said last-mentioned piece of ground, are now to be, and the same are accordingly hereby mutually abandoned and given up by the parties hereto for their respective interests." And in this feu-contract there is a provision for a new road being formed to the north of the feu of no less than sixty feet wide. It was maintained that as these parties had agreed between themselves to shut up the road, Colonel Hozier was entitled to do so now. But against that there are two facts which taken together are quite conclusive. In the first place, I think in 1857, when this deed was entered into, the public were entitled to keep the road they had got for the reason I have stated—I mean the road along the north and west sides of Robinson, Dunn, & Company's feu to the Ree Road—and so they were entitled to have a deviated road provided as a substitute if they gave up that right, although not bound to submit to a deviation. But in the next place it appears from the evidence that the new road round the extended feu has been used by the public since 1857 down to the present time as a substitute, just as they used the former road, and taking these two things together I think it is not possible to maintain successfully that from 1857 down to the present time the public have been in such a position that they have had to acquire a new right entirely by forty years' possession.

Again, I may notice here what I think is worthy of observation, that while, on the one hand, the declaration to which I have referred provides that streets might be shut up so far as the superior's and feuar's rights were concerned, there is in the clause of warrandice in the contract an exception of "any servitude rights of walking along the banks of the river Clyde, or the said ground, or otherwise, which may affect the same," showing that the parties were quite conscious of the rights-of-way which the public have vindicated by the present action.

If there had been no such deviations as I have mentioned, I think it is clear that the public had a right-of-way along the river bank from the Meadowside Ferry to the Ree Road. But I regard what occurred in 1847 or 1848 and 1857 as a mere deviation of that existing road, and I am of opinion that something a great deal short of forty years' possession would in the circumstances be sufficient to give the public the right-of-way along the deviated line of road. Having regard to the terms of the titles and the uninterrupted possession, I hold that the pursuer or his predecessors authorised, or at all events acquiesced in the deviations, and cannot now successfully challenge the use by the public of the deviated lines.

Upon the whole, I am of opinion that the judgment of the Lord Ordinary should be adhered to.

Lord Mure and the Lord President concurred.

The Court adhered.

Counsel for Pursuer—J. P. B. Robertson—Graham Murray. Agents—A. & A. Campbell, W.S.

Counsel for Defenders—Brand—Lang. Agents—Macbrair & Keith, S.S.C.

Tuesday, June 17.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

NIXON (INSPECTOR OF PORT-GLASGOW) *v.* DEAS (INSPECTOR OF GREENOCK).

Poor—Settlement—Residential Settlement—Constructive Residence—Poor Law Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 76.

Where a settlement has been once acquired, residence in the parish in the sense of section 76 of the Poor Law Act 1845, may be merely constructive during the whole five years.

A man who had a residential settlement in the parish of P. went abroad in December 1876, leaving his wife and family in a house in P. He intended to remain abroad for two years, and then, if successful, to bring his wife and family out to him, if unsuccessful to return home. During his absence he regularly remitted money to his wife, which she used to pay the rent of the house and maintain the family. He died abroad in 1882 without having ever returned to this country, and his wife and family became chargeable in G, to which parish they had removed in September 1879. *Held* that the residence which he had acquired for himself and his family at P. had not been lost by absence at the date of the chargeability, and that G. had a good claim of relief against P. for the aliment afforded.

This was an action at the instance of the Inspector of Poor of the parish of Greenock against the Inspector of Poor of the parish of Port-Glasgow, for relief outlay made by him on the widow and children of James Beattie. They became chargeable in Greenock on 19th October 1882. James Beattie, and his wife Mary Wharton or Beattie, were both born in Ireland, and were married there in 1866. In 1869 Beattie came to Port-Glasgow, and was followed by his wife in 1870. They continued to reside there together along with their children, four in number, all of whom were born in Port-Glasgow, till 1876. In that year, having at the time a settlement in Port-Glasgow, Beattie, who was a joiner in a shipbuilding yard, resolved to go abroad, and embarked on board the "Emu," a vessel bound for Adelaide, South Australia, leaving his wife and family in Port-Glasgow.

Beattie obtained work in Australia, and never returned to this country, but died there on 11th July 1882. From the time of his arrival in Australia in the spring of 1877 he made regular remittances of money to his wife, averaging £4 a-month, which remittances enabled her to pay the rent of the premises she occupied, and to keep her family in comfort. He also sent numerous letters to her, and in his last, which was dated the 9th November 1880, besides enclosing a little money, he spoke of trying to get a passage home in the course of that season. He had not been successful in the colony.

In a joint minute of admissions for the parties it was admitted that Beattie's object in going to Australia, as expressed to his wife and family,

was to see if he could make a better living in that colony. If he got work and found that he could better himself in the colony, then he was to send for his wife and family, but if he did not improve his circumstances, then he was to return. It was arranged, however, that he was to give the colony a trial for two years. Mrs Beattie and her family resided continuously in the parish of Port-Glasgow from the time of Beattie's departure in December 1876 till 16th September 1879, when they removed to the parish of Greenock, and ultimately became chargeable there in October 1882.

The Sheriff-Substitute (SMITH) on 31st October 1883 (after findings in fact to the effect above stated) found in law that the residential settlement which James Beattie had acquired in the defender's parish (Port-Glasgow) was lost by his absence from that parish for more than four years, and that his wife and children not having been deserted by him were incapable of acquiring a residential settlement for themselves during his lifetime; he therefore assoilzied the defender from the conclusions of the action.

The pursuer appealed to the Sheriff, who by interlocutor of 18th January 1884 sustained the appeal, and found in law "that in the circumstances above set forth, the residential settlement acquired by James Beattie for himself and his family in the defender's parish of Port-Glasgow, had not been lost by absence at the date of the paupers' chargeability." He therefore decerned against the defender in terms of the conclusion of the summons.

"*Note.*—The questions raised in this appeal are important, all the more so because if the Sheriff-Substitute's judgment is well founded the paupers will or may be removed to Ireland, although the whole of the children were born in Port-Glasgow. The first question to be decided is, whether in any circumstances a residential settlement can be retained when the person on whose movements its retention or loss depends is not personally resident in the parish of settlement during any part of the statutory period? So far as the Sheriff knows, this question has never arisen for decision, but in his opinion it falls to be answered affirmatively. It is settled law that the word 'residence' in section 76 of the statute does not necessarily mean personal residence. Again, the result of the latter decisions is, that in dealing with the effect of absence from the parish, the character more than the duration of the absence is to be considered, and accordingly we find that while absence for a fortnight will break the continuity of residence if the home is broken up and the family removed, continuous absence for nearly two years—*Greig* v. *Miles and Simpson*, 5 Macph. 1132—and absence for periods amounting in all to thirty-eight months—*Moncrieff* v. *Ross*, 7 Macph. 331—have been held consistent with continuity of residence. The questions in each case are—Where is the man's home? Where does his family reside? Where are his earnings spent? And what is the object and character of his absence? If, then, the character and not the duration of the absence is to be chiefly regarded, where is the line to be drawn? If absence for four years, or to take a less extreme case, for three years, of a character consistent with constructive residence, will not cause a settlement to be lost, why should absence of the same kind for four years and a day produce a different result? The Sheriff thinks that the Lord President's comment in *Beattie* v. *Stark*, 23d May 1879, 6 R. 956, upon the ratio of previous decisions, viz., that he assumes that 'the Court will arrive at the conclusion (when the case arises) that the residence may be constructive merely for the whole five years,' is thoroughly justified. So far the Sheriff-Substitute's opinion coincides with that of the Sheriff, and the only remaining question is, whether the facts of this case justify such a conclusion as that anticipated by the Lord President? It may be conceded that the length of the absence is by no means immaterial, and that absence for the whole statutory period raises a strong presumption against continuity of residence, but it is thought that that presumption may be overcome, and that it is overcome in the present case. James Beattie, the father, sailed for Australia on 20th December 1876. Four years from that date expired on 20th December 1880. The date of chargeability was 19th October 1882. If, then, it is shown that he ceased to 'reside,' in the sense of the statute, in Port-Glasgow when he sailed in December 1876, his settlement there was lost in December 1880. But, on the other hand, if it can be shown that his residence was continued constructively until the 16th September 1879, the settlement was not lost on 19th October 1882. Now, what are the facts? Beattie's wife and family resided and were maintained by him in the parish of Port-Glasgow continuously from 20th December 1876 until 16th September 1879, a period of two years and nine months, the latter date being only about three years and one month before the date of chargeability. During that period of two years and nine months, and for some time thereafter, his earnings, amounting to the substantial sum of £4 a-month, were remitted to his wife, and applied by her in support of herself and family, and payment of the rent of premises occupied by them. Indeed, James Beattie was entered on the assessment rolls of the Parochial Board of Port-Glasgow as occupier of the said premises. He never finally decided to settle abroad,—the test of which is, that while he undoubtedly intended to send for his wife and family should he come to that resolution, he never did send for them. He announced before he started that he should give Australia at least two years' trial. If, then, the true character of his absence during the first two years was tentative, there is an end of the case, because two years from 20th December 1876 did not expire till 20th December 1878, which is within four years of the date of chargeability. It was scarcely maintained that his residence ceased when he sailed. If it did not cease then, why should it cease before the expiry of the not unreasonably long time of trial named by him? But while this view would be sufficient for the decision of the case, the Sheriff is of opinion that Beattie's absence throughout was compatible with continuous constructive residence in Port-Glasgow. It was argued for the defender at the debate that the period of absence must be dealt with as a whole, and could not be divided. *Beattie* v. *Stark* is a strong authority to the contrary, because the latter part of the absence there was undoubtedly such as to infer abandonment of residence. The apparent difficulty of

the case is really caused by the fact that Australia, the scene of his trial to obtain better work, was so distant from Port-Glasgow that it was impossible for James Beattie to return at intervals to visit his wife and family. Had he gone to look for work in another parish in Scotland, or even in England, he would undoubtedly have returned from time to time to Port-Glasgow, as was the case in *Simpson* v. *Kennedy* and *Harvey* v. *Roger and Morison*, both reported of date 21st December 1879, 6 R. 446, and previous cases. But it was otherwise in the case of Australia. It was not worth his while to go there at all unless he remained a considerable time, and the expense of returning home made occasional visits to his family practically impossible. When this is considered, his long-continued absence loses its apparent importance. In some respects the case is *a fortiori* of the case of *Beattie* v. *Stark*, 23d May 1879, 6 R. 956, because there the father not only did not return to the Barony parish but removed his wife and family from it after an absence of only six months. It is said that James Beattie's absence was not incidental to the residence in Port-Glasgow. Taking 'incidental' as equivalent to 'consistent with,' or 'not incompatible with,' continued residence, absence for the purpose of finding better work is just as much incidental to residence as absence in search of health, although in the one case, as in the other, if *e.g.* permanent work be found, or if the state of the man's health renders permanent absence necessary, and the family is removed from the parish of settlement, the absence which at first was tentative and temporary may become of a character inconsistent with continuity of residence.

"Reference may be made to the case of *Hamilton* v. *Kirkwood and Smith*, 2 Macph. 107, a decision pronounced before *Greig* v. *Miles and Simpson*, in which absence for six weeks in search of work was held not to interrupt continuity of residence. It is not perhaps necessary to consider the subtle question put by the Sheriff-Substitute, whether a settlement can be acquired without some personal residence; but looking to the opinions of many eminent Judges, it is safer to hold that the acquisition and retention of a settlement must be judged of by the same rules. Taking it so, the Sheriff is inclined to think that if a man's family, with his knowledge and approval, settle and continuously reside in a parish for five years, he, the father, being absent the whole time, in circumstances similar to those in the present case, a settlement by residence will be thereby acquired for him and them. In such a case, however, the wife would not acquire directly for herself, but for her husband, as representing him, and through him for herself. It is said that the effect of so holding is to make the acquisition or retention of a settlement depend on the wife and not on the husband. That is true in a certain sense. If, for instance, the wife, during the husband's absence, gives up the house in which he has placed her, and removes to another parish, the settlement would be lost by her act as binding her husband, because it is enough for the parish to show that neither the husband, nor anyone representing him, continued to reside within it for the requisite period. But it does not follow that a wife could acquire a settlement for her husband without his express authority and knowledge. The present case is exceptional, but the Sheriff is of opinion that the pursuer is entitled to prevail."

The defender appealed to the Court of Session, and argued—Beattie lost his residence when he left the country, and as he never returned he had no opportunity of re-acquiring it. There was not in this case sufficient constructive residence to bring it within the provision of sec. 76 of the statute. Even admitting that bodily presence during the whole time of residence has been held not to be necessary, yet Beattie was absent from Port-Glasgow for five and a-half years, and his wife was absent for three and a-half years, so that it could hardly be maintained that there was constructive residence during the statutory period. As to Beattie's *animus*, that could only be interpreted from his actions; he never returned, and intended when he started to send home money to bring his family out to him. The three facts which told against this being a case in which Beattie could retain a constructive residence in this country were—(1) The length of time; (2) The nature of the absence (it not being essential to his business); (3) The distance which he had gone.

Authorities—*Harvey & Morrison*, and *Simpson* v. *Kennedy*, 21st Dec. 1878, 6 R. 446; *Cruickshank* v. *Greig*, 10th Jan. 1877, 4 R. 267; *Beattie* v. *Paterson*, 25th Oct. 1876, 4 R. 19; *Allan* v. *Shaw*, 24th Feb. 1875, 2 R. 463.

Argued for pursuer—There might be bodily absence and yet constructive presence, and the effect of absence depended more upon its character than its duration. If the residence was held to be constructive down to October 1878, then the settlement was not lost at the date of chargeability. Beattie's *animus* was shown by his letters, and by the fact that he was practically supporting his family in this country. Down to the last he was a mere sojourner in the colony, and but for the distance he would have periodically returned. Therefore mere length of absence was no test.

Authority—*Cruickshank* v. *Greig*, 10th Jan. 1877, 4 R. 267; *Beattie* v. *Stark*, quoted by the Sheriff.

At advising—

Lord President—That an Irish emigrant in Australia who has been earning a livelihood there for six years, and has nevertheless been all the time residing constructively in the parish of Port-Glasgow in Scotland is a hard saying; but it is the logical sequence of previous judgments of the Court. Therefore I found my opinion upon the authority of the previous judgments which have determined that proposition, and am on that account for affirming the decision of the Sheriff.

Lord Shand—Both the judgments of the Sheriff-Substitute and the Sheriff are able and exhaustive, while that of the Sheriff is in accordance with the principle settled by a great number of cases. It has been decided that when a settlement has been acquired, a pauper might continue constructively to reside in the parish of settlement, by having his home and family there, although he was personally absent for reasons that were temporary only.

I think, that the decisions rest upon sound principles, and that the present case is ruled by the previous case of *Beattie* v. *Stark*.

LORD ADAM—There is no doubt that the present case goes further than any of the previous decisions upon the subject, and certainly leads to somewhat startling results. The present case was foreseen and commented upon by the Lord President in the case of *Beattie* v. *Stark*. I can only say that I am unable to distinguish this case from any of the previous decisions, and think, therefore, that we should adhere to the interlocutor of the Sheriff.

LORD DEAS and LORD MURE were absent.

The Court affirmed the judgment of the Sheriff.

Counsel for Defender (Appellant)—Mackay—Wallace. Agent—Adam Shiell, S.S.C.

Counsel for Pursuer (Respondent) — Comrie Thomson—Dickson. Agents—R. R. Simpson & Lawson, W.S.

Tuesday, June 17.

FIRST DIVISION.

ESSON (ACCOUNTANT IN BANKRUPTCY) *v.* DAVIE.

Bankruptcy—Procedure where Trustee Removed—Trustee—Removal of Trustee—Meeting of Creditors to be Called by Accountant in Bankruptcy—Bankruptcy (Scotland) Act 1865 (19 *and* 20 *Vict. c.* 79), *secs.* 159, 161.

On 9th December 1880 James Davie, merchant, Dundee, was appointed trustee on the sequestrated estates of William Ireland, merchant, Dundee. On 24th May 1882 Mr George Auldjo Esson, Accountant in Bankruptcy, reported to the First Division of the Court of Session, under sections 159 and 161 of the Bankruptcy (Scotland) Act 1856, that the trustee had failed to perform his duties—"First, in so far as he has failed for over three years to take possession of the bankrupt's estate and effects, and to realise and recover the same, as provided by section 80 and the other sections of said Bankruptcy Statute." "Second, that he never called a second meeting of the creditors, or prepared and submitted to them a report, in terms of section 96 of said statute."

Intimation was made to the trustee, who lodged answers, but did not appear at the hearing.

The Court, after hearing counsel for the Accountant, pronounced this interlocutor:—

> "The Lords having considered the report of the Accountant in Bankruptcy and heard counsel thereon, remove the said James Davie mentioned in the report from the office of trustee on the sequestrated estates mentioned in the Accountant's report, and decern: Appoint the said Accountant to call a meeting of the creditors for the election of a new trustee, at Dundee, on Friday 27th curt. at 1 o'clock p.m., and appoint the Sheriff-Substitute to preside at the said meeting: Find the said James Davie liable in expenses to the Accountant in Bankruptcy," &c.

Counsel for the Accountant in Bankruptcy—Mackay. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, June 20.

FIRST DIVISION

[Lord Kinnear, Ordinary.

MAGISTRATES OF ELGIN *v.* THE HIGHLAND RAILWAY COMPANY.

Superior and Vassal—Casualty—Railway Company—Statutory Title—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. c.* 19), *secs.* 80, 107, 111, 126—*Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 4, *sub-sec.* 4.

Section 126 of the Lands Clauses Act provides—"The rights and titles to be granted in manner herein mentioned in and to any lands taken and used for the purposes of this Act shall, unless otherwise specially provided for, in nowise affect or diminish the right of superiority in the same, which shall remain entire in the person granting such rights and titles; but in the event of the lands so used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors."

Under powers in their Act, a railway company acquired certain lands which were parts or portions of other lands held by the same owners under the same titles. The title of the company to these lands was taken in the form prescribed by the 80th section of the same statute, by which they obtained a complete and valid feudal title. An action at the instance of the superiors of the lands so taken against the company, under sec. 4, sub-sec. 4, of the Conveyancing (Scotland) Act 1874, for declarator and payment of a casualty, *held* excluded by section 126, and *dismissed*.

This was an action under the Conveyancing (Scotland) Act 1874, section 4, sub-section 4, at the instance of the Lord Provost, Magistrates, and Council of Elgin, as superiors of the various parcels of land after referred to, and duly infeft therein, against the Highland Railway Company, incorporated by Act of Parliament, to have it found and declared that in consequence of the deaths of the several vassals last vest and seised in the said various parcels of land, casualties of one year's rent, amounting *in cumulo* to £3300, had become due and payable to the pursuers, and that the defenders should be decerned to make payment of the said sum.

These parcels of land were acquired compulsorily by the Inverness and Aberdeen Junction Railway Company, under powers conferred by their Act in 1856, in which were incorporated the provisions of the Lands Clauses Act 1845, and the Railway Clauses Act 1845, and compensation was made to the owners and occupiers.