Ordinary thinks that the bankrupt cannot be allowed to litigate, to the effect of excluding the defenders, without finding caution for expenses. The question relates solely to the defenders ranking and voting in the sequestration, and the distribution of the estate therein. The very object of this action is to exclude the defenders from the sequestration, and this would only enlarge the rights of other creditors, and would not, so far as appears, affect the bankrupt himself. The Bankrupt Act places the distribution of the estate in the hands of the creditors, and they are all satisfied that the present defenders are entitled to rank. The bankrupt cannot attempt to invert this without finding caution for the expenses of the litigation.

"If, indeed, there had been any question as to the bankrupt's personal protection or liberation from jail, the Lord Ordinary would have allowed such question to be raised without caution—at least this is the general rule, although the matter is always one of discretion. But there is no such question here. The bankrupt's person is not threatened or said to be in danger, and the only averments on record are made in the interests of the other creditors. The Lord Ordinary has therefore ordered the bankrupt to find caution, and he has given him very ample time for doing so.

". . . The only averment which appears relevant for probation is, that the deed No. 167 of process was finally delivered to the pursuer as a discharge, and that it was thereafter wrongfully cancelled without the pursuer's consent or authority. The Lord Ordinary rather thinks that a proof of these averments might be allowed, without the necessity of a separate process of proving the tenor. The deed itself is extant, although the signatures have been deleted, and the Lord Ordinary inclines to think that it would be pressing a point of form beyond its legitimate effect to insist on a separate process of proving the tenor."

The pursuer reclaimed.

Argued for the defender—(1) The pursuer has no title to insist in the action, either as trustee or executor, or as an individual. (2) The pursuer being an undischarged bankrupt, is not entitled to sue the present action without finding caution for expenses incurred and to be incurred in this process.

At advising—

LORD PRESIDENT—The pursuer sues in this action in three different characters. First, as sole surviving trustee of the late John M'Alister; second, as executor of the late Peter M'Alister; and, third, as an individual, and for his own right and interest. The object of the action is to have it declared that he was exonered and discharged of certain debts in respect of a deed of discharge.

The Lord Ordinary found that the pursuer has no title to sue either as trustee or as executor. He has not found him disqualified as a pursuer in his individual capacity, but finds that he cannot proceed with the action without finding caution for expenses, in respect that he is an undischarged bankrupt. I am not able to agree with the Lord Ordinary on all these points. As to the first point, the Lord Ordinary has made some mistake in confusing the question of title with the merits. He holds that the pursuer has failed to instruct any debt due to the late M'Alister's trustee. But that is merits. If he has no claim for debt, of course he cannot succeed; but he produces, in support of his claim as trustee an extract trust-deed, which is surely sufficient in the question of title As to his title as executor, that stands in a totally different position, for he produces no evidence of any kind to instruct this character. So on that point I agree with the Lord Ordinary. There remains the question whether, suing, as he is entitled to do, in his individual capacity, he ought to be allowed to do so without finding caution? This is always a delicate question. No doubt the general rule is that an undischarged bankrupt cannot sue without finding caution. But there are exceptions to this rule, some of them well-established exceptions. I cannot say that this falls within the latter class. Everything depends upon the circumstances of the case. Now here the action is founded upon a formal deed, which has been signed, and bears to be a discharge by the trustee on the pursuer's sequestrated estate, and certain creditors, among whom are the defenders. But this deed is in a peculiar position, for in it the signatures of the granters are cancelled, as well as of the witnesses to their signatures. There is no explanation of how this came about. The deed was recovered from the agent of the former trustee, but the trustee himself is dead. The pursuer not only alleges that the deed in question was executed, but also that it was delivered. And his explanation of how it is not in his own possession is simply that the trustee got it on some pretext or other, and never returned it. I think the pursuer should have the opportunity of proving the delivery of the deed in an unmutilated condition, and therefore am willing to accede to his demand to be allowed to proceed without finding caution—qualifying the judgment, however, by the words *in hoc statu.*

LORDS DEAS, ARDMILLAN, and JERVISWOODE, concurred.

Counsel for Pursuer—C. Smith and M'Kechnie. Agents—Drummond & Mackersy, S.S.C.

Counsel for Defenders—J. M. Duncan. Agent—David Dove, S.S.C.

Wednesday, November 12.

SECOND DIVISION.

SPECIAL CASE—THE INSPECTORS OF POOR OF THE PARISHES OF ST CUTHBERT'S AND CRAMOND.

Poor—Settlement.

A pauper born in B parish, removed with his parents when two years old to A parish, in which his father acquired a residential settlement. The father died, and the mother after having been for some years chargeable on A parish, married again. The pauper having become insane, without previously acquiring any other residential settlement,—*held* that A parish was chargeable for his support.

This Special Case was submitted for the opinion and judgment of the Court by the Inspectors of the parishes of St Cuthbert's and Cramond. William Gardiner, the pauper whose settlement was the subject of dispute, was born on 18th July 1853 at Granton Mains, in the parish of Cramond, where his father was then residing. The pauper's father removed at Whitsunday 1855 into St Cuthbert's

parish with his family, and he and they continued to reside in that parish till 1860. On 12th September in that year the father died, having thus acquired a settlement by residence in St Cuthbert's, in virtue of which his widow and five children (of whom the pauper was one) became chargeable to that parish on 3d October 1860, and continued so until 6th March 1863. At this date Gardiner's widow married James Brownlee, a labourer. Since this second marriage she has resided in St Cuthbert's; but ever since September 1863 her husband has resided apart from her, in regular employment in various parishes other than St Cuthbert's, and has visited her only about four times a year for a few hours at a time. Brownlee was born in the parish of Whitburn, and, at the date of his marriage, did not possess, and has never since acquired, any residential settlement in any other parish.

The pauper (William Gardiner) continued to reside with his mother after his father's death until 10th February 1871, when he enlisted in the 8th Hussars, being at that time of the age of seventeen years and seven months. From the time of his mother's second marriage he had earned 2s. 6d. a-week for some time as a message boy, and thereafter, in various employments, from 5s. to 8s. a-week, until he enlisted. After serving ten months with his regiment in Dublin, he was discharged as unfit for service, and became chargeable on St Cuthbert's as a pauper lunatic on 14th September 1871, at which date he was eighteen years and five months old. He was placed in the Royal Edinburgh Asylum by the parish, to which he continued to be chargeable until 19th May 1872, when he was removed by his mother. Becoming again chargeable on 13th August 1872, he was again removed to the Royal Edinburgh Asylum, where he still remained chargeable to the parish. For the purpose of the case it was admitted that liability to support the pauper rested either upon the parish of St Cuthbert's or that of Cramond; but it was maintained for St Cuthbert's—(1) that the settlement which the pauper might have had in that parish at the date of his father's death came to an end either in 1863 by his mother, with whom he lived and on whom he was dependent, having then lost a settlement in St Cuthbert's both for herself and him, or in 1867, by the pauper attaining the age of puberty; (2) that his second residence in St Cuthbert's until he left it in 1871 was in itself insufficient to give him residential settlement therein; and (3) that his residence in St Cuthbert's while in pupillarity could not competently be combined with his residence after puberty, so as to entitle him to a residential settlement therein. The Counsel for Cramond parish, on the other hand, maintained that St Cuthbert's was liable, in respect that the pauper had, when he became chargeable to that parish, a residential settlement therein.

Authorities—*M'Lennan* v. *Waite*, 10 Macph. 908; *Greig* v. *Adamson*, May 2, 1865, 3 Macph. 575; *Kirkwood* v. *Mann*, 9 Macph. 695; *Craig* v. *Greig & M'Donald*, July 18, 1865, 3 Macph. 1172; *Hume* v. *Pringle*, 12 D. 411.

At advising—

Lord Cowan read the following opinion:—

The question raised by this Special Case is, Whether, in the circumstances set forth, the parish of St Cuthbert's—the alleged residential settlement of the pauper—or the parish of Cramond—the birthplace of the pauper—is liable for his support?

Although born in Cramond parish in July 1853, the pauper removed with his parents at Whitsunday 1855 to the parish of St Cuthbert's. His father died in September 1860, at which date the pauper, then living in family with his parents, was still in pupillarity. His mother, then a widow, became chargeable to the parish of St Cuthbert's in October 1860, with five children, including the pauper, and continued to be chargeable until March 1863, when she married a second husband, James Brownlee, whose settlement is admitted to have been Whitburn, the parish of his birth, but against which the parties concur in stating no claim lies. Notwithstanding her marriage, the pauper's mother continued to reside, and still resides, in St Cuthbert's, her second husband having work elsewhere, in several districts, and visiting his wife only on rare occasions, about four times a year, and then for a night at a time. The pauper continued to reside with his mother in St Cuthbert's from his father's death in 1860 until February 1871, when he enlisted in the army, being then seventeen years and seven months old. He served with his regiment for a period of only ten months, and became chargeable to St Cuthbert's as a pauper lunatic in December 1871.

These are the material facts—and, *first*, it is certain that on the death of the pauper's father in 1860 he had acquired a residential settlement in the parish of St Cuthbert's; *second*, it is also certain that this settlement innured to his widow and family, and that in affording them relief till the widow's second marriage in 1863 St Cuthbert's discharged only its legal obligation; *third*, that although the mother's second marriage transferred her settlement to her second husband's parish from St Cuthbert's, the fact of her residence with her family, including the pauper, having continued uninterruptedly in that parish, establishes that the residential settlement acquired by his pupil children through their father in St Cuthbert's, was not destroyed through want of residence in the parish; and *fourth*, the facts farther establish that no other residential settlement was acquired by the pauper through his mother—her residence having all along continued to be in St Cuthbert's.

The propositions contended for on the part of the parish of St Cuthbert's are set forth in article 11 of the Special Case. It is not disputed by Cramond that the second and third pleas there stated are well-founded. It is the first proposition maintained by St Cuthbert's which raises the question between the parishes. That at his father's death the pauper had a residential settlement derived from him in St Cuthbert's is certain; but this settlement, it is said, was lost either by his mother's second marriage in 1863, or by the pauper attaining the age of puberty in 1867. As regards the first contention, no authority is referred to in support of it. Although it has been decided that a mother may after the father's death acquire by residence for five years a residential settlement which will enure to their children, there is no authority for holding that if no such new settlement by residence has been acquired, her pupil children lose their derivative residential settlement through the father by the mere fact of her second marriage. This view was not pressed at the discussion. The argument maintained was that on the pauper attaining the age of puberty in 1867, the father being dead, the derivative residential settlement came to an end, and that, consequently,

upon his becoming chargeable in December 1871, Cramond, as the parish of birth, was legally liable for his support.

It must be kept in view that the residential settlement which pupil children living with their father acquire derivatively from him becomes their settlement in *their own right*, and any question occurring after the father's death as regards the retention or the loss of such residential settlement, is to be judged of on that footing. Throughout the decisions, and especially from the case of *Lasswade* downwards, this has been recognised in the opinions of all the Judges by whom those decisions were pronounced. And therefore, when the question arises under the 76th section of the statute, either as to the acquisition of a residential settlement, or as to its non-retention or loss, the same principles are to be regarded in its solution, whether it is the personal residence of the pauper himself on which the settlement depends, or the settlement of the pauper's father, from whom derivately it has been acquired by the pauper. And I am not aware of any authoritative opinion until very recently pronounced to the contrary.

The case of *Adamson* v. *Barbour*, as decided in the House of Lords in 1854, on social considerations very fully explained by the Lord Chancellor and Lord Brougham, negatived the views which had been taken in this Court, that where the father of a family is dead, or has deserted them leaving them in poverty, that a distinction prevailed between residence and birth settlements. It was found that the whole family of pupil children and their mother, wherever born, fell to be supported by the father's parish, whether his settlement was derived from residence or from birth. I do not find, however, that, excepting in that class of cases, all distinction between derivative settlement was by that judgment put an end to. On the contrary, there have been repeated decisions since that judgment recognising the principle that a derivative residential settlement continues with the child acquiring it until it has been lost under the 76th section of the statute through non-residence, or until a new settlement has been acquired through the child's own residence in another parish. The case of *Hume* v. *Halliday*, in 1849, affords an apt illustration. There the derivative residential settlement was held to have been lost through non-residence for the period required by the statute, and on that ground the parish of birth was found liable. And it may be noticed that in the Lord Ordinary's interlocutor, to which the Court adhered, the residential settlement acquired by the pauper through the father is expressly stated to be "in his own right and as his own proper settlement;" and Lord Jeffrey in reference to the same matter states "that it is actual residence," and not properly derivative by presumption of law. The cases also of *Allan* v. *Higgins*, 1864, and *Beattie* v. *Adamson*, 1866, proceed upon a recognition of the same principle; and I may farther refer to the case of *Fraser* v. *Robertson*, June 5, 1867, which, having regard to the circumstances of the case, could not have been decided as it was except upon principles altogether hostile to the views contended for on the part of St Cuthbert's. The note of the Lord Ordinary (KINLOCH) and the opinion of the Judges of the Second Division are quite in accordance with the other decisions to which I have referred.

The cases on which the argument for St Cuthbert's was mainly founded were (1) that of *Craig*, in July 1863, (2) the case of *M'Lennan*, June 1872, and (3) the case of *Ferrier* v. *Kennedy*, Feb. 1873. Now the first of these cases was a competition between the birth parish of the father and the pauper's birth parish, and though in the other two cases opinions were expressed which appear to go the length of holding that a minor *pubes* and forisfamiliated cannot found on any derivative settlement from his father, whether that settlement be by residence or birth,—I cannot hold that question to have been decided by the case of *Craig*, while, as your Lordship has fully explained, the decisions in those other cases are capable of being arrived at on other grounds.

On the whole, in the circumstances of this case, I think judgment must be given against St Cuthbert's.

LORD BENHOLME—My opinion coincides. I think that in this case the derivative settlement acquired through the father was lost neither by puberty nor by the second marriage of the pauper's mother. I think that it must accordingly govern your Lordships' decision.

LORD NEAVES—I am of the same opinion. The pauper in this instance started with a good residential settlement derived from his father. It would be an extravagant proposition to maintain that when a pauper's mother marries again the pauper follows the settlement of his step-father. The only effect of a mother's marriage might be to prevent a person becoming a pauper at all, but such a marriage could not alter the pauper's settlement.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

> "Find that the parish bound to support the said pauper is the parish of St Cuthbert's; and find the parish of Cramond entitled to expenses."

Counsel for Inspector of St Cuthbert's—The Dean of Faculty (Gordon) Q.C., and Marshall. Agent—E. Mill, S.S.C.

Counsel for Inspector of Cramond—Watson and Burnet. Agents—W. & J. Burness, W.S.

Friday, November 7.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

EARL OF MINTO *v.* REV. JAMES PENNELL. (LOCALITY OF BALLINGRY).

Teind—Surrender—Valuation—Over-payment—Decree of Locality.

Where an heritor's teinds were valued, and he had continued to make over-payments under a subsequent final decree of locality for more than forty years,—*held* that his right of surrender was not thereby barred.

The Earl of Minto was one of the heritors of the parish of Ballingry, of which the Rev. James Pennell was minister. The teinds of the parish were valued by decree of approbation of the High Commission, dated 24th March 1637, but under a final decree of locality pronounced in 1791 Lord Minto and his authors had been in use to make