and I agree also that we cannot say that there was no evidence on which he was entitled to form an opinion one way or another. I think there was enough before him to make it his duty to decide the question of fact. He did decide it, and we cannot interfere with his decision.

LORD MACKENZIE concurred.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

". . . Find in answer to the first question in law in the case that the arbitrator is not bound to accept the medical referee's report as conclusive of the question which the Sheriff-Substitute had, as arbitrator, to decide under the statute: Refuse to answer the second question as stated: Affirm the determination of the Sheriff-Substitute as arbitrator: . . ."

Counsel for the Appellant—Constable, K.C.—Hon. W. Watson. Agents—Cuthbert & Marchbank, S.S.C.

Counsel for the Respondents — J. A. Christie — T. G. Robertson. Agents — R. & R. Denholm & Kerr, Solicitors.

Saturday, February 11.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

KILMARNOCK PARISH COUNCIL *v.* STIRLING PARISH COUNCIL.

Poor — Settlement — Illegitimate — Minor Pubes — Forisfamiliation — Mother with no Residential Settlement.

An illegitimate child, who after puberty becomes a pauper, and who has not himself acquired a residential settlement, will, failing a residential settlement of the mother, take his own birth settlement, and not the birth settlement of the mother.

An illegitimate blind child was born on 12th March 1893 in the parish of Kilmarnock, and resided with her mother till she attained puberty. About a month thereafter, viz., on 7th April 1905, while still residing with her mother, she was sent to a school for the blind, where she remained till 3rd August 1907, when she was removed. She resided with her mother till 30th September 1908, when she (the daughter) became chargeable. The mother had acquired no residential settlement, and her birth settlement was Stirling.

Held (on the assumption that the child herself was the pauper) that the child's settlement was in the parish of her birth, Kilmarnock, and not in the parish of her mother's birth, Stirling.

The Parish Council of Greenock, *pursuers*, raised an action in the Sheriff Court at Kilmarnock against the Parish Council of Kilmarnock and the Parish Council of Stirling, *defenders*, for payment by one or other of them of advances made by the pursuers to Marion Campbell Mackie.

The following *narrative* of the *facts* is taken from the opinion of the Sheriff (Lorimer), and was adopted by the Lord President in the Inner House:—"Marion Campbell Mackie, the illegitimate blind daughter of Marion Campbell, was born on 12th March 1893 in Kilmarnock, and resided with her mother till she attained puberty on 12th March 1905. About a month after, viz., on 7th April 1905, while still residing with her mother in Edinburgh, she was, at the instance of the School Board of Edinburgh, sent for board and education to the Royal Blind School at West Craigmillar, under the provisions of the Blind and Deaf Mute Children (Scotland) Act 1890, where she remained till 3rd August 1907, when she was, at the instance of the authorities of that school, removed. She resided with her mother till 30th September 1908, when she (the daughter) became chargeable at Greenock, from which parish she received relief. She was then a minor of fifteen years of age. Her mother was, in April 1905, and has since continued, chargeable to Stirling, her birth parish. She resided in Edinburgh till the end of May 1907, and thereafter elsewhere, her daughter throughout being with her, and spending the school holidays with her while she was at Craigmillar."

The defenders, the Parish Council of Kilmarnock, pleaded, *inter alia*—"(1) The said Marion Campbell Mackie not being forisfamiliated she follows the settlement of her mother, which is in the parish of Stirling, and the defenders, the Parish Council of the Parish of Kilmarnock, should be assoilzied."

The defenders, the Parish Council of Stirling, pleaded, *inter alia*—"(1) The said Marion Campbell Mackie having been forisfamiliated on attaining the age of puberty, she takes her own birth settlement, which is in the parish of Kilmarnock, and the Parish Council of said Parish of Kilmarnock being responsible for her maintenance, the defenders, the Parish Council of the Parish of Stirling, ought to be assoilzied, with expenses."

On 8th December 1909 the Sheriff-Substitute (D. J. MACKENZIE) pronounced this interlocutor — "In respect that it is admitted (1) that the sums sued for have been expended by the pursuers on behalf of the pauper Marion Campbell Mackie; (2) that the said Marion Campbell Mackie is an illegitimate child, having been born at Kilmarnock on 12th March 1893; (3) that the birth settlement of her mother is in the parish of Stirling; (4) that the said Marion Campbell Mackie lived with her mother until she attained the age of puberty on 23rd March 1905; and (5) that about a month thereafter she was sent to the Royal Blind School at West Craigmillar, under the provisions of the Blind and Deaf Mute Children (Scotland) Act 1890, where she remained until 3rd August 1909, thereafter returning to live with her

mother until, at Greenock on 30th September 1908, she became chargeable to the pursuers: Finds that the said Marion Campbell Mackie, although having attained to puberty, has not been forisfamiliated, and that as an illegitimate child she takes the parochial birth settlement of her mother, which is in the parish of Stirling: Finds that the defenders the Parish Council of the Parish of Stirling are liable to the pursuers in repayment of the advances made on behalf of the said Marion Campbell Mackie, amounting in all to the sum of £4, 7s. 6d.: Therefore decerns against the said defenders the Parish Council of the Parish of Stirling for payment to the pursuers of the said sum of £4, 7s. 6d., with interest from the date of citation: Assoilzies the defenders the Parish Council of the Parish of Kilmarnock from the conclusions of the action."

Note—[*After narrating the facts*]—"This last parish [Greenock] having afforded her relief, now sues the parishes of Kilmarnock and Stirling for repayment. Against Kilmarnock it is urged that if forisfamiliation has taken place here, that parish is liable as that of the pauper's own birth. The ground of liability against Stirling is that that was her mother's birth settlement which she, as an illegitimate child, takes until by forisfamiliation she is relegated to her own birth settlement, or acquires a new one in some other way.

"It is not averred that she has acquired a settlement by residence, so that the question is one between the two birth settlements.

"This again resolves itself into the question whether this girl has been forisfamiliated (1) by the attainment of puberty, or (2) by that event combined with her residence in the Blind School.

"In the case of a legitimate child it seems to be settled that if his father be dead and he attains to puberty his settlement ceases *eo ipso* to be that of his father, and becomes that of his own birth (*Craig* v. *Greig and Macdonald*, 1863, 1 Macph. 1172). The effect of his continuing to reside or be supported by his widowed mother does not appear to have been regarded as material. The change at puberty is explained by the Lord Justice-Clerk (Inglis) in the above case as resulting from the cessation of the *patria potestas* and the mother's custody during the years of nurture.

"But in the case of illegitimates the relations of parent and child are different from the moment of birth. Over the illegitimate child there is no *patria potestas*. It has been settled as a rule in the poor law that the illegitimate child during pupillarity follows the settlement of its mother. But what, if any, is the change operated by the child's arrival at puberty? That event cannot put an end to the *patria potestas* for that has never begun and has no existence. If the child at that age leaves his mother and sets up in life for himself he may be forisfamiliated in a sense, although there is no complete *familia* from which to emerge. But if he remains with the only parent with whom he has any legal relation, the parent whose parochial settlement has been imputed to him, it appears to me to be consistent with principle and the decisions alike to hold that he retains that artificial settlement until forisfamiliation has taken place in some other way, as by leaving his mother's house and starting a career of his own. In this way the family, such as it is, would be kept together, otherwise it might be dispersed among different parishes, in the event of destitution, disability, or lunacy supervening.

"The desirability of keeping the family as much as possible together was strongly pointed out in the opinion of Lord Chancellor Cranworth in the case of *Adamson* v. *Barbour* (H.L.), 1 M'Queen 376, in the year 1853. Ten years later occurred the well-known case of *Craig* v. *Greig and Macdonald*, 1863 (1 Macph. 1172), above referred to. At first sight it would appear as if this decision was such as to settle the present question in favour of a finding that the pauper's own birth settlement must rule. But I am not satisfied that it is so. The child in that case was living apart from its widowed mother. It was legitimate and therefore dependent on its father's settlement up to the time of his death and its minority. Here both these elements are wanting. The child's home was undoubtedly with its mother (for in the view I take the residence in the Blind Institution did not make any change in this respect), and there was no *patria potestas* in the father and never had been any. The case of *Fraser* v. *Robertson*, 1867, 5 Macph. 819, dealt with the case of an insane daughter whose pupillarity continued for this cause until her father's death, when she took his settlement. In *M'Lennan* v. *Waite*, 1872, 10 Macph. 908, the decision in *Craig* was followed and the settlement of a pauper girl who had attained puberty after her father's death but had not lived latterly with her mother, nor acquired a residential settlement of her own, was found to be that of her birth. In that case Lord Kinloch, who was one of the minority in the case of *Craig*, says—'I do not consider the decision in that case to interfere with the condition of children, whether below or beyond puberty, who are unemancipated and are residing in family either with their father, or with their mother after their father's death. But in regard to all emancipated children I hold the case to settle that their arrival at puberty *eo ipso* discharges any settlement derived from a parent, and in default of any other settlement throws them on the parish of their birth.' With this opinion Lord Deas concurred. In *Ferrier* v. *Kennedy*, 1873, 11 Macph. 402, Lord Deas again referred to the importance of the question of the mother's survival, but the case was decided on the assumption that she had not survived. In *St Cuthberts'* v. *Cramond*, 1873, 1 R. 174, it was held that a derivative residential settlement held by a pupil at the date of his father's death was not lost on his attaining to puberty, the distinction

from the case of *Craig* apparently lying in the difference between a residential settlement and a birth settlement.

"All the above cases refer to legitimate children. The question, as I have indicated, is still undetermined as to the effect of the attainment of minority by a pupil who continues to reside with his mother, whose birth settlement he takes. The rule established by *Craig* v. *Greig and Macdonald, supra*, was applied to the case of an illegitimate child in *Greig* v. *Ross*, 1877, 4 R. 465, but in that case the child was not resident with its mother. In *Wallace* v. *Caldwell*, 1894, 22 R. 43, it was held that the mother's industrial settlement applies to the illegitimate child, and is only lost under the conditions of the 76th section of the Act of 1845. But it is not clear that that case is an authority for the proposition that puberty alone is equivalent to forisfamiliation. The illegitimate child in *Glasgow* v. *Kilmalcolm*, 1904, 6 F. 457, had been deserted by her mother at the age of six, and had been admitted into a charitable institution. It was held that never having lived with her mother after the age of six she was forisfamiliated at puberty. The case of *Shotts* v. *Rutherglen*, 7th November 1905 (a report of which is in process) was decided on other grounds than that of forisfamiliation at puberty in the case of an illegitimate child, and it still leaves open the question at issue here.

"On the only other point which affects the question of forisfamiliation raised on this record, namely, whether the reception of this blind girl into an institution under the Blind and Deaf Mute Children Act 1890, soon after the age of puberty, operates as forisfamiliation, I am inclined to hold that it does not, even if there were no averments as to residence with her mother during the holidays. I therefore think it unnecessary to have proof as to that. The mother's house evidently remained the girl's home, and it is not denied that she returned there after her period of attendance at the institution had come to an end.

"It appears to me that the case of *Fraser* v. *Robertson*, 1867, 5 Macph. 819, is an authority against forisfamiliation in these circumstances—see also *Galashiels Parish Council* v. *Hawick Parish Council*, 1902, 44 P. L. Mag. 475. In a case of this kind it is not for me to speculate on rival principles, I can only endeavour to ascertain what has been decided. Where, however, there is admittedly no definite ruling to be found, I think I am bound to adopt the course which is most consistent with the general trend of those decisions which come nearest to a solution of the point at issue.

"I therefore hold, although not without some hesitation, that the pauper child here, not having been forisfamiliated, retains the settlement which as an illegitimate child she had at birth, namely, that of her mother's birth, the parish of Stirling."

The Parish Council of Stirling appealed to the Sheriff (LORIMER), who on 2nd March 1911 pronounced this interlocutor—". . . Finds in terms of the five admissions in fact in the Sheriff-Substitute's interlocutor of 8th December last: *Quoad ultra* recals the said interlocutor: Finds in law (1) that the pauper, the said Marion Campbell Mackie, upon attaining puberty as aforesaid, took her parochial settlement in the parish of her birth, which is the parish of Kilmarnock, and (2) that the defenders the Parish Council of Kilmarnock are liable to the pursuers in repayment of the advances made on her behalf, amounting to the sum of £4, 7s. 6d.: Therefore decerns against the said defenders the Parish Council of the Parish of Kilmarnock for payment to the pursuers of the said sum of £4, 7s. 6d., with interest from the date of citation: Assoilzies the defenders the Parish Council of the Parish of Stirling from the conclusions of the action. . . ."

Note.—[*After the narrative of facts above quoted*]—"In these circumstances the Sheriff-Substitute holds that the parish of the daughter's settlement is the parish of her mother's birth settlement, viz., Stirling. But I have the misfortune to differ, and hold that the pauper's settlement is in the parish of her own birth.

"It is to be observed that though the girl has been blind from birth she is not, according to poor law, incapable of acquiring a residential settlement. She is not a lunatic or idiot, and the education afforded to the blind in such schools as Craigmillar enables them to support themselves, which, however, is not now the test of capacity to acquire a residential settlement.

"I recognise the necessity, particularly in cases in this branch of the law, of observing the maxim *stare decisio*, and welcome the following five propositions formulated by Lord Kyllachy in the recent case of *Greenock* v. *Govan*, June 29, 1905, 7 F. 884, at pp. 888-9, as settled points in Poor Law:—

"'1. An illegitimate child stands towards his mother's settlement in the same relation as a legitimate child stands towards his father's settlement.

"'2. Up to puberty a legitimate child takes his father's settlement whatever it is and however constituted.

"'3. Similarly an illegitimate child takes up to puberty his mother's settlement, whatever it is and however constituted, whether by residence, or birth, or marriage.

"'4. On the other hand, at puberty a legitimate child takes his father's residential settlement, that is to say, the settlement, if any, acquired by his father's own residence, and retains that settlement until it is lost in the manner provided by the 76th section of the statute.

"'5. Similarly, an illegitimate child takes at puberty any residential settlement acquired by its mother, that is to say, any settlement acquired by its mother's own residence, and retains that settlement until lost in terms of the statute.'

"Lord Kyllachy adds that the first proposition has never been questioned, and the second and third have been long settled, while the fourth and fifth have been the

subject of controversy, but may be held as now firmly established as regards legitimate children by the case of *St Cuthbert's* v. *Cramond*, 1873, 1 R. 174, and as regards illegitimate children by the case of *Wallace* v. *Caldwell*, 1894, 22 R. 43.

"Observe the difference between the third and fifth propositions which both apply to illegitimate children, the former when in pupillarity, the latter in puberty. The pupil takes its mother's settlement whatever it is and however constituted, whether by residence or birth or marriage, whereas the minor pubes takes at puberty any settlement acquired by its mother's own residence, but that only, excluding therefore the mother's birth settlement and her marriage settlement (if she had one). Further, the illegitimate minor pubes starts at puberty with its mother's residential settlement (if she has one), which thereby becomes the child's residential settlement and continues to be so till lost by its own non-residence, whether as minor or major, under the Poor Law Act 1898, sec. 1, coming in lieu of the 76th section of the Act of 1845. As Lord President Robertson expresses it in *Wallace* v. *Caldwell*, *supra*, p. 45—'These conditions' (of that section of the Poor Law Act) 'regulate the retention and loss of an industrial (or residential) settlement as regards the child who derives it as well as the parent who acquires it,' from which it follows that the one might retain and the other lose it.

"But in this case the mother had no residential settlement, and her birth settlement is not one, as above shown, which her daughter on attaining puberty could take, and accordingly she (the daughter) must fall back on her own birth settlement.

"This is the short method by which, relying on Lord Kyllachy's summary of 1905, I reach a different conclusion from the learned Sheriff-Substitute.

"But perhaps I am bound to try and meet the difficulties which presented themselves to him and led him to the opposite result.

"It is common ground that neither mother nor daughter has acquired a residential settlement for herself. As regards the mother she was in receipt of parochial relief in and since 1905; and as regards the daughter she resided both before and after puberty with her mother, except during her residence for two years and four months in Craigmillar School, when she spent her holidays with her mother. The School Board of Edinburgh provided the funds for her maintenance and education under the Act of 1890 (sec. 3), having a claim for relief therefor against the school board of the parish of the parent's legal settlement, here Stirling. That Act also provides (sec. 7) that the parent shall not be pauperised by any payment made for the child under the Act; and that benefit has been extended to the child itself (7 F. 884). But in this case the mother was already in receipt of parochial relief.

"In these circumstances the Sheriff-Substitute asks whether the girl was forisfamiliated (1) by attaining puberty, or (2) by that event combined with her residence in Craigmillar School, which, of course, falls short of the time for acquiring a residential settlement. In the Sheriff-Substitute's view an illegitimate child by continuing to reside with its mother after attaining puberty does not enter on the state which, in the case of legitimate children, is called forisfamiliation, and accordingly (he argues) no change of settlement takes place, and the child retains the settlement it had during pupillarity, viz., in this case, that of the mother's birth.

"Now it is true that it cannot be said in the case of legitimate children that attainment of puberty and forisfamiliation or emancipation are equivalents, for a child may, during puberty and after, reside in family with his father and be unforisfamiliated, but that ceases on the death of the father, 'for emancipation is nothing else than relief from the *patria potestas*, which must cease with the death of the father' (Lord J.-C. Inglis and Lords Benholme and Mackenzie in *Craig* v. *Greig and Macdonald*, 1863, 1 Macph. 1172, at p. 1179 foot). But the survivance of the mother does not prolong the state of dependency. 'The mother never possesses any authority of the same kind as the *patria potestas* . . . When the child attains the age of puberty all legal authority of the mother over the child is at an end, unless she has been nominated by her husband or chosen by her child as one of his curators; apart from such special and factitious relation of curator and minor the widowed mother and the child in puberty are persons quite independent of one another—the same Judges, p. 1180, and Lord Barcaple, 1192, top. Accordingly the three Judges declared that they considered it altogether irrelevant to inquire whether the son lived with his mother after he attained puberty—p. 1179.

"That was the case of a lawful child, but where it is illegitimate there is no *patria potestas*, and the relation between mother and child in puberty cannot, I think, be stronger, if so strong, as in the case of a widowed mother and a minor lawful child. Accordingly in *Greig* v. *Ross*, 1877, 4 R. 465, where an illegitimate child who had lived with his mother till he was nearly thirteen, but apart from her when he attained puberty, was held on that event to drop his mother's settlement by marriage and take his own birth settlement. On this the Lord Justice-Clerk (Moncreiff) observed that 'the mere fact of there being no such thing as *patria potestas* in the case of an illegitimate child brings such a case more clearly under the general rule that where a child attains the age of twelve or fourteen and becomes a *minor pubes* the parish of his birth becomes his settlement, and he loses the derivative settlement which he had during his pupillarity.' The other Judges also founded on the absence of *patria potestas*.

"This case, however, scarcely touches the point of the effect of an illegitimate child's residence with his mother. But in *Wallace* v. *Caldwell*, 1894, 22 R. 43, there was such residence at puberty, notwith-

standing which on that event the child's settlement was held to change from its mother's residential settlement to its own birth settlement.

"It would appear that the reason for wishing to prolong for an illegitimate child after attaining puberty the settlement derived from its mother is the desire not to separate mother and child at that early age; but in poor law administration such separation is not involved—a pauper does not necessarily reside in the parish that supports him. Indeed in the present case the mother lived for years in Edinburgh, but was chargeable on and supported by Stirling.

"I am aware that in the case of *Craig* in 1863, where the Court, or at least some influential Judges, held it altogether irrelevant to inquire whether a son lived with his mother after he attained puberty, Lord Deas (1 Macph. 1195) reserved his opinion on the question whether a child living in family with and dependent on its mother would, on attaining puberty, become chargeable on the parish of its birth. And in *M'Lennan* v. *Waite*, 1872, 10 Macph. 908, Lord Kinloch (p. 910) said that he did not consider the decision in the case of *Craig* 'to interfere with the condition of children, whether below or beyond puberty, who are unemancipated and are residing in family either with their father, or with their mother after the father's death. But in regard to all emancipated children, I hold the case to settle that their arrival at puberty *eo ipso* discharges any settlement derived from a parent, and in default of any other settlement throws them on the parish of their birth.'

"With this Lord Deas expressed his concurrence. Again in *Ferrier* v. *Kennedy*, 1873, 11 Macph. 402, Lord Deas thus explained what he and Lord Kinloch meant by their caveat in *M'Lennan* v. *Waite*—'What Lord Kinloch as well as myself wished to guard against was the stringent application of the rule in the case of children falling into poverty when forming part of the mother's family' (p. 403).

"It is to be observed that these reservations apply, as Lord Kinloch says, to children either above or below puberty who are unemancipated and are residing with the father or the surviving mother. That description cannot apply to an illegitimate child, in regard to whom the idea of emancipation is foreign, as there is no *patria potestas* from which to be emancipated. From the decisions it is clear that the death of the father at or after puberty emancipates the child, and if the father be non-existent it follows that all that is necessary to the child acquiring full capacity of a minor and, *inter alia*, power to choose a residence, is to attain puberty.

"In the case of *Greig* v. *Ross* in 1877 Lord Moncreiff thought the doubts of Lord Deas were unfounded in the case of an illegitimate child, where 'there is no ground whatever for the contention' (14 S.L.R. 346-347). Indeed, to give effect to these doubts would be to introduce a new limitation on the capacity of minors for which there appears to be no warrant either in the statutes or at common law.

"I therefore answer the Sheriff-Substitute's questions by saying that the girl was forisfamiliated, or rather ceased to be in law identified with the mother, on attaining puberty, and that the residence at Craigmillar School was residence in her own right.

"I may add that the case of *Shotts* v. *Rutherglen*, 1905, P.L.M., p. 45, was cited to me as on all fours with the present. It was decided by Sheriff-Substitute A. O. M. Mackenzie, then of Airdrie, in the same sense as this interlocutor, and was appealed to the First Division of the Court, where it was decided upon a different issue of fact (continuity of residence), and the Sheriff-Substitute's interlocutor was accordingly recalled, but not on the merits of the present question. The Court of Session's decision is in process.

"As this judgment will fix liability for future years, and as both parties desired an authoritative judgment, I have granted leave to appeal."

The Parish Council of Kilmarnock appealed, and argued—Until forisfamiliation a legitimate child had to look for relief to the parish of the father's settlement—*Adamson* v. *Barbour*, May 30, 1853, 1 Macq. 376—and similarly they submitted an illegitimate child had to look to the parish of the mother's settlement. In the case of legitimate children, attainment of puberty plus the death of the father did not *per se* involve forisfamiliation, for forisfamiliation was not equivalent to relief from *patria potestas*, though it was true that there was a dictum to that effect in the joint-opinion of Lord Justice-Clerk Inglis, Lord Benholme, and Lord Mackenzie in *Craig* v. *Greig & Macdonald*, July 18, 1863, 1 Macph. 1172 at 1179, but that appeared to be contrary to the opinion of Lord Kinloch (concurred in by Lord Deas) in *M'Lennan* v. *Waite*, June 28, 1872, 10 Macph. 908 at 910 (foot), 9 S.L.R. 566, and to the opinions of Lord Deas in *Ferrier* v. *Kennedy*, February 8, 1873, 11 Macph. 402 at 403, 10 S.L.R. 257, and in *Craig* v. *Greig & Macdonald* (*cit. sup.*), for Lord Kinloch and Lord Deas evidently were of opinion that if a minor lived with his mother after the father's death he was not forisfamiliated. The question had been regarded as still open in *Rutherglen Parish Council* v. *Glenbuck and Dalziel Parish Council*, 33 S.L.R. 366, *per* Lord Moncreiff at 368. An illegitimate child stood in the same relation to its mother's settlement as a legitimate child towards its father's settlement — *Greenock Parish Council* v. *Govan Combination Parish Council*, June 29, 1905, 7 F. 884, 42 S.L.R. 682 (Lord Kyllachy's first proposition); *Primrose* v. *Milne*, February 27, 1890, 17 R. 512, Lord President Inglis at 514, 27 S.L.R. 356—and just as a legitimate child living with his father was not forisfamiliated by the attainment of puberty or even majority—*Fraser* v. *Robertson*, June 5, 1857, 5 Macph. 819; *Lees* v. *Kemp*, October 17, 1891, 19 R. 6, 29 S.L.R. 6; *Parochial Board of Elgin* v. *Parochial Board of Kinloss*, June 1, 1893,

20 R. 763, 30 S.L.R. 684 (*sub nomine Elder* v. *Leitch*)—so an illegitimate child living with its mother was not forisfamiliated by the attainment of puberty. Had the opposite been the case, and had the dictum in *Craig* (*cit. sup.*) been sound, then there would have been no need to consider forisfamiliation, as had been done in *Parish Council of Glasgow* v. *Parish Council of Kilmalcolm*, March 1, 1904, 6 F. 457, 41 S.L.R. 347, opinions of Lord Moncreiff and Lord Stormonth Darling, and *Greenock Parish Council* v. *Govan Combination Parish Council* (*cit. sup.*). Accordingly they submitted that the pauper child not having been forisfamiliated retained the settlement which she had at birth, and, being an illegitimate child, that was the parish of her mother's birth, the parish of Stirling. Reference was also made to *Greig* v. *Ross*, February 10, 1877, 4 R. 465, 14 S.L.R. 346.

Argued for the respondents—The mother never possessed any authority of the same kind with the *patria potestas*. The primary rule was that stated by Lord Barcaple in *Craig* (*cit. sup.*) at 1 Macph., p. 1191, namely, that every pauper ought to be supported by his own parish, and that was the parish of his birth or of his own residential settlement. They submitted that on attaining puberty an illegitimate child took the parish of its birth as its settlement unless—and this was the only case in which the rule had been impinged upon—the mother had acquired a residential settlement—*Wallace* v. *Caldwell*, November 7, 1894, 22 R. 43, 32 S.L.R. 38. [The LORD PRESIDENT referred to *Inspector of Poor of St Cuthbert's* v. *Inspector of Poor of Cramond*, November 12, 1873, 1 R. 174, 11 S.L.R. 64.]

At advising—

LORD PRESIDENT—The facts in this case are succinctly and accurately stated by the Sheriff, and I take them from his note. [*Quotes the narrative supra.*]

The question is whether the settlement of the daughter is the birth settlement of the mother or is her own birth settlement; and I pause here to say that the case has throughout been argued upon the assumption that the child herself is the pauper, and that there are no facts given in the case sufficient to enable us to come to any other conclusion. Accordingly the opinion that I am about to deliver must not be held as necessarily applying to a case where, a child never having been separated from its mother at all, it might be held that the mother was the pauper and the child merely the dependant of the pauper mother.

From the general point of view it is probably a matter of little moment how this case is decided provided that the decision is not based on any principle antagonistic to what has been settled. The system as developed is so artificial that it becomes, I am afraid, almost impossible so to decide it that there shall be no hold for criticism.

Upon the whole matter, I am of opinion that the judgment of the Sheriff is right. I am content to adopt the five propositions enunciated by Lord Kyllachy in *Greenock Parish Council* v. *Govan*, June 29, 1905, 7 F. 888-889. If they be adopted, then I think this case is a natural corollary to that one, for the proposition that is there expressed negatively, viz., that the illegitimate child after puberty who has not himself acquired a residential settlement does not take the derivative settlement of his mother, may in consonance with the opinion be expressed positively, viz., that such a child after puberty will take the residential settlement of the mother, but failing that, must take its own birth settlement.

The argument which weighed with the Sheriff-Substitute might be put thus: The puberty of a legitimate child whose father is dead changes the settlement of the pupil from that of the father's birth settlement (in the case where the father has no residential settlement) to that of the child's own birth settlement, yet all that depends on the cessation of the *patria potestas*. But inasmuch as in the case of an illegitimate child there is no *patria potestas* there can be no cessation; consequently puberty *per se* cannot in such a case effect emancipation, and here there was no *de facto* forisfamiliation. I think this is putting too much weight on the cessation of the *patria potestas*. The point of puberty is not that the *patria potestas* ceases—for it does not cease though it is weakened—but that the pupil turns into a minor and is for the first time capable of earning a residential settlement for him or herself. But till he has done so he must, as it has been phrased, start life with some settlement. It has been held by a series of decisions that in the case of a legitimate child he starts with the residential settlement of the father, if such exists, but otherwise with the settlement of his own, not of his father's birth. To this rule there is only one exception, that if he goes on *de facto* living with the father and supported by him he still adheres to the settlement of the father whatever it is, and that is upon the score of the remaining although attenuated *patria potestas* in minority. It seems to me that the general rule in the case of an illegitimate child should be the same, substituting mother for father, as the illegitimate child has no father. The exception here has no place, because there is no *patria potestas* on which to base it.

For these reasons I propose to adhere to the Sheriff's interlocutor.

LORD KINNEAR—I agree with the opinion your Lordship has expressed.

LORD MACKENZIE—I concur.

The LORD PRESIDENT intimated that LORD JOHNSTON, who was absent at advising, also concurred.

The Court pronounced this interlocutor—

". . . Affirm the interlocutor of the Sheriff dated 2nd March 1910: Repeat

the findings in fact and in law contained therein: Of new decern for payment in terms thereof: Dismiss the appeal and decern. . . ."

Counsel for the Appellants—M'Lennan, K.C.—J. M. Hunter. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents—Morison, K.C.—Lippe. Agents—Fraser, Stodart, & Ballingall, W.S.

Wednesday, February 22.

FIRST DIVISION.

[Lord Dewar, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* NEWBURGH AND NORTH FIFE RAILWAY COMPANY.

Arbitration—Railway—Contract—General Arbitration Clause — Jurisdiction of Court.

A railway company entered into an agreement with another railway company to work and maintain a line of railway which the second company undertook to construct. In terms of the agreement the first company came under an obligation to pay the second company such a sum as would be sufficient to make up the annual dividend to four per cent. on the "paid-up share capital" of the second company. The agreement contained this clause—"All questions which may arise between the parties hereto in relation to this agreement, or to the import or meaning thereof, or to the carrying out of the same, shall be referred to arbitration. . . ." A question having arisen as to whether the *ex facie* paid-up share capital of the second company, looking to the mode in which it had been created, which was said to have been *ultra vires*, was truly "paid-up share capital" in the sense of the agreement—*held* that the question was a pure question of construction under the contract, and that although it was a question of law it fell under the arbitration clause.

On 3rd December 1909 the North British Railway Company, *pursuers*, raised an action against the Newburgh and North Fife Railway Company, *defenders*, to have it found and declared "(1) that the pursuers are freed and relieved from liability under articles seventh and eighth of the agreement dated 31st March and 5th and 6th April 1897, scheduled to and confirmed by the Newburgh and North Fife Railway Act 1897, to contribute any sum or sums to make up any dividend or dividends of the defenders, and that the said articles of the said agreement are null and of no effect as from the twenty-fifth day of January Nineteen hundred and nine, or from such other date as our said Lords may determine: Or (2), otherwise and alternatively, that the pursuers and the defenders are freed and relieved from the said agreement, and that the said agreement is null and of no effect as from the twenty-fifth day of January Nineteen hundred and nine, or from such other date as our said Lords may determine: or (3), otherwise and alternatively, that the liability of the pursuers under articles seventh and eighth of the said agreement to contribute any sum or sums to make up any dividend or dividends of the defenders does not extend or apply to a dividend or dividends on one hundred and eighty thousand pounds of share capital of the defenders, but only to a dividend or dividends of four per centum per annum on such smaller amount of share capital as our said Lords may, after such inquiry, remits, reports, or other procedure as they shall think proper, ascertain and determine in the course of the process to follow hereon to be the equivalent in amount of the legal and proper capital expenditure of the defenders."

The scheduled agreement which provided that in the event of an Act of Parliament being obtained and the capital subscribed the second parties should construct and complete a railway from Newburgh to St Fort, stations on the North British Railway, and that upon the construction and completion thereof the first parties should work and maintain it in perpetuity, subject nevertheless to the right of the second parties to terminate the agreement at the end of ten years on six months' notice, contained these articles—"*Article Fourth.* . . . (5) The first parties shall collect the said gross revenues and shall be entitled to retain fifty per centum thereof as their remuneration for maintaining the railway and relative works and conveniences and working and managing the traffic thereon and collecting the said revenues, and shall pay over the balance of fifty per centum to or for the behoof of the second parties in manner hereinafter provided. . . . *Article Seventh.* If the nett revenue accruing to the second parties is not sufficient to pay a dividend of four per centum per annum on the paid-up share capital of the second parties, then the first parties shall, out of fifty per centum of the mileage proportion of receipts accruing to them on their own railway from traffic including mails passing over their system or any part thereof to or from any place on the railway, contribute such sum as may be necessary to make up that dividend so far as the said fifty per centum of mileage receipts accruing in each half year to the first parties shall suffice to pay such deficiency. *Article Eighth.* Should the sum to be contributed under the immediately preceding article along with the said nett revenue of the second parties not be sufficient to pay a dividend of four per centum per annum on the paid-up share capital of the second parties, then the first parties shall, out of twenty-five per centum of the mileage receipts accruing to them on their own railway from traffic, including mails passing over their system or any part thereof and