COURT OF SESSION.

Thursday, February 21.

OUTER HOUSE.

[Lord Wellwood.

WATSON *v.* BUTCHART.

Poor Law—Pauper Lunatic—Order for Removal of Wife and Children—Reduction—Poor Law Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 77.

A person who had been born in England, and who had no settlement in Scotland, became insane, and was admitted to an asylum and maintained as a pauper lunatic. Thereafter, on the application of the inspector of poor, an order was pronounced for the removal of the pauper lunatic with his wife and children to England.

Held (*per* Lord Wellwood) that the order, so far as the wife and children were concerned, was outwith the powers conferred upon the justices by section 77 of the Poor Law Act of 1845, in respect that the wife and children of a pauper lunatic are not identified with him as in the case of an ordinary pauper, and decree of reduction of the order pronounced.

The Poor Law Amendment (Scotland) Act 1845 (8 and 9 Vict. c. 83), section 77, provides "that if any poor person born in England, Ireland, or the Isle of Man, and not having acquired a parish or settlement in any parish or combination in Scotland, shall be in the course of receiving parochial relief in any parish or combination in Scotland, then and in such case it shall be lawful for the sheriff or any two justices of the peace of any county in which such parish or any portion thereof is situate, and they are hereby authorised and required, upon complaint made by the inspector of the poor or other officer appointed by the parochial board of such parish or combination, that such poor person has become chargeable to such parish or combination by himself or his family, to cause such person to be brought before them, and to examine such person or any witness on oath touching the place of birth or last legal settlement of such person, and to take such other evidence or other measures as may by them be deemed necessary for ascertaining whether he has gained any settlement in Scotland; and if it shall be found by such sheriff or justice that the person so brought before them was born either in England, Ireland, or the Isle of Man, and has not gained any settlement in Scotland, and has actually become chargeable to the complaining parish or combination by himself or his family, then such sheriff or justices shall and they are hereby empowered, by an order of removal under their hands . . . to cause such poor person, his wife, and such of his children as may not have gained a settlement in Scotland, to be removed . . . to England, or Ireland, or the Isle of Man respectively . . . ."

Section 79 provides that, if any person so removed afterwards returns to Scotland and becomes chargeable to the same parish in Scotland, without having obtained a settlement therein, he shall be liable to criminal prosecution, and on conviction, to imprisonment not exceeding two months.

On 30th March 1894 Daniel Watson became insane and was removed to Murthly Asylum by the defender, the Inspector of Poor of the parish of Rattray, and was subsequently maintained as a pauper lunatic in the asylum.

On 10th April the defender applied under the 77th section of the Poor Law Act of 1845 and subsequent statutes to the justices of the peace for the removal of Watson and his wife and family to Tynemouth, England, in which Watson was said to have been born. After hearing evidence on 17th April, the justices on 24th April granted warrant in usual form for the removal of Watson and his wife and three children to Tynemouth.

The present action was raised by Mrs Watson, with consent and concurrence of her husband, Daniel Yallop Watson, who had been liberated from the asylum, as her curator and administrator, and by Daniel Yallop Watson as tutor and administrator-in-law of his pupil children, against Patrick James Butchart, Inspector of the Poor of the parish of Rattray, for reduction of the order above mentioned so far as it ordered the removal of Mrs Watson and her children.

The pursuers averred (Cond. 4)—"The pursuer, Mrs Watson, and her family have not been in receipt of parochial relief. For a considerable time before her husband's removal to the asylum, and until the removal to Tynemouth above mentioned, she by her own industry had supported herself and her family, and she is able by her own industry to support herself and her family in the parish of Rattray, where she had and now has employment. She could get no employment in Tynemouth."

The pursuers pleaded—"(1) The said order of removal being illegal and without statutory warrant as regards the pursuers, they are entitled to declarator and reduction as craved, with expenses."

The defenders pleaded—"(1) The action is incompetent. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons."

The Lord Ordinary (WELLWOOD) on 21st February 1895 granted decree of reduction in terms of the reductive conclusions of the summons, with expenses.

"*Opinion.*—This case raises a novel question in the administration of the poor law. On 30th March 1894 Daniel Watson became insane and was removed to Murthly Asylum by the defender, the Inspector of Poor of the parish of Rattray, and was subsequently maintained as a pauper lunatic in the asylum.

"On 10th April the defender applied under the 77th section of the Poor Law Act of 1845, and subsequent statutes, to the Justices of the Peace for the removal of Watson and his wife and family to Tynemouth, England, in which Watson was said

to have been born. After hearing evidence on 17th April, the Justices on 24th April granted warrant in usual form for the removal of Watson and his wife and three children to Tynemouth.

"The present action is brought by Watson's wife and children concluding for reduction of the removal-order, in so far as it ordered their removal to Tynemouth. Assuming the pursuer Mrs Watson's statements to be true she has sufficient interest to insist in the action. She says she was able to support herself and family at Rattray, and that she could get no employment at Tynemouth; but that she was not in safety to return to Rattray, because if she did so and subsequently became chargeable in Scotland she was liable under section 79 of the Poor Law Act of 1845 to be prosecuted as a vagabond and punished by imprisonment with or without hard labour for a period not exceeding two months.

"The defender pleads that the action is incompetent, and so it certainly would be if Daniel Watson could be regarded as an ordinary pauper. In that case it would have been absolutely in the discretion of the Justices to order the whole family to be removed to England without drawing any distinction between them; and this Court would have had no power to review such a judgment.

"The peculiarity of the case is that Daniel Watson was a pauper lunatic, who in the public interest and by the public law had to be placed in an asylum and maintained at the expense of the ratepayers. It was not a case of ordinary pauperism. The case of a pauper lunatic is now clearly recognised as exceptional in the administration of the poor law, and the ordinary rules and consequences do not apply or attach to it. For instance, the lunacy of a child does not pauperise the father although he is unable to support him in an asylum—*Palmer* v. *Russell*, 10 Macph. 185. Again, the parish of the lunatic's settlement (even if derivative) at the date of his being placed in the asylum remains permanently liable for his support, whatever changes may take place in the settlement of the lunatic's parent. Again, to come nearer the present case the wife of a pauper lunatic is regarded and dealt with as if she were *sui juris*, a widow, or a deserted wife. In the case of *Scott* v. *Beattie*, 7 R. 1047, the question arose whether an able-bodied woman, the wife of a pauper lunatic, was entitled to parochial relief. The Sheriffs held that she was, on the ground that she must be held to be one person with her husband in law, and that the husband being pauperised the wife must be so also. This Court held otherwise, and found that the woman was not a proper object of parochial relief.

"Lord President Inglis said—'If the husband were struck down by sudden illness, he and his family would be entitled to and would get relief, because the husband's power to earn subsistence was gone for himself and family. It is no part of the wife's duty to earn the living of the family—that is the husband's duty—hers is to nurse the children. But that is not the case before us. The husband is insane, and has been separated from his wife on grounds of public policy, and maintained at the public expense. She is practically *sui juris*—his curatorial power is in abeyance—and she is accordingly in the position of an unmarried woman. She has no one dependent on her, and is able to earn a living. That being so, I think the parish cannot be charged with her maintenance. The facts, moreover, of this case do not place the applicant in a better position than that of a deserted wife or widow, able-bodied and without incumbrance, and it is well settled that such persons are not proper objects for parochial relief.'

"If the law thus stated by high authority on the subject, and adopted by the rest of Court, is sound—and I must hold it to be so—it rules this case. The pursuer Mrs Watson, on her husband being placed in the asylum, was left in the position of an unmarried woman, or a widow, or a deserted wife. She fell to be treated as a separate person from her husband, and as on the one hand being able-bodied she was not entitled to receive parochial relief, so on the other hand she was entitled to exemption from the liability to be removed which attaches to the wife of an ordinary pauper.

"But that is not the case before us. The husband is insane, and has been separated from his wife on grounds of public policy, and maintained at the public expense. She is practically *sui juris*—his curatorial power is in obeyance—and she is accordingly in the position of an unmarried woman. She has no one dependent on her, and is able to earn a living. That being so, I think the parish cannot be charged with her maintenance.

"I observe that evidence was led before the Justices that the defender had given Mrs Watson five shillings on the 30th March; but that sum was repaid before the hearing before the Justices, and therefore she could not in any fair sense be said at the date of the order for removal to be 'in the course of receiving parochial relief.' But I do not proceed upon this. I found on the broad facts which are frankly admitted, viz., that the removal order was asked for and made, not on the footing that Mrs Watson was in course of receiving parochial relief, but on the footing that Daniel Watson was the pauper, that he was pauperised by his lunacy and the expenses attendant on it, and that his wife and children were to be removed simply as dependent upon and identified with him. If the pursuer Mrs Watson was not identified with him, the order *quoad* her was bad—a nullity.

"In this view it is not necessary to consider the other grounds of reduction urged by the pursuers.

"It remains to consider whether this Court can set the order aside. If it had merely been that the Justices exercised their discretion badly, or proceeded on insufficient evidence, or admitted incompetent evidence, reduction might have been in-

competent. But, under a petition to remove A and those identified with him, to remove B who for the time at least is not identified with him, is so outwith the powers conferred by the statutes as to ask for the interference of this Court. I am not surprised that the Justices should have made the order craved, because the objection was novel and difficult. But a question of principle is involved, which, once settled, is easy of application, and I feel bound to give the pursuers the remedy they ask."

Counsel for the Pursuers—D. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Defender—Craigie. Agent—James Russell, S.S.C.

Tuesday, March 19.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

COUNTY COUNCIL OF DUMFRIES, &c. *v.* PHYN, &c.

Sheriff — Justice of the Peace — Distribution of Criminal Business—Action by County Council and Chief-Constable—Competency — Title to Sue — Police Act 1857 (20 and 21 *Vict. cap.* 72), *secs.* 12 *and* 26.

The County Council and the Chief-Constable of a county brought an action of declarator against the Procurator-Fiscal of the Sheriff Court and the Sheriff to have it found and declared that the said Fiscal was bound to follow forth and dispose of all criminal charges competently reported to him by the said Chief-Constable, by any of the constables under him, or by any of Her Majesty's lieges, and if proceedings were brought to bring the same before the Sheriff Court of the county, and that the Fiscal and Sheriff were not entitled to transfer charges reported to them to the Court of the Justices of the Peace. The Court (*aff.* judgment of Lord Wellwood) *dismissed* the action as incompetent, holding (1) that the duty of the Chief-Constable and of the constables under him was to bring offenders before a magistrate; that in discharging this duty they were bound to obey the orders of the Sheriff and Justices, and that they had no concern with the subsequent prosecution of offenders except to lend aid when called upon; and (2) that the question whether prosecutions should be instituted before the Sheriff or the Justices of the Peace, being one of administration and not of law, was for the Lord Advocate and not the Court to determine.

Held, further, that the County Council, having no responsibility as to the distribution of criminal business, had no title to sue an action for the purpose of determining that distribution.

The County Council of Dumfries and William Gordon, Chief-Constable of the said county, brought an action against Charles Steuart Phyn, Procurator-Fiscal of the Sheriff Court of Dumfriesshire, and Richard Vary Campbell, Sheriff of Dumfries and Galloway, to have it found and declared "that the defender the said Charles Steuart Phyn is bound to follow forth and dispose of all criminal charges which may be competently reported to him, whether by the pursuer the said William Gordon, or by any of the constables acting under the said William Gordon, or by any of Her Majesty's lieges, either by bringing no proceedings, or if proceedings are brought, by bringing such proceedings before the Sheriff Court of the county of Dumfries, and that the defenders the said Charles Steuart Phyn and Richard Vary Campbell are not entitled to remit or transfer any charges reported as aforesaid to the Court of the Justices of Peace of the county of Dumfries, or to the Procurator-Fiscal of the said Court, or to any other court or procurator-fiscal whatever."

The pursuers averred, *inter alia*—"(Cond. 2) The Chief-Constable is responsible for the detection and prevention of crime in his county, and he and the constables forming the force under his orders are directed by the Police Act 1857 to bring before the Sheriff or Justices of the Peace persons accused or suspected of any crime or offence. . . . (Cond. 3) In Dumfriesshire there is a Justice of Peace Court Procurator-Fiscal as well as a Sheriff Court Procurator-Fiscal, and the said pursuer in the exercise of his discretion sent some of the cases reported to him to the Procurator-Fiscal of the Justice of Peace Court. He found, however, that the result was most unsatisfactory and detrimental to the maintenance of order in the county. He accordingly refrained from reporting any common law criminal charges to the Procurator-Fiscal of the Justice of Peace Court, and sent them all to the Procurator-Fiscal of the Sheriff Court. In this he took what, in his opinion, was the best course to diminish and prevent crime in the county, and in doing so he acted with the knowledge and approval of the Standing Joint-Committee and of the County Council. The averments in the answer hereto, as to the practice in the country as to dealing with common law cases, are denied. No such cases (with three exceptions, in consequence of the Sheriff Court Fiscal and his deputy being unavailable at the time and the accused being in custody) have been sent to the Justice of Peace Fiscal since 18th August 1891. . . . (Cond. 5) On 21st December 1891 the defender Sheriff Vary Campbell issued an order instructing the Chief-Constable 'to revert to and follow the practice of his office as established under his predecessor with reference to the disposal of common law offences.' An order in the same terms was issued by the Justices in Quarter Sessions on 6th January 1892. These orders, the pursuers were advised, were *ultra vires* and illegal, and