LORD JUSTICE-CLERK—I am of opinion that the defence is wholly irrelevant, and that the appeal must be dismissed.

LORD TRAYNER—I agree. I am surprised that the defence here stated should have been persisted in. The law is that where anyone borrows documents on a borrowing receipt his duty *ante omnia* is to return the documents whatever claim he may have in regard to them otherwise.

LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Dismiss the appeal and affirm the interlocutor appealed against: Of new repel the defences, and ordain the defender to deliver the documents as craved."

Counsel for Pursuers—Baxter. Agents—Wylie & Robertson, W.S.

Counsel for Defender—Macaulay Smith. Agent—W. A. Hyslop, W.S.

Saturday, July 16.

FIRST DIVISION.

[Sheriff of Ayrshire.

PARISH COUNCIL OF KIRKMICHAEL *v.* PARISH COUNCIL OF KILMARNOCK.

Poor—Relief—Poor Law Amendment (Scotland) Act 1845 (*8 and 9 Vict. c.* 83), *sec.* 71.

Where the father of an illegitimate child was in good circumstances and acknowledged his liability to support it, *held* that a parish was not entitled, under sec. 71 of the Poor Law Act 1845, to recover outlays made on account of the child from the alleged parish of its settlement, the child not being a proper object of parochial relief.

Marion Fulton, whose settlement at the time was in the parish of Kilmaurs, gave birth on 16th October 1887 to an illegitimate son Robert Fulton or Hay, who was deaf and dumb from his birth.

In 1888 or 1889 Marion Fulton married William M'Connell, whose settlement was in the parish of Kirkmichael. On 22nd November 1889 William M'Connell removed with his wife to the parish of Kilmarnock, where he acquired a settlement.

In May 1894 the child was placed in the Ayr District Asylum, but after the lapse of about ten weeks was discharged on the ground that he was not insane. He was thereupon taken charge of by the Inspector for Kirkmichael, and was placed on the roll of that parish as an ordinary pauper. His putative father, however, who was a farmer, paid accounts rendered to him for the outlays made, both during the child's detention in the Asylum, and thereafter from time to time by the parish of Kirkmichael.

In January 1896 the boy was sent to an institution in Glasgow for training the deaf and dumb, his name was struck off the roll of paupers for Kirkmichael, and the putative father discharged all outlays made by that parish down to that date.

Thereafter the superintendent of the institution intimated that the boy was a hopeless imbecile, and requested that he might be removed. Accordingly on 16th April 1896 Kirkmichael removed him from the institution, and restored his name to their roll as an ordinary pauper. The boy was boarded out, and the agents for Kirkmichael, on applying to the agent for the putative father, received payment from him of certain sums which they remitted direct to the woman with whom the boy was boarded. All outlays down to 2nd July 1896 were thus discharged by the putative father, and the boy's name was once more deleted from Kirkmichael roll. On 30th July, however, it was again replaced on the roll, no account for outlays since 2nd July having been presented to the father, and no payment having been made.

In these circumstances the Parish Council of Kirkmichael raised an action in the Sheriff Court at Kilmarnock against the Parish Council of Kilmarnock to be relieved of advances made by them on account of Robert Fulton or Hay down to February 1897, amounting to £12, 5s. 4d., and of all further sums paid on account since that date.

In addition to the facts above set forth, the pursuers averred that it was by the advice of the Local Government Board that they took charge of the boy on his removal from the institution in Glasgow.

The defenders explained that the putative father had always been and still was able and willing to pay all outlays incurred on account of the boy. They further produced a letter from the father's agent to the pursuer's agents in the following terms:—"Dear Sirs, — I have received intimation from Messrs J. & J. Sturrock & Co. that your clients have raised an action against the Parish Council of Kilmarnock in this matter, and that they look to my client for relief. I have, of course, nothing to do with the merits of the action, nor with your client's object in raising it; but in view of the intimation referred to I desire to intimate to you, as I have done to Messrs Sturrock, that my client does not repudiate liability for the child's maintenance. If, therefore, your clients have made disbursements, and have any account against him for maintenance, I shall be glad that you render it, and if correct it will be paid."

The pursuers pleaded—"(1) The said pauper child Robert Fulton or Hay being illegitimate, followed the settlement of his mother, the said Marion Fulton or M'Connell, and the latter being married takes the settlement of her husband, and the same being now the parish of Kilmarnock, the defenders are liable in the sum sued for."

The defenders pleaded—"(4) The putative father being willing to continue to relieve pursuers of their outlays on behalf of the said Robert Fulton or Hay, and never hav-

ing refused to do so, and having intimated to pursuers his willingness to pay the sum sued for, pursuers should have no interest to insist in the action, which should be dismissed with expenses."

On 26th January 1898 the Sheriff-Substitute (HALL) pronounced an interlocutor finding that Robert Fulton or Hay followed the settlement of his mother, and that Kilmarnock being the parish of the mother's settlement, the pursuer was entitled to be relieved by the defenders, and were not bound to have recourse against the putative father.

Note.—"In this case the putative father, while admitting liability, has neither made nor offered to make any provision for the bastard's maintenance, but merely pays such accounts as are from time to time rendered to him of the sums expended on his child's behalf. If Kilmarnock is really the parish of the child's settlement, the pursuers seem not to be bound to transact with the putative father in a matter which is not properly their concern, and they have a manifest interest to get the liability of the defenders ascertained, since in the event of the putative father's death or insolvency they might find themselves cut off from that source of repayment. In the circumstances in which John Fulton or Hay is placed, it cannot, I think, be said that when the sum now sued for was expended by the pursuers he was not a proper object of relief.

"The observations of the late Lord President Inglis in *Anderson* v. *Paterson*, June 12, 1878, 5 R. 904, to which I was referred, are *obiter*, and at all events apply to the entirely different case of a legitimate child whose father, an able-bodied man, was alive, and his residence known to the relieving parish. On the question of settlement, there can, I presume, be no doubt that a bastard follows that of its mother, even should she change it after he has become chargeable, unless he is detained in a lunatic asylum under the Lunacy (Scotland) Act 1857 (20 and 21 Vict. c. 71), when, in terms of section 75, his settlement as it stood at the date of his admission remains permanent—*Farquharson* v. *Liddell*, February 23, 1894, 21 R. 583. Here John Fulton or Hay was on 2nd May 1894 placed in the Ayrshire District Asylum at Glengall, but was removed on 7th July following by order of Dr Skae, the medical superintendent, on the ground that though a deaf mute he was not an imbecile. Since 7th July 1894 he has been on the roll of Kirkmichael as an ordinary pauper, with the exception of a short interval in 1896. In that year, on the application of the pursuers, under the Act 53 and 54 Vict. c. 43, the Kilmarnock School Board obtained admission for him into an institution for the education of the deaf and dumb, but from it also he was removed after a few months' trial, and this time on the ground that he was imbecile and incapable of being taught. The defenders maintain and offer to prove that he is still imbecile, but whether he is so or not appears to me to have no material bearing on the present question. He certainly is not, and since 7th July 1894 has not been detained in a lunatic asylum under the Lunacy (Scotland) Act 1857. He is therefore beyond the scope of the provision contained in section 75, and the case must, I think, be dealt with on precisely the same footing whatever might be the result of an inquiry into his mental condition. If this is so, the statements and admissions of the parties appear to furnish sufficient data for deciding the question between them."

The defenders appealed. Their argument sufficiently appears from Lord M'Laren's opinion.

The pursuers founded on the Poor Law Act 1845 (8 and 9 Vict. c. 83), secs. 71 and 72. They maintained that they were entitled to exercise an option between proceeding against the putative father and proceeding against the parish of the child's settlement. If they chose the former course they would not be entitled to be relieved of the expenses it involved—*Austin* v. *Shennan*, October 30, 1874, 2 R. 68. They therefore chose the latter course, and were quite within their rights in so doing. At all events, they were entitled to have the question of liability for the pauper's maintenance settled in this process.

At advising—

LORD M'LAREN—This appeal from the interlocutor of the Sheriff-Substitute of Ayrshire is brought to determine the liability of one or other of these parishes for the maintenance of Robert Fulton or Hay, an imbecile pauper. The action is instituted by the Parish of Kirkmichael against the Parish of Kilmarnock, which is alleged, on apparently sufficient grounds, to be the parish of the boy's settlement. I am, however, of opinion that during the period when maintenance was given, the boy Robert Fulton or Hay was not a proper object of parochial relief. In this view the relieving parish has no claim against the parish of settlement.

As regards the question of settlement the material facts are these:—The child was illegitimate, and was born on 16th October 1887. The settlement of his mother Marion Fulton was then in Kilmaurs, but by her marriage with William M'Connell in 1888 or 1889 her settlement was transferred to Kirkmichael. M'Connell on 22nd November 1889 removed to Kilmarnock parish, and has acquired a settlement there. This is now the settlement of the child derived through his mother.

The child was congenitally deaf and dumb. Being believed to be imbecile he was in 1894 sent to the Ayr Lunatic Asylum, but after the lapse of a few weeks was discharged because the medical superintendent of the asylum was of opinion that he was not of unsound mind but only a deaf mute. From 7th July 1894 until January 1896 the child was maintained by the parish of Kirkmichael, the parish being repaid the cost of maintenance by the putative father. The child was next sent to an institution for the training of the deaf and dumb in Glasgow, his name was

struck off the roll of paupers for the parish of Kirkmichael, and the account of outlay of Kirkmichael parish was rendered to the putative father and paid. After a few months' trial the superintendent of the Glasgow institution intimated to the Kilmarnock School Board (who had sent the child) that he was a hopeless imbecile, and requested that he should be removed.

I pause here to say that by this time the temporary connection between the supposed pauper and the parish of Kirkmichael had been entirely severed, and as it is perfectly clear that the mother's settlement is in Kilmarnock, I have difficulty in understanding on what ground Kirkmichael agreed to undertake the further care of this imbecile child. It is stated in the condescendence that the parish acted on the instructions of the Local Government Board, who held that, as Kirkmichael was the last determined settlement, that parish was bound to take charge of the child pending the determination of his legal settlement by a court of law. It seems to have been overlooked that the child had a solvent father who acknowledged his paternity, and that he was therefore not a pauper. But supposing the Local Government Board were right in holding that Kirkmichael must take the child from the deaf and dumb institution, that could only be for temporary custody until the child could be given over to the care of his father. Kirkmichael very properly at once entered into arrangements with the father to relieve the parish of the burden of maintaining the child, and it is stated in Cond. 11 that the father's agent "agreed on behalf of the father to pay the outlays already incurred by Kirkmichael, and to remit the future aliment direct to the woman with whom the said Robert Fulton or Hay was boarded." But this statement is corrected in the joint minute annexed to the record, and it now appears that the payments made by the father of the child were sent to the agent for the Parish Council, and were by him remitted to the woman who had the care of the child. The child's name was then deleted from the Kirkmichael roll.

The claim against Kilmarnock arises in the following circumstances, as stated by the pursuers in the 12th and 13th articles of the condescendence. On 30th July 1896, in consequence of the monthly allowances not having been forwarded to the woman who was keeping the said Robert Fulton or Hay, and of her having applied to Kirkmichael, the child's name was replaced on the roll as an ordinary pauper. From that date until 11th February 1897 Kirkmichael has made advances for the support of the child, amounting as at the latter date to the sum of £12, 5s. 4d., which they claim from Kilmarnock as the parish of settlement.

I am quite unable to understand why the money of the Kirkmichael ratepayers should have been applied in making these advances, or why the ratepayers of Kilmarnock should be asked to repay these advances made on behalf of a person who, though undoubtedly having a settlement in Kilmarnock, was not a pauper. There are cases, doubtless, where a child—it may be a legitimate child or it may be illegitimate—is found destitute, and is properly received into the poorhouse of the parish in which he is found. In such a case, if the parent cannot be found, or if the paternity is not admitted, a claim against the parish of the child's settlement, when discovered, will arise. In such cases I understand that if the paternity is not admitted the parish of settlement usually repays the advances of the relieving parish, and undertakes the duty of enforcing the liability of the defaulting parent. This is a convenient rule, and I do not mean to say anything against it. But I do not think that this is a case falling under the rule. In April 1896, when the child was thrown on the parish of Kirkmichael, the father was applied to, and he agreed to provide for the future aliment of the child. Either Kirkmichael was or was not a party to the arrangement with the woman. In the latter case the parish had no occasion to interfere, because the board was not regularly remitted. This was a question between the father (who it is admitted is in a respectable station and able to pay) and the woman who was boarding the child. In the former case the representatives of Kirkmichael parish seem to have acted outwith the scope of their official duties and to have constituted themselves agents or guarantors for the child's father by entering into an arrangement involving responsibility for the board of his child. It is not the law of Scotland that parish councils are guardians of all the illegitimate children of the country or guarantors of their maintenance, The mere statement of such a proposition suffices to exhibit its absurdity. If the responsibility so needlessly assumed by Kirkmichael really existed, I suppose it would follow that if a parent in any rank of life sends his child to a boarding school and fails to remit the board punctually, the master or mistress has a claim against the parish of the child's settlement. In the present case Kirkmichael parish ought, at the time of the child being returned to it from Glasgow, to have insisted on the father making his own arrangements for the board of his child, declining responsibility. If Kirkmichael has made itself responsible for the aliment of the child, that will not give the pursuers a claim of relief against Kilmarnock, because it is a condition of the right to be indemnified by the parish of settlement that the person for whose aliment the outlay was incurred was at the time a proper object of parochial relief.

On this short ground I am of opinion that the appeal ought to be sustained and the action dismissed.

LORD KINNEAR and LORD ADAM concurred

The LORD PRESIDENT was absent

The Court pronounced the following interlocutor:—

"Find in fact that during the period when Robert Fulton or Hay was alimented by the pursuers, the said Robert Fulton or Hay was not a pauper and not a proper object of parochial relief: Find in law that the pursuers have no claim against the parish of settlement of the said Robert Fulton or Hay, and that it is unnecessary to determine whether that settlement is in Kilmarnock: Therefore sustain the appeal; recal the interlocutor of the Sheriff-Substitute of 26th January 1898; and dismiss the action."

Counsel for the Pursuers — Salvesen — Deas. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Defenders — Guthrie, Q.C. — James Reid — Findlay. Agent — James M'Kie Thomson, S.S.C.

Tuesday, July 19.

SECOND DIVISION.

[Dean of Guild, Perth.

JACKSON *v.* MACDOUGALL'S TRUSTEES.

Police—Burgh—Height of Houses—"Habitable Room"—Theatre—Perth Harbour, City Improvement, and Gas Act 1897, *section* 86.

The Perth Harbour, City Improvement, and Gas Act 1897, section 86, enacts that "No dwelling-house or other house or erection of any kind shall be built in any existing street or court within the burgh which shall exceed in height, from the level of the pavement to the roof of the highest habitable room, one and a quarter times the width of such street or court, measuring from the front walls of the buildings or intended buildings on each side thereof." A petition was presented in the Dean of Guild Court for warrant to erect a theatre, the roof of the auditorium and of the highest dressing-room being shown on the plans as much higher than the breadth of a lane which bounded one side of the theatre. *Held* that as there was no room in a theatre which could be properly described as a "habitable room," there was no way of measuring the height as directed in the statute, that consequently the statute did not apply, and the petitioner was entitled to decree of lining as craved.

Edward Jackson, solicitor, Perth, as trustee for and on behalf of the promoters of a theatre company to be formed in Perth, presented a petition in the Dean of Guild Court there, in which he craved warrant to erect certain buildings to be used as a theatre.

The ground upon which it was proposed to erect the theatre was described in the petition as "situated between the High Street and Mill Street of Perth, and lying on the east side of the Cutlog Vennel."

Objections were lodged by Miss Isabella Macdougall's trustees, and by Messrs Leitham & Davidson, iron and general merchants in Perth, who were respectively proprietors of subjects opposite to but divided from that on which the petitioner proposed to build the theatre by Cutlog Vennel, which was a narow lane. The property of Miss Macdougall's trustees consisted of a tenement of dwelling-houses, and that of Messrs Leitham & Davidson consisted of lofts and stores. These parties were cisted as respondents by the Dean of Guild in deference to the judgment of the Court of Session in *Lawrie* v. *Jackson*, July 15, 1891, 18 R. 1154, although their properties were not conterminous with that which was the subject of the petition.

Objections were also lodged for the Master of Works, but he subsequently gave up his opposition.

Both of the sisted respondents had practically the same objections to the erection of the theatre. These were—(1) that the erection of such a large building opposite their properties in Cutlog Vennel—which was only 7 feet wide—would deprive them of light and ventilation, and so cause a nuisance; and (2) that the height of the proposed theatre would be a contravention of section 86 of the Perth Harbour, City Improvement, and Gas Act 1897. They also maintained (3) that the petitioner had no right or title to obtain a decree of lining, as he had not produced a valid title to the subjects on which he proposed to build the theatre.

The Perth Harbour, City Improvement, and Gas Act 1897, section 86, enacts as follows:—"No dwelling-house or other house or erection of any kind shall be built in any existing street or court within the burgh, which shall exceed in height from the level of the pavement to the roof of the highest habitable room, one and a quarter times the width of such street or court, measuring from the front walls of the buildings or intended buildings on each side thereof."

The plans showed that the roof of the auditorium and of the highest dressing-room of the theatre was much higher than one and a quarter times the breadth of Cutlog Vennel.

The first deliverance on the petition was dated 14th March 1898. On April 14th the petitioner lodged a mandate signed by certain persons designing themselves as "a majority and quorum of tho promoters of the theatre company to be formed in Perth." This mandate was signed on various dates between April 9th and April 13th 1898 inclusive. On the same day the petitioner also lodged missives of sale of the ground upon which he craved warrant to erect the theatre. These missives were dated 14th April 1898.

On 21st April 1898 the Dean of Guild issued the following interlocutor:—"Having heard the agents for the compearing respondents, the trustees of the late Isabella Macdougall, and Leitham & Davidson,