Friday, December 22.

EXTRA DIVISION.

[Sheriff Court at Dunblane.

STIRLING PARISH COUNCIL *v.* DUNBLANE AND LECROPT PARISH COUNCIL.

Poor — Settlement — Lunatic — Capacity to Acquire Settlement—Proof—Certificate of Insanity.

A woman, who had resided in the parish of S. since her attainment of puberty in 1903, was in 1908 certified insane, and became chargeable as a pauper lunatic. In an action at the instance of the relieving parish against another parish as the parish of the pauper's settlement, the pursuers contended that the certificate of insanity granted in 1908, coupled with proof that the pauper's state of mind had been the same since her attainment of puberty in 1903, was conclusive as to her incapacity to acquire a settlement in the parish of S.

Held that the certificate did not of itself justify an inference of insanity at any period prior to its date, and raised no legal presumption to that effect, but was merely an item of evidence to be taken into consideration with the other facts of the case.

Held, further, that the pauper had not acquired a settlement in the parish of S.

Inverkip Parish Council v. *Nairn Parish Council*, October 26, 1909, 47 S.L.R. 54, *commented on.*

Process — Appeal — Competency — Finality Clause — Poor — Lunacy (Scotland) Act 1857 (20 *and* 21 *Vict. cap.* 71), *sec.* 78.

Section 78 of the Lunacy (Scotland) Act 1857 provides for the recovery by a parish, which has maintained a pauper lunatic, of its expenses from the parish legally liable by summary process before the sheriff, whose judgment is to be final. *Held* that this section only applied to cases where the question of legal liability was not disputed, and that, accordingly, it did not render incompetent an appeal to the Court of Session from a judgment of the Sheriff deciding such liability.

The Lunacy (Scotland) Act 1857 (20 and 21 Vict. cap. 71) enacts—section 78—"If the parish of the settlement of any such pauper lunatic cannot be ascertained, and if the lunatic has no means of defraying the expense of his maintenance, nor any relations who can be made liable for the same, the expenses attending the taking and sending such lunatic, and of his maintenance in the district asylum, shall be defrayed by the parish in and from which he was taken and sent, but with recourse, nevertheless, to such parish, at any time when it shall appear that such expenses are legally chargeable to any other party or parish, against such party or parish, and who or which shall be liable also in interest and expenses; and the sheriff of the county in which the parish defraying such expenses in the first instance is situated shall certify under his hand the amount of such expenses; and such certificate shall be final and conclusive as to such amount, and shall not be subject to review by any process whatsoever under any proceeding instituted for recovery of the same; and the party entitled to recover such expenses shall proceed as accords of law against the party or the parish liable for the same, by summary process before the sheriff of the county within which such party resides, or in which such parish is situated, and the judgment of such sheriff shall be final . . . ."

On 31st March 1910 the Parish Council of Stirling brought an action in the Sheriff Court at Dunblane against the Parish Council of Dunblane and Lecropt to recover sums incurred, and for relief from future expenditure, on account of Marjory Faichney, an inmate of Stirling District Asylum, Larbert, who became chargeable to the parish of Stirling on 18th March 1908.

The pursuers pleaded, *inter alia*—"(2) The said Marjory Faichney being mentally incapable of acquiring a settlement by residence while in Stirling, the defenders are liable for her maintenance."

The defenders pleaded, *inter alia*—"(5) The said Marjory Faichney being capable of acquiring a settlement by residence, and having acquired such in the parish of Stirling by residence there for more than three years without having recourse to common begging, and without having received or applied for parochial relief, the defenders are not liable for her maintenance and are entitled to absolvitor, with expenses."

On 1st March 1911 the Sheriff-Substitute (SYM) after a proof pronounced the following interlocutor—"Finds in fact (1) that the action relates to the parish by which, as parish of settlement, Marjory Faichney, . . . is liable to be supported, and that it is not in dispute that the pursuers' parish of Stirling, or the defenders' parish of Dunblane and Lecropt, is the parish of her settlement; (2) that she is the daughter of William Faichney, labourer, Dunblane; (3) that she was born in 1891, and attained puberty in May 1903, at which time she was living with her mother in Stirling; (4) that her father died in 1902 in Stirling, but having a residential settlement, which he had never lost, in Dunblane; (5) that, at all events from very early youth she has never been of normal intelligence, and that in 1908 she was certified to be insane; (6) that she is now a certified lunatic in Larbert Asylum under certificate of lunacy granted at said time; (7) that the Parish Council of Stirling in this action seek from the Parish Council of Dunblane reimbursement of sums paid for her support, and declarator that Dunblane, not Stirling, is liable in future for her support, maintaining that she never could or did acquire a settlement, and that Dunblane, as the parish of birth or the parish of her

settlement, is the parish of her settlement; (8) that Dunblane contends that she was able to acquire and did acquire a residential settlement in Stirling by residence for three years after the time of attaining puberty in 1903, during which years she was maintained without recourse to common begging or to parochial relief; (9) that she is not an idiot, but that her case is one of strong body, but of undeveloped mind and of much imbecility; (10) that there had been no pronounced change in her state prior to said certification, and that she might with the same justification have been certified insane at any time after attaining puberty: Therefore finds (*a*) that she is a lunatic, and (*b*) was incapable of acquiring a settlement: Finds further in fact (11) that it is not established that the parish of Stirling has admitted that her settlement is in that parish, or (12) that the parish of Stirling has so acted as to deprive the parish of Dunblane of any evidence or to prejudice the position of that parish: Therefore finds that her settlement is not in Stirling, but is in the defenders' parish of Dunblane: Repels the defences, and grants decree of declarator and reimbursement as concluded for."

Note.—"The state of this young woman appears to be as follows:—She has been weak in mind from very early youth, and probably from birth. She was sent to school when she came to school age, but never made any real progress, though she learned to read a very few small short words and to write a very little, apparently by copying what was written for her. As she grew into a big girl, she did not associate with young people of her own age, but played with little children. She could distinguish between certain coins, such as a penny or a shilling, but she could not distinguish between such coins as a florin and a half-crown. At her home with her married sister she was very passionate without reason. She could wash a few dishes under supervision, but could not be trusted alone to go through the washing of the few dishes after a meal at which the family of three persons had been present. She could not be trusted to watch a pot on the fire, nor did she learn the time properly on the clock. Though fond of playing with children, she could not be trusted to 'mind' a baby for any length of time alone lest she should drop the baby when carrying it about. She was of dirty habits in her person, though she could manage as to the calls of nature without guidance. She could go a simple message at times, but could not be trusted with more than one message.

"In youth Marjory Faichney did not have the advantage of the special care and skilful training which can now be afforded for very feeble-minded children. It is quite possible that if early taken into such care she could have learned more than she did. An ordinary industrial school could not have taken her. It appears that since she has been placed in Larbert Asylum as a young woman she has, though very slowly, learned a certain amount more. She can now write her name if asked, and if in a humour to do it, can sing over, or at least say over, a piece of a hymn or a song, can sew some simple sewing, and can knit, and knows coins, and how many pennies go to sixpence, and can do a little simple addition. Some days, it is thought, she is more willing or more able than others to concentrate such mind as she possesses upon the questions put to her, and she may feel more friendly to some people than to others. It does not seem possible to find that she has ever had delusions—though in conversation with Dr Skinner she maintained wrongly that 'General' Booth of the Salvation Army was in Stirling at a particular time when he was not. But then he has been sometimes in Stirling, and she was often at Salvation Army meetings, and this may be just a stupid mistake—obstinately adhered to. Physically the girl is fairly well grown and strong. She was at one time sent away to a Salvation Army 'Home' in Dundee, with the idea that this would save her from the 'sexual dangers' which her sad state made very evident (these dangers have something to do with her being certified a lunatic), and with the idea that, with firm control and work to do she could be taught to do a maidservant's work. But though the experience was very short it was negative of her powers so far as it went, and the matron of the 'Home' did not consider her a case of sufficient intelligence to be hopeful, and handed her over to the poor law authorities because she was suffering from a skin disease (impetigo). This disease assailed her because of a low state of health at the time, and of the dirty habits contracted before she went to the 'Home.'

"On the evidence the Sheriff-Substitute considers that this young woman has always been unable to earn her own living, and that she has always been unable to do more than a little simple house-work under close supervision. She is not an idiot. She is of small and undeveloped intelligence requiring the guidance and management and aid of others to enable her to have any decent life. She might never have been certified lunatic had the means, and perhaps the wisdom, of those around her, enabled them to give to her the special care she needs. She has been getting that for more than two years now, but under a lunacy certificate.

[*After examining the authorities, the Sheriff-Substitute proceeded*]—"In this case Stirling's contention is that there has been no deterioration making Marjory Faichney liable to be certified in 1908 though not sooner, but, on the contrary, that she could have been certified before the alleged qualifying residence began or at any time during it. In the examination of the evidence it is to be noticed that there are sundry medical certificates relating to the girl's state which do not affirm lunacy at all. As to this certain of the doctors artlessly say, 'Oh, yes, but then these were only certificates for getting her into the poorhouse.' It is also to be noticed that

when an asylum was thought to be the best place of care it was not at all an easy matter to grant a certificate. Thus Dr Murray, Medical Officer for Stirling (pursuer) says—'I was requested by the inspector to watch the case and report progress. It was a case of this sort that I had to make a dozen or more visits to find out her mental condition . . . the difficulty was whether she had become insane or whether she was just an imbecile. I concluded that she was imbecile. I had seen her six or seven times before she was certified' (in 1908). The 'statement of facts indicating insanity observed by myself' in this certificate is certainly far from convincing. That also may explain Dr Carswell's answer already quoted.

"In March 1907, when those in charge of the Salvation Army Home at Dundee found that Marjory Faichney was not to be a success with them, and was suffering from impetigo caused by dirty habits, she had been examined by Dr Buist of Dundee ere admission to the poorhouse. The Sheriff-Substitute is satisfied that he is a man of experience in mental cases and gave careful, albeit brief, examination in the matter. He, in answer to the question 'Is applicant . . . lunatic, insane, idiot, or of unsound mind?' certified 'No.' She was in Dundee Poorhouse Infirmary for about a month, and was apparently so little suspected to be insane, that she was never so much as taken to the observation ward. Dundee, of course, gave information to Stirling and Dunblane. The former wrote to Dundee regarding her state thus, 'She is unfit to work, and has never been sent to employment being mentally deficient,' . . . 'and has never been forisfamiliated by being self-supporting.' At the beginning of the following month, after the girl had been returned to Stirling and to her sister's house there, Dr A. C. Buist of Dunblane, who had known her as a child, saw her there and certified her as 'well developed physically and in good bodily health. Mentally she is weak, but the weakness is not of such extent as to prevent her from doing ordinary unskilled labour. If allowed to remain idle she will most probably deteriorate in mind and morals.'

"In the spring of 1908, after Dr Murray had made up his mind to certify Faichney to be a person 'of unsound mind,' it was resolved to obtain the sanction of the Board of Lunacy to board her out. The application bears that she is 'occasionally violent or noisy, that she is not of uncleanly habits or offensive to decency, nor dangerous to others day or night, and that she is capable of helping the proposed guardian a little in household or other work,' and the medical certificate bears that 'she does not require either for her own welfare or the safety of the public to be placed in an asylum.' Sanction having been got, an attempt was made to board her out at Causewayhead, near Stirling. She would not stay, but returned to her sister's house. Then after some months authority was obtained to put her in the lunatic wards of Linlithgow poorhouse, but the governor of that poorhouse returned her without a day's delay because she was suffering again from a skin disease which made her unsafe for the other patients. Then it was, in September 1908, that the inspector of Stirling, after, of course, a petition setting forth that she was a proper person for treatment in an asylum for the insane, and producing medical certificates to that effect, obtained warrant of the Sheriff to send her to Larbert Asylum, the asylum where Stirling lunatic paupers are boarded. It cannot be disputed by anyone that to treat her at Larbert is one very good and humane way of treating her, though the well-known specialist Dr Yellowlees thinks that the case was not bad enough for an asylum, and that he would not have certified her, 'but some people would have certified her.' There is strong medical opinion from others that she was wisely certified, and that the asylum is the proper place for her.

"At all events certified she is, and it is not a question for the Court what is the best way of treating a particular lunatic. The *motive* certainly was the difficulty of otherwise disposing of the pauper. The *effect in law* of the certifying of the pauper, together with the strong medical evidence that she might have been certified at a far earlier date (including the time when she was twelve years old), is this, viz., the certification is proof that the girl was insane at its date. The certification is also an important piece of evidence that she was insane at an earlier date if the proof shows, as it is here held to show, that the mental condition has been practically the same from a period long anterior to the certification. The case is one of an undeveloped intellect, in which no definite change can be pointed to, but on the contrary in which the condition is shown not to have changed, and indeed in which no change could have taken place. The Sheriff-Substitute holds on the facts as a whole that the imbecility, which at the time of certification was great enough to warrant the certificates, has existed all along and would have warranted earlier certification.

"So far as matter of law is involved in this opinion, the Sheriff-Substitute refers to the opinion of Lord Skerrington in the case of *Inverkip* v. *Nairn*, S.L.T. 1909, p. 99, *aff.* 47 S.L.R. 54, October 26, 1909.

"That case is the more in point, because Lord Skerrington would have thought, apart from the specification, that the case of the Inverkip pauper was ruled by the decisions in such cases as *Cassels* already quoted. That is just what the Sheriff-Substitute would say of Marjory Faichney. He cannot express himself as wholly satisfied with the state of matters, because it is evident that the differentiation of one person from another in much the same mental condition is made a question not so much for the Court as for varying medical opinion as to what may be the best way to treat the case. But this *Inverkip* case seems entirely in point.

"It is thought, therefore, that the Sheriff-Substitute must pronounce this pauper

to have been lunatic and incapable of acquiring a residential settlement during the period within which Dunblane contends that such a settlement was acquired."

The defenders appealed, and at the hearing the pursuers objected to the competency of the appeal, and argued—Under section 78 of the Lunacy (Scotland) Act 1857 (20 and 21 Vict. cap. 71) the Sheriff's judgment was final—*Roxburgh, Berwick, and Selkirk District Board of Lunacy* v. *Parish Council of Selkirk*, January 28, 1902, 4 F. 468, *per* Lord Young at p. 474, 39 S.L.R. 546. The account in the present case fell directly within the terms of section 78. It was not too late to state the objection—*Hillhouse* v. *Walker*, November 3, 1891, 19 R. 47, 29 S.L.R. 85; *Shirra* v. *Robertson*, June 7, 1873, 11 Macph. 660, 10 S.L.R. 445; *Burns* v. *Waddell & Son*, January 14, 1897, 24 R. 325, 34 S.L.R. 264.

Argued for the defenders—The appeal was competent. Section 78 provided a shorthand method for parishes which had maintained paupers of recovering their expenses, but it had nothing to do with the question of the liability of parishes *inter se*. This was not a summary cause within the definition of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 3. It was an action with a declaratory conclusion to settle rights for a long period. The procedure followed here was not in accordance with a summary process.

LORD KINNEAR—I think that the objections which have been stated to the competency of this appeal are altogether untenable. The action before us is not founded on, and has nothing to do with section 78 of the Lunacy (Scotland) Act 1857. That section does not deal with and in no way affects the common law rights and liabilities of parishes *inter se* for the support of pauper lunatics. It provides a shorthand method for ascertaining expenses in a special case, and recovering the amount so ascertained by a summary process. A consideration of section 78, read along with the immediately preceding sections, makes this perfectly clear. Section 76 provides for the recovery from the parish of settlement of "all the expenses attending the taking and sending a pauper lunatic to any district asylum in or from any parish which is not the parish of the settlement of such lunatic." Section 77 then proceeds to provide for the recovery of the expense incurred by any superintendent of any asylum in relation to the examination, removal, and maintenance of any lunatic, and then follows section 78, which provides—"If the parish of the settlement of any such pauper lunatic cannot be ascertained . . . the expenses attending the taking and sending such lunatic, and of his maintenance in the district asylum, shall be defrayed by the parish in and from which he was taken and sent, but with recourse nevertheless to such parish at any time when it shall appear that such expenses are legally chargeable to any other party or parish, against such party or parish, . . ." and then there follow provisions for the ascertainment and recovery of these expenses which amount to this, that the Sheriff of the county defraying the expenses in the first instance is to certify their amount, that his certificate is to be final, and that any proceedings necessary for recovery are to be summary in their character, and that the Sheriff's judgment is to be final.

Accordingly what is provided for is a summary method for recovering expenses from a parish whose liability for these expenses is apparent, and where the only questions are whether the expenses have in fact been defrayed by the party claiming recourse, and if they have, what is the amount? It is a condition-precedent to the summary process that the expenses are legally chargeable to some other parish or party. So long as there is a dispute between two parties which is the party truly liable, section 78 does not come into operation, and the question of legal liability falls to be determined by the ordinary forms of process. If the action had been rested on section 78, the whole procedure which has taken place in the Sheriff Court would have been incompetent, because the requirements of the statute, both as to the certificate which is to be the basis of the summary process prescribed and as to the summary character of that process have been completely disregarded. But the pursuers do not found their case upon that section, and I find nothing in the section to prevent them from raising an action in ordinary form to determine whether their parish or another is liable to maintain a particular pauper.

LORD DUNDAS—I concur.

LORD MACKENZIE—I am of the same opinion. I do not think section 78 of the Lunacy (Scotland) Act 1857 was intended to apply to the decision of questions of liability between parishes. It seems to me ancillary to section 77, which provides that the expenses incurred by any superintendent of an asylum, or other party, for the examination, removal, and maintenance of a pauper lunatic, shall be defrayed by the parish of settlement of the lunatic, and that the superintendent or other party disbursing such expense shall be entitled to recover it from those liable to defray the same. That section deals with expenses disbursed by an individual. Section 78 deals with the case where the parish of settlement of the lunatic cannot be ascertained, and provides that in such cases the expense shall be defrayed by the parish from which the pauper lunatic was taken. The sheriff of the county in which the parish defraying such expenses is situated shall certify the amount thereof. Then the party (not the party or parish) entitled to recover such expenses shall proceed against the parish liable by summary process before the sheriff, and the judgment of the sheriff shall be final. That is simply a shorthand method for getting repayment of the expenses incurred under section 77. It therefore, seems to me that the whole

question of ulterior liability is left to be determined by the ordinary processes of law.

The Court repelled the objection.

The case was then heard on the merits.

Argued for appellants—The Sheriff had misunderstood the cases and had misapplied the law. It was nowhere held that where there was a particular state of facts at a certain date with a certificate of lunacy, and a similar state of facts at an earlier date, the certificate drew back to the earlier date and established lunacy at that date. The certificate had no bearing on the question, and to deduce the same state from the same facts five years before was a complete *non sequitur*. There was no definition of the amount of incapacity which would prevent a pauper from acquiring a settlement, and from the cases it appeared that nothing short of idiocy or complete mental incapacity could prevent him—*Watson* v. *Caie and Macdonald*, November 19, 1878, 6 R. 202, 16 S.L.R. 121; *Cassels* v. *Somerville and Scott*, June 24, 1885, 12 R. 1155, 22 S.L.R. 772; *Nixon* v. *Rowand*, December 20, 1887, 15 R. 191, 25 S.L.R. 175; *Parish Council of Kirkintilloch* v. *Parish Council of Eastwood*, December 19, 1902, 5 F. 274, 40 S.L.R. 179; *Parish Council of Kilmalcolm* v. *Parish Council of Glasgow*, March 1, 1904, 6 F. 457, 41 S.L.R. 347, *aff.* 8 F. (H.L.) 12, 43 S.L.R. 639. The question of incapacity to acquire a settlement was one of proof, and a certificate of insanity was not necessary—*Cathcart Parish Council* v. *Glasgow Parish Council*, June 5, 1906, 8 F. 870, 43 S.L.R. 653. The Sheriff had founded on the case of *Inverkip Parish Council* v. *Nairn Parish Council*, October 26, 1909, 47 S.L.R. 54, as establishing that the certificate was conclusive where the state of facts was the same. But properly read that case established no such principle, and simply followed previous cases. The certificate *per se* was not evidence of incapacity to acquire a settlement. That required to be established by substantive evidence. The importance of the certificate was that it usually implied confinement, and confinement deprived the pauper of the capacity of acquiring a settlement. The question was one of fact—Was the mind capable of exercising and free to exercise an option — *Melville* v. *Flockhart, &c.*, December 19, 1857, 20 D. 341; *Crawford* v. *Petrie and Beattie*, January 25, 1862, 24 D. 357. In the present case the evidence fell short of establishing idiocy or insanity.

Argued for the pursuers—The certificate of lunacy was conclusive evidence as to the pauper's state of mind at its date, and if the proof showed that her state of mind in 1903 was the same the Court would hold that she could not acquire a settlement—*Parish Council of Rutherglen* v. *Parish Council of Glenbucket and Dalziel*, October 24, 1895, 33 S.L.R. 366; *Inverkip Parish Council* v. *Nairn Parish Council, cit. sup.* The latter case was singularly similar in its facts to the present one. The case of *Parish Council of Kilmalcolm* v. *Parish Council of Glasgow, cit. sup.*, had virtually obliterated the ordinary meaning that would be attached to the words "shall have maintained himself" and made them equivalent to "shall have lived." The result was to substitute for a fairly easy test, viz., self maintenance, another test, viz., whether the party residing in the parish had sufficient intelligence to give the residence operative and legal force. There was another test, however, which was discoverable from the authorities, and that was that if the person was either certified or certifiable under the Lunacy Acts that person should be excluded from settlement—*Cassels* v. *Somerville and Scott, cit. sup.*, *per* Lord President Inglis at p. 1160. The same test was found in *Cathcart Parish Council* v. *Glasgow Parish Council, cit. sup.*, and appellants' argument was just that of the unsuccessful party in that case. It was difficult to reconcile this test with that of *Parish Council of Kilmalcolm* v. *Parish Council of Glasgow, cit. sup.*, which made volition the test. The present case fell under the rule of the certificate which afforded a simple test as to whether the pauper's state of mind was the same at the commencement of the period of settlement as it was when the certificate was granted, whereas the test of volition was a very difficult one. The case of *Inverkip Parish Council* v. *Nairn Parish Council, cit. sup.*, was an absolute precedent. It was the presence or absence of the certificate that decided whether the rule of *Inverkip* or *Kilmalcolm* should be applied. The evidence showed that the pauper in this case was of a lower degree of intelligence than that of persons who in former cases had been held incapable of acquiring a settlement.

At advising—

LORD DUNDAS—The pursuers in this case are the Parish Council of Stirling, and the defenders are the Parish Council of Dunblane and Lecropt. The question is whether or not the defenders are liable to relieve the pursuers of the maintenance of Marjory Faichney, who is (and has been since 1908) a pauper inmate of Larbert Asylum. Marjory Faichney was born on 12th May 1891, and therefore attained the age of puberty on 12th May 1903. Her father died in 1902, having a settlement in the defenders' parish, though he had for some years prior to his death resided in Stirling. Her mother died in 1904. After that the girl continued to live in the same house with her sisters, and (after March 1905) with the eldest of these, who at that time married a man named Thomson. In March 1908 Thomson applied for and got relief from the Stirling Inspector of Poor on Marjory's behalf. On 16th September 1908 the girl was admitted to the Larbert Asylum (where she has since remained) upon a petition to the Sheriff accompanied by proper medical certificates, including an emergency certificate to the effect that she was of unsound mind and a proper patient to be placed in an asylum. The question of legal liability depends on whether or not Marjory Faichney had prior to 1908

acquired a residential settlement in Stirling, and this again depends—the fact of residence being admitted—on whether or not, looking to her mental condition during the three years following on her attainment of puberty, she was capable of acquiring a settlement. The decision of the case depends, to my mind, wholly upon the view to be taken of the facts admitted or proved, but as we had a very full citation of authority at the discussion it may be well at this stage to say what seems necessary in regard to existing decisions.

The recent case of *Kilmalcolm*, 1906, 8 F. (H.L.) 12—to go no further back—decides that if a person has resided in a parish for the requisite period and has been maintained without recourse to common begging or to parochial relief, mental weakness, short of lunacy or idiocy, will not incapacitate him from acquiring a residential settlement there. Lord Robertson, in the course of his opinion, sketched the development of judicial construction, whereby the literal meaning of the words "maintained himself," which occur in section 76 of the Poor Law Act 1845, and are repeated in section 1 of the Act of 1898, has apparently been reduced to one synonymous with "lived," but observed that "whether the authorised construction of the words 'maintain himself' will stand the strain of a condition of insanity" was "a question generically different from that before the House." The *Kilmalcolm* case was immediately followed by that of *Cathcart*, 1906, 8 F. 870, the decision of which had, as appears from the reports, been delayed pending the judgment of the House of Lords. The Second Division (adhering to the interlocutor of the Lord Ordinary (Ardwall)) decided that "a person who is in fact insane, although not certified or under restraint, is incapable of acquiring a residential settlement." It appeared that the pauper had resided in Cathcart parish from 1895 to 1903, and it was only in the latter year that he was certified insane and removed to an asylum, but the evidence showed that he was, during the whole period in a fit state for certification, and would in fact have been certified as early as 1895 but for his mother's strong aversion to that course. I observe that the reclaimers' counsel argued—and the argument bears a very close resemblance to that maintained before us by Mr Blackburn for the present defenders—that "an insane person was not incapacitated from acquiring a settlement by residence unless he was certified to be insane and placed under restraint either in an asylum or in private custody. It was not insanity, or even certified insanity, that prevented *de facto* residence having the usual effect, but the fact of the residence being not voluntary but compulsory and under restraint." I notice also that reference was there made in the argument to, *inter alia*, an Outer House decision (*Cramond*, 1903, 11 S.L.T. 12) where Lord Kincairney said he thought "the cases have come to hold the test to be a certificate of lunacy and admission to a lunatic asylum on such a certificate." The Second Division, however, emphatically rejected the reclaimers' contentions. The Lord Justice-Clerk's opinion is short and strong, and Lord Stormonth Darling said —"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 and Scott*, 12 R. at pp. 1159-60, 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.'" So much for the case of *Cathcart*. A later decision referred to in the discussion at our bar was *Inverkip*, 1909, 47 S.L.R. 54, to the supposed legal import of which too much was, in my opinion, attempted to be attached. I do not think the *Inverkip* case (to which I was a party) was intended to introduce, or did introduce, any new principle of law or rule of practice; it merely applied the result of prior decisions to the particular facts before the Court. Accordingly I am not surprised to find that the case has not apparently been thought worthy of a place in the official series of our reports. The gist of the matter was this—the pauper was certified insane and admitted to an asylum in January 1905; but the crucial period in relation to her mental condition was that immediately following her attainment (in November 1899) of the age of puberty. The Court held it proved on the facts that there was practically no change in her condition between the two dates; and as it seemed clear that she was insane at the later date "the natural and indeed inevitable conclusion" (as Lord Low put it) was "that at the former date she was also insane." At the same time it was clearly stated, both in the Outer and the Inner House, that the fact of certification in 1905 did not of itself justify an inference of insanity in 1899, and raised no legal presumption to that effect—a view which, I notice, had already been expressed, *mutatis mutandis*, by Lord Kincairney in the *Cramond* case (*sup. cit.*). I think these views are correct; and that the fact of subsequent certification has not necessarily of itself any special virtue or significance as throwing light on anterior conditions, but is just one of the elements to be taken into account along with the others in a case where it is present. Nor do I consider that (as was suggested to us in the argument) Lord Moncreiff's opinion in the

Outer House case of *Glenbucket*, 1895, 33 S.L.R. 366, was intended to have, or has, when fairly read in the light of the facts then before him, any other or different import.

It seems, then, to be decided that insanity, for the purposes of a case like the present, does not require to be evidenced by actual certification and confinement, but may be established as a fact by other proof, and that where a certificate exists it does not of itself necessarily warrant an inference of insanity at a previous period. One must endeavour to apply these rules to the facts of the present case. The learned Sheriff-Substitute (who has evidently bestowed much care upon the matter) has decided in favour of the pursuers. He considers, in the first place, and I think rightly, that Marjory Faichney must be taken to have been insane at the date of her admission to the asylum, and to be so still. I do not see that any other conclusion could properly be reached, looking to the fact of her certification and the whole other evidence bearing upon this point. But the Sheriff-Substitute also "holds on the facts as a whole that the imbecility, which at the time of certification was great enough to warrant the certificate, has existed all along and would have warranted earlier certification." This is, to my mind, the crucial point in the case; for if the girl must be taken to have been insane in 1908, and if her mental condition from the age of puberty onwards has been practically the same, then "the natural and indeed inevitable conclusion" (to use once more Lord Low's words in the *Inverkip* case) must be "that at the former date she was also insane." The Sheriff-Substitute has summarised the mental conditions of this girl at the outset of his note in a manner which both parties admitted to be substantially accurate and exhaustive; and he has considered and dealt with the points (and they are far from unimportant) in the evidence which tend in the defenders' favour. I do not propose to discuss the proof in detail, though I have read it carefully. It is enough to say that I should be very slow to differ from the learned Sheriff-Substitute's conclusion upon a question of fact unless I thought that he had plainly erred, which I certainly am not in this case prepared to affirm. Indeed, I rather think the scale may be considered to be decisively turned against the defenders by a passage in the evidence of their own witness Dr Yellowlees, whose views are, of course entitled to great weight in such matters. He agrees that this girl is a congenital imbecile, though (he considers) of a mild type; he states the opinion (based upon some decree of personal knowledge in both instances) that her mental case is worse than that of the *Inverkip* pauper; and he adds, "I think her mental condition now is what she was born with." On the whole, therefore, I think we ought not to differ from the Sheriff-Substitute's decision; and that we may of new find in fact and in law in terms of his interlocutor, though I do not greatly admire the actual terms in which it is framed. I ought, perhaps, to add that his decision upon the pleas in bar stated for the defenders was not made the subject of appeal in the discussion before us.

In arriving at these conclusions I have not left out of view that it may well be, indeed I think it is, the fact that the mental condition of Marjory Faichney was and is no worse than that of some of those other afflicted beings who in previous cases have passed muster at the sight of the Court as capable of acquiring a residential settlement. But it would be vain to attempt to regulate our decisions by a method of comparison of the proofs submitted in successive cases; at the best we can but try to preserve some degree of uniformity of rule and principle. This view has often been expressed by the Court in similar cases; *e.g.*, by Lord Stormonth Darling in the *Kirkintilloch* case, where he said (5 F. at p. 276) that "in all poor law questions it is of much more importance to preserve uniformity of decision than to make any particular case square exactly with one's own notions of logic or even equity." Even more apposite here are Lord Ardwall's words in the *Cathcart* case (8 F. at p. 873)—"I am conscious that it is not easy to see as a mere question of fact why the pauper in this case should be deemed incapable of acquiring a settlement for himself, and the paupers in the cases of *Kirkintilloch* and *Glasgow*" (the *Kilmalcolm* case), "above quoted, should have been deemed capable of acquiring such settlements. But it has been recognised by the Court that some general rules should be laid down in such matters for the guidance of parishes, even though the application of these rules to particular cases may sometimes appear to produce anomalies." I quote this passage, not only because I agree with what Lord Ardwall said, but because it shows that "anomalies" precisely similar to those (such as they are) of the present case—which the Sheriff-Substitute and counsel at our bar appear to think originated in the *Inverkip* case in 1909—were present to Lord Ardwall's mind in 1905, as raised by the case he was then considering. As already observed, I do not think anything said or decided in the *Inverkip* case altered in any way, for better or worse, the law or practice in such matters.

It might perhaps be desirable, from the point of view of expediency, that a definite line should be drawn, for the guidance of practitioners in this somewhat arid and artificial region of the law, between insanity and non-insanity in questions of settlement, by requiring, *e.g.*, the facts of certification and detention as proof of the former, and holding everything short of or different from these facts to be insufficient. Some such rule might probably minimise, or even extirpate, the expensive and regrettable class of litigations of which the present is the latest example, though it would very likely result in a much greater number of paupers being certified in the future than has been customary in the past. But if a new departure of the sort is desirable, it

would, I apprehend, require to be inaugurated by the Legislature, and not by the Judges of the Court of Session.

LORD KINNEAR and LORD MACKENZIE concurred.

The Court adhered.

Counsel for Pursuers and Respondents—Constable, K.C.—W. J. Robertson. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for Defenders and Appellants—Blackburn, K.C. — Mitchell. Agents—Dundas & Wilson, C.S.

Saturday, January 13, 1912.

SECOND DIVISION.

[Sheriff Court at Glasgow.

SPENCE *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising Out of Employment—Heart Disease—Aggravation by Strain—Proof.*

In arbitration proceedings to recover compensation under the Workmen's Compensation Act 1906 the arbiter held it proved (1) that the claimant, while in the course of his employment lifting a derailed hutch, felt a sharp pain near the heart, followed by palpitation and shortage of breath; (2) that on being examined the claimant was found to be suffering from advanced disease of the heart, which was of long standing, was in its nature progressive, and bound to manifest itself sooner or later; and (3) that it was not proved that the lifting of the hutch accelerated the disease. *Held* that the arbiter was entitled to find that the claimant had not proved that he had sustained an accident arising out of and in the course of his employment within the meaning of the statute.

Clover, Clayton, & Company v. *Hughes*, [1910] A.C. 242, *distinguished.*

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) in the Sheriff Court at Glasgow, between William Spence, *appellant*, and William Baird & Company, Limited, *respondents*, the Sheriff-Substitute (THOMSON) dismissed the petition and stated a case for appeal.

The following *facts* were found proved or admitted—"(1) That the appellant was roadman and fireman in respondents' Bedlay Pit, Chryston, at a wage of 34s. 10d. a-week, that he had been employed there for about a year, and that he had been employed in similar work in coal pits for ten years or thereby immediately preceding. (2) That his ordinary daily duties involved, *inter alia*, the lifting and moving of loaded hutches from the lye at the back of the haulage wheel on to the rails of the haulage road, which was work requiring considerable physical exertion. (3) That the appellant on the morning of Friday, 20th May 1910, he being then alone, while lifting a derailed loaded hutch from the lye on to the haulage road, felt a sharp pain immediately above the stomach, followed by palpitation of the heart and a shortage of breath; that he lifted no more hutches that day, but remained till the end of the shift performing such light work as fireman as there was to do; that after a rest on the Saturday and Sunday (which were not working days for him) he resumed work on the Monday morning, and while in the act of moving a hutch he again experienced the same sensations as on the Friday. (4) That the appellant, however, adduced no direct evidence to corroborate his own statement that an accident had occurred on the Friday in lifting the hutches, but he consistently, when examined at the time and later by doctors on his own behalf and on behalf of the respondents, repeated his statement as to the sensations which he experienced in lifting the hutch, and his physical condition (to be immediately referred to) makes his statement quite probable. (5) That the appellant on being medically examined was found to be suffering from advanced disease of the mitral valve of the heart, with enlargement of the heart; that this condition was not due to the alleged accident but was of long standing, although possibly the appellant may not have been aware of the disease; that it was in its nature progressive and was bound to manifest itself sooner or later, and would do so probably in the way in which appellant describes, and might do so even when he was not engaged in active exercise. (6) That the appellant's condition has gradually become worse since 20th May 1910, and he is now permanently incapacitated for work as the result of the diseased condition of the heart. (7) That it is not proved that the lifting of the hutches on 20th May accelerated the progress of the disease."

On these facts the Sheriff-Substitute found that the appellant, even on the assumption that his statements as to his sensations were proved (as the Sheriff-Substitute held them to be), had not proved that he had sustained an accident arising out of and in the course of his employment with the respondents, and dismissed the petition.

The *question of law* for the opinion of the Court was—"Was the arbiter justified on the above facts in finding that the appellant had not proved an 'accident' within the meaning of the statute?"

Argued for the appellant—On the facts found by the arbitrator the appellant's incapacity was due to an aggravation or acceleration of the disease directly due to the physical exertion of lifting the hutch. There being no other evidence, the inference was that on 20th May 1910 the appellant suffered a strain, which was of course injury by accident—*Stewart* v. *Wilsons and Clyde Coal Company, Limited*, November 14, 1902, 5 F. 120, 40 S.L.R. 80—and that strain so aggravated or accelerated