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

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

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

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

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

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

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

The Court adhered.

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

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

Wednesday, November 3.

FIRST DIVISION.

[Commissary of Renfrew.

PETITION—MRS SARAH TURNBULL OR MUIR.

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

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

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

parties gave in a joint minute stating that they had agreed that they should be appointed joint-executrices.

The Commissary-Depute (COWAN) pronounced the following judgment:—"The Commissary-Depute having resumed consideration of the petition, with the joint minute of consent, and heard the petitioner's procurator—Finds in law that a mother is not one of the next-of-kin of her children, and that the petitioner is therefore not entitled to be decerned executrix-dative *qua* one of the next-of-kin, as craved; therefore dismisses the petition, and decerns.

"*Note.*—The Commissary-Depute is of opinion that by the well-defined principles of the law of Scotland, as established by a variety of decisions (of which a very good review will be found in Bell's Law Dict. and Digest, *voce* Succession) a mother is not recognised as one of the next-of-kin. The Intestacy Act of 1855, no doubt, introduced in favour of the mother a right to a certain part of the succession, and in respect of that right she might be entitled in certain events to be confirmed as executrix. This is not however quite clear. The point does not arise for decision in this case, as she seeks to be confirmed not *qua* mother but *qua* one of the next-of-kin. Had she sought in her proper character *qua* mother to be confirmed, a difficulty would even then have occurred in giving effect to the minute of consent produced in process, the other petitioner claiming *qua* relict, and it being at least unusual, if not incompetent, to conjoin in the office parties claiming in different characters."

On appeal the Commissary (FRASER) adhered, and added the following note:—

"*Note.*—A mother is clearly not one of the next-of-kin, and it is a misapprehension of the Act 18 Vict. cap. 23, to suppose that it made any change upon the common law in this respect. It provided certain remedies for admitted grievances by giving a right to the succession in personal estate to persons who by the common law would have had no such right; but this privilege did not import them into the class of next-of-kin. The objects and scope of the Act are well explained in the case of *Turner* v. *Cooper*, 27th Nov. 1869, 8 M'Pherson, p. 222."

The petitioner appealed.

At advising—

LORD PRESIDENT—The appellant on 6th March last presented a petition to the Commissary of Renfrew, praying to be decerned executrix-dative *qua* next-of-kin to the late Alexander Muir, who was her son. The Commissary-Depute found "in law, that a mother is not one of the next-of-kin of her children, and that the petitioner is therefore not entitled to be decerned executrix-dative *qua* one of the next-of-kin as craved," and therefore dismissed the petition. The Commissary, on appeal, adhered to this judgment, and substantially, I think, on the same grounds. Now, I am not disposed to differ from the Commissary-Depute, or from the Commissary, in saying that the mother is not one of the next-of-kin in the technical sense of the term, and probably the deliverances of both of these gentlemen are strictly right; but I cannot help thinking that they have dealt a little too severely with the petitioner, who is the mother of the deceased. It appears that the next-of-kin will not accept the office, and that the only other party in the field is the relict, and by a joint-minute the relict and mother have agreed that they should be appointed joint-executrices of the deceased. The Commissary-Depute had some doubt as to the competency of such confirmation. Now, I think that the mother of the deceased, in the absence of any one having a better title, may be confirmed, in consequence of her interest in his succession, by the provisions of the Intestate Succession Act, and in conformity with the old practice I think that parties having equally good titles may be jointly-confirmed executors. Now, I apprehend that parties having an interest in the succession are entitled to be confirmed executors—that is the test of their right to be confirmed. A legatee may be confirmed, and a creditor may be confirmed, upon the ground that they are interested in the administration of the succession. Now, in the case of the mother, this ground of an interest in the succession is supplied by the statute, and therefore her title is quite good. The only difference between her right and that of the relict is that the relict's interest goes back much further, but it is founded on the same ground. We must therefore, I think, send this petition back to the Commissary, with directions to allow an amendment of the petition and to proceed further as shall seem just.

LORD DEAS—There seems to have always been a notion that it is more natural for parents to provide for their children than for children to provide for their parents. That notion has given rise to the old law that collaterals were to come in before either father or mother in succession. The new law appears to me to be better and more equitable. The fact that that was law gave rise to the practice of denominating collaterals next-of-kin, although I do not know that a brother or sister can be said to be nearer in kin than a father or mother. The term next-of-kin has been used in various senses, but has been appropriated to a certain class, in respect that that class was entitled to be preferred to the beneficial succession. The question here is, Whether a father or mother, looking to the recent statute, can be legitimately appointed executor? and I agree with your Lordship in thinking that the interest they have in the succession is very material. There is nothing very technical in the appointment of executors; it is within the control of the Court, to be regulated from time to time. The present practice originated in 1666 by the instructions given by the archbishops and bishops to their commissioners and clergy. They ran thus:—"If there be no nomination or testament made by the defunct, ye shall confirme the nearest of kin desiring to be confirmed, and if the nearest of kin shall not desire to be confirmed ye shall confirm such of the creditors as desire to be confirmed as creditors; and if neither nearest of kin, executor, or creditor shall desire to be confirmed, you shall confirm the legators, such of them as desire to be confirmed and instruct that they are legators. And if no person having interest forsaid shall confirm, you shall confirm your procurator-fiscal, datives being always duly given thereto before. And if after the saids datives (but before confirmation) any person having interest shall desire to be surrogat in place of the

procurator-fiscall, ye shall confirm them as executors surrogate in place of the procurator-fiscall."

Now, the archbishops and bishops were assuming the provinces of this Court in giving such instructions, and consequently they were ordered to be recorded in the books of this Court under protest not allowing them to encroach on their jurisdiction. But these instructions recognise that any person having an interest in the succession may be confirmed executor. There are certain classes to be confirmed, and it was at one time inferred that you could confirm no one outside these classes; but in the case of *Crawfurd* (M. 3818), general disponees, who are not a class mentioned in these instructions, came forward and were preferred to the next-of-kin as executors, and since that time it has always been held that general disponees, and not the next-of-kin, come first, and are entitled to be confirmed before anyone else.

That being so, and now that the father and mother have under the recent law become beneficiaries, the only ground on which they were not confirmed is done away with, and therefore I have not the least doubt that they may be confirmed *qua* father or *qua* mother. The only difficulty is in saying whether they can be confirmed *qua* next-of-kin. It is no very great stretch to say that they are among the next-of-kin; but the only thing necessary to say here is that she is to be confirmed *qua* mother. Nothing more need be asked for; that is enough.

Lord Mure—I agree with your Lordships in thinking that this petition should be remitted to the Commissary to amend. Prior to the Intestate Succession Act of 1854, the rule was that all those who had an interest were entitled to be confirmed unless those who had a preferable interest applied, and it was competent to conjoin persons having different interests if it was judged expedient to do so. Now, by that Act four new classes were introduced as having an interest in the succession, and I find that Mr Alexander, in his edition of 1859 of his Commissary Practice, had no difficulty in giving a form of application for the confirmation of the mother as executor.

Lord Deas—I may add, in consequence of the ground on which we have gone in this petition, that the executor-creditor is entitled to be confirmed by the Act of 1695, cap. 41, and the judicial factor by an Act of Sederunt of this Court.

The Court pronounced the following interlocutor:—

> "Recal the interlocutors of the Commissary-Depute and the Commissary, dated respectively the 27th April and 10th May 1876, and remit to the Sheriff of Renfrewshire, as coming in place of the Commissary under the authority of the 35th section of 39th and 40th Victoria, caput 70, to allow the appellant to amend the prayer of the petition, and thereafter to proceed as shall be just, and decern."

Counsel for Petitioner—Millie. Agents—J. & A. Hastie, S.S.C.

Wednesday, November 1.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

JOHN ALAN M'DONALD *v.* ALASTAIR M'IAIN M'DONALD.

(*Ante*, vol. xi. p. 290; xii. p. 635.)

Approbate and Reprobate—Election—Marriage-Contract—Provision to Children—Power of Apportionment, Exercise of—Condition adjected—Intention.

By an antenuptial contract of marriage the wife's fortune was conveyed to trustees, with directions, on the death of the survivor of the spouses to "pay over or assign" the whole trust-funds to "the child or children of the marriage," in such proportions, and at such time, and under such conditions, as the spouses should by joint-deed appoint, and failing such apportionment, then in certain specified proportions. A portion of the wife's funds, amounting to £25,000, was advanced by the marriage-contract trustees on heritable bond over two estates purchased by the husband for £28,000, during the subsistence of the marriage. The parents, on the narrative that it was their wish to entail those estates, as well as the patrimonial estate of the husband, on the children of the marriage and their heirs before the children of any subsequent marriage of the husband or other substitutes, and that the husband had for that purpose agreed to alter the destination of his patrimonial estate, and to execute an entail of the whole estates, and had executed the same, proceeded in the exercise of their power of division to provide that the above-mentioned sum of £25,000, secured over the husband's estates, should be "settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estate," the said sum being the share of the trust-fund "which we do hereby allot and apportion as the share of our eldest son, or, failing him, of the heir of entail succeeding to the said entailed estate, it being our desire and appointment that the said trustees under our marriage-contract before narrated, or the survivors of them, should immediately on the death of the survivor of us renounce and discharge the said heritable bond, and disburden the said lands and estates" of the same. —*Held* that the eldest son was not put to his election between the entailed lands and the £25,000 in the marriage-contract, but that although he took the £25,000 absolutely (which he had been found entitled to do) he was also entitled to remain in possession of the entailed lands.

Opinion (*per* Lord Justice-Clerk) that in respect of the manifest intention of the granter of the entail, the eldest son was bound to pay off the debts affecting the estate, and could be compelled to do so, but not in respect of his taking the £25,000 under the appointment.

This was an action of declarator and denuding at the instance of John Alan M'Donald, second surviving son of the late General Sir John M'Donald