"*Note.*— . . . . (2) The pauper was born in the poorhouse belonging to the City parish of Edinburgh, which is situated in the parish of Colinton. The question is, whether he was born in the parish of Colinton or in the parish of Edinburgh? The pursuer says that in regard to questions of settlement the poorhouse must be held to be situated in the parish to which it belongs.

"The Lord Ordinary cannot adopt that view. It seems to him that the birth settlement of the pauper must be in the parish in which he was actually born. The theory of the pursuer, that the poorhouse is constructively in the parish of Edinburgh, is not supported by any authority. If it were to be entertained at all, it would seem to follow that it should hold good for all parochial purposes; but the parish of Colinton does not extend it to the levying of poor-rates."

The pursuer reclaimed, and argued that the poorhouse of the City of Edinburgh must, though geographically in Colinton, be held on questions of settlement to be in the parish to which it belonged.

Authorities — *Dalmellington* v. *Ruthwell and Troqueer*, Jan. 22, 1822, 1 Shaw (n.e.) 244; *Craig* v. *Ross*, 39 Jur. 390; *Macdonald* v. *Taylor and Craig*, 1866, 9 Poor Law Mag. 348.

At advising—

Lord Justice-Clerk—If the *criteria* of liability introduced by the Poor Law Acts were founded on logical principle there might be something to say for this action, but they are purely arbitrary, and any rule that could be followed in such a matter must often produce bad results. The simplest and most reasonable adjustment of the question is that the child was born in Colinton, and that not being doubtful it is impossible for us to find that by construction it must be held to have been born in the City parish. The Act says that the parish of birth shall be liable—the child was born in Colinton. The building was no doubt erected in Colinton for the benefit of Edinburgh, but that will not enable us to make an exception.

Lord Young—I am of the same opinion, and I must say without any feeling that the case of Colinton is a case of hardship. This poorhouse probably pays more rates to Colinton than any other property in the parish, and there must be comparatively few births in it—not nearly so many as in a village containing the same number of persons.

But apart from that I agree with your Lordship that we must apply the law as it exists, and that is, that the birth settlement of a child shall be the parish where it is born. It is a mere question of fact. The geographical limits of parishes are fixed, and this child was born in Colinton. Applying that law, I hold that a child born in that parish has its birth settlement there. If there is ground for making an exceptional law here, it is a matter for the Legislature and not for the Court.

Lord Craighill—I concur. The only rule on which we can go is to consider the parish in which the child is born. This child was born in Colinton. A more anomalous and a harder result for Colinton would have been if the mother had died at the time of the child's birth, and the child had from its birth been a pauper on the parish of Colinton. We cannot avoid hardships in such matters. All we can do is to administer the Act of Parliament, and there is no escape from the conclusion that Colinton must relieve the City parish.

The Court adhered.

Counsel for Colinton—Wallace. Agent—A. Morison, S.S.C.

Counsel for City Parish—J. A. Reid. Agents—Curror & Cowper, S.S.C.

Counsel for St Cuthbert's Parish—Kinnear—M'Kechnie. Agent—Jas. M'Caul, S.S.C.

Thursday, January 27.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

DRUMMOND *v.* CARSE AND ANOTHER.

Judicial Factor, Liability of—Process—Expenses—Right of Judicial Factor to Pay Expenses of Litigation in which he has been Found Liable out of the Estate under his Charge.

D., a judicial factor who had in *bona fide*, and so far as appeared in the due discharge of his duty, entered into a litigation in which he had been partly unsuccessful, was decerned to pay "as judicial factor" a certain sum. The decree went on to "find the said D. liable in expenses." He paid the expenses thus decerned for out of the trust-estate, which was thereby diminished, so as not to suffice for payment of the principal sum found due. *Held*, in a suspension by D. of a charge to pay the principal, that the decree did not import personal liability to pay the expenses, and that therefore D was not bound to make up out of his own funds the deficiency in the estate caused by the payment of the expenses.

Question—Whether, a judicial factor being an officer of Court, and responsible to the Court in the factory process, such diligence against his person or property was competent?

This was a suspension at the instance of James Drummond, C.A., Edinburgh, judicial factor on the estate of the late Stewart Carse, painter, Musselburgh, of a charge to make payment as judicial factor of a sum of £220, 19s. 0½d. to the respondents Richard Carse and another. The prayer of the note was to suspend the said charge and whole grounds and warrants thereof, at least in so far as the said charge threatens or may form a step in the process of doing personal diligence against the complainer or diligence against his personal property. The circumstances in which the charge was given appear from the following passage from the note of the Lord Ordinary (Curriehill):—"The complainer unsuccessfully opposed an action at the instance of the respondents, in which he was, by interlocutor of the Second Division dated 29th January 1880, decerned and ordained, as judicial factor on the estate of the late Stewart Carse, to

pay to the respondents the sum of £220, 19s. 0½d., with interest on the principal sum of £136, 8s. 5d. from 4th November 1878; and by the same interlocutor the Court 'find the said James Drummond liable in expenses both in the Outer and Inner House, but subject to a deduction of one-third from the audited expenses incurred by the pursuer.' These expenses were taxed at the sum of £106, 1s. 11d., and were paid without a charge; but the decree was extracted, and a charge has now been given to the complainer to pay the said sum of £220, 19s. 0½d. as judicial factor foresaid. He has suspended the charge on the ground that as judicial factor foresaid he has no funds. If, in point of fact, the trust funds under his management are all exhausted by payments, forming proper and preferable charges against these funds, the suspension is well founded, and must be sustained. Now, the way in which the complainer says he has exhausted the trust funds is this,—After he was appointed judicial factor on Stewart Carse's estate, he found that it consisted wholly, or almost wholly, of some house property in Musselburgh which had been adjudged by the late Edward Carse's trustees in 1866 for payment of a debt of about £450 due by Stewart Carse to these trustees, partly on a bill granted by him to Edward Carse, and partly as the balance of his intromissions as factor for Edward Carse's trustees. The holders of the adjudication had taken no steps to obtain a declarator of the expiry of the legal, although that term had in point of fact expired; but they were willing to deal with their adjudication merely as a security, and to retrocess Stewart Carse's representatives on receiving payment of the debt and interest, under deduction of the rents intromitted with by them as adjudging creditors. The complainer, however, as he explains, 'called a meeting of the whole children and representatives of the said deceased Stewart Carse, and consulted with them regarding the said claim, and they all assured him that although decree had been obtained in absence, constituting the said debt and adjudging for it, there was no debt really due, and that in the interests of the estate it was his duty to open up the said decree,' and he thereupon in 1877 instituted an action of reduction of the decree. It is thus very clear that the reduction was raised by the complainer with the full sanction and at the desire of his constituents, and in doing so he must be held to have acted on the footing that if unsuccessful he would be liable in expenses to the defenders in that action, but with a good claim of relief against his constituents. The litigation in the reduction was long, keen, and expensive:—proof was led and a remit made to an accountant; a counter action was raised against the complainer by the defenders in the reduction, and the two actions were conjoined, with the result that by interlocutors of the Second Division, dated 29th January 1880, the complainer was held to have failed to establish his reasons of reduction, but that on paying the amount of the original debt as contained in the decree of adjudication, and interest, under deduction of the rents intromitted with by the original defenders, Edward Carse's trustees, he would be entitled to obtain from said defenders (but at his own expense) a discharge of the decree of constitution and adjudication and writs following thereon. By the same interlocutor the Lords 'find the said James Drummond liable in the expenses of both actions, and of the conjoined actions, both in the Outer and Inner House, but subject to the deduction of one-fourth from the audited expenses incurred by the defenders in the conjoined actions in the Outer House.' The complainer has redeemed the adjudication by paying the principal sum adjudged for with interest, under reduction as aforesaid, and he has also paid the expenses in which he was found liable by the interlocutor just recited, which amounted to £336, 5s. 1d. But he has paid these expenses, and the expenses of the action at the instance of the present respondents (£106, 1s. 11d.), in all £442, 7s., not out of his own pocket, but out of the trust-estate of Stewart Carse, and it is admitted that if these expenses are not preferable charges on the trust estate, there are ample funds to pay the sum of £220, 19s. 0½d., for which the present charge is given. The complainer, however, maintains that the whole sums which he has been found liable to pay, not only principal debts and interest, but also the expenses of process, are due by him only as judicial factor, and that none of these sums—not even the expenses—are payable by him as an individual." The previous litigation referred to will be found reported in 7 R. 452.

The suspender pleaded—"(1) The complainer being liable to pay the sum charged for only as judicial factor, and having no factory funds in his hands, the charge, in so far as directed against him personally, ought to be suspended. (4) The complainer having litigated in *bona fide*, is entitled to pay the expenses *bona fide* incurred by him out of the estate."

The respondents pleaded—"(3) The complainer is not entitled to diminish the funds of the factory estate by paying therefrom any sums in which he is personally liable."

The Lord Ordinary on 20th Nov. 1880 repelled the reasons of suspension and found the letters orderly proceeded, adding this note—. . . . "I confess I can see no ground in the present case from deviating from the general rule established in the case of *Gibson*, 11 S. 656, that a litigant in the position of the complainer must if unsuccessful pay out of his own pocket to his opponent the expenses in which he may be found liable in so far as the trust-funds may be inadequate for that purpose. He cannot therefore plead as against the respondents, who are creditors of the trust-estate, and who obtained decree for the amount of their debt on 29th January 1880, with expenses, on the same day that the complainer was found liable in expenses to Edward Carse's trustees, that the expenses in any of the actions are preferable to the respondents' debt. In short, he is not entitled, to the prejudice of the respondents, as holders of a decree of constitution against the complainer as judicial factor, to plead that the trust-funds are exhausted by paying expenses for which he is himself primarily liable as an unsuccessful litigant.

"The complainer says, that according to the sound construction of the interlocutors of the Court in all the actions, he was not found personally liable in the expenses. To me it is pretty clear that the Court meant the expenses to follow the ordinary rule, because while the finding of liability for payment of the principal debt and interest is against 'James Drummond

as judicial factor,' the expenses are given against him solely as 'James Drummond.' If I had deemed the construction doubtful, I would have reported the case without a judgment, but in my humble opinion the meaning of the judgment of the Court is, without doubt, that which I have now attached to it. That this was understood by the complainer himself to be the sound construction of the interlocutors is made very plain by the terms of the discharge of the adjudication, which was prepared by the complainer's own agent and was granted by the trustees of Edward Carse. That document, which is dated 16th June 1880, was with great reluctance exhibited at the bar by the complainer as his voucher for part of the payments which, as he maintains, have exhausted the trust-estate. I ordered it to be lodged in process, and I see that it is therein expressly stated that the sum of £609, 17s. 10d., being the debt contained in the decree of adjudication, with interest, but deducting rents as aforesaid, had been paid by 'the said James Drummond as judicial factor foresaid,' while in the next sentence the said sum of £336, 5s. 1d. of taxed expenses is said to have been paid by 'the said James Drummond as an individual.' On the whole, I have no hesitation in refusing the suspension, with expenses."

The suspender reclaimed, and argued — A judicial factor being an officer of Court appointed to manage an estate when other means of management fail, ought to be more liberally dealt with in questions of personal liability than an ordinary trustee. He is entitled at least to the expense of defending the trust-estate, and the contention of the respondents amounted to this, that whenever a claim is made large enough to exhaust the trust-estate the factor must litigate the question entirely at his own risk. In this case the whole funds would have been swept away had the factor not partially succeeded in the previous litigation. No analogy can be drawn from the case of a trustee in bankruptcy, who acts on the instructions of the creditors, nor from that of a private trustee, who is not an officer of Court.

Answered for respondents—All that is asked is that the respondents be paid the principal sum in the decree, leaving relief to be operated by the judicial factor against the beneficiaries. The respondents having a good claim against the trust-estate, now find that the trust-estate has been partially expended in resisting it. If a trustee in a sequestration disputes a claim unsuccessfully, the creditor is entitled to his ranking, and to the expenses of the litigation also, and if the trustee has not funds sufficient for paying the dividend on the claim as well as the expenses, he is personally liable to make up the amount—*Houston* v. *Duncan*, Nov. 25, 1841, 4 D. 80. The reason of that is, that otherwise the creditor would have to contribute to the expense of resisting his own claim.

Additional authorities — *Gibson* v. *Pearson, Wilkie, and Robertson*, May 25, 1833, 11 S. 656; *Graham* v. *Marshall*, Nov. 22, 1860, 23 D. 41.

At advising—

Lord Young—The Lord Ordinary has rightly described the respondents as "holders of a decree of constitution against the complainer as judicial factor" on the estate of their deceased debtor. On that decree they have charged the complainer as "judicial factor" to pay, and he now asks us to suspend the charge, "at least in so far as the said charge threatens or may form a step in the process of doing personal diligence against the complainer or diligence against his personal property." I think it right to say that I doubt the competency of diligence on such a decree of constitution against the person or property of a judicial factor, who is an officer of this Court, and strictly accountable in the factory process for his conduct and administration. I waive this doubt in deference to the desire of both parties that the question in dispute between them should be determined in this process of suspension, which they were agreed presented it with all the materials which they could command or desired for its decision. It would certainly be inconvenient to convert this process into an accounting by the judicial factor for his administration; but the parties told us that the only question of interest to them was, whether or not the complainer was entitled with the factory funds to pay certain expenses which he had been ordered to pay to the respondents and others in his litigations with them, and desired us to assume that the factory estate was sufficient or not to meet the debt charged for according as it should be held that he was or was not so entitled.

The Lord Ordinary has so taken the case, and so taken it is of course assumed that the complainer is not personally liable for the respondents' debt—the only question being whether or not he is bound to restore to the factory estate (which is the proper debtor) the amount of these expenses which he has, improperly as the respondents contend, paid out of it? This question obviously regards the proper costs and charges of administration, which (always, of course, assuming their propriety) must of course be paid in the first instance. These are generally, and so far as possible ought to be, paid as they are incurred. I need hardly say that the factor is not the ultimate judge of their propriety, and that improper payments made or credits taken will be disallowed on the examination of his accounts. This examination we are now, at the desire of the parties, and for their convenience, anticipating with respect to the matter I have referred to.

The general rule of law and practice undoubtedly is, that a judicial factor is entitled to be kept *indemnis*, and also to suitable remuneration for trouble, out of the factory estate, provided he has done his duty and has not misconducted himself in his office, and nobody yet to be appointed would accept of the office on any other footing.

But if the costs and charges of the factor are to be allowed or not, according as they were properly incurred or not, what ground is there for dealing exceptionally with the expense of litigation, which like any other expense may or not be incurred properly? A judicial factor will not of course be allowed to expend the factory funds in improper litigation; and either in the suits themselves (if in this Court), or ultimately on the examination of his accounts, the estate will be protected and the cost thrown on himself personally, if his conduct shall appear to the Court to have been such as to require it; and I venture to say that the Court would not be slow to take account of any impropriety on the part of its own officer,

and that in the suit in which, or with reference to which, the misconduct occurred. With regard to the litigations referred to in this record, which were before this Court, it is not suggested that the Court censured the factor for pursuing the one or defending the other, or expressed any disapprobation of his conduct. This is not conclusive, and I accordingly put it to the counsel for the respondents whether misconduct disentitling the complainer to the indemnity he would otherwise have been entitled to from the estate was alleged, and inquiry desired? The answer was in the negative, and that the respondents' case was rested entirely on the legal view on which the Lord Ordinary had proceeded, viz., that the factor was not entitled to payment or credit for the expenses decerned for against him, to the effect of rendering the estate insufficient to meet their debt of £220, and that without reference to the propriety or impropriety of his conduct as factor.

I assume for the purpose of this case that a judicial factor is personally liable to his adversary in a lawsuit for expenses decerned for against him, though I desire to say that I perceive no distinction between this liability and any other incurred by a judicial factor in the course of the factory with respect to his right of relief out of the factory estate. The general rule is that the factor is personally liable for every debt which he incurs in the course of his office—it being for him, and not for the party with whom he contracts, to see to the sufficiency of the factory funds to meet the liability. He is thus personally liable to every professional man and tradesman whom he employs, and for the price of all commodities he orders, however clearly he acted according to his duty in incurring the obligations. But his right to pay with the factory funds, or to be relieved out of the estate, depends precisely on whether or not he acted according to his duty, and therespondents' third plea-in-law, which the Lord Ordinary in effect sustains, is in my opinion untenable. If the factor's proper costs and charges reduce the estate so that it is insufficient to meet the liabilities, this is a misfortune, but affords no reason for disallowing them, contrary to the rule that the factor if guilty of no misconduct is entitled to be indemnified. I have already pointed out that there is here no question of misbehaviour disentitling the complainer to the indemnity which in the absence of misbehaviour is his legal right. The respondents, with respect to their debt charged for, are in no different position from any other creditor or claimant on the estate, and suffer no more than all others interested in it, *i.e.*, having claims on it, from the fact that it is reduced in amount by the costs of unsuccessful litigation, though the circumstance may be more provoking to them than to others.

The case of a trustee in bankruptcy who spends in litigation a dividend set aside under the Bankrupt Act to meet a contingent claim is not in point, for reasons obvious enough, and which were expressed in the course of the argument. In that case the result would be the same in whatever way the dividend so set aside was spent, instead of being reserved and made forthcoming, as under the statute it ought to be. The trustee spending would be personally liable to make it good to the party disappointed, by his violation of the statute.

Lord Justice-Clerk—I entirely concur in the opinion of Lord Young, and have only this remark to make, that the analogy derived from the position of a trustee in a sequestration is, in my opinion, entirely inapplicable in deciding a question of this kind relating to a judicial factor. The trustee is a representative of creditors, and acts under their superintendence and on their instructions. The judicial factor is an officer of this Court, and responsible to the Court. In that view the grounds of Lord Young's opinion seem to me to be perfectly sound.

Lord Craighill not having been present at the discussion, gave no opinion.

The Court recalled the interlocutor of the Lord Ordinary and suspended the charge, with expenses.

Counsel for Suspender — Lord Advocate (M'Laren, Q.C.) — Campbell Smith — Millie. Agents—M'Caskie & Brown, S.S.C.

Counsel for Respondents—Asher—J. A. Reid. Agent—Thomas White, S.S.C.

Thursday, January 27.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

LAWSON *v.* CALEDONIAN RAILWAY COMPANY.

Railway — Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 33), *secs.* 17, 18, *and* 19—*Railway Clauses Act* 1845 (8 *and* 9 *Vict. c.* 32), *sec.* 6—*Whether a Person whose Property has been Injured by the Operations of a Railway Company under Powers contained in a Private Act has Right of Action at Common Law.*

A railway company having by virtue of a private Act of Parliament acquired a piece of vacant ground across which a road ran forming an access to a house built at the boundary of the piece of ground, and having executed certain operations upon the road by which its value as an access was said to have been diminished—*held* that the proprietor of the house was not entitled to an action at common law against the company, but must proceed in the manner provided by sec. 6 of the Railway Clauses Consolidation (Scotland) Act.

By feu-contract recorded 4th July 1870 James Steel disponed to John Cameron, builder in Leith, All and Whole the area or piece of ground situated on the west side of George Street, North Leith, and bounded on the north by a new street about to be formed on the south side of the Caledonian Railway. By the feu-contract Steel bound himself and his heirs and successors to form the carriageway of the new street as far as the piece of ground thereby feued extended, and that by levelling the same, putting in a water-channel, and laying on a coat of broken stones blended with ashes. Cameron erected on the piece of ground thus feued by him a tenement consisting of a shop and dwelling-houses, intended to form the corner house of George Street and the pro-