Thompson had a majority of legal mandates at the meeting of the board.

The Court accordingly gave effect to the conclusions of the summons, and remitted to the Parochial Board of Inveresk to declare that Thompson had been duly elected inspector of poor of said parish.

Agent for Pursuer—W. K. Thwaites, S.S.C.

Agents for Defenders—Gillespie & Paterson, W.S.

Friday, December 1.

FIRST DIVISION.

PALMER *v.* RUSSELL AND OTHERS.

Poor—Settlement—Pauper Lunatic—Statute 20 *and* 21 *Vict. c.* 71, §§ 75 *and* 95.

Process—Expenses.

Held (1) that under no circumstances can a married woman have a settlement which is not derived from her husband.

(2) That when the wife of an able-bodied man is dealt with by the parochial board as a pauper lunatic in terms of the Poor Law and Lunacy Acts, the result is not to make the husband a pauper, though the wife may become chargeable to the parish.

(3) That the lunatic wife becoming chargeable on the parish of her husband's settlement, at the date of her confinement, continues, in accordance with § 75 of the Lunacy Act, to be chargeable upon that parish throughout the whole term of her confinement, though the husband's parish of settlement may have changed during that period.

And (4) That where there is no district asylum, or where from peculiar circumstances the pauper lunatic is, by consent of the lunacy board, confined in some other than a district asylum, the requirements of § 75 are satisfied, and the above result equally follows.

Margaret M'Intosh or Tweedie was born in the parish of Lochbroom, in Ross-shire, in 1819. On 27th January 1838 she was regularly married at Lochcarron to Robert Tweedie, and the marriage was duly recorded in the parochial register. Tweedie and M'Intosh, however, never lived together as man and wife. Within a few hours after the marriage ceremony she deserted him. She never afterwards returned to him, but went into service and supported herself, until the date of her becoming chargeable, as after mentioned. For more than five years previously to 1861 Margaret M'Intosh or Tweedie maintained herself industrially as a domestic servant in the parish of Dunoon, so that on 23d August 1861 she would have had a residential settlement in Dunoon parish if she had been unmarried and capable of acquiring one. Having shortly before removed to the parish of Stirling, she was, on said 23d August 1861, by order of the Sheriff, on application of the Inspector of the Poor for the parish of Stirling, confined as a lunatic. There being at that time no district asylum in the Stirling district, she was sent to Hallcross Asylum, Musselburgh, where she remained until 5th February 1869, when, a district asylum having been erected at Larbert for the Stirling district, she was removed there, and continued an inmate until her death on 2d February 1871.

In the meantime, her husband Robert Tweedie, who was born in the parish of Manor, in Peebles-shire, had resided industrially in the parish of Portree for twelve years prior to 1859, and had therefore obtained a residential settlement there. At Whitsunday 1859 he went to the parish of Bracadale where he afterwards resided continuously and industrially down to the day of his death in 1871.

The inspector of the parish of Stirling being under the impression that Margaret M'Intosh or Tweedie was an unmarried woman, sent the statutory notice of chargeability to the parishes of Dunoon and Lochbroom only in August 1861. But having obtained farther information, he, on 5th April 1865, sent notice to the parish of Bracadale, the then parish of the husband's settlement, and still later, on 24th August 1869, to Portree, the settlement of the husband at the date of the lunatic's first confinement.

In the present action, raised by the Inspector of the Poor for the parish of Stirling, on April 18, 1871, the whole other parishes of Dunoon, Lochbroom, Portree, and Bracadale were called as defenders.

The pursuer pleaded—"The pauper is chargeable upon either (1) the parish of Dunoon, as the parish of her residential settlement; or (2) Lochbroom, as the parish of her birth settlement; or (3) Portree, as the parish of her husband's settlement at the date of her becoming chargeable; or (4) Bracadale, in which her said husband has had a settlement since Whitsunday 1864; and the pursuer, as representing the parish of Stirling, by which the sums sued for were disbursed, is entitled to have decree against one or other of the said parishes, as concluded for, with expenses."

For the parish of Dunoon it was pleaded—"(2) The said Margaret M'Intosh or Tweedie was incapable of acquiring *stante matrimonio* any settlement apart from that of her husband. (3) The said Margaret M'Intosh or Tweedie never having acquired a settlement in the parish of Dunoon, the present defender is entitled to be assoilzied."

For the parish of Lochbroom it was pleaded—"(2) The pauper having been until her death a married woman, and it not being alleged that her husband has no settlement in Scotland, or that he has or ever had a parochial settlement in the parish of Lochbroom, the present defender is entitled to absolvitor, with expenses."

For the parish of Portree it was pleaded—"(2) The residenttal settlement of Robert Tweedie in Portree having been lost by him in 1863 by reason of non-residence for the statutory period, that parish is not liable to repay the advances sued for, made since that date. (3) The parish of Portree is not liable for advances made prior to 1863, in respect no statutory notice was sent to it until after that date. (4) In no view is Portree liable for any advances prior to 24th August 1869, when it received statutory notice."

For the parish of Bracadale it was pleaded—"(1) The parish of the pauper Margaret M'Intosh or Tweedie's legal settlement, at the date of her being placed in the Hallcross Asylum as a pauper lunatic, was the parish then chargeable with her maintenance and other relative expenses, and the said parish continued to be the parish of her settlement, and to be chargeable with her maintenance as a lunatic for the rest of her life, and is now liable for such maintenance and expenses. (2) The parish of Bracadale, represented by the defender, not having been the parish of the said pauper's settlement at the said date, the defender is not liable in the sums sued for, or any part thereof."

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh*, 21*st June* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and process, finds that the parish of Bracadale, as the parish of the settlement of Robert Tweedie, the husband of the lunatic Margaret M'Intosh or Tweedie, from and after 15th May 1864 to the date of her death on 2d February 1871, is liable to the pursuer the Inspector of Poor for the parish of Stirling, for the expense incurred by him during that period for or in relation to the examination, removal, and maintenance of the lunatic, the said Margaret M'Intosh or Tweedie; assoilzies the defenders, the Inspectors of Poor for the parish of Dunoon, Lochbroom, and Portree, from the conclusions of the libel; and decerns and appoints the cause to be put to the roll with a view to the ascertainment of the amount for which the pursuer is entitled to obtain decree against the defender, the Inspector of Poor for the parish of Bracadale, and for the disposal of the question of expenses.

"*Note.*— . . . . The grounds on which the parishes of Lochbroom and Dunoon have been called as defenders are, that the former is the birth settlement of the lunatic Margaret M'Intosh or Tweedie, and that the latter is the parish in which she had acquired a settlement for herself by industrial residence while living separate from her husband.

"The Lord Ordinarys of opinion that neither the parish of Lochbroom nor the parish of Dunoon is liable in the sums sued for, because Margaret M'Intosh or Tweedie, on being married, lost her birth settlement, and because she could not, while her marriage with Robert Tweedie subsisted (which it did until February 1871, when it was dissolved by death), acquire any settlement in her own right, and apart from that of her husband. From the day of the marriage his settlement became her settlement. But it is said that Margaret M'Intosh or Tweedie deserted her husband on the very day of her marriage, and never returned to him, and that after cohabiting with a cousin for about a month she went into service, and maintained herself by her own industry down to the time of her becoming chargeable as a lunatic. This does not, in the opinion of the Lord Ordinary, affect the question, because Margaret M'Intosh or Tweedie, being a married woman, could not during her husband's life, and notwithstanding her desertion, acquire any settlement separate and apart from him—*M'Rorie* v. *Cowan*, 24 D. 723.

"The defender, the Inspector of Portree, has, by minute lodged in process, consented to the Inspectors of Lochbroom and Dunoon being assoilzied, but the Inspector of Bracadale refused to give any such consent.

"Statutory notices of chargeability were sent to the Inspector of Bracadale on 5th April 1865, and to the Inspector of Portree on 24th August 1869. By the Lunacy Act, 20 and 21 Vict. c. 71, sec. 78, the parish of the lunatic's settlement is liable in repayment of the expenses of the lunatic's examination, removal, and maintenance 'incurred subsequent to such notice, and for the year preceding.' The account libelled on in the conclusion of the summons against Bracadale commences at Whitsunday 1864—that is, on the expiry of the period of Robert Tweedie's five year's residence in that parish by which he acquired a residential settlement therein, and within the year preceding the date of the notice.

"The Inspector of Bracadale maintains that Robert Tweedie could not acquire a settlement in his parish, because he was, by reason of his wife's treatment as a pauper lunatic in Hallcross Asylum, Musselburgh, from and after 23d August 1861, when his and her settlement was in the parish of Portree, constructively a pauper, and in receipt of parochial relief. The question whether the wife or the husband is in such circumstances the pauper is attended with much difficulty. It has not, so far as the Lord Ordinary is aware, been decided. It is admitted in the record by the Inspector for Bracadale that the husband, during the five years preceding 15th May 1864, did not apply for or receive parochial relief in Bracadale, and it was admitted at the debate by him that the husband did not have recourse to common begging. He therefore supported himself. His wife was confined and treated in a lunatic asylum under the provisions of the Poor Law and Lunacy Acts, as her condition required such treatment, and as it was the duty, under the Poor Law Act, of the inspector of the parish of Stirling, in which she was found, to make the necessary provision for that purpose. If her husband had been able, he would have been bound to pay for his wife's maintenance and treatment in the asylum. But if not able, from his position in life, to make such payment, or to provide such maintenance and treatment, he could not be compelled to do so; and her treatment in an asylum, rendered necessary by the nature of her disease, and enjoined by statute, fell to be defrayed by the parish of the settlement of the lunatic, which, seeing that she was a married woman, was that of her husband. As her position as a lunatic was exceptional, and as her confinement and treatment in an asylum were statutory, it seems to the Lord Ordinary that no obligation can be held to have attached to her husband Robert Tweedie in regard to her maintenance in the asylum, and that her maintenance became a parochial burden. Accordingly, the Lunacy Act makes express provision for such a case by enacting (sec. 77) that if the lunatic has no estate, and if the expense of examination, removal, and maintenance of the lunatic shall not be borne by the relations, 'then the lunatic shall be treated as a pauper lunatic, and such expense shall be defrayed by the parish of the settlement of such lunatic.' The defrayment of such expense cannot, therefore, it is thought, be considered in such circumstance as parochial relief furnished to the husband for behoof of his insane wife, or be pleaded as a bar to the acquisition of a residential settlement in Bracadale by Robert Tweedie.

"The Inspector of Bracadale also contended that as Portree was the settlement of Robert Tweedie and of his wife on 23d August 1861, the date when she first became chargeable as a lunatic, the parish of Portree continued to be the parish of her settlement, and to be chargeable with her maintenance as a lunatic for the rest of her life. The Lord Ordinary is of opinion that this plea is untenable. It is expressly provided by the Poor Law Act (sec. 76) that a residential settlement shall not be retained if there has not been residence in the parish continuously for at least one year during any subsequent period of five years. The Lord Ordinary is not aware of any rule of law or principle suspending the operation of this statutory provision in the case of a derivative settlement,

and he is of opinion that the settlement in Portree of Robert Tweedie and of his lunatic wife was lost in consequence of his not having resided in that parish during any part of the five years ending on 15th May 1864. During all that time he resided in the parish of Bracadale, and he resided there until February 1871, during which month both he and his wife died.

"The Inspector of Bracadale also contended that the settlement of the lunatic must be held to be in the parish of Portree in respect of the provisions of section 75 of the Lunacy Act. The Lord Ordinary is of opinion that as Margaret M'Intosh or Tweedie was not 'detained in any district asylum under this Act' while her husband's settlement was in Portree the section does not apply. He also considers that the interpretation put upon the section by the Inspector of Bracadale is erroneous. But it is unnecessary to refer further to its construction, as it does not apply."

Against this interlocutor the parish of Bracadale reclaimed.

PATTISON and WATSON, for the reclaimer, the parish of Bracadale, maintained, that either by virtue of the 75th section of the Lunacy Act the lunatic's settlement at the beginning of chargeability remained her settlement to the end, or that the fact of his wife becoming a pauper lunatic pauperised the husband, and prevented him gaining a new residential settlement, and that a burden which did not attach to him in such a way as to prevent him acquiring a settlement could not attach to him immediately he had acquired it.

BALFOUR and MACKINTOSH, for the pursuer, the parish of Stirling, contended that the present was not a case of parochial relief at all. It is relief introduced in an exceptional way by statute. It is so exceptional as to be given to the wife and children of an able-bodied man—*M'Rorie*, 24 D. 723; *Keay*, 19 D. 232; and *Beattie*, 5 Macph. 47. A man is bound to aliment his wife, but only in family with himself. When by public authority and for public objects the wife is taken from her husband and placed in an asylum, the husband, if he has not the means, is exempt from payment. That introduces a new element into the question, which cannot therefore be determined by the principles of the poor law only.

MUNRO and TRAYNER for the parish of Dunoon.

MILLAR and BURNET, for the parish of Lochbroom and Portree, referred to *Kirkwood*, 7 Macph. 1027; and *Fraser*, 5 Macph. 819.

At advising—

LORD PRESIDENT—On August 23, 1861, the Inspector of the Poor of the parish of Stirling presented a petition to the Sheriff for an order authorising the transmission of Margaret M'Intosh or Tweedie to a lunatic asylum, as being in such a condition of mental derangement as to require confinement and treatment there. She was described in the statement appended to this petition as being a single woman who had maintained herself as a domestic servant, and as having no relative liable for her support. It was quite plain therefore that the lunatic must be treated as a pauper, because a person in such condition could have no estate out of which she could be supported. The parish of Stirling had at that time no public asylum of its own to which it was possible to send the woman, and accordingly warrant was granted to send her to Hallcross House, in the neighbourhood of Musselburgh, a recognised asylum. The lunatic remained there under treatment until 28th January 1869, when a district asylum having been in the meantime built at Larbert for the Stirling district, an application was made for her transmission there. From January 1869 until her death, in 1871, she was confined in the district asylum at Larbert.

It now turns out that this woman, who was described as a single woman in the application of 1861, was in truth married, and the parish of Stirling seems to have been placed in some embarrassment in determining against what parish to apply for the expenses of the lunatic's maintenance. And this action is brought against four different parishes, to all of which the Inspector of the parish of Stirling had given the statutory notices, though at different periods. Notice was given upon 26th August 1861 to the parish of Dunoon, where the lunatic had resided industrially for five years previous to her confinement. Another notice was sent about the same time to the parish of Lochbroom, which was the parish of her birth. Some years, afterwards, in consequence, I suppose, of the Inspector of the parish of Stirling becoming aware of the fact of her marriage, a notice was given to the parish of Bracadale, on the ground that it had been the parish of her husband's settlement from Whitsunday 1864 downwards. And later still, on 24th August 1869, a notice was sent to the parish of Portree, as the parish of her husband's settlement at the date when she herself became chargeable. All the parties called entered appearance to defend the action. The Lord Ordinary has selected Bracadale as liable, from and after Whitsunday 1864 at any rate, when the husband's settlement in that parish was acquired, as the notice given on 5th April 1865 draws back to that date, but the Lord Ordinary has assoilzied the other parishes, including Portree, which was the parish of the husband's settlement at the date of her first chargeability.

Now, this case raises some questions of considerable difficulty, but there are one or two principles involved which are clear enough, and I think it advisable to state them at the outset.

First—This woman could have no settlement except one derived from her husband. It is said no doubt that after their marriage they never cohabited as man and wife—that the marriage was never consummated. It is needless to say that that does not affect the case at all; they were married persons to all intents and purposes, *concursus non concubitus facit matrimonium*, and the woman not having been deserted by her husband it follows of necessity that, standing the marriage, the woman could have no settlement but her husband's.

Second — It is quite clear that the husband never was a proper object of parochial relief. He has been throughout an able-bodied man, and could not possibly become an object of parochial relief, notwithstanding any amount of domestic incumbrances. That has been a settled point since the case of *Thomson* v. *Lindsay*, and it would follow as a natural consequence of that rule that the mere fact of his wife being affected with mental disease could not have the effect of pauperising the husband, an able-bodied man, and himself not an object of relief. He must bear his own burdens, and cannot be chargeable on the parish in respect of them. It has been characterised as a harsh law, but there is no doubt that it is the law, and by the consent of a vast number of men who have

deeply studied the subject, it is admitted to be the most expedient and politic law notwithstanding.

Now, these matters being clear, we return to the case in hand. There can be no doubt that in the administration of the poor law, both before and after the passing of the Lunacy Act, the case of lunacy was always exceptional, and for good reason. Because the confinement and treatment of a lunatic is not a mere matter between the husband or father and the parish, but it is one in which public interests are concerned, and where the Legislature has interfered from motives of public policy. A lunatic, except under peculiar circumstances, must be sent to an asylum, and the poor law itself has made a special provision for the case of a pauper lunatic in its 59th section, which provides that when any poor person who shall have become chargeable in any parish shall be insane, the parochial board shall provide that such insane person be conveyed to and lodged in an asylum or establishment legally authorised to receive poor patients, excepting only that, under special circumstances, in particular cases, it shall be lawful for the parochial board, with the consent of the board of supervision, to dispense with the removal of such insane poor persons to a lunatic asylum, &c. But the ordinary rule is that every pauper lunatic shall be sent to an asylum. That being so, when a married woman comes to be sent to an asylum, being the wife of an ordinary labouring man, this difficulty occurs—the labouring man is not a pauper, and cannot become a pauper—but the law has enacted an artificial mode of proceeding. It takes away his wife from him. It will not allow him to support her in family with himself, which he may be quite able as well as willing to do. But from motives of public expediency it sends her to a lunatic asylum. The natural result is, that the law which prevents him from maintaining his wife in the natural order of things, must relieve him of the burden which, on grounds of public policy, it creates, namely, of maintaining his wife in a lunatic asylum. And, therefore, without reference to the Lunacy Acts, it would seem that the parish must maintain the lunatic wife in cases of this kind.

If the question arises, What parish is to bear this burden? the answer undoubtedly is, the parish of the husband's settlement. The wife's person is sunk in marriage. She cannot acquire a settlement of her own; and the mere fact of lunacy will not enable her to do so; therefore the husband's parish is liable for her maintenance. But a question of great practical importance at once occurs, for the parish of settlement of the husband, who is not himself a pauper, is changeable, and it may suffer more changes than one. It may be that where the wife is sent to the asylum the husband may have a settlement by industrial residence in one parish. But suppose he changes his residence to another parish? After he has been there for four years and one day he has lost his residential settlement in the former parish, but has not gained a new one in his present parish. He himself would fall back upon his birth parish as his parish of settlement. But when 364 days more have elapsed he has acquired another residential settlement in his new parish, and then comes another change of the wife's chargeability. And so it might happen, during a long confinement like this, that he may change his settlement half-a-dozen times. Nothing could well be more inconvenient than this, and I think the Lunacy Act intended to provide against its consequences.

First, the 95th section provides that every pauper lunatic shall be sent to the asylum for the district in which the parish of the settlement of such pauper lunatic is, and then it proceeds to say that under special circumstances compliance with this rule may be dispensed with by consent of the lunacy board. But the general rule is that every pauper lunatic is to be sent to a district lunatic asylum.

Then, taken in connection with this, we have the 75th section, which provides that every pauper lunatic detained in any district asylum under the Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted. Now, it is very difficult to say that that is not to apply to a derivative as well as a proper personal settlement. In fact, the inconvenience to be remedied is greater when the settlement is derivative than when it is personal. The only case, where the settlement is personal, in which inconvenience could arise, would be if the lunatic had at first an industrial settlement, and if by residence in the asylum he came to lose it, there might then come a time when the chargeability would shift to the parish of birth. But in the case of a derivative settlement the inconvenience would be much greater. Such a shifting of liability might occur several times. This the 75th section most certainly intended to exclude. But then, in the present case, it happens that the lunatic pauper was not sent to a district asylum, and it is therefore maintained that the 75th section does not apply. This is undoubtedly a question of some delicacy, but I am of opinion that where from some special cause, under warrant of the board of supervision, or the lunacy board, the rule is relaxed, that does not affect the application of section 75, because the other place of confinement comes just in place of the district asylum, and I do not think it is at all inconsistent with the canons of ordinary construction of a statute to hold that where, from the non-existence of a district asylum at the time, or other good cause, confinement in another legalised asylum is permitted, the same effect shall follow, as where the confinement is in the proper district asylum. Now here it was from absolute necessity that the pauper was sent to the asylum at Musselburgh, for there was no district asylum in existence at the time. When one was built a transference was immediately made. I am therefore of opinion that section 75 does apply, and that the parish of settlement during the whole time of the lunatic's confinement must be held to be the legal settlement of that lunatic at the term of first chargeability. That was the parish of Portree, being at that time the parish of the husband's settlement. Its liability is certainly, in the present case, very limited, for the notice was only given on 24th August 1869, and can only draw back a year from that date. Portree being the parish liable, the other parishes fall to be assoilzied.

Lord Deas—There are, as your Lordship says, some points involved here on which there can be no doubt. I agree with your Lordship that this woman must, in certain respects at least, be regarded as a pauper lunatic, apart from any pauperism of the husband. She must be provided for as a pauper lunatic, though her husband is an

able-bodied man, and not himself entitled to relief. It is an exception, produced by the necessity of the case, to the general rule, that the husband or father must be the pauper. I need not add anything to what your Lordship has said on these points.

In the next place, I have no hesitation in saying that, although this be so, the settlement of the woman must be held to be her derivative settlement as a married woman—in other words, her husband's settlement. I have no doubt that a derivative settlement in a question like this is on precisely the same *footing* as a personal settlement. The difficult point comes to be, whether the derivative settlement which the wife had at the time of her first confinement is to remain the same throughout, notwithstanding an intermediate change or changes in her husband's settlement. If she had been put into a district asylum there would be no doubt about it, for the 75th section of the Lunacy Act would have applied in express terms. For that section provides that every pauper lunatic detained in a lunatic asylum shall be held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for confinement was granted. In that case there can be no doubt that the pauper lunatic cannot change the parish of settlement during the period of confinement. The whole difficulty therefore arises from the words of that section applying apparently exclusively to a district asylum. The point of difficulty is, whether that enactment can be held applicable to this case, where the lunatic was confined in an authorised asylum which was not a district asylum. The determination of this question requires attention to some previous sections of the statute. It would be a very anomalous result if that section applied only to the case of a lunatic confined in a district asylum, and not to a pauper lunatic placed, in terms of the exception introduced at the end of the clause just quoted from, in an asylum which is not a district asylum. All asylums are comprehended in the terms public and private asylums. By the interpretation clause (§ 3), "the words 'public asylum' shall mean and include all such hospitals, mad-houses, or asylums as are or shall be established for the custody of lunatics by Act of Parliament or royal charter, &c., without any view to pecuniary gain or profit; and also all hospitals, mad-houses, or asylums other than district asylums, into which lunatics committed, by order and certificate as hereinafter provided, cannot be refused access or reception without special cause shown." So that all those asylums which common language calls private, are, in the language of this statute, public asylums. Then section 10 adds that all public asylums established after the passing of this Act shall be under and subject to "the like powers and provisions as existing public asylums are by this Act made subject to." Then, by section 25, the Sheriff is empowered to visit and inspect all asylums, public, district, and private, within his jurisdiction, in which a lunatic is detained under his order. And by section 34 the Sheriff may order the reception of a lunatic into any public, private, or district asylum. All are in this respect placed on the same footing. The question whether a district asylum shall be established at all, depends upon sections 51 and 52. These sections lay down that there is to be no district asylum at all if there is already sufficient accommodation in the district. Then by section 59 the district boards may agree and contract with the proprietors or parties interested in any asylum within their district for the reception of pauper lunatics. The only other section to be noticed is section 95, which is in these terms—"Every pauper lunatic to be detained under this Act shall be sent to the asylum for the district in which the parish settlement of such pauper lunatic is situated." It is quite plain that if you were to take these words by themselves the pauper lunatic could not be sent anywhere but to a district asylum. That would be a contradiction to what had gone before in the section which I have just noticed. But then section 95 goes on—"Provided always, that under special circumstances it shall be lawful for the parochial board, with consent of the board, to dispense with the removal of any pauper lunatic to such asylum." There is thus power, in the very same section which says the pauper lunatic shall be sent to the district asylum, to send him to any asylum. Now, when we couple all these sections together, it seems utterly impossible to read the statute as intending to make a distinction between paupers confined in a district and in any other public asylum. The difficulty is only apparent, and when section 75 is read by itself alone. But when it is taken in conjunction with the other sections the difficulty disappears altogether. If that be so, then there is an end of the only nice question in this case. I am humbly of opinion that the construction which I have put upon these clauses is the right one, and therefore that we must alter the judgment of the Lord Ordinary. I observe that my opinion as to the construction of the Lunacy Act is strengthened by the provision of a later Act, 21 and 22 Vict. c. 89, as to lunatic wards in poor-houses. That Act was temporary only, and I do not know whether it has been re-enacted.

Lord Ardmillan—I cannot say that I think one of the questions which were argued before us is attended with much difficulty. I am of opinion that the woman had and could have no settlement but that of her husband. But it is a fact that when she became a lunatic she was living in separation from him. And it is a legal consequence of the fact of her being stricken down with this mental disease that she was made a pauper necessarily and at once. Then, as a lunatic, she is taken by the Inspector of the parish of Stirling and sent to a lunatic asylum. If we were dealing with this one pauper lunatic only, I think it would be impossible to come to the conclusion that her husband's settlement, wherever it might be for the time, must be liable for her. But then she was sent as a pauper to this asylum, and I think that when the law in the person of the Sheriff interposed its authority, then the Lunacy Act, in virtue of which the law acts, comes to rule the question of liability. And I think that the Lunacy Act is very clear on the subject. Namely, that if placed in a district asylum she would have been chargeable to that parish, which was the parish of her settlement at the date of her confinement. That parish was Portree, the then parish of her husband's settlement. But the asylum to which she was sent was not a district asylum. And this part of the case is attended with some little difficulty. I have listened with great attention to the opinion delivered by Lord Deas upon the effect of the different clauses in the Lunacy Act, and I quite concur in that opinion. I have only one additional

ground to state. I think that if a private asylum, on the necessary consent being given by the lunacy board, is a legal substitute for the district asylum in any district where there is none yet in existence, until one is built, then, as stated by your Lordship, confinement in such asylum may very well be held the same in its effect as confinement in a district asylum. But, farther, I think it would never do to allow the inspector of a parish, by any voluntary act on his part, to affect the incidence of liability for the pauper lunatic's maintenance. It can never be permitted to a man in the position of a poor's inspector to do any act which could shift the liability for the lunatic from one parish to another. It was his duty so to act as to leave the liability of other parishes where the law placed it. Even did the provisions of the Lunacy Act on this subject not exist, I would not have thought it right to give effect to that choice of the poor's inspector, so as to alter the legal incidence of chargeability.

Lord Kinloch—The case with which we have now to deal is that of a lunatic, and is mainly to be decided by the enactments of the Lunacy Acts. Even under the Poor Law Act, the case of a lunatic is special and exceptional. In the general case, relief cannot be sought for a wife or child where the husband or father is able-bodied. But, on considerations of public policy, a lunatic is maintained at the public expense, even where the party on whose settlement he hangs would be excluded from claiming relief for himself or the other members of his family.

It is not disputed on any side in the present case that Margaret M'Intosh was in 1861, when relief was given to her by the parish of Stirling, a proper object of parochial relief, and so continued till her death in 1871. It is said that on this account she was a pauper in her own right. I do not much object to the term, though I would rather avoid using it, as it is liable to misconstruction. I sufficiently express her position in saying she was a proper object of parochial relief.

By the Lunacy Act, 20 and 21 Vict. c. 71, § 76, it is provided, generally, that anyone whatever incurring expense in the maintenance of a lunatic shall, in default of other means of reimbursement, have recourse against "the parish of the settlement of such lunatic." By section 75 it is provided that every lunatic detained in a district asylum "shall be deemed and held to belong, and be chargeable, to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted;" and further, that "the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic." By section 95 it is provided that every pauper lunatic "shall be sent to the asylum for the district in which the parish of the settlement of such pauper lunatic is situated;" but under the qualification that in special circumstances this may be dispensed with. Combining these enactments, I think that section 75 must be held to rule, universally, the case of all pauper lunatics, whether actually confined in a district asylum or not. I conceive that, for the purposes of that section, all are constructively so confined. I can see no reasonable ground for making any distinction, so far as the enactment of section 75 is concerned. The chargeability of the parish of settlement at the time relief is first afforded, and downwards, is in reason equally applicable, whether the lunatic reside in a district asylum or a private house. And the same chargeability, I think, follows in either case from the direct implication of the statute.

Applying this principle, the question comes to be, What was the legal settlement of Margaret M'Intosh when, in August 1861, she received relief as a lunatic from the parish of Stirling? As to this there can be no doubt. The legal settlement of her husband was then in the parish of Portree; and this was equally the settlement of the wife. The peculiar circumstances of the marriage do not, as I think, affect this question; for they do not get rid of the fact that Margaret M'Intosh was then a wife lawfully married, nor of the law that the settlement of a wife is in every case that of her husband. In August 1861 the parish of Portree was the parish of her settlement, and liable in relief to the parish of Stirling.

But this being so, I am of opinion that Portree continued, down to Margaret M'Intosh's death in 1871, to be liable for her maintenance. I consider this to follow from the terms of the Lunacy Act already referred to, which throw on the parish of settlement, at the time of the lunatic being taken under maintenance, the burden thereafter of his support, and constructively protract that settlement during the continuance of the lunacy. This is nothing more than to apply the general principle of the poor law, that after parish relief is received the settlement remains fixed during the continuance of the pauperism.

The only difficulty connected with this conclusion arises from the fact that the husband of the lunatic, who had his settlement in Portree in 1861, had his settlement changed to the parish of Bracadale from 1864 downwards. Of this I think there can be no doubt. He removed from Portree to Bracadale in 1859. By the lapse of more than four years he lost his settlement in Portree; by the lapse of five years he acquired a settlement in Bracadale, which he retained till the time of his death. I am clear that the receipt of parish aid by his lunatic wife did not place this able-bodied man himself in the position of a pauper, nor prevent his acquiring a new settlement. I am equally clear that this settlement was in Bracadale subsequently to 1864.

To hold Margaret M'Intosh to be, notwithstanding this, still chargeable to Portree, conflicts with the principle that a wife's settlement varies with that of her husband, and leads to the anomalous conclusion that the settlement of the wife came ultimately to be in one parish, and that of the husband in another. But this result simply arises out of the statutory provision of the Lunacy Act, by which the general principles applicable to the case must be held overruled. Perhaps there is nothing in the result more anomalous than it would be to hold that after becoming an object of parochial relief the settlement of the still continuing pauper lunatic shifted from one parish to another. Whether the result arising in a case like the present was contemplated by the framers of the statute, or whether they had their view confined to the case of a personal, as distinguished from a derivative, settlement, may be fairly questioned. But so I think the words of the statute import; and I am not at liberty to deny them effect on any merely speculative view.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be altered, and the

charge laid upon the parish of Portree. The charge cannot, of course, be carried farther back than a year prior to the date of the statutory notice. This notice can have no effect whatever in regard to legal rights and obligations. But when once these are settled, it limits the pecuniary amount.

The different parishes assoilzied moved for their expenses against Portree, the parish ultimately found liable. It was objected, on the part of Portree, that the parish of Stirling must be held liable, if not for the expenses of Bracadale, which it was mistaken in calling, then at least for the expense of Dunoon and Lochbroom, which it was not justified in calling.

LORD PRESIDENT—There is no doubt that Bracadale has been entirely successful in maintaining its defence. Therefore the pursuer is liable to Bracadale. But then the pursuer must be relieved by Portree, the parish ultimately found liable, because the real question was between Portree and the other parishes. Therefore Portree must bear the expenses of the pursuer and Bracadale. But with regard to the other two parishes, Dunoon and Lochbroom, I think the pursuer was perhaps justified in bringing them into Court. But he must always take his chance of being found liable in expenses, as I think he should be here. But then, though the parishes were entitled to appear and defend themselves, I do not think that, after the Lord Ordinary's judgment, they were entitled to come into the Inner-House without first inquiring whether anything was going to be insisted in against them there. I think therefore they should only have their expenses in the Outer-House.

Agents for the Pursuers the Parish of Stirling—Traquair & Dickson, W.S.

Agents for the Reclaimers the Parish of Bracadale—T. & R. B. Ranken, W.S.

Agents for the Parish of Dunoon—W. & J. Burness, W.S.

Agents for the Parishes of Lochbroom and Portree—Adam & Sang, W.S.

Friday, December 1.

SECOND DIVISION.

M'DOWALL *v.* STEWART.

Process—Extrajudicial Expenses. *Held* that a party who had been successful in an action in the Court of Session, and found entitled to the expenses of process, was not entitled to recover in another action the extrajudicial expenses incurred in the former suit.

M'Dowall obtained decree in the Court of Session against Stewart for £45, as the price of a horse, with interest from the date of the alleged sale, and expenses. The price, interest, and taxed expenses were paid by Stewart. M'Dowall thereafter raised the present action against Stewart for £25, being damages sustained by the pursuer, and law expenses incurred by him to his law agent, in consequence of Stewart having wilfully failed to implement his bargain by paying the price of the horse at the date agreed on. The expenses sued for were extrajudicial expenses which had been disallowed by the Auditor in the taxation in the Court of Session action. The amount of these extrajudicial expenses had been subsequently, at the request of the pursuer's agent, taxed by the Auditor as between agent and client. The grounds of damage set forth were loss of time and personal expenses. The Sheriff-Substitute (RHIND) decerned for the amount of the account of expenses, and *quoad ultra* found no damages due. The Sheriff (HECTOR) recalled, and assoilzied the defender.

M'Dowall appealed.

ROBERTSON for him.

J. C. SMITH and M'KECHNIE in answer.

The Court dismissed the appeal, holding that the extrajudicial expenses could not be recovered, and that the other grounds of damage were not relevant.

Agent for Appellant—W. R. Garson, S.S.C.

Agent for Respondent—William Milne, S.S.C.

Friday, December 1.

BRADY *v.* GRIMONDS.

Reparation—Accident—Fault. Circumstances in which *held* that the employers of a little girl, ten years of age, who had fallen down the shaft of an elevator and been severely injured, were not in fault, and consequently not liable in damages for reparation.

This was an appeal from a decision of Sheriff HERIOT in a case at the instance of Mary Brady, daughter of William Brady, Rose Lane, Dundee, against Messrs J. & A. D. Grimond, Bowbridge Works, for £250 damages for injury by an accident which pursuer sustained in the defenders' mill on 3d November 1870, by falling down the hatchway of an elevator. The pursuer's statement was, that on the day in question, being the third day of her employment in the mill, and while she was leaving her work on the third floor at the meal hour, she observed a boy enter the door that leads to the elevator passage on that floor, and supposing that to be the way out she passed through that door and fell through the elevator passage the depth of three storeys. In consequence of that she was severely bruised and injured, and had her legs broken. The defenders alleged that the girl, when she met with the accident, was in violation of her duty and of the rules of the work, about to swing herself down the ropes of the elevator, but that in attempting to do so she had missed her hold of the ropes, and had fallen down the passage of the elevator the distance of one flat, being from the third to the second floor. Evidence was led on the various points at issue between the parties, and on the 1st July Sheriff CHEYNE issued an interlocutor finding that in the circumstances, and having special regard to the pursuer's age (which was ten years in February 1871), the accident was not attributable to fault on her part, but that the defenders were liable to compensate her for the injuries she had received, and therefore found her entitled to £20 of damages. The defenders appealed the case to the Sheriff-Principal (HERIOT), who recalled the Sheriff-Substitute's interlocutor, and found for the defenders, as the elevator down which the pursuer fell was securely fenced, and therefore they were not in any way responsible for the accident.

BRADY appealed.

SCOTT and STRACHAN for her.

SOLICITOR-GENERAL and SHAND in answer.