Friday, February 23.

SECOND DIVISION.

[Sheriff of Forfarshire

FARQUHARSON *v.* LIDDELL.

Poor—Settlement—Imbecile Pauper Child Confined in Charitable Institution—20 *and* 21 *Vict. cap.* 71, *secs.* 75 *and* 95—25 *and* 26 *Vict. cap.* 54, *sec.* 7.

An illegitimate imbecile pauper child was in terms of section 95 of the Lunacy (Scotland) Act 1857 admitted with the consent of the Board of Lunacy to a charitable institution for the training of imbecile children, the institution being licensed in terms of section 7 of the Lunacy (Scotland) Act 1862. There was a district lunatic asylum for the parish.

The husband of the imbecile pauper's mother having thereafter acquired a residential settlement in another parish, *held*—following the case of *Palmer* v. *Russell*, December 1, 1871, 10 R. 185—that the parish of the imbecile pauper's settlement at the date of his admittance to the institution remained liable for the burden of his maintenance during the whole period of his confinement as a lunatic, in virtue of the 75th section of the Lunacy (Scotland) Act 1857.

By section 75 of the Lunacy (Scotland) Act 1857 (20 and 21 Vict. cap. 71), it is enacted—"Every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly; and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic."

By section 95 of the said Act it is enacted—"Every pauper lunatic to be detained under the powers of this Act shall be sent to the asylum for the district in which the parish of the settlement of such pauper lunatic is situated; provided always that under special circumstances it shall be lawful for the parochial board, with consent of the board, to dispense with the removal of any pauper lunatic to such asylum, and to provide for him in such other manner and under such regulations as to inspection and otherwise as shall be sanctioned by the board; and provided further that the provisions of this Act as to the requisite licence and order and returns or reports of the board shall be duly complied with."

By section 7 of the Lunacy (Scotland) Act 1862 (25 and 26 Vict. cap. 54) it is enacted—"It shall be lawful for the board to grant licence to any charitable institution established for the care and training of imbecile children, and supported in whole or in part by private subscription, without exacting any licence fee therefor, and such licence may be in name of the superintendent of such institution for the time being."

Thomas Buttar Farquharson, Inspector of Poor for the parish of Coupar-Angus, brought an action against William F. Liddell, Inspector of Poor for the parish of Murroes, for the purpose of recovering the expense incurred by the parish in maintaining William Stewart as a pauper lunatic. The action was brought in the following circumstances:—The pauper was the illegitimate son of Marjory Stewart, and was born in 1879. He was imbecile from the time of his birth. In 1885 Marjory Stewart married John Thow, whose settlement at that time was the settlement of his birth, viz., the parish of Murroes. John Thow was not the father of the pauper. In 1886 John Thow and Marjory Stewart went to the parish of Coupar-Angus, and thereafter they resided in that parish. In March 1890 the Inspector of Poor for the parish of Coupar-Angus applied to have the pauper admitted to the institution for the training of imbecile children at Baldovan, an institution which is licensed by and is under the supervision and inspection of the Board of Lunacy, and is the asylum or training school for imbecile pauper children nearest to the parishes of Murroes and Coupar-Angus. As the result of this application the pauper, who was certified to be capable of deriving benefit from training and treatment in the institution, was with the sanction of the Lunacy Board admitted on 1st July 1890 to the institution, and he subsequently remained there. There was a district lunatic asylum for the parish of Murroes. On 1st August 1891 John Thow acquired a residential settlement in Coupar-Angus. The Inspector of Poor for the parish of Murroes refused to pay for the board of the pauper child for the period after 1st August 1891, holding that on that date the child had acquired a settlement in the parish of Coupar-Angus, because the settlement of the child was that of the mother, and the settlement of the mother was that of her husband John Thow.

On 15th July 1893 the Sheriff-Substitute (CAMPBELL SMITH) pronounced the following interlocutor—"Finds that the child whose aliment is the subject-matter of the present action is a bastard and a congenital idiot, and that his settlement is the settlement of his mother: Finds that her settlement is the settlement of her husband, and that his settlement has been since 1st August 1891 in the parish of Coupar-Angus: Finds that the parish of Murroes is the birth parish of the said child's mother's husband: . . . Finds that pursuer's contention is that after being lodged in Baldovan Institution, the said child's settlement became fixed upon Murroes and incapable of following the settlement of the person from whom it was derived in respect the provisions of 20 and 21 Vict. c. 71, s. 75; but finds that the proved facts do not justify

the application of said statute to said child in respect that there was no urgent or necessary cause for declaring him to be a lunatic beyond what had existed from his birth, and because the most probable and credible explanation of his being transferred to Baldovan was that his mother's husband was on the point of acquiring a residential settlement in pursuer's parish of Coupar-Angus: Finds that he had at or before 1st August 1891 acquired such a settlement, and that he has in law acquired said settlement both for his wife and her imbecile child: Therefore sustains pursuer's claim only up till 1st August 1891, as admitted by the defender before this action was raised: . . . *Quoad ultra*, assoilzies the defender from the conclusions of the summons."

The pursuer appealed to the Sheriff (COMRIE THOMSON), who on 2nd November 1893 dismissed the appeal.

The pursuer appealed to the Court of Session, and argued—The institution at Baldovan, although not a district lunatic asylum, was licensed by the Lunacy Board in terms of section 7 of the Lunacy (Scotland) Act of 1862. The pauper had been sent to it with the consent of the Board, because in the district asylum there were no appliances for developing the faculties of idiot children. The Baldovan Institution was thus for legal purposes in the same position as a district asylum, and in accordance with *Palmer* v. *Russell*, December 1, 1871, 10 Macph. 185, the parish of Murroes, which was the settlement of the pauper child at the date of his entry to the asylum, remained his settlement permanently.

Argued for the defender—Baldovan Institution was not a district asylum, and therefore section 75 of the Lunacy Act 1857 did not apply. The case of *Palmer* was quite consistent with this view, as in that case there was no district asylum in the parish and the lunatic had to be sent to the nearest public asylum or to none at all. But in the present case there was a district asylum in the parish. There being thus no speciality in the case, the settlement of the pauper was Cupar-Angus, the parish of the settlement of the husband of the pauper's mother—*Milne* v. *Henderson*, December 3, 1879, 7 R. 317.

At advising—

LORD JUSTICE-CLERK—[*After stating the facts*]—Now, it being beyond doubt that if this boy, the pauper lunatic, had been lodged in a district asylum the Act would have applied, and that the settlement which he now has would not have changed so long as he remained a lunatic, and was detained in the district asylum, the question is whether that is changed by his not having been put into a district asylum, but into an institution, which was considered by those who had power to adopt an alternative, more suitable for him in the circumstances. In my opinion the principle of the case of *Palmer* v. *Russell*, December 1, 1871, 10 Macph. 185, applies clearly. In that case it is true that there was no district asylum for the parish in which the pauper lunatic had a settlement, and she was sent to another which was used for those lunatics who would in ordinary course be sent to a district asylum, but I think the principle laid down there is applicable to this case, and settles that the placing of a pauper lunatic in an asylum which has been selected for him as the best place in the circumstances, instead of in the district asylum, is fulfilment of the statutory requirement. Then section 95 of the Act provides—[*His Lordship read the section.*] Taking that along with section 75, it confirms the view I have stated, because it plainly allows that some other asylum may, if the authority of the Lunacy Board be obtained, be substituted for a district asylum. That power being given, it seems to me to be a reasonable deduction that such confinement in a selected and authorised institution is the same thing in legal effect as confinement in the district asylum would be.

If it was thought that the case of *Palmer* ought to be reviewed, we should require to send this case to a full bench, but that case was decided twenty-three years ago, and has been acted upon ever since, so that even if I did not agree with the result, I should not think it proper to throw doubt upon it. But I agree with the decision, and think that we should act upon it in this case.

LORD RUTHERFURD CLARK—I am of the same opinion.

We are asked to reconsider the case of *Palmer*. I see no reason for doing so. It has stood unchallenged for nearly quarter of a century, and I think that it must be taken to be a sound exposition of the law until it is reversed by a higher Court.

If we follow that case, there can be no doubt that if the lunatic had been sent to a district asylum, the parish of settlement at the date of his admission would continue to be liable for his maintenance so long as the lunacy continued. But it is said that that consequence does not follow, because he was not sent to a district but to a parish asylum called the Baldovan Asylum. He was sent to it with the sanction of the Lunacy Board. In these circumstances I think that we follow the case of *Palmer* in holding that the Baldovan Asylum is to be taken as an equivalent for the district asylum.

By the 95th section of the Act it is directed "that every pauper lunatic detained under the powers of the Act shall be sent to the asylum for the district in which the parish of the settlement of such pauper lunatic is situated." But there is a dispensing power. The parochial board may, with consent of the Lunacy Board, dispense with the removal of the pauper to a district asylum, and provide for him in such other manner as shall be sanctioned by the Lunacy Board. When they exercise that power they are creating an equivalent for the district asylum. To use the words of the Lord President—"One place of confinement is substituted for another by legal authority, and the same effects will follow."

The words "district asylum" as they occur in the 75th section must be read in connection with the dispensing power, and construed to include any place which shall be substituted by the exercise of that power, otherwise the exercise of the power would affect the liability of parishes, and there is no ground for thinking that the Legislature had any such purpose. The reasons for the rule introduced by the 75th section apply with equal force whether the lunatic be detained in a district asylum or in any substituted place.

LORD TRAYNER—I agree. Lord Rutherfurd Clark has expressed the views I hold so exactly that I have nothing to add to what his Lordship has said.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor appealed against: Find in fact that the parish of Murroes was the parish of settlement of the husband of Marjory Stewart or Thow, the mother of the illegitimate imbecile child at the time when the said child was with the sanction of the Board of Lunacy first sent to the Baldovan Institution, an establishment duly licensed for the reception of imbecile children: Find in law that in virtue of the 75th section of the Act 20 and 21 Vict. cap. 71, that the parish of Murroes is liable for the expenses of maintaining the said child during the whole period of his confinement as a lunatic: Decern against the defender as inspector of the said parish of Murroes for the sum of £28, 17s. 11d. with the interest as concluded for."

Counsel for Pursuer—Dickson—A. M. Anderson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Defenders—Graham Murray Q.C.—Kennedy. Agents—Macpherson & Mackay, W.S.

Tuesday, February 27.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

WOOD AND OTHERS (BRUCES' MARRIAGE-CONTRACT TRUSTEES) *v.* WYLLIE GUILD (BRUCE'S TRUSTEE) AND OTHERS.

Husband and Wife—Antenuptial Marriage-Contract—Trust—Exclusion of Jus Mariti.

By antenuptial marriage-contract a wife conveyed certain funds to which she was entitled under her father's settlement to trustees, for the following purposes, *inter alia*—That during the joint lives of the said intended spouses the clear revenue of £5000 of the trust funds was to be paid to herself, exclusive of the *jus mariti* and power of administration of her husband, and that "the clear revenue of the remainder" of the trust funds was to be held for the joint behoof of the spouses, and paid to them on their joint receipt. The husband renounced his *jus mariti* and right of administration as to the capital of the funds conveyed by the wife and the revenue of the £5000 above mentioned, but there was no express exclusion or renunciation of the *jus mariti* as regarded the revenue of the remainder.

The husband having been sequestrated a competition arose between the marriage-contract trustees, the trustee in the husband's sequestration, and the wife. *Held* that "the revenue of the remainder" did not fall under the husband's *jus mariti*, and that the marriage-contract trustees were bound to pay one-half thereof to the wife, and the other half to the husband's trustee so long as the sequestration should continue, and to the husband himself thereafter.

By antenuptial marriage-contract dated in July 1855, entered into between George Cadell Bruce and Roberta Cadell, the latter conveyed to Robert Philip Wood and others, as trustees for the purposes after mentioned, all and whole her share (about £10,000) in the residue of the estate of her deceased father, settled upon her by his trust-disposition and settlement (with the exception of £1000 which she assigned direct to George Cadell Bruce), and in particular, without prejudice to the said generality, the sum of £5000, being along with said sum of £1000 the amount of said share of residue which was presently divisible, and which share of the residue, with the exception of the foresaid sum of £1000, was to be held by the trustees in trust for the following purposes—"First, that during the joint lives of the said intended spouses the clear revenue of £5000 of the trust funds is to be paid to the said Roberta Cadell, exclusive of the *jus mariti* and power of administration of the said George Cadell Bruce, for whose debts and deeds and to whose control the same shall not in any way be liable or answerable, and the clear revenue of the remainder of the trust funds is to be held for the joint behoof of the spouses and paid to them on their joint receipt."

By a preceding clause in the marriage-contract George Cadell Bruce expressly renounced his *jus mariti* and power of administration, "and every other right and claim which he as husband of the said Roberta Cadell might have to the funds and effects and means and estate hereinafter conveyed in trust, and that in so far as the capital of the funds and estate is concerned and the revenue of £5000 thereof specially after mentioned: Declaring that the same shall not be affectable by his debts or deeds legal or voluntary, nor by the diligence of his creditors."

After the year 1876 the two parties to the