is covenanted for, it must be left to the ordinary Courts; and then this special agreement is come to regarding the question of law, namely, that "your claim" (that is, the claim of Walker's trustees) "for compensation shall not be barred by reason of our" (that is, the railway company) "not taking any part of your respective lands." This is simply a covenant whereby a plea in bar is waived or departed from—the claims shall not be barred on certain grounds—and I assume that the Court will give effect to this covenant in considering the legal question of liability, but it does not arise at the present stage of the procedure.

The agreement next proceeds that the amount of compensation shall be determined under the Lands Clauses Consolidation Act 1845. At first sight this appears to contemplate two appeals to the statutory arbiters or jury, and possibly this may be necessary if the first award does not exhaust valuation questions, or does not contain materials to enable the Court to discriminate between certain claims or to deal with the whole claims. It is quite possible in the event of a claim being only partially sustained in law that recurrence must be had to the arbiters or jury to divide or to fix the pecuniary amount. But if proper care be taken in the primary proceedings before the arbiters or jury no second inquiry into pecuniary value will be required. It will be the interest of the parties to require and take care that a separate valuation or assessment be placed by the arbiters or jury upon every distinct and separate ground of damage, so that if the Court sustain the sufficiency in law of some of the claims, and reject the sufficiency or validity of others, then being all separately valued, full materials for an exhaustive and final judgment will exist in the award or verdict of the arbiters or jury.

I am of opinion, therefore, in accordance with the Lord Ordinary's interlocutor, that the present note of suspension and interdict should be refused, and that the respondents should be allowed to insist in the proceedings before the arbiters, and the arbiters and oversman to proceed in common form.

I am only anxious to add, however, that in coming to this conclusion I have not proceeded to any extent upon a consideration of the validity in law of any of the respondents' claims, although as to some of them we had a good deal of ingenious argument. The compensation claimed by the respondents is rested upon alleged injury or damage of various kinds. These different claims involve very different legal considerations, and it will not be possible ultimately to dispose of them without invoking the aid of different and even dissimilar legal principles. For example, the claim in respect of altered gradients is quite different in kind from the claim apparently founded on the fact that the railway company have taken away the houses and shops on one side of Eglinton Street and have substituted a railway wall or embankment. But I think that the time has not come for deciding all or any of these questions. It may easily be figured that the respondents may ultimately succeed in some of their claims and may fail in others, but on all of these points of law I reserve my opinion entire. I think it best to abstain from forming an opinion until the full materials for judgment are placed before the Court.

LORD RUTHERFURD CLARK (who was called in in the absence of Lord Ormidale)—I may say that I am quite prepared to decide at this stage the question decided by the Lord Ordinary as to the relevancy of the damage averred by the respondents, but as your Lordships have decided that the claim cannot go to the arbiters upon the letter granted by the railway company, I think it unnecessary to express my opinion.

The Court adhered.

Counsel for Complainers (Reclaimers)—Lord Advocate (Watson)—Johnston—Keir. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Respondents—Asher—Lorimer. Agents—Ronald & Ritchie, S.S.C.

Wednesday, December 3.

SECOND DIVISION.

[Sheriff of Aberdeen.

MILNE (INSPECTOR OF NEWHILLS) *v.* HENDERSON (INSPECTOR OF MONQUHITTER) AND SMITH (INSPECTOR OF KINELLAR).

Poor — Settlement — Pauper Lunatic — Relief to Able-bodied Father for Imbecile Son.

A lunatic resided in family with his father, an able-bodied man, who was however unable to support him. For six years the parish of K gave relief to the father merely for behoof of the son. The father had acquired a settlement by residence, but had lost it by non-residence, unless he had been pauperised by the aid given him for his son. After the father's death, *held* (1) that the son took the settlement of his father; (2) that the father was not pauperised by the relief given him for behoof of his son; and (3) that in the circumstances the parish liable for the support of the lunatic was that of the father's birth.

Observations upon the case of *Palmer* v. *Russell*, Dec. 1, 1871, 10 Macph. 185.

This was an appeal from the Sheriff Court of Aberdeenshire in an action at the instance of John Milne, Inspector of Poor, parish of Newhills, against Andrew Henderson, Inspector of Monquhitter, and Alexander Smith, Inspector of Kinellar, alternatively, for payment of £6, 11s. disbursed by Milne on behalf of Alexander Lovie. He was a harmless lunatic or imbecile, son of James Lovie, and was born in the parish of Dyce. In December 1871, when relief was first given to Alexander, he was sixteen years of age and lived with his parents. He was never forisfamiliated. His father, who had been born in the parish of Monquhitter, was an agricultural labourer, and had been many years resident in the parish of Kinellar prior to 1868, but in that year he left it, and was absent till 6th May 1874. He again lived there between May 1874 and May 1877, when the relief to Alexander was discontinued; and removing to the parish of Newhills, James Lovie died there in the receipt of parochial relief in February 1879. That parish had since August 1878 supported Alexander, and it was for

repetition of the amount thus expended that this action was brought. The relief had been given to James Lovie for or on account of Alexander.

The Inspector of Newhills pleaded, *inter alia*—"(2) The settlement of the lunatic is the settlement of his father. (3) The parish of Monquhitter being the parish of the father's birth, is liable unless it can establish settlement by residence elsewhere; and in the event of a settlement by residence of the father being established in Kinellar, that parish is liable."

The Inspector of Monquhitter pleaded, *inter alia*—"(1) Alexander Lovie being, assuming the contention of Kinellar as to the facts to be correct, in law a pupil from his birth till now, by reason of his non-forisfamiliation and weakness, has throughout had his father's settlement. (2) James Lovie, the father, having acquired a residential settlement in Kinellar, that settlement enured to Alexander Lovie; and James Lovie's settlement in Kinellar having still existed at the date of the chargeability in 1877, the parish of his birth is in no way liable for the relief afforded him. (3) The parish of Kinellar having, in full knowledge of the whole facts, admitted that both the father's and son's settlements were in the parish of Kinellar, and that they were proper objects of parochial relief, cannot now withdraw that admission, and it is irrelevant and incompetent to inquire further than is indicated by that admission what was the settlement of the said Alexander Lovie and James Lovie."

The Inspector of Kinellar pleaded, *inter alia*—"(1) Alexander Lovie never having been forisfamiliated, and having been imbecile from his birth, is in law a pupil, and takes the settlement of his father. (2) James Lovie not having resided in Kinellar continuously for at least one year between May 1868 and May 1874, his residential settlement in that parish which he had previously acquired was lost, and he has not again acquired a residential settlement in Kinellar. (4) The pecuniary aid given by Kinellar from 1871 to 1877 being neither actually nor constructively parochial relief furnished to James Lovie himself, was not *per se* sufficient to constitute him a pauper, or to prevent the loss of a residential settlement which otherwise he had not retained, or to constructively protract his son's derivative settlement. (5) The granting of pecuniary aid from 1871 to 1877 to Alexander Lovie—whose father, the said James Lovie, was then able-bodied and *presumptione juris et de jure* earning a subsistence, and able and bound to support his son—was an excess of power on the part of the parochial board of Kinellar, and did not constitute parochial relief within the meaning of the statute. (6) James Lovie having—with the assistance of his family, who were able and bound to support him and his dependants living in family with him—been capable of maintaining himself and his dependants without assistance from the ratepayers, was not a proper object of parochial relief, and the relief afforded by the parish of Newhills has been improperly given."

The Sheriff-Substitute (DOVE WILSON) gave decree, by interlocutor of 15th April 1879, against the inspector of Monquhitter. On 3d June 1879 this interlocutor was recalled by the Sheriff (GUTHRIE SMITH), who decerned against Kinellar. He added this note to his interlocutor—

"*Note.*—[*After stating the facts*]—It is not disputed that from 1871 until Whitsunday 1877 inclusive the lunatic was treated as one of the parochial poor by the parish of Kinellar. He lived with his father, but he received a weekly sum on his account. It is also clear that in 1871, when the claim was first admitted, the father James Lovie, and through him his son Alexander Lovie, were both possessed of a settlement in the parish. But the defender, the inspector of Kinellar, repudiates the acts of his predecessor. He says that James Lovie being beyond question an able-bodied man in the receipt of good wages, the parochial board had no right to give relief to his imbecile son. It was in fact a mistake—a misapplication of public money—which must now be disregarded; and so dealing with it when the present claim arose, the settlement acquired by James Lovie in the parish of Kinellar had been lost by absence without a new one being acquired, and consequently Monquhitter as the father's birth parish is liable.

"There are thus two questions—the competency of the relief given, and its effect. As to the first, the point can hardly be considered open since the case of *Hay* v. *Paterson* in 1857, 19 D. 332. It was there decided that an able-bodied man burdened with a lunatic son may receive relief on the latter's account, just as a widow or an unmarried woman burdened with an infant is entitled. The parochial board may indeed refuse the claim when in their opinion the earnings of the family or the weakness of the imbecile member is not such as to require relief. But it is a matter for their discretion, subject to the review of the Sheriff, whether in all the circumstances the discretion was well and fairly exercised; and the case is quite different from *Petrie* v. *Meek*, March 14, 1859, 21 D. 614, and others of that class, in which it has been held that a claim by an able-bodied man himself, and on his own account, cannot be entertained. In the present instance, the board being possessed of the power to give relief, cannot be allowed to say at this distance of time that they were guilty of an improper exercise of it. They cannot be permitted to impeach their own acts in order to rid themselves of the liability thence arising.

"The case of *Palmer* v. *Russell*, Dec. 1, 1871, 10 Macph. 185, which is referred to by the Sheriff-Substitute, decides that when a lunatic is taken possession of by the parish, and separated from his family, the doctrine of derivative settlement ceases to be applicable. The insane person is henceforth to be treated as an individual. The relief which a wife receives does not pauperise the husband, and whatever changes may occur in his settlement, the wife's stands as it is fixed at the date of the committal to the asylum. The rule is simple and easily understood, and there was an obvious expediency in giving it the statutory sanction which it received in section 75 of the Lunacy Act (20 and 21 Vict. cap. 71). But it is a mistake to regard it as then introduced for the first time, because in the earlier case of *Hay* v. *Paterson* above referred to, and which occurred some years before the passing of the Lunacy Act, a similar principle is recognised—Lord Ivory observing that 'from the moment the child is taken possession of by the parish, and separated from the family, the child may be held no longer to follow the settlement of the father. It is true that in

this instance Alexander Lovie, the lunatic, was never separated from the family; but it is admitted by the parish of Kinellar that he was dealt with as a pauper in his own right from the age of 16 until the age of 22. It was on his account, and not on account of the father James Lovie, that application for relief was made; it was because he was unable to make his living, being subject to epileptic fits, that relief was asked, and it is Alexander Lovie whom we find entered in the list of paupers belonging to the parish. If the facts be as they are stated by the parish of Kinellar itself, it must be held that the pauper was not the father, but the son; and as for six years the parish admitted its liability without question, the Sheriff is of opinion that the settlement belonging to the pauper at the date of relief cannot be affected by subsequent changes in the settlement of the father."

The Inspector of Kinellar appealed, and argued — Apart from the provisions of the Lunacy Act (20 and 21 Vict. c. 71), sec. 75, a lunatic living with his father would change his settlement along with his father's. The Lunacy Act only applied to patients actually in an asylum. Where a person not *sui juris* was in receipt of relief, that did not prevent the father or husband from getting a new settlement, and the person not *sui juris* following the father or husband to the new settlement and becoming chargeable in it. There was no doubt that a lunatic in childhood had its father's settlement, and it just came to this, that a lunatic was always a pupil. Monquhitter had to maintain, that notwithstanding the natural obligation of the father to maintain his child, if the child had ever obtained relief from a parish, that parish was bound to maintain it in all time coming; and this contention was negatived by *Wallace* v. *Turnbull*, March 20, 1872, 10 Macph. 675; and *Anderson* v. *Paterson*, June 12, 1878, 5 R. 904.

Authorities—*Palmer* v. *Russell*, December 1, 1871, 10 Macph. 185; *Hay* v. *Paterson*, January 29, 1857, 19 D. 332; *Beattie* v. *Adamson*, November 23, 1866, 5 Macph. 47.

Argued for Monquhitter—Under the Lunacy Act (secs. 75 and 95), the first settlement continued so long as the person remained a lunatic (*Palmer* v. *Russell* quoted *supra*). Here, at the first period when relief was given, the giving of relief to the lunatic child did not pauperise the father and the child having become chargeable on Kinellar then, as a pauper lunatic, and having been a pauper ever since, could not have changed its settlement. Kinellar therefore still continued liable.

Authorities—Those already quoted for the appellant; and *Bremner* v. *Taylor*, November 13, 1866, 3 Scot. Law Rep. 24; *Beattie* v. *Arbuckle*, January 15, 1875, 2 R. 330; *Young* v. *Gow*, February 9, 1877, 4 R. 448.

At advising—

LORD ORMIDALE—I think it right to preface my opinion in this case by the remark that it is very desirable that principles which must be taken as already conclusively settled in relation to the liability of parishes for the support of the poor should not be gone back upon. It is only by adhering to decisions once pronounced that litigation and expense are likely to be best avoided in a class of cases in which for obvious reasons such results are much to be deprecated. I have made this remark because, unless I am greatly mistaken, the present case must be held as ruled in all essential respects by principles which have been already the subject of judicial recognition and decision, and cannot, or at least ought not, now to be trenched upon.

The question is, whether the burden of supporting Alexander Lovie, a pauper lunatic, falls upon Monquhitter, the birth parish of his father, or Kinellar, the parish in which his father had a residential settlement at the time when it would appear some parochial aid was first granted to Alexander Lovie? Now, I take it to be indisputable that a lunatic child cannot while in that condition, and living in family with its father, either acquire or lose a settlement. The case of *Hay* v. *Paterson*, in 1857, 19 D. 332, referred to and founded on by the Sheriff-Principal in the present case, is itself conclusive to that effect. But then in that case it is true that the lunatic or imbecile person had not reached majority when the question arose, while here the lunatic or imbecile person is above majority. On principle I think it clear that this can make no difference, for a party already a lunatic is incapable of either losing or acquiring a settlement while he or she continues in that condition. And so accordingly it was determined in the recent case of *Lawson* v. *Gunn*, 4 R. 151, that a woman, imbecile from infancy, had from the time of her father's death, which happened after her majority, a derivative settlement from her father in the parish of his birth, and that the parish of her own birth was not liable for her support. In short, it was in that case decided that a lunatic or imbecile child, irrespective of actual age, must be dealt with in such questions as the present as *in statu pupillari* so long as the lunacy or imbecility continues.

The case might of course have been different if Alexander Lovie had reached majority or been forisfamiliated before he became imbecile or lunatic; but here it was conceded at the debate that he was to be taken as having been in that condition from his birth downwards. It also appears that he resided with his father, an able-bodied man, down to the death of the latter on 7th February 1879, at which date the settlement of James Lovie, the father, was in the parish of Monquhitter, where he was born.

In this state of matters, and keeping in view the settled principles in the law of parochial relief to which I have adverted, it is difficult to understand how any other parish than that of Monquhitter can be liable for the support of the lunatic Alexander Lovie, for that was his father's birth settlement, and must in ordinary circumstances be also the derivative settlement of his lunatic son.

The first reason that seemed at the debate to be relied on for avoiding this conclusion, and holding that Kinellar is the parish bound to support the lunatic, was, that although all along resident with his father he had received some support from, and had been for more than five years treated as a pauper by, that parish. But I cannot think that this is a good or sufficient reason. To hold that it is would be contrary not only to the decisions of this Court, which have been already noticed, but also to the judgment of the House of Lords

in the well-known cases of *M'William* v. *Adams* (1 Macq. 120), and *Lindsay* v. *M'Tear* (*ib.* 155), by which it was determined that able-bodied men are absolutely excluded from relief by the Poor Law of Scotland; that a father himself entitled to no relief is not entitled to it on behalf of his children, even although one or more of them should be in a condition of imbecility or lunacy; and that the Poor Law does not recognise children as distinct from their parents while they are living in family with him. The result on a consideration of the authorities is therefore that an able-bodied man, such as James Lovie in the present case, cannot be held to have been pauperised in consequence of receiving some parochial relief —which he had no right to—on account of his imbecile or lunatic son Alexander, and that the son being a lunatic and living in family with him could not be dealt with as the pauper. The case of *Wallace* v. *Turnbull* (March 20, 1872, 10 Macph. 675), although the party there was a wife and not a lunatic son, is not, I think, as regards principle, distinguishable from the present.

The aid or relief, therefore, which appears to have been afforded by the parish of Kinellar cannot be held in any way to affect the question whether it or the parish of Monquhitter is the parish legally liable for the relief now in dispute given to the lunatic, or his father on his account, between August 1878 and 1879 by the parish of Newhills.

Nor do I think that the second and only other reason urged by Monquhitter for holding that Kinellar and not Monquhitter is liable, which was founded on the case of *Palmer* v. *Russell*, referred to in the notes both of the Sheriff-Substitute and Sheriff-Principal, can be held to affect the matter, for in that case it was found, not that a lunatic living with and who had never been separated from his father could have a settlement different from his father, but that in terms of the Lunacy Act (20 and 21 Vict. c. 71), sec. 75, that was the result, upon a reasonable construction of the statute, where a lunatic was removed from his father and placed in an asylum, even though it was not the district but a different asylum. But not only was it not decided in that case that the mere circumstance of some relief being given to a lunatic living in family with his father could affect either his or his father's settlement, but no such question was or could have been raised in that case. So far, however, as the reasoning of the Judges in that case can be supposed to have any bearing on the present, it appears to me to be adverse, rather than otherwise, to the parish of Monquhitter. The question being whether the terms of section 75 of the Lunacy Act required that a lunatic should be removed to the district asylum in order to affect his parochial settlement, it was held to be enough to satisfy the statutory terms, on a just and reasonable construction of them, that he was removed to an asylum substituted for the district one. No difficulty would have arisen if it was sufficient that some relief was given to the lunatic living with his father and never removed to any asylum. Therefore, and without any serious difficulty, I am, for the reasons I have stated, and notwithstanding the deference I feel for the judgment of the Sheriff-Principal, especially in a case such as the present, of opinion that the appeal ought to be sustained, the interlocutor of the Sheriff-Principal recalled, and that of the Sheriff-Substitute reverted to.

Lord Gifford—I cannot say I differ from Lord Ormidale, but I have found this case attended with great difficulty. Relief was given to this lunatic child in 1871, and was given for five years and upwards. Now, I quite agree that that circumstance did not pauperise the father, but I think it must be held to have pauperised the child; and I have great difficulty in thinking it possible for a person who has been pauperised by receiving parochial relief to change his settlement. At the same time, I cannot help thinking that great weight attaches to the opposite view. The boy was never forisfamiliated, and the relief given him was very small, merely 1s. per week to assist his father. It would be very strange and very awkward if the different children of a family should have different settlements. On the whole, therefore, I am satisfied with the judgment proposed by Lord Ormidale.

Lord Justice-Clerk—I concur with your Lordships. The question is a very narrow one. On the one hand there is the rule that a lunatic cannot acquire a settlement, from which it would appear to follow that he cannot be pauperised. On the other hand there is the rule that the father of a lunatic receiving assistance is not thereby pauperised. The true solution of the difficulty seems to be, that in the case of a father with a lunatic child there is a humane relaxation of the rule that an able-bodied man is not entitled to receive parochial relief. This view is confirmed by the clause of the Lunacy Act to which reference has been made. On the whole, therefore, I agree with your Lordships that the interlocutor of the Sheriff must be altered.

The Court pronounced the following interlocutor:—

"Find that the parish of Monquhitter was the parish of birth, and also the parish of the settlement, of the father of the pauper lunatic, and that the pauper lunatic was incapable of acquiring any other settlement: Therefore sustain the appeal, recal the judgment of the Sheriff appealed against, and decern against the inspector of Monquhitter in terms of the conclusions of the action," &c.

Counsel for Newhills (Pursuer)—Scott—J. A. Reid. Agent—R. C. Gray, S.S.C.

Counsel for Kinellar (Defender and Appellant) —Asher—Moncreiff. Agents—Auld & Macdonald, W.S.

Counsel for Monquhitter (Defender and Respondent)—Wallace. Agents—Webster, Will, & Ritchie, S.S.C.