established that the water obtained by the defenders from the well in question is water that finds its way into the well by percolation through the surrounding ground, and it would not, in my opinion, affect the judgment to be pronounced were it admitted that part of the water so obtained comes from the Lossie by percolation through the bank which intervenes between that river and the well. Even were it proved (as it is not) that the whole of the water pumped out of the well came from the Lossie, the quantity taken is quite immaterial in comparison with the flow of the river, and is not calculated to prejudice the rights of the pursuer. Taking the figures given by the Lord Ordinary, and which, I think, the proof fully warrants, it appears that after six weeks of dry weather the flow of the river was equal to nearly 15 million gallons a-day. From this quantity only 12 thousand gallons a-day (on the hypothesis I have stated) is abstracted by the defenders. This, too, which is about the amount of one minute's flow, is only taken twice a-week. On the same figures the flow of the river for a week is about 103½ million gallons; the quantity abstracted is 24,000 gallons, or about one gallon in every 4000 or 5000.

Lord Moncreiff—I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

I think that the pursuer's case fails at its first stage. He has failed to prove that the defenders have interfered directly with the water of the Lossie. It is not proved that the tank draws from the Lossie by percolation water which would not otherwise come into the tank. It may be that it does, but I do not think this is proved. The whole of the ground in the neighbourhood of the tank is saturated with water of the same character as the Lossie water, and the water with which the tank is filled may just as reasonably be supposed to be such water.

But secondly, assuming that any wate was induced by the construction of the tank to leave the bed of the stream, it is not proved that the abstraction is of such material amount as to affect the flow of the stream. The pursuer's action is based on the assumption that "a large portion ot the water of the said river Lossie was directed from its natural channel." There is absolutely no proof of this. It could, I apprehend, have been ascertained to a certainty if accurate observations had been taken while pumping was going on. But this has not been done. The pursuer's calculations are based upon the assumption (1) that the tank is filled entirely with water drawn directly from the Lossie; (2) that the defenders are continually pumping and supplying the tank. The first point has not been proved; on the second point, it appears that only 24,000 gallons are drawn from the tank in a week, while the weekly summer flow of the Lossie is about 150,000,000 gallons.

I am therefore of opinion that the pursuer has not made out his case, and is not entitled to the interdict asked.

I should add that towards the close of the argument it was not seriously maintained that the defenders are not entitled to impound water running in undefined channels which has not been drawn from the Lossie, but which, if not intercepted, might find its way into it. The case of *Chasemore* v. *Richards* seems to be conclusive against any such contention.

The Court adhered.

Counsel for the Pursuer—Shaw, Q.C.—Laing. Agents—Philip, Laing, & Harley, W.S.

Counsel for the Defenders — Sol-Gen. Dickson, Q.C.—W. D. Murray. Agents——Boyd, Jameson, & Kelly, W.S.

Friday, November 25.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

PARISH COUNCIL OF KILMARNOCK *v.* PARISH COUNCIL OF LEITH.

Poor — Residential Settlement — Double Residence — Married Man Absent from Home for Purposes of Work or Business —Poor Law Amendment Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 76.

A workman who was employed in Kilmarnock from October 1888 to May 1896 resided in that parish with his wife and family till May 1891. At that date, his rent being in arrear he was unable to obtain another house in Kilmarnock, and took a house for his wife and family in Ayr, where they resided till Martinmas 1892. He himself during that period lived in Kilmarnock, partly in lodgings and partly in the house of a relative, and was in the habit of visiting his family every Saturday, returning to his work on Sunday night. At Martinmas 1892 he brought his family back to Kilmarnock, and resided with them there till they became chargeable in 1896.

Held (*dub.* Lord Kinnear) that for the period during which the pauper's family resided at Ayr, his residence was in that parish, and that accordingly he had not acquired a residential settlement in Kilmarnock.

An action was raised by the Parish Council of the Parish of Kilmarnock against the Parish Council of the Parish of Leith for payment of the sum of £14, 9s., being the amount expended by the pursuers on behalf of a pauper named Mrs Margaret Miller and of her husband James Miller from the 27th May 1896 to the 2nd July 1897. In consequence of her husband's illness Mrs Miller became chargeable in May 1896, and received aliment from the pursuers till July of that year. She again became chargeable in November 1896, and

along with her husband, who became chargeable in December, was relieved until July 1897.

The pursuers alleged that James Miller was born at Restalrig, in the parish of Leith, and that he had never acquired a residential settlement.

The defenders maintained that he had acquired a residential settlement in the parish of Kilmarnock, and that accordingly he was chargeable to that parish.

The decision of the case came to turn entirely upon the question whether the acquisition by Miller of a residential settlement in Kilmarnock was interrupted by the period of eighteen months from Whitsunday 1891 to Martinmas 1892, during which his wife and family resided at Ayr in the circumstances stated by the Lord Ordinary.

The Lord Ordinary (M'Laren) on 1st March 1898 pronounced the following interlocutor:—"Finds that James Miller did not acquire a settlement in the parish of Kilmarnock, and that his birth settlement is in the parish of Leith: Therefore decerns against the defenders in terms of the conclusions of the summons," &c.

Opinion.—"The question is whether the pauper James Miller is chargeable on the rates of the parish of Leith, his birth settlement, or whether he is chargeable on the parish of Kilmarnock by reason of industrial residence there for the prescribed period of five years.

"There is no dispute as to the facts of the case. Miller, who was a witness in the cause, was for some time in the army, but was discharged in 1884 at Ayr, which I understand was the depot of the regiment in which he was serving. Thereafter he was employed as a miner, working successively at Kilmarnock and at Kinghorn, in the county of Fife, and again at Kilmarnock. But as regards the present question, the only facts necessary to be considered are those which relate to the period from 11th October 1888, when Miller obtained employment at Kilmarnock, to 21st May 1896, when Miller's wife and children were relieved by Kilmarnock parish, being admittedly proper objects of parochial relief. If Miller had resided in Kilmarnock during the whole of this period of seven and a half years, or had resided there for five years continuously, he would be chargeable on Kilmarnock parish. But, first, he did not have a residence at Kilmarnock until November 1888, because during the few weeks of his employment preceding the Martinmas term his wife and family lived at Ayr. This point is of no materiality in the case, and I only notice it because it is a fact in the man's history. But in May 1891 Miller had to leave his house at Kilmarnock because his rent was in arrear, and for this reason he was unable to get another house in Kilmarnock. Miller's wife then went to Ayr, where she lived with the children from Whitsunday 1891 to Martinmas 1892. During this time Miller visited his wife and children every Saturday, returning to his work on Sunday night. From Martinmas 1892 until parochial relief was given, Miller resided with his family at Kilmarnock. If we exclude the period of eighteen months during which the wife and children resided at Ayr, while Miller himself was working at Kilmarnock, Miller did not acquire an industrial settlement, because his residence at Kilmarnock would then be reduced to two discontinuous periods, the first of two and a half years, the second of less than four years. But for Leith it is argued that the period from Whitsunday 1891 to Martinmas 1892 ought to included, because Miller was physically resident in Kilmarnock during six days of every week of that period.

"Now, unless we are to throw over the doctrine or fiction of constructive residence, I am unable to admit that Miller's bodily presence at Kilmarnock contituted a residence for the time when he was maintaining his wife and family at Ayr. The principle of constructive residence, first applied to the cases of sailors and fishermen, who are necessarily absent from their homes for a considerable part of every year, was afterwards extended to the case of a shepherd or farm-servant whose home is at such a distance from his place of work that he can only make weekly or periodical visits to it—*Greig* v. *Miles*, 5 Macph. 1132; *Moncreiff* v. *Ross*, 7 Macph. 331; *Cruickshank* v. *Greig*, 4 R. 267; *Harvey* v. *Rodger*, 6 R. 466; *Beattie* v. *Stark*, 6 R. 957. Miller's case is of this description. If we suppose that instead of bringing his family back to Kilmarnock at Martinmas 1892, Miller had continued his way of life for three and a half years longer, working at Kilmarnock for six days in the week and visiting his family in Ayr at the week's end, then on the authorities, he would have acquired a residential or industrial settlement in Ayr. But there can only be one residential settlement for the purposes of poor-law administration, and if during the disputed period Miller was legally or constructively resident at Ayr, that fact excludes the supposition of a residence at Kilmarnock during the same period. While the period of residence at Ayr was not nearly sufficient to found a settlement in Ayr, yet if there was residence there within the meaning that has been put on the 76th section, it follows that the residence in Kilmarnock was interrupted.

"I do not think that it would serve any useful purpose to review the authorities as to constructive residence. It is open to counsel to argue that in some particular case the principle has been unduly extended or wrongly applied. Speaking for myself, I should not feel bound to decide for constructive residence merely because the facts of the particular case were very similar to the facts of a decided case, because the decision of a question of fact does not necessarily or usually constitute a precedent. But the principle of constructive residence has been admitted as a qualification of the 76th section of the Poor Law Amendment Act, and, as was to be expected, the decisions make no distinction in this question between the cases of acquiring and losing a settlement. It must also be said that the principle of constructive

residence has been liberally applied. Now, there is nothing peculiar in the character of the double residence in the present case. It is just the case of a labouring man whose employment is in one parish while his home or family residence is in another and not very distant parish. It may be said that it was not from choice, but from the force of circumstances, that Miller placed his family at Ayr while he was working at Kilmarnock. But as much might be said in most of the cases where constructive residence has been recognised. It does not seem to be material (in the sense of raising a distinction) whether, as in the case of the farm-servant, the wife and children are left in a different parish because there are no cottages on the farm, or whether, as in the present case, there are houses to be had but the man is in bad credit and unable to procure one. The language of the 76th section does not suggest that choice has anything to do with the acquisition of a settlement, nor has this element been at all considered in the decisions so far as I can discover.

"Again, I do not think that Leith can take any benefit from the case of *Simpson*, 16 R. 18. In that case the person whose settlement was in question left the parish, where he was in the course of acquiring an industrial settlement, when a few weeks were wanting to complete the statutory period of five years. The residence was continued by his wife, because a house in the new parish of residence could not be immediately procured. But this residence on the part of the wife was held to be unavailing, because the husband had no intention of returning, and did not, in fact, return; and therefore the wife's residence in such circumstances was not equivalent to the residence of the husband. The case is of the nature of an exception or limitation to the conception of constructive residence, restoring the statutory rule in its literal sense. But, as already said, I do not find anything exceptional in the facts of the present case; they appear to me to fit the category of constructive residence as explained by the decisions. For these reasons I am of opinion that the pauper had only a birth settlement, and that the parish authority of Leith is liable to relieve Kilmarnock of the cost of maintaining the pauper and his family, in terms of the summons."

The defenders reclaimed, and argued—For the whole period required by the statute Miller had been actually and personally resident in Kilmarnock. The Lord Ordinary had attached too much importance to the fact of the residence of his wife and family, and had overlooked the question as to his intention whether he ever intended to leave Kilmarnock, which it was clearly proved by his after residence there that he never did. The doctrine of "constructive residence" had never been carried to the length to which the Lord Ordinary had carried it. It implied that there must have been a pre-existing residence by the pauper himself, and if there were such it might be eked out when he was absent by the residence of his wife and family for the purpose of eliding interruption. But it could not be maintained that residence could be established in a parish by leaving the pauper's wife and family there until he actually came in person. Accordingly, in all the cases cited by the Lord Ordinary there were these elements existing—personal residence by the pauper in a parish to begin with, followed by his absence from it, and the leaving there of his wife and family. This view was confirmed by the fact that as a rule the plea of "constructive residence" was only set up by the parish which was trying to make out that a settlement had been acquired, not as here by the parish negativing that contention. See cases cited by the Lord Ordinary, and *Hewat* v. *Hunter*, July 6, 1866, 4 Macph. 1033; *Wallace* v. *Beattie & Highett*, January 6, 1881, 8 R. 345; *Greig* v. *Simpson*, October 25, 1888, 16 R. 18.

Argued for respondents—The case fell under the well-established rule laid down in the authorities quoted by the Lord Ordinary, viz., that the residence of a married man was for the purpose of settlement at the place where he had established a home for his family. That rule rested on the principle that the parish which benefited by the pauper's earnings should become liable for his support. The mere fact that he was earning his wages in Kilmarnock could not defeat the fact that his home residence was in Ayr. The facts of the present case were precisely those to which effect had been given in establishing this rule.

Lord President—At this time of day we have not to reconsider but to apply the doctrine of constructive residence in poor law cases. Examining the present case from that point of view, I have come to be of the same mind as the acting Lord Ordinary.

This married man established and maintained a house for his wife and children at Ayr, which is some eleven miles from Kilmarnock, where he worked. He was not living in separation from his wife, but in dutiful amity; he went to Ayr each week-end, and oftener when he was out of work, and each week he handed his wages to his wife. If we were to speak of this family collectively, there can be no doubt that the house and home was in Ayr. The man himself never had a house in Kilmarnock during the time in question. For a short time he was in a lodging-house; for most of the period in dispute he lived during the working week with his brother-in-law in the brother-in-law's one-roomed house. He paid nothing for this, and he was there out of good will, and on a purely precarious tenure. He had no tie to Kilmarnock except his work. To my thinking it matters little or nothing that the reason the house was at Ayr and not at Kilmarnock was because they were poor and could not get credit at Kilmarnock.

Now, if we were to reopen past legal controversies, there is a great deal to be said against these facts proving the case of Kilmarnock under the terms of the 76th

section of the Poor Law Act. On the other hand, it is a perfectly intelligible theory that a married man resides where he establishes his wife and family, and where he himself lives as much as the ties of work or business allow, although during the working part of the week he sleeps where he finds his work, and this seems to me to be the law as applied to the facts before us. I am for adhering.

LORD M'LAREN—I adhere to the opinion which I gave in support of the interlocutor under review. In giving judgment in that sense I proceeded entirely upon the authorities, and it seems to me that in any questions of settlement the best rule is the one which is most clearly and certainly applied. It is no doubt desirable to proceed upon principle, but when a rule is once fixed and consistently applied, its operation on the average affects all parties nearly alike, and there is great inconvenience in disturbing it. The rule that a married man is to be taken to have his residence for the purpose of settlement at the place where he has established a house for his family is a very convenient rule, because the facts admit of immediate ascertainment. It is not an unreasonable rule, because the place where a man has his house is generally the place where he spends his money, and that parish which eventually has to support him is the one which has got the benefit of his industrial residence.

LORD ADAM—Under pressure of recent decisions I concur.

LORD KINNEAR—I have very great difficulty in agreeing, because I think that the decision proposed by your Lordships will carry a somewhat artificial rule a great deal further than it has been carried hitherto, and I have some apprehension that it will impose upon the statute a meaning the very reverse of that which its words convey. All that I understand to be established by the case of *Greig* v. *Miles*, and the series of decisions which followed it, is that the residence required to satisfy the conditions of the 76th section of the Poor Law Act need not be actual throughout the whole course of its duration, but may be made up, to a certain extent, of shorter or longer periods of constructive residence; and that only means that the man need not be personally present in the parish at every moment of the statutory period without interruption in order to make it his parish of residence in a reasonable sense. He might go away occasionally, as most people do go away occasionally from their house, but if he retains his home, and his family continues to live in it, his occasional absence does not break the continuity of his residence. That doctrine has certainly been applied in very extreme cases, but still it goes no further than this, that periods of occasional absence may be taken into account along with periods of actual residence. I do not think it has been held hitherto, but it rather appears to me that your Lordships are now holding, that the entire statutory period may be made up from beginning to end of what is called "constructive" residence — that is to say, in order to satisfy the conditions of the Act the pauper need not personally and actually reside in the parish at all in order to acquire a settlement. I think that is going a step further than has been hitherto gone. I quite appreciate the materiality of the contention that the wife and family had their place of residence in another parish, and also that the actual residence of the pauper himself was partly in a lodging-house and partly in the house of a relative, and again that the wages may have been spent by the wife and family in another parish; but then I think none of these circumstances answer the test prescribed by the statute itself. I think we have not to consider whether the purpose of the statutory requirement was that the parish which had the benefit of the man's earnings should support him when he became a pauper, or that the parish which had the benefit of his work should support him. That is not a question which the statute raises for our consideration, because all that is proposed by it is the perfectly simple test of residence in point of fact. Then again, I think that hitherto the importance of the family residence being in the place which has been abandoned for a time by the pauper arises from its indication of a fixed intention to treat the residence where he has left his wife and family as his real home. But I am unable to see that the cases afford any authority for the proposition that where a man has lived and worked in a parish with an intermission of a period of eighteen months, during which he himself has continued to live and work in that parish, but has found a house for his wife and child in a neighbouring parish, and gone to see them on Saturday nights, he is to be treated as a resident in the parish where his wife has been living, and not in the parish where he himself has been living. At the same time, I entirely assent to what Lord M'Laren said, that it is much more important in cases of this kind that rules which have once been established should be consistently followed, than that any one particular case should be decided upon principles which may commend themselves to the judge or judges who happen to decide it; and since your Lordships are all of opinion that previous cases rule this one, and establish a principle from which this cannot be excepted, I am content that my difficulty should be overruled.

The Court adhered.

Counsel for Pursuers — Guthrie, Q.C.— Deas. Agents — Macpherson & Mackay, S.S.C.

Counsel for Defenders—Salvesen—C. D. Murray. Agents—Snody & Asher, S.S.C.