Lords had decided the appeal in the case of *Kilmalcolm*, lest their Lordships might express opinions having a bearing on this case. Judgment has now been given in that appeal, which raised the question whether residence in a charitable institution by a pauper unable from mental and bodily weakness to earn her living was enough to constitute a residential "settlement" in the parish containing the charitable institution. Plainly the question of most importance there to the parishes interested turned on the charitable character of the institution as rendering the parish which contained it possibly liable for a number of imported paupers. Accordingly I find that the noble and learned Lords dealt chiefly with this aspect of the case, and decided that the statutory condition of the pauper having "maintained himself without recourse to common begging either by himself or his family, and without having received or applied for parochial relief," in order to the acquisition of a residential settlement, was a condition entirely independent of where the means came from, so long as they did not come from common begging or the poor fund of the parish. But I also find that both Lord James of Hereford and Lord Robertson (with whom the Lord Chancellor and Lord Atkinson concurred) expressly said that the incapacity through mental weakness to earn the means of support must be short of "lunacy or idiocy," or to put the same thing in other words, must be of a kind "not involving insanity." In none of the cases has it ever been laid down that a medical certificate of lunacy was indispensable, or that insanity might not be proved as a fact in the case. On the contrary, Lord President Inglis in the case of *Cassels* v. *Somerville & Scott*, 12 R. at p. 1159, after stating it as settled by the case of *Melville* v. *Flockhart*, 20 D. 341, that a person who was boarded in an asylum could not acquire a settlement in the parish in which the asylum was situated, and by the case of *Watt* v. *Hannah*, 20 D. 342, that the same result followed if the person was sent to be boarded under a keeper in respect he was a lunatic, went on to say—"The pauper here was not sent to be boarded in Lesmahagow because he was insane, but because, his mind being weak, he was not capable of earning a livelihood like other men in his position. He was not in any sense a lunatic." And his Lordship added—"It might have been shown that though he had not been certified a lunatic he was nevertheless one in fact."

Now that is an averment which is made here, the reason which Cathcart assigns for his not being sooner confined as a lunatic being his mother's great disinclination to sanction such a step. Agreeing as I do with your Lordship and the Lord Ordinary that these averments are amply proved, I do not find it necessary to resume the passages in the evidence on which that opinion is founded. It is only because as Lord Ordinary I had something to do with both the *Kilmalcolm* case and the *Kirkintilloch* case (5 F. 274) that I have thought it right to make these few observations. I notice that in the latter of these two cases Lord Adam intimated (at p. 282) that he had come to the same conclusion as I had done as Lord Ordinary, viz., that the pauper's mind was weak but not disordered, and that he was not by any means an idiot. Here I do not think that the pauper was an absolute idiot, but I do think that his mind was so disordered as to make him a lunatic during the whole period of his residence in the parish of Cathcart outside the asylum, and that he was thereby disqualified from acquiring a residential settlement.

LORD LOW—I concur.

The Court pronounced this interlocutor—

"Refuse the reclaiming note: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor reclaimed against, and decern."

Counsel for Reclaimers—Younger, K.C.—Orr Deas. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents—Dean of Faculty (Campbell, K.C.)—Hunter, K.C.—Wark. Agents—J. & J. Galletly, S.S.C.

Saturday, June 2.

FIRST DIVISION.

[Lord Johnston, Ordinary.

LEE *v.* POLLOCK'S TRUSTEES.

Process — Abandonment — Withdrawal of Minute of Abandonment—Right to Withdraw—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 10—*Act of Sederunt* 11*th July* 1828, *sec.* 115.

The pursuer in an action, who has lodged a minute of abandonment, has an absolute right to withdraw such minute, the defender's remedy being to move for absolvitor in the action on the ground of delay, which motion the Lord Ordinary may grant if consistent with the justice of the case, or may refuse allowing the pursuer to proceed subject to conditions as to expenses.

The Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 10, after providing for the making up of a record which shall foreclose the parties in point of fact, *inter alia* enacts—"the pursuer having it in his power notwithstanding to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent." The Act of Sederunt of July 11, 1828, passed in pursuance of the Judicature Act 1825, by sec. 115 enacts—"And whereas it is enacted by section 10 of the Act that the pursuer shall have it in his power to abandon the cause on paying full expenses to the defender, and to bring a new action if otherwise competent, it is declared that this applies only to the case of the pursuer abandoning his cause before an interlocutor has been pronounced assoilzieing the defen-

der in whole or in part, or leading by necessary inference to such absolvitor, after which it shall not be competent for him to do so in regard to that part of the cause decided by said interlocutor either expressly or by necessary inference; reserving, however, to him any remedy by a new action which may be competent to him under subsisting regulations."

On 9th June 1905 John Bethune Walker Lee, Solicitor in the Supreme Courts, Edinburgh, brought an action of declarator and for payment of a casualty in respect of certain heritable subjects in the town of Mauchline, Ayrshire, against Mrs Martha Jamieson or Pollock and others, trustees under the trust-disposition and settlement, dated 30th October 1903 and recorded 6th October 1904, of the late Andrew Pollock, agricultural engineer, Mauchline. In the course of the proceedings Lee lodged a minute of abandonment and subsequently moved for leave to withdraw it.

The circumstances of the case are given in the opinion of the Lord Ordinary (JOHNSTON), who on 15th March 1906 pronounced this interlocutor:—"Refuses the pursuer's motion to withdraw the minute of abandonment lodged by him in respect the pursuer has failed to pay the defenders' taxed expenses: Assoilzies the defenders from the conclusions of the summons, and decerns: Approves of the Auditor's report on the defenders' account of expenses, and decerns against the pursuer for payment to the defenders of the sum of £130, 13s. 9d. sterling, being the taxed amount of said account."

Opinion.—"Mr Lee raised this action, which is the statutory action for recovery of a casualty, in June 1905. The record was closed on 18th July 1905 and the case heard in the procedure roll. It turned out that the summons was out of shape, and I allowed an amendment on condition of payment of a modified sum of expenses, and the condition having been fulfilled allowed a proof to be taken on 1st February 1906. The identity of the defenders' lands is not in dispute. But there is a difficult question of fact at issue regarding the limits of the pursuer's superiority, and whether it covers the defenders' lands.

"In the course of procedure between the closing of the record and the diet of proof Mr Lee gave great trouble by non-production of the titles on which his condescendence founds, and he received great and unusual indulgence not only from me but from his opponents. On 22nd December 1905 a diligence for recovery of documents was granted to the defenders. But on 17th January 1906 I had peremptorily to order Mr Lee to lodge in process the documents enumerated in a list. It came to be informally understood that Mr Lee would not be able to proceed with his proof on 1st February 1906, but it was only late on the previous day that he lodged the minute of abandonment 'in terms of the statute.' Whereupon on the morning appointed for the proof (1st February) I wrote the usual interlocutor—'In respect of the minute of abandonment for the pursuer, Discharges the diet of proof fixed for this date: Appoints the defenders to lodge an account of their expenses, and remits, &c.' The defenders' account of expenses was lodged on 15th February and taxed on 23rd February. As taxed it amounts to the sum, large for the point which the procedure had reached, of £130, 13s. 9d. The amount has, however, been a good deal increased by Mr Lee's conduct of the case.

"On 21st February, *i.e.*, before taxation of the account, Mr Lee verbally moved for leave to withdraw his minute of abandonment, and referred me to the two precedents of *Tod*, 16 S.L.R. 718, and *Dalgleish*, 23 S.L.R. 552. I intimated verbally that assuming it to be a matter of discretion I was not disposed to grant leave to abandon, and explained that I should like to look at the account of expenses after taxation.

"On 28th February I was moved to approve of the Auditor's report on the taxation of the account of expenses, and Mr Lee renewed his motion for leave to withdraw his minute of abandonment, and asked me to pronounce such interlocutor as he might take to review.

"On looking more particularly into the matter of procedure, I have come to the conclusion that notwithstanding the above precedents I have no discretion in the matter. If I thought otherwise, as I have already said, I am not disposed to exercise that discretion in Mr Lee's favour. I desire to say, however, that I do not think Mr Lee's action either vexatious or frivolous. I think that there was a fair question to be litigated, and requiring with a view to decision to be cleared up by proof. My reason for refusing the appeal to my discretion would be that I think Mr Lee has had already more than the indulgence due to a litigant.

"But as in my judgment I have no discretion, I have still to determine what is the result of Mr Lee having lodged a minute of abandonment and failed to pay the taxed amount of the expenses.

"Is Mr Lee entitled to withdraw his minute of abandonment as matter of right and to ask for a new diet of proof, and if so, on what conditions? or,

"Are the defenders entitled to hold him to his abandonment, and in respect of his failure to implement the condition of abandonment, to require me to pronounce decree of absolvitor with expenses.

"The abandonment is under the Judicature Act 1825 (6 Geo. IV, cap. 120), section 10, and the relative Act of Sederunt, 11th July 1828, section 115, the terms of which I need not quote.

"In *Ross* v. *Mackenzie*, 16 R. 871, the Lord President (Inglis) said—'It seems to me that the failure to pay expenses after the minute of abandonment was lodged merely deprived the pursuer of the privilege of abandonment.' That language is not inconsistent with the view that he may still proceed, though I am far from saying that that was his Lordship's meaning.

"The other cases which I have found bearing on the subject are—*Lawson* v. *Low*, 7 D. 960, which makes it clear that after the

minute of abandonment, until expenses are paid, and the Court sustains the minute and in respect thereof and of the payment of expenses dismisses the action, the action remains in dependence. At the same time the Court held in that case that notwithstanding such dependence the pursuer was not prevented convening his opponent in a new action, provided he went no further than merely convening him until the abandonment of the first action was sustained and the first action taken out of the way. But Lord Mackenzie gives expression to an important dictum. 'I do not think,' he says, 'that the statute gives a party power of abandoning an action until the expenses are paid or consigned. He may say he abandons it, but that is only abandoning his own pleas, for the opposite party may still take judgment against him.' This would in my opinion entitle the defender to crave, on the pursuer's failure to fulfil the condition of abandonment, judgment of absolvitor.

"*Cormack* v. *Waters*, 8 D. 889, merely confirms the view that the case is still in dependence notwithstanding a minute of abandonment, until the minute is sustained, which it cannot be until the expenses are paid.

"*Muir* v. *Barr*, 11 D. 487, is merely though most emphatically to the same effect.

"I may also refer to *White* v. *Duke of Buccleuch*, L.R., 1 Scotch and Divorce Appeals, 70.

"Upon a consideration of the point, and in view of these authorities, the opinion to which I have come is—(1) that I have no discretion in the matter; (2) that if I have, the pursuer's motion should be refused; and (3) that the pursuer is not now entitled to proceed, even on condition of paying the expenses rendered useless by his abortive abandonment, but that the defenders are entitled as matter of right to be assoilzied with expenses, and I shall grant decree accordingly.

"I have explained the reasons fully, so that the pursuer may have my judgment reviewed if so advised by the Inner House."

The pursuer reclaimed, and argued—It was competent to withdraw the minute of abandonment on payment of the expenses thereof, the Lord Ordinary having no discretion in the matter—*Todd & Higginbotham* v. *Corporation of Glasgow*, July 4, 1879, 16 S.L.R. 718; *Dalgleish* v. *Mitchell*, March 19, 1886, 23 S.L.R. 552; *Ross* v. *Mackenzie*, June 26, 1889, 16 R. 871, 26 S.L.R. 600. There was nothing in the Judicature Act 1825 or the Act of Sederunt of July 11, 1828, relative thereto, to constitute a minute of abandonment a judicial contract. The Lord Ordinary's interlocutor should be recalled.

Argued for the defenders and respondents—The whole matter was in the discretion of the Lord Ordinary—*Todd & Higginbotham* v. *Corporation of Glasgow*, and *Dalgleish* v. *Mitchell*, *ut supra*. His interlocutor was correct according to the established practice—Coldstream's Court of Session Procedure (4th ed.) p. 110 note A—and should be sustained.

Lord President—The question here is as to the effect of a minute of abandonment. I am not able to agree with the conclusion to which the Lord Ordinary has come, which seems to me, if I may say so, founded on a misapprehension of what a minute of abandonment is. A minute of abandonment is a privilege given by statute to a pursuer to abandon his action upon certain conditions. It is not a judicial contract between the pursuer and the defender. When a minute of abandonment is lodged by a pursuer and received, the ordinary and proper interlocutor is to remit the defender's account of expenses to the Auditor to tax and report; but the meaning of that is simply to reduce to a certain fixed sum the condition which the pursuer has to fulfil in order to get his minute of abandonment given effect to. The Auditor's report as to expenses is conclusive, and when the case comes back from the Auditor, the pursuer, on paying the expenses so fixed, is entitled, in respect of his minute and the payment of the expenses, to have the action dismissed, and so be in a position to bring another action. A very good test is this, that no one ever heard of an interlocutor decerning for these expenses as upon a minute of abandonment, and in consequence allowing extract thereof.

The whole misundertanding has probably arisen from the form of interlocutor which is set out in a well-known text-book which is generally right. Of course, if the pursuer after lodging his minute and getting the expenses taxed, does nothing, the defender must have his remedy. That remedy is not in respect of a judicial contract under the minute—because there is no such contract—but is the ordinary remedy of asking the judge to give judgment in his favour, because the pursuer will not move. In such a case—there having been ordinarily nothing more done, and no more expenses incurred—the Auditor's report can be approved as it stands. Accordingly, I can understand that interlocutors may have been written in the form given in the text-book referred to. In truth, however, the form of interlocutor there given—though it may have been pronounced in such an ordinary case as I have mentioned—is not actually right, because it looks as if it were an interlocutor pronounced on the minute of abandonment, whereas, in order to be complete, it should run—"In respect that the pursuer is no longer proceeding with the case, therefore approves of the Auditor's report and decerns and assoilzies the defender." I can imagine cases where there would require to be an eke to the Auditor's report, if, after the minute had been lodged and the account taxed, there had been some further proper step taken by the defender. He would be entitled to the expenses of that appearance over and above the expenses that had been taxed.

When we look at what a minute of abandonment is—as correctly stated by Lord President Inglis in *Ross* v. *Mackenzie*, 16 R.

871—it seems to me that the pursuer has an absolute right to withdraw it if he likes. But what is the result? The result is that the case is in the position it was in before the minute of abandonment was lodged, with this difference that the pursuer has put himself in the position of having caused delay in the proceedings. The defender may enrol and ask for absolvitor, and that motion would be granted unless the pursuer is able to show that his proceedings have been *in bona fide*. In that event the pursuer would be entitled to go on with the case subject to such conditions as to expenses as the Lord Ordinary chose to lay down. It seems to me, then, that the proper interlocutor for your Lordships to pronounce is to recal the Lord Ordinary's interlocutor, sustain the pursuer's motion to withdraw the minute of abandonment, and to remit to his Lordship to proceed with the case as to him may seem just. I do not wish to take it out of the power of the Lord Ordinary to do what he might have done at the time the motion was made to withdraw the minute of abandonment. He will take up the case—the minute of abandonment being gone—and will either allow a proof subject to such conditions as to expenses as he thinks proper, or if he thinks that course consistent with the justice of the case he will assoilzie the defender.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the pursuer's reclaiming note against Lord Johnston's interlocutor dated March 15, 1906, Recal the said interlocutor; sustain pursuer's motion to withdraw his minute; allow him to withdraw said minute accordingly; remit the cause to the Lord Ordinary to proceed therein as to him may seem just: Find the pursuer entitled to expenses since the date of the interlocutor reclaimed against, and remit the account thereof to the Auditor to tax and to report to the said Lord Ordinary, to whom grant power to decern for the taxed amount of said expenses."

Counsel for the Pursuer and Reclaimer—Spens. Agent—Party.

Counsel for the Defenders and Respondents—Lippe. Agents—Boyd, Jamieson, & Young, W.S.

Tuesday, June 5.

SECOND DIVISION.

BATE'S TRUSTEES *v.* BATE.

Succession—Vesting—Trust—Assignation in Trust—Liferent by Implication—Accessory—Repugnancy—Gift of Fee on a Party's Death.

A in contemplation of her marriage to B assigned to trustees her whole estate; "(*Second*) After my death, in the event of my marrying and predeceasing the said" B "and of there being no children or issue of children of said intended marriage, for behoof of the said" B "in liferent . . . so long as he shall remain unmarried . . .; (*Third*) for behoof of the lawful issue, if any, of my said intended marriage then surviving, and the lawful issue *per stirpes* of such of them as may have predeceased leaving such issue, equally, or share and share alike, payable at the majority or marriage of such issue, whichever of these events shall first happen . . . after the decease or second marriage of the said" B "if he shall be the longer liver; and (*Fourth*) failing children of my said intended marriage, then for behoof of my own heirs or assignees whomsoever in fee: But declaring always . . . that in the event of the said" B "entering into a second marriage, the foresaid liferent provision created in his favour, in the event before mentioned, shall as on the date of such second marriage *ipso facto* cease and determine." A was married to B, and died intestate survived by B and two sons. B claimed a liferent by implication under the third purpose, or alternatively that the income of the estate till his death or second marriage was undisposed of and fell into intestacy.

Held that B was not entitled to a liferent of the trust estate, that it vested as at A's death in her sons, and that they were entitled to immediate payment both of the capital and the accrued interest, it following as an accessory.

Ralph v. *Carrick*, 1879, 11 Ch. Div. 873, *commented on and distinguished.*

By assignation in trust, dated 16th, 17th, and 20th July 1878, and registered in the Books of Council and Session 15th January 1883, Miss Mary Whitehill, with consents therein set forth, in contemplation of the marriage contracted and about to be entered into between her and Thomas Elwood Lindesay Bate, surgeon in the Bengal Medical Service, conveyed in trust to certain persons therein named, and the acceptors and survivors of them, and to such other person or persons as might be assumed into the trust, her whole estate then belonging to her, or which she might succeed to or become vested in during the marriage. The purposes for which the said trust assignation was granted were as follows:—