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

bags of the potatoes at 7s. 3d. per bag, and of these he got 180 bags, amounting at said rate to the sum of £65, 5s. Finds that this was all the extent to which the bill for £153 (No. 20), granted by Smellie to the defender, was liquidated, Smellie having become bankrupt, so that the defender never received for the potatoes so much as he had paid Jackson. Finds that although there can be little doubt that Jackson himself knew he was insolvent at the time he bought the potatoes from Forrest, and that he re-sold them to the defender at so large a deduction merely for the sake of obtaining some ready cash, it is not only not proved that the defender knew Jackson to be insolvent at that time, but it is on the contrary proved, more especially by the evidence of the bank agent Spiers, that Jackson was generally believed to be solvent, and that he was in good credit. Finds that, although the defender resold the potatoes at a large advance on what he paid for them, the evidence is very inconclusive as to what their real value was. Finds that the defender himself depones that he considered he gave Jackson their full value, that he saw them when they were being lifted, that part of them was a fairish crop, and part of them very bad, and that he bought better potatoes that season for less money. Finds that this statement is corroborated by Smellie, who depones—'I now think the value of the potatoes when I purchased them was about £15 per acre;' by John Bell, labourer, who was employed to lift the potatoes, and who depones they were 'a very poor crop, small, with a good deal of second growth;' and by Alexander Walker, merchant, Larkhall, who depones that he bought a good many potatoes that season, that the prices varied from £15 to £31 an acre, that the potato trade is a very uncertain one, and that he would consider £14 per acre enough to pay if the crop was poor. Finds in point of law that there is here no allegation of an illegal preference to a favoured creditor, or challenge of a transaction as reducible under the Acts 1621 or 1696, but only the averment of a fraud at common law, the contention of the pursuer being that the defender having obtained the potatoes at so much less than their true value, and having resold them soon afterwards at nearly the same price as Jackson had agreed to pay for them, must be held to have acquired no legal right to them, and to be liable to the pursuer, as representing Jackson's creditors, in payment of the alleged value of £160: But finds that although a debtor, knowing himself to be insolvent, cannot validly make *gratuitous* alienations to the prejudice of his general body of creditors,—even to a party who is ignorant of the insolvency,—the same rule does not apply to an alienation made by an insolvent still carrying on business for an onerous consideration, to a party giving the consideration in good faith, in which case the transaction does not admit of challenge. Finds that in as far as the defender actually paid £85, 18s. [8s.] 6d. for the potatoes, the alienation to that extent was clearly not gratuitous, and the only question which can remain is whether it was gratuitous to the extent of the difference between that sum and £160, the said difference being £74, 1s. 6d. Finds that this question falls to be answered in the negative, in respect that the real test of the gross value of the potatoes, in as far as the defender is concerned, is not what Jackson gave for them, or what the defender was able to sell them for, but what they were likely to realise in the market after being lifted and seen. Finds that there is no evidence to shew that they would then have realised more than £85, 18s. [8s.] 6d., and in point of fact they did not ultimately realise that amount to the defender, so that the price he paid to Jackson was an onerous, or, in the words of Professor Bell (Com., vol. ii. p. 197), 'a valuable consideration,' as applicable to the whole potatoes. Finds further that it has not been shown that the defender acted collusively or fraudulently in the bargain he made with Jackson, for although he no doubt expected to make a profit from the potatoes, he paid a substantial price for them, and bought them in the usual course of trade from one who was *in titulo* to sell. Finds in the whole circumstances that whilst the defender could not in any view be called upon to repay the money he has already paid, neither is he now bound to pay to the pursuer any more than he would have been bound to pay to Jackson an additional sum as effeiring to an assumed additional value. Recalls the interlocutor appealed against, sustains the defences, and assoilzies the defender. Finds the pursuer liable in expenses, allows an account thereof to be given in, and remits the same to the Depute-clerk of Court at Hamilton, as auditor, to tax and report, and decerns."

The pursuer appealed.

HORN and ASHER for him.

FRASER and BALFOUR in answer.

The Court adhered. The trustee could not succeed unless he could have shew the sale was not for value, or greatly under it; and that Miller knew of the state of Jackson's affairs; and he had proved neither. There was great difficulty in judging of the value of a growing potato crop; and Miller, if any one, as being a potato merchant, should have been able to estimate their value. Also Smellie found he had made a bad bargain, and estimated the real value at only £1 per acre more than Jackson sold them at.

Agent for Pursuer—M. Macgregor, S.S.C.

Agents for Defender—Miller, Allardice & Robson, W.S.

Friday, June 24.

M'DOUGALL *v.* LOBLEY.

Lease—Landlord and Tenant—Assignee—Onus—Representative. The lessee of a shop under a lease which excluded assignees and sub-tenants agreed to assign the lease, representing the landlord would consent without any difficulty. The landlord did not consent. *Held* the sub-lessee was liable to the lessee for the stipulated rent.

Opinion, per Lord Kinloch, that the onus of getting the landlord's consent lay on the assignee.

Opposite opinion, per Lord Deas.

The pursuer is trustee on the sequestrated estate of Robert Westland, grocer, 1 South College Street, Aberdeen. Westland held the shop in College Street under a lease excluding sub-tenants and assignees. Lobley being desirous to occupy the shop, and to place his daughter in it, agreed to purchase the shop and fittings for the sum of £50. Westland granted the following letter and receipt to Lobley's daughter:—