satisfy the law on the other point, viz., that the debt is resting-owing. That will still remain to be established by the creditor. It has, indeed, been often contended that where a written order is given the debt is of a description to which the triennial prescription does not apply, as being a debt founded on a written obligation. But this plea the Court has uniformly disregarded, on the principle that the Legislature meant to apply the triennial prescription to all debts in which there is not such a regular written constitution of the obligation as naturally requires a written discharge." The law laid down there I adopt here. The case put by Mr Bell is weaker than the case we have here—for he puts it that the defender has given a written order, but here the only writing is an offer made by the pursuer; in the case before us there is no writing by the defender, in Mr Bell's case there is. But the result of both is the same, namely, that there is not a written contract requiring a written discharge. It is therefore subject to the triennial prescription. I think, therefore, that the Sheriff's interlocutor must be recalled.

LORD DEAS—I concur. The view of the Sheriff, and the arguments presented to us upon it, are ingenious. It is plausibly maintained that this was a written contract, there being a written estimate on the one side which was adopted by the other. If that had been made out, it might not have been affected by the triennial prescription; as it is, I cannot see how it escapes it.

LORD SHAND—This is a case of considerable importance. It is an attempt to include under debts not affected by the triennial prescription a class of obligations not hitherto so included, and which if admitted would very much limit the operation of that statute. There is no case recorded where a written obligation is said to have been granted where it was not granted by the defender or those authorised by him. The cases referred to by Bell, viz., *Ross* v. *Shaw* and *Douglas* v. *Grierson*, are *a fortiori* of the present, because in both there was writing by the defender showing what the articles ordered had been, and in the latter, in addition, a carrier's receipt for the goods; and yet the Court held there was no written obligation.

The argument upholding the judgment of the Sheriff was founded mainly on the case of *Blackadder* v. *Milne*, but your Lordships have taken opportunity in the cases of *White* v. *Caledonian Railway Company* and *Barr* v. *Edinburgh and Glasgow Railway Company* to limit the operation of that case, and to intimate that you would not be disposed to apply the principle which there received effect in circumstances not clearly the same in all essential particulars.

LORD MURE was absent.

The Court recalled all the interlocutors pronounced in the Inferior Court, and sustained the defence founded on the Statute 1579, c. 83, and in respect thereof assoilzied the defender.

Counsel for the Pursuer (Respondent)—Kinnear—Patten. Agents—J. & J. Patten, W.S.

Counsel for the Defender (Appellant)—Trayner—Moncreiff. Agents—Carment, Wedderburn, & Watson, W.S.

Tuesday, November 19.

FIRST DIVISION.

[Sheriff of Banffshire.

WATSON (INSPECTOR OF BOHARM) *v.* CAIE (INSPECTOR OF FORGLEN) AND MACDONALD (INSPECTOR OF KEITH).

Poor—Settlement—Acquisition of Industrial Settlement where Party Incapable of Earning Livelihood.

A pauper had been deaf and dumb from her birth, and likewise suffered from great bodily weakness, the result of an accident in childhood. She was further irritable in temper, and lazy in disposition, so as to be quite incapable of earning her livelihood, although she had been in service for a time. She had been an inmate of a deaf and dumb institution for some years, and had subsequently been taught dressmaking; she could answer questions put to her by the Sheriff through the slate with fair intelligence. *Held* that she was not legally incapable of acquiring a settlement by residence.

Poor—Interference to Prevent the Acquisition of a Settlement—Incidental Absence.

An illegitimate pauper resided with her aunt, her mother being in service. In order to prevent the acquisition of a settlement in the parish of the aunt's residence, the chairman of the board, who was also factor to the aunt's landlord, interfered. The pauper, who did not at the time require parochial relief, was in consequence sent to live in another parish with the aunt's daughter, but after an absence of eleven months returned. *Held* that in these circumstances the residence had not been interrupted.

In this case the inspector of poor of the parish of Boharm concluded alternatively against the inspector of the parish of Forglen and the inspector of the parish of Keith for the repayment of certain alimentary sums paid by him in respect of a pauper named Isabella Smith.

The pauper was the illegitimate daughter of Isobel Grant, domestic servant at Carnousie, in the parish of Forglen, and was born in the parish of Keith in 1841. She was deaf and dumb from birth, and for long suffered from spinal irritation and rheumatism. It was further averred by the pursuer, and also by the defender the inspector of Keith, that she was incapable of earning her own subsistence, having been imbecile all her days. She resided in the parish of Boharm with her aunt, a Mrs Edwards, from the 20th March 1865 until the date of the raising of this action on 10th April 1875, with the exception of a period of about eleven months, from Whitsunday 1869 to Whitsunday 1870, during which she lived in the parish of Inverkeithny with a daughter of Mrs Edwards. Her mother's settlement was in the parish of Forglen.

The pursuer, the inspector of Boharm, pleaded, *inter alia*—"(2) Either the parish of Forglen, as the residential settlement of the pauper's mother, and her own parentage settlement, or the parish of Keith, as her own birth settlement, is liable to the pursuer as concluded for in the summons, with expenses."

The defender the inspector of Forglen pleaded, *inter alia*—"(7) The inspector of Boharm having in 1869 resorted to an unfair device in causing the removal of Isabella Smith at or about Whitsunday 1869 to Inverkeithny, with the intention of fraudulently preventing her acquiring an industrial settlement in Boharm, contrary to the Poor Law Amendment Act and instructions of the Board of Supervision of April 1846, is barred, *personali exceptione*, from pleading that absence; and being in the full knowledge that the mother of Isabella Smith was supporting her adequately from her own means, any relief granted to her or through the aunt Mrs Edwards was relief granted in *mala fide*, and did not prevent Isabella Smith acquiring an industrial settlement in Boharm."

The defender the inspector of Keith pleaded, *inter alia*—As against Forglen—"(2) Assuming Isabella Smith to have been a proper object for parochial relief, her settlement follows that of her mother, viz., Forglen, in respect of her having been incapable of ever acquiring a settlement in her own right." As against Boharm—"(5) The said Isabella Smith's residence in Boharm from 1865 to this date having been purposely interrupted by pursuer in breach of the statute and rules of the Board of Supervision, and her absence from said parish during that period not having been voluntary on her part, but forced and through compulsion, the same must be held to have been merely incidental, and cannot bar her settlement in pursuer's parish, assuming that she was capable of acquiring such."

The Sheriff-Substitute (GORDON) after proof, found the inspector of Forglen liable, on the ground that the pauper though weak in body and of an ill-regulated temper was not insane, and was consequently capable of acquiring a settlement. He treated the question in dispute as lying entirely between Forglen, the mother's settlement, and Keith, the pauper's own birth settlement, and did not discuss the point raised by the seventh plea for Forglen and the fifth for Keith quoted above.

On appeal the Sheriff (BELL) recalled the Sheriff-Substitute's interlocutor, and found the inspector of Boharm liable, on the ground that the pauper had resided long enough in Boharm to acquire a settlement but for the absence of eleven months from Whitsunday 1869 to Whitsunday 1870, and that this absence was brought about by the illegal action of the Boharm parochial authorities. What that illegal action was appears sufficiently from the opinions of Lord Deas and Lord Shand *infra*.

The pursuer appealed, and argued—(*a*) Down to June 1870 the pauper had not acquired a settlement in Boharm, as she was absent for eleven months of the required period, and for that time in no way connected with the parish. The Sheriff had held, on the authority of *Brown* v. *Gemmel* and *Taylor* v. *Strachan and Brown*, that this absence, being caused by the devices of pursuer, or those for whom he was responsible, must be treated as if it had never taken place. But, in the first place, it was not proved that there were such devices; and secondly, admitting that they existed, it was quite a legitimate thing for parochial authorities to try to get a person who might possibly become a pauper, but who was not one at the time, sent out of their parish. In the cases relied on by the Sheriff the person was actually requiring parochial relief. (*b*) After June 1870 the pauper could not acquire a settlement in Boharm as she was in receipt of parochial relief. It was said that neither she nor her mother authorised the receipt of this relief, and that in point of fact she was not a proper object of relief. But she herself, whatever may have been the case as regarded her sanity, was unable to manage her affairs or to earn her own livelihood. Her mother never had taken any charge of her, and was too poor to support her. But her aunt, who had all along taken charge of her, had sufficient authority to apply for relief when she felt herself unable to continue the support which she had hitherto (without any obligation) given to her niece.

Argued for Forglen—(1) As against Boharm—Boharm could not found upon the interruption of eleven months, as it was brought about by their own devices — in particular by the action of Mr John Watson in his double capacity of member of the Parochial Board and factor for Lord Seafield, Mrs Edwards' landlord. But throwing out of account the notice of undue interference, this absence was in its nature incidental — the pauper went to reside with Mrs Edwards' daughter, intending to return to Mrs Edwards, and actually did return. Her connection with Boharm was never really broken. Further, Boharm was liable in that the pauper had resided there since Whitsunday 1870, and the relief given to the pauper's aunt for behoof of the pauper was improperly given. (2) As against Keith—The rule was that the parish of birth prevailed over that of mother's settlement unless the pauper was legally incapable from insanity. Now, here the whole evidence showed that though deficient in bodily power, and to some extent intellectually, the pauper was perfectly sane.

Authorities—*Brown* v. *Gemmel*, May 29, 1851, 13 D. 1009; *Taylor* v. *Strachan and Brown*, November 8, 1864, 3 Macph. 34; *Greig* v. *Ross*, February 10, 1877, 4 R. 465; *Craig* v. *Greig and Macdonald*, July 18, 1863, 1 M. 1172; *Hopkins* v. *Ironside and Wallace*, January 27, 1865, 3 Macph. 424; *Lawson* v. *Gunn*, November 21, 1876, 4 R. 151; *Walker* v. *Russell*, June 24, 1870, 8 Macph. 893; *Hay* v. *Paterson and Macdonald*, June 29, 1857, 19 D. 332.

Keith commented on the evidence to show that insanity existed, and otherwise adopted the arguments of Forglen.

At advising—

LORD DEAS—The first question that is raised in this case is — whether the alleged pauper Isabella Smith was a person capable of acquiring an industrial settlement by residence? and in regard to that question I do not suppose, on the whole, that your Lordships will have much doubt.

She was the illegitimate daughter of Isobel Grant, who was a cook in service at Carnousie, in the parish of Forglen. She—Isabella Smith, I mean—was born in 1841. She was deaf and dumb from her infancy, but she had a good deal of teaching. She was in the Deaf and Dumb Institution at Aberdeen, and was there taught to converse on her fingers. She was afterwards sent to learn dressmaking at Turriff, and there spent three years in being instructed in that department of industry. At the end of that time she went to live with her aunt Mrs Edwards in the

parish of Boharm, and she is living there now. She is peculiar in her temper, but she is strong and vigorous—she does a great deal of work, although she might perhaps have done more had she been willing. On the whole, I have no hesitation in thinking that she was capable of acquiring an industrial settlement if she has resided in the parish for the requisite period without interruption.

Now, it is not questioned that she would have lived in the parish of Boharm for a sufficient term, had it not been that she was absent from it for eleven months. The question is, whether these eleven months are to be deducted?

It is quite settled by decisions, which I need not quote, that it is not necessary for the pauper to spend every month of the period, necessary to acquire a settlement in, the new parish. There may be an absence which will not destroy the effect of the residence. Your Lordship in the chair at one time doubted this, but, after the cases to which I have referred, your Lordship has now acquiesced in the principle — although of course it is always a question of circumstances in each case.

This pauper was living at her aunt's house as her home. As her mother was in service and could not receive her, her aunt very kindly kept her, and so far as we can see she would have continued so to keep her had she not been interfered with. But it is proved that the inspector more than once expressed a wish that she should not continue in the parish, and in particular that Mr John Watson, who had been a member of the Parochial Board since 1869, and latterly its chairman, and who is also factor to Lord Seafield, interfered in this way, and the consequence of his interference plainly was that the pauper was sent out of the parish for eleven months and then returned. The house in which the aunt lived belonged to the Earl of Seafield, and Mr Watson is his Lordship's factor. I think it is sufficiently proved that Mr Watson lead Mrs Edwards to understand that either the pauper must be sent out of the parish, so as to prevent the acquisition of a settlement there, or they must leave the cottage in which they had lived so many years. Mr Watson does not exactly say so, but I am satisfied that it was in consequence of what he said that Isabella Smith was sent away.

Now, it is rather a strong thing that a girl should be sent away in this manner from her home—and I do not think that it is any less her home that it was her aunt's house she was living in, and not her mother's. But I am not going to make any reflections upon the conduct of the Parochial authorities. The question is, whether these eleven months are to be deducted? The reason urged for deduction here is undoubtedly different from the reason in the cases that were cited. But I am very humbly of opinion that the Poor Law Board are not to be allowed to prevent the acquisition of a settlement through interference of this kind —interference which amounts to a threat. Indeed this case seems to me to be *a fortiori* of the former ones. I am therefore of opinion that Boharm is liable.

Lord Shand—I am of the same opinion. The first question raised by the defenders is that the pauper was insane and really in a state of perpetual pupilage, and so incapable of acquiring a settlement by residence. But I am of opinion that that has not been made out. She has shown herself to be a person of some intelligence. She is capable of answering questions put to her by the Sheriff, not perhaps as a person of ordinary intellect would do, but still with some clearness.

The second question is, Whether the residence in Boharm was for five years. As your Lordship has pointed out, there have been a great many cases in which absence has not prevented the acquisition of a settlement. These are extremely well commented on in the last edition of Mr Guthrie Smith's Book on the Poor Law, page 331, and I do not know any better statement of the law than by your Lordship in the chair in the case of *Crosby* v. *Taylor and Greig*, Oct. 21, 1869, 8 Macph. 39, quoted by Mr Smith—"It could never be meant that the statute should be so construed as that a person could not be away in pursuit of his ordinary business, or for an occasional visit of pleasure, or on account of some accidental circumstance interrupting the continuity of his residence. In short, the statute must be read with reference to such a kind of absence as either accidentally or incidentally occurs in the life of everyone." Now, the circumstances make it quite clear where this pauper's residence was. Her mother was in service, and never seems to have had a home. The next place was her aunt's house, and it was here that her home was. She lived there during the necessary period with the absence of eleven months.

Now, I think that this absence will not interrupt the continuity of her residence. Although she was away, her home was still in Boharm. I think her absence was accidental. I do not mean accidental in the sense that Mr Watson did not intentionally interfere to interrupt the continuity of her residence. Nor, on the other hand, do I put my judgment on this, that the actings of the Board were such as to render their parish liable. But I say that, looking to the account that is given of the cause of the interruption, I think it is plain that the absence of the pauper was what may fairly be called accidental. I am therefore for holding Boharm liable.

Lord President—I concur.

Lord Mure was absent.

Counsel for Watson (Inspector of Boharm), Appellant—The Dean of Faculty (Fraser)—Keir. Agent—George Andrew, S.S.C.

Counsel for Caie (Inspector of Forglen), Respondent—Balfour—J. P. B. Robertson. Agent—Alexander Morrison, S.S.C.

Counsel for Macdonald (Inspector of Keith), Respondent—Asher—J. A. Reid. Agents—William Duncan, S.S.C.