survivor of them, equally between or among them, if more than one; and, failing the said child or children, to and in favour of William Greig, George Greig, Robert Greig, and Barbara Greig, children of the marriage between George Greig, tenant at Easter Denside, and Isobel Black, my sister-german, and the survivors or survivor of them, equally among or between them in fee." Now this destination, being to the future as well as to the existing children of Betsy Black, it established in her, on the testator's death, a fiduciary fee for all her children. It is quite true that her children when they were born took an interest in the estate, but an interest of uncertain amount, and subject to the survivance of their mother. Upon her death, however, the surviving children took the fee equally among them, they then got the beneficiary enjoyment of the fee, which vested absolutely in them.

It is, however, argued against this view that this settlement is not to be construed as merely a provision to children, but that it is of the nature of an entail, and that the Greigs are not conditional institutes but substitutes. Now, if this settlement is an entail, it is curious that it defeats the principal object of entails, in that, instead of making provisions to keep the estate together, its effect and apparent object is to cut up the estate and divide it. Besides, the idea of the Greigs being substitutes is negatived by the way they are called, for they are called in the same way as Betsy Black and her children are, and the words "survivors or survivor," as applied to the Greigs, has reference to the same time as when applied to the Blacks—viz., the time when the liferent comes to an end. When that time came—that is, when Elizabeth or Betsy Black died—there were only two of her children and none of the Greigs in existence, and it is impossible to maintain that the rights of these surviving children of Elizabeth or Betsy Black were defeated by the children of the Greigs.

I am therefore of opinion that Edward Keatts Nelson Snell and Sophia Low, having survived Betsy Black, took an absolute right to the fee of the property, and that that right transmitted to their heirs, and that therefore the first and second parties in this case have each of them an absolute right to the fee of one-half of the estate.

Lord Deas—I arrive at the same conclusion. The first thing to keep in view is that by this settlement a trust is constituted in Betsy Black for behoof of her children and the survivors or survivor of them. So when Betsy Black dies and leaves two children, the fee vests absolutely in them.

Lords Ardmillan and Kinloch concurred.

Agents for First Party—Mitchell & Baxter, W.S.
Agent for Second Parties—Wm. Archibald, S.S.C.
Agents for Third Parties—Webster & Will, S.S.C.
Agents for Fourth Party—Henry & Shiress, S.S.C.

Thursday, May 23.

SECOND DIVISION.

SPECIAL CASE—MILNE AND RAMSAY.

Poor Law (8 *and* 9 *Vict. c.* 83, § 76)—*Settlement.*

Held that a residential settlement in a parish was acquired by a residence of five years, notwithstanding occasional absences of short duration, where the pauper's wife and family continued to live and be maintained by him in that parish.

Robert Galashan was born in the parish of Kincardine O'Neil about the year 1835. He learned the trade of a shoemaker, and usually worked as a journeyman shoemaker; but sometimes he acted as a farm servant or cattle-man, as afterwards stated. On 1st August 1863 he went with his wife and family to the adjoining parish of Lumphanan, where he resided until 12th September 1866, working chiefly as a journeyman shoemaker, and sometimes engaging himself as a farm-servant. During about six months, however, in 1864, he worked as a shoemaker in the parish of Kincardine O'Neil, sometimes remaining there all night, and sometimes returning for the night to his wife and family, who continued to reside in Lumphanan. On 12th September 1866 he went to Dorsinsilly in the parish of Glenmuick, eighteen or twenty miles distant from Lumphanan. He had entered into an engagement to go there and to remain until Martinmas (22d November) 1866, as a farm-servant in room of one who had left. During his engagement he was employed as cattle-man, (having been engaged chiefly in that capacity), but worked occasionally at the harvest. His wife and family continued to reside in Lumphanan, in a house containing furniture and other property belonging to him, and he visited them only twice,—once when sent for by his wife, and once on his way to a feeing market. He was not engaged for Dorsinsilly at a feeing market, but was sent for by a person who knew him, and engaged him for the farmer at Dorsinsilly. From Martinmas 1866 till 6th August 1869, he resided with his family in Lumphanan, where he worked as a journeyman shoemaker, except for about six months in 1868, when he worked in the parish of Cluny, about eight miles distant, returning home for a night weekly or fortnightly, as suited his convenience, and for some weeks in 1868, when he worked as a "harvest hand" in Midmar parish, also about eight miles from his house, returning home to his wife sometimes weekly and sometimes once a fortnight.

On 6th August 1869 he made an application for parochial relief to the parish of Lumphanan, which was granted; and on 31st August of that year he was lodged in the Lunatic Asylum in Aberdeen. His wife and family continued thereafter to reside in Lumphanan parish.

The question for the opinion and judgment of the Court was—

"Whether the parish of Kincardine O'Neil, as the parish of birth, was liable for the relief of the pauper; or whether the pauper had acquired a residential settlement in the parish of Lumphanan, and that parish was therefore liable for his relief?"

H. Smith, for John Milne, Inspector of Poor, Lumphanan, contended that the absence of the pauper for two months and a-half in 1866, on a contract of service, and not in pursuance of his ordinary calling, prevented him from acquiring a residential settlement at Lumphanan, and that, moreover, he had been absent for even longer periods in other years—*Beattie* v. *Kirkwood*, 1861, 23 D. 915.

Keir, for Samuel Ramsay, Inspector of Poor, Kincardine O'Neil, replied that the pauper had acquired a residential settlement at Lumphanan, because his absences had been of a temporary nature, he had always shown an *animus revertendi*, and, as

matter of fact, his family continued to reside, to be maintained and visited by him at Lumphanan during these occasional absences—*Greig* v. *Simpson and Miles*, 1867, 5 Macph. 1132, 4 Scot. Law Rep. 199; *Moncrieff* v. *Ross*, 1869, 7 Macph. 331, 6 Scot. Law Rep. 211.

At advising—

The LORD JUSTICE-CLERK — Cases of settlement are always difficult, as they depend on arbitrary rules, and the ecclesiastical divisions of counties into parishes. The question is, Whether the parish of Lumphanan, as the parish of residence, or the parish of Kincardine O'Neil, as the parish of birth, is liable for the support of the pauper? The real principle upon which the law of settlement is founded is, that the parish which has benefited by the pauper's industry should bear the burden of his maintenance when he can no longer work for his own support. Recurrence to the birth settlement is an exception to this rule. But the residence necessary for the acquisition of a settlement must be of a continuous character, and if there have been interruptions in the residence, these may prevent the pauper from acquiring a settlement, and he may have to fall back on the parish of his birth. But we must take into account the nature and *animus* of the absence. If a man goes away for a short time, leaving his wife and family to reside in the parish, you cannot say that he has ceased to reside there. There is nothing set out in this case to show that the pauper had interrupted his industrial settlement in Lumphanan. He maintained himself, his wife, and family there by his industry for five years, and resided there himself, with the exception of certain periods of absence, amounting in all to a little more than a year, when he worked in other parishes. I have no difficulty in holding that these absences did not interrupt, when they were, as was generally the case, merely because the man's work lay in an adjoining parish, while his real home was still in Lumphanan. Neither do I think that his absence in the parish of Glenmuick, upon a temporary engagement there, is sufficient. He was only there for two months and a-half. He got employment as a farm servant, which was one of his trades. There was nothing to show that he had changed his residence or abandoned the parish of Lumphanan. I think it must be held that the pauper resided for five years in the parish of Lumphanan, in the sense of the 76th Section of the Act.

LORD BENHOLME—Had this case come before us without our having the benefit of previous decisions, my opinion would have been that there had here been an interruption of the residence in the parish of Lumphanan. But the judgments which have been pronounced compel me to come to a different conclusion. In the case of the sailor (*Greig v. Miles*), it was held that a man need hardly reside at all in the parish if he has a wife and family there. It is true he could not be acquiring a settlement elsewhere because he was at sea. But in the case of the fisherman (*Moncrieff v. Ross*), even that element was wanting, because he resided in a different parish in Scotland, and might have acquired a settlement there if he had remained long enough, so that it could not be said that he was not in a position to acquire a residential settlement elsewhere. With that case before us, I cannot help giving effect to the principle established. It is not contended in the present case that any other settlement was acquired, and I can hardly think that when the pauper was at Dorsinsilly he was in a position to acquire a settlement in Glenmuick parish. He had no house there, and his wife and family resided elsewhere. The element of intention is important, and is clearly brought out by the case of *Beattie v. Kirkwood*, where the Court came to an opposite decision. In that case the pauper, a young man, who lived with his father, had neither house nor wife and family. The father with whom he resided broke up his establishment, and so he, the son, had no place to which he could return, and his connection with the parish was entirely severed. On the whole, there is enough in the decisions to enable us to hold that the settlement was not interrupted.

LORD COWAN and LORD NEAVES concurred.

Agent for Milne—John Whitehead, S.S.C.
Agents for Ramsay—Skene & Peacock, W.S.

HIGH COURT OF JUSTICIARY.

Monday, May 20.

MACKINTOSH, PETITIONER.
(Before a full Bench).

Private Prosecutor—Concourse of Lord Advocate.

Circumstances in which the Court refused to ordain the Lord Advocate to grant his concourse to a prosecution at the instance of a private person, or to allow him to prosecute at his own instance, without the concourse of the Lord Advocate.

Mr Mackintosh of Holme presented a petition, which set forth, "that having some time ago prepared a bill for criminal letters in order to the prosecution of Dr Graham Weir for conspiracy and other crimes, your petitioner, on or about the 22d day of February 1872, applied to George Young, Esq., Her Majesty's Advocate, to the end that he might grant his concourse to said bill; that, in answer to your petitioner's said application to the Lord Advocate, your petitioner received a letter from Mr Thomas Shillinglaw, clerk to the Crown Agent, stating that he was directed by the Lord Advocate to inform the petitioner that his Lordship was of opinion that it was not fitting that he should grant his concourse to such a prosecution, and that his Lordship therefore refused his concurrence; that, on or about the 8th day of March 1872, your petitioner presented the aforesaid bill for criminal letters to your Lordships; and that, on the 16th day of said month, your Lordships superseded consideration of the said bill, in order that (as your petitioner understood) he might have an opportunity, if so advised, of presenting a petition to your Lordships praying for any remedy that he might be advised was competent, with a view either to obtaining the concourse of the Lord Advocate, or being allowed to prosecute without any such concourse; that if the Lord Advocate be not ordained to grant his concourse, or if your Lordships do not grant to your petitioner the fiat craved by him in his bill for criminal letters, and allow him to prosecute, at his own instance, without the Lord Advocate's concourse, he will, he believes, be excluded from justice, and his rights as one who has been injured by criminal acts wickedly and feloniously done against him: May it therefore