for which the defenders are responsible, Mrs Brown has suffered much. Her system has sustained a severe shock, and may be permanently affected. The pursuer James Brown has suffered much anxiety, has been put to great trouble and inconvenience, and has expended considerable sums of money in payment of medical outlays and fees; and the defenders are jointly and severally, or severally, liable to the pursuers in reparation and solatium, which they estimate at £400." "(Cond. 8) The said horse was known to both of the defenders as a powerful and spirited animal, but notwithstanding this the defender David Fulton culpably and carelessly authorised or allowed the boy defender to take it out for exercise, or so culpably, negligently, and carelessly kept the said animal, that the boy defender was on the morning in question in charge of the said horse, which he had neither the requisite strength nor experience to manage, being only about fourteen years of age and of slender build. It is believed and averred that the said animal has prior to the morning in question been in charge of the boy defender, when he was likewise unable to govern or control it, which was well known to the defender David Fulton, or ought to have been."

The Sheriff-Substitute (SPENS) having allowed a proof, the pursuer appealed to the Court of Session for jury trial.

On their proposed issue being lodged, counsel were heard in Single Bills on an objection by the defenders to the relevancy of the pursuers' averments.

The defenders argued—No relevant ground of damage to found an issue was set forth on record. There was no averment of "fault" against either of the defenders. As against the father, it was quite insufficient to aver that he culpably authorised or allowed the boy to ride a horse though he knew it to be strong and the boy weak. As against the boy the averment was even weaker—the best of riders might, without "fault" of his, be run away with on horseback, and the averment came to no more than that.

Argued for pursuers—If the horse was a strong one, and the father knew his boy could not control him, he was bound, on the analogy of such cases as *Galloway* v. *King*, June 11, 1872, 10 Macph. 788; *Campbell* v. *Ord & Maddison*, Nov. 5, 1873, 1 R. 149; *King* v. *Pollock*, Oct. 27, 1874, 2 R. 42, to take measures to keep him off the horse.

After a discussion the pursuers amended Cond. 8 so as to read thus:—"The said horse was known to both of the defenders as a powerful and spirited one, but notwithstanding this the defender David Fulton culpably and carelessly authorised or allowed the boy defender to take the horse out for exercise, which he had neither the requisite strength nor experience to manage, being only about fourteen years of age, and of slender build. The said horse had, prior to the morning in question, been in charge of the boy defender, when he was likewise unable to govern or control it, which was well known to the defender David Fulton, or ought to have been."

The issue, as finally approved for the trial of the cause, was as follows:—"Whether on or about 6th October 1880, at or near the Alexandra Park gate, Dennistoun, Glasgow, the female pursuer was knocked down and injured by a horse then belonging to the defender David Fulton, and at the time being ridden by the defender John Fulton, through the fault of the defenders, or either of them, to the loss, injury, and damage of the pursuers?"

Counsel for Pursuers — Dickson. Agent — Donald Mackenzie, W.S.

Counsel for Defenders — Trayner — Lang. Agents—Dove & Lockhart, S.S.C.

Friday, October 28.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

THOMSON (INSPECTOR OF POOR OF RUTHERGLEN) *v.* KIDD (INSPECTOR OF POOR OF ROTHESAY) AND BEATTIE (INSPECTOR OF POOR OF BARONY PARISH, GLASGOW).

*Poor—Settlement—Lunatic—*8 *and* 9 *Vict. c.* 83, *sec.* 76.

Held (following *Crawford* v. *Beattie*, Jan. 25, 1862, 24 D. 357) that a person who had acquired an industrial settlement in a parish, and having become lunatic and a pauper had been relieved there, had lost that settlement by a subsequent absence for more than four years from the parish, during which time he ceased to be a pauper, although he continued to be a lunatic.

John Thomson, Inspector of Poor for the Parish of Rutherglen, raised this action against John Kidd, Inspector of Poor for the Parish of Rothesay, and Peter Beattie, Inspector of Poor for the Barony Parish of Glasgow, to have the said John Kidd ordained to pay him a sum of £45, 15s. 4d., being the balance remaining due of sums expended by pursuer on behalf of a pauper named Robert Wright from 23d October 1879 onwards; or otherwise, and in the event of it being instructed that at and subsequent to the said date the pauper's residential settlement was in Barony parish, to have the defender Beattie ordained to pay the said sum to the pursuer.

The material facts of the case, as stated in a joint-minute of admissions by the parties, were these:—"The pauper Robert Wright was born in the parish of Rothesay in the year 1836. His settlement of birth is in that parish, and there he resided till 1852, when he removed with his parents to the Barony parish. In that parish he resided, with various short absences, till 1st June 1864, when he became insane, and was admitted as a private patient to the Royal Gartnavel Asylum. On 1st September 1864 he became a pauper patient in that asylum, and was supported by the Barony parish till 21st September 1869, when he escaped from the asylum, and his name was removed from its books. On 1st December 1869, being still insane, he was admitted to the Barony Parish Poorhouse, and was maintained in the lunatic wards of that poorhouse till 27th November 1873. At that date he was handed over to the care of his relatives, with whom he

resided and by whom he was entirely supported until 23d October 1879, when he was removed to the Smithston Lunatic Asylum at the expense of the parish of Rutherglen, as hereinafter stated. During the period between 27th November 1873 and 23d October 1879 the pauper resided at the following places, viz., at Maryhill, in the Barony parish, from 27th November 1873 till Whitsunday 1875, in the parish of Monifieth from Whitsunday 1875 till Whitsunday 1876, in the parish of Dundee from Whitsunday 1876 till 23d October 1878, and in the parish of Rutherglen from the last-mentioned date till 23d October 1879. Throughout the period from 27th November 1873 till 23d October 1879 the pauper continued insane. On 11th September 1879, in consequence of application for relief made on behalf of the pauper to the pursuer, statutory notice was sent to the defender Kidd, and on 4th October 1879 statutory notice was sent to the defender Beattie. On 23d October, both defenders having refused liability, the pauper was removed to the Smithston Lunatic Asylum at the expense of the parish of Rutherglen."

The defender Kidd (Rothesay parish) pleaded —"(1) The pauper having been lunatic when he was removed from the lunatic ward of the Barnhill Poorhouse, and ever after, was *quasi in statu pupillari*, and incapable of losing his acquired settlement. (2) The pauper not having lost his residential settlement in the Barony parish, the defender the inspector of poor of the parish of Rothesay ought to be assoilzied from the conclusions of the action, with expenses."

The Lord Ordinary (CURRIEHILL) found "that the legal settlement of the pauper in question is in the parish of Rothesay," and therefore decerned against the defender Kidd, and found him liable in expenses both to the pursuer and to the other defender Beattie.

His Lordship added the following note:—"I have not much doubt about this case. The point is this—A person having been born in Rothesay, acquired by long residence in Glasgow a residential settlement in the Barony parish. On 1st June 1864, having that settlement, he became insane, and was admitted as a private patient to the Royal Gartnavel Asylum in Govan parish. On 1st September 1864, while still insane, and still retaining his settlement in Barony, he became a pauper, and was supported in that asylum by the Barony until 21st September 1869, when he escaped from the asylum and was removed from their books. Certainly up to that time he had his settlement in the Barony parish, because at the time he became a pauper and insane he had not lost his residential settlement, and he continued to retain it, because being a pauper and alimented by the parish of his settlement during all these years, his residence in the place provided for him by that parish is in law residence within the parish, although in fact not within its bounds.

"Thereafter, on 1st December 1869, being still insane and still unable to support himself, he was by the Barony parish placed as a pauper lunatic in the lunatic ward of their poorhouse at Barnhill, where he remained till 27th November 1873, when he ceased to be a pauper, although still insane, and he was taken charge of by his relatives. Now, up to this date I need hardly say that he still retained his residential settlement in Barony, and in point of fact he continued to retain it by actual residence in that parish till Whitsunday 1875. But from that date until the present hour he has never for a single day resided in Barony parish; and as he recently, when residing in Rutherglen, became again a pauper, and was sent by the pursuer (the inspector of that parish) to Smithston Asylum, near Greenock, as a pauper lunatic, the question arises, which parish is bound to support him? It is admitted that Rutherglen is not liable, and that the burden must be borne either by Rothesay as the birth settlement of the pauper, or by Barony as his residential settlement. But he has not resided in the latter parish for the last six years; and accordingly, as a matter of fact, he cannot be said to have complied with the condition which, by section 76 of the Poor Law Act, is an essential requisite to the retention of a residential settlement, viz., continuous residence for at least one year in every period of five years after his original absence began. His continuous absence from Barony for six years would unquestionably in the ordinary case have destroyed his residential settlement in that parish. It is, however, maintained by the birth parish of the pauper that in the present case the absence cannot have that effect, because the pauper being insane when he left Barony in 1875, and having ever since been insane, he had not capacity either to lose that settlement or to acquire another by residence. It may be conceded that mere residence in a parish, however long, would not give a lunatic a settlement in that parish; but it does not follow that a lunatic, by his absence from a parish where during sanity he has acquired a residential settlement, does not lose that settlement. It appears to me that this point is settled by the case of *Crawford* v. *Petrie and Beattie* (24 D. 357), in which it was decided that the mere fact of absence for more than four years forfeited the residential settlement, although during half of the period of non-residence the pauper was insane. In that case the whole Court by a majority of eleven to two overruled the case of *Melville* v. *Flockhart* (20 D. 341), which was held to have been badly decided,—several of the Judges in the later case expressly negativing the doctrine laid down by some of the Judges who had decided the case of *Melville*, to the effect that mental capacity was essential to the loss of a residential settlement. It appears to me that the principle on which the case of *Crawford* v. *Petrie* was decided was simply this, that in cases like the present the question, and the only question, is one of fact, viz., has the person who had acquired a residential settlement resided in the parish of that settlement so continuously as not to have incurred the statutory loss of the settlement? The only difference between that case and the present as matter of fact is, that in the former the pauper was sane when he left the parish, and did not become insane till after an absence of a year or two, whereas in the present case he was insane when he left the parish. If indeed the law had stood as it was left by *Melville* v. *Flockhart*, the argument would have been sound; but the case of *Crawford* v. *Petrie* having overruled that case, and it having been there decided that an inquiry as to the mental incapacity of the pauper during his absence is irrelevant, it appears to me that no sound distinction can be

drawn between the present case and that of *Crawford* v. *Petrie*. The pauper therefore having by his non-residence in Barony for upwards of four years after Whitsunday 1875 lost his residential settlement in that parish, he is now chargeable to Rothesay as the parish of his birth, and decree will be pronounced finding that parish bound to relieve Rutherglen, and also finding it liable in expenses both to Rutherglen and the Barony."

Kidd (Rothesay parish) reclaimed.

The pursuer did not appear in the Inner House.

The case was partly argued before the Lord Probationer (M'Laren), who pronounced his opinion that the Lord Ordinary's interlocutor should be adhered to.

The reclaimer argued—The pauper had not lost his residential settlement in Barony parish. He could not do so, having been lunatic during his whole period of absence. A pupil could neither acquire a residential settlement—*Craig* v. *Greig*, July 18, 1863, 1 Macph. 1172—nor lose by absence the residential settlement derived from his deceased father—*Hendry* v. *Mackeson*, Jan. 13, 1880, 7 R. 458. The case of a lunatic was *a fortiori*. He was incapable of that *animus* which is always important in cases of disputed settlement—*Beattie* v. *Smith*, Oct. 25, 1876, 4 R. 19. The lunatic here must be held constructively to have resided throughout in Barony, actual residence being in no case necessary—*Roger* v. *Maconochie*, July 4, 1854, 16 D. 1005 (prisoner); *Moncrieff* v. *Ross*, Jan. 5, 1869, 7 Macph. 331 (fisherman); *Beattie* v. *Wallace*, Jan. 6, 1881, 8 R. 345 (sailor). This case fell exactly under the rule of *Melville* v. *Flockhart*, Dec. 19, 1857, 20 D. 341; and was to be distinguished from the subsequent and overruling decision of *Crawford* v. *Petrie and Beattie*, Jan. 25, 1862, 24 D. 357, because in the present case there had been no sane absence at all.

Replied for Barony parish—The analogy of pupils did not apply. The father was held to comprise in himself his children in nonage. A derivative settlement was matter of construction, but a residential settlement was matter of legislative enactment. The statute was clear. No help could be obtained from *Melville* v. *Flockhart*, that decision having been pronounced unsound in *Crawford* v. *Petrie and Beattie*—an authoritative decision which exactly ruled this case.

Additional authorities—*M'Lennan* v. *Waite*, June 28, 1872, 10 Macph. 908; *Hay* v. *Cumming*, June 6, 1851, 13 D. 1057; *Greig* v. *Chisholm*, Dec. 19, 1857, 20 D. 339; *Greig* v. *Ross*, Feb. 10, 1877, 4 R. 465; *Beattie* v. *M'Kenna*, March 8, 1878, 5 R. 737.

At advising—

Lord President—In this case the pauper resided in the Barony parish from 1852 to 1864, and so he acquired a residential settlement in that parish. But in 1864 he became insane, and also became a proper object of parochial relief. From 1864 down to 1873 he continued to be a lunatic pauper, and of course all that time his settlement was in Barony parish, and he was in point of fact, as he was entitled to be, maintained by that parish, because he had had a settlement there when he became a pauper. But in 1873, though he still continued to be insane, he ceased to be a pauper, and from 1873 to 1879 he was maintained by friends, with whom he resided; and during these six years he was never in Barony parish. Now, having ceased to be a pauper in 1873, a question arises whether his absence from Barony parish from 1873 to 1879 does not establish that he had failed to retain his settlement of residence in Barony parish, in terms of section 76 of the statute? It was maintained for the reclaimer that though he was absent from that parish for more than five years continuously, without residing one year of the five in that parish, yet he retained his settlement there because he was insane. Now, if we were to follow the judgment in the case of *Melville* v. *Flockhart*, no doubt the reclaimer would prevail. But that judgment was doubted very soon after it was pronounced. It was the judgment of three very learned Judges, of whom my brother on my right (Lord Deas) was one, but it was pronounced with the dissent of the Lord President (Lord Colonsay). A similar case arose soon after in the Second Division, when I had the honour of presiding there, and as we entertained serious doubts of the soundness of the judgment in *Melville* v. *Flockhart*, we resolved to have the question decided by the whole Court. The Lord Ordinary (Lord Kinloch) had, of course, followed *Melville* v. *Flockhart*, but at the same time expressing doubts as to the soundness of that case. The case was argued in minutes of debate, and sent to the whole Court to settle finally and authoritatively the question raised, and the result was that of the thirteen Judges eleven were of opinion that *Melville* v. *Flockhart* was not well decided, and that the judgment of the Court should be of an opposite character, and accordingly the case of *Crawford* v. *Petrie and Beattie* was decided adversely to *Melville* v. *Flockhart*, and distinctly repudiated that case as settling the law. The question has never since been raised, and I do not know in what view the reclaimer here has thought fit to dispute it. If *Crawford* v. *Petrie and Beattie* is not to be followed, I do not know how any question of law can ever be finally settled. I think we are bound to follow the decision in *Crawford* v. *Petrie and Beattie*, and to decide as the Lord Ordinary has done.

Lord Deas—It is not necessary, and I have no desire, to say more in this case than that I am of opinion that the judgment in *Crawford* v. *Petrie and Beattie* justifies and authorises the decision of the Lord Ordinary.

Lord Mure and Lord Shand concurred.

The Lords adhered.

Counsel for Pursuer—Sym. Agents—Torry & Sym, W.S.

Counsel for Defender Kidd—Lang—G. Burnet. Agent—R. W. Wallace, W.S.

Counsel for Defender Beattie—Burnet—Ure. Agents—Mackenzie, Innes, and Logan, W.S.