and the clerk to the process is the judge of the sufficiency of the caution. Now the impropriety of the Sheriff-clerk judging of the sufficiency of the caution which he himself must find is manifest. Or he may be called on to consign a sum of money in the hands of the clerk of Court—*i.e.* in his own hands.

All dangers would be avoided, the process would go on, and be conducted with perfect propriety, and with due regard to all requisite safeguards, by adopting the proposed remedy, viz., where a Sheriff-clerk is a party to a cause in his own Court, another wholly independent should be appointed in his place.

In this view I am compelled to the conclusion that, while recalling the interlocutor of the Sheriff, we ought to recal all the interlocutors pronounced in the case, and dismiss the petition.

Lord Deas—The ground of the Sheriff's judgment is—(*reads interlocutor*).

Now, if the law were so, I think the disadvantage arising from such a state of the law would be quite as much or more injurious to the public than to the Sheriff-clerks themselves. There is no better instance of that than the present case. I agree with your Lordship, however, that that is not the law. A Sheriff-clerk may undoubtedly bring an action in his own Court. The whole question is, In what way should the process be conducted? I agree in thinking that the best way is that proposed by your Lordship. That is not the only way, however. For we have the high authority of Stair to the effect that the Sheriff-clerk depute might act in such a case. A man does not cease to be a responsible public officer because he has been appointed to the public office he holds by his principal, and if the depute in this case had not been the partner in business of his principal, I don't see why he should not have acted.

I have some difficulty, however, in nullifying the proceedings *ab initio*. There is a great deal to be said for the view that there was a necessity for having the interlocutor of citation to set the process going. I do not mean necessity, in the absolute sense that nothing else could have been done, but I am not surprised that it did not occur to the Sheriff on the moment that he ought to appoint another clerk. There might in such a case have been that amount of necessity which would justify the course adopted. With these explanations and qualifications, however, I am not prepared to differ from your Lordship in the conclusion you have arrived at.

Lord Ardmillan—I cannot say that I quite agree with the view taken of this case by the Sheriff. I am not prepared to decide that the Sheriff-clerk is not entitled to institute an action in the Sheriff-court of the county, or that he cannot defend himself in the Sheriff-court. I think that would be a penalty on the office, and, as your Lordship says, a denial of justice to the Sheriff-clerk which the law does not sanction. Justice—and accessible justice—the prompt, available, and cheaply attained justice of the Sheriff-court—cannot be refused to the Sheriff-clerk. It is not in that aspect that the question is here presented to my mind. The Sheriff-clerk cannot act as agent in the Sheriff-court. He does not do so here: an agent, or procurator of Court, appears for him.

To me the true question appears to be—whether the duties of Sheriff-clerk in this cause, where the Sheriff-clerk was a party, have been competently and legally discharged? The office and duties of Sheriff-clerk are certainly important, and he must be neutral, and independent of both parties. I think that he himself cannot competently and legally act as Sheriff-clerk in his own cause. But another clerk may be appointed by the Sheriff: the occasions on which, on account of the Sheriff-clerk being a litigant, another clerk requires to be appointed, cannot be numerous. When they occur the Sheriff must provide the remedy. It is in his power to do so, and he should be asked to do so. Such an occasion is an emergency—and the appointment by the Sheriff of a Sheriff-clerk for the temporary purpose of meeting that emergency, seems to be a reasonable and competent proceeding; and it was so considered by the Court in the case of *Galbraith*. But the remedy must be provided by the interposition of the Sheriff. The Sheriff-clerk, who in his own case cannot personally act, cannot himself appoint his substitute to act for him. It was his part, as a litigant in the Court where he was clerk, to apply to the Sheriff, and crave from him the appointment of a person to act as clerk in the emergency. I rather think a motion might have been sufficient.

Not having done so—but having devolved the duties of clerk on his own depute, representing himself—his *alter ego*—I cannot think that the procedure was correct: one of the protections by which law guards the neutrality and independence of judicial procedure is weakened,

In expressing this opinion I do not rely on the fact of the Sheriff-clerk depute being partner in business of the Sheriff-clerk, though that is a complication of the matter. My opinion rests on the more general ground, and is in accordance with that which your Lordship has stated.

Lord Jerviswoode concurred.

The Court accordingly, regarding the whole proceedings in the petition as incompetent, recalled all the interlocutors pronounced in the case, and dismissed the petition.

Counsel for Petitioner—Orr Paterson. Agents—J. & A. Peddie, W.S.

Counsel for Respondent—R. Maclean. Agents—J. & R. Macandrew, W.S.

Saturday, February 8.

FIRST DIVISION.

FERRIER *v.* KENNEDY.

Poor—Minor—Settlement.

Held that a minor is emancipated by the death of his father, and has no claim against the parish of his father's residential settlement.

This was a Special Case for Andrew Ferrier, Inspector of Poor for the parish of New Monkland, and for D. M. Kennedy, Inspector of Poor for the parish of Auchinleck.

The facts of the case were as follows:—John Syme, the pauper whose settlement was the matter in dispute in this case, was born on 2d August 1841, at Clarkston, in the parish of New Monk-

land, where his father then resided. In the year 1846 the father, with his family, including the said John Syme, removed from Clarkston to Lugar, in the parish of Auchinleck, where he resided until his death on 11th April 1860. At the date of his death, he (the said John Syme's father) had a settlement by residence in Auchinleck.

On 8th May 1860 the said John Syme enlisted at Kilmarnock, and he thereupon left Scotland, and remained with his regiment on foreign service until the month of February 1872, when he was discharged as unfit for service in consequence of sun-stroke. Upon his discharge he returned to Scotland, and there he became chargeable as a pauper to the parish of Kilmarnock in February 1872. John Syme was unmarried, and during his absence from Scotland on foreign service, from 1860 to 1872, he had no house or place of residence in the parish of Auchinleck. It was admitted that the pauper had no settlement in the parish of Kilmarnock, and the question submitted to the Court was, whether the parish bound to support the said pauper was the parish of Auchinleck or the parish of New Monkland.

It was argued for the parish of New Monkland that the pauper had a settlement in Auchinleck. His father had on his death a residential settlement there, and this settlement passed to his minor son (the said John Syme), who was not forisfamiliated, but was living in family with his father. The pauper did not loose that settlement by non-residence, because (1) he only resided in this country three weeks after his father's death before he enlisted and went abroad; and (2) his residence abroad was not the kind of non-residence by which a settlement is lost, it being compulsory absence on military service.—*Greig* v. *Miles and Simpson*, July 19, 1867, 5 Macph. 1132; *Craig* v. *Greig and Macdonald*, July 18, 1863, 1 Macph. 1172; *Thomson* v. *Morris*, July 19, 1850, 12 D. 1266; *Lasswade, Kirk Session of*, v. *Newlands, Kirk Session of*, March 4, 1844, 6 D. 956; *Hume* v. *Pringle*, Dec. 22, 1849, 12 D. 411; *Robertson* v. *Melville*, Feb. 24, 1860, 22 D. 892; *M'Lennan* v. *Waite*, June 28, 1872, 44 Jur. 496.

It was argued for the parish of Auchinleck that the parish of the pauper's birth was liable. The pauper being a minor at the time of his father's death did not take the residential settlement which his father had, but, being forisfamiliated by the death of his father, had after that no settlement but his own. Even if the father's settlement had passed to the pauper, he had lost it by non-residence, for the Poor Law Act made no distinction between non-residence in this country and non-residence through residence abroad.

At advising—

LORD PRESIDENT—The pauper in this case became chargeable in February 1872, when he was thirty-one years of age. He had acquired no residential settlement, and therefore one would think that there was no doubt that the parish liable was the parish of his birth. But it is said that he was in possession of a derivative settlement, which he had not lost by his twelve years' residence abroad, as that residence had been in the capacity of a soldier on service. Such a doctrine is very suspicious, the result showing unsoundness.

That, however, is not sufficient to enable us to give judgment in this case, but we must examine the facts.

When his father died the pauper was between eighteen and nineteen years old, and his father had at the time of his death a residential settlement in Auchinleck. It further appears that a few weeks after his father's death the pauper enlisted and went on foreign service, where he remained for nearly twelve years. It is not stated that after his father's death the pauper resided with his mother; if he had done so that might have made a difference.

I am of opinion that upon the death of his father the pauper was necessarily emancipated, and that at the date of his emancipation his settlement was in the parish of his own birth. I conceive that the principle laid down first in *Craig* v. *Greig and Macdonald*, and in *M'Lennan* v. *Waite*, is conclusive. I said in the latter case that "a person who has no residential settlement in his own right is chargeable on the parish of his own birth if he is above the age of puberty; and as soon as he does attain the age of puberty, his father being dead, his settlement is in his birth parish in preference to any derivative settlement which he previously had." I am quite prepared to repeat that opinion, and when I delivered it I understood the Court to concur. That rule is directly applicable in the present case, and the parish of the pauper's birth, that is the parish of New Monkland, is bound to support this pauper.

LORD DEAS—This is a case in which the father dies when the son is nineteen years of age. It is not stated whether or not the mother survived the father, but I go upon the assumption that she did not, because if she did, a fact of such importance would have been stated in this case. If the mother had survived the father, that fact might in some circumstances have made all the difference, because the mother's survivance might have raised a totally different question, and what we decide in this case must not be held to exclude question in a case where a surviving mother, with a family below majority but above pupilarity, and consequently forisfamiliated, brings a claim against the parish of her husband's residential settlement, both for herself and for her family.

But that is not the case here, and the effect of the father's death was not to pauperise his family, or at least his son, with whom we are now dealing; but one effect of the father's death was undoubtedly to emancipate the son. It is not stated whether the son maintained himself during the three weeks between his father's death and his own enlistment, but it is not said that he did not do so; so, if we take the case to be that the son fell into poverty at the end of the three weeks, and not twelve years after, still he would fall into poverty after emancipation, and would have to go upon his own parish. In the case of *M'Lennan* v. *Waite* there was no doubt thrown on that doctrine by Lord Kinloch, whose opinion I adopted. What Lord Kinloch wanted to guard against was the stringent application of the rule to the case of a family being pauperised when part of the mother's family. But in a case of this sort, when there is no pauperism at the date of emancipation, the person afterwards becoming pauper must go upon his own parish, and in this case it is the parish of his birth.

It is not necessary to deal with the question whether a residential settlement is lost by military service abroad.

LORD ARDMILLAN—There are two simple facts in this case which leave no room for doubt.

The first is, that actual pauperism only took place in 1872, when the pauper was thirty years of age, and the time of poverty is the true time to look to in order to ascertain what the pauper's settlement is. The second fact is, that this pauper was nearly nineteen years of age when his father died.

If when his father died the pauper had been a pupil, it would have been very important to know when the mother died, for a pupil has no settlement of his own—a pupil is not a pauper but a burden upon his parent. But when the pupil becomes a minor he has the capacity to acquire and hold a settlement for himself. So when the minor is forisfamiliated by the death of his father, he is no longer a member of his father's family, but *sui juris*, and must go on the parish of his own settlement. In this case the only settlement of his own which the pauper ever had is the parish of his birth, and that parish is chargeable.

It is not necessary to enter upon the question of absence, but no case has been yet decided to support the proposition that a man without home or family in this country can retain or acquire a settlement here by residing abroad.

Lord Jerviswoode concurred.

The Court held that the parish of the pauper's birth was bound to support the pauper.

Counsel for the First Party—Black. Agent—Curror & Cowper, S.S.C.

Counsel for the Second Party—Watson and Balfour. Agents—Webster & Will, S.S.C.

TEIND COURT.

Monday, February 17.

JOHN IRVINE AND OTHERS *v.* SIR JOHN HERON MAXWELL, BART.

Church—Erection of Quoad Sacra Parish Act, 7 *and* 8 *Vict. c.* 44, § 8.

A petition was presented, setting out that a manse and stipend had been provided in conformity with Act 7 and 8 Vict. c. 44, § 8, and proposing to take parts from five adjoining parishes, in order to erect a *quoad sacra* parish. *Held*, that as the erection would interfere with the adjoining parishes, and was unnecessary, it was the duty of the Court to refuse the application.

Observed by the Lord President, that it was not enough that the stipend and manse should be provided; the parties must show that there was a want of spiritual supervision.

The Rev. John Irvine and others, as trustees for the constitution of Kirtle church, in the Presbytery of Annan, presented this petition for the erection of that church as a parish church, and for the designation of a district in connection therewith. They proposed for this purpose to take certain portions from the parishes of Annan, Dornock, Middlebie, Kirkpatrick-Fleming, and Brydekirk.

The proposed disjunction and erection had been approved by the Presbytery of Annan.

The district contained a resident population of about 1000, and was about six miles long by three broad.

Sir John Heron Maxwell of Springkill and other heritors, along with the Rev. John Anderson, minister of Dornock, the Rev. John Murdoch, minister of Kirkpatrick-Fleming, and others, appeared as respondents, and stated objections to the boundaries proposed by the petitioners, and also to the site of the church and manse. Sir John Heron Maxwell stated that the proposed erection was quite unnecessary and highly inexpedient, and that the district was, both from its size and conformation, unsuited for being erected into a parish *quoad sacra.*

The respondents stated that the total area proposed to be erected into a *quoad sacra* parish amounted to 7710 acres, whereof 1980 were taken from the parish of Annan, 760 from Middlebie, 4470 from Kirkpatrick-Fleming, and 500 from Dornock. The population was about 1300. The new parish would thus, in extent and population, be larger than the adjoining parishes from which it was taken.

Several debates took place on the question as to the boundaries of the proposed *quoad sacra* parish, and as to the site of the church and manse.

At advising—

Lord President—It is much to be regretted that so much discussion has taken place in this case; for great expense must thereby have been caused to the parties. This, however, was inevitable from the opposition which was made to the erection from parties interested. The ministers of two neighbouring parishes which were affected, and also the heritors whose interests were involved in a serious manner, have been heard to-day on the question which of two districts—one larger and the other smaller—is to be assigned. We have not had any argument to-day as to the expediency of the erection at all.

Now, in sanctioning the erection of parishes the Court has to exercise jurisdiction of a very unusual and difficult kind. It is too much taken for granted that if the parties have provided a church, and have made arrangements for the payment of the minister, it follows as a matter of course that the Court will assign a district. If any such idea does prevail, the sooner it is put an end to the better, for that is not the object of the Act of Parliament. The object of the Act is to provide spiritual and pastoral care for districts which were destitute of it, either because they were situated apart from the parish church, or on account of the large number of the population, or some such similar circumstance. The erection here proposed is in a part of the country which is not populous, and it is proposed to separate the lands from parishes which are not very populous. The necessity for the erection is not very apparent to my mind. There is no part of it very distant from a parish church, except one part of Annan, but it is not of great extent. The part taken from Middlebie is somewhat larger, but the parish church is adjoining. The parish of Dornoch is very small, but it is proposed to take away a part of it. The effect of this would be to make the proposed parish larger than the parish of Dornock. Neither Kirkpatrick-Fleming nor Middlebie is in need of any such relief. The only parish which affords a feasible case is Annan, the north part of which is some distance from the parish church. But the distance there is not very great. I have therefore great difficulty in holding that any necessity exists for the proposed erection.

This view of the case is confirmed by the opposition which has been raised by the ministers of the