ancing process of making the investment. But be that as it may, that is the way in which he writes. Well, Mr Douie, without asking any other approval other than the conditional one he had got, invests the money on this unfortunately overburdened house property on the 27th September. And it is here that the difficulty, and the only one so far as I am concerned, occurs to my mind, and which I began by stating. But for all that I think there are no grounds for liability. I think the defender is not responsible for the investment which was made by Mr Douie upon this assent of his. There is, be it observed, no case of this kind: "The investment was made on the 27th September, and the money might have been saved if you had used due diligence thereafter. If you had inquired and ascertained if the money had been lent with Christie's approval, you would have found that it had not, and the money might then have been rescued." That, I say, is not the ground of action. It was put more than once in the course of the argument—the money was irrecoverably lost, because it was paid over to the borrowers on the 27th September, and the ground of action was that this security was an utterly bad one. But I do not think the assent of Kennedy in London was without due inquiry, or was incautious. Taking all the circumstances together, and leaving none of them out of view, I think a trustee resident in London cannot have imputed to him negligence or a reckless disregard of the safety of the trust funds when in answer to such a communication from his co-trustee in Glasgow, who had theretofore managed the trust property, and who indeed had managed it before the defender had become a trustee at all, he assents in a provisional way—"If you and Mr Christie both approve, and my brother is satisfied, he being a very prudent man and a judge of such matters, and having the most material interest in it, I assent too." If the investment is then made, and turns out to be bad, there may be a good case against the trustee who made it, Mr Douie, but I do not think an action can lie, on the ground of negligence, against the trustee who gave the assent. Therefore, upon the whole matter, and really regarding the observations I have made as more superfluous than otherwise, I concur in the judgment proposed.

Lord Craighill—I also concur in the judgment of the Lord Ordinary, the affirmance of which your Lordship has proposed, and I do so for the reasons which the Lord Ordinary and your Lordship and Lord Young have explained. I feel that were I to say more to endeavour to expound the grounds upon which I individually have proceeded, it would only be to repeat that which has been better said. I therefore content myself with expressing my concurrence in the judgment.

Lord Rutherfurd Clark—I have shared the doubts that have already been expressed by Lord Young, and perhaps I felt them more than his Lordship did; but after giving the case such consideration as I have been able to give it, I have come to think that the interlocutor of the Lord Ordinary ought to be affirmed.

The Court adhered.

Counsel for Pursuers—Comrie Thomson—Salvesen. Agent—Thomas M'Naught, S.S.C.

Counsel for Defender—Trayner—Jameson. Agents—Dove & Lockhart, S.S.C.

Tuesday, December 9.

FIRST DIVISION.

BEEBY (INSPECTOR OF POOR OF THE PARISH OF FALKIRK) *v.* CALDWELL (INSPECTOR OF POOR OF THE PARISH OF AYR).

Poor—Settlement—Soldier—Poor Law Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 76.

Held that a soldier who had acquired a residential settlement in a parish before he enlisted had lost that settlement through absence with his regiment for more than five years.

This Special Case was presented by John Beeby, Inspector of Poor of the Parish of Falkirk, and David Caldwell, Inspector of Poor of the Parish of Ayr, to settle whether, in terms of the Poor Law Act 1845 (8 and 9 Vict. c. 83), a pauper by his absence on military duty lost the residential settlement he had acquired in the parish of Falkirk. Section 76 of the Act provides—"From and after the passing of this Act no person shall be held to have acquired a settlement in any parish or combination by residence therein unless such person shall have resided for five years continuously in such parish or combination, and shall have maintained himself without having recourse to common begging either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement if during any subsequent period of five years he shall not have resided in such parish or combination continuously for at least one year."

The following facts were stated in the Case—John Brown, the pauper, was born in the parish of Ayr in 1857. When nineteen years of age he enlisted. For six years before enlisting he had been employed as a clerk in the parish of Falkirk, supporting himself there, and it was admitted that he had thereby acquired a residential settlement in the parish of Falkirk. After enlisting he was absent from Falkirk for six years with his regiment. At the end of this period he left the army and returned to Falkirk, and remained there for about two months. He was then called upon to serve in the army reserve, and went to Egypt with his regiment. At that time he was absent from Falkirk about twelve months, after which he was discharged, and again returned to Falkirk, shortly after which he became insane and chargeable as a pauper. He was never married.

The question of law for the Court was—"Whether the said John Brown lost his residential settlement in Falkirk by his absence from that parish on duty with his regiment for a period of upwards of five years?"

The parties were agreed that in the event of the question being answered in the affirmative the parish of Ayr would be liable for the support

of the pauper; but if in the negative the parish of Falkirk would be liable.

Argued for the parish of Falkirk—There had been no actual residence at all for a period of six years, and there could be no constructive residence, for the pauper had neither wife nor family. —*Crawford and Petrie* v. *Beattie*, January 25, 1862, 24 D. 357; *Hume* v. *Pringle*, December 22, 1849, 12 D. 411; *Allan* v. *Higgins and Others*, December 23, 1864, 3 Macph. 309; *Thomson* v. *Kidd and Beattie*, October 28, 1881 9 R. 37; *Beattie* v. *Leighton and Mitchell*, February 20, 1863, 1 Macph. 434.

Argued for the parish of Ayr—A soldier when absent on duty did not lose his residential settlement, because his absence was incidental, and on the public service.—*Masons* v. *Greig*, March 11, 1865, 3 Macph. 707; *Hay* v. *Cook and Beattie*, February 5, 1858, 20 D. 507; *Rogers* v. *Maconochie*, July 5, 1854, 16 D. 1005; *Greig* v. *Miles and Simpson*, July 19, 1867, 5 Macph. 1133; *Moncrieff* v. *Ross*, January 5, 1869, 7 Macph. 331; *Waller* v. *Beattie and Highet*, January 6, 1881, 8 R. 345; *Deas* v. *Nixon*, June 17, 1884, 11 R. 945.

At advising—

Lord Mure—In this case a question is raised as to the construction and application of the 76th section of the Poor Law Act of 1845, and the circumstances are free from any complication.

Brown, the pauper, was born in the parish of Ayr, but afterwards moved to the parish of Falkirk, where he resided long enough to acquire a residential settlement. After that he enlisted, and was absent from Falkirk for six years on duty with his regiment, and was never back in Falkirk during that period. He has since returned to Falkirk, but has not resided for a sufficient period to acquire a settlement.

The question raised is, whether although he was absent for six years, he yet retained his settlement because he was absent during that period on duty with his regiment? As matter of fact he has not resided in Falkirk for the period required by the 76th section to enable a person to retain a residential settlement; but it has been argued that as he was absent in the discharge of his duty, he somehow or other was resident in Falkirk. Several cases were referred to, in some of which there was absence from the parish of settlement for a considerable period, but in those cases there was always this element, that though the father was away his wife or family was left in the place where he had resided. That being so, it was held that there was constructive residence authorising the Court to hold that the father had substantially resided in the parish, since he was paying for a house there and supporting his family in it. These are the only cases in which the Court has held that there was constructive residence. I referred to some cases of that class in *Beattie* v. *Smith and Paterson*, 4 R. 21, and in all of them there was this same element, viz., that there had been a wife or family left, so that the difficulty explained by your Lordship in *Crawford and Petrie* v. *Beattie*, 24 D. 357, was got over, for in that case the lunatic had left no family when he went to the asylum.

In these circumstances the question arises whether the requirements of the 76th section are to be held as operative when the person is away on duty as a soldier, and has left no home, wife, or family behind. I cannot see how the doctrine of constructive residence can be brought in, and I therefore think that the provisions of section 76 apply to the case of a soldier who is absent for six years on duty.

Lord Shand—The words of the statute by which this question must be determined are these —[*reads as above*]. These directly apply to the facts of the present case, for it is admitted that the pauper resided for five years in the parish of Falkirk, and thereby acquired a residential settlement, but that for a subsequent period of six years he had not resided for one year. That, I think, is an end of the case.

I agree with the test stated in the case of *Crawford and Petrie* v. *Beattie*, that the application of the section depends upon a question of fact, and the fact here is that there was no residence during the necessary period. It has been said, however, that although there was no residence, but only absence, that a certain privilege should be extended to the case of a soldier absent on duty, to the effect of holding him to be present when he was absent. I can find no good reason or ground for distinguishing his case from that of others similarly employed, and if this was to be said of him, the same might be said of every civil servant. His absence, again, was said to be involuntary. I do not agree with that remark, for his enlistment was voluntary; but whether voluntary or involuntary, I do not think it makes any difference.

The only appearance of an argument was that founded on the supposed analogy between the present case and that class of cases of which *Deas* v. *Nixon* (*sup. cit.*) is one, but the latter are entirely different. In those cases, too, the same test would be applied—was there in fact residence during the period required? The answer would be in the affirmative, for the settlement was retained through the residence of the person's wife and family, and it could not be said that there was no residence, for there was the residence of the wife and family.

The Lord President and Lord Adam concurred.

The Court found and declared that the pauper had lost his residential settlement by his absence from the parish of Falkirk for five years, and that therefore the parish of Ayr was liable for his support.

Counsel for the Parish of Falkirk—J. P. B. Robertson—Shaw. Agents—Curror & Cowper, S.S.C.

Counsel for the Parish of Ayr—Mackintosh—J. A. Reid. Agent—John Macmillan, S.S.C.