I do not, however, proceed on this view. I prefer to put my judgment on the ground that in making the entail the trustees did not exceed their powers.

The LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the interlocutor reclaimed against and assoilzied the defenders.

Counsel for the Pursuer — Dundas — Salvesen. Agents—Dundas & Wilson, C.S.

Counsel for the Defender—Lorimer—C. S. Dickson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, December 22.

SECOND DIVISION.

HUNTER *v.* HENDERSON.

Poor—Desertion—Pupil Children Deserted by Father—Settlement.

An able-bodied man deserted his pupil children in 1890, and they became chargeable to and were maintained by the parish of P., in which the father had a residential settlement at the date of the desertion. In September 1892 the father, who had by this time lost his settlement in the parish of P. by non-residence, was discovered in another parish, where he had applied for and obtained relief. He continued in receipt of parochial relief until his death, which occurred in the following year. Liability for the cost of his maintenance was admitted by O., the parish of his birth. In October 1892 the parish of P. gave notice to the parish of O. claiming to be relieved of the burden of maintaining the pauper's pupil children. O. denied liability.

Held that the settlement of the children followed the settlement of the father, and that consequently the parish of O. was liable for their maintenance from the date of the statutory notice sent by the parish of P.

Upon 23rd August 1890 George Bathgate, mason, deserted his wife and children. His children, the eldest of whom was six years of age, became chargeable to the parish in which they were then residing. Liability for their maintenance was, however, admitted by the parish of Prestonpans, in which Bathgate had a residential settlement at the date of the desertion, and the children were removed to and subsequently maintained by that parish.

The parish of Prestonpans did everything in their power to discover the whereabouts of Bathgate, but until he applied for relief to the parish of Falkirk, as after mentioned, no trace of him could be discovered.

At the date of the desertion George Bathgate's wife was in a lunatic asylum. She was discharged cured on 28th February 1891, and afterwards supported herself.

Upon 18th September 1892 Bathgate applied for and obtained relief from the parish of Falkirk. Three weeks later he left Falkirk, and on 20th October he applied for and obtained relief from the parish of Tranent. He was removed to the poorhouse of that parish, where he remained until his death in March 1893. Prior to 18th September 1892 he had lost his settlement in the parish of Prestonpans by non-residence. Up to that time he had never personally obtained relief. Liability for his maintenance from 18th September 1892 until his death was admitted by Ormiston, the parish of his birth.

Upon 27th October 1892 the parish of Prestonpans sent a notice to the parish of Ormiston claiming relief and repayment of the advances made or incurred by the said parish on behalf of Bathgate's pupil children. Ormiston denied liability.

A special case was accordingly presented by (1) Robert Hunter, Inspector of Poor of Prestonpans, and (2) Robert Henderson, Inspector of Poor of Ormiston, in order to obtain the opinion of the Court upon the following question:—"Whether the parish bound to support the said three pupil children of the said George Bathgate, as from and after 18th September 1892, is the parish of Prestonpans or the parish of Ormiston?"

The first party argued — The aliment given to these pupil children after 18th September 1892 was recoverable from the second party, because at the date when the father applied for relief, and his whereabouts became known to Prestonpans parish, he had lost his residential settlement, and was therefore chargeable to his birth settlement. The pupil children took their father's settlement. It was settled that, if a husband deserted his wife, and acquired a residential settlement in another parish, that parish was liable for the support of the wife—*Wallace* v. *Turnbull*, March 20, 1870, 10 Macph. 675. Pupil children were in the same position as a wife—*Milne* v. *Henderson and Smith*, December 3, 1879, 7 R. 317; *Milne* v. *Ross*, December 11, 1883, 11 R. 273. It was true that desertion by a father or husband if he was able-bodied was equivalent to death, but that assumption came to an end when the father or husband was discovered, and it was only aliment from the date of the father's discovery that was sought. Here the father was discovered after his desertion as a pauper; he had lost his residential settlement in Prestonpans, he therefore became chargeable to his birth settlement, and as his pupil children followed their father's settlement, they also were chargeable to their father's birth settlement—*Anderson* v. *Wilson*, June 12, 1878, 5 R. 904; *Greig* v. *Simpson and Craig*, May 16, 1876, 3 R. 642; *Adamson* v. *Barbour*, May 30, 1853, 1 Macq. 376; *Parish of Dumfries* v. *Parish of Tinivald*, January 21, 1893, 3 Poor Law Mag. (N.S.) 196.

The second party argued — When the pauper deserted his wife and children on August 23rd 1890, Prestonpans admitted its liability to support the chil-

dren, on the ground that the father had a residential settlement there. The children therefore acquired a settlement in Prestonpans parish in their own right, because the desertion of their father was equivalent to his death, and if he had died in 1890 Prestonpans would undoubtedly have been liable for their support—*Greig* v. *Simpson and Craig* (cited *supra*); *Beattie* v. *Adamson*, Nov. 23, 1866, 5 Macph. 47. Against that view it was urged that the father had been discovered after he had lost his residential settlement and reverted to his birth settlement, but that was not so, because his desertion had never ceased, and could not cease unless he was in a position when discovered to be made liable for the support of his family, whereas in fact when he was discovered he was himself a pauper. The children therefore retained the settlement they had acquired in their own right —*Beattie* v. *Muir and Brown*, December 11, 1893, 11 R. 250; *Campbell* v. *Deas*, November 14, 1893, 21 R. 64.

At advising—

LORD JUSTICE-CLERK—I do not think it is necessary in this case to consider the earlier history of George Bathgate, whose settlement and that of his children is in question. It is sufficient to notice that in 1890 he had a residential settlement in Prestonpans, and that in that year he deserted his wife and three pupil children. At that time undoubtedly Prestonpans was the parish to which they became chargeable, for he could not be found, and as it has been held that such desertion has the same effect as death, his dependents at the time of his desertion were entitled to relief from the parish in which he had his settlement. Had matters remained in that position Prestonpans would have continued to be liable. But the peculiarity of this case is that after he had lost his settlement in Prestonpans he reappeared on the scene, and became himself an object of parochial relief, and received relief in the parish of Falkirk, and afterwards in the parish of Tranent. His children, who had been relieved by Prestonpans, continued to be relieved by that parish. The question now is, whether the parish of birth of George Bathgate, which was chargeable for his maintenance as a pauper from September 1892 until his death, is liable for the relief given to his children? I am of opinion that the parish of his birth, viz., Ormiston, is so liable. I am unable to come to the conclusion that he being alive and himself a pauper, his children could have any separate settlement from his. There has been no case in which it has been held that children can have any other settlement than that of their parent. And while it was decided that desertion was in the question of settlement equivalent to death, it was pointed out by the late Lord President in the case of *Greig* v. *Simpson*, 3 R. 672, that if the deserting husband should return, then "a new rule may come in to fix the parish which is bound to maintain him and his family." He may revive a settlement which during his desertion cannot be proceeded against for the support of his wife and family, or he may put an end to a settlement which has inured to his wife and family. It is true that in this case the position is not that the desertion came to an end by the parent returning to the parish which became chargeable for relief to his children, or by the fact of his being alive in another parish becoming known to the parish which at the time of desertion was bound to give relief to his children, on the footing that he was to be held to be dead. Although he had reappeared upon what I may call the poor law scene, by demanding and obtaining relief from the parishes of Falkirk and Tranent, he may be said to have been still in desertion as regards Prestonpans, as the parochial authorities of that parish had after all due diligence failed to trace him. But the case of *Greig* settles this, that although desertion is equivalent to death in the question of proper settlement, that only continues while matters remain in the position in which they were when the desertion was ascertained. If the deserting parent is discovered by the relieving parish, the fiction of his death must of course give way to the fact. It is said that the case is different where, although the fact is ascertained that he is alive, this fact does not become known to the parish which in consequence of his desertion is relieving his children. But it is difficult to see how there can be any ground for continuing to act upon an assumption of death to any effect when in point of fact the father, whose settlement inures to his pupil children, has been ascertained to have been alive and securing relief under the poor law. It being the admitted fact that the father died after losing his settlement in Prestonpans, and that his settlement was then in Ormiston, I hold that the children's settlement must be ruled by his. I see no principle for holding that the accident of his whereabouts not having been ascertained by the parish of desertion until he reached Tranent on 20th October 1892 can affect the question, whether—as in point of fact it is known that he was alive and had a settlement in another parish—the settlement of his children must follow his. He was liable to maintain his children, and his inability to do so does not affect the fact of it being his obligation. Now, here it certainly was only accidental that Prestonpans did not discover him till October 1892. Had they discovered him sooner they could at once have maintained that they were no longer liable to give relief to his children. There are obvious reasons of expediency for the rule which treats desertion as being the same as death. But there seems to me to be no ground for making that rule stand as against ascertained facts to the contrary. As the deceased pauper became an object of parochial relief on 18th September 1892, and Ormiston was liable for his own chargeability as a pauper from that date, I think that parish must be held liable for relief to his children. I think the proper

answer to the question put in this case is that Ormiston is the parish liable for the support of his three pupil children from the date of the notice given, viz., 27th October 1892.

LORD YOUNG—I agree in the result. I say no more than that in my opinion the settlement of surviving pauper children of a deceased pauper father is in the parish of settlement of the deceased pauper father at the time of his death.

LORD RUTHERFURD CLARK—The material facts are these—George Bathgate deserted his children in 1890. They were then and they still are in pupillarity. They became chargeable to the parish of Prestonpans, in which their father had at the time of the desertion a residential settlement. They have since been supported by that parish.

All trace of George Bathgate was lost until 18th September 1892, when he obtained relief from the parish of Falkirk. Three weeks thereafter he left Falkirk. On 20th October 1892 he obtained relief from the parish of Tranent. He was removed to the poor-house of that parish, where he died on 2nd March 1893. Until he received relief from Falkirk he was an able-bodied man.

In September 1892 he had lost his residential settlement in the parish of Prestonpans, and it is matter of admission that at that date his settlement was in Ormiston as the parish of his birth. That parish admitted its obligation to relieve him, and did relieve him from September 1892 till his death.

The parish of Prestonpans came to know that Bathgate was in receipt of parochial relief from the parish of Ormiston. On 27th October 1892 it sent a notice to the parish of Ormiston claiming to be relieved of the burden of supporting the children.

I do not refer to the history of the wife, because in my opinion it has no bearing on the questen which we have to decide. No claim is made on her account. The only question which we are asked to determine is whether the children are to be supported by the parish of Prestonpans or by the parish of Ormiston.

I accept the rule that desertion is equivalent to death. It is on this ground that the children of an able-bodied man are entitled to receive aliment during his lifetime, and that in the general case the parish in which the father has his settlement at the time of the desertion continues to be the settlement of the children, so long as they are entitled to relief by reason of the desertion. It is obvious that during that period he is not the pauper, and is not receiving parochial relief. In the eye of the law he is dead, and the children are paupers by reason of his assumed death. The rule does not depend on any presumption of death. It exists though the father may be known to be alive. It means nothing more than that the obligation to maintain the children is determined as if he were dead.

If the father, being an able-bodied man, returns, it seems to me that the chargeability of the children necessarily ceases. They were paupers only by reason of his desertion. On his return they can have no right to parochial relief, for the children of an able-bodied man, when they are not deserted, can have no claim against the parish. If he is not an able-bodied man and is destitute, he is a pauper, with a right to such aid as may be requisite for himself and his children. The liability to support him must be on the parish of his settlement at the time when his right to obtain relief arises, and the parish which maintains him must also maintain his children.

In this case the father did not return. But when it was discovered that he was a pauper in Falkirk and afterwards in Tranent, the notice which I have mentioned was sent. The question then arose whether the father and children were to be maintained by the parish in which the father's settlement existed, or whether they were to be maintained by different parishes —the father by the parish of his settlement when he became a pauper, and the children by the parish which had been his settlement at the date of his desertion. It is the same question now, for if the parish of Ormiston was bound to maintain both the father and the children, the liability to maintain the children must necessarily continue.

If the father had been able-bodied, the liability of the parish of Prestonpans would in my opinion have terminated. For it would have been entitled to require the father to maintain his children, and to send them to him in order to that end. Probably that could not be done at once. The ordinary principles of humanity might forbid. But the difficulty of enforcing the obligation does not in my opinion throw any doubt on its existence, or on the right of the parish to require its performance. In continuing to support the children the parish would be performing the obligation of the father, and the obligation incumbent on a parish in which poor persons are found destitute. It would not be performing the obligation of the parish of settlement. I do not mean to say that if the father were resident out of Scotland the same result would follow. For the parish would not be entitled to send the children out of the country. Consequently the children would retain their right to be supported by the parish of their father's settlement as at the date of his desertion.

The father was a pauper when he was discovered. That fact did not relieve him from his obligation to maintain his children, though it disabled him from performing it. It follows in my opinion that it must be performed by his parish of settlement, which is bound not only to support the pauper himself, but also his pupil children. They cannot be separated from him. As Lord Jeffrey said in *Hume* v. *Pringle and Halliday*, 12 D. 411, the branches are where the root is, and the principle recognised by the House of Lords in *Adamson* v. *Barbour*, 1 Macq. 376, was that the children have the settlement of the father in order that they may not be divided from him. The union of the family

may not be very perfect, but it cannot be attained at all except by holding that the same parish must support both the father and the children.

These views, I think, prevailed in the case of *Wallace*, 10 Macph. 675. There a deserted wife was supported by the parish of St Nicholas, the birth settlement of her husband, from 1860 to 1869. In 1868 it came to the knowledge of St Nicholas that the husband was living in Stewarton, and that he had acquired a settlement therein. Accordingly, it gave the usual notice, and called on Stewarton to relieve it. Its claim was sustained, because Stewarton was the settlement of the wife, inasmuch as her settlement followed the settlement of the husband. As the Lord Justice-Clerk (Moncreiff) said, the obligation to support the husband included an obligation to support the wife. The husband was an able-bodied man. Nevertheless, St Nicholas recovered from his parish of settlement. It was held that it had given relief in an administrative capacity, and that it was not bound to proceed against the husband.

I allow that some difficulty exists, because of the fact that the husband was an able-bodied man, from which I think it would follow that the wife, after his place of settlement was discovered, had no longer a claim to parochial relief. But if the husband had been a pauper I see no room for question. He cannot have two settlements at the same time, so that the one shall support him, and the other shall perform his obligation to support his wife. The same rule applies to the case of pupil children.

Nor can it, I think, be doubtful that if the children are to be supported by the parish which is maintaining the father, the obligation continues after his death. On the occurrence of that event they became paupers in their own right, but they have no settlement other than the settlement of their father.

I am aware that in the case of *Greig*, 3 R. 642, the Lord President says that the rule that "desertion is equivalent to death admits of no qualification except in this respect, that desertion only remains equivalent to death so long as the desertion lasts. The deserting husband may return, and then a new rule may come in to fix the parish which is to maintain him or his wife and family." The other Judges expressed opinions to the same effect, and I am sensible that they are of great weight. But if they can be read as applicable to the *species facti* which exists here, they were *obiter* only, for they were not necessary for the disposal of the case which was before the Court. A husband had deserted his wife at a time when he had a residential settlement to which the wife became chargeable. More than four years had elapsed from the date of the desertion, so that the husband, if alive, would have lost his residential settlement. The question was, whether the burden of maintaining his wife was thereby transferred to his birth settlement, The Court held, for the purposes of that question, that the desertion was equivalent to death, and that the husband could not lose his residential settlement after his death. They decided nothing more. They did not consider what was to be the effect of the husband being himself chargeable, and known to be chargeable, to another parish. So far as I see, the case of *Wallace* was not quoted, and I am not surprised. It had no bearing on the question which was before the Court.

I am therefore of opinion that the parish of Ormiston is bound to support the children, but only from the date of notice, viz., 27th October 1892.

LORD TRAYNER was absent.

The Court found that the parish of Ormiston was bound to support the three pupil children of George Bathgate from and after October 27th 1892, the date of the statutory notice sent by Prestonpans to Ormiston.

Counsel for the First Party—Ure—G. Stewart. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Second Party—Macfarlane—Younger. Agents—W. & J. Burness, W.S.

Thursday, January 10, 1895.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

M'RAE AND ANOTHER (MACKENZIE'S TRUSTEES) *v.* GRAY AND OTHERS.

Process—Trustees—Exoneration and Discharge—Multiplepoinding—Competency.

Trustees were about to distribute a trust-estate among the beneficiaries when a claim was made against it, which certain of the beneficiaries refused to admit, while others desired that it should be paid. The trustees thereupon brought an action of multiplepoinding against the beneficiaries and the claimant for the purpose of obtaining their exoneration and discharge. They did not aver that the beneficiaries had refused to grant them extrajudicial exoneration and discharge.

Held (*rev.* judgment of Lord Kyllachy) that the action was incompetent.

Expenses—Trustees—Incompetent Action for Exoneration and Discharge—Personal Liability.

Held that trustees who had brought an action of multiplepoinding for their exoneration and discharge which was found to be incompetent, were personally liable for expenses.

George M'Rae, stone polisher, Peterhead, and others, were the testamentary trustees of the late Hector Mackenzie, who died in 1893. The trust-estate amounted to about £300 (less legacies of £40, Government duties, and expenses of administration), and