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-

man. Except after January 1862, and for a short time in 1852, it cannot be said that he was unable to direct his own affairs, or to perform all the ordinary duties which a man of his class should attend to. He married, in 1852, Catherine Laurenson, a woman residing with her father at Houlland in Tingwall, and the witness Walter Williamson says that on his marriage he meant to remove from Havera. His connection with Tingwall for some time after his marriage, and up to May 1855, was very slight; he was at first for a few months in a lunatic asylum, then at Houlland in Tingwall for nine months, then two months in Lerwick, and afterwards for seven months on a foreign voyage as a sailor, till September 1854. He spent the period from September 1854 till May 1855 at Havera, fishing, and at Houlland with his wife. But his residence during this period is not very definitely fixed. But from May 1855 till January 1862, his connection with Tingwall becomes more close. He spent the first nine months of that period fishing from Oxna and Scalloway both in Tingwall, living with his wife at Houlland; the next three months he was at Havera fishing, while his wife remained at Houlland, and he visited her during that period. At Whitsunday 1856 a room was taken for himself, his wife and family, to reside in at Scalloway in Tingwall, and that became from that date till January 1862 the residence of his wife and family, and of himself when not absent in pursuit of his ordinary occupation. Fishing is prosecuted in the Shetland islands either by boats from stations on the coasts near the fishing grounds, to which stations the fishermen resort from their homes in various parishes during the fishing seasons, or by smacks on the banks at Faroe, &c. The important stations in Shetland are the Skerries, Stennis, and Fethaland: this man did not resort thither, but to the islands of Havera and Burra, both in Bressay. In the former his father lived, in the latter his brother, and with these persons he naturally spent the fishing seasons of the year. These two islands are not fishing stations in the same sense as those formerly mentioned; but it is abundantly clear that strangers go to them to make up the boats' crews of islanders, because these islands are good fishing stations. In this way, while the wife and family of Thomas Williamson were always in Scalloway, he was absent twice in each year from his home there for a period varying from two to four months each absence. During these absences he occasionaly visited Scalloway for the combined purposes of visiting his wife and transacting business. These visits, though rare, reduce the length of the absence, and keep up the link with his home. In the course of these residences at Scalloway he procured a boat to facilitate the possibility of his getting from Havera and Burra to Scalloway. He considered Scalloway his home. His children were born there. He took his provisions from Scalloway, and his wife got credit there on his account. The rent of the room at Scalloway was paid, as appears from the rental of the witness Charles Nicolson, from Williamson's share of the fish which his boat's crew obtained, and which were sold to Nicolson as fishmaster. One season he went to Faroe, and he was absent at London for two months, bringing home a fishing smack. But these absences do not seem to differ in their character from what is usual in the life of a Shetland fisherman, and more than once it is in evidence that his life was just like that of any other Shetland fisherman, and that other fishermen move about exactly as he did. One point in reference to his wife and family requires special notice. During the man's voyage to London bringing home the fishing-smack, his absence in consequence of bad weather seems to have been more prolonged than was expected, and his wife and children not having sufficient funds to continue in Scalloway, took refuge for some weeks in her father's house in Lerwick. At first sight this might seem sufficient to dislocate the connection with Scalloway, and to break the continuity of the residence in Tingwall. But on turning to Nicolson's rental-book, it appears that they were debited with the rent for the whole four quarters of that year, and that they retained their room in Scalloway during that absence. Their connection with it was not destroyed. Another point in reference to the wife may be noticed. The room, it is said, was let to her. This, in the opinion of the Sheriff-substitute, was a matter of no importance. It is clear that the rent of the room was paid out of funds forming part of the goods in communion. The man was liable for the rent, and it was the common home of himself and his family. But it is equally clear that of the whole five or six years and a half during which the man and his family were in Tingwall parish (according as the terminus *a quo* be reckoned from Whitsunday 1856 or May 1855), he himself was personally present only a small part of the time in the parish of Tingwall. He was probably not more than four or five months of each year actually resident in Scalloway. Can a man in such circumstances acquire residential settlement in a parish? The question is of general importance, and of extensive application in a fishing and seafaring population like Shetland. The words 'continuous residence' in the 76th section of the Poor Law Act, are, as is well known, open to construction. They have not been defined in the Act itself, and it has long been settled that they do not mean constant and uninterrupted residence. In the latest reported case, *Hewat* v. *Hunter*, July 6, 1866, 4 Macpherson 1033, Lord Justice-Clerk Inglis observed—'It could never be meant that the Statute could be so construed as that a person could not be away in pursuit of his ordinary business.' And in the same case Lord Cowan observed—'In considering questions of this nature we must inquire whether the man was fixed and attached to some permanent place of abode which can be called his residence.' Lord Neaves in the same case remarks, that the 'occupancy of a dwelling-house by a man's wife and family may often be a material point in questions of residence.' Lord President M'Neill, in the immediately preceding case of *Hustings* (8 P. L. Magazine, p. 336), thus stated his views—'I do not think that personal presence is the sole test. 'An important fact in deciding a case of this kind is the permanent character of the residence, as, for instance, if the person has been a householder during the disputed period.' In the present case, the Sheriff-Substitute is of opinion that the absences were occasioned by Thomas Williamson following his ordinary occupation, and that he did so in the only way possible to him. While at Havera and Burra he was never on land except for the purpose of resting from the labours of the sea, and he could not be, in the whole circumstances of this case, beginning a new residence in these islands while his actual residence was elsewhere. Again, the absence of Thomas Williamson never had the character of a complete depar-

ture and separation from Scalloway. He never meant, when he left the place to fish, to sever the tie that existed between him and it. His absences were temporary, and he meant on each occasion to return to the common home of his wife and himself. He did return there always, and though his wife, from the insanity of her husband, looks back upon his life in Scalloway as more for her than for his sake, and with feelings that make her evidence not the most reliable in this case, it is clear that he considered Scalloway his home, and spoke of it as such to his fellow fishermen. Again, the absences of Thomas Williamson were incidental to his residence in Scalloway. He and his wife went there from the facility it afforded him of following his business, and of meeting his wife easily. But Scalloway, though a seaport, is too much inland for him to have fished from it during the spring and summer fishings at least, and he necessarily went elsewhere. If a fisherman in Shetland can acquire a settlement by residence at all, the events of Williamson's life, being similar to many others, should enable him to do so. In conclusion, the Sheriff-substitute thinks this judgment not only more consistent with principle, but more in accordance with policy, with reference to the social life of the people among whom he administers justice. He has often heard it said since he came to Shetland that the actual population exceeds by nearly ten thousand the number which appears in the census, and the reason given is that all the fishermen were astir and away from their homes at sea the night before the census was taken. Many of these were at stations out of their parishes. It would be a serious thing to say that none of these could acquire a settlement by residence. This case is in some respects peculiar and special, but its general features will be found in the lives of all Shetlanders. In regard to the alleged admission by Bressay of liability, the Sheriff-Substitute thinks that there was a good deal of vacillation on the part of the parochial board of that parish, but while there was a payment of a certain sum of money, there was no express admission of liability, and it was speedily followed by a repudiation. In a parish a new rate may be imposed every year, the ratepayers may change, and the whole members of a parochial board may be different each succeeding year. In such circumstances, it seems a favourable case for sustaining the plea of error. Still it must be error in point of fact, and the Sheriff-Substitute thinks that the effect of the evidence must be held to be that the case, though investigated by the Bressay Board, was not sufficiently so, and that they were entitled to resile from an implied admission prematurely and incautiously made."

The Sheriff (GIFFORD) adhered.

The inspector of poor of the united parishes of Tingwall, Whiteness, and Weisdale advocated.

CLARK and CHEYNE for advocator.

MILLAR and A. MONCRIEFF for respondent.

At advising—

LORD DEAS—This question is one of some nicety, as almost all these questions are. I must say I think a little too much is rested in the interlocutors of the Sheriffs on the case of *Greig* v. *Simpson and Miles*, which may or may not have been a clear case in its circumstances, but which depended almost entirely on its own circumstances. There is no principle in that case more than in others of the same class beyond this, that while on the one hand personal residence is necessary to acquire a settlement, that personal residence need not necessarily be continuous. I don't think that principle has been ever doubted, and, so far as that goes, I see no conflict in the opinions of the Court. When you get beyond that, the whole question is one of circumstances, whether the absence or employment in another parish is of that kind which is inconsistent with the supposition that the personal residence still continues. It seems to me that to lay down that the case of *Simpson and Miles* affirms a principle necessarily conclusive of this case, or any other case of this kind, is a total mistake. To make one case conclusive of another the circumstances would need to be the same. You must take the whole circumstances, and very little may make a material difference. The case of a sailor, no doubt, is strong in favour of the view that the absence may be very considerable and yet the acquisition of a settlement may not be interrupted. There was room in that case for difference of opinion. It was a stronger case than this, but I should decide this case as the Sheriffs have done though that case had never been decided. The principle to be applied would have been the same. Now, in this case you find that Williamson, who was married in 1852, came in 1856 to live with his wife in a house of his own in the parish of Tingwall. His wife says—"He spent the first nine months of that period fishing from Oxna and Scalloway, both in Tingwall, living with his wife at Houlland. The next three months he was at Havera, fishing, while his wife remained at Houlland, and he visited her during that period." And so he spends the first nine months here with his wife and family. The question is, whether what afterwards occurred prevented that personal residence from continuing to the end.

Now, after that nine months, Williamson engaged in fishing in that other parish with his father and brother, evidently because the fishing could be more profitably carried on there, and also because his mental constitution was peculiar, and it might be safer that he should reside a good deal with his father and mother instead of with his wife and family. But, so far as consistent with his occupation as a fisherman, during the whole period he goes back and forward to his wife and family. He maintains them in his own house. His relations all understood his house to be there; and, although I admit these things are not so important as in a case of disputed domicile, they are of some importance as to whether his personal residence was abandoned. Although there were a good many months in the year when he was not living with his wife and family, he yet visited them for a night or two from time to time. As his wife says, he did so whenever he had a chance. It seems to me that, consistently with the principle which I have stated, this case has been righty decided by the Sheriff on its circumstances. In questions of this kind it is impossible to lay down a principle of law that shall necessarily rule. Every such question must be decided very much on a common-sense view, and an attention to the special facts. My opinion in this case is, that the acquisition of a settlement by Williamson was not interrupted by his absence from Scalloway, and that without reference to the case of *Simpson and Miles*.

LORD ARDMILLAN concurred.

LORD KINLOCH concurred, and thought that the Sheriffs had rightly laid a good deal of stress on the decision in *Simpson and Miles*.

LORD PRESIDENT—I am in a position of some

difficulty. If I thought this case to be clearly ruled by the previous judgment in *Simpson and Miles* I should have nothing to say, but simply to apply the rule of that case to the present, however much I may have differed in that case from the opinion of the majority of the Court. But it appears to be admitted that the case of *Simpson and Miles* does not rule this case. My brother on the right (Lord Deas) thinks that this case must be decided in the same way as if *Simpson and Miles* had never been heard of, and all your Lordships are of opinion that it differs materially in its circumstances. It certainly is carrying the principle of *Simpson and Miles* a good deal farther to apply it in the present case, and it is for that reason that I find myself in a position to dissent from the present judgment, for though of course I must apply *Simpson and Miles* to every case precisely similar, I do not consider myself bound to carry it one step farther.

The most material difference between the two cases is, that in *Simpson and Miles* when the pauper was absent from his home he was not resident in any other parish, but was on the sea, and that was a circumstance which certainly influenced very much the opinions of the Judges in the majority. But here it appears to me that when the pauper was absent from his home in Scalloway he was resident elsewhere, and resident within the meaning of the 76th section of the Poor Law Amendment Act. He was in the parish of Bressay, and was resident there in this sense, that he lived on land except when he was out fishing. He occupied a bed, and consequently a dwelling-house on land in Bressay. Every one knows that fishermen must ply their trade on land as well as at sea, and must come to shore in order to repair and dry their nets, to mend their boats, and to repair their tackle. They must come on shore likewise for the purpose of selling their fish, and sometimes, as in this case, for curing their fish. Besides, it is in evidence that the father of the pauper had a croft, and this pauper was employed in its cultivation and management.

It will hardly be disputed that if Williamson had resided in that way in Scalloway for five years continuously, he would have acquired a residential settlement in Scalloway. Therefore, this case involves the proposition that a man may, within the meaning of the 76th section of the Act, be resident in two places at the same time. For the case of *Simpson and Miles* upset the rule which had been established in the three previous cases of *Aberdeen Infirmary* v. *Watt*, *Hutcheson* v. *Fraser*, and *Macgregor* v. *Watson*. It did not proceed on a construction of the same word as these cases, for they proceeded on a construction of the word "continuous," while the case of *Simpson and Miles* proceeded on a construction of the word "residence." But the practical result was to destroy one rule and set up another. *Simpson and Miles* did establish this, that "residence" and "residing" within the meaning of the statute may be satisfied by constructive residence. That is, a man may be held to be "resident" when he is never present in the place at all; in short, that constructive residence may be accepted in place of actual residence. Now the circumstances of this case afford a very strong example of the application of this rule. It is proved that for the greater part of the five years this man was *de facto* eating and drinking and sleeping in the parish of Bressay; that he was always there except when he was at sea, not fishing at a great distance, but off the coast of Bressay, and that his residence at Scalloway was for a much shorter period.

All I shall say is, that I conceive "residence," in the meaning of the 7th section, to be actual and not constructive residence; but this case will establish the principle that something that is not personal residence will be sufficient for the acquisition of a settlement, and if that is so decided, I shall, of course, hereafter interpret the clause in that way.

Agents for Advocator—Stuart & Cheyne, W.S.
Agents for Respondent—J. & R. D. Ross, W.S.

Tuesday, January 5.

SECOND DIVISION

CLARK *v.* CLARK.

Reference to Oath—Bill—Charge—Alleged want of Value. Circumstances in which *held* that the terms of an oath were negative of the reference.

This was a suspension of a charge upon a bill, on the ground that no value had been received by the suspender. The question of value had been referred to the charger's oath. It appeared from the oath that the suspender had been sequestrated in November 1867, and at that time the charger was his creditor in a bill for £146, 17s. 8d.; and also that the suspender had been discharged in February 1868 under a composition-contract, whereby his creditors, including the charger, had agreed to accept of a composition at the rate of 7s. 6d. per pound. It farther appeared that some time after the charger had agreed by letter to accept of the composition the parties met at Greenock, when the suspender accepted a second bill for £147—namely, the bill now charged on. The suspender averred, with reference to this bill, that he accepted it as an accommodation to the charger, who was his brother, but the charger deponed in reference to it—"My brother gave me the second bill of his own free will. He said he had failed so shortly before, and he did not wish to take me in. Both he and I considered that the granting of the second bill was a rearing up of the debt."

The Lord Ordinary (MANOR) passed the note.

The charger reclaimed.

GIFFORD and DUNCAN for him.

BURNET in answer.

The Court reversed, holding that the terms of the oath were negative of the reference. The old debt was no doubt extinguished by the discharge following upon the composition-contract, and the suspender was under no legal obligation to grant the second bill; but every bankrupt was under a moral obligation to pay his debts in full if he became able to do so, and that obligation was sufficient legal consideration for granting the bill. It was also thought to be clear, from the passage in the oath above quoted, that the consideration referred to was the cause of the suspender accepting the bill.

Agent for Suspender—William Mason, S.S.C.
Agents for Charger—J. & R. Macandrew, W.S.

Thursday, January 7.

FIRST DIVISION.

FRASER *v.* CONNELL AND CRAWFORD.

Arbitration — Award — Ultra vires — *Compensation.*