

COURT OF SESSION.

Tuesday, October 26.

SECOND DIVISION.

[Lord Skerrington, Ordinary.]

INVERKIP PARISH COUNCIL v.
NAIRN PARISH COUNCIL.*Poor—Settlement—Lunatic—Capacity to Acquire Settlement—Proof—Medical Certificate.*

Five years after attaining puberty a woman, who had admittedly always been of weak intellect, became chargeable to a parish, was certified insane, and was committed to an asylum. In an action at the instance of the relieving parish the proof disclosed that the pauper's mental condition had not substantially changed from the time she attained puberty till the date of the medical certificates. *Held*, on the evidence, taken in conjunction with the medical certificates, that the state of her mind at the age of puberty was such as to render her incapable of acquiring a settlement in her own right.

In September 1908 the Parish Council of Inverkip raised an action against the Parish Council of Nairn, concluding for declarator that on 3rd January 1905, when Betsy M'Phee, thereafter an inmate of Smithston Asylum, Renfrewshire, became chargeable as a pauper to the parish of Inverkip, the parish of Nairn was her parish of settlement, and as such was liable to relieve the parish of Inverkip of all sums incurred on her account. Decree was also sought for £134, 13s. 4d., being the amount of advances already incurred on account of the pauper.

The pursuers pleaded, *inter alia*—“(2) The defenders' parish, as the parish of the birth settlement of the pauper, is liable to the pursuers in payment of the sums concluded for. (3) The said pauper having been forisfamiated at the date of chargeability, and not having acquired a residential settlement in any parish, and the defenders' parish being the parish of the pauper's birth, the pursuers are entitled to declarator in terms of the declaratory conclusions of the summons with expenses.”

The defenders pleaded, *inter alia*—“(3) The legal settlement of the pauper lunatic not being the parish of Nairn, the defenders ought to be assolizied with expenses.”

The facts are given in the *opinion* of the Lord Ordinary (SKERRINGTON) who, on 20th January 1909, after a proof, pronounced this interlocutor—“Sustains the third plea-in-law stated for the defenders: Assolizies them from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses against the pursuers,” &c.

Opinion.—“The pursuers sue the defenders for repayment of alimentary advances made on behalf of a pauper lunatic Betsy M'Phee or Johnstone, and for relief

from future advances which they may require to make on her account. The pauper is unmarried, and was born in the defenders' parish on November 21, 1887. She is the illegitimate daughter of Joan M'Phee or Johnstone and of a man of the name of White. On August 27, 1901, the pauper's mother married Robert Johnstone, with whom she had lived for some time previously. The Johnstones travel about the country as pedlars and live in a tent. The pauper lived with them and was supported by them until December 1904, when she wandered away by herself. The pursuers allege that on January 3, 1905, the pauper was landed from a steamer at Gourrock Pier in their parish; that she was then in a destitute condition and incapable of looking after herself; that she was examined medically, and on being certified as insane was committed to Smithston Asylum, where she has since remained at the charge of the pursuers' parish. They allege, however, in general terms 'that the pauper was forisfamiated before chargeability, and capable of acquiring a residential settlement, but that she did not do so in any parish.' They therefore maintain that her settlement is in the parish of her birth. The defence is that the pauper 'is a congenital idiot, or at all events has been an imbecile since early pupillarity.' The defenders accordingly maintain that the pauper was never capable of possessing an independent settlement in her own right, and that in any event she was never forisfamiated.

“The pauper is not an idiot, but her mind is very feeble and undeveloped. When she was about six years of age she became very deaf, and to a great extent lost her power of speech, and she has remained in the same condition physically ever since. She can utter single words in her own way, but it is doubtful whether she can frame a complete sentence. As she never had any education or training until her admission to the asylum her mind has had little opportunity for development. The pursuers' experts attribute her unfortunate condition to these physical defects and adverse circumstances, but the defenders' experts are of opinion that her mind is congenitally weak. According to the evidence of her mother, stepfather, and brother she was able to take charge of her half-brothers and sisters in the absence of her parents, and she was trusted to sell trifling articles. Since her admission to the asylum she has learned to do housework and laundry work under supervision. She is said to be quick at learning and a good worker, and she dresses herself neatly.

“If it had not been for the fact that on January 3, 1905, the pauper was certified as a lunatic I should have held that her case was governed by the decisions in *Cassells v. Somerville*, 1885, 12 R. 1155; *Nixon v. Rowand*, 1887, 15 R. 191; *Kirkintilloch Parish Council v. Eastwood Parish Council*, 1902, 5 F. 274, and *Glasgow Parish Council v. Kilmalcolm Parish Council*, 1904, 6 F. 457, *aff.* 8 F. (H.L.) 12. These cases

decide that imbecility short of idiocy does not prevent a person from acquiring a settlement in his own right. I should further have been prepared to repel the defenders' plea to the effect that the pauper was never forisfamiliated. I know of no authority for the proposition that a child, whether legitimate or illegitimate, who is mentally capable of acquiring a settlement is after attaining the age of puberty reckoned to be one of the family of its stepfather. The cases are, I think, the other way—see *Shotts Parish Council v. Bothwell and Rutherglen Parish Council*, 1896, 24 R. 169, and *Greenock Parish Council v. Govan Combination Parish Council*, 1905, 7 F. 884. Of course it is different where the chargeability takes place before the pauper has attained puberty—see *Coupar-Angus v. Murroes*, 1894, 21 R. 583. I am therefore of opinion that the defenders cannot escape liability except upon the footing that the pauper was mentally incapable of acquiring a settlement in her own right at the time when she attained puberty.

"The fact that the pauper was certified as a lunatic on January 3, 1905, does not of course raise any legal presumption to the effect that her mental condition was the same more than five years previously when she attained puberty. If, however, her condition had been different at the earlier date, I should have expected that the pursuers would have alleged and attempted to prove this as a fact. It was, on the contrary, proved by the pauper's mother, stepfather, and brother that her mental condition was much the same when she lived with them as when they visited her in the asylum. In was further proved that the shelter of an asylum was as necessary for her wellbeing and safety at the earlier date as at the later. When she was between ten and twelve years of age she wandered away from her mother on at least three different occasions, and had to be taken charge of by the police until her stepfather recovered her. On one of these occasions she was found by the police in the street at Oban performing antics which collected a crowd of children around her.

"After considering the whole evidence, I have formed the opinion that the imbecility which existed when the pauper attained puberty was of the same character as that which existed when she was certified as a lunatic; that this imbecility amounted to unsoundness of mind, and that she might all along have been certified as a lunatic. It will be kept in view that the Lunacy (Scotland) Act 1862 (25 and 26 Vict. cap. 54, sec. 1), defines the word 'lunatic' to 'mean and include every person certified by two medical persons to be a lunatic, an insane person, an idiot, or a person of unsound mind.' I regard the certificate, not as a solemnity which can have no effect except from its date, but rather as constituting conclusive evidence to the effect that the patient was of unsound mind at its date. I see no good reason why the certificate should not also be accepted as an important item of evidence in regard to the mental

state of the patient even at a considerably earlier date if the proof shows that the mental condition of the patient has been substantially the same throughout. The conclusion at which I have arrived is, I think, supported by the judgment of Lord Moncreiff in the Outer House in the case of *Rutherglen Parish Council v. Glenbucket and Dalziel Parish Council*, 1895, 33 S.L.R. 366, though the interval between the date of the certificate and the date of attaining puberty was much shorter in that case than in the present one.

"It follows that the defenders are entitled to absolvitor."

The pursuers reclaimed, and argued—Mere weakmindedness or imbecility not amounting to idiocy was ineffectual to prevent the acquisition of a residential settlement—*Kilmalcolm Parish Council v. Glasgow Parish Council*, May 29, 1906, 8 F. (H.L.) 12, aff. 6 F. 457, 43 S.L.R. 639, 41 S.L.R. 347; *Kirkintilloch Parish Council v. Eastwood Parish Council*, December 5, 1902, 5 F. 274, 40 S.L.R. 179; *Nixon v. Rowand*, December 20, 1887, 15 R. 191, 25 S.L.R. 175; *Cassels v. Somerville & Scott*, June 24, 1885, 12 R. 1155, 22 S.L.R. 772; *Rutherglen Parish Council v. Glenbucket Parish Council*, October 24, 1895, 33 S.L.R. 366. In 1899, on attaining puberty, the pauper was not an idiot, and therefore not a perpetual pupil in the sense of these cases. Nor could insanity at the age of puberty be inferred from medical certificates granted at a later date—*Edinburgh Parish Council v. Cramond Parish Council*, March 26, 1903, 11 S.L.T. 12, per Lord Kincairney, p. 15. No doubt the certificates were conclusive evidence of insanity in 1905, but they could not be carried back to 1899. On the evidence the pauper was not then insane. The case was one of defective mental development, not of unsoundness of mind, and was thus distinguishable from *Cathcart Parish Council v. Glasgow Parish Council*, June 5, 1906, 8 F. 870, 43 S.L.R. 653.

Argued for the defenders—It was sufficient for the defenders to show that the pauper was a lunatic as defined by the Lunacy (Scotland) Act 1862 (25 and 26 Vict. cap. 54), sec. 1, viz., a person certified by two medical persons to be a lunatic, an insane person, an idiot, or a person of unsound mind. It was unnecessary to show that she was an idiot. Here the pauper was an insane person, and as such could not acquire a settlement—*Cathcart Parish Council v. Glasgow Parish Council*; *Kirkintilloch Parish Council v. Eastwood Parish Council*, *supra*. She was certified insane in 1905. The certificate was not conclusive of insanity in 1899, but an important item of evidence—*Rutherglen Parish Council v. Glenbucket Parish Council*, *supra*. The evidence showed that her mind became dormant in pupilarity, and continued so from the age of six till the date of the certificate. Between these dates the pauper was a perpetual pupil—*Lawson v. Gunn*, November 22, 1876, 4 R. 151, 14 S.L.R. 118.

LORD LOW—The question in this case is whether the pauper Betsy M'Phee was, when she attained the age of puberty, capable of acquiring a settlement for herself. It is settled that if a pauper is a congenital idiot or is insane, he or she must be regarded as incapable of acquiring a settlement. That has long been recognised in the case of the congenital idiot. But while there were many dicta to the effect that a lunatic, although not certified, was incapable of acquiring a settlement, that was not actually decided until the case of *Cathcart Parish Council v. Glasgow Parish Council*, 1906, 8 F. 870, when this Division held that a person who was in fact insane, although not certified as a lunatic, was incapable of acquiring a residential settlement.

The pauper in the present case attained the age of puberty in 1899, and in 1905 she was certified to be insane, and was committed to Smithston Asylum, where she has been detained ever since. I assent to the argument which was pressed on us for the pursuers that the fact that the pauper was certified in 1905 does not justify the inference that she was insane in 1899, although I agree with the Lord Ordinary that the certificate is an important item of evidence. A great deal of evidence was led as to the precise mental condition of the pauper. But no one says that she was improperly certified in 1905, and no one says that she has been improperly detained since that date, so that as to her condition in 1905 there is no room for doubt or discussion.

Now, the evidence in regard to the pauper's condition stands thus—When a very young child the pauper became totally or almost totally deaf; after that she practically lost the power of articulate speech; she has never been able to do anything but the simplest kind of work; and she was in the habit of leaving her mother and step-father with whom she lived and wandering about the country. There was practically no change in her condition between 1899, when she attained puberty, and the date in 1905 when she was certified to be insane. The evidence certainly shows that no deterioration was going on. In these circumstances it would have been very difficult to say, if it had not been for what happened in 1905, whether the condition of the pauper was one of unsoundness of mind which incapacitated her from acquiring a settlement, or was only one of very low or undeveloped intelligence, which, according to the authorities, would not, for the purposes of the poor law, have rendered her incapable of acquiring a settlement. But in my opinion we do not require to consider that question, because it seems to me that we must hold it to be an ascertained fact that the pauper's condition in 1905 was one of insanity which justified her detention in a lunatic asylum. Therefore as it is proved that her condition in 1899 was the same as her condition in 1905, the natural and indeed inevitable conclusion is that at the former date she was also insane. I am therefore of opinion your Lordships

should adhere to the interlocutor of the Lord Ordinary.

LORD ARDWALL—I concur. The question comes to be one of fact whether this pauper was at the time when she attained the age of puberty an idiot or insane. Now she was certified as a lunatic on 3rd January 1905, and there is no evidence to show that she was in any different condition in 1899; on the contrary, the evidence of those she lived with is to the effect that they saw no change in her. I would only add that apart from the more or less artificial rules that have been laid down in poor law cases and the refinements of medical witnesses, and looking at the matter from the common sense point of view, it is quite plain that the pauper was never, according to the ordinary meaning of language, capable of acquiring a settlement of any sort. She frequently ran away from her people and was taken up by the police as not being able to take care of herself. On every ground, therefore, whether of the decisions already given in poor law cases or of ordinary fact, I am of opinion that the Lord Ordinary's judgment is well founded.

LORD DUNDAS concurred.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for Pursuers—Hunter, K.C.—A. R. Brown. Agent—Thomas Liddle, S.S.C.

Counsel for Defenders—Munro—Jameson. Agents—W. & F. Haldane, W.S.

Saturday, November 20.

FIRST DIVISION.

URQUHART *v.* AIR AND OTHERS.

Burgh—Town Council—Election—Irregularity of Proceedings—Death of Candidate before, but not Known to Returning Officer till after, Commencement of Poll—Stoppage of Poll—Town Councils (Scotland) Act 1900 (63 and 64 Vict. c. 49), sec. 36—Ballot Act 1872 (35 and 36 Vict. cap. 33), sec. 1.

One of three candidates for two vacancies in a town council died on the morning of the polling day, but the returning officer did not hear of the death till after the commencement of the poll. On hearing of it he stopped the poll and declared the two remaining candidates duly elected.

Held that as the Ballot Act 1872, sec. 1, only made provision in the event of a candidate dying before the commencement of the poll for countermanding notice of the poll, which could not be done after the poll had commenced, the returning officer was wrong in stopping the poll, that, accordingly, there had been an irregularity in the proceedings rendering the election abortive, and