was to give the Court power to grant authority to trustees to do things not in the contemplation of the truster. The truster here had in view the objects of the trust, not the means by which these were to be carried out. He only directed what seemed to him most advantageous at the time. In any case, all he intended was that the property should not pass out of the truster's hands, and if feuing was allowed that would not take place. There was no fixed purpose of the trust against feuing.

Authorities—*Merchant Company* v. *Governors of Heriot's Hospital*, M. 5750; *Arkley and Others (Hay's Trustees)* v. *Miln*, June 13, 1873, 11 Macph. 694.

At advising—

LORD PRESIDENT—We are empowered under the Trusts Act 1867 to grant the authority which is here asked, provided we are satisfied that the same is expedient for the execution of the trust, and also "not inconsistent with the intention thereof," that is, with the intention of the truster. The power here required is a power to feu, and it is admitted that the trust-deed contains prohibition to sell, but it is contended that there is no prohibition against feuing. It is needless to enlarge upon the distinctions between these powers, for the question is, what was the intention of the truster in the provision he made with reference to the prohibition to sell. He directs his trustees to allow the residue of his estate "to remain in bank, or otherwise invest it on security to their satisfaction, and add the interest of it annually to the rents of Tait's Hole," the property here in question. That fund is to be applied to the carrying out of the main object of the settlement, and with regard to Tait's Hole there is a special provision as follows [*reads as above*].

Now, what does the testator mean when he says that Tait's Hole is "never to be sold or disposed of." It appears to me that these words can have no meaning unless they are to cover such an alienation as is proposed in this petition. The trustees are further forbidden to let on long lease, or even on lease for the ordinary term of possession, for it is provided that no lease is to exceed seven years in duration; and it would be strange if in these circumstances we were to hold that there was no inconsistency in granting the power to feu, although in the same sentence there are contained the prohibitions to which I have alluded. There is no room for doubt in this clause, and we must take it that the prohibition against a disposal of this property either by sale or for an annual payment, except for a limited number of years, includes a prohibition to feu. There is only one answer to the question whether the power asked is inconsistent with the testator's intention, and the testator has left no room for hesitation as to what his meaning is. While the granting of this power might have been expedient, it is impossible to hold that it is in conformity with the truster's intention.

In the other case which has been alluded to —*Arkley and Others (Hay's Trustees)* v. *Miln*, June 13, 1873, 11 Macph. 694—the truster had created a trust, directing his trustees to hold certain estates in any event for twenty-one years. His debts were to be paid, and an annuity had also to be provided for out of the annual proceeds of the estate. The project of the truster turned out impossible, and the trustees after a few years found the estate not only bankrupt, but irretrievably so, the burdens largely exceeding the rental, and that was a condition which would be aggravated every year. There was a prohibition in the trust-deed against selling any part of the landed estate, because the ultimate purpose under the deed was that that should be entailed. In these circumstances an application was made for power to sell a part of the estate, the effect of which would be to enable the debt to be paid off, and to leave a balance of the property to be entailed. It was represented that the intention of the testator was impracticable, and that if the power were refused the estate would be torn to pieces by the diligences of creditors, and that the only alternative was to carry out the intention of the testator so far, and settle an entailed estate not of the same amount as had been contemplated by him, but of some amount, upon the series of heirs. That was a telling argument, but the Court found themselves compelled to refuse the application, because the prohibition was so expressed that they could not say that the condition of the statute was purified, which requires that the granting of such a power must not be inconsistent with the intention of the testator.

The present is a stronger case, and the petition must accordingly be refused.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

The Court adhered.

Counsel for Petitioners—Dean of Faculty (Watson)—Jameson. Agents—Scott-Moncrieff, & Wood, W.S.

Tuesday, May 16.

FIRST DIVISION.

[Sheriff of Midlothian.

GREIG AND SIMPSON *v.* CRAIG.

Poor—Settlement—Desertion—Statute 8 *and* 9 *Vict. cap.* 83, *sec.* 76—*Husband and Wife.*

A man who had a residential settlement deserted his wife and children, and was absent for more than five years.—*Held* that his desertion being equivalent to his death, his residential settlement inured to his wife and children till he should return, or till they should acquire a new settlement for themselves, and was not lost by his absence, in spite of the 76th section of Stat. 8 and 9 Vict. c. 83, there being no presumption that he was still alive.

John Scott was born in the parish of South Leith. In 1854 he was married, and in 1868 he deserted his wife, having previously acquired a residential settlement in the parish of St Cuthbert's. In respect of this settlement his wife and children, who had become paupers, were relieved by St Cuthbert's parish down to June 1872. In June 1873 they left that parish and came to reside in the City parish of Edinburgh, and in that month they obtained relief from the City parish.

Notice of chargeability was sent to the parishes of South Leith and St Cuthbert's, and relief claimed from the former as John Scott's birth-settlement, or from the latter as the parish in which he had acquired a residential settlement. The paupers again became chargeable to St Cuthbert's in November 1873. Notice was then sent to the parish of South Leith of this chargeability, and relief was claimed. A similar notice had been sent to the parish of South Leith in June 1872 by the inspector of St Cuthbert's parish, claiming relief on the ground that the husband had then been absent from St Cuthbert's parish for more than the statutory period, and so had lost the settlement acquired by him prior to his desertion.

The pursuer, who was inspector of poor for the City parish of Edinburgh, brought this action to have it found that either the defender Simpson, as inspector of poor for South Leith parish, or the defender Craig, as inspector of poor for St Cuthbert's parish, was liable for the relief advanced to the pauper by the City parish of Edinburgh.

The defenders admitted by minute that the relief concluded for was due by one or other of them, and consented to the question of liability being determined in this action.

On 6th August the Sheriff-Substitute (GEBBIE) pronounced this interlocutor:—Finds, in fact, that John Scott, a draper, was born in High Calton, Edinburgh, in the parish of South Leith, on or about the 28th October 1835; that John Scott deserted his wife Jane Bald or Scott and family about 1st June 1868, when they became chargeable to, and were relieved down to June 1872, by the parish of St Cuthbert's in respect of a residential settlement which he had acquired therein, and where they continued until June 1873, when they came to reside in the pursuer's parish, the City parish of Edinburgh; that Jane Bald or Scott in June 1873 applied for and obtained relief for herself and children from the City parish; that notice of such chargeability was sent by the pursuer to, and relief claimed from, the parish of South Leith as the birth settlement of John Scott, and also to the parish of St Cuthbert's in which he had acquired a residential settlement; that on or about 10th June 1872, and 12th November 1873, at which latter date she again became chargeable to, and was relieved by, the parish of St Cuthbert's, notice of chargeability was sent by the said parish to, and relief claimed from, the parish of South Leith in respect of John Scott's absence from St Cuthbert's parish for more than the statutory period: Finds, in law, with reference to the foregoing facts, that Jane Bald or Scott has not lost her residential settlement in St Cuthbert's parish in consequence of her husband's absence for more than four years, and that it is still liable to maintain her, and relieve the pursuer of the sum claimed: Therefore decerns against the defender James Craig, as inspector of poor for St Cuthbert's parish, of St Cuthbert's and Canongate combination, and as representing the parochial board thereof, in terms of the conclusions of the libel: Finds the said defender liable in expenses to both the pursuer and the other defender, the inspector of poor for the parish of South Leith: Allows accounts thereof to be given in, and remits, &c.

"*Note.*—The Sheriff-Substitute is of opinion the parish of St Cuthbert's is liable to maintain the pauper Jane Bald or Scott and her children. Although her husband deserted her and has been absent from that parish for more than four years, she herself had never been absent for that period, and has received relief down to a recent time. The relief granted stopped the running of the period requisite for destroying the residential settlement acquired through him, and that settlement inured to her on her husband's desertion, exactly as his death would have done."

"In *Barbour* v. *Adamson*, 1 Macq. 376, the House of Lords found the parish of the father's settlement, whether acquired by birth or residence, bound to maintain his children left destitute by reason of his being transported, and the same principle would seem to apply to the case of a wife of a deserting or transported husband. The opinions of some of the judges in *Masons* v. *Greig*, 11th March 1865, 3 Macph. 707, go far to support the conclusion arrived at in the foregoing interlocutor."

The defender Craig appealed to the Sheriff (DAVIDSON), who sustained his Substitute's judgment, and appended the following note to his interlocutor:—

"*Note.*—The husband has undoubtedly deserted his wife and family, but where he has been, and is, is not stated nor (it is supposed) known. It is, however, only a probability that (if he is alive) he has not been continuously or partially resident in St Cuthbert's. It is not shown that he has lost his residential settlement in that parish.

"Be this as it may, he left his wife and children, and immediately or soon after his desertion they became chargeable, and have been relieved in the parish of his settlement. They were entitled to the benefit of that settlement, and the parish of St Cuthbert's was bound to relieve them, and in the circumstances is bound still."

Craig appealed to the Court of Session.

Argued for him.—A wife can, *stante matrimonio*, have no other settlement than that of her husband, and she and her family must always be held to be chargeable on the same parish as the head of the family. Under the 76th section of the Poor Law Act of 1845 he has lost his residential settlement in St Cuthbert's parish, and in that event his birth settlement revives. The presumption certainly is that he is alive, and therefore by this absence, if he has not acquired any new settlement, he has at all events lost for himself and his family—who must, so long as he lives, follow his fortunes—the residential settlement acquired by him in St Cuthbert's parish previous to his desertion. In the case of *Masons* v. *Greig*, 11th March 1865, 3 Macph. 707, quoted for the defender Simpson, it must be remembered that the husband was an Irishman, and therefore, as was true of all the other cases quoted to the same effect (*Hay* v. *Skene*, 13th June 1850, 12 D. 1019; *Macrone* v. *Cowan*, 7th March 1862, 24 D. 723), there was no radical settlement in Scotland to fall back on. Here there is. These cases can have no application to the case of a wife married to a native Scotchman. In the case of *Barbour* v. *Adamson* the question was as to the disposal of children, and the contention was that they must

be chargeable on their respective birth settlements. The argument as to the inexpediency of separating the family, on which that judgment in part proceeds, has no application here. The wife and family must therefore be held chargeable to South Leith, the birth settlement of the deserting father.

The other defender was not called on.

At advising—

Lord President—The Dean of Faculty is right in saying that no question precisely similar to the present has been decided, but it appears that there is a principle running through the whole series of decisions applicable to this case and all its circumstances.

The wife of John Scott was deserted by him on 1st June 1868. She and her children became chargeable to the parish of St Cuthbert's, and received relief till June 1872. No question was then raised, because the husband had acquired a residential settlement in that parish. It was when they came to reside in the City parish of Edinburgh in June 1873, and to claim relief from that parish, that this question was raised. St Cuthbert's parish claimed relief from South Leith, the birth settlement of the husband and father, in respect that he had been absent for more than the statutory period—that is to say, that if absence of the husband is capable of destroying a residential settlement that has inured to his wife and children, he had been absent for a period long enough to have that effect.

The real question comes to be, whether his wife and children, having at the time of his desertion a residential settlement which inured to them in respect of the deserting husband, could lose this settlement by his failure to reside for the next five years, in terms of the 76th section of the Poor Law Act; or whether the settlement had not become incapable of being destroyed by their having received parochial relief during that time and entitled them to say that they had never lost it.

Now, it has been held that in a question as to parochial relief, desertion of his wife and family by a husband is equivalent to his death. This has been decided not without much difficulty and difference of opinion, but we must now hold it to be the fixed rule of the law. That rule applied here ends the question. If this man had died and left a residential settlement to his wife and children, nothing has happened since his death—supposing it to be a death—to deprive his widow of this settlement. But it is contended that the rule is applicable only where the husband and father has no other settlement in Scotland. But the doctrine has been laid down in wider terms, and if the doctrine only admits of this qualification, that a deserting husband may return, and that when he returns a new rule may come in as to the parish which is to maintain him or his wife and family, and that by thus coming to life again, as I may call it, he may revive another settlement or put an end to that settlement that had inured to his wife and children, that does not prevent its application during the period of his absence. Except for that qualification, the rule has been laid down as universally applicable, and I should be sorry to disturb it, and therefore I am inclined to approve of the Sheriff's judgment; indeed, I have no doubt on the matter.

Lord Deas—This man deserted his wife in June 1868. He had then a residential settlement in St Cuthbert's parish, and that settlement was then hers also. If he had died then it would have inured to the wife till she acquired another, or if he had been transported it would also have inured to her. I know of no reasonable grounds for holding that a residential settlement does not inure to a deserted wife and children until they acquire a new one, or until the husband returns. In that case a new question would arise with which we have nothing to do here. So long as the desertion lasts it is perfectly clear that the residential settlement must last, unless the wife acquires a new one for herself; otherwise there would be constant changes of settlement. It is said that the husband must be presumed to be alive, but it would be strange and inconvenient to hold that there is the same presumption that the husband is alive in questions of this kind as there may be in other cases; besides, that is never so much a presumption as a question of fact, and here we know nothing of the husband being alive or dead. It would be dangerous to assume in questions of Poor Law administration that he is still alive. This settlement will remain till the husband comes back.

Lord Ardmillan—It is of great importance in questions of the administration of the Poor Law that there should be uniformity of decision, and when a principle has been settled it is inexpedient to resume consideration of it, and eminently undesirable to disturb it. I was slow to assume that desertion is equivalent to death, but now that the question has been deliberately considered it is not expedient to revive it. That being so, desertion is equivalent to death at the date and during the period of the desertion. If the husband returns, a new question arises. Desertion has been decided to be equivalent to transportation, and no distinction has been pointed out between the legal effects of transportation and desertion in a question of parochial relief.

As to the birth settlement of the husband—a man has not both a birth settlement and a residential settlement at once. The birth settlement is attendant on the other, and revives when it fails, the death of a man closes all possibility of further change, and leaves the settlement of the wife fixed.

Lord Mure—I am of the same opinion. It must now be held settled that desertion is equivalent to death; whatever may have been the difference of opinion as to the policy of this rule when it was introduced, it must now be held to be the rule.

The Court affirmed the judgment of the Sheriff.

Counsel for Pursuer—Dean of Faculty (Watson) —M'Kechnie. Agent—Ebenezer Mill, S.S.C.

Counsel for Defenders—Trayner—W. F. Hunter. Agents—David Curror, S.S.C.—J. C. Irons, S.S.C.