cumstances I think the cases of *Greig* v. *Greig and Macdonald*, 1 Macph. 1172, and *M'Lennan* v. *Waite*, 10 Macph. 908, are in point, and that the pauper's settlement must be held to have been in the parish of her own birth in preference to any derivative settlement she may have had previously.

"It is said that by reason of her mental weakness she was incapable of acquiring a settlement in her own right, and must therefore take the settlement of her father, which is not in Scotland. I think the case of *Cassels* v. *Somerville*, 12 R. 1155, is conclusive upon that point. That decision, as I understand it, establishes a general rule which, in the common interest of all parishes, ought not to be departed from except upon grounds of distinction much more substantial than any that can be found in the circumstances of the present case."

The defender reclaimed, and argued—The pauper was a congenital imbecile, *i.e.*, a perpetual pupil. In such a case the settlement was in the birth parish of the father, which here was not in Scotland. In *Cassels'* case, referred to by the Lord Ordinary, the pauper was more intelligent than in this case—*Milne* v. *Ross*, December 11, 1883, 11 R. 273; *M'Currie* v. *Cowan*, March 7, 1862, 24 D. 723; *Hay* v. *Skene*, June 13, 1850, 12 D. 1019; *Greig* v. *Young*, June 21, 1878, 5 R. 977; *Caldwell* v. *Dempster*, July 20, 1883, 10 R. 1263; *Lawson* v. *Gunn*, November 21, 1876, 4 R. 151; *Milne* v. *Henderson and Smith*, December 3, 1879, 7 R. 317; *Watson* v. *Caie and Macdonald*, November 19, 1878, 6 R. 203.

The pursuer argued—This case could not be distinguished from *Cassels*. It was only an idiot who could not acquire a settlement in her own right, and the pauper here was not an idiot.

The Court, without delivering opinions, adhered.

Counsel for the Defender and Reclaimer—M'Kechnie—J. Clark. Agent—D. Lister Shand, W.S.

Counsel for the Pursuer and Respondent—D.-F. Mackintosh—Wallace. Agent—Adam Shiell, S.S.C.

Wednesday, December 21.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DUNBAR *v.* CHIENE (WILSON & DUNLOP'S TRUSTEE).

Agent and Client—Law-Agent—Factor—Whether entitled to Credit for Business Charges.

The management of an estate, to which the proprietor succeeded in 1865, was conducted during his minority by his mother. He attained majority in 1869, but owing to the state of his mind, she continued to manage the estate until her death in 1873. During the whole of this period she acted under the advice of the family law-agents. On her death the proprietor executed a trust-deed, which, however, was never acted upon, and his brother undertook the management of the estate. He had no legal authority. The family agents were appointed by him factors and law-agents, and acted as such. In 1875 a *curator bonis* was appointed, who raised against the trustee on the law-agents' estate an action of accounting for their intromissions with the rents of the estate. *Held* that they were entitled to set off against any sums that might be due by them, the amount of the business accounts and fees due to them as law-agents and factors on the estate.

In 1865 Edmund Paterson Balfour Hay succeeded to the estate of Carpow, and to the estates of Mugdrum, Leys, and Randerston, while he was still in minority. These estates were managed by his mother until he attained majority in January 1869, and subsequently until her death on 6th September 1873. Messrs Wilson & Dunlop, W.S. Edinburgh, were the family law-agents. In order to provide for the term of Martinmas next after Mrs Paterson's death, Mr Hay's brother, Mr Peter Hay Paterson and Messrs Wilson and Dunlop, ultroneously undertook the management of the estate.

On 18th October 1873 Mr Hay executed a trust-deed in favour of three trustees, Mr Peter Hay Paterson, Sir William Dunbar of Mochrum, Bart., and Lord Elibank. This deed was never acted upon, Sir William and Lord Elibank both refusing to accept. Accordingly Mr Paterson, with the approval of his sister and other relatives, gratuitously assumed the office of guardian or curator to his brother, and continued to act in that capacity, managing the estates, with Messrs Wilson & Dunlop as the family factors and law-agents, down to 6th July 1875, when Sir William Dunbar was appointed *curator bonis* to Mr Hay.

On 10th March 1879 Messrs Wilson & Dunlop executed a trust-deed for behoof of creditors in favour of George Todd Chiene, C.A., Edinburgh.

Sir William Dunbar raised this action of count and reckoning against Mr Chiene, as such trustee, to ascertain and recover the balance which he alleged was due to him on the intromissions of Messrs Wilson & Dunlop with the rents and estates of his ward. He averred that from 1873 to 1875 Messrs Wilson & Dunlop had without authority, and on their own responsibility, intromitted with the rents and income of Mr Hay's estate to an amount exceeding £15,000, and that they had not accounted therefor; that a large part had not been expended for behoof of the ward or his estate, which the pursuer estimated at £5000; that an account was opened in Mr Paterson's name with the Commercial Bank of Scotland at Newburgh on 6th November 1873, into which Mr Wilson or Messrs Wilson & Dunlop paid certain rents uplifted by them; that Mr Paterson from time to time drew sums out of this account, and for a considerable portion of these, the pursuer averred, he had failed to account to the pursuer or to establish that they were applied *in rem versum* of Mr Hay. The pursuer further averred that Mr Wilson had no legal warrant or authority to pay these sums to Mr Paterson's credit, and that he was fully aware that Mr Paterson had no legal title to intromit with the funds, or manage Mr Hay's estates.

The defender replied that Messrs Wilson &

Dunlop "were appointed by Mr Paterson factors and law-agents, and acted as such (as they had formerly done during Mrs Paterson's life) down to the pursuer's appointment in 1875;" that they had uplifted the rents of the estates under Mr Paterson's charge, and paid the same into the Commercial Bank, and did not even retain sufficient income to defray their professional accounts and factors' fees, which amounted to £320, 2s. 1d. for the period in question, for which they had raised an action against the pursuer on 17th April 1884. He averred that "the rents and other income were applied in and exhausted by payment of interest on the securities over the estates, public burdens, maintenance of the ward's establishment, and ordinary expenses."

The pursuer pleaded—"(1) The defender is bound to hold just count and reckoning with the pursuer for the intromissions of Messrs Wilson & Dunlop, and of Mr Wilson and Mr Dunlop, with the estate of Mr Hay, and income thereof. (4) The defender's authors were not exonered of their intromissions by payments to Mr Paterson."

The defender pleaded—"(1) Messrs Wilson & Dunlop having already accounted for their intromissions to Mr Paterson, by whom they were employed, are not liable to account to the pursuer. (2) There being no balance due upon Messrs Wilson & Dunlop's intromissions, the pursuer is not entitled to any payment or ranking. (5) Any claim which the pursuer may have had against Wilson & Dunlop has in the circumstances stated been extinguished."

The Lord Ordinary (KINNEAR) remitted to Mr James Haldane, C.A., to examine into the state of intromissions.

In his report Mr Haldane stated that he had given the defender credit for their business accounts and fees. "The pursuer admits these subject to taxation, and reserving the objection to a portion of them, that Messrs Wilson & Dunlop, having acted without legal title, are not entitled to remuneration, but he objects to the sum sued for in the counter-action being placed to the credit of the defender in the present accounting."

The Lord Ordinary (KINNEAR) on 14th July 1887 repelled, *inter alia*, the pursuer's objection in regard to the business charges; approved of the report, subject to taxation of the business accounts and factors' fees, as these should be taxed by the Auditor, to whom he remitted them for that purpose.

"*Note.*—The first question for consideration is, whether Wilson & Dunlop are to be treated as pro-curators, so as to render them liable for omissions, and therefore for rents drawn directly by Mr Peter Paterson from the tenants of Mugdrum House and others, and to debar them from claiming remuneration for their professional services.

"I am unable to assent to the pursuer's argument upon this point. I think Mr Wilson and his firm did not assume the character of curators, but acted in the totally different character of factors and agents. They had held that position under the ward and his mother, and continued to hold it after Mr Peter Paterson had assumed the position of a pro-curator. The evidence shows that they were aware or ought to have been aware of the defective title of Mr Peter Paterson, and they cannot therefore discharge themselves of their intromissions with the rents by a proof of payments to him, except in so far as the moneys paid to him were applied for the benefit of the ward or his estate. But they are not liable for his intromissions with moneys which did not pass through their hands, and I think they are entitled to set off against the pursuer's claims in this action the sums which may be shown to be due to them for professional services of which the estate has had the benefit. I can have no doubt that Mr Wilson acted throughout in good faith, and in the interest as he believed of the ward. I see no good ground for holding that he thrust himself into a position in which he must be held in law to have acted gratuitously."

The pursuer reclaimed, and argued with regard to the question of remuneration—Under the circumstances Messrs Wilson & Dunlop were to be looked on as pro-curators. They acted without any proper authority, and they were therefore not entitled to claim remuneration for their professional services—*Fulton* v. *Fulton and Others*, March 21, 1864, 2 Macph. 893; Begg on Law-Agents, pp. 323 to 329; *Mitchell* v. *Burness*, July 20, 1878, 5 R. 1124.

The defender replied—That though Messrs Wilson & Dunlop had no direct authority from Mr Hay to act for him, they had for years acted as the family law-agents, and not unnaturally continued to give their advice to Mr Paterson, who came forward at a critical period, and, with the consent of all interested in Mr Hay's estate, administered the estate. They were clearly entitled to their law charges and factors' fees.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary's interlocutor is substantially in favour of the defender, and I am not disposed to disturb it, because I think it is well founded. The circumstances of the case are somewhat peculiar, and require full examination. The proprietor of Mugdrum—Mr Balfour Hay—became, as it is admitted, incapable of managing his own affairs, and his estate was for a long time in the hands of Messrs Wilson & Dunlop, as factors and agents upon it, and up to 1873 it appears that his mother had had the management, they acting as her agents. On her death in that year the question arose as to how the estates were to be conducted in the future. A brother of the proprietor, Mr Paterson, who was interested in the matter, took some part in the management, and Messrs Wilson & Dunlop ultimately, and without direct authority, undertook to manage the estates, so as to provide for the ensuing term of Martinmas 1873. But that could not continue to go on for ever. So Mr Hay executed a trust-deed nominating Sir William Dunbar, Lord Elibank, and his brother Mr Peter Hay Paterson as his trustees. Apparently by common consent the deed was not acted upon, and Sir William declined to accept, and so from 1873 to 1875 no one was properly authorised to act for the proprietor of the estate. It seems, however, that Mr Paterson assumed that right, and with the acquiescence of persons who might have had a title to interfere, and in particular with the acquiescence of Sir William Dunbar, he undertook the management of the estate. There was no interference, and Messrs Wilson & Dunlop continued to act, though it is right to say that Sir William issued

a caveat, warning them that they might expose themselves to unpleasant questions in the future. From 1873, then, to 1875 Mr Paterson, in the absence of any authority given to act, took upon himself to give the instructions necessary for the management. But the circumstances rendered it undesirable that Mr Paterson should continue to manage the estates, and in the end Sir William was appointed *curator bonis* to Mr Hay, and he raised this action against the trustee on the estate of Messrs Wilson & Dunlop, who had under these circumstances acted as agents. The accountant has gone fully into the accounts. . . .

As to the question whether Messrs Wilson & Dunlop are entitled to remuneration for their business actings, there are no doubt cases in which questions have arisen and have been decided unfavourably to the agent; but here all the business done has been done *bona fide*, and therefore I am clear the law-charges may be allowed.

Lord Young—I also think the Lord Ordinary should be affirmed, and I have some difficulty in comprehending the questions on which our judgment is asked. The action is simply one of count and reckoning, and is directed against the trustee on the estate of Messrs Wilson & Dunlop, who are described as law-agents. Before the Lord Ordinary it was pleaded that they had intromitted with the rents on Mr Paterson's employment, and that having accounted to him they were not bound to do so again to Sir William Dunbar; and if Mr Paterson had a lawful title to manage the estate, and Messrs Wilson & Dunlop were employed by him, they would have discharged themselves by simply paying to him. The Lord Ordinary accordingly allowed an inquiry in order to see if that was the footing of affairs, which, if it were, would have excluded the action of accounting altogether. The result of an inquiry was to show that Mr Paterson had no title to manage the estate, and therefore that Messrs Wilson & Dunlop must account directly to Sir William Dunbar. The accounting therefore went on, and a remit was made to an accountant on the footing that Messrs Wilson & Dunlop should not have credit for rents which they drew, "except in so far as the moneys paid to him (*i.e.*, Mr Paterson) were applied for the benefit of the ward or his estate." That was, I think, right, and I put the question early in the argument whether that was disputed? and the answer I got was, that "we don't ask credit for any sums except those paid to Mr Paterson and applied for the benefit of the ward." The accounting accordingly took place on that footing, and the plea that Messrs Wilson & Dunlop were sufficiently discharged by having accounted to Mr Paterson was repelled. The Lord Ordinary approved of the accountant's report, and I do not know that anything can be said except that perhaps he took too liberal a view of the extent of the estate, and of the reasonableness of the amount expended. The Lord Ordinary and the accountant were both satisfied that the sums expended were reasonable charges, and it is almost out of the question for a Court of four Judges to go into this kind of matter.

The only other point raised was that Messrs Wilson & Dunlop were at all events not entitled to be paid their professional accounts, because they had acted without authority. This appears a simple matter, and I concur with the Lord Ordinary. I do not know who is the proper guardian yet. If you go to the strictness of the matter, a man *non compos mentis* ought to be cognosced. But we are no great sticklers for the strict matter of procedure in Scotland, and it is common, where all are agreed, for the Court to appoint a curator. But short of it, and cases must be frequent where a man is not able to manage his own affairs, and his family do not desire to have him cognosced, or to have a curator appointed to him, if he has a brother or other relative who will be responsible for managing his estate—in such a case to say that the family law-agent, who has been applied to under such circumstances to give advice, is dealing gratuitously because he countenances the arrangement, is quite extravagant. I cannot censure Messrs Wilson & Dunlop because they countenanced Mr Paterson, even although he turned out a bad manager. I cannot say that by failure to come to this Court at the very first they acted in such a way as to forfeit their proper law charges. They were the family agents during the father's and mother's lifetime, and they were only giving their professional services.

Lord Craighill—I concur.

Lord Rutherfurd Clark—With respect to the law charges, I think they were properly incurred, were necessary for the estate, and that the agents must have their ordinary remuneration.

The Court adhered.

Counsel for the Reclaimer—Sol.-Gen. Robertson—Dickson. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Counsel for the Respondents—Gloag—Lorimer. Agents—Davidson & Syme, W.S.

Thursday, December 22.

FIRST DIVISION.

[Lord Trayner, Ordinary.

THE STEEL COMPANY OF SCOTLAND (LIMITED) *v.* TANCRED, ARROL, & COMPANY.

Arbitration—Arbiter Unnamed—Reference Invalid.

The arbitration clause in a contract for the construction of a bridge provided that any question that might arise as to the meaning and intent of the contract should be settled in the case of difference by the engineer for the time being of one of the parties. *Held* that the reference was invalid as the arbiter was not named.

Custom—Usage of Trade—Contract—Proof Inadmissible where Language not Technical.

A contract was entered into by which manufacturers of steel offered to supply the contractors who were constructing a bridge with the whole of the steel required by them for the bridge, at prices which were stated,