the subsequent parts of his settlement he contemplates that it may become necessary to sell if his affairs turn out unfavourable. But his main contemplation evidently was, that the heritable estate will be retained by the trustees and be liferented by his widow, and descend to his children. After giving her a liferent, which is really a liferent of that heritable property, he adds this important declaration:—"Declaring that she shall be entitled to actual possession, if she so wish it, of the subjects and effects to be liferented by her, so long as the same are not required to be otherwise disposed of in fulfilment of the purposes of this trust." It is then provided, farther, that it should be in the power of the trustees to sub-feu or to let the property in whole or in part; but no sub-feu or lease shall be granted during her lifetime without her written consent. Farther, in the event of the property being let, the trustees are to sell by public roup or private bargain the whole crop, farm stocking, and implements of husbandry belonging to the trust estate. Taking these different provisions together, the intention of the testator comes out. He meant that his widow, if she wished it, should have personal occupation of that estate just as he left it. In short, that she should have a liferent of that stock and plenishing of the farm. And, accordingly, she did elect to take this farm just as it stood; and, being accustomed probably during her husband's lifetime to such pursuits, she continued, apparently with success, to manage this farm. The question comes to be, in these circumstances, On what footing she is to account, or her representatives are to account, at the time of her death, for the farm-stocking which she got when she took personal occupation of the farm?

It is clear that we cannot deal with this case as if the widow had been entitled to a liferent of this farm without the stocking. Nor can we so construe her right as if she had been a liferenter of moveables. If she had been so as to horses and cows there are principles of law which, I think, are not applicable to this case. For what she was to have, and what she had, was a stocked farm, *i.e.*, a heritable subject with these accessory moveables. The question is, What is the fair obligation on a party having a mixed subject of that kind, and what are her rights?

Now I am clear that a liferent of such a subject does not entitle the liferenter to leave it displenished of moveables. On the contrary, it is her fair obligation that she is to keep up the farm during her term of occupation, and to leave it at her death, as she received it, as a properly stocked farm. I think, therefore, that when the horses and cows died they did not perish entirely to the fiars, but that, on the contrary, it was her business to supply their place. And so as to the farm implements. In short, it was a condition of the liferent occupation that she should keep up the working stock on the farm.

That disposes of all the points raised in the Lord Ordinary's interlocutor as to particular subjects. And when we come to the crop, the principles applicable are all of the same kind as those which apply to the live stock. In managing such a farm there will always be a certain part of the farm occupied by a particular crop, and at the commencement and termination of the lease there will, if the rules of good husbandry be followed, be pretty nearly the same proportions of crop on the different parts of the farm. And, therefore, if the liferenter received part of the land in winter wheat in January 1844 and left part in winter wheat in January 1862, and in like manner received part in young grass and left a part in young grass, I should not be disposed to inquire very strictly whether one was larger than the other, but to take that as a fair equivalent. It is somewhat different as regards the crop in the stack-yard, or barn, or granary, though even there there must be a distinction. In so far as it may be on its way to the market, it is not part of the stocking, but in so far as it is only a moderate stock, for the maintenance of the cattle on the farm, it is part of the stock of the farm. The general result is, that we are not to weigh in minute scales the differences of the stocking, but, unless there is some material difference, the one is to be set against the other. But if there be a material increase in amount or improvement in quality, so as to make it a much better stocked farm, then I am not prepared to say that she is not to have the benefit of it. Her executors will fairly be entitled to the value.

That allows us to come to a conclusion which should enable the parties to settle without much inquiry; and I propose to substitute for the findings of the Lord Ordinary something like what I have suggested.

There remains only one other thing to be noticed, and that is the first finding in law of the Lord Ordinary. The Lord Ordinary finds, "that although the nominal raisers of the present process, as trustees of the deceased John Rogers, did not enter into actual possession and management of the trust estate of the deceased on the death of the truster, but left the same in the hands of the liferentrix, they must be held in law, in a question with the objectors, to have had such possession and management since the death of the truster." Now that involves considerations of some importance. My objection to it is, that it is unnecessary. If these trustees had undertaken the management of the estate, and had left the liferenter in possession without any control, and she had dissipated the estate, and died insolvent, when the fiars were minors under the charge of the trustees, a question of personal liability might have arisen against the trustees. But that is not the case here, for the widow was not the kind of person to die insolvent; she was a careful manager, and seems to have improved the subject. And, therefore, it seems that there is no interest on the part of any one to maintain the personal liability against the trustees seeming to be involved in this finding. If it does not involve that meaning, it is unnecessary, and should be recalled.

The other Judges concurred.

Agents for Anderson—D. Crawford & J. Y. Guthrie, S.S.C.

Agents for White and other Claimants—Macgregor & Barclay, S.S.C.

Friday, July 19.

GREIG *v.* SIMPSON AND MILES.

Poor—Settlement—Residence. Held by a majority of the whole Court (diss., Lord President and Lord Benholme) that a sailor who was tenant of a house in parish of B for five years, and whose wife resided there during the whole period, but who himself did not reside there for half of the time and never for more than ten months at a time, being during the rest of the five years ab-

sent on voyages, had acquired a settlement in B by 'continuous residence.'

Poor—Expenses. The parish of A raised a summons against the parishes of B and C for relief of aliment to pauper. The whole discussion was between B and C. A held not entitled to expense of attending discussion of B's reclaiming note in the Inner-House.

The question in this case related to the settlement of a pauper, Andrew Messer or Mercer. The pauper was a sailor and sailmaker. It appeared that he had resided continuously for thirteen years prior to Whitsunday 1858 in the parish of South Leith. At Whitsunday 1858 he became tenant of a house in North Leith, and continued tenant of the same house till Whitsunday 1863. His wife lived in the house during the whole of the intervening interval. The pauper himself was absent during a large portion of those five years on various successive voyages, of different lengths. In the intervals between the voyages—except in the first instance, when, having left his ship in London, he shipped again in that port three days afterwards—the pauper lived with his wife in their house in North Leith. He had been living with her there for about ten months before they jointly left the house on 25th May 1863. In 1865 the pauper and his wife, then residing in the City Parish of Edinburgh, became chargeable as proper objects of parochial relief, and received relief, as such, from the pursuer, inspector of poor of the City Parish. The pursuer then brought this action against the parishes of South Leith and North Leith, concluding for relief from one or other of these parishes as the parish of the paupers' settlement.

The Lord Ordinary (KINLOCH) held that the pauper had acquired a residential settlement in North Leith Parish by continuous residence for five years.

The parish of North Leith reclaimed.

DEAN of FACULTY (MONCREIFF) and SCOTT for reclaimer.

MONRO and TRAYNER for South Leith.

WATSON attended for pursuer, but did not take part in the debate.

The Court sent the papers for the opinion of the Second Division and of the Permanent Lords Ordinary. All the consulted judges, with the exception of Lord Benholme, were for adhering to the judgment of the Lord Ordinary.

LORD BARCAPLE returned the following opinion:—

"I think that, on a sound construction of the 76th section of the Poor-Law Amendment Act, the pauper must be held to have resided continuously, in the sense of that clause, in the parish of North Leith for upwards of five years preceding May 1863. In the sense in which I read the expressions there used, I consider that he was residing in North Leith, and was not residing anywhere else, during the periods when he was personally absent on voyages, while he kept his wife and family in the house where he lived with them when not so employed. I hold it to be clear, that residence and personal presence in the parish are not synonymous terms in the present discussion. The statute requires that the pauper shall reside continuously in the parish for five years; but it has never been disputed that temporary personal absence may occur without destroying the continuity of the residence. Any other interpretation would have defeated the obvious meaning and intention of the statute.

"The strongest elements of residence concur in the present case, where the pauper, a married man, lived constantly, when not at sea, in his own house with his wife and family. The only objection taken to the settlement is, that he went on voyages in the exercise of his occupation as a sailor—his wife and family remaining in the home where he left them, and he himself returning to them there at the end of each voyage. Each time he went away he did so with the intention, which he fulfilled, of returning without establishing even a temporary residence elsewhere,—for there could be no residence, in the sense of the statute, where there was constant locomotion; and also of keeping up during his absence the common home of himself and his family. It would, I think, be putting a constrained and unnatural interpretation upon the words of the statute to hold that there has not been continuous residence in such a case; and I am therefore of opinion that the interlocutor of the Lord Ordinary ought to be adhered to."

LORD BENHOLME returned this opinion:—

"The question at issue is, Whether the pauper, Andrew Messer, acquired a residential settlement in the parish of North Leith, between 25th May 1858 and 1863.

"The facts are these—The pauper, with his wife, took a house in North Leith on 25th May 1858, and in that house the wife seems to have resided during the whole time; but her husband, who was a sailor, only resided there in the intervals between his voyages. His absence during those voyages occupied more than the half of the whole time, and lasted on one occasion nearly two years. His personal residence seems, in no one instance, to have lasted continuously for a year, or for more than ten months. During the whole of the protracted absence of the pauper he was following his professional calling, and he had no industrial occupation in the parish of North Leith.

"In these circumstances I am of opinion, that he has not 'resided for five years continuously' in North Leith, in the sense of the Act 8 & 9 Vict., c. 83.

"Any view that can be taken of the statutory residence required to constitute a settlement involves, in my opinion, a continuity with reference to the pauper's ordinary industrial occupation. If the *locus* of his ordinary employment have been within the parish in question, occasional absences incidental to, and not inconsistent with, the permanency of that local employment, will not be held to interrupt the continuity of the residence, even although they may have lasted for a considerable time. Whereas comparatively short absences, if attended with a temporary change of the *locus* of his professional occupation, such as taking work or engaging in service in another parish, have been held to interrupt the continuity.

"But in the case of a sailor such as the pauper in question, the *locus* of his professional and only industrial occupation is at sea, whilst at North Leith the pauper Messer had no industrial employment. His intervals of companionship with his wife were rather to be considered as incidental to his professional life at sea than as constituting the principal residence to which his whole professional life could be considered as incidental.

"Again, the great length of his absences from North Leith is, in my opinion, sufficient to deprive them of the character of either incidental or accidental. That these would have been fatal to the pursuer's claim had this pauper been a single man,

cannot for a moment be disputed. And I cannot consider the circumstance that he had a wife resident in a house in North Leith sufficient to come in place of his own personal presence. Such a plea has been disregarded in several cases.

"It appears to me that several fallacious arguments have been employed by the pursuer in this case. In the *first* place, the analogy of the law of domicile has been too strongly relied upon,—a law which does not, like the Poor-Law Amendment Act, require as a necessary element personal and continuous residence for a considerable period. A domicile is acquired or changed *animo et facto*. The intention is the ruling element. To find out the party's HOME is the object of inquiry. But that is by no means the decisive and indispensable element, nor the proper object of inquiry, in questions of residential settlement under the Poor-Law Amendment Act. The inquiry in such questions is not, what the party *intended*, but what he has *done;* not where he had his *home*, but whether he has lived there for five years, and has had there his continuous residence, in a sound and reasonable sense. The case of *Crawford* v. *Beattie*, decided by the whole Court, by which the previous case of *Melville* was over-ruled, affords a strong illustration of the distinction between domicile and settlement. In that case the want of a year's continuous personal residence during the statutory period was held to extinguish a residential settlement previously acquired, although the pauper was incapable of any intention or *animus* in regard to the matter.

"If once the idea of a *home* is substituted in the aquisition of a settlement for continuous personal residence,—all regard to the positive requirement of the statute will be lost sight of, as it seems to be in the argument of the pursuer in this case. If two years' continuous absence, and absence for a majority of the whole number of days contained in the statutory period, be disregarded, I cannot see why the principle must not be carried much farther. Provided the pauper keeps up a home by the residence of his wife, his own presence in the place of settlement may be reduced to a *minimum*—to a few days spent there during the intervals of his voyages—provided his wife has had attractions enough to secure, from time to time, his return to her. And how the statute is to apply to such a person, in regard to the loss of a settlement once acquired, it is difficult to imagine. He surely must always be held to have resided continuously during *one year* during a subsequent period of five years,—although he has never been a year on shore—who has been held to have resided *five years* continuously during the former period, and thus to have acquired a settlement, in the circumstances of the pauper in question.

"A *second* fallacy under which the pursuer's argument labours, is that of supposing that the settlement by residence is a favourite of the Poor-Law Amendment Act, requiring the Court to give it a liberal construction, and to apply it, by force of construction, to every class of persons.

"It appears to me that the very opposite of this is the case. The statute has, in fact, swept away the whole previous law of settlement, and, by a stringent 'unless,' has required a longer period, and prescribed a closer residence in the acquisition, and introduced a greater liability in losing a settlement. The object of the statute, both as to foreigners and natives, is very clear. It was intended that to foreigners the acquisition of a settlement in Scotland should be extremely difficult. And as to natives, the statute has brought into application the birth settlement in a way that the former law knew little of—just by rendering a residential settlement so difficult to acquire, and so easy to lose.

"It is also a mistake to say that by giving fair-play to the plain intentions of the statute, any hardship is imposed on the individual pauper. To him it is matter of indifference whether the parish of his birth, or of a residential settlement, is to maintain him. The contest and the real interest is between the two contending parishes. And even as between parishes, in the long run, it is a matter of indifference which cause of liability shall oftenest prevail. As between them, the matter is as broad as it is long. The prevalence of the birth settlement may in one case operate against an individual parish, but in another it will operate in its favour.

"In short, I am for giving the statute fair-play, and see no reason for adopting a strained construction of its requirements for the benefit of married sailors. To hold that the pauper in the present case has resided continuously for five years in North Leith,—notwithstanding his having been abroad or at sea during more than half of the time, and for periods extending, in one instance, to a third part of the whole period—were to construe the statute in a *non-natural* sense, which I cannot bring myself to adopt. I therefore am of opinion that the interlocutor of the Lord Ordinary ought to be altered, and the defenders assoilzied."

At advising—

LORD CURRIEHILL said that the question in this case depended, as in many other cases, on the construction of the words "continuous residence," as used in the Poor-Law Amendment Act. It was to be regretted that the Legislature had not given an interpretation clause, to fix the meaning of these words; but it had not done so, and the Court must find it out for themselves. He did not mean to give any exhaustive definition of the words, but merely to state whether or not the facts here amounted to continuous residence. The distinguishing features of this case might be stated in five propositions:—(1) that Mercer was a householder in the parish of North Leith for five years from Whitsunday 1858 to Whitsunday 1863; (2) that during all this period his wife resided in the house of which Mercer was a tenant; (3) that Mercer himself personally resided there at the commencement of his lease in 1858, and also for considerable periods on different occasions, and that that was the place of his personal residence before the termination of the lease in 1863; (4) that during the intervening period he was a seaman on board of different vessels, and at the termination of each voyage returned to North Leith; (5) that he never during all this period had any other residence. His Lordship thought that that state of facts was enough to constitute continuous residence in the sense of the Poor-Law Amendment Act, and unless that were held to be the case it would be almost impossible for a seaman ever to acquire a settlement by continuous residence. He did not think the section of the Act meant to make it impossible for that large class of the community to acquire a residential settlement. And in the other enactment, as to a party losing his settlement if during any five years he had not one year's continuous residence, the same meaning might easily be attached to the words "continuous residence" in that clause as in the other.

Lords Deas and Ardmillan concurred.

Lord President—I am sorry to be compelled to differ, but I concur in the opinion of Lord Benholme. It appears to me that the words of the 76th section of the statute are not open to construction in so far as regards the nature and quality of the residence required. It must, in my opinion, be a personal residence of the pauper himself, and not of his wife and family. The word "continuous" is open to construction, because in one sense "continuous residence" is next to impossible. The ordinary emergencies of life prevent any man from always being in the same place, or even from sleeping in the same place, and therefore this word "continuous" has been reasonably construed so as to admit of certain interruptions; and a pauper is not required to be *de facto* resident the whole time. But here the pauper did not reside for half of the time, and never for one year continuously. The mere statement of this is to me conclusive against the pauper acquiring a settlement. The majority of the Court think that the house in which the pauper's wife resides is, in the meaning of the Statute, the residence of the pauper himself. This is a new construction of the Statute, not turning on the construction of the word "continuous" but of the word "residence." I am not moved by the consideration that, unless the construction of the word by the majority of the consulted judges be adopted, it will be impossible for a seaman to acquire a residential settlement. This is of no consequence, and paupers have no interest in the question whether the parish of their birth or some other parish shall bear the burden of their needful sustentation. I dissent from the judgment to be pronounced, (1) because it involves an unwarrantable construction of words used in the Statute in their ordinary meaning; and (2) because I could not adopt it without contradicting the words of my judgments in previous cases, in which I understood some of my brethren now in the majority concurred.

Watson for pursuer moved for expenses of attending the debate in the Inner-House.

In accordance with the decision in *Hay* v. *Thomson*, 23d June 1854, 16 D., 994, motion refused.

Agent for Pursuer—A. Greig, S.S.C.

Agent for North Leith—A. Duncan, S.S.C.

Agent for South Leith—P. S. Beveridge, S.S.C.

Friday, July 19.

HAMILTON *v.* TURNER AND ANOTHER.

(*Ante*, vol. i, pp. 52, 338.)

Reparation — Superior — Mineral Tenant—Feuar—Obligation — Delict—Underground Working—Property. A party holding a feu-right of property in a mineral district brought an action against the superior and his mineral tenant for damages on account of injury to buildings on the feu by reason of underground working. A proof was led. Held (1) that the superior was liable, and (dub. Lord Deas) that his liability was entirely *ex contractu*; (2) (diss. Lord Curriehill) that the mineral tenant was also liable, and (dub. Lord Deas) that his liability was entirely *ex delicto*.

This was an action of damages for injury caused to property by mineral workings, and was directed against the superior of the ground and the mineral tenants.

The pursuer holds a feu-right of his property from Mr Dennistoun, the predecessor of the defender, Mr Turner of Barbauchlaw, which was granted on 12th August 1856. The superior reserved to himself the property of the minerals, "I and my foresaids paying to my said disponees and their foresaids all damages the subjects belonging to them may sustain in and through working or taking away the same. . . But declaring always that should said minerals be let by me or my foresaids, my said disponees and their foresaids shall have recourse against the lessee thereof for all damages which may be occasioned by the working thereof, and not against me or my foresaids farther than that I and my foresaids shall be bound to oblige our tenants to settle said damages with our said disponees and their foresaids in manner above mentioned."

The Monkland Iron Company had become tenants of the minerals lying beneath the pursuer's subjects under a lease from Mr Dennistoun, dated in 1854. The lease stipulated that his tenants "shall annually satisfy and pay all damages done by their operations, whether above or below ground." Farther "the said second parties (the tenants) bind and oblige themselves and their foresaids to free and relieve the said first party (the superior) of all claims and demands whatsoever which may be made against him and his foresaids by the tenants of said lands arising in any way out of the operations of the said second parties in working, raising, storing, carrying away, or disposing of the minerals hereby let."

The pursuer averred that, in consequence of improper working of the minerals, proper support not being left for the surface-ground, his subjects had sunk and given way, his houses and buildings being weakened, and put in danger of falling.

The Lord Ordinary (Kinloch) held the action relevant as against the mineral tenants, but dismissed it as against the superior. The Court recalled that interlocutor, and allowed a proof before answer of the averments of all the parties.

After the proof, the Lord Ordinary found it proved that the ground and houses belonging to the pursuer had sustained damage through the operations of the Monkland Iron Company in working the minerals without leaving sufficient support for the surface, and held that these defenders were liable in damages, which he modified to £500. He again assoilzied Mr Turner. The Lord Ordinary, in his note, stated his adherence to his former opinion,—that every mineral tenant is bound so to conduct his workings as to afford sufficient support to the surface. He was as much bound to this as the proprietors of an under-floor of a house is bound so to conduct operations on his property as not to injure the support afforded to the floor above. When the minerals are constituted into a separate property from the surface the proprietor or tenant of the one is as little entitled to do injury to the other through the necessary consequence of his operations as in the case of any other wholly distinct properties. Here injury had been proved. It was said that the minerals could not possibly have been worked without causing some subsidence to the surface, but the rest of the evidence explained this simply to mean, that subsidence could not be avoided where the workings were carried on in the particular way adopted, and so as to work out the minerals under the pursuer's property. There was no impossibility in leaving these minerals unwrought—probably none in working them to such