der; she claimed as a creditor, and being resident abroad she could only insist in her claim if she sisted a mandatory.

LORD JUSTICE-CLERK — I think this is rather a hard case for the reclaimer. The litigation has been going on for about two years, and nothing has been accomplished so far as this lady's claim is concerned. The claimant is apparently unable to support herself, and has gone to South Africa to seek a livelihood.

The question of sisting a mandatory is one for the discretion of the Court, and that discretion should be exercised with greater care where the question relates to a defender. In this case I think that discretion will be exercised best by not requiring that a mandatory be sisted.

LORD TRAYNER—I am of the same opinion. This lady's claim is not one that is absolutely without foundation. There is at least a question to try upon the letters to which we have been referred, and the circumstances of the claimant induce me to share the opinion which your Lordship has expressed. The case has gone on so long without any determination upon this lady's claim that I think she cannot be shut out at present from insisting in it, and that without sisting a mandatory.

LORD MONCREIFF — I am of the same opinion. It is always a question of circumstances for the discretion of the Court whether a mandatory should be sisted. I think this would be a hard case in which to require a mandatory, and therefore I agree with your Lordships.

LORD YOUNG was absent.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuers (Real Raisers) and Respondents — Hon. W. Watson. Agents—Scott Moncrieff & Trail, W.S.

Counsel for the Claimant and Reclaimer —G. Watt, K.C.—A. M. Anderson. Agents —Wylie & Robertson, W.S.

Tuesday, March 1.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

PARISH COUNCIL OF GLASGOW *v.* PARISH COUNCIL OF KILMALCOLM

Poor — Settlement — Capacity to Acquire Residential Settlement—Maintenance in Charitable Institution — Irrelevant Defences — Mental Weakness and Chronic Physical Disease — Educational Institution—Domicile of Charitable Institution —Continuous Residence — Forisfamiliation — Poor Law (Scotland) Act 1898 (61 *and* 62 *Vict. c.* 21), *sec.* 1.

In an action by the Parish of Glasgow against the Parish of Houston and the Parish of Kilmalcolm as to the liability for the support of M. G., a female pauper, the following facts were admitted on record:—The pauper was born in Houston in 1881, the illegitimate daughter of a farm servant; in 1887 she was admitted to Quarrier's Homes, a charitable institution in Kilmalcolm, and she remained there till 1901, when she was removed to Glasgow Poorhouse.

In their defences the Parish of Kilmalcolm averred that (1) during her stay at Quarrier's Homes the pauper "suffered from mental weakness and chronic physical disease which made her incapable of maintaining herself;" (2) the Homes were entirely for the education and training of children; (3) the head office and domicile of the Homes were in Glasgow; (4) the pauper's residence in the Homes had not been continuous, she on one or more occasions having been removed to the seaside Home at Dunoon; and (4) the pauper had never been forisfamiliated.

Held that the defences were irrelevant, and that the pauper had acquired a settlement in Kilmalcolm.

The Poor Law (Scotland) Act 1898 (61 and 62 Vict. c. 21), enacts—sec. 1—"From and after the passing of this Act no person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall either before or after, or partly before and partly after the commencement of this Act, have resided for three years continuously in such parish, 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."

In April 1903 the Parish Council of Glasgow raised an action against the Parish Council of Houston and Killellan and the Parish Council of Kilmalcolm, concluding for declarator that on 30th March 1901, when Mary Gillespie, then an inmate of Glasgow City Poorhouse, became a proper object of parochial relief, the parish of Houston and Killellan in respect of her birth, or alternatively the parish of Kilmalcolm in respect of her having acquired by residence a parochial settlement in that parish, was her parish of settlement, and as such one or other of the defenders was liable to relieve the pursuers of all sums incurred on account of the pauper; and for decree ordaining one or other of the defenders to make payment to the pursuers of £26, 13s., being the amount expended on behalf of the pauper.

The following averments on record were admitted by all parties:—That the pauper was born in the parish of Houston on 18th February 1881, and was the illegitimate daughter of a farm servant Catherine Gillespie, whose whereabouts were unknown; that on 12th October 1887 she was admitted to Quarrier's Homes in Kilmalcolm Parish; that she continued in that institution till March 1901, when she

was discharged; and that on 30th March 1901 she was removed to the City Poorhouse in Glasgow, where she remained at the date of the action.

In their defences the Parish Council of Kilmalcolm made the following averments:—(1) During all the time that the pauper resided in the Homes she was a proper object of parochial relief, and suffered from mental weakness and chronic physical disease, which made her incapable of maintaining herself. She was admitted during pupilarity, and no change took place in the nature of her residence or in her condition or mode of life while in the Homes. (2) Quarrier's Homes were maintained on charitable donations received from day to day, and were entirely for the education and training of children till they were fit to earn a livelihood. The pauper would have been discharged before 1901 but for the fact that after attaining puberty she was utterly incapable, and that no relative could be found to take charge of her. (3) Quarrier's Homes were founded in Glasgow; the head office was there, and Glasgow was the true domicile of the institution. All children for admission or discharge required to go to the premises in Glasgow. The pauper resided in the premises in Glasgow for five days before being sent to the Homes at Kilmalcolm in October 1887, and for other five days before being sent to the poorhouse in March 1901. (4) That the pauper's residence at the Homes at Kilmalcolm was not continuous, as on one or more occasions between October 1887 and 27th March 1901 she was removed to the Seaside Homes at Dunoon; and (5) that the pauper had never been forisfamiliated.

The defenders the Parish Council of Kilmalcolm pleaded—"(2) The pauper by residing in the said Quarrier's Homes did not lose the settlement which she had at and prior to her admission, and did not acquire any settlement in the parish of Kilmalcolm, in respect (*a*) that the said Homes are simply for the education and training of children who are not forisfamiliated; (*b*) that it is a necessary condition for admission that the children should be in absolute destitution; (*c*) that the children in said Homes do not maintain themselves or do anything to earn their own livelihood; and (*d*) that the said Homes are entirely supported by gifts or doles given by the public in response to daily appeals. (3) The parish of Kilmalcolm is not liable in the relief of the said pauper, in respect that (1st) during the whole period of her residence in that parish the pauper has been mentally and physically incapable of acquiring a settlement by residence in said parish; (2nd) that she had never been forisfamiliated; (3rd) that she has been a proper object of relief during the whole period of her residence in said parish; (4th) she has never during the whole period of residence in said parish maintained herself, but has been entirely supported by charity. (4) The pauper acquired no settlement in Kilmalcolm, in respect that her residence there was not continuous for the statutory period. (5) The domicile of the Homes as an institution being in the parish of Glasgow, that parish is liable to relieve the pauper."

On 28th October 1903 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Finds that the case stated by the defenders the Parish Council of Kilmalcolm, whether as against the pursuers the Parish Council of Glasgow, or the other defenders the Parish Council of Houston and Killellan, is irrelevant: Therefore repels the pleas-in-law for the first-named defenders, and in respect it is stated at the bar that there is no objection to the account sued for, decerns against the said defenders the Parish Council of Kilmalcolm in terms of the petitory conclusions of the summons so far as directed against them: Assoilzies the other defenders the Parish Council of Houston and Killellan, from the conclusions of the summons; Finds it unnecessary as against the said defenders the Parish Council of Kilmalcolm to deal with the remaining conclusions of the summons, and decerns," &c.

Note.—"Both the pursuers, who represent the relieving parish, and the Parish Council of Houston, who admit Houston to be the parish of the pauper's birth, challenge a decision on the relevancy of the defence stated for the Parish Council of Kilmalcolm, who admit that the pauper actually resided in that parish with certain breaks from 12th October 1887 to 25th March 1901. Kilmalcolm replies that the facts connected with a pauper have usually been ascertained either by a proof or by admissions in some formal shape. That is quite true; but parish councils are not exempted any more than other litigants from the ordinary rules of relevancy; and when certain points in poor law administration have been settled by decision I see no advantage in the ratepayers' money being expended on a vague inquiry ranging over irrelevant topics. No subject of parole proof is more to be deprecated than one which seeks to define the precise decree of mental weakness from which a pauper has suffered. Certain tests, rough it may be but conclusive, have been laid down in the cases, and to these it is necessary to adhere. In short, a parish, if there be a *prima facie* case of liability against it, can only get rid of that liability by pointed averments sufficient to establish its immunity.

"Now, what is the *prima facie* case against Kilmalcolm? All parties are agreed that the pauper Mary Gillespie is the illegitimate daughter of Catherine Gillespie, a farm servant (who is believed to be alive), and that she was born in the parish of Houston on 18th February 1881; that she was admitted to Quarrier's Homes, a charitable institution in the parish of Kilmalcolm, on 12th October 1887, *i.e.*, at the age of six years and eight months; that she continued in that institution till she was discharged in March 1901; and that on the 30th of that month she was

removed to the City Poorhouse in Glasgow, where she has since remained. It follows that she attained puberty in February 1893, and that she became chargeable as a pauper at the age of a little over twenty.

"How does Kilmalcolm attempt to get rid of that *prima facie* case? It is not averred that during the thirteen years of her residence in Quarrier's Homes, or rather during the eight years of her residence there after attaining puberty, the pauper either had recourse to common begging, or received or applied for parochial relief. Further, it is not averred that she was ever certified as a lunatic, or that she is an absolute idiot. All that is said about her condition is that during the whole period of her residence in Kilmalcolm she 'suffered from mental weakness and chronic physical disease which made her incapable of maintaining herself.' But it is settled by the recent case of *Kirkintilloch Parish Council* v. *Eastwood Parish Council*, 5 F. 274, 40 S.L.R. 179, following a series of cases in the thirteenth and fourteenth volumes of Dunlop's reports, that incapacity to earn a livelihood, even when coupled with the fact of dependence on the charity of others, does not prevent the acquisition of a residential settlement, so long as the pauper himself does not resort to common begging and does not apply for parochial relief. The same case decides—following *Cassels* v. *Somerville & Scott*, 12 R. 1155, 22 S.L.R. 772, and *Nixon* v. *Rowand*, 15 R. 191, 25 S.L.R. 175, that mere weak-mindedness or imbecility, not amounting to idiocy, is equally ineffectual to prevent the acquisition of a residential settlement. Therefore it seems to me that the defence, so far as founded on the charitable character of Quarrier's Homes and on the mental condition of the pauper, is clearly irrelevant.

"I say the same of two special averments made by Kilmalcolm, and I say it not on the authority of any decided case but on the reason of the thing. One of these is directed against the pursuers the Parish Council of Glasgow, and is to the effect that, inasmuch as the institution called "Quarrier's Homes" has a head office in Glasgow where children are received and discharged, and inasmuch as this pauper spent five days there in 1887 before she was sent to Kilmalcolm, and a like period in 1901 before her final discharge, her residence during all these thirteen years and upwards was truly in Glasgow as being what is called the "true domicile of the institution." This is certainly "constructive residence" with a vengeance. The principle of constructive residence has been admitted in the case of a man who maintains his wife and family in a house provided by him within a particular parish, though he himself remains absent from it for more than the disqualifying period, the strongest illustration of that highly exceptional doctrine being *Deas* v. *Nixon*, 11 R. 945, 21 S.L.R. 637. But that is on the theory that a man's home is where his household gods are, and that his own residence elsewhere is not of such a character as to infer any change of home. This theory affords no countenance to the strange suggestion that a person actually residing in a house in one parish is all the time residing in a house in another parish merely because there is a business connection between the two houses. As well might it be said that a caretaker living on the premises of some branch bank in the country was truly resident in the head office of the bank in Edinburgh.

"The other special averment made by Kilmalcolm is directed against Houston as the birth parish, which must be liable if no residential settlement has been acquired. It is to the effect that the continuity of residence in Kilmalcolm was broken by the removal of the girl 'on one or more occasions between October 1887 and 25th March 1901 to the Seaside Home at Ardnadam, in the parish of Dunoon.' Nothing is said as to the number or duration or purpose of these breaks except what may be inferred from the very name of a 'Seaside Home,' as pointing to a change of air for the sake of health. And yet these are particulars without which it is impossible to judge of the effect of such breaks. Hardly anybody lives for three years in one parish 'continuously,' in the sense of never being absent from it for a single night. Periods of absence of considerable duration, so long as the purpose is incidental and temporary and infers no abandonment of the regular home, will not break the continuity of residence. Accordingly it seems to me that without much greater specification the averment as it stands cannot be admitted to probation.

"It only remains that I should notice Kilmalcolm's plea that the pursuer never having been forisfamiliated, is chargeable to the parish of her mother's settlement. In support of that plea, Kilmalcolm cites the cases of *Fraser* v. *Robertson*, 5 Macph. 819, 4 S.L.R. 74; *Lees* v. *Kemp*, 19 R. 6, 29 S.L.R. 6; and *Mackay* v. *Munro*, 19 R. 396, 29 S.L.R. 332. But each of these cases presented the feature that the pauper, though long past the period of puberty, was living in the father's house and was supported by him down to the time of chargeability or removal to an asylum. This was the circumstance which was held to prevent the legal result which in the ordinary case would have followed the attainment of puberty. Here, on the other hand, the pauper never lived with her mother after the age of between six and seven. After she emerged from puberty she must be held in law as having been enabled to maintain herself, not by her mother, but by the charity of strangers. How in such a case as that it can be said there was no forisfamiliation I am altogether at a loss to understand.

"I shall therefore find that the case stated by the Parish Council of Kilmalcolm, whether as against the pursuers or the other defenders, is irrelevant, and unless any point is to be made as to the amount expended on the pauper by the pursuers, it would seem to follow that decree should be pronounced in terms of the conclusions of the summons against

Kilmalcolm, and that Houston ought to be assoilzied."

The defenders the Parish Council of Kilmalcolm reclaimed, and argued—(1) This case was distinguished from the *Kirkintilloch* case, *infra*, in respect that Quarrier's Homes were for the purposes of education and training of children and not a charitable institution for the upkeep of adults. These homes were in the same legal position as a boarding-school. (2) The domicile of the institution was in Glasgow. (3) The pauper's residence at the homes had been broken by her occasional residence at Dunoon. (4) She had never been forisfamiliated. This point had not been raised in the *Kirkintilloch* case. The pauper had been deserted by her mother, who ought to have maintained her; she was weakminded from childhood, and after attaining puberty had never been capable of leading an independent life. In such a case forisfamiliation was impossible—*Parish Council of Brechin* v. *Parish Council of Barony Parish, Glasgow*, February 24, 1897, 24 R. 587, 34 S.L.R. 443. The mere fact of reaching puberty did not of itself operate forisfamiliation—*Wallace* v. *Caldwell*, November 7, 1894, 22 R. 43, 32 S.L.R. 38. By the case of *Parish Council of Rutherglen* v. *Parish Council of Glasgow*, May 15, 1902, 4 F. (H.L.) 19, 39 S.L.R. 621, it had been decided that the desertion of a wife by her husband did not confer on her the capacity to acquire an industrial settlement. In the present case the pauper being a child of weak mind was in the same position as the wife in the *Rutherglen* case.

Argued for the defenders the Parish Council of Houston and Killellan — The judgment of the Lord Ordinary was right. (1) The case was ruled by the decision in *Parish Council of Kirkintilloch* v. *Parish Council of Eastwood*, December 19, 1902, 5 F. 274, 40 S.L.R. 179. (2) and (3) The argument for Kilmalcolm under these heads was extravagant. (4) The pauper had become forisfamiliated. She had never been certified as insane. She had been abandoned by her mother, and had in effect been adopted by strangers. They quite conceded that no forisfamiliation would take place even after puberty in the case of a lunatic or weakminded person who resided with her father, as in *Fraser* v. *Robertson*, June 5, 1867, 5 Macph. 819, 4 S.L.R. 74, or remained under the control of her father, as in *Parish Council of Brechin, supra*. But the circumstances of the present case were quite distinct.

At advising—

LORD JUSTICE-CLERK—The facts in this case may be stated shortly thus—The pauper is the illegitimate daughter of Catherine Gillespie. She was deserted by her mother, who has not been heard of since the pauper was a pupil. She was born in Houston in 1881, and when she was six years old she was admitted to Quarrier's Homes in Kilmalcolm parish, and resided there till 1901, when she was removed to the City of Glasgow Poorhouse, where she now is.

Now in ordinary circumstances there could be no doubt that a pauper with such a history would be held to have acquired a settlement in Kilmalcolm, it being the fact that she did not during that time have recourse to common begging or receive or apply for parochial relief. Kilmalcolm therefore must rely upon special circumstances to exempt itself from liability. The special circumstances alleged are—(1) that on some occasions the pauper was removed to a seaside home in Dunoon for a time; (2) that before she was sent to the City Poorhouse, and again before she was sent to the poorhouse, she lived for five days in Morrison Street, Glasgow, at the head office of Quarrier's Homes; (3) that she was mentally weak and had chronic physical disease, and was incapable of maintaining herself.

I agree with the Lord Ordinary that none of these facts affect the present case. The idea that an occasional removal to the seaside would affect continuity of residence so as to interrupt a settlement seems quite out of the question. Kilmalcolm does not aver anything definite as regards number or duration of these visits to the seaside, except that it happened "on one or more occasions." It would require some much more specific averments to make a case for proof of interruption of residence than those made by Kilmalcolm.

The second allegation that she was a few days in Glasgow before she went to Kilmalcolm, and that before she was sent to the poorhouse she was for five days in Glasgow, seems to me to be quite devoid of bearing on the case. The suggestion made that her residence was constructively residence in Glasgow, because the headquarters of the Quarrier's Homes was there, seems to me to be quite untenable. And if the pauper had acquired a settlement in Kilmalcolm before the day in 1901 when she was taken to Glasgow it could not alter her legal position that for five days she was cared for in Glasgow before she passed into the poorhouse.

Lastly, it is not alleged that the pauper is either a lunatic or an idiot. There is no practical difference in regard to the allegations as to her condition from those which applied to the case of the pauper in the *Kirkintilloch* case. They amount merely to allegations of incapacity to earn a livelihood, and that is not a sufficient bar to the acquisition of a residential settlement.

I would move your Lordships to adhere to the Lord Ordinary's interlocutor.

LORD TRAYNER—It is not material to the issue here raised to consider where the residence of the pauper was prior to her attaining minority. She attained her minority in 1893, from which period she was entitled to choose her own residence. She had not been for about six years previously residing in family with her mother, and has never resided with her sister, and being illegitimate she had no father. She was therefore in 1893 *sine juris*, and was forisfamiliated and capable of acquiring a settlement for herself by residence. After

1893 she resided in the parish of Kilmalcolm for a period of about eight years continuously, and by virtue of such residence acquired a settlement in that parish. That she was weak-minded (not being a lunatic or an idiot) did not prevent the acquisition of a settlement provided that she had not recourse to common begging or received parochial relief. Neither of those things can be said of her. The parish of Kilmalcolm, however, aver that the residence was not continuous, as the pauper "on one or more occasions" was removed from Kilmalcolm to the sea-side. The Lord Ordinary refused to allow a proof of this averment, as I think, properly. The statement is too vague to be remitted to probation. The number of the alleged absences or their duration is not specified, and unless that is done I think no proof can be allowed. The counsel for the Parish of Kilmalcolm (in answer to my question) stated that his clients were not in a position to make the statement more precise than it at present stands on the record. I must take it therefore that the pauper being *sine juris* had resided continuously in the parish of Kilmalcolm for more than three years and thus, acquired a residential settlement in that parish.

The view that while actually resident in Kilmalcolm she was constructively resident in Glasgow because the office of the charitable institution in which she lived was there, is, I think, extravagant, and cannot be seriously maintained.

I am therefore for refusing this reclaiming-note.

LORD MONCREIFF—The broad facts of the case are that the pauper Mary Gillespie was admitted to Quarrier's Homes, a charitable s intitution in the parish of Kilmalcolm, on 12th October 1887, when she was six years old, and there she remained till March 1901, when she was twenty. She never lived with her mother after the age of six or seven, and so completely was she taken off the mother's hands by the charitable institution that they have entirely lost sight of the mother, and do not know whether she is alive or dead.

In 1893 the girl attained puberty, and since that date resided till March 1901 continuously in the parish of Kilmalcolm without having recourse to common begging or receiving or applying for parochial relief.

It is averred by Kilmalcolm that she is incapable of maintaining herself, partly from mental weakness and partly from chronic physical disease. But it is settled by a series of authorities, as the Lord Ordinary points out, that incapacity to earn a livelihood, even when coupled with the fact of dependence on the charity of others, does not prevent the acquisition of a residential settlement—*St Cuthbert's*, 13 D. 583; *Edinburgh*, 13 D. 1057; *Hay*, 14 D. 352; *Kirkintilloch*, 5 F. 274. In short, as long as the alleged pauper does not resort to common begging or apply for parochial relief it is immaterial from what source he or she obtains the means of support.

It is equally well settled (*Kirkintilloch* v. *Cassels*, 12 R. 1155; *Nixon* v. *Rowand*, 15 R. 191) that weakness of mind or imbecility not amounting to lunacy or idiocy will not prevent the acquisition of a residential settlement.

I do not think it necessary to say more about the two special averments made by Kilmalcolm, which are noted in the Lord Ordinary's note, than that I entirely agree with his Lordship that both of them are irrelevant.

The only point on which I have felt any difficulty is in regard to the forisfamiliation of the pauper. There is no doubt that in the ordinary case of a parent placing a child in an educational establishment, the child will not be held to be forisfamiliated on the attainment of puberty although he or she may not for some years return to reside with the parent. And even the fact that board and education are to a large extent, or even wholly, given gratuitously, will not necessarily affect the position of the child. Forisfamiliation depends on various considerations—in particular, on the age of the child and the existence or absence of control or maintenance by the parent. In the present case the pauper is about twenty years of age. The connection between the child and the parent seems to have been so completely severed in 1887 as if the girl had been out-and-out adopted by some charitable person. The mother then parted with all control, and contributed nothing to the child's support. In this respect the case is in marked contrast with the cases noted by the Lord Ordinary —*Fraser* v. *Robertson*, 5 Macph. 819; *Lees* v. *Kemp*, 19 R. 6; and *Mackay* v. *Munro*, 19 R., 396—in all of which the parent retained control of and helped to support the child. On the other hand, in the case of *Kirkintilloch* the facts were as here—the child was entirely supported by charity for twelve years.

I recognise the hardship to a parish of a large charitable institution being established in it, with the result of importing a number of destitute children, who may in certain events come to be burdens on the parish of their residence. But I do not think that this is a matter which is relevant or can be taken into consideration. I think the case must be disposed of just as if this girl had been adopted and maintained in the parish of Kilmalcolm by some charitable individual who resided there.

On these grounds I am of opinion that we are in a position without further inquiry to affirm the Lord Ordinary's interlocutor.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers and Respondents—Lees, K.C.—W. Thomson. Agents —Mackenzie, Innes, & Logan, W.S.

Counsel for the Defenders and Reclaimers the Parish Council of Kilmalcolm—Wilson, K.C.—Deas. Agents—Morton, Smart, Macdonald, & Prosser, W.S.