On this sole ground I am of opinion that the appeal must fail.

LORD LINDLEY—Section 23 of the Finance Act 1894 relates to the application of the Act to Scotland, and clause 14 declares that "the expression 'settled property' shall not include property held under entail." Whatever difficulty there may be in determining whether these words include money directed to be laid out in land in Scotland and to be entailed according to the laws of that country, the expression "property held under entail" in a section relating solely to Scotland cannot, in my opinion, apply to land in some other country, nor to money to be laid out in the purchase of land in some other country, even although such land is to be held upon trusts creating interests similar to those created by a Scotch entail.

Now, the trust-disposition or will in this case undoubtedly created a trust to lay out money in the purchase of land in Scotland to be held under entail according to Scotch law, but the direction contained in this will was very materially altered by the codicil. The two instruments together impose upon the trustees an obligation to lay out money in land, but that land need not be in Scotland, it may be in England. The trustees are to exercise their own judgment, not only as to when they will invest the money in land, but as to the country in which the land to be bought shall be situate. Even if, therefore, the money can be regarded as converted into land, it is, in my opinion, impossible to treat it as converted into land before it is actually invested or agreed to be invested in such land. In other words, the money whilst uninvested cannot be regarded as "property held under entail" within the meaning of section 23 (14) of the Finance Act, nor can money be regarded as "an entailed estate" within the meaning of clause 16 of the same section.

It is so well settled that there is no conversion of land into money or of money into land, if the trust for conversion is not imperative, that it is quite unnecessary to cite authorities on the point. They will be found collected in Lewin on Trusts, pp. 1158 and 1163, edition 10. I do not understand that there is any difference between the law of Scotland and the law of England on this subject, and consistently with this principle the money in question in this case cannot be regarded as land in Scotland.

In this view of the case it becomes unnecessary to determine the more difficult question whether, if the original trust-disposition had not been varied by the codicil, the money thereby directed to be invested in land in Scotland and to be entailed would or would not have been "property held under entail" within the meaning of section 23, clause 14, of the Finance Act 1894. I have, however, carefully considered this question, and I concur in the conclusion arrived at and expressed by my Lord Robertson in his judgment, which has removed the doubts I at one time entertained on this part of the case.

I am of opinion that the appeal fails, and ought to be dismissed with costs.

Interlocutor appealed from *affirmed*, and appeal *dismissed* with costs.

Counsel for the Pursuer (Respondent and Appellant) — Solicitor-General (Dickson, K.C.)—A. J. Young. Agents—Solicitor for Inland Revenue for England, and Solicitor for Inland Revenue for Scotland.

Counsel for the Defenders (Reclaimers and Respondents)—Dean of Faculty (Asher, K.C.)—J. C. Lorimer—R. G. Seton. Agents Martin & Leslie, and Blair & Cadell, W.S.

Thursday, May 15.

(Before the Lord Chancellor (Halsbury) and Lords Macnaghten, Shand, Davey, Brampton, Robertson, and Lindley.)

PARISH OF RUTHERGLEN *v.* PARISH OF GLASGOW.

(*Ante*, March 19, 1901, vol. xxxviii. p. 528, and 3 F. 705.)

Poor—Settlement—Residential Settlement—Deserted Wife—Acquisition of Residential Settlement by Deserted Wife.

Held (*rev.* decision of the Court of Session) that while the marriage continues undissolved the deserted wife of a man who has a settlement in Scotland cannot acquire an independent residential settlement for herself.

Gray v. *Fowlie*, March 5, 1847, 9 D. 811, *approved* and *followed*.

Subsequent authorities *reviewed* and *commented on per* Lord Robertson.

This case is reported *ante ut supra*.

The parish of Rutherglen, pursuers and appellants in the Courts below, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The one question which appears to me to be cardinal in the determination of this appeal is whether it is true to say that when a husband deserts his wife she can until the dissolution of the marriage acquire a settlement different from that which was her husband's at the time he deserted her. I am of opinion that she cannot.

The line of authorities quoted by the respondents are for the most part irrelevant to this question, inasmuch as with one exception they were cases in which the husband had no settlement at all—either no settlement or no settlement in proof before the Court.

That a wife upon her marriage acquires her husband's settlement cannot be disputed, and while the marriage continues that settlement must remain. It is obvious therefore that if I am right in treating the authorities quoted to your Lordships as being applicable to cases where the husband either had none or was assumed to have

had none, the question as I have propounded it did not arise.

Underlying both the reasoning and the determination of the judgment appealed against is the proposition boldly laid down by Lord Kinnear, that the desertion of a wife by a husband is the death of the husband, or as his Lordship says, putting it in another form, there is no dispute as to the general law that where a husband deserts his wife and family, desertion in a question as to parochial relief is equivalent to death. I cannot help thinking that the use of that phrase in Poor Law Statutes has led to great misapprehension.

It is true enough the statute enacts that a destitute deserted wife may be relieved under the Poor Law as though she were a widow, but no Act has provided that she may acquire a settlement in her own right if she is deserted. And the statute does not make her a widow for all purposes, but simply provides that she may receive parochial relief as if she were a widow.

The singular result in this case would be that the deserted woman is a widow with a husband alive; she has neither applied for nor obtained parochial relief, and she is made a pauper with the maintenance of the children of the marriage under an arrangement made by her deserting husband.

The only doubt I have entertained has been in respect of the peculiarity of the law of Scotland as to the position of a deserted wife having authority to enter into contracts for herself; but I am satisfied by the decision of the majority of the Scotch judges in *Gray* v. *Fowlie* that that authority does not extend to creating for herself a settlement which shall have the effect of extinguishing the settlement of her husband—relieving him therefore of the obligation to support the children of the marriage, and depriving her of rights which the law has invested her with, and which are deemed to be destroyed by the wrongful act of her husband.

To my mind this is sufficient to dispose of the principle upon which the decision rests, and I am of opinion that the decision should be reversed with the ordinary consequences.

LORD MACNAGHTEN—I am of the same opinion. I have had an opportunity of reading and considering the judgment about to be delivered by my noble and learned friend Lord Robertson, and I agree in it entirely.

LORD SHAND — My noble and learned friend Lord Robertson has given me an opportunity to read and consider the full, and if I may venture to say so the interesting and very clear judgment he has prepared in this case, in which all the authorities in the law of Scotland touching the question of the position of a married woman deserted by her husband who has a subsisting settlement in Scotland have been cited and discussed. I entirely concur not only in the result of his Lordship's judgment but also in holding that the view that desertion is to be taken as equivalent to death and that the position of a deserted wife is, in its legal aspect the same as that of a widow, is not consistent with the authority of the case of *Gray* v. *Fowlie* and the other authorities which so strongly settle the principle that in Scotland a wife's settlement must be that of her husband. It would be an idle waste of time on my part to examine again the cases which his Lordship has so fully gone into and I have only to add that I agree with his Lordship's opinions on these cases in the valuable historical view of them which he presents.

Taking the question raised as one to be determined on Scotch law only, I am therefore of opinion that desertion by a husband of his wife is not equivalent to his death, and that the appeal should be allowed, and the defence repelled, with costs.

LORD DAVEY—I concur in the judgment which has been proposed by my noble and learned friend on the Woolsack, and I can state my reasons for doing so very shortly. I find that the exact point which has been argued in this appeal was decided by the whole Court of Session so long ago as the year 1847 in the case of *Gray* v. *Fowlie*, and I cannot find that any decision at variance with that case has ever been given in the Scottish Courts. I find also in the case of *Adamson* v. *Barbour* in this House a strong expression of opinion that the principle of derivative settlement ought to be maintained with all its consequences. It is true that that case is not a direct authority in the one before your Lordships because it was a question relating to minor children only, and the contest was between the father's place of settlement when he left the country and the place of the children's birth. But the grounds assigned by Lord Cranworth for his opinion appear to me as they did to Lord Young to support the view, which I have taken of the present case. Against the decision in *Gray* v. *Fowlie* there have been quoted to us a certain number of *dicta* by learned judges, and a principle is said to have been laid down which is in conflict with the principle of the decision in *Fowlie's* case. I will not trouble your Lordships by a detailed examination of those cases which were very fully discussed at the bar, and will, I believe, be examined and commented on by my noble and learned friend Lord Robertson. They are said to have established as a proposition of Scottish law that in its effect on the status of a married woman desertion by her husband is equivalent to his death. Now, that may have been an appropriate and accurate way of stating the effect of the law in the cases then before the Court, but it is not a legal proposition or even an accurate statement of the law generally. The adoption of it as a formula to solve all questions as to a deserted wife's settlement is only another illustration of the danger of elevating an epigram into a principle of law. I am therefore of opinion that the motion proposed is in accordance with the weight of authority in Scottish law, and as it also commends itself to my judgment I have no hesitation in expressing my

concurrence. I will only add my satisfaction in knowing that my conclusion is in accordance with that arrived at by so experienced and learned a judge as Lord Young. I entirely accept the reasons given by him.

LORD BRAMPTON—In March 1899 Catherine, the wife of Alexander Faulds, became chargeable to the parish of Rutherglen, from which she received weekly relief to the amount of £4, 10s. This sum Rutherglen seeks to recover from the parish of Glasgow, upon the ground that Glasgow was the place of her last legal settlement.

Both husband and wife were born in Glasgow, and each had a birth settlement there, but on their marriage the wife's settlement, by very familiar law, merged in that of her husband. Several children were the issue of that marriage. They of course acquired the settlement of their father, who for anything we know still retains his birth settlement.

The whole family resided together in Glasgow until the 16th October 1893. On that day the husband deserted his wife and children, leaving them chargeable to the parish of Glasgow. They were received into the poorhouse of that parish, where they remained until the 31st January 1894, when the wife voluntarily left the House, taking with her her eldest daughter aged 10 years, but leaving behind her the four younger children still chargeable. On the 26th of October the husband, for his desertion of his wife and family, was committed to prison for 60 days, which expired on the 24th of December. After his release he does not appear to have visited his wife or his children, but being still liable to maintain them he negotiated with the Inspector of the Poor of Glasgow, and on the 17th of January 1894 agreed to pay him five shillings weekly towards their support, the inspector undertaking to relieve him from further responsibility. Since that day the four children have been maintained by the parish of Glasgow, though boarded out of the poorhouse. Their father, with no great regularity, made weekly payments under the agreement until the 12th of May 1896, since which day he has made no contribution towards their support. His occupation was that of a miner, and his earnings were somewhat uncertain. I collect from the case that he worked and lived in the neighbourhood, though his precise address seems to have been doubtful. He was last heard of at Paisley on the 25th of August 1896. But in a parish book for the year 1898 I find an entry touching the children to this effect — "Father living in cohabitation with another woman; mother unfit to support." Nothing more is disclosed as to the husband.

As to the wife, the mother of the children, it appears that shortly after leaving the poorhouse she made her way with the eldest daughter to the parish of Rutherglen, where she obtained work and continued to reside, supporting herself by her own industry until the 13th of March 1899, when she became chargeable to and was relieved by that parish.

In this action Rutherglen seeks to recover from Glasgow, as the place of her legal settlement, the amount of the relief they have given her. Glasgow repudiates the claim on the ground that since coming to reside in Rutherglen she had lost her husband's settlement by gaining an independent settlement for herself in that parish by continuous residence therein without parochial relief for a period of more than three years, under section 1 of the Poor Law (Scotland) Act 1898. The learned Judges by whom this case was heard decided by a majority that the contention of the parish was right, and this appeal is against that decision.

The first matter to be considered is whether the wife had during her husband's life capacity to acquire any independent settlement other than that she derived from him. The ground upon which it was broadly contended that she had such capacity was, that there was a well-settled principle applicable to the Poor Law of Scotland that a deserted wife during desertion is in the same position as a widow—that is, *sui juris*—and therefore may during desertion acquire a residential settlement for herself.

I cannot agree that any such principle exists to the extent claimed. To some extent I grant that a woman deserted by her husband may during his desertion of necessity be treated and dealt with as a widow. But it is in my opinion against every principle of the law affecting parish relief, both in England and in Scotland, to recognise the ability of a married woman having a living husband, from whom she has derived a settlement in the county in which she is residing—and which settlement he still retains—to abandon that settlement and gain a new and independent settlement in her own right—and for herself only—for certainly neither husband or children could share it with her. Not a single judgment can be cited in which prior to the present case such a settlement has been directly held to be valid either in England or in Scotland. No statute can be found to sanction it, and we have been referred to no work of authority which declares the recognition of the few *dicta*, and as I think erroneous opinions, which have been called to our attention. I purposely abstain from commenting upon those cases cited from the Courts in Scotland, because having just read the judgment of my noble friend Lord Robertson, I find he has so thoroughly done so that further comment would be supererogatory. I will content myself by simply stating that the origin and reason of the law which decrees that when a woman who before marriage has acquired a legal settlement marries a man who has also acquired a legal settlement, she by such marriage merges her own settlement in that of her husband, is to avoid the separation of husband and wife, which the law does not permit, and the origin and reason for decreeing that the issue of that marriage shall take the settlement of the parents is that they may be under the care and protection of their

parents until they become emancipated and get a new settlement for themselves, and to prevent their separation from their parents in the meantime. These objects would be utterly defeated if in such a case as the present, the husband having deserted his wife and children, the wife could "as a widow" acquire a new settlement for herself which she could not extend to her supposed dead though really living husband, nor to her children who had acquired the settlement of their living father, for it is not suggested that they are to be treated as fatherless, and that the settlement they acquired from him died with him, while in fact the husband and father was alive and possibly gaining a new settlement for himself. To my mind the possibility of such a state of things gives to the contentions of the respondents something approaching an appearance of absurdity. Such being my opinion it is unnecessary to consider whether, even had the law permitted, the wife would have acquired any settlement in Rutherglen—as to which I have grave doubts. I agree in thinking that this appeal ought to be allowed, with costs.

LORD ROBERTSON—For the clearer discussion of the important general question raised by this appeal I intend to assume, without reservation, that Alexander Faulds had deserted his wife from and after 16th October 1893. By the time she became chargeable she had resided for the statutory period (without begging or receiving relief) in the appellants' parish; and if it be legally possible for the wife of a living Scotchman who himself has a parochial settlement in Scotland to acquire an industrial settlement for herself in a different parish from his, and so to relieve her husband's parish, then the appellants are liable. But the starting point of the case is that the respondents are the parish of the husband's settlement, and what they have got to make out is that they are freed of their liability for his wife by the fact that he deserted her, for, but for the fact of his desertion, it is not, in the meantime at least, maintained that her separate residence in Rutherglen would of itself avail. Why this distinction should be drawn, and what is the special virtue of desertion in releasing the husband's parish of his liability to maintain his wife are, however, questions which it is difficult to evade, and which will recur in what I have to say.

The question before your Lordships' House is simplified by the clearness with which it is stated in the opinions of the learned Judges. What their Lordships have held is, to quote the words of Lord Kinnear, that "it is settled now in law that the desertion by a husband of his wife is the death of the husband, and that the desertion by the husband puts the wife in the position of earning a residential settlement for herself, because it enables her or compels her to earn her own living, and to earn her own living as if she were an unmarried woman or a widow." Now, there is certainly some show of authority for this proposition, although of itself it sounds rather startling, and although the boldness of its expression invites criticism. But while the majority of the Seven Judges whose decision is under review may have been right in thinking themselves bound by the more recent instead of the earlier statements of the law on this subject, I am almost sorry that so strong a Court as was constituted to consider this question did not critically examine the grounds upon which the formula rests, for they might ultimately have deemed themselves free to act on their independent judgment. The very careful argument to which your Lordships have listened has compelled such an examination by this House; and, as far as I am concerned, I am unable to support the judgment appealed against.

First of all, the proposition that the desertion of a husband is equivalent to his death is no doubt suggested by the juridical position of a widow under the Scotch poor law. A widow, it had been held in the *Crieff* case in 1842 (4 D. 1538), can acquire a residential settlement for herself, and for children living with her, in a parish where she has resided industriously as the head of the family. This seems a very sound proposition, and for present purposes I have nothing to say against it. The woman in that case has no husband, she is under no disability, and there is nothing and nobody to prevent her acquiring a settlement for herself. But when it is proposed to assimilate to a woman having no husband a woman who has one, a question of the gravest principle arises.

Now, this question did arise in Scotland, five years after the *Crieff* case, in *Gray* v. *Fowlie*, 9 D. 811, in circumstances which for practical purposes are exactly the same as the present (the husband being a living but deserting Scotchman with a Scotch settlement), and it was decided by the whole Court, by nine to four, that a deserted wife was not in the same position as a widow, but presented a case distinguished by the most vital difference. The case was deliberately considered. All and more than all the arguments which have been submitted to your Lordships' House on the present occasion on behalf of the respondents are to be found in the judgments of the minority of the Court. It was then said that the law recognised in a deserted wife capacities to act independently in contracts and in suits, which made it reasonable that she should be held to acquire by her independent and industrious residence an independent settlement; and this view was supported by full illustrations of the common law. The reply of the Lord Justice-Clerk Hope shows that this view of the question, at its best, was fully realised and fully met. His Lordship pointed out, in a passage of great merit, that the Scotch law in the chapter referred to did no more than come to the aid of a deserted wife by relaxing her disabilities so far as it is necessary for the business of life in her isolated position, that the law in making such exception did not proceed on any view that the marriage was dissolved, or the woman's status altered, or that

third parties can plead liberation of obligations towards her because of the husband's illegal conduct in deserting her. The right to separately contract and separately sue, where this conduced to or facilitated her gaining her living while left alone, did not, in the view of the Lord Justice-Clerk and of the majority in *Gray* v. *Fowlie*, involve any change of liability on the part of third parties to support her as the wife of the deserter.

Now, if this case of *Gray* v. *Fowlie* stood alone, it is admittedly directly in point; it is a decision of the Whole Court; and it meets directly the argument on the common law rights of a deserted wife, which at your Lordships' bar has been indicated rather than developed.

No one can pretend that *Gray* v. *Fowlie* is not in diametrical opposition to the doctrine that desertion is the same as death, and what is said is that *Gray* v. *Fowlie* is no longer law. Now, I think it is true that in later decisions the Divisions of the Court of Session have disregarded this decision of the Whole Court, and have pronounced judgments inconsistent with it, but it has never been formally overruled. What is more, from *Gray* v. *Fowlie* down to the present time there has been no revival of the theory that the common law capacities of a deserted wife led to or opened the door for her acquisition of a residential settlement in the parish where she had exercised those capacities. As will immediately appear, the cases which set up the doctrine that desertion is death were not cases of a residential settlement at all, but of a maiden settlement. The theory that desertion is death may be good or bad, but it does not pretend to rest on the common law about deserted wives being able to contract and to sue.

How the newer and conflicting doctrine came into vogue was thus—A series of cases occurred in which, instead of the deserting husband having, as in *Gray* v. *Fowlie*, a Scotch settlement, he had (or was supposed to have) no settlement available for attack by the relieving parish. This was the case in *Hay* v. *Skene*, in *Gibson* v. *Murray*, and in *Carmichael* v. *Adamson*. What was said in those cases was that you must find a settlement somewhere, and that as the husband had none you must turn to the wife's own settlement (which in all these three cases was her maiden settlement), and not her residential settlement. Now, in passing, it may be observed that in more recent times there would probably not be held to be any compelling necessity to discover for the relieving parish some other parish liable to it, and also that where the husband was an Englishman it did not follow that the relieving parish had no remedy under the 77th section of the Act of 1845 merely because that remedy was troublesome. But I will assume, as the Court did, that the husband had no settlement, and this is past all doubt the ground of decision in the first and most referred to of these three cases — *Hay* v. *Skene*, 12 D. 1019. The theory of *Hay* v. *Skene* was that a wife does not lose her maiden settlement unless she gets one from her husband in exchange. This is most distinctly laid down by every one of the three Judges who were parties to the decision, and indeed is repeated to elaboration in the leading opinion. This, moreover, is stated as the justification for distinguishing the case from *Gray* v. *Fowlie*—"Here the wife has a direct interest in the question raised"—that is to say, in *Gray* v. *Fowlie* she got, and here she did not get, a new settlement. Now, it is observable that in the later development of the doctrine this case of *Hay* v. *Skene* was appealed to as settling that desertion was the same as death. In the reported judgments there is no direct expression of such a theory. The view taken was that the woman had her own settlement all along until she or her husband got another, whereas in *Gray* v. *Fowlie* she exchanged her own for her husband's. From the decision in *Hay* v. *Skene* Lord Moncreiff dissented on the ground that the proposed judgment was in conflict with the decision of the Whole Court in *Gray* v. *Fowlie*, and Lord Moncreiff (who had been in the minority in the decision of *Gray* v. *Fowlie*) says —"The principle is that a wife cannot be separated from her husband except by death, divorce, or other legal process, and must be considered as still part of himself, for whom no claim can be made except through him and against parties liable on his account. But the plea of the pursuer assumes a *persona standi* in the wife apart from her husband, to the effect of creating rights to one third party against another without any provision to that effect in any statute."

Gibson v. *Murray*, 16 D. 926, the second of the cases I have named, is distinguished from the present by two vital differences—first, it is the case of a husband having or assumed to have no settlement; and second, it is not a case of desertion at all but of death, the dispute being whether, the husband dead, the children took their own birth settlement or their mother's maiden settlement. Its bearing is therefore too remote to justify further comment.

Carmichael v. *Adamson*, 1 Macph. 452, has much more importance for several reasons. Here we have launched for the first time this maxim that desertion is equivalent to death, received as it was by Lord Justice-Clerk Inglis with the remark that he could "find for it no reasonable or intelligible ground." The question in the case was, whether an Englishman, assumed to have no settlement, having deserted his wife, the settlement of his child was that of its own birth or its mother's birth, and the Whole Court held that it was the latter. The minority was headed by the Lord Justice-Clerk Inglis, and included Lord President Colonsay.

I have grouped these three cases together because they are all cases where the husband had no Scotch settlement. We come next to a case—*Mason* v. *Greig*, 3 Macph. 707, where it was held to be doubtful in fact whether he had or had not a Scotch settlement, and the decision is to that extent

unsatisfactory. It was a First Division case in the time of Lord Colonsay. The respondents can fairly claim at least two of the Judges as acquiescing in the desertion-equal-to-death theory, and it is ascribed by Lord Ardmillan to *Hay* v. *Skene*.

Johnston v. *Wallace* is another case of a man without a Scotch settlement; he was an Irishman by birth, deserting his wife. It was decided on the authority of *Carmichael*, the Lord President Inglis remarking that he could not say that that decision obtained any support from him, "but it is now a settled rule."

Now, down to this point it cannot be said that there was any decision or even *dictum* to the effect that the same rule would be applied where the deserting husband had a Scotch settlement. But, curiously enough, this was said afterwards, *obiter* in *Gray* v. *Simpson*, 3 R. 642, by Lord President Inglis, who had most strenuously resisted the rule which he now yielded to, but it was said in a case in which the dispute was between the birth settlement of the husband (of course, Scotch) and his alleged residential settlement (also, of course, Scotch)—said, too, on the authority of a decision (*Beattie* v. *Greig*, 2 R. 923) about a deserting Englishman.

Gray v. *Simpson* accordingly seems a rather significant case. The "rule" that desertion is equal to death had now hardened into inflexibility and had lost all relation to its original principle. The question to be decided was whether by efflux of time (five years), during which the man was *de facto* absent from the parish where he had acquired an industrial settlement, he had not lost it; and the decision was that, having deserted his wife, he must be held to have been dead, and therefore not absent, and not to have lost the settlement. The great lawyer who thus followed and extended decisions from which he had vigorously dissented cannot but have seen in this application of the rule a new confirmation of his original opinion that it had "no reasonable or intelligible ground."

This closes the *catena* of cases on which the respondents rely. Of them all there is but one (*Mason* v. *Greig*) where on any possible view of the facts the deserting husband had a Scotch settlement. The most definite statement of judicial opinion in favour of the respondents on the case of a deserting husband having a Scotch settlement occurs, as I have shown, in a case where neither of the disputants represented either the wife's maiden settlement or her residential settlement, and where, therefore, the vital element in the present controversy was wanting.

In these circumstances, on a review of the authorities, *Gray* v. *Fowlie* stands out as the only decision directly determining the present question, and it is a decision of the Whole Court. Its authority might be adequate for the decision of the present appeal. But some of the more recent judgments on which the respondents rely are irreconcileable with *Gray* v. *Fowlie*, and the "rule" that "desertion is death" is in direct conflict with the principle of *Gray* v. *Fowlie*. It seems to me to be therefore impossible to avoid dealing with the question on a somewhat broader ground than at first sight might seem adequate for the disposal of the case.

It is not necessary to go back to the origin of the poor law, but it is as well to remember that while by the old Scots Acts birth and residence give statutory right to relief in the parishes of birth or residence, the two other modes of acquiring such rights, viz., parentage and marriage, are, in the words of the Lord Justice-Clerk Inglis (in *M'Crorie* v. *Cowan*, cited *infra*), "engrafted on statute law by the necessary application to the statutory system of certain essential and inflexible rules of the common law on the relations of husband and wife and of parent and child." We are taken, therefore, at once to the common law of husband and wife, and the general rule about such matters as are on hand is so clear that the only question is whether some exception arises where a wife is deserted. In order to judge of this question, however, it is needful to notice the ground of the general rule. For this purpose I am going to refer to a case, not cited at the bar, but highly relevant to the present question, in which this subject was considered by the Whole Court—the case of *M'Crorie* v. *Cowan*, 24 D. 723.

The question before the Court was, whether the Scotch birth settlement of the wife of an Irishman, resident in Scotland but having no settlement in Scotland, could be made liable for moneys expended on her maintenance in a lunatic asylum by the parish from which she has been sent to the asylum under the Lunacy (Scotland) Act. "To that question," said Lord Justice-Clerk Inglis, "I am prepared to give an unhesitating answer in the negative, on the broad and simple ground that a married woman is in law incapable *stante matrimonio* to have any settlement in her own right or independently of her husband. If her husband has a settlement, that also is her settlement. If her husband has no settlement, just as little has she. She is in my opinion as completely incapable of possessing a settlement in her own right during the subsistence of the marriage as she is to have a separate domicile from her husband, or to enjoy any other personal status or franchise in her own right." I turn to the joint opinion in the same case of the Lord President (Colonsay), and Lords Ivory, Curriehill, Ardmillan, and Kinloch, and I find this as the ground of their judgment—"The demand is resisted, *inter alia*, on the general ground that by her marriage with Donaldson her birth settlement was suspended or put in abeyance, and that it cannot revive so long as the marriage subsists; that being a married woman she cannot have any settlement of her own apart from her husband, or any settlement that is not his settlement; that her fate in that respect is linked to his; and that the circumstance which here occurs of her husband not having a settlement in any parish in Scotland does not exclude the applica-

tion of the general rule. We are of opinion that, in reference to the present case, this defence is well founded, that it is sufficient for the decision of the settlement, and that the parish of Monkton (the wife's maiden settlement) ought to be assoilzied."

I cite these considered utterances of eminent Judges as enunciations of the general law and its grounds, and the grounds are of high and peremptory principle. But occurring, as this case did, after *Hay* v. *Skene*, it is evident that *M'Crorie* was sent by Lord Justice-Clerk Inglis to the Whole Court because of *Hay* v. *Skene*, and in *M'Crorie* the Lord Justice-Clerk Inglis declared himself "unable to reconcile the judgment now to be pronounced with the decision in the case of *Skene* v. *Hay*, or to save the authority of that case in pronouncing this judgment." His Lordship examined the grounds of decision in *Hay* v. *Skene* and pronounced them unsound—"The loss of the maiden settlement does not depend on the acquisition of another settlement, but on the complete merging of the person of the wife in that of the husband by force of the marriage."

As I am referring to *M'Crorie's* case I may explain that, as it was not a case of desertion, its bearing on the series of cases now before the House is through the principles which it laid down. But historically it is quite clear that it went to the Whole Court because of that relation to *Hay* v. *Skene*, and again that *Carmichael* v. *Adamson*, which occurred the following year, and which, as already seen, was a case of desertion, went to the Whole Court because the Lord Justice-Clerk Inglis again saw that after the decision in *M'Crorie*, the rule of *Hay* v. *Skene* could only be re-applied, if re-applied at all, by the Whole Court. After *Carmichael* the Lord Justice-Clerk Inglis seems to have seen that nothing more could be done in the Court of Session, and he gave (in *Gray* v. *Simpson*) free play, or perhaps more than free play, to the rule.

The general principle then being that the wife is disabled by marriage from having a settlement of her own, how does the fact of desertion effect a change? I have already referred to the judgment of Lord Justice-Clerk Hope as containing an admirable discussion of this question, and I repeat that the common law in the case of separation goes no further towards enlarging the capacities of the wife than is required by the necessities of her efforts at self-maintenance. But all these legal facilities lead no distance towards changing her settlement, and the only reason suggested for that result, viz., the justice of making the community which conjecturally has profited by her residence bear the burden of maintaining her is founded on totally different considerations, not relating to the interests of the wife at all, but to the equities of parishes. But further, what is now asked is that we should hold that the fact of desertion operates as a release of the liability of the wrongdoer's parish, and deprives the wife of her claim against that parish. I cannot say that I think this a very rational proposal, but it is at least plain that it bears no relation to the aid given by the law to separated wives and can claim no support from that chapter of law. I may add that the inapplicability to the present question of the common law appealed to is further illustrated by the fact that that law so appealed to is at once too wide and too narrow for the present case. In some of the aids given to separated wives the law takes no account of the reason of separation, while in others the husband must be abroad in order to give rise to them.

It seems to me that the true principle to be applied in all these cases is that laid down by the Lord Justice-Clerk Inglis in the case of *M'Crorie*, that it is of universal application, and that adherence to this principle is the only solution of the numberless complications which otherwise arise. The same rule which was laid down by your Lordships' House in *Adamson* v. *Barbour* in the case of children applies to the wife. The wife is a part of the husband's family. The fact of the husband's desertion cannot avail to alter his own parish's liability for wife any more than for children. But the existence of children in the present case affords another test of the question. One of the children, Catherine, was living with her mother in the appellant's parish. In which parish is Catherine's settlement—in her father's or her mother's? This challenge was not met by the respondents, and their difficulty in answering it is increased by the fact that there are other four children who have not been living with their mother. Where is their settlement? The only way in which these questions can be answered rationally and in accordance with *Adamson* v. *Barbour* is by keeping the whole family to the settlement of its head.

I regret that it should be necessary to pronounce a judgment which may disturb a certain amount of practice, and I entirely share the reluctance of the learned Judges to unsettle poor law decisions. But what has already occurred has shown how an erroneous maxim once asserted is drawn into analogies and deductions alien even to its original conception. The only safeguard against such consequences is adherence to clear and dominant principles, and I have the satisfaction of knowing that the motion which I support does no more than re-establish the doctrine of the earliest and most authoritative Scotch case upon the subject.

Lord Lindley—*Gray* v. *Fowlie*, 9 D. 811, decided in 1847 by the Court of Session, is a clear and unmistakeable decision that by the law of Scotland a deserted wife cannot, while her husband is alive, acquire by residence an independent settlement of her own. The law of England is clearly the same. See Burns' Justice of the Peace, title "Poor," chap. xxix., sec. 3, vol. iv. p. 322, edition 1869. As in England so in Scotland the husband's settlement, if he

has one, is his wife's. *Gray* v. *Fowlie* is undistinguishable from the case now under appeal, and unless your Lordships are prepared to overrule *Gray* v. *Fowlie* this appeal must be allowed.

The whole difficulty in the case arises from the fact that there are several Scotch decisions since *Gray* v. *Fowlie* which have more or less departed from the principle on which it is founded. Lord Robertson, whose judgment I have read, has traced the origin and progress of the departure from that principle, and I can add nothing to what he has said.

In my opinion the judgment of Lord Young was right, and this appeal ought to be allowed.

Appeal *allowed*, and interlocutors appealed from *reversed* with costs.

. Counsel for the Pursuers and Appellants —The Lord Advocate (Graham Murray, K.C.) — A. O. Deas — Craig Henderson. Agents—Bunhills & Company—H. B. & F. J. Dewar, W.S.—Montgomerie & Flemings.

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COURT OF SESSION.

Saturday, May 17.

FIRST DIVISION.

WATSON'S TRUSTEES *v.* WATSON.

Succession — Heritable and Moveable — Conversion—Constructive Conversion—Vesting.

A testator directed his trustees to set apart sufficient of the trust property to provide for an annuity to his widow, and also to make provision for securing a liferent allowance to his unmarried daughters, and "on the eldest of my children reaching twenty-three years of age complete, or upon the marriage of any one of my daughters," to cause "an estimate and valuation of the whole remaining trust funds and estate to be made, and to . . . take a portion or share corresponding to the number of my children then in life, . . . and such part or share they shall pay over to my child, son or daughter, who shall have attained the age of twenty-three years." . . . The child or children so paid were at the termination of the annuities to have "an eventual right to receive subsequently his or her share of that part of the estate which shall have been set aside for satisfying annuities or liferents thereon." It was further provided that on each of the remaining children attaining the age of twenty-three or being married, a similar share was to be paid over to them at the times when "they have right thereto and claim the same."

The trustees were given power "to sell and dispose of all or any part of the heritable property at such time or times as to them shall seem proper in the circumstances of the trust." They were also given power, in making the division described above, to allocate the house property or other subjects which they were empowered to sell, so as to make the share of any one or more of the children consist of such property in whole or in part.

The testator died in 1855 survived by his widow, who died in 1878, and by ten children. Various payments were made by the trustees to the beneficiaries. Two of the testator's sons died after attaining the age of twenty-three. At the dates of their deaths certain heritable subjects in Glasgow still remain unrealised in the hands of the trustees. The income from this property, after the death of the widow released the charge upon it, had been divided among the children. No claim had been made by the sons who died for any further payment of their shares.

Held, in a question between the heir in heritage and the heirs *in mobilibus* of the sons who had died, (1) that a right to a *pro indiviso* share of the heritable subjects had vested in these sons in their lifetimes, and (2) that there had been constructive conversion of this heritage, and that their interests therein were moveable rights which passed to their respective heirs *in mobilibus*.

Mr William Watson, manufacturer, Glasgow, died on 22nd July 1855, leaving a trust-disposition and settlement with three relative codicils, by which he conveyed his whole means and estate to trustees.

The trustees were directed to pay to Mrs Margaret Watson, the truster's widow, during her widowhood, a free yearly liferent annuity of £250, and to "set apart such a portion of the trust funds and estate as they may deem sufficient, the income and interest arising from which shall be applied in satisfaction of the said annuity, and till such provision be made they shall pay the said annuity out of the general income of the estate."

The testator further provided *in the sixth place*—(With regard to his daughters who should remain unmarried at the death or re-marriage of his widow if she survived him, and otherwise at his own death) "I hereby direct my said trustees and their foresaids, in addition to the share and portion of my estate falling to such unmarried daughters in common with my sons and married daughters, to pay to them and survivors and last survivor of them unmarried the interest and income arising from the principal sum of two thousand pounds — [reduced by a codicil to £1500] —as a provision for their more ample and comfortable alimentary use and support; and the said sum of two thousand pounds necessary to provide a fund to be