

The Court, in respect of the opinions of the majority of the consulted Judges, dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for Pursuer (Appellant)—Trayner—Ure. Agents—Ker & Smith, W.S.
Counsel for Defender (Respondent)—Mackintosh—Lang. Agents— W. & J. Burness, W.S.

Friday, July 20.

FIRST DIVISION.

THE GLASGOW COAL EXCHANGE COMPANY (LIMITED) *v.* THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY.

Railway—Entry on Lands—Interdict—Compensation—Appropriation for Purposes of Underground Railway of Part of Subsoil of Public Street included in Titles of Private Property—Glasgow City and District Railway Act 1882.

A railway company obtained by their Special Act, for the purposes of forming their line, which was intended to run in tunnel beneath various public streets in a town, power to enter upon, take, and use the lands referred to in the books of reference. The Special Act further provided that the company might, for the purposes of the Act, "appropriate and use the subsoil of the streets, roads, roadways, lanes, footpaths, and places" shown on the plans, and also that they should not be obliged wholly to take these lands, or any part of the surface thereof, or any cellar, vault, or other construction therein or thereunder, held or connected with any house or abutting on such street, road, or lane, "but the company may appropriate and use the subsoil and under-surface of the roadway or footpath of any such street, road, or lane, and if need be they may purchase, take, and use, and the owners thereof, or other persons interested in such cellar, vault, or other construction, shall sell the same for the purposes of the railway; and no such subsoil or under-surface, cellar, vault, or other construction to be appropriated and used or purchased as aforesaid shall be deemed part of a house or other building or manufactory within the meaning of sec. 90 of the Lands Clauses (Scotland) Act 1845." Provision was also made for compensation to be payable in respect of easements acquired under streets, and for the purchase of cellars, &c.

The company in the course of making their line entered on and opened up a part of a public street, which was included within the titles of a private proprietor, though under the jurisdiction of the burgh for police purposes. Prior to doing so they had not given notice to the proprietor, nor paid any compensation for the taking of the subsoil of the street. In a petition by him for interdict against their interfering with the part of the street which fell within his titles until his interest therein had been paid —*held* that the company were under their Act entitled to "appropriate and use" the subsoil of the street, as distinguished from the cellars or other portions of the houses abutting on it, without first paying to the proprietors their interest therein, and that the petition for interdict therefore must be *refused.*

Opinions that the proprietor had a claim for compensation under the company's Special Act.

The Glasgow Coal Exchange Company were proprietors of a block of property bounded on the north by the centre of West Regent Street, Glasgow. The southern half of West Regent Street thus fell within their titles. West Regent Street is a public street. By sec. 28 of the Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii.) "Every public street, for the objects and purposes thereof and of this Act, and the public sewers for the drainage thereof, shall vest in the [police] board, but it shall be lawful for the proprietors of lands and heritages adjoining any such street to construct cellars or vaults under the footpavement opposite to such lands and heritages where by their titles they have a right so to do." The company had such a right.

The Glasgow City and District Railway Company were incorporated under their private Act (45 and 46 Vict. cap. ccxvi.) in 1882, and had power thereunder to form a railway westward from Queen Street Station passing under West Regent