Wednesday, June 22.

STEVENSON *v.* MEIKLEJOHN.

Filiation and Aliment—Proof—Sheriff-court. Observations by the Court upon the manner of conducting proofs in the inferior court.

This was an action by Meiklejohn in the Sheriff-Court of Stirlingshire, against Stevenson, concluding that he should be declared the father of the pursuer's two children, born 29th July 1863 and 3d August 1866 respectively, and for aliment. After a proof, the Sheriff-Substitute gave decree in terms of the conclusions of the summons. On appeal, the Sheriff-Depute affirmed this judgment. In the note the Sheriff-Depute remarked :—"The Sheriff wishes, in connection with this case, to direct the attention of the Sheriff-Substitute, and through him of the procurators, to a matter of general practice. The Act of Parliament directs proofs to be taken, 'as far as may be *continuously*, and with as little interval as the circumstances or the justice of the case will admit of.' This direction of the Act appears to have been in this as in a previous case after referred to, but must not in future cases be, overlooked. In the present case the pursuer commenced and concluded her proof on the 21st July. The defender's proof was not commenced until the 10th of August—was then adjourned, and not again taken up and completed until the 18th of August. There do not appear to be any circumstances, and none are stated, to justify these long intervals. In a recent case appealed to the Second Division of the Court (*Sands* v. *Auld*), a somewhat similar delay was the occasion of condemnation from the bench, and was remarked upon as particularly reprehensible in a filiation case; and it was observed that the evidence of the pursuer and defender in such cases should be noted in detail, and that it was bad practice to note that either of the parties in their evidence said '*conform*' to a preceding witness. They should be made to tell their own story in their own way. Further, it is desirable for the information of the courts of appeal that the ages of the pursuer and defender, and of the witnesses generally, should appear in the notes of evidence. All these remarks are applicable to the present proof, but may be easily obviated in future cases."

The defender appealed.

BALFOUR and HARPER for him.

BUNTINE, for respondent, was not called on.

The Court unanimously dismissed the appeal.

LORD PRESIDENT—I concur with the very judicious observations of the Sheriff-Depute upon the manner in which the proof in this case has been conducted. In the first place, the proof occupies a month instead of a couple of days, in consequence of a long adjournment during its course.

This is a practice entirely inconsistent with the Act of Parliament, and is the cause both of delay and expense. I hope the observations of the learned Sheriff, which are well entitled to respect in his own Court, will be attended to elsewhere. In the second place, the testimony of the pursuer, who is the principal witness in the cause, is reported in a most unsatisfactory way. She is held as concurring on the most important points with the testimony of her own witnesses, who have been previously examined. Now, every word of the examination of such a witness, and of all witnesses, should be taken down.

In the third place, we have the new fashion of not giving the age of the witnesses. That information is sometimes of the very greatest importance, and ought always to be supplied in the Court.

These considerations, I am satisfied, have only to be pointed out in order to insure their adoption.

Agents for Appellant—Duncan, Dewar & Black, W.S.

Agent for Respondent—James Barclay, S.S.C.

Friday, June 24.

FIRST DIVISION.

INSPECTOR OF STOW *v.* INSPECTOR OF CLACKMANNAN.

Poor—Settlement—Forisfamiliation—Insane Pauper. Held (1) on a proof that a pauper was not insane, and *observed* that a person who was insane or weak of intellect may yet be able to acquire a settlement through self-support; and (2) as forisfamiliation destroys the settlement derived from a father, this rule must apply even where the pauper by birth in England has no settlement of her own on which recourse for relief can be had.

In this action John Forbes Walker, Inspector of the Poor of the Parish of Stow, was pursuer, and Thomas Russell, Inspector of the Poor of the Parish of Clackmannan, was defender. The pursuer sought for declarator that the pauper Margaret or Phœbe Ann Miller was chargeable on the parish of Clackmannan, and for decree of payment of certain sums advanced or incurred by the pursuer on the pauper's behalf. The pauper is the daughter of John Miller, who was born in the parish of Clackmannan in 1793. Miller left his birthplace when about 20 years of age, and, after about 15 years' hawking in various parts of England, married Phœbe Ann Kelly, and of that marriage the pauper was born. Some years after, Miller deserted his wife, and has never since been heard of. The pauper and her mother, both of whom were of somewhat weak intellect, travelled about as hawkers till the latter's death in July 1866. On 16th May 1867 the pauper, who had been travelling about the country, was taken ill at a farm in the parish of Stow, and delivered of a child. The pursuer, on application, gave the pauper relief, but learning from the parochial doctor that he thought she was of unsound mind, and finding the doctor and another (who was also consulted some time after) were of the same opinion, the pauper was, on 4th June, removed to Morningside Asylum by warrant of the Sheriff of Midlothian. The child died a month after its birth. On 18th May 1867, the pursuer sent the defender the usual statutory notice, and on 12th June claimed relief from him. The pursuer maintained that the parish of Clackmannan is liable in support of the pauper, as being the parish of her father's birth, and as she had been too weak of mind to gain a settlement for herself. The defender rested his defence on the ground that the pauper was not insane, and had been forisfamiliated.

The acting Lord Ordinary (NEAVES) assoilzied the defender in the following interlocutor :—"The Lord Ordinary having heard counsel for the parties, and considered the closed record and proof—Finds that the pauper in question, now chargeable on the parish of Stow, as the relieving parish, is

the daughter of John Miller, who was born in the parish of Clackmannan, in December 1793: Finds that the said John Miller left Clackmannan and Scotland when under or about twenty years of age, and went to England, where he became a hawker or travelling merchant, and was married at Cheltenham, in the year 1828, to the pauper's mother, Phœbe Ann Kelly, who gave birth to the pauper in England in September 1829: Finds that a few years afterwards the said John Miller deserted his wife, and that no authentic account of him has since been received, nor any sufficient evidence now adduced with regard to him: Finds that, after being deserted by her husband, the pauper's said mother, with the pauper, and at first also with a son who was born of the said marriage, travelled about the country as hawkers, and latterly the pauper's mother and herself followed the same course of life in England and in Scotland, until her mother died in the month of July in the year 1866: Finds that the pauper, though naturally of weak intellect, was not a lunatic nor a natural idiot, and was able to some extent to contribute to her own livelihood by knitting and selling small wares along with her mother, and that she had received some instruction at school, and could read, and take care of any money she had occasion to receive: Finds that the pauper and her mother were never reduced to beggary, nor became paupers in any way, and that they are not shown to have received any parochial relief or assistance, although it appears that, after the death of the pauper's mother, some claim had been made on the mother's account on the parish of Clackmannan, and that a sum of £2, 3s. 9d. was, in September 1866, paid by the inspector of that parish in reference thereto, but upon what footing does not appear: Finds that, after her mother's death, the pauper herself went about the country without begging and without becoming an object of parochial relief, until the time when she was delivered of a child in May 1867, at a place within the parish of Stow: Finds that at this time she became seriously ill, and that her mind was affected, and that thereafter she was admitted into Morningside Asylum, and there remains as an insane person: Finds that the pauper, having thus become chargeable on the parish of Stow, the pursuer, on 18th May and 12th June 1867, intimated to the parish of Clackmannan, in terms of the Statute, that such was the case, and that he claimed to be relieved by that parish of her support, as the parish of her father's birth: But finds that, in the circumstances of the case, that claim of relief now sought to be enforced is not well founded, and that the parish of Clackmannan is not bound to support the pauper: Therefore to this effect sustains the defences, and assoilzies the defender from the conclusions of the action, and decerns: Finds the pursuer liable in expenses; allows an account thereof to be given in, and, when lodged, remits the same to the Auditor to tax and to report.

"*Note.*—The parish of Clackmannan can only be subjected in this action if it is the parish of the pauper's settlement. But it is thought that the facts of the case do not support that contention. In the absence of a residential settlement, the parish generally liable is the parish of the pauper's own birth. There are undoubtedly exceptions to that rule, and the most conspicuous of these is the case of children in pupillarity, who may have either lost their father or have been deserted by him. His settlement is their settlement. They never have had a *status* of their own, and the settlement of their own birth is not, in the first instance at least, at all regarded.

"The pursuer here maintains that the settlement of the pauper is the birth settlement of her father, because, on the one hand, it does not appear that the father ever acquired any other settlement, and because, on the other hand, "the pauper has from childhood been of unsound mind." The Lord Ordinary is disposed to think that, if the fact here assumed were true, the conclusion deduced from it would be well founded. It may not be quite clear in this case that the father ever acquired another settlement, but, waiving that difficulty, the question arises as to the pauper's state of mind. One who is truly a lunatic or a natural idiot may, it is thought, be considered incapable of acquiring any settlement of his own, and may be considered a perpetual pupil or infant, whose settlement remains through life the settlement which he derived from his father. But then it is thought that, in order to have the effect of thus annihilating the pauper's personality, the lunacy or idiocy must be complete and unequivocal. Mere weakness of understanding will not do. There is an infinite variety in the shades of such weakness that would make it extremely dangerous to introduce any laxity in this respect. The Lord Ordinary has been unable to hold that the defect in the pauper's mind in this case was of such a nature as to put her in the position of a mere pupil. She was not a lunatic, and he thinks it cannot be said that she was an idiot. She had been sent to school, and had received such instruction as to be able to read respectably or even well. She could count to a certain extent, and knew enough to enable her to manage the little money matters that she had occasion to deal with. She could knit articles that were saleable, and she could sell the little wares that her mother and she carried about. She had no illusions, and it is doubtful if she had any delusions, though she may have imbibed naturally enough some of her mother's foolish imaginations or pretensions as to being a great personage. Nothing definite, in short, is proved about her, except the general idea that she was deficient, and upon that subject the evidence is conflicting. It is not wonderful that with a weak, and probably an excitable mind, the melancholy position in which she was placed by the unprincipled conduct of some unknown man, in making her the mother of a child, would, for a time at least if not permanently, disorder her understanding to such a degree as to account for the state to which she was then reduced, and in which she has since been. The doctor who saw her at the time of the child's birth might have thrown more light on this matter, but he was not examined.

"In these circumstances, the Lord Ordinary cannot see that she was incapable of acquiring even a residential settlement if she had ever settled down in a fixed abode, and he thinks that it would be contrary to all correct principle to hold that, whatever her intermediate history may have been as to residence, she was destined to retain through life the paternal settlement which she derived from her father forty years ago.

"It has been suggested that, from her living with her mother all along, she must be held to have had at least her mother's settlement, and that her mother, whether as the wife or the widow of John Miller, had the settlement of her husband at Clackmannan. Even supposing that this was

the mother's settlement, there seems no good ground for holding that a grown-up daughter, if not otherwise incapable of any *status*, must take her mother's settlement because the two lived together, and helped each other to earn their livelihood. The daughter here may have done little in one way, but she was abler and stronger in another, and the two mutually contributed their best.

"The payment made by Clackmannan after the mother's death seems not to be conclusive of anything. It is rather remarkable that, after that event, the pauper seems to have gone on by herself, for nearly twelve months, without having either begged or got relief. She probably lived upon some money which the mother seems to have had, and to which the son refers in his evidence, and which is also spoken to by the witness Hyslop."

The pursuer reclaimed.

ORR PATERSON for him.

FRASER and BALFOUR in answer.

At advising—

LORD PRESIDENT—Two points are raised by the reclaimer—first, that the pauper in this case was insane, and therefore from the time of her father's desertion incapable of acquiring a settlement in consequence of being a perpetual pupil. On this head the findings of the Lord Ordinary were that the pauper was neither an idiot nor a confirmed lunatic; and that neither the mother nor the daughter during the mother's lifetime became objects of parochial relief, nor the daughter herself till a year after her mother's death. I think this is a true view of the evidence in the case. In the eye of the poor-law a person is not considered to become chargeable to the parish merely by reason of weakness of intellect, or even insanity, when that weakness or insanity is not incompatible with the pauper maintaining himself.

The second point raised by the reclaimer is, that this woman, having been born in England, can have no settlement in Scotland, unless it be that derived from her father. I do not know any principle of the poor-law that bears out this; nor do I know any rule which requires that a person must have a settlement in Scotland in order to entitle that person to relief. But then it is contended that where there is a derivative settlement the pauper, for want of a birth settlement in Scotland, falls back upon it. The case of *Craig*, 18th July 1863, decides that where forisfamiliation takes place, and the person forisfamiliated becomes chargeable, the parish of birth is liable, not the parish of the parents' birth. In that case the pauper had a settlement by birth in Scotland, and that birth settlement was held to extinguish the derivative settlement. Apply that principle to the present case. Here we have no birth settlement in Scotland; but even though that be the case, I can see no reason why the principle should not apply that one forisfamiliated does not fall back upon the parents' birth settlement, but upon his own. There is no need for any duration, for, as already said, a birth settlement in Scotland is not necessary to entitle to relief.

LORD DEAS—On the question of evidence on the first point your Lordship adverted to, I am satisfied that the pauper was not in that state of insanity which by the poor-law of Scotland would have precluded her from acquiring a residential settlement in Scotland. The evidence shows that even after the mother's death she maintained herself for a whole year, until the birth of her child. She was, therefore, quite capable of acquiring a settlement.

The second question is, Whether, the pauper's birth settlement being in England, her case is not to be ruled by that of *Craig*? The distinction between this case and *Craig's* is, that in *Craig's* the pauper had a birth settlement of his own in Scotland—here she has not. I do not see that that makes any difference in principle. The case of *Craig* was decided on two grounds—(1) that there were only two settlements, derivative and residential; and (2) where the pauper is emancipated, the connection between the pauper and his family ceases, and the derivative settlement is at an end. Now, the time at which one has to look to determine the question of settlement is the time at which the pursuer becomes a pauper. The woman was thirty-eight when she became chargeable. Her father had deserted, or was as good as dead in the eye of the law. Had she a birth settlement, that undoubtedly would have been the settlement liable for her relief. It is quite true that while a member of his family she had her birth settlement, but it was merely because she was a member of his family. It seems to me clear that when she ceased to be a member of his family the necessary qualification was cast off; and there is no more ground for holding that she still has a derivative settlement. She is entirely cast off from her father's family; and unless she can again fall back into her father's family there is no ground for putting her back to her father's birth settlement. Her father having deserted her, or being practically dead, she cannot do this.

I quite see the force of holding that, while the family is together, there is reason for holding that the settlement must be that of the father. But so many years after the family is broken up I see no such ground, and therefore I am for adhering.

LORD ARDMILLAN—I agree on both points. I think there was no such imbecility proved as to prevent the acquirement of a residential settlement.

The other proposition is, that she, having been born in England, does not come within the principle of the case of *Craig*. We are dealing with the case of a person nearly forty years of age. I think that while a child is living in family with the father you need not disturb yourself about the settlement of that child; it is not the child's but the parent's settlement that is there wanted. The question is, What was the position of the pauper at the time she became a pauper? At that time she had no residential settlement. If she had had a birth settlement in Scotland, she would, according to the case of *Craig*, have gone back upon her own birth settlement; and, after the fullest consideration, I can see nothing which should alter the principle laid down by the case of *Craig*. I think a great deal of error is imported into this class of cases by taking a wrong point of time at which to determine the pauper's settlement. It must always be that at which the person becomes chargeable.

LORD KINLOCH—In the view I take of this case it is decided by the case of *Craig* v. *Greig and Macdonald*, in accordance with the result arrived at by the Lord Ordinary. I was in the minority, and against the judgment in *Craig's* case; but the decision then given must now be taken as laying down the rule with regard to the matter involved

in it. It has often been said, with regard to this department of our law, that it is not of so much consequence what the rule is, as that it should be well fixed. There is a great deal of truth in this. It certainly makes no difference to the pauper what parish is liable; and as to the parishes, what they lose by the application of any particular rule in one case they gain in some other,—that is, if the rule be properly adhered to.

Now, *Craig's* case fixed this principle, that forisfamiliation *eo ipso* deprives a pauper of the derivative settlement acquired from the father. The law formerly was different, and ruled that forisfamiliation only capacitated a pauper for acquiring a new settlement, and that his derivative settlement remained until the new one was acquired. The new principle of *Craig's* case is quite an intelligible, and not an unreasonable, one; though I thought it required legislation for its introduction. It must now be held to rule the law.

The pauper here was clearly forisfamiliated unless she was so weak intellectually as to remain all her life a pupil. She was a woman of nearly forty years of age when she became chargeable. After her father's desertion she contributed to her own support; and after her mother's death maintained herself by her own exertions. With regard to the state of her mind, I agree in thinking that there was nothing which could interfere with her being forisfamiliated, and thereby losing her derivative settlement. It appears from the proof that both mother and daughter were in many respects peculiar and eccentric; but, withal, they were winning their bread, and doing so in an independent way. I cannot hesitate to hold that, if the pauper had lived long enough in one parish she would have acquired a residential settlement; and, if this be so, she had clearly capacity to be forisfamiliated, and to lose the settlement derived from her father. So I consider she did. And I do not think it material, if true, that she had no other settlement in Scotland. This may impose some hardship on the relieving parish; but it cannot give a claim against a parish not liable to support her.

Agents for Pursuer—H. & A. Inglis, W.S.
Agents for Defender—H. G. & S. Dickson, W.S.

Friday, June 24.

MACKIE *v.* MILLER.

Bankruptcy—Fraud—Price—Potatoes. B sold a crop of growing potatoes for £160, 4s. to C. Nine days later C sold the crop for £85, 8s. 6d. to D, who is a potato merchant. Twelve days later D sold the potatoes to E for £153. Eighteen days later C's estates were sequestrated. *Held*, C's trustee had no right to claim from D the difference between the price at which C bought and sold the potatoes, as he (the trustee) had not shewn the sale not to be onerous, and that D knew of C's embarrassments.

The pursuer, as trustee on the sequestrated estate of William Jackson, farmer, Earnock Muir, Hamilton, sought payment of some potatoes from the defender, who is a potato merchant in Motherwell. On 17th September 1868 Mr Forrest, bank agent in Hamilton, sold by public roup to Jackson, at a price of £160, 4s., the growing crop of potatoes on 6 acres and 22 poles of ground which he rented. Jackson granted a bill for the price, which was not retired, as his estates were sequestrated on 26th October 1868. On 26th September 1868 Jackson sold the potatoes to the defender for £85, 8s. 6d., for which he got a receipt on October 3d; and on 8th or 9th October the defender sold them to Smellie at a price of £153. The pursuer, averring fraud, now sought payment from the defender of £160, less whatever price he paid to Jackson. The Sheriff-Substitute (VEITCH) found the defender liable in payment for the sum sued for—viz., £160, less £85, 8s. 6d. The Sheriff (GLASSFORD BELL) reversed, and assoilzied the defender in the following interlocutor:—"Having heard parties' procurators on the defender's appeal, and made avizandum with the proof, productions and whole process, finds that this is an action founded on fraud at common law, the averment in the summons being that the potatoes therein referred to and which had been purchased by the bankrupt Jackson at the price of £160, 'were of that value, and were fraudulently taken possession of and removed by the defender in virtue of a pretended sale thereof to him by Jackson.' And it is further set forth in the revised condescendence that the pretended sale was non-onerous, and was entered into without any just price being stipulated or paid, and at a time when Jackson was insolvent, and knew himself to be so. Finds it established in point of fact that on 17th September 1868 Jackson bought by public roup from J. C. Forrest, bank agent, Hamilton, potatoes then growing on ground extending to 6 acres and 22 poles, which belonged to or was rented by Forrest, at the price of £160, 4s., for which price Jackson granted his bill at three months. Finds that said bill was not retired when due, Jackson's estates having been in the interval sequestrated, and he himself having absconded, and no part of the price of said potatoes was ever paid to Forrest. Finds that soon after the purchase Jackson applied to the defender, who is a dealer in potatoes on his own account, to repurchase the potatoes from him, and he and the defender went to the ground and looked at them together, after which the defender went another day by himself and again looked at them. Finds that the defender has deponed, and there is no contradictory evidence, that he did not ask and was not told and did not know what price Jackson had paid for the potatoes. Finds that the defender was not conjunct and confident with Jackson, but on the contrary, only knew him by sight previous to the transaction in question. Finds that on the 26th September the defender made Jackson an offer of £14 per acre, or £85, 18s. [8s.] 6d. in all, for said potatoes, and Jackson, after some hesitation and standing out at first for a higher price, ultimately accepted the offer. Finds that he and the defender then went to the bank in Motherwell, and got the bill No. 19, for the said sum of £85, 18s. [8s.] 6d., written out by the bank agent, Mr Fulton Spiers, who believed the transaction to be a *bona fide* one, and discounted the bill to Jackson. Finds that the defender afterwards got from Jackson the receipt, No. 7/8, and the said bill was taken up when due by the defender, who thus paid the £85, 18s. [8s.] 6d. for the potatoes. Finds that on 8th or 9th October 1868 the defender resold the potatoes to the witness William Smellie, cowfeeder and dealer in Hamilton, for the sum of £153, being an advance of £68 over the price he had bought them at, but it was part of the bargain with Smellie that the defender was to take 200