1853.
11*th and* 14*th March.*
30*th May.*

ADAMSON, ... APPELLANT.
BARBOUR, ... RESPONDENT.

Legitimate children in nonage are to look for relief under the poor-law, not to the parish of their birth, but to the parish in which their father had a settlement.

It is immaterial whether the settlement of the father was by origin or by residence.

The policy of the law is to prevent as far as possible the dispersion of the family.

The doctrine of derivative settlement is created, not by statute, but by construction; and it exists equally in Scotland as in England.

The Jedburgh case over-ruled.

THE facts and the arguments appear sufficiently from the opinions of the *Lord Chancellor* and Lord *Brougham*. The case is fully reported below (*a*).

Mr. *Rolt* and Mr. *Anderson*, for the Appellant. The *Lord Advocate* (*Moncreiff*) and the *Solicitor-General* (*Bethell*), for the Respondent.

The LORD CHANCELLOR (*b*):

My Lords, in July, 1846, a man named Duncan M'Intyre, living with his family at Glasgow, was apprehended on a charge of theft, convicted, and transported. This family consisted of a wife and five children;—the eldest child nine years old, the youngest an infant of a few weeks. The two eldest children were born at Falkirk—the two youngest at Glasgow—the other child was born at Linlithgow, but died in March, 1847.

The mother, being unable to support the children, applied to the proper authorities at Glasgow for relief. This relief was afforded during the years 1847 and 1848, and part of 1849. But the inspector of the poor of Glasgow, the Appellant at your Lordships' bar, afterwards applied, according to the provisions of the 8th and 9th Victoria, chap. 83, sec. 70 (*c*), to the inspector of the poor of the parish of Lochwinnoch for reimbursement—alleging that Lochwinnoch, and not Glasgow, was the parish bound to maintain these children.

The inspector of the poor of Lochwinnoch, now

(*a*) 2nd July, 1851; Second Series, vol. xiii. p. 1279.
(*b*) Lord Cranworth.
(*c*) Sections 70, 71, 72, 73.

Lord Chancellor's opinion.

Respondent, resisted the demand, and the case was brought in the first instance before the Sheriff of Renfrewshire, who decided in favour of the Appellant. It was then carried by advocation to the Second Division of the Court of Session, and the Judges of that Division reversed the decision of the Sheriff. Hence this appeal to your Lordships.

Now, my Lords, it is the common case of both parties that, at the time when Duncan M'Intyre was transported, his place of settlement was Lochwinnoch. He was born there, and never afterwards acquired a settlement by residence, or, if he did, he had afterwards lost it; and the point to be determined is, whether Lochwinnoch, the father's place of settlement, is the place of settlement for the children, or whether they are to be considered as settled where they were born.

What is the law of Scotland as to the settlement of a child abandoned by its father, and driven to seek relief under the Poor Law?

The Appellant contends that until the child is emancipated, as we say in England, or until it is *forisfamiliated,* as it is said in Scotland, its settlement is constantly that of the father.

The Respondent, on the other hand, insists that the child must seek relief from the parish of its own birth.

It is to be observed that neither in England nor in Scotland does the statute law make any provision as to derivative settlements. In Scotland there are but two original settlements—that acquired by birth, and that acquired by residence. In England, as we know, there are many; and till lately there were more. But all the settlements which have been created by statute are original. No statute has ever said, in the English law, that a child shall derive a settlement from its father, or a wife from her husband. But yet early in the administration of the Poor Laws it was held that

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this was necessarily to be understood. It was assumed that [redacted]ife must be with her husband; that children mus[redacted]n with their father; and that any settlement gained by him was gained, not for himself alone, but for all his family.

A leading case on this subject is that of *Cumner* v. *Milton* (*a*), where Lord *Holt* says, "Children are settled where their parents are settled; as for instance, if the father is settled in the parish of H., but goes to work in the parish of B., and before he gains any settlement there, has a son born in the parish of B., and then dies, this child shall be sent to the parish of H., for it is the settlement of the father that makes the settlement of his child; and if the father hath gained a new settlement for himself, he hath likewise gained a new settlement for his children."

This principle has been acted on ever since; and the English Courts, in so acting on it, have not hesitated to pursue it through all its consequences. The doctrine, as I have already remarked, is founded on the principle so well illustrated by Lord *Jeffrey* (*b*), where he speaks of the father as the root, and the children as the branches. Once ascertain in what soil the root is fixed, and you have the soil with which the branches are connected; and this connection, according to the doctrine of the English law, must continue, pursuing the same metaphor, how often soever and wheresoever the tree is transplanted, until the branch has been severed, and so ceases to be connected with the parent trunk.

Great difficulty must arise in the application of the principle, if it is not followed through all its consequences. It is obvious that if during nonage (before emancipation as we should say in England), a child, in

(*a*) 2 Salk. 524; but more distinctly, 3 Salk. 259.

(*b*) *Hume* v. *Halliday*, 22nd Dec. 1849; Second Series, vol. xii. p. 412.

Lord Chancellor's opinion.

consequence of being deserted by its father, is compelled to seek parish relief, it must look for it f[redacted] the father's parish. The father's parish is t[redacted]d's parish, and so bound to maintain it.

This is certainly the rule in England, but it is said that a different rule obtains in Scotland. A child, it is contended, in a state of nonage, so long as its father is alive, has by the laws of Scotland no right to relief. The father is bound to maintain it. If, from age or infirmity, he is unable to do so, still no right to relief accrues to the child. The father, in such a case, has a claim to relief, the extent of which is measured by the wants of his child as well as his own; or rather by his own wants, treating the necessities of his child as a part of those wants. Still it is to him that the law gives relief, and not to the child (*a*). In such a case obviously the parish bound to furnish relief is the father's parish. That the child gets relief from the father's parish in such a case is not, it is said, the consequence of any direct right in the child against that parish, but of the child's claim on its father. If, therefore, the parish of the father's settlement has, by his death, or by his having deserted his family and absconded, or by his having been transported, ceased to be under the obligation of maintaining the father, it is under no obligation to maintain the child. The child in such case seeks relief on a new foundation—*i. e.*, on its own claim as a destitute child, and so must look to the parish of its own birth, and not to the parish which was bound to maintain the father. This is the reasoning on which the Court of Session has rested its decision.

The question, my Lords, is, whether there are not other elements which ought to have been taken into consideration, and which would have led to a different

(*a*) In support of this contention, the Respondent's counsel cited *Lindsay* v. *M'Tear*, *suprà*, p. 155.

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result? I think there are. Considering the peculiar nature and object of the Poor Laws,—the affording relief to those unable to maintain themselves, it is absolutely necessary that we should construe the provisions of the Legislature so as to meet the ordinary social wants of those for whose benefit they were made.

It was on this principle that we in England permitted the doctrine of derivative settlements at all. The monstrous consequences which would have flowed from not adopting that doctrine were deemed sufficient to justify the Courts in holding that it was impliedly contained in all the enactments as to settlement. I see no reason why the same rule of construction is not to be adopted in Scotland.

If, in the present case, the father had gained a settlement by residence, it is admitted that by the law of Scotland it would have enured for the benefit of his children as well as of himself. *His* residence would have been for purposes of settlement *their* residence; and when the children, having become poor and destitute children, were obliged to seek parochial relief, their claim would have been on the parish where they had thus acquired a settlement by means of his residence.

I cannot understand why a different consequence should follow when the place of the father's settlement is not one acquired by residence, but one which he had by birth. The settlement acquired by the children by means of the father's residence is strictly derivative. This is plain from its being immaterial whether the child has actually resided with the father or not; and indeed, it would be gained by a child under the age of five years, and who could not therefore have resided for the statutory term.

What, then, is the principle which gives this derivative settlement to the children? There is no enactment on the subject, and it is, as I conceive, merely the

result of a construction which the Courts have felt warranted in putting on the statutes relating to the maintenance of the poor, namely, that for all purposes relating to the settlement, the father is understood to comprise in himself all his children who are in a state of nonage.

I observe the Lord Justice *Clerk* (*a*) says that "this matter of the supposed cruelty of separation is merely an argument of sentiment." Now I entirely agree that it would be most unfit to violate or strain the law in order to escape any supposed or even any real hardship in its application. But the point here is, not what is the consequence of an admitted law, what are the evils or hardships which it occasions,—but what *is* the law? And in answering that inquiry, where there is no positive statute to guide us, it is surely a legitimate element for consideration that one interpretation avoids, while the other admits and sanctions, what is harsh and revolting to the common feelings of our nature. In the English case of *Cumner* v. *Milton* (*b*), to which I have already referred, Mr. Justice *Powell* (a very high authority), is reported to have said, "The children's settlement shall not be divided from the father, for that would be unnatural." He gives us as a reason, and as the only reason, for what he considered *to be the law*, that the contrary construction would be unnatural.

The same reasoning is, I apprehend, equally applicable to Scotland.

I do not discover in the Scotch text-writers, or in the decided cases, until very recently, anything tending to bring into question these principles. On the contrary, settlement by "parentage" is spoken of as something well-known to the law of Scotland in the

(*a*) Second Series, vol. xiii. p. 1281.
(*b*) 2 Salk. 528.

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treatises as well of living as of deceased writers on this branch of the law. And the doctrine was acted on in the case of *Coldingham* v. *Dunse* (*a*), in 1779; *Howie* v. *Arbroath* (*b*), in 1800, (which was a case of desertion by the father, and not of his death); and in the case of *Lasswade* (*c*), in 1844; and there are other authorities to the same effect.

I am aware that in these cases the settlement by parentage was a settlement gained by the residence of the parent, not that of his birth; but I have already said that I am unable to discover any ground of distinction in principle between the two cases. The moral necessity of treating the whole family as one and indivisible is the same in both cases. The evil of dispersing (*d*) the children into different parts of the kingdom instead of keeping them together, and so giving to family affection its fair chance of operating favourably on the character and contributing to the happiness of its objects, is as great when the parent has *not*, as when he *has*, gained a settlement by residence.

I am aware that in coming to this conclusion your Lordships will be not only overruling the decision of the Court of Session in the present case, but that you will be acting in opposition to the principles on which that Court acted in the *Jedburgh case* (*e*). That is undoubtedly true. In fact, it was candidly stated that the present appeal was intended to call in question the doctrine of both cases.

But, my Lords, I am clearly of opinion that by the

(*a*) Morr. 10,582. (*b*) Morr. app. voce *Poor* No. 1.

(*c*) Second Series, vol. vi. p. 956.

(*d*) According to the decision below, the two eldest children would have gone to Falkirk; the third, if alive, to Linlithgow; and the two youngest ones would have remained at Glasgow.

(*e*) *Inspector of St. Cuthbert's* v. *Inspector of Jedburgh*, 26th Feb., 1851; Second Series, vol. xiii. p. 783.

law of Scotland, as well as by that of England, legitimate children during nonage are to be considered as so far identified with their father, that it is to *his* place of settlement, *however constituted*, that they are to look for relief when they are so circumstanced as to be entitled to relief at all. And I come to this conclusion because any other interpretation of the laws of settlement would or might lead to a harsh and violent severance of the domestic tie in a manner which I cannot believe the Legislature to have contemplated.

Lord Chancellor's opinion.

Lord BROUGHAM:

My Lords, I have had the advantage of perusing my noble and learned friend's opinion, and, entirely agreeing as I do with that opinion, I need not trouble your Lordships further, except with a very few words respecting the state of the case in the Court below.

Lord Brougham's opinion.

One should hesitate in reversing a decision however the argument might have turned, if there had been a distinct and clear unanimity below. But that is very far from being the fact here; for, my Lords, we are to consider this case as intimately connected with the *Jedburgh case;* and in truth, as my noble and learned friend has observed, the *Jedburgh case*, to all intents and purposes, may be said to be now before us. Now, my Lords, I advert to the *Jedburgh case* merely for the purpose of supporting my position, that on the present occasion there is anything rather than an unanimous decision of the Judges in the Court below. The *Jedburgh case* was disposed of by three most able and learned Judges undoubtedly, the Lord Justice *Clerk*, Lord *Cockburn*, and the late Lord *Moncreiff*. But Lord *Medwyn* differed from his learned brethren, and Lord *Medwyn* had agreeing with him the learned *Lord Ordinary* (Lord *Cuninghame*), from whom the case had come to the Inner House. Consequently the *Jedburgh*

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case was carried by the narrow majority of three Judges to two. I need say nothing of the other case of *Hume* v. *Halliday*, in which we have the benefit of Lord *Jeffrey's* opinion clearly in the same direction with that which has been now expressed by my noble and learned friend, and against the decision of the Court below.

My Lords, the text-writers, up to a very late period, seem to have had no doubt upon this subject. There is the late Mr. William Bell (*a*), Mr. Hutchinson (*b*), the late Professor Bell (*c*), and I think one or two others, living authors, and therefore not to be referred to. They appear to have had no doubt respecting derivative settlement being the law of the land (*d*); and I can see no difference whatever (any more than my noble and learned friend can) between derivative settlement, as applied to a case where a parent has acquired it by industrial residence as it is termed, and one in which he has acquired it in any other way. But I decline, after the able and distinct statement of my noble and learned friend, to enter further into the argument.

Interlocutors reversed.

(*a*) Law Dictionary, 747.

(*b*) Justice of Peace, vol. ii. p. 64. (*c*) Prin. § 2157.

(*d*) In the case of *The Parish of Lasswade* v. *The Parish of St. Cuthbert's*, 6th March, 1844, Second Series, vol. vi. p. 956, the inquiry was as to the settlement of the *mother*; which showed that derivative settlements were known to the law of Scotland.

WARD.—DEANS & ROGERS.