Wednesday, July 12.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BOYD *v.* BEATTIE AND DEMPSTER.

Poor—Settlement—Imbecile—8 and 9 Vict. c. 83, sec. 76.

A pauper pupil who had acquired a residential settlement derived from his father in one parish went to another parish and continued to reside there for a period of more than four years. The Court being satisfied on a consideration of the proof that though of weak intellect he was capable of earning a livelihood—*held* that he was capable of losing the residential settlement derived from his father, and was therefore now chargeable on the parish of his birth.

Opinion (per Lord Young) to the effect that mere absence for four years, quite apart from the question whether that absence is intelligent or not, is sufficient (on the authority of *Crawford and Petrie* v. *Beattie*) to destroy a residential settlement.

Involuntary Absence.

Question—Would a four years' involuntary absence caused by the pauper being in penal servitude destroy a residential settlement?

Opinion affirmative per Lord Young.

This action was raised in the Sheriff Court of Lanarkshire by the Inspector of Poor of the United Parishes of Monkton and Prestwick, in the county of Ayr, against the Inspectors of Poor of the Barony Parish and the City Parish of Glasgow respectively, concluding alternatively against the defenders for repayment of certain sums disbursed for the maintenance of Robert Quick Hutchins or Hutchison from 15th April 1879 to 16th August 1881.

The pauper was born on 1st October 1855 in the Barony Parish of Glasgow, and afterwards resided with his father in the City Parish of Glasgow, in which the father acquired and retained a residential settlement till the date of his death in August or September 1869. The father at his death was chargeable as a pauper to the City Parish. The pauper, being then a pupil, became chargeable to the City Parish, and continued to be so till 31st January 1871, at which date he was residing at Polmont. He continued to reside there without being chargeable to any parish from that date till 7th January 1876, when he received relief from the parochial board of Polmont, and was subsequently removed to Larbert Asylum, from which he was discharged in April 1876. On becoming chargeable in January 1876 he had apparently lost his former derivative residential settlement in the City Parish, and the parochial board of Polmont raised an action in the Sheriff Court of Lanarkshire at Glasgow against the Barony Parish for repayment of the amount expended for the pauper, and to be relieved of the pauper's future support. The Sheriff-Substitute (GUTHRIE) in an interlocutor dated 19th June 1880 found that the pauper's parish of settlement was the Barony Parish, and decerned against the Barony Parish. This decision was affirmed on appeal by the Sheriff-Principal (CLARK) on 21st July 1880.

On the 15th March 1879 the pauper was sent by the pursuer to the Ayr District Lunatic Asylum at Glengall. The sums sued for were expended by the pursuer in the pauper's committal to the asylum and his support therein.

On behalf of the Barony Parish it was stated—"Upon each occasion on which the pauper received parochial relief, he so received it by reason of his being of weak mind and imbecile. The pauper was from birth deformed in body, and was a congenital imbecile. He had always been more or less in the care and under the supervision of others. As he had grown older his imbecility had developed itself, and became more pronounced, until latterly, when he became adult, he became dangerous and insane, and required asylum treatment. Since 1869, when he became chargeable to the City Parish, his congenital bodily and mental weakness had culminated in confirmed imbecility, requiring constant asylum treatment. The parochial settlement of the pauper's father was the City Parish of Glasgow, by his residence therein for the statutory period."

On behalf of the City Parish it was pleaded that the pauper had been absent from the City Parish continuously without being chargeable as a pauper to it for more than four years, and had thereby lost his residential settlement derived from his father.

The parties agreed to import into this case the evidence taken in the before-mentioned case of date 21st July 1880. The import of the proof as led in both cases was as follows:—The pauper lived during his residence in Polmont, under the care of his uncle by marriage, and, although he was of weak intellect and low intelligence, he worked for his own livelihood as a miner as any other boy of his years might have worked. He went away from the house of his uncle and his uncle's widow several times, especially after his uncle's death, and was proved to have got employment on one occasion at least on his own account, to have got wages, which were stated to amount to 3s. a-day, and to have expended them in buying clothes for himself.

The Sheriff-Substitute (GUTHRIE) found, *inter alia*—"That the pauper continued to reside in Polmont without being chargeable to any parish from 31st January 1871 till 7th January 1876, being a period of more than four years; that during that time, although he was of weak intellect, he was not a lunatic nor a natural idiot; that he had received some instruction at school; and that to some extent he was able to contribute to his own livelihood, and to take care of himself; that in these circumstances he ceased to have a settlement in Glasgow City Parish, and that he was now chargeable to the Barony Parish of Glasgow as his parish of birth: Therefore decerned against the inspector of Barony Parish as craved for payment of the sum sued for, with interest as craved, and also for relief."

He added this note:—"It was contended for the City Parish that according to the principle that a residential settlement is lost wherever the pauper has not resided (as required by sec. 76 of the statute) for one year during any period of five years in the parish of such settlement, and that whether he be a lunatic or a person of full capacity (the rule established by *Crawford and Petrie* v. *Beattie*, 24 D. 357, and the late case of

Thomson v. *Kidd and Beattie*, 28th October 1881), it must be held that in this case the pauper Robert Quick Hutchins lost between 1871 and 1876 his derivative settlement in the City Parish, Glasgow, and had none but his birth settlement in Barony Parish.

"It is alleged, however, that the pauper here is not one who has become a lunatic, but that he has been insane from birth, and is a natural or congenital idiot. In a series of cases it has been settled that such idiots are incapable of having any settlement, even a birth settlement, of their own, but retain that which they derive from their father at the date of their becoming chargeable, whether it be in him a birth settlement or one acquired by residence, and hence it becomes necessary to consider whether the pauper is to be included in the category of natural idiots or idiots from birth.

"The same point was raised in a former case before me, in which the parish of Polmont sued the parish of Barony for relief of advances made on account of the same pauper at an earlier date —*Gentles* v. *Beattie*, June 19, 1880—*aff.* July 21, 1880. The evidence in that case has, by consent, been imported into this, and as I do not think that the additional evidence now adduced has strengthened the case for the pauper's birth parish, Barony, I adhere to my former opinion, and refer to my former judgment for the grounds of it. The evidence of Dr Hamilton, a very sensible and superior witness, who knew the pauper for some years, confirms the view which I then took. I think it is clear that although the pauper is now a lunatic incapable of acquiring a settlement, he was at the critical time for the present question (1871 to 1876) fit to support himself, and therefore within the principles of the authoritative cases cited in the former judgment. It is not even necessary to hold that he was during all the period of four or five years in such a condition of mind that he could acquire a settlement, for if he was fit to support himself even for two or three years I might possibly be bound to hold under these authorities that the lunacy or idiocy was not complete or unequivocal, that his personality was not destroyed, and that therefore, under the rule of *Crawford and Petrie* v. *Beattie*, his former settlement was lost by non-residence, though during part of the requisite period of absence he was incapable of acting for himself. That point, however, does not arise, as I think it proved that he was maintaining himself by his own industry for nearly five years."

The inspector of Barony Parish appealed to the Second Division of the Court of Session, and argued—It was clearly proved that the pauper here was a congenital idiot in a state of pupillarity, and continued to be such up to the date of his confinement in the asylum. The physical appearances of idiocy, and the medical evidence of that idiocy was not displaced by the fact that he occasionally earned his livelihood, inasmuch as he was on these occasions under supervision, and resumed his animal habits when free from restraint.

Authorities—*Heritors of Haddington* v. *Heritors of Dunbar*, December 19, 1837, 16 S. 268; *Greig* v. *Ross*, February 10, 1877, 4 R. 465; *Beattie* v. *Mackenna and Wallace*, March 8, 1878, 5 R. 737; *Watson* v. *Caie and Macdonald*, November 19, 1878, 6 R. 202; *Milne* v. *Henderson and Smith*, December 3, 1879, 7 R. 317; *Hendry* v. *Mackison and Christie*, January 13, 1880, 7 R. 458.

The pursuer replied—Even if it were relevant to inquire into the condition of the pauper's mind, which it was not, there was ample and unequivocal evidence to show that the pauper was able to maintain himself and earn his own livelihood. If that were so, he was not in such a condition as to be incapable of acquiring and losing a settlement. But (2) the question was one of residence alone. It was settled law that non-residence for a period of four years was sufficient to break a residential settlement.

Authorities—*Crawford and Petrie* v. *Beattie*, January 25, 1862, 24 D. 357; *Walker* v. *Russell*, June 24, 1870, 8 Macph. 893; *Lawson* v. *Gunn*, November 21, 1876, 4 R. 151; *Thomson* v. *Kidd and Beattie*, October 58, 1881, 9 R. 37; *Scott* v. *Gardner*, December 17, 1881, Poor Law Magazine, 10, p. 149.

At advising—

Lord Justice-Clerk—I understand that your Lordships do not desire to hear further argument in this case, and for my own part I am of opinion that the judgment of the Sheriff-Substitute should be affirmed, and that solely on one ground. It is admitted that the father of the pauper here had a residential settlement. If that was continued by the pauper it might still have remained as his settlement, but under the provisions of the statute it is necessary that after acquiring such a residential settlement the pauper should reside for a period of one year in five in the parish, and in this case the parish which relieved the pauper was not the one in which the residential settlement was acquired. The Sheriff-Substitute has found that the parish of the pauper's birth, and not the parish of his settlement, is liable for his relief under the provisions of the Poor Law Act referred to. The answer that is made to this is that this pauper is a congenital idiot and fatuous, and incapable of exercising judgment in such a matter, and therefore it is argued, on the authority of the cases quoted to us, that as the exercise of mind and will is necessary for the acquisition and loss of a settlement, the pauper was not in such a condition as to be capable of severing himself from his residential settlement, and therefore that that settlement remained to him.

I must fairly say that after going through the authorities, and after hearing discussion on the somewhat conflicting decisions on this branch of the law, I think that it is apparent that there has been greater waste of public time and parochial money and judicial acuteness displayed on this subject than on almost any other. It can do no good to anyone. There is no material principle of law involved, and I cannot say on what principle it has been decided that a period of residence of five years is to make a parish liable for the support of a pauper. The whole matter is just this—A certain amount of residence on the part of a pauper is held necessary so to make him one of the community of a parish so that that parish shall be under obligation to support him when he becomes unable to support himself. It is really a question of liability and contingent obligation, and, as I have said, involves no legal principle whatever. The pauper has not even a choice in

the matter at all, and therefore I own I am unable to follow with much continuity the long series of decisions on the matter. However, I think this case may be decided without much difficulty, and without the necessity of going into the abstruse questions raised.

This pauper is undoubtedly of weak intellect, and has probably been so from his birth, and his imbecility is of such a kind that he will probably end by becoming absolutely insane, but on the question as to whether or not he is capable of earning his own subsistence I am not satisfied on the evidence that it is to be answered in the negative. One of the witnesses tells us that at one time he was not only capable of choosing his own employment, but that he actually did so, and spent his earnings where and when he chose. Now, if he had mind enough to enable him to do that, it is impossible to hold that he was in such a condition that he should be unable to acquire and lose a settlement, and on that ground I am of opinion that the Sheriff is right. I do not think it necessary to review the authorities quoted to us, because I think that the amount of imbecility which has been established here does not bring the present case within the category of these cases.

LORD YOUNG—I am of the same opinion. I think the evidence of imbecility here is not such as in any view I can take of the law can hinder the pauper's absence from putting an end to the residential settlement which he derived from his father.

I think there is room for distinction between a birth and a residential settlement here as in many other points. The primary settlement is that of birth, and it is the only one which is never destroyed absolutely so as to be incapable of reviving. It is rather suspended, while one of another character, whether industrial or derivative, subsists, and when the latter is ended it then revives.

Now, the pauper's parish of birth, and consequently of his settlement by birth, is the Barony Parish. That was suspended with reference to its operation so long as the pauper's residential settlement derived from his father subsisted, and I know no difference from the legal incidents of a residence acquired by himself or that derived from from his parent. In the latter case the settlement is imported to him by law. Now, so long as that subsisted the birth settlement was suspended, but then a residential settlement stands for its creation and existence on the provisions of an Act of Parliament which says that whereas five years is necessary for the acquisition of a settlement, whether acquired by the pauper himself or by his father, that settlement cannot survive an absence of five years from the parish. Now, it seems to have been the decision in the case of *Crawford and Petrie* v. *Beattie* that it would not matter whether the absentee was during the whole or part of his absence in a state of imbecility. The case of *Lawson* v. *Gunn* was different. There it was not a case of the residential settlement surviving absence during the insanity of the pauper. It was attempted to be argued in *Crawford's* case that because for a part of the time during which the pauper was absent he was not intelligently absent, therefore that period should not count in the five years. Now, I should be disposed to hold with the Judges there that intelligent absence was not necessary, and I do not think that (assuming intelligent absence) it would make any difference that the absence was involuntary, supposing, for instance, that the absentee was in penal servitude. Now, in such a case would the settlement survive because the absence was involuntary, so that when the absentee returned and became a pauper again he could go back to his residential settlement, and not to that of his birth? I rather think not, and there is a pretty distinct principle (not necessary to decide in this case) in mere absence—that residential settlement acquired by mere presence under the provisions of the Act shall not survive absence, which is the reverse of what gives it. But on the whole matter, independently of more subtle and metaphysical considerations, I agree with your Lordship in thinking that this pauper's absence was not accompanied by such an amount of imbecility as would render him incapable of acquiring or losing a settlement.

LORD CRAIGHILL—This is a case of nicety and one certainly of importance. My opinion, however, is that the judgment of the Sheriff ought to be affirmed. The pauper was born in 1855. He lived with his father in 1869, and after his father's death he was supported by parochial aid. In 1871, when he was living in the family of his uncle in the parish of Polmont, he was employed as a miner. He made that which was sufficient for his own support, and things so continued until 1876.

The question upon these facts to be determined is whether he was capable of losing the residential settlement in the City Parish of Glasgow which he had acquired from his father in 1869. That he was absent for the requisite period is certain, and it has been maintained on behalf of the City Parish that mere absence is all that is required. There are authorities to this effect, and those authorities in parallel cases must be held to settle the law. But in all these the settlement which was lost simply by absence was a settlement acquired by the pauper. In the present case the settlement was not acquired by the pauper, but by the father, and as at present advised I am not disposed to hold that what was fixed in the cases referred to is law for a case like the present. But it is unnecessary that I should commit myself to an opinion upon this subject, as I agree with the Sheriff-Substitute, who holds that the pauper was capable of losing and could have acquired for himself a settlement. Every case of this kind is a case of degree. So Lord Neaves said in *Watson* v. *Caie and Macdonald*, 19 Nov. 1876, 6 R. 202. And consequently what is now to be determined is, whether the imbecility of the pauper was so absolute as to render him as incapable as an infant or a lunatic? That he was weak in mind and in body too is proved beyond all doubt. And he was capable of some things—among others he was capable of learning to read, and he was able to work, so that out of his earnings he would be supported. Hardly any one test may be regarded as decisive, but if one thing more than another may be accepted as a solution of a question like the present, it seems to me to be the ability to earn a livelihood. It would be strange that one living in a parish, able to work, and by his work to support himself, should be

thought incapable of acquiring a residential settlement; and surely it would be a stranger thing to hold that being able to acquire, he might through absence in another parish for the requisite period be incapacited from losing a residential settlement acquired from his father. The evidence of Hunter, in whose house the pauper lodged for two months, seems to me to be the most important. The pauper should be judged of by what he was able to do, and Hunter proves that he was not only able to work, but that he drew wages, purchased his own provisions, and acted in such a way as to show that he could make and could also spend the money that he earned. The doctors who have been examined are no doubt of opinion that he was congenitally imbecile; but there are many degrees of imbecility, and an imbecile, whatever doctors may say, who is capable of doing the things which were done by this pauper appears to me to be one who is *sui juris*, and capable therefore of either gaining or losing a residential settlement.

LORD RUTHERFURD CLARK—I also am of the same opinion. The case of the appellant is that the pauper has always been in *statu pupillari*, and therefore that he retained the residential settlement derived from his father, notwithstanding that after minority he was absent from that parish for more than the full number of years required by the statute. I think the appellant's case fails in fact, and therefore that the Sheriff-Substitute's judgment should be affirmed. On the nicer questions raised I give no opinion.

The Lords dismissed the appeal, and affirmed the judgment of the Sheriff-Substitute.

Counsel for Appellant — J. Burnet — Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents—Mackintosh—Lang. Agents—W. & J. Burness, W.S.

Thursday, July 13.

SECOND DIVISION.

[Sheriff of Argyllshire.

NICOL *v.* M'INTYRE.

Bankruptcy—Statute 1696, *cap.* 5*—Preference Created by means of Bills.*

A person involved in pecuniary difficulties, within sixty days of his insolvency handed three bills drawn in his favour to the agent of one of his creditors, who happened to be also agent for a branch of the Commercial Bank. The latter discounted the bills at the bank, and they were paid by the several acceptors as they became due. *Held* that, although there was no fraudulent intention, this was a transaction challengeable under the Act 1696, cap. 5.

In December 1879 Angus Campbell, farmer, residing at Soroba, near Oban, was pressed by several of his creditors for payment of their claims. Among these he was charged by John M'Intyre, residing at Lochvoil Villa, Oban, on the 13th of December, on a bill for £100 which he had failed to meet. On the 15th Campbell called on Mr MacArthur, who was acting as M'Intyre's agent, and was also agent for the Commercial Bank at Oban, and told him that he was making arrangements for paying this debt out of the proceeds of a sale of stock which he had advertised to take place at his farm of Soroba on the 16th, and that the sale was to be conducted by his agent Mr Lawrence, from whom he undertook to get a letter authorising that the debt should be so paid. The sale was accordingly conducted by Mr Lawrence. Under the conditions of roup six months' credit were given to purchasers on approved bills, and consequently there was little or no cash paid at the sale, but bills were granted by the several purchasers payable six months after date. Mr Lawrence was not able to pay M'Intyre's claim in full, but on the 24th of December he handed over to MacArthur £10 in money, showing him at the same time the bills which he had received and which the National Bank had refused to discount. Of these bills MacArthur selected three which he was willing to discount, and these after being endorsed by Campbell were discounted by MacArthur at the Commercial Bank, for which he was agent, and of which bank the acceptors were customers. The bills as they became due were paid by the several acceptors. A similar transaction was concluded at the same time with another creditor.

Campbell's estate was sequestrated on the 8th February 1880, and at a meeting of creditors held at Oban on the 20th of the month James Nicol, solicitor, Oban, was elected trustee; thereafter the present action was raised by him against M'Intyre, on the averment that Campbell was insolvent at the date of the said arrangement with the defender, and when the said bills were obtained by him through his agent, and that this fact was well known to the defender and his agent; that the estate of the bankrupt had been sequestrated within sixty days of the date of delivery of the said bills to the defender, and that that delivery was a preference struck at by the Bankruptcy Statutes and the common law, under which it was reducible.

He pleaded—"(1) The defender having obtained an undue and illegal preference over the bankrupt's other creditors, to their loss and injury, is bound to surrender the same. (2) The endorsation and delivery of the bills referred to within sixty days of bankruptcy, and at a time when he was hopelessly insolvent, being an alienation by the bankrupt of his estate, and struck at by the Bankruptcy Statutes and the common law, the defender is bound to restore the value of said bills. (3) Even assuming that £10 were paid in cash, the same was not a *bona fide* payment in the circumstances, and therefore the defender is bound to repeat said sum."

The defender denied that he was cognisant of the insolvency of the bankrupt when he obtained the bills through his agent, or that he was party to a fraud on the general creditors.

He pleaded —"(1) The payment of £10 received from Mr Lawrence as agent for the debtor Angus Campbell, was a *bona fide* payment, and is not struck at by the Bankruptcy Statutes as an illegal preference. (2) The sum of £46, 2s. 2d. paid to account of defender's debts, in the circumstances set forth, was also a *bona fide* payment to account of defender's debt, and is not reducible. (3) The defender not having received a security or preference struck at by the Bank-