law: Repels the pleas for the pursuer, in so far as inconsistent therewith, and assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to their expenses, of which allows an account thereof to be lodged, and remits the same to the auditor to tax and to report.

"*Note.*—The Lord Ordinary had the benefit in this case, which is doubtless one of much importance and interest to the parties, of an able and satisfactory argument. But that argument embraced, with perfect propriety, a wider field than that on which the Lord Ordinary thinks it necessary to enter in briefly explaining the grounds of his present judgment.

"He assumes, in the outset, that no serious doubt can be entertained, if the entail of 1800 be effectual and binding on the pursuers in any sence, the terms of the clause declaring that, in the event of any person succeeding to the lands and estates contained in the entail, and thereafter coming to be the heir of Sir Alexander Munro, is sufficient to provide that such person shall be bound and obliged to divest himself or herself of the said lands and estates.

"The really important inquiry, therefore, regards the validity of that entail of 1800; and in dealing with the question, it seems to be right to state that the Lord Ordinary assumes it to be clear, as a general proposition sound in law, that in a question *inter hœredes*, the fact that the entail is not recorded in the Register of Tailzies cannot be pleaded by an heir in possession as affording any warrant for a disregard on his or her part of the provisions and conditions of the deed. Now, taking it to be so, the Lord Ordinary heard nothing in relation to the special provisions of the deed of 1800 which would lead him to hold that they are framed otherwise than in such terms as effectually to bind the pursuer. But it is said, and the 5th plea in law for the pursuer is directed to that matter, that the said deed of 1800 is truly altogether ineffectual and invalid, in respect of the erasure or interpolation of the word 'not' in the prohibitory clause. The deed itself was produced to the Lord Ordinary for inspection, and he examined it accordingly.

"That examination satisfied him that the writer of the deed had, after writing the word 'shall,' as mentioned in the 14th article of the condescendence, written the word 'be,' which immediately follows the 'not,' as it now appears, and perhaps other following words, before he observed the omission of 'not' after the word 'shall,' and he appears to have inserted the said word 'not' in a contracted space between the said words. The Lord Ordinary is not satisfied that this was certainly done after the deed had been completed. But however that may be, the Lord Ordinary has come to the conclusion that the objection founded on the fact of the interpolation is insufficient in law to nullify the clause; as, if the *whole* clause be read, the grammatical construction of the passage —'that it shall' (not) 'be lawful to me, *or* to any of the heirs of tailzie or substitutes above named, *nor* to the descendants of their bodies who shall happen to succeed to the lands and others above specified, to alter, innovate, or change the order of succession above specified,'—seems to be such as to demonstrate that the omission of the word 'not' in question, if ever omitted at all, was a mere clerical blunder, to give effect to which, as sufficient to render the whole clause ineffectual, would carry even the admittedly strict rule applicable to such a deed far beyond what is warranted by any of the previous judgments of a kindred character.

"On the whole, the Lord Ordinary is of opinion that the defenders must here be assoilzied."

The pursuer reclaimed.

SOLICITOR-GENERAL and DUNCAN for him.

MILLER, Q.C., and BLAIR for defender.

The Court held that the deed of 1800 was vitiated by reason of the interpolation of the word "not" in the clause prohibiting alteration of the order of succession, and that the fetters of an entail cannot be effectually imposed by a supplementary deed referring to the deed containing the conveyance of the lands, although the two deeds were intended by the grantor to be read together as a *mortis causa* disposition; and, by a majority (Lord Justice-Clerk dissenting), that, the deed of entail being invalid, a clause of devolution was not binding on the heir in possession of the estate. The Lord Justice-Clerk was of opinion that the clause of devolution was binding on the party who took under the voluntary deed.

Agent for Pursuer—James Steuart, W.S.

Agents for Defenders—Hunter, Blair, & Cowan, W.S.

Saturday, December 19.

OUTER HOUSE.

(Before Lord Barcaple.)

BELL *v.* JARVIS.

Maills and Duties—Landlord and Tenant—Taxes.

A creditor in possession under decree of maills and duties is only liable in ordinary diligence. A landlord held liable in a question with his tenant for the owner's proportion of all taxes upon the amount of the sub-rents except poor-rates.

Mrs Jarvis was proprietrix of subjects in Dumbarton. These she let in 1856 to M'Lean and Loban at a rent of £19, 19s., on a lease for ten years. The lease gave power to the tenants to build, and bound them to insure the buildings when erected. At the expiry of the lease the buildings were to belong to Mrs Jarvis without giving any compensation to the tenants. The rent having fallen into arrears, Mrs Jarvis obtained decree of maills and duties against the lessees and their subtenants in the buildings erected by them for the amount of the principal rent due and to become due. Under this decree she entered, previous to her marriage, into possession of the subjects by factors, whom she appointed from time to time to manage the property and draw the sub-rents. The pursuer was the first of these factors, and he bound himself, as a condition of his appointment, to free Mrs Jarvis from all claims by the lessees. His factory was put an end to by Mrs Jarvis after lasting only one year. The pursuer, in May 1865, obtained an assignation from M'Lean and Loban of their rights as lessees, and in December 1865 he raised this action of count and reckoning against Mrs Jarvis for her intromissions under the decree of maills and duties. Accounts having been lodged, the same were remitted to Mr Martin, accountant. He made a lengthy report, and submitted therein questions for the decision of the Court.

DUNCAN for pursuer.

R. V. CAMPBELL for defenders.

The following authorities were cited:—Poor Law

Act, 8 and 9 Vict. c. 83, § 44; Bankton, 2, 24, 38; 3, 2, 70; *Forsyth* v. *Avid*, 13 December 1853, 16 D. 197; *Blair* v. *Galloway*, 21st December 1853, 16 D. 291.

LORD BARCAPLE pronounced the following interlocutor:—

"*Edinburgh, 10th November* 1868.—The Lord Ordinary having heard counsel for the parties, and considered the closed record and process, with the report of the accountant, Finds that, by lease dated 21st June 1856, the defender Mrs Kennedy or Jarvis, then Miss Kennedy, let to Alexander M'Lean and Thomas Loban, carrying on business under the firm of M'Lean & Loban, joiners in Dumbarton, certain ground and premises situated in High Street, Dumbarton, for ten years from Whitsunday 1856 at the rent of £19, 19s.: Finds that by said lease it was agreed that the tenants should have full power and liberty to erect on that part of the premises thereby let fronting the said High Street a stone and brick tenement of two storeys with slated roof, which they thereby bound themselves to do at their own expense, and the said tenants bound themselves, on the said tenement being erected and finished, to keep and maintain the same in good repair during the currency of the lease, and on expiry thereof to leave the same in the same state as when erected, ordinary tear and wear excepted; and further, that they should not be entitled at the expiry of the lease to receive or claim any compensation or allowance from the said defender for the value of the said tenement: Finds that by said lease the said tenants bound and obliged themselves to keep up and pay the premium on an insurance against fire for £200, effected or to be effected by the said defender, in her own name, on the whole buildings on the premises belonging to her during the whole currency of the tack: Finds that the said tenants did erect said tenement of two storeys on said premises: Finds that the said tenants having fallen into arrear of their rents, the said defender raised an action of maills and duties, and on 3d April 1860 obtained decree therein against them and their sub-tenants for payment of rents and fire insurance, past due and to become due, during the currency of the lease, and for expenses of process and dues of extract: Finds that on 18th April 1860 the defender appointed the pursuer, John Bell, and Dugald M'Lachlan to be her factors during her pleasure, for collecting the rents of said subjects under the said decree of maills and duties, in consideration of their having become bound jointly and severally not only to account to her for their intromissions, but also to free and relieve her and her successors of all claims and demands whatsoever which might be made against her or them by the said Alexander M'Lean and Thomas Loban, or M'Lean and Loban, or either of them, or by any other person or persons in any way whatsoever connected with said property, or her operations under said decree: Finds that, in virtue of this appointment, the pursuer and the said Dugald M'Lachlan acted as the defender's factors under said decree of maills and duties till April 1861, when their factory was recalled: Finds that since that time John Dewar, messenger-at-arms and house-factor, Dumbarton, has acted as factor for the said defender, and collected the rents of said property under said decree of maills and duties until the date of the present action: Finds that the said defender was married to the co-defender Mr Jarvis in May 1863: Finds that by assignation, dated 4th May 1865, the said Messrs M'Lean and Loban assigned to the pursuer the said lease and all action competent to them thereupon, and also the rents uplifted by the defender under said decree of maills and duties, or such balance thereof as might remain due by her, said assignation being subject to the condition that the pursuer should pay the rents due under the lease, and fulfil the whole other obligations therein incumbent on the tenants during the unexpired period thereof: Finds, in terms of the accountant's report, that, exclusive of certain matters involving questions of law reserved by him for the Lord Ordinary, the amount of rents received by the defenders, or for which they are accountable, after deduction of outlays for repairs and expenses of management, and of the whole taxes paid by the factor, is £173, 10s. 11d., and that the amount due under the decree of maills and duties is £143, 9s. 8d., showing a balance against the defenders at 26th December 1865, the date of the summons in this action, of £30, 1s. 3d.; and in reference to said questions reserved by the accountant—*First*, Finds that the defenders are liable not only for the landlord's taxes effeiring to the £19, 9s. payable under said lease, amounting to £11, 10s. 10d., but also for the landlord's taxes effeiring to the said new two-storey tenement erected by the tenants, except the poor rates payable in respect thereof, which poor's rates, amounting to the sum of £6, 16s., were payable by the tenants without any claim for repayment thereof against the defenders: Finds that the balance of landlord's taxes effeiring to said two-storey tenement, after deducting said sum of £6, 16s., amounts of £9, 7s. 1d. *Second*, Finds that the pursuer does not now dispute that the defenders are entitled to credit for the sum of £7, 16s. 6d., being the amount of an account for law proceedings for recovery of the rents due by the said Messrs M'Lean & Loban, incurred prior to the date of the said decree of maills and duties. But, as to the law accounts reported on by the accountant, amounting to 5s., and £10, 11s. 4d. incurred after the date of said decree, finds that the defenders have not set forth any sufficient grounds to entitle them to credit for the same in this accounting; and *third*, as to the claim of the pursuer to have the defenders debited with arrears of sub-rents unrecovered, finds that the defender Mrs Jarvis, as possessing under said decree of maills and duties, was only liable for ordinary and reasonable diligence: Finds that the sub-rents unrecovered for the period from the date of the decree of maills and duties to the date of the summons in this action amount to £69, 1s., whereof £7, 13s. 2d. effeired to the period during which the pursuer and the said Dugald M'Lachlan acted as factors and collected the rents; and finds that, having regard to the nature of the property and of the sub-rents falling to be collected, £10 sterling is a fair and reasonable sum with which the defenders ought to be debited in respect of rents unrecovered: Finds, accordingly, that there falls to be placed to the debit of the defenders, in addition to the said sum of £30, 1s. 3d., the said sums of £11, 10s. 10d., and £9, 7s. 1d. of landlord's taxes, and the said sum of £10 in respect of rents unrecovered, and that the defenders are entitled to credit for the said sum of £7, 16s. 6d., leaving as the balance with which they fall to be debited the sum of £53, 2s. 8d., and decerns against the defenders conjunctly and severally to make payment to the pursuer of the said sum of £53, 2s. 8d., with interest as libelled, superseding diligence against

the person of the defender Mrs Jarvis during the subsistence of her marriage: Finds the defenders liable in expenses, subject to modification, allows an account thereof to be given in, and when lodged, remits the same to the auditor to tax and report.

"*Note.*—It appears from the foregoing findings what are the questions on which the parties are at issue.

"The Poor Law Amendment Act, 8th and 9th Vict. c. 83, § 44, provides that where houses have been built by the tenant of land held under a building lease, the tenant shall, for the purposes of the Act, be taken to be the owner. In this case the lease is of greatly shorter duration than is usual in the case of a building lease. But that circumstance must have been in the view of the parties in adjusting the rent and other stipulations of the contract, under the provisions of which the houses have been built. The Lord Ordinary is therefore of opinion that this must be dealt with as a building lease, and that the tenants were liable for the landlord's proportion of poor-rates. No question was raised as to the taxes effeiring to the rental of the erections behind, which the accountant has treated as falling to be debited wholly to the tenants.

"The Lord Ordinary thinks that the tenants were liable for the account for law proceedings for recovery of their rents incurred prior to the date of the decree of maills and duties. This was not disputed at the debate. The accounts incurred subsequent to the date of the decree do not appear to him to be of such a kind that either the tenants, or the pursuer under his obligation to relieve Mrs Jarvis of claims at the instance of the tenants, can be held liable for their amount in this accounting.

"The defenders cannot be liable to the pursuer for unrecovered arrears of rent which accrued during his own management as factor. After deducting the sum of £10, with which the Lord Ordinary finds that the defenders must be debited for rents unrecovered, the proportion of the rents falling due subsequent to the termination of the pursuer's factory which have not been recovered is not greater than the proportion of unrecovered arrears which accrued during the pursuer's management. Looking to the nature of the rents, and the whole circumstances of the case, the Lord Ordinary does not think that the defenders ought to be debited with more than the above sum of £10.

"The liability which is sought to be enforced against the defenders was incurred partly before and partly since Mrs Jarvis' marriage, in the administration of her heritable property, as to which the defenders state that her husband's *jus mariti* and right of administration were excluded by their antenuptial contract. The liability does not result from obligations undertaken by Mrs Jarvis in regard to the subjects, but from funds having been received by her, or on her account, in the course of the management of her separate estate, to which the principal tenants of the subjects had right. The Lord Ordinary thinks that this is a debt for which Mrs Jarvis must be held to be liable, whether it accrued prior or subsequent to her marriage. On the other hand, he is of opinion that her husband is not only liable for that portion of it which was due at the date of the marriage, as for any other debt of his wife contracted prior to marriage, but also for the sums received and unaccounted for subsequent to the marriage. These sums, when actually received, fell under the *jus mariti*, subject to the obligation to account to any party who could show a good claim to them.

"The pursuer has been so far successful, and the defenders must be liable in expenses, but subject to modification, as the pursuer's claims were considerably in excess of what have been sustained, and the management of the subjects was forced upon Mrs Jarvis by the failure of the tenants to pay their rents."

The interlocutor has become final.

Agents for Pursuer—J. & R. Macandrew, W.S.

Agents for Defender—Maitland & Lyon, W.S.

Tuesday January 5.

FIRST DIVISION.

MONCRIEFF *v.* ROSS.

Poor—Residential Settlement—Constructive Residence—Poor-Law Amendment Act. A fisherman resided for nine months in the parish of T. with his wife and family. During the next five years he occasionally resided in T. with his wife and family—they residing there the whole time—but spent the greater part of his time in the parish of B., where, when not engaged in fishing, he occupied a room in his father's cottage. *Held* by a majority (Lord President diss.) that the pauper had acquired an industrial settlement in T. by continuous residence there in the sense of the Poor-Law Amendment Act.

This was a question between the united parishes of Tingwall, Whiteness, and Weisdale, and the united parishes of Bressay, Burra, and Quarff, as to the settlement of a pauper lunatic named Williamson, formerly a fisherman in Shetland, the point at issue being whether the pauper had acquired a residential settlement in the parish of Tingwall.

After a proof, the Sheriff-substitute (Mure) found that the pauper had acquired a residential settlement in Tingwall, adding the following note, which sufficiently sets forth the facts on which the case depended:—"The present is a question of considerable importance to the two parishes concerned, and to Shetland generally. It is also one in which the result depends on several points, on which opposite doctrine may be quoted from the judgments of the Supreme Courts. If personal presence be the test of continuous residence, the interlocutor now given cannot be supported, nor can it be supported if the residence of the wife and family in a house within a parish will not in any circumstances preserve the husband's statutory residence there. For the affirmative of these propositions the very highest authority may be quoted. But, on the other hand, a recent judgment of the whole Court seems to place the construction of the words of the 76th section of the Poor Law Act on a different footing. Thomas Williamson was born in Havera, an island in the parish of Bressay, and in respect of his birth there that parish is sought to be made liable for the support of his wife and family. He followed the usual occupation of an ordinary Shetlander, that of fisherman and sailor, and his life, in most respects except one, seems to resemble that of thousands of the male inhabitants of these islands. He seems to have had the seeds of insanity in his constitution, to have been naturally moody and passionate, and his work companions had to be careful not to contradict, but to humour him. But he was a good boatman, and appeared to know thoroughly and perform well the duties of a fisher-