Wednesday, October 25.

FIRST DIVISION.

[Lord Shand, Ordinary.

BEATTIE *v.* SMITH AND PATERSON.

Poor—Residential Settlement—Continuous Residence —Intention.

A parish which it was sought to make liable for the support of a pauper, in respect of its being his residential settlement, answered that the necessary continuity of residence had been broken by absence. The pauper, a mason, had been absent at work elsewhere, and had left his wife at home, without telling her where he was going. She joined him afterwards, and after three months' absence he returned, and found the lease of his house expired, and his furniture, which had been left there, sequestrated for the rent. He afterwards paid the rent and got possession of the furniture, which he used in another house.—*Held* that it was competent to inquire into the pauper's intention to abandon or maintain his residence, and that in this case the absence was incidental to, and not subversive of, a continuous residence.

Observed by Lord Shand that a minor who, although living with his father, sets up in business for himself, may acquire a settlement by residence.

In this action the Inspector of Poor of the Barony Parish of Glasgow sought (1) for declarator that the Parish of Hamilton, or alternatively that of Cardross, was the parish of settlement of Robert Miller, a mason, who latterly resided in Glasgow and was in receipt of parochial relief there from January 1871 till his death in December 1871; and (2) for payment of the advances he had made on Miller's behalf, and also on that of his wife and three children since his death.

It was admitted that none of the paupers had ever a settlement in the Barony parish. The parish of settlement in respect of Miller's birth was Hamilton, but the inspector of that parish alleged that Cardross was liable as his residential settlement, in respect of his continuous residence there from the latter part of 1861 to July 1868. Cardross denied that, and further averred that if Miller had ever had a residential settlement there it had been lost by non-residence at the date of chargeability.

Miller and his father's family, it was in evidence, had gone to reside at Cardross at Whitsunday 1862, and they left it permanently in 1868. At first he lived with his father, and, having served out an apprenticeship as journeyman mason, was supporting himself by his earnings, allowing his mother a weekly sum for board. It was not clearly proved what his age was when he went to Cardross. While still in household with his father he was absent from home for several months at work, coming home generally on Saturday evenings. This happened on two occasions, when his usual employers, all living in or in the neighbourhood of the parish of Cardross, were engaged on contracts in the country. He married in May 1866, and in August of that year he left his father's house and took up house himself in Cardross. From Christmas 1866 to Whitsunday 1867 he was absent in Arrochar in the execution of work for one of his ordinary employers. He left Cardross on that occasion without informing his wife of his intention, and leaving her in possession of the house and furniture. Driven by necessity, she in April went to Dumbarton to get work, and took a house there, leaving her husband's furniture in the house in Cardross. She afterwards joined her husband when she ascertained he had gone to Arrochar, and she had been with him for six weeks when they both returned to Cardross on 15th May 1867. She did not regard Arrochar as their home, and had left the furniture at Cardross. During their absence at Arrochar the lease of the Cardross house had expired, and the furniture had been sequestrated for the rent. That was paid and another lodging taken, in which the furniture was put. They lived there for ten months, and then removed to Glasgow.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 26th January* 1876.—Having considered the cause, finds that the deceased Robert Miller, mason, sometime residing at No. 50 Meuse Lane, Cowcaddens, Glasgow, who died in December 1871, resided continuously within the parish of Cardross for the period between May 1862 and the end of 1868, and thereby acquired a residential settlement in that parish, the benefit of which accrued to his widow and children; therefore decerns against the defender William Stuart Paterson, inspector of poor of, and as representing the Parochial Board of, the parish of Cardross, in terms of the conclusions of the summons against him: Assoilzies the defender Alexander Laidlaw Smith, inspector of poor of, and as representing the Parochial Board of, the parish of Hamilton, from the conclusions of the action directed against him, and decerns: Finds the defender William Stuart Paterson liable in expenses to the pursuer and to the other defender, Alexander Laidlaw Smith; allows accounts of these expenses to be given in, and remits the same when lodged to the Auditor to tax and to report.

"*Opinion.*—The question I have to decide in this case is whether the parish of Hamilton has established that there was a continuous residence of five years, within the meaning of the Poor-Law Act, by the late Robert Miller in the parish of Cardross. The *onus* of establishing that plainly lies upon the parish of Hamilton, which is admittedly the parish of birth. . . I think it is proved that Robert Miller resided in the parish of Cardross from Whitsunday 1862 to the end of 1868, that is, for a period of six years and five months. I am further of opinion, on the evidence, that there were no breaks during this period to interrupt the continuity of residence, and there was nothing to prevent Miller from beginning to acquire a residential settlement when he went to reside in Cardross in May 1862.

"Mr Moncreiff has submitted, in the first place, that it is not proved that Robert Miller was major when he went to Cardross, and that until majority he could not begin to acquire a residential settlement there; and secondly, that throughout the period of residence there were several interruptions, so as to take the case out of the clause of the statute which requires that

there shall be five years' continuous residence. . . . . I must take the evidence as shewing that Robert Miller was major when he went to live at Cardross with his parents. But even if it were not so, and I were to hold that when he went to reside at Cardross he still wanted a year, or possibly two years, of majority, it would not in my opinion make a difference in the case. If you take the case of a young man somewhat under majority, who while living with his father sets up in business for himself, as many young men do, or who enters into partnership with his father, continuing to live with his parents, I should not doubt his capacity to acquire a settlement by residence; and between these cases and the present there appears to me no difference. Miller had finished an apprenticeship and entered upon another position. He had been for some time earning journeyman's wages, not in the trade of his father, but in a separate trade. His contribution to the expenses of the household cannot make any difference. This continued for a few months after majority just as it had done before, and was merely a payment for bed and board, which he must have made wherever he resided. There appears to me therefore to be no difficulty in holding that the residence in Cardross in the acquisition of a settlement began in 1862.

"The next question relates to the alleged breaks in the continuity of the residence, and upon that subject the test which I apply in this case is that which has been stated in the authorities which have been cited, viz., the consideration whether the breaks were incidental to the residence or subversive of the residence. If they are of a character merely incidental to the residence, such casual absences from the place of home or residence as occur more or less in the lives of most people, for pleasure or health, or on business, then the continuous residence has not been interrupted, and, as the result, the parish of Cardross will be liable. If, however, they are subversive of the continuous residence, that is, if when Miller left Cardross at the times mentioned by the witnesses he gave up his house or room in Cardross as his home, having had no intention of returning to it as his home, the result would be that Cardross should succeed.

"This question involves simply a matter of fact on which I have to give a verdict, and the conclusion at which I have arrived is that the absences proved are of the former kind,—that they are incidental to, not subversive of, the continuous residence of Miller in the parish of Cardross. The first breaks that are referred to and founded on are those during the period when Miller lived with his father. During that time he was absent at work for several months; at a later period he was in the same way absent for several months. It appears, however, in the first place, that these absences were necessarily temporary in their character, and were for temporary purposes. A mason living in a country town, as this man was, gets employment from the master-masons round about; and according to the place where these masons happen to be employed building, or adding to one house, or repairing another, over the country, the journeyman workman will be temporarily engaged and resident. Wherever the employer has work the workman is sent for the time. He takes his clothes and tools, and lives from home for a time; when the work is completed he again returns to his home. The workman's home in such cases is in my opinion as much his residence as the home of any one who goes to the country for a few weeks at intervals, for health or pleasure, continues to be his residence. . . . .

"Apparently from about Christmas 1866 to Whitsunday 1867 Miller was not living in Cardross, and I think this break in the residence is the only one that I can regard as raising a question of some difficulty in the case. I have come to the conclusion, however, that it is not sufficient to break the continuity of residence. This absence must be looked at in the light of all his previous life, and was, I think, of the same class as those already referred to. It appears at this time that Miller went to Arrochar in the execution of work of one of his ordinary employers in the neighbourhood. It was a temporary absence in the prosecution of a temporary employment there. It appears, in the next place, that he lived there alone, and that his wife lived in Cardross, and he had left his furniture in the house he had taken there. The furniture was of most trifling value, but such as it was it was the furnishing of his house. He left his wife, with whom he seems to have had a quarrel. She had at that time resolved to part from him, and after he left her she took a house for herself in Dumbarton. She did not know where he had gone, but latterly she traced him to Arrochar, and found him there. It is stated he intended to desert his wife, but it does not appear that he entirely separated himself from Cardross. He was, in the course of his ordinary trade, in the employment of the builder with whom he worked generally. His wife joined him, and he returned to Cardross, where his father's house and his own were, and took up his house there, where a child was born, and where he continued to live till the end of the year. On the whole, I am of opinion that the residence at Arrochar was of a character incidental to, not subversive of, a continuous residence of five years in the parish of Cardross.

"If that be so, there is no question between the parties here. The case of *Beattie* v. *Leighton and Mitchell*, 1 Macph. 434, does not create any difficulty, for there the Court held that there was a break in the residence which was subversive of its character,—that the pauper never intended to return to the parish in which he had resided when he left it; and, taking that to be the case, it was held that the residence was not continuous.'

"The case of *Milne* v. *Ramsay*, 10 Macph. 721, in which the residence was held to have been continuous, notwithstanding several absences of more or less duration, seems to me to be of the same character as the present, although of course every case will differ in its particular circumstances."

The Inspector of the parish of Cardross reclaimed.

Authorities—*Beattie* v. *Leighton and Mitchell*, Feb. 20, 1863, 1 Macph. 434; *Allan* v. *Shaw and King*, Feb. 24, 1875, 2 Rettie 463; *Crosbie* v. *Taylor and Greig*, Oct. 21, 1869, 8 Macph. 39; *Milne* v. *Ramsay*, May 23, 1872, 10 Macph. 731; *Hastings* v. *Brigham and Semple*, Jan. 27, 1866, 8 Poor Law Mag. 331.

At advising—

Lord Deas—This case raises a question whether

the pauper Miller had acquired when he fell into poverty a residential settlement in the parish of Cardross, and it is necessary to relieve the parish of Hamilton, which is the parish of birth, to prove that he had.

Now it is quite clear to me, as the Lord Ordinary remarks, the unless that period of about five months, when the pauper was in Arrochar, be deducted, there is no substantial ground for disputing the liability of the parish of Cardross. The other periods cannot be said to be sufficient. But about that period there is a nice question.

It is contended that the continuity of residence was broken by the pauper's absence for these five months, and in support of that contention it is said that it is not admissible to inquire into the pauper's intention to abandon or maintain his residence. The contrary was decided by Lord Neaves so long ago as the case of *Hay* v. *Beattie and Hardie*, Dec. 1, 1857, 20 D. 146. An opposite opinion was most distinctly expressed by Lord Cowan, and by your Lordship, then Lord Justice-Clerk, in the case of *Crosbie* v. *Taylor and Greig*, 8 Macph. 39, but no decision was pronounced, and I think it is plain that the course of decision has been the other way. In the case of *Moncrieff* v. *Ross*, Jan. 5, 1869, 7 Macph. 331, the Lord President observed that the case of *Greig* v. *Miles and Simpson*, July 19, 1867, 5 Macph. 1132, had set up the rule that the term residence was satisfied by constructive residence, and accordingly that rule was acted on in the decision of the Court in that case. In the case of *Milne* v. *Ramsay*, 10 Macph. 731, the accident of the pauper's working in another parish for the period of six months was held not to break the continuity of his residence. It cannot therefore be doubtful that the course of decisions has been that the intention of the pauper must be taken into account, and mere bodily absence is not sufficient to break the continuity. Now, I admit that the very length of the absence may indicate that there was no intention of returning, but here the pauper's conduct certainly carries no such interpretation—he left his wife and children behind him—he left his furniture—and did not therefore break his connection with the parish, and therefore there is neither proof nor presumption that he intended to leave it, and therefore I can see no authority for holding that the continuity of residence was broken.

The only case mentioned on the other side was the case of *Allan* v. *Shaw and King*, 2 R. 463. That was a very narrow case, but there the pauper retained no connection with his parish, but came back to it only because there were better wages going there. On the whole, I think it is consistent with the course of decisions—and therefore in such a case as this highly expedient—to concur with the Lord Ordinary in the result at which he has arrived.

Lord Mure—This case is attended with some nicety. It is difficult to say whether it is to fall under the case of *Allan*, last quoted by Lord Deas, or under the earlier decisions. In the circumstances of the case, the rent of the house having been paid up to Whitsunday 1867, the pauper had been five years resident in, and is therefore chargeable to, the parish of Cardross, if his residence can be held to have been continuous.

Now, the first case upon this point is that of *Greig* v. *Milne*. There a sailor's residence was held not to have been broken by his absence in pursuit of his calling. That was followed by the case of *Moncrieff* v. *Ross*, which was decided on the same principle, and the next case was in 1872, where a shoemaker was in the habit of going away and wandering about the country. In all these cases long absences were held insufficient to break the continuity of residence, for the paupers had in each case kept up their homes. In *Allan's* case, on the other hand, the man had no intention of returning. Now, in the case before us, if this man's wife had lived in his house while her husband was away, we should have the same circumstances as in the case of the shoemaker and the earlier cases. Now, is there a sufficient difference here to warrant us in making a distinction between this case and those? I think that here there is no break in the continuity of residence, because the furniture was left behind, and rent was paid for the house for the whole time. Therefore I come to the same conclusion as Lord Deas.

Lord President—There is no doubt that the five years' residence required by the statute may consist in part of a period of constructive residence, but it has not yet been decided that the whole of the five years may consist of merely constructive residence, nor what part may be so. That will be a difficult matter to decide: all the length that the decisions, as I think, have gone is, that if a man goes away leaving his wife and children, and leaving a furnished house, he does not thereby break the continuity of his residence. I think, as Lord Mure has said, that this decision carries us a step further than we have yet gone, but I think that that is warranted by the principles of the authorities quoted to us.

The Court adhered.

Counsel for Inspector of Hamilton—Macdonald—Lorimer. Agents—Bruce & Kerr, W.S.

Counsel for Inspector of Cardross—Balfour—Moncrieff. Agents—Murray, Beith & Murray, W.S.

Wednesday, November 3.

FIRST DIVISION.

[Commissary of Renfrew.

PETITION—MRS SARAH TURNBULL OR MUIR.

Executor-dative qua *next-of-kin*—18 *and* 19 *Vict. c.* 23—*Relict.*

Held that a mother was entitled to be confirmed executrix *qua* mother jointly with a widow *qua* relict, on the ground of the interest in the succession given her by the Intestacy Act of 1855.

This was a petition presented to the Commissary of Renfrew by Mrs Sarah Turnbull or Muir, craving to be decerned executrix *qua* next-of-kin to her son Alexander Muir. The widow of the deceased had previously presented a petition craving the same appointment *qua* relict. The