It seems to have been quite liquid when it was collected on the previous evening, but owing to the change to frost which had occurred, it had become solid enough to stick to the feet of a man or horse. He came, then, to this collection of mud, which was certainly not hard or solid, and both he and the horse tripped over it and fell down, with the result that the pursuer sustained severe injuries. As to the nature of the obstacle over which they tripped, it seems to me that the Sheriff is right in considering that the pursuer's evidence unduly exaggerates its dimensions. The mud had been merely swept to the side of the street, and had not been made up into heaps for the contractor to remove; it had not been artificially collected, but had merely been swept aside. I can understand the pursuer's evidence that it formed a considerable obstruction on the road, but the fog being sufficiently dense to produce complete darkness, a horse and man would be very apt to be tripped by a mere change in the substance of the road irrespective of the size of the obstacle.

Turning now to the history of the events leading to the accident, I take it that it is necessary that there should be, for longer or shorter periods, such collections of mud as the present one lying upon the roads. The Commissioners must get the mud off the road; they must collect it in heaps, and have it removed at a "convenient" time—convenient, I take it, for the interests which the Commissioners have to protect, *i.e.*, the protection of the public safety, of traffic, and so on. Now, the primary judges of this "convenience" must be the Commissioners themselves, but it is their duty to use due expedition in the removal of the mud. In this case the question we have to consider is, whether there was fault on the part of the Commissioners, and whether it was that fault which left the mud on the road? The facts are that the Commissioners' servant, while in course of collecting the mud into heaps for removal by the contractor, found that owing to the density of the fog he was unable to go on with the work. The excuse therefore of the Commissioners for their failure to remove the mud is, that they cannot contend against such unusual emergencies as the dense fog upon the day in question, and that is the reason why the mud was not removed. The collection of mud had therefore to remain on the road, forming a necessary danger; and the question comes to be, if the Commissioners are to be absolved from blame for this, what else were they to do? It has been somewhat faintly suggested from the bar that they should have put lights to show the existence of the mud-heaps, but these lights would have been a complete novelty, and drivers of vehicles would probably have been much confused by them. Indeed, I question very much if the Commissioners could have successfully defended an action for damages for an accident caused by their having put down lights without giving previous notice. As regards the Commissioners, therefore, I am for adhering to the Sheriff-Substitute's interlocutor. The case against Graham seems to me to be very unsubstantial. His defence is that his liability arose from his contract, and under that contract he was bound to clear away the mud as soon as the Commissioners' servant got it ready for him. Owing to the fog it was not ready for him, and consequently his duty had not begun at the time of the accident. I therefore think he is entitled to absolvitor.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute with additional expenses.

Counsel for Appellant—Rhind—Baxter. Agent—John Veitch, Solicitor.

Counsel for Respondent William Lucas—H. Johnston—Maclaren. Agents—Macpherson & Mackay, W.S.

Counsel for Respondent William Graham—Deas. Agents—J. B. Douglas & Mitchell, W.S.

Thursday, January 21.

SECOND DIVISION.

[Sheriff of Ross-shire, at Dingwall.

MACKAY *v.* MUNRO.

Poor—Settlement—Imbecile—Forisfamiliation.

A pauper received parochial relief from the parish of his birth for himself and his family. His eldest daughter—aged twenty-one—had resided all her life with him, but was of such weak mind that she could only do light housework, or work in the fields if under constant supervision. She was confined of an illegitimate child, and received additional parochial relief.

Held that for such relief the parish of her father's settlement was liable, and not that of her own birth.

Donald Mackay, Inspector of Poor, Kilmuir-Easter, in the county of Ross and Cromarty, brought an action in the Sheriff Court at Dingwall against John Munro, Inspector of Poor, Lochbroom, in the same county, for, *inter alia*, repayment of 15s. paid on behalf of Mary Mackenzie, aged twenty-one, an unmarried daughter of Alexander Mackenzie, a pauper, residing in Barbaraville, in the parish of Kilmuir-Easter, during her confinement.

It was averred that Mary Mackenzie, although of age, had been imbecile from her birth, was quite unable to earn a living for herself, had never done so, was and had been dependent on her father all her life, had not been emancipated, had never acquired a settlement of her own, and followed the settlement of her father.

The defender admitted that Lochbroom was liable for the parochial relief of Alexander Mackenzie and his minor children, not for that of his daughter Mary. The statements made with regard to her were denied, and it was pleaded that "Mary Mackenzie being forisfamiliated or emancipated, has her settlement elsewhere than in the parish of Lochbroom."

The Sheriff-Substitute (HILL) allowed a proof, the import of which sufficiently appears from his note and from the opinions of the Judges in the Court of Session, and on 3rd August 1891 he pronounced the following interlocutor:—"Finds (1) that the pauper Alexander Mackenzie was born in the parish of Lochbroom, but has lived in the parish of Kilmuir-Easter since 1869, and has during all that time been receiving parochial relief, for which, so far as properly granted, Lochbroom, as the parish of his birth, admits liability; . . . (5) that Mary Mackenzie, daughter of the pauper, was born in the parish of Edderton in 1868, was taken to Kilmuir-Easter when a few months old, and has lived in family with her father ever since; (6) that on 14th February 1890 she gave birth to a female illegitimate child, and there is now claimed from the defender 10s. and 5s. of expenses incurred in connection with that event; (7) finds it proved that Mary Mackenzie is a person of weak mind, but that it has not been proved that her mental capacity is such as to make her incapable of acquiring a settlement for herself: (8) Finds in point of law that the above sums of expenses in connection with her confinement, amounting to 15s., having been paid on her account after she became *sui juris* and capable of acquiring a settlement for herself, are not chargeable against the parish of her father's settlement, &c.

"*Note.*— . . . The 15s. paid on account of Mary Mackenzie was for a nurse, and for extra nourishment to her at the time she gave birth to an illegitimate child. This happened when she was beyond twenty-one years of age, so that she was then *sui juris*, might be a pauper in her own person, and was no longer chargeable to the parish of her father's settlement unless she was from mental incapacity incapable of acquiring a residential settlement for herself. A great deal of evidence has been led with the view of showing that that was her condition.

"It has been clearly proved that she was from infancy and is weak-minded. But that is not enough. The mental incapacity must be such as to prevent her from doing anything to earn a living for herself. Now, some of the witnesses describe her as 'silly,' others as 'imbecile,' others as 'just an idiot.' But it is evident that these expressions are used without any very definite meaning, and throw little light upon the question as to her actual state. That must be ascertained from the facts of her history brought out in the evidence. Now, the evidence is to the effect that from her earliest years she was silly, and different from other children; that for several years she had been sent to school but could be taught nothing, and she can neither read nor write nor count; that as she grew older she could do some domestic work if looked after, such as cooking and washing; could knit and could go a message; and that latterly during several seasons she was occasionally employed as an out-worker on the neighbouring farms, and could do such work under supervision, but when left alone would do nothing, and would sometimes while employed at such work, without any apparent reason, throw down her hoe or other implement and go home, but on all occasions when employed as an out-worker she was paid the same hire as the other women.

"Such, I think, are the most important facts brought out in the evidence in regard to Mary Mackenzie. And it happens that two cases have been decided in recent years in which the circumstances are very similar to those in the present case. In *Cassels* v. *Somerville*, June 24, 1885, 12 R. 1155, a person who had been from infancy so weak in mind as to be unable at any time to earn anything, though able to do simple labourer's work under supervision, was boarded by his friends for twelve years in a parish. He could only read very imperfectly, could not write, and knew nothing of arithmetic. It was held that his state of mind was not such as to prevent him acquiring by residence a settlement in the parish. And in *Nixon* v. *Rowand*, December 20, 1887, 15 R. 191, a woman, twenty-four years of age, who was a congenital imbecile but not an idiot, who was incapable of earning a living, and could not learn either to write or go a message, who could not dress herself, or do ordinary housework without superintendence, was held not to be in such mental condition as to be a perpetual pupil, and therefore was capable of having a settlement of her own.

"It appears to me that the condition of Mary Mackenzie is substantially the same as the paupers in these two cases, and that the present case must be ruled by them."

The pursuer appealed to the Sheriff (JAMESON), who on 26th October 1891 adhered.

"*Note.*—The case would have been one of very great difficulty had it not been for the two decisions quoted by the Sheriff-Substitute in his note, which appear to me to be conclusive of the present case on the points to which they apply. In both of these cases I think that the mental condition and capacity for industry of the pauper were lower than in the present case.

"A further point, however, was taken by the agent for the pursuer, who maintained that, even assuming that Mary Mackenzie was capable of acquiring a settlement other than her father's, yet, not being forisfamiliated, she did not and could not acquire such settlement, and that her settlement accordingly remained that of her father to the exclusion of her own birth settlement. The case of *Fraser* v. *Robertson*, 5 Macph. 819, seems to settle that a person is not necessarily forisfamili-

ated for poor law purposes by attaining the age of twenty-one. I confess I find some difficulty in reconciling this doctrine with some observations in the case of *Craig* v. *Greig and Macdonald*, 1 Macph. 1172. But I think that there is every presumption in favour of the forisfamiliation of a child who has attained majority, unless it is shown that he or she is absolutely and entirely dependent on his or her father for support. It is not necessary for forisfamiliation that a child should leave his or her father's house, if he or she works outside of it on his or her own account. See *Dempster* v. *M'Whannell and Deas*, 7 R. 276. In the present case it is proved that Mary Mackenzie did such work as she was fit for, outside her father's house, and was sometime away begging on her own account. Further, it is to be noticed that her father personally did little or nothing for her support, he being a pauper himself. In these circumstances I think that Mary Mackenzie having attained majority, must be held to have been sufficiently forisfamiliated for poor law purposes, and that as an adult pauper she became chargeable to her own parish of birth or her parish of residence if she had such, in place of her father's parish of birth. I certainly think that this conclusion is in accordance with the spirit of the Poor Law Acts of 1579 and 1672, and the proclamation of 1692, which seems to make it clear that when an adult pauper having no residential settlement becomes chargeable, it is the parish of his own birth which must be liable for his support, and not the parish of the birth or residence of his father. It is, I think, to be regretted that the question of forisfamiliation in connection with the administration of the poor law has not been made the subject of express enactment, but standing the law as it does, I am not disposed to lay much stress on the doctrine of forisfamiliation after a child has attained the age of twenty-one. And in the present case I should be very unwilling, on the strength of a doctrine drawn from a branch of the law very different from the law of pauper settlement, to fasten on the parish of Lochbroom the support of a pauper not born there and who never lived there."

The pursuer appealed to the Court of Session, and argued—The case was ruled by that of *Robertson* v. *Fraser*, June 4, 1867, 5 Macph. 819, and by the recent case of *Lees* v. *Kemp*, October 17, 1891, 29 S.L.R. 6. The case of *Lawson* v. *Gunn*, November 21, 1876, 4 R. 151 was also in the appellant's favour.

Argued for the respondent—Forisfamiliation took place at twenty-one although the child continued a member of his father's household—Ersk. i. 6, 53; iii. 9, 23. The presumption was in favour of a person's own birth settlement and not of a derivative settlement. The only exceptions were the cases of children of tender years and of lunatics, who were regarded as in perpetual pupillarity. Here the pauper, although of weak mind, was capable of doing some work, and in that respect differed from the pauper in *Lees* v. *Kemp*. This case was ruled by those of *Cassels* v. *Somerville & Scott*, June 24, 1885, 12 R. 1155; and *Nixon* v. *Rowand*, December 20, 1887, 15 R. 191, the former of which was *a fortiori* of the present case.

At advising—

LORD JUSTICE-CLERK—The facts of this case are pretty clear. The only evidence presenting any difficulty is the evidence of the doctors. They only speak after one interview with the woman whose mental capacity is in question, and I think we should put their evidence aside and consider what was the condition and state of this woman in the opinion of those who were in daily contact with her. From their evidence it is clear that this woman was not capable of being entrusted with her own conduct and affairs. She did a certain amount of work no doubt, but many of very weak mental capacity can do that under close supervision. The whole evidence satisfies me that if this woman had been turned out to the world to do for herself, the result would have been a lamentable failure. She worked in her father's house, and did some field labour, but the evidence comes to this—that unless someone stood over her and watched her she would throw down her hoe and stop working. She was in fact not to be trusted to do any work at all if left alone. I think the ground of employing her was the ground of charity, and that farmers employed her from good feelings towards her family. That is my distinct impression from the evidence before us; therefore if the question is as to the forisfamiliation of this young woman, I think she was not forisfamilated. The law regards imbeciles as persons whose childhood continues, and I am very clearly of opinion that this young woman was still in the condition of being practically a child in her father's house on account of her mental state. It therefore appears to be just the case over again that we had in the recent case of *Lees* v. *Kemp*, and I think the Sheriffs have erred in holding that the defender was not liable for the advances made, and that the relieving parish is entitled to have its outlays repaid by the parish of this young woman's father's birth settlement.

LORD RUTHERFURD CLARK—I concur. I think that this woman, although of full age, was not forisfamiliated, and that we have here substantially the same circumstances as in the previous cases of *Fraser* v. *Robertson* and *Lees* v. *Kemp*.

LORD TRAYNER—I agree in thinking that this case is ruled by those of *Fraser* and *Kemp*. This girl was of very weak mental capacity, and it has not been proved that she ever did or was able to maintain herself. She has lived with her father since childhood, she has not been forisfamiliated, and she therefore takes her father's settlement.

LORD YOUNG was absent.

The Court recalled the judgment of the Sheriff and decerned in favour of the pursuer.

Counsel for the Pursuer and Appellant—M'Kechnie—Kennedy. Agents—Pringle, Dallas, & Company, W.S.

Counsel for Defender and Respondent—Vary Campbell—Dickson. Agents—Dove & Lockhart, S.S.C.

Thursday, January 21.

SECOND DIVISION.

[Sheriff of Renfrewshire.

BAIN *v.* DUNCAN AND ANOTHER.

Loan—Bond and Disposition in Security—Titles Assigned to Lender—Right of Borrower to Delivery of Assigned Writs—Exhibition.

Held that a lender who held a bond and disposition in security over certain lands which contained an assignation of writs in common form was not bound to deliver up the property titles to the borrower, even for a limited period, while the loan remained unpaid.

On 17th October 1888 Mrs Margaret Helena Park or Bain, 115 Renfield Street, Glasgow, purchased a dwelling-house in Manse Road, Old Cathcart, at the price of £600, and thereafter granted a bond and disposition in security for £360 over the same in favour of Miss Barbara Duncan and Miss Ann Dunlop Duncan, Clyde Bank Cottage, Ferry Road, Yoker, which contained an assignation of the writs in common form. A second bond for £209 was subsequently granted over the same property. Thereafter Mrs Bain, on the ground that she was anxious to sell the property, or procure an additional loan upon the security thereof, applied to the Misses Duncan to deliver up the assigned property titles for a limited period. They refused this request, but offered to exhibit the titles when required. Thereupon Mrs Bain brought an action against them in the Sheriff Court at Renfrew to have them ordained to deliver to "the pursuer for such space of time, on such receipt, and under such obligation for the return thereof to the defenders as to the Court shall seem proper, the whole title-deeds, writs, vouchers, notices, receipts, searches, and all other documents whatsoever belonging to the pursuer, that have come into their possession, or are under their control."

It was averred that (Cond. 5) "the pursuer and her agent are, and have always been, willing to return said title-deeds and others to the defenders as soon as her purpose with them is served, and to grant a receipt and obligation in common form for their return, which is in accordance with the practice of the legal profession in Scotland. . . . . (Cond. 6) The defenders wrongously and unwarrantably refuse to deliver up to the pursuer the said title-deeds and others in their possession belonging to her. The defenders' explanation in answer, that their agent has informed the pursuer that he is willing to exhibit the deeds to her or her agent, is admitted under explanation that such exhibition of titles is insufficient for the pursuer's purposes, and is contrary to the common rule and practice of the legal profession in Scotland."

The pursuer pleaded—"(1) The said titles and others being the property of the pursuer, the defenders are bound to lend them as craved. (2) This action having been rendered necessary in the circumstances above set forth, the pursuer is entitled to decree, with expenses as craved. (3) The defences are irrelevant."

It was explained by the defenders, in answer to Cond. 3, that the agent held the said titles not only as their agent but also as agent for the second bondholders, and that they had been informed by him that he further held the deeds as hypothecated for an account due to him by the pursuer in connection with the purchase of the property and the bonds granted by the pursuer.

The defenders pleaded—"(1) The action is irrelevant, and should be dismissed, with expenses. (2) All parties are not called. (3) The deeds referred to in the prayer of the petition being held by the defenders' agent on their behalf, in virtue of the assignation of writs contained in the bond and disposition in security by the pursuer and her husband in their favour, the pursuer is not entitled to delivery thereof."

Upon 27th October 1891 the Sheriff-Substitute (COWAN) repelled the defences stated, and ordained the defenders, upon receiving from the pursuer's agent the usual borrowing receipt, and on undertaking to return the titles, to deliver to the pursuer for a period of 14 days the title-deeds specified in the petition.

"*Note.*—Although the pursuers have bonded their property, with the usual power of sale, so long as that power is unexercised the property remains in them, and they are entitled, if they can find a purchaser, to sell under burden of the bond, or they may raise a further loan on the property. For these and other purposes they have a legitimate right to obtain temporary use of the titles, and, in the opinion of the Sheriff-Substitute, the defenders have not averred any valid reason why this should not be granted to them."

The defenders appealed to the Sheriff (CHEYNE), who on 20th November 1891 pronounced the following interlocutor:—"Finds, under reference to the accompanying note, that the pursuer is not entitled, *in hoc statu*, to have possession of the documents mentioned in the prayer of the petition, even under the restrictions therein set forth: Therefore dismisses the petition."

"*Note.*—When a bond and disposition in security is granted over heritable property the property titles are sometimes retained by the borrower under an obligation to make them furthcoming to the lender when required, and sometimes they are