

to any innocent individual the pain of being held answerable for the death of this man, or to avoid the cowardly course of saying, "We will let them find out who it was."

I have therefore no hesitation whatever, although this is a second verdict, in setting it aside as unwarrantable, unsupported by any evidence which in any rational view could sustain it, and if the pursuer or her friends—contrary, I am sure, to any professional advice which she can receive—should proceed to trial again, conscious that she has no other case than that which has been presented already, and which the Court has emphatically pronounced to be insufficient to support the verdict, I for my part should set aside another verdict in the same way.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the pursuer on the rule granted by the preceding interlocutor, make the rule absolute, and grant a new trial, reserving all questions of expenses."

Counsel for the Pursuer—The Lord Advocate—A. J. Young—Hay. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for the Defenders—D. F. Balfour—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Wednesday, December 4.

SECOND DIVISION.

[Sheriff-Substitute of
Forfarshire.

HANTON v. TAYLOR.

Poor—Settlement—Poor Law Amendment Act 1845 (8 and 9 Vict. c. 83), sec. 76—Continuity of Residence.

Robert Malcolm lived from March to November of each year in his daughter's house in the parish of Carmyllie. His daughter kept an imbecile half-brother, and received small sums of money at intervals from her father for doing so. In winter Malcolm worked as a miller in different parishes. While there were still six months to run for him to acquire a residential settlement in Carmyllie, he became tenant of a mill in another parish for a year. He spent every Saturday night during that period in his daughter's house in Carmyllie, which he used to speak of as his home.

Held: that he had not acquired a residential settlement in the parish of Carmyllie.

Hugh Hanton, Inspector of Poor for the parish of Barry, brought an action in the Sheriff Court of Dundee against James Taylor, Inspector of Poor for the parish of Carmyllie, and W. B. Spence, Inspector of Poor for the parish of Monifieth, for repayment of certain funds expended on be-

half of Robert Malcolm, a pauper lunatic, and for relief of all future parochial aid required for said pauper. As the pauper was a congenital idiot, and therefore incapable of acquiring a settlement for himself, his legal settlement was that of his father Robert Malcolm senior, and the question was whether his father at the time of his death had acquired and was possessed of a residential settlement in Carmyllie parish, or still retained his birth settlement in the parish of Monifieth.

A proof was allowed, at which the following facts were established:—Robert Malcolm senior was born in the parish of Monifieth in March 1815. He worked from November 1878 to November 1882 as a quarryman in Carmyllie parish, but during the winters of 1880-81, 1881-82, and 1882-83 he avoided the exposure attendant on quarrying, and worked as a miller in different parishes. In the spring of 1883 he did not return to the quarries in Carmyllie parish, but became tenant of Craichie Mill, in the parish of Dunnichen, and continued so from Whitsunday 1883 to March 1884, when he returned to Carmyllie. He worked in the quarries there during the summers of 1884, 1885, and 1886, and as a miller in Arbirlot and Kirriemuir parishes respectively during the intervening winters. While he worked in Carmyllie parish he lived with his daughter in a house which was also in that parish, and which since 1880 had stood in her name. She kept his imbecile son, and he gave her small sums of money at intervals. He used to speak of that house as his home, and after he went to Craichie he spent from Saturday to Sunday afternoon of each week there. During the rest of the week he lived alone in a poorly furnished house belonging to the mill. He had expressed a wish that his daughter should come to Craichie and keep house for him, but this she never did. He did not return to Carmyllie parish after November 1886, and died in his daughter's house in Carnoustie, in the parish of Barry, on 27th March 1888, aged seventy-three.

By interlocutor dated 23rd April 1889 the Sheriff-Substitute (CAMPBELL SMITH) found it proved that from Martinmas 1878 to November 1886 Robert Malcolm, the lunatic's father, had his house in the parish of Carmyllie, and was possessed of a settlement therein at his death, and decerned against the defender Taylor, the inspector of that parish accordingly.

"*Note.*—[After stating the facts]—To get at the heart of the real matter in dispute it is necessary to put the question formulated by more than one judicial master of precision in expression. What was this man's home? and to bring that question into clear relief by the negative alternative—Had he no home at all? I do not think our law anywhere, and certainly never in the poor law, contemplates the idea that any man can be without a home. The home may be difficult to find, but it is always presumed to exist. The poor law certainly contemplates one home, and it rejects the idea of more than one, and most

of the difficult questions in regard to residential settlement resolves into a competition in renunciation between two or more homes, because the pauper's estate is a sort of negative quantity.

"The present case resolves into a balancing of evidence, and of legal presumptions as between two homes, one of which I may describe, for brevity's sake, as the home of his occupation, and the other, with equal terseness and roughness, as the home of his affections, assuming of course that the old man had not become an entire stranger to human affection; and further, holding it to be proved beyond doubt that he did have a strong fatherly fondness for his idiot boy—a fondness not to be accounted for by self-interest or by cold reason, but nevertheless the ruling instinct or passion of the father's latter years.

"There can be no doubt that during the first fifteen months that Robert Malcolm lived in Carmyllie parish at Milton of Connon, his house was there, and all but indisputably also up to Martinmas 1880. But when there, in or about the beginning of 1880, he granted a trust-deed in favour of his creditors; his daughter Jessie, who was his housekeeper, bought the furniture of the house from the trustee, and the trustee advised her that in order to keep the furniture safe the house in which she was to keep it must be taken in her own name. Thereafter the house was chiefly in Jessie's name. She says that when the receipts for rent were in her father's name it was by mistake. But he always appears to have acted and been received in the house as if it had been his own. He lived in it when he was working in the quarries in the parish of Carmyllie, summer after summer, and he also lived in it when he was not working, getting his food off the common table. He paid neither board nor lodgings. He gave all his wages to Jessie, except a little which he retained for tobacco and pocket-money, and out of his earnings this family of three, which included the imbecile boy, was supported. When he was absent in the winter time employed at mills, he returned as often as he could to his daughter's house, and spent his Sundays there, going to the Free Church in his best or only black suit, which he never withdrew from the parish of Carmyllie. The daughter washed his working clothes for him as he required them. She acted, in short, as his housekeeper, just as her mother or stepmother would have done had not both happened to die. The death of a wife may deprive a man of a home, but I do not think it does so by necessity of law. I do not think it ever occurred to this old man that either his second widowhood or his trust-deed had stripped him of a home. Neither did this occur to his family. A sister, one of the second family, also a brother, was married out of this house after it in name became the daughter's. The idiot boy, dear to the father's heart, always lived there, and when the father's last illness had hung a week about him, he rose from his sick-bed among strangers, and travelled fully twenty miles to reach this daughter's house to be nursed

there and to die. If this daughter's house cannot fill up the measure of the legal idea of a home, I think the bothy of the Mill of Craichie is still less fit to do it. That the old man went there in the spring of 1883 is certain, whether at Whitsunday or six weeks before it is not so clear. That he took the mill for a year, and that he stayed eight or nine months, is proved only by one witness. I assume it to be true also that he tried to carry on business there, and, on the other hand, that it is not less true that though there during the week he spent all his Sundays in Carmyllie at his daughter's. But if this frail old man, after he had been stripped of everything by his creditors except his clothes, hoped at his time of life to establish a new business for himself at Craichie, I can hardly resist the conclusion that his mind was as frail as his body. Delusive hopes must have led him to talk vaguely as if he expected his daughter to go there to keep his house. This important fact, however, is that she never went, and that what was virtually this old man's family, and all that had to suffice him for *lares et panetes*, never were transferred. Certain articles no doubt were transferred from the daughter's house. The farmer of Craichie says only 'a chair and a table,' not so much as a bed, and the chair and table were left behind him when he left in February, probably in deference to the law of hypothec, or perhaps because they were not worth carrying away. The daughter adds to the farmer's inventory a second chair, a bed, and some dishes. There were, it seems, three rooms in this miller's house or bothy. Whether it be called a house or a bothy, it does not seem to me to have been furnished according to any ordinary Scottish ideal of a house, and I for my part feel utterly unable to believe that this old man could ever have felt at home there until in that house a shelter was found for his helpless boy. Therefore my opinion is against the contention of the parish of Carmyllie—*Cruickshank v. Greig*, 4 R. 268; *Watson v. Macdonald*, 6 R. 202."

The defender Taylor, Inspector of Carmyllie, appealed to the Court of Session, and argued—When Malcolm became tenant of Craichie Mill he broke his residence in Carmyllie parish, and consequently never acquired a residential settlement there. Monifieth, the parish of his birth, was therefore liable for the support of his lunatic son. A person at once interrupts the residence necessary to acquire a residential settlement by settling elsewhere—*M'Gregor v. Watson*, March 7, 1860, 22 D. 965; *Milne v. Ramsay*, May 23, 1872, 10 Macph. 731, *Lord Cowan*; *Allan v. Shaw and King*, February 24, 1875, 2 R. 463; and especially the recent case of *Greig v. Simpson*, October 25, 1888, 16 R. 18. In the set of cases relied upon by the respondent the residence of the man himself elsewhere was "casual or occasional"—*Lord Kinnear in Greig, supra*—and his residence within the parish was held to be constructively retained by his wife and family. Malcolm in this case had no right to enter his daughter's house without her consent. His house or home

was at the time in question at Craichie Mill, which was not in the parish of Carmyllie.

Argued for the respondent—The Sheriff-Substitute was right in his view as to where Malcolm's home was between Whitsunday 1883 and March 1884, and that was the only question here. This case belonged to the class ruled by the cases of *Greig v. Miles and Simpson* (sailor), July 19, 1867, 5 Macph. 1132; *Moncrieff v. Ross* (fisherman), January 5, 1869, 7 Macph. 331; *Harvey v. Roger and Morrison* (farm-servant), December 21, 1878, 6 R. 446; *Beattie v. Stark* (invalid), May 23, 1879, 6 R. 956; and especially the recent case of *Deas v. Naxon* (man in Australia), June 17, 1884, 11 R. 945.

At advising—

LORD JUSTICE-CLERK—The person whose settlement is here in question went in the spring of 1883 to Craichie Mill, which is in a different parish from that which the Sheriff-Substitute has found liable for the support of his imbecile son. At Whitsunday, after two months' residence at Craichie, he became tenant of the mill, and continued so for some ten months. His view of his own position is quite clear from the desire he expressed that his daughter should come to Craichie and keep house for him, and is not affected by the fact that this proposal came to nothing. It is said that he still retained his settlement in Carmyllie parish because his daughter and his imbecile son were still there, and he stayed over Saturday night with them, and spoke of his daughter's house as his home. There is not much in that expression to guide us here. He had no right to enter the house in Carmyllie without his daughter's consent. In these circumstances it appears to me that an interruption in the residence in Carmyllie parish was caused by the taking of the mill, and that the view of the Sheriff-Substitute is incorrect.

LORD RUTHERFURD CLARK—The question put to us in this case is, where did Malcolm reside between Whitsunday 1883 and March 1884, or as Mr Smith preferred to put it, where was his home. It appears to me that he resided and had his home in the house in which he lived, which was indeed the only house he was entitled to live in, and that we cannot say it was not his home because he paid occasional visits to his daughter and his son.

LORD LEE—It is impossible to say upon the evidence in this case that Malcolm, the father of the imbecile boy, had his residence in the parish of Carmyllie, while he was tenant of Craichie Mill and resided there with the exception of weekly visits to his boy at his daughter's house. Upon that simple ground I think we should reverse the judgment of the Sheriff-Substitute, unless we are to challenge the law laid down in the recent case of *Greig*, 16 R. 18. It is clear that the father of the lunatic here was as much absent from Carmyllie as the person in that case was from Leith during the last six weeks of the five years

necessary to the acquisition of a settlement in that parish.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

“The Lords . . . Find in fact and in law (1) that the pauper Robert Malcolm has been imbecile from his birth, and incapable of acquiring a settlement for himself, and that the burden of maintaining him falls on the parish of the settlement of his father Robert Malcolm, who was born in the parish of Monifieth in March 1815, and died in March 1888; (2) that the said deceased Robert Malcolm did not reside for five years continuously in the parish of Carmyllie, and did not by residence acquire a settlement in that or any other parish, and that his settlement at his death was in the parish of Monifieth, the parish of his birth: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute appealed against; decern in terms of the conclusions of the petition against the defender W. B. Spence, as Inspector of the Poor of the parish of Monifieth as representing the Parochial Board of that parish: Assoilzie the defender the Inspector of the Poor of the parish of Carmyllie from the conclusions of the action: Find the defender the Inspector of Poor of the parish of Monifieth liable to him and to the pursuer in expenses in the Inferior Court and in this Court,” &c.

Counsel for the Pursuer—Guthrie Smith—Hay. Agent—D. Milne, S.S.C.

Counsel for the Defenders—Sol-Gen. Darling, Q.C.—Watt. Agent—Wm. Officer, S.S.C.

Friday, December 6.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

YOUNG v. THE CLYDESDALE BANK (LIMITED.)

Bank—Overdraft—Cautioner—Fraudulent Misrepresentation—Essential Error—Reduction.

A customer of a bank whose account was overdrawn induced his brother to sign an unlimited guarantee to the bank by representing to him that he was only undertaking a liability of £300 or £400. This misrepresentation was unknown to the bank. The parties met in the bank premises, and the bank agent produced a letter of guarantee for past and future advances without reading or explaining it, and it was signed by the cautioner without any knowledge of its contents, although full opportunity was given to him of examining it. The bank raised an action against the cautioner for £5330.