her parents, and therefore that the assignation could not be revoked by the pursuers, even with their daughter's consent.

The pursuers reclaimed, and offered caution for return of the funds in case of the birth of any other child of the marriage.

FRASER and M'LAREN, for the reclaimers, cited the following authorities:—*Scheniman* v. *Wilson*, 6 S. 1019; *Majendie* v. *Carruthers*, 16th Dec. 1819, F. C. and 6 Pat. App. 597; *Beattie's Trs.* v. *Cooper's Trs.*, 24 D. 519; *Craigie* v. *Gordon*, 15 S. 1157; *Thornhill* v. *M'Pherson*, 3 D. 394; *Smitton* v. *Tod*, 2 D. 225; *Pretty* v. *Newbigging*.

Lord Advocate (YOUNG, who was not called on) and H. J. MONCREIFF, for respondents.

At advising—

LORD PRESIDENT—Here a disposition was made to trustees by the husband and wife. The trustees entered and administered the trust. They made various payments to the husband and wife from the income of the trust-estate, and various advances from the principal sum.

It is now proposed to revoke the disposition, with the consent of the only child of the marriage. The intention of that disposition was that there should be no division of the fee till the death of the longest liver, and the fee was then to go to the child or children equally, the issue of any child who had predeceased the survivor of the spouses taking the share of its or their parent.

Now, it is said that as Mrs Allan is forty-nine years of age she may not be expected to have more children. That may be unlikely, but it is not impossible, and if she have any more children they have an interest in the trust-estate.

But the pursuers propose to avoid this difficulty by their offer of caution, and they say that the children of the daughter of the marriage have no interest, and cannot be taken into consideration whilst she is alive. Whether this proposition is correct or not, however, cannot be discussed till the question of caution has been settled.

Now, an offer of caution is an appeal to the discretion of the Court. No party is entitled to it as a matter of course, and it can only be acceded to on the conditions prescribed by the Court. It is therefore a matter for our consideration whether we should agree to it. Now, the object of this trust was to prevent the risk that was run in case of Mr Allan's bankruptcy. But the very reason of this revocation is because he is in difficulties. Acceding, then, to the pursuer's offer of caution would make the Court aid them in defeating the very object of the trust-disposition. When the Court accepted caution in the cases of *Scheniman* and *Pretty*, referred to, it was in order to give effect to the testator's views, whereas division of the money here would defeat them.

A question of great importance also is, What are the rights of the possible grandchildren? But there are none, and there may never be any; yet we are asked to decide the question. Now we never decide a question before it arises, and that would be sufficient to prevent our stating our views upon this proposition of the pursuers, even if we got over the difficulty about caution, and, as I have already said, we cannot listen to this offer of caution. I am therefore of opinion that the proper course is to dismiss this action.

LORD DEAS—I concur with what your Lordship has said, and I may add, if the trustees were, as it is said they could, to throw this disposition into the fire, they could be tried at the criminal bar for it. It is a delivered deed to trustees, and is therefore not revocable, much in the same way as if it were an antenuptial contract of marriage.

The question just is, whether the right not having vested in the daughter so as to be transferable to other parties, that yet she should be entitled to set aside the deed by a revocation. In *Routledge's* case the marriage had been dissolved, and it was the only child of the marriage that made the revocation.

LORD KINLOCH—My opinion is not matured on the two propositions, but any opinion I have is against the idea that the parents could revoke, and that the child of the marriage is the only party interested in this trust-assignation. Her issue have a strong interest in it; and this question we are asked to decide prematurely, by anticipation, and on contingency. Now, we never do that.

Recall the interlocutor of the Lord Ordinary, dismiss the action, and sustain the defences, with expenses.

Agents for Reclaimers—Henry & Shiress, S.S.C.

Agents for Respondents—Morton, Whitehead, & Greig, W.S.

Thursday, October 21.

SECOND DIVISION.

INSPECTOR OF UPHALL *v.* INSPECTORS OF SOUTHDEAN AND EDINBURGH CITY PARISH.

Poor—Residential Settlement—Absence from Parish—Constructive Residence—Birth Settlement. Held (1) that residence in the sense of the Poor Law Act is a matter of fact and not of intention. (2) Circumstances in which held that a residential settlement had been lost by absence from the parish, and that liability devolved on the parish of birth.

This was an action brought to determine what parish was liable for the aliment of the wife and children of a hawker of the name of Williamson, who was some time ago sentenced to fifteen years' penal servitude for an assault committed upon his wife. The parish of Uphall was the relieving parish, the parish of Southdean was the parish of birth, and the City Parish of Edinburgh was alleged to have been the parish in which Williamson had at the time of his incarceration a residential settlement. The facts of the case were substantially that Williamson held, prior to 1845, when he left his father's house, a residential settlement in Edinburgh; that since 1845 he had been more in Edinburgh than any other place, and had made it his chief resort, but that he had been constantly a good deal away from it, his habit having been to wander about the country making or selling baskets, especially during the summer months.

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the defenders in the conjoined actions, and considered the Closed Record and Proof: Finds that at and prior to the year 1845, or about that time, James Williamson, the husband and father of the paupers, had acquired and then retained a residential settlement in the City Parish of Edinburgh: Finds that at or about that time he ceased to reside continuously in said parish, and has not since then resided there con-

tinually for a year: Finds that the Parish of Southdean is the parish of birth of the said James Williamson, and the parish liable for the aliment of his wife and children: Repels the Defences stated for Neil Taylor, the Inspector of the Poor of the said Parish of Southdean, and decerns against him in terms of the conclusions of the libel: Sustains the Defences stated for George Greig, Inspector of the Poor of the City Parish of Edinburgh: Assoilzies him from the conclusions of the libel, and decerns: Finds the said Neil Taylor liable in expenses to the pursuer and to the Inspector for the City Parish of Edinburgh: Allows accounts thereof to be given in, and, when lodged, remits the same to the Auditor to tax and report.

"*Note.*—The import of the evidence seems to be that since James Williamson left his father's house, about 1845, he has been much more in Edinburgh than in any other place, and has made it his chief resort. But he has constantly been very much away from it, his habit having been to wander about the country making or selling baskets, especially during the summer months. When he went away he took his family with him, and he left behind him no house or place of business in Edinburgh. The case is peculiar, but the Lord Ordinary does not think it can be held that, after leaving his father's house, Williamson ever resided for a year continuously in Edinburgh."

The parish of birth reclaimed.

MILLAR, Q.C., and BURNET for reclaimer.

GORDON, Q.C., and BALFOUR in answer.

At advising—

LORD COWAN—I am of opinion that the interlocutor of the Lord Ordinary should be adhered to. Residence, in the sense of the Poor Law Act, is a matter of fact, and not of intention. Unlike the principle of domicile, it is not concerned with the *animus revertendi*. There is therefore no room for the argument maintained by the parish of birth on the party's intention to return to Edinburgh, and his actually having done so. As to residence, it must be continuous. Absence of varying duration may no doubt take place, and the law allows considerable latitude in this respect, if they are not of such a nature as to interrupt continuity. Such an absence from the place of residence is one made when a visit is being paid. But it is out of the question to say that a party had continuous residence in a place who went wandering about the country, living in lodgings, and giving them up as he travelled along.

LORD NEAVES—I agree in thinking that we ought to adhere to the interlocutor of the Lord Ordinary. This is a class of cases involving circumstances of infinite diversity, and the two words used in the statute are words of very difficult definition. It is difficult to tell what a residence is. It is difficult also, by a definition, to say what continuousness is. These things we must just determine according to the ordinary current of human affairs. As to residence, a person must be personally present, not only *animo* but *corpore*. But he may be continuously resident without always being personally present, and it is difficult to say what amount of absence will destroy continuity. It is easy to suppose a man absent on his business during the greater part of the week from a particular place, except on Sundays, and still have his residence there. Such is the case of a commercial traveller, or an inspector of schools, or a Queen's messenger, if there was such an office in Scotland, or a courier, or such other kind of person. In arriving at the decision proposed by your Lordship, we are not at all going against former decisions. If there be a well begun residence—for the latitude allowed is all in the middle, and not at the two extremes—and that ends with a good residence, you then may have considerable periods of absence. But these absences are plainly subsidiary—travelling about, for example, on visits made in the vacation of a man's business. Such absences do not interfere with the character of residence. But then these cases must come to this, that the connection of the party with the place must be maintained in some way or other, as, for instance, by the party having a house in the place which he was always looking to when away. But there is no such connection here. There was no house nor fixed place preferred by the person as the place of his residence. He could not say he was residing in any one parish when he gave up his lodgings in the way he did. He could not have assigned a residence for himself. He went about the country with his wife and children, who were born in different places, carrying with him his whole stock-in-trade, and, with the ancient sages, might have said, *Omnia mea mecum porto.*

LORD JUSTICE-CLERK—I entirely concur in the proposed judgment. I don't think the case is free from difficulty, because, as Lord Neaves has suggested, the words "continuous residence," used in the statute, are incapable of definition. But in this case, if it is proved that the pauper did not maintain his residential settlement, acquired through his father, by one year's residence in the parish, there is an end of the case. There is always a fallacy present in this class of cases, from the language use of the acquisition of a settlement by the pauper, as if the pauper acquired a right. The fact is, that the acquisition by the pauper is merely the incidence of a burden upon a parish. I concur with Lord Cowan that the intention of the pauper is not an element in the question, and that the analogy of domicile is misleading. Residence is a fact, and, as a fact necessary to raise the liability of the parish, does not depend on the mind of the pauper, and therefore to search much for legal principle in such cases is to proceed upon a mistaken view of them. The rule is arbitrary, and that is well illustrated by the present case; for we are to find the parish of birth liable, and that was a mere accident occurring among the nomadic habits of the class to which this man belonged. There is no principle in that—it is a mere fact fixed by a rule. And the residence in Edinburgh is of the same character, marked by a very thin line of demarcation, residence in one place being, in the parish of Edinburgh, divided by a staircase perhaps from the city parish; so that really everything depends on fact. I assume here that Edinburgh was the main haunt of this man; but his residence was not continuous, because he was not continually there. He resided in Edinburgh when he was in Edinburgh, and he resided in another place when he was in that place. But it is said that constructively there was continuous residence in Edinburgh, and that because he meant to come back to Edinburgh, and did actually come back. But that is to introduce the element of intention. I do not deny that such cases as *Miles* v. *Greig*, and *Moncrieff* v. *Ross*, to a certain extent recognise constructive residence, but I think the underlying

principle of such cases is, that when a man leaves his wife in search for his livelihood, his earnings being spent in the parish, he is therefore regarded as residing there. But there is nothing of the kind here.

LORD BENHOLME absent.

Agents for Pursuer—H. & A. Inglis, W.S.
Agent for Southdean—John Gibson, jun., W.S.
Agent for Edinburgh—Geo. Cairns, S.S.C.

Friday, October 22.

FIRST DIVISION.

DUNDAS AND OTHERS *v.* DUNDAS.

Antenuptial Contract—Heirs—Heritable. A sum of money was assigned to trustees by a lady in her antenuptial contract, with a provision that if she left no disposition of the money, and no children of the marriage nor their issue survived, it was to go to her heirs. *Held* that the part of the sum which was heritably invested at the commencement and dissolution of the marriage, and had not been converted into moveables by the trustees though empowered to do so, must go to the heir-at-law.

By antenuptial contract of marriage between Colonel, afterwards General Sir James, Simpson and Miss Elizabeth Dundas, second daughter of the late Sir Robert Dundas of Beechwood and Dunira, Bart., the former assigned £7500, and the latter £10,000, to trustees, directing them to pay the produce of the money to Colonel Simpson during the subsistence of the marriage. On its dissolution the trustees were directed to set apart certain provisions for the child or children of the marriage, and to pay the produce of these provisions and the balance of the trust funds to the survivor of the spouses.

In the event of there being no children of the marriage, nor their issue, alive at its dissolution, the £10,000 contributed by Miss Dundas were to go to her disponees, or if she left none, to her heirs, after the termination of Colonel Simpson's liferent. Of this sum of £10,000, £6500 were heritably secured at the date of the marriage and at its dissolution. The trustees were empowered to convert the various securities into money, and were directed to pay the provisions to the children rateably out of the funds contributed by the spouses.

Mrs Simpson died on 27th November 1840, leaving no deed nor will; and no children were born of the marriage. On General Simpson's death, a competition arose between Mrs Simpson's heir-at-law and the next of kin for the possession of the £10,000.

The Lord Ordinary (BARCAPLE) found that the £3500, as being moveable, went to the next of kin, but the £6500, as being heritably invested, went to the heir-at-law, and found no expenses due by either party. His Lordship added the following note:—

"The Lord Ordinary could have had no hesitation in repelling the claim of Sir David Dundas, as heir-at-law, to the sum of £3500, which was invested on moveable bonds at the constitution of the trust. The subsequent investment of that portion of the trust-funds on heritable security was mere matter of trust management, for the better preservation of the funds, and was not done either in obedience to a direction of the truster or from any necessity arising in the execution of the trust. This part of the claim was not insisted in at the debate.

"The question which remains for decision is, whether Mrs Simpson's heir in heritage or her next of kin have right to the sum of £6500, which was invested on an heritable security at and prior to the constitution of the trust, and was conveyed in that form to the marriage trustees. If this question had arisen upon the construction of a mere testamentary trust-deed by Mrs Simpson, containing trust directions as to the disposal of the fund identical with those which occur in the marriage-contract, the Lord Ordinary would have had no doubt that it was not intended to make the sum of £6500 moveable by destination, as regarded her heirs, who were to take on the failure of children, and that, there being no direction to convert that sum into moveable estate, and no necessity for its conversion having arisen, it must have been held to be heritable, and to go to the heir in heritage. He thinks that the authorities against conversion in such circumstances would have been entirely applicable and conclusive, and he sees no ground for holding that a mere testamentary destination to the heirs of the truster on the failure of the children for whose benefit the trust was created, is to be read as excluding the heir-at-law in regard to any portion of the trust-funds which are heritable.

"The question in the present case, however, relates to a trust executed in implement of an obligation in a marriage-contract, the trust purposes, including the destination to the truster's heirs, being contained in the contract. In the case of *Meiklam's Trustees*, 15 D., 159, where an heritable bond was conveyed by the husband to marriage-contract trustees in implement of an obligation in the marriage contract to content and pay £30,000 to them, it was held that a surplus of that sum beyond what was required for the purposes of the trust, which the trustees were directed to pay and make over to the husband and his heirs and successors, was not heritable, and did not go to the heir-at-law, in respect of the heritable form in which it was conveyed to the trustees. In that case the Court looked to the obligation out of which the trust originated, which was simply to pay a sum of money. It was held that the character of the trust-fund was not altered by the fact that the trustees accepted, in implement of that obligation, an heritable investment which the husband offered them, any more than it would have been by their procuring such an investment from any other quarter. It appears to the Lord Ordinary that, in this respect, the present case is different in principle. The obligation undertaken by Mrs Simpson was to convey to the marriage trustees the sum of £10,000 contained in three several bonds specially set forth, viz., an heritable bond for £6500, and two moveable bonds for £3500, being her whole fortune, which then stood on these investments. This being so, the Lord Ordinary thinks that the constitution of the trust, and the directions for disposal of the fund, must be held to have relation to the estate as it was actually invested. The ultimate destination of the fund, on the failure of children, is truly a testamentary provision, and no part of the contract between the spouses, and must be dealt with on the principles applicable to such provisions. If Mrs Simpson had survived her husband, there being no children of the marriage, the sum of £10,000 conveyed by her to the trustees would, by the express terms of the trust, have been 'at her absolute disposal.' There can be no room