lodged to the Auditor to tax and to report: Find that in all questions with the pursuer under this action the defender is not entitled to deduct the expenses which he has incurred in this action or those in which he has been found liable to the pursuer from the trust estate of the deceased Dr Anderson; *Quoad ultra* reserve the defenders' right of relief against said estate; Find the defender liable in expenses since the date of the interlocutor reclaimed against, and remit," &c.

Counsel for the Pursuer and Reclaimer — Salvesen, K.C. — Clyde, K.C. — F. C. Thomson. Agents—J. & D. Smith Clark, W.S.

Counsel for the Defender and Respondent — W. Campbell, K.C. — Ingram. Agent — Thomas Henderson, W.S.

Friday, November 8.

FIRST DIVISION.

PARISH COUNCIL OF THE PARISH OF KEITH *v.* PARISH COUNCIL OF THE PARISH OF KIRKMICHAEL.

Poor — Settlement — Derivative Residential Settlement — Retention—Lunatic — Non-Residence—Poor Law (Scotland) Act 1898 (61 *and* 62 *Vict. cap.* 21), *sec.* 1.

A lunatic who had a derivative residential settlement, derived from her father, in the parish of K. continued for more than five years after his death to reside out of the parish of K. in an asylum, where she was maintaincd by a brother. At the end of that period she became chargeable as a pauper. *Held* in a special case between the parish of K. and the parish of her birth settlement that she had lost her settlement in the parish of K. by non-residence, and that her birth parish was liable.

Crawford and Petrie v. *Beattie*, 24 D. 357; and *Thomson* v. *Kidd and Beattie*, 9 R. 37, 19 S.L.R. 25, *followed.*

Elsie Gordon Grant, daughter of James Grant, was committed to the Royal Lunatic Asylum, Aberdeen, on 20th November 1885 as a private patient, and with the exception of two short intervals, viz., from 31st March 1893 to 20th April 1893, and from 29th May 1894 to 29th June 1894, during which she resided in family with her father James Grant, she continued to reside there as a private patient until 1st April 1900, when she was transferred to the pauper roll.

James Grant died in January 1895. His daughter Elsie was born on 19th March 1866 in the parish of Kirkmichael, in which her father James Grant resided for about two years after her birth She lived in family with her father until she was committed to the asylum in 1885. For the twenty-two years preceding his death her father resided in the parish of Keith, where he acquired a residential settlement which he possessed at his death. Until he died James Grant maintained his daughter in the Aberdeen Asylum, and after his death she was maintained there by her brother until 1st April 1900, when she became chargeable.

Questions having arisen as to what parish was liable for the pauper Elsie Grant, a special case was presented for the opinion of the Court of Session.

The parties to the special case were (1) the Parish of Keith, and (2) the Parish of Kirkmichael.

The first party maintained that on 1st April 1900, when Elsie Grant became a pauper, her settlement was in the parish of Kirkmichael as the parish of her birth; and the second party maintained that at that date she was chargeable to the parish of Keith, in respect of her having a derivative settlement in that parish through her father.

The questions of law were—"(1) Was the settlement of the pauper, the said Elsie Gordon Grant, in the parish of Keith, on 1st April 1900, when chargeability commenced, and is the parish of Keith bound to pay for her maintenance subsequent to that date? or (2) Was the settlement of the pauper, the said Elsie Gordon Grant, in the parish of Kirkmichael, on 1st April 1900, when chargeability commenced, and is the parish of Kirkmichael bound to pay for her maintenance subsequent to that date?"

Argued for the first party — The pauper had lost the residential settlement in the parish of Keith which she had derived from her father, because during a period of four years after his death she had not "resided in such parish continuously for at least one year and a day" — Poor Law (Scotland) Act 1898 (61 and 62 Vict. cap. 21), sec. 1. It was said that because the pauper was insane she was incapable of losing her derivative settlement. This proposition was supported by the decision in *Melville* v. *Flockhart*, December 19, 1857, 20 D. 342; but that case had been overruled by the Whole Court case of *Crawford and Petrie* v. *Beattie*, January 25, 1862, 24 D. 357. A lunatic who had acquired a residential settlement before becoming insane might by non-residence during insanity lose that settlement—*Thomson* v. *Kidd and Beattie*, October 28, 1881, 9 R. 37, 19 S.L.R. 25. The fact that the pauper's settlement was not acquired by herself but derived from her father made no difference — *Boyd* v. *Beattie and Dempster*, July 12, 1882, 9 R. 1091, Lord Young p. 1095, 19 S.L.R. 812; *Parish Council of Falkirk* v. *Parish Councils of Govan and Stirling*, June 12, 1900, 2 F. 998, Lord Kinnear, p. 1010, 37 S.L.R. 759—and the pauper's absence from the parish of Keith began to take effect to deprive her of her derivative settlement as soon as her father died — *Fraser* v. *Robertson*, June 5, 1867, 5 Macph. 819, Lord Cowan p. 822, 4 S.L.R. 74. The Lunacy (Scotland) Act 1857 (20 and 21 Vict. cap. 71), sec. 75, which provided that a pauper lunatic should be chargeable to the parish in which he had a settlement at the time of his reception into a district asylum, did not apply in the circumstances

of the case. Elsie Grant was not a pauper lunatic when admitted to the asylum, and that fact distinguished the present from the case of *Kirkwood* v. *Lennox*, July 10, 1869, 7 Macph. 1027, 6 S.L.R. 670.

Argued for the second party—The parish of settlement was to be determined by the settlement of the pauper at the date when admitted to the asylum. No doubt by non-residence a lunatic might lose his settlement if an acquired one, but the cases quoted by the first party did not apply to a derivative settlement—*Palmer* v. *Russell*, December 1, 1871, 10 Macph. 185, 9 S.L.R. 134—and the fact that part of Elsie Grant's residence as a lunatic was not that of a pauper lunatic made no difference. The pauper was a lunatic in the sense of sec. 75 of the Lunacy (Scotland) Act 1857, and her settlement at the date of her admission to the asylum was in the parish of Keith, the parish of her father's settlement. She was never forisfamiliated, her father's settlement was always hers, and in the case of a perpetual pupil absence in an asylum did not lead to loss of settlement.

At advising—

LORD ADAM—This is a case between the parishes of Keith and Kirkmichael. The pauper whose settlement is in question had a residential settlement in the parish of Keith. The question is whether she has retained that settlement. If she has, then Keith is liable for her maintenance. If she has not, then Kirkmichael, which is the parish of birth, is liable.

The pauper Elsie Gordon Grant on 20th November 1885 was committed to the Royal Lunatic Asylum, Aberdeen, as a private patient. She was then about 19 years of age. She has continued to be an inmate of that asylum ever since, with the exception of two short intervals from 31st March to 20th April 1893, and from 29th May to 29th June 1894, when she was removed by her father and lived in family with him in the parish of Keith.

Her father died in January 1895. During his life she was maintained in the asylum by him, and after his death by her brother, until 1st April 1900, when she was transferred to the pauper roll.

It is admitted that the pauper's father had a residential settlement in the parish of Keith at the time of his death.

It is not at all doubtful that the pauper's settlement was that of her father. She was never forisfamiliated, and must be regarded as having been a child in his family. She never, in fact, appears to have had an independent existence—*Fraser* v. *Robertson*, 5 Macph. 819. Her settlement, therefore, on her father's death in January 1895 was a residential settlement in the parish of Keith derived from him, and the question, as I have said, is whether she has retained that settlement.

It will be observed that the pauper has been continuously absent from the parish of Keith for upwards of five years since her father's death, and has not resided there for one year continuously or at all during these years. Unless, therefore, the fact that she was a lunatic during this time is to make a difference, I think there can be no doubt that she has failed to retain her residential settlement in that parish under the provisions of the 1st section of the Poor Law Act 1898.

I think this case is ruled by the case of *Crawford*, 24 D. 357. In that case the pauper's birth settlement was in the parish of Eaglesham. Prior, however, to September 1851, he had acquired a residential settlement in the Barony Parish of Glasgow. He then left that parish and resided in the parish of Wishaw till August 1854. He then became insane, and was removed by his friends to a lunatic asylum in the parish of Govan, where he was supported by them till July 1856; when he became a pauper he had never returned to the Barony Parish. It will be observed accordingly that the pauper had been for upwards of four years continuously absent from the Barony parish, without having resided there one year continuously, but that he became a lunatic before he had been three years absent from the parish.

The question was, whether the pauper had failed to retain his residential settlement in the Barony Parish because he had not resided therein for one year out of the five years succeeding 1851, when he left it.

The case went to the Whole Court. A minority, consisting of Lords Ivory and Deas, were of opinion that a question of settlement was to be determined by the state in which matters stood at the date of the pauper's lunacy; that as a lunatic could not acquire, so neither could he lose a settlement; and that therefore as the pauper had been less than three years absent from the Barony Parish when he became insane, he had not lost his settlement in that parish.

The majority, however, were of a different opinion. They held, overruling the case of *Melville* v. *Flockhart*, 20 D. 341, that the full period of time prescribed by the statute having elapsed between the date of the pauper's migration and the date of his becoming chargeable, the only question under the 76th section of the statute was, whether during that interval he had or had not resided continuously in the parish for at least one year, and as that question could not be answered in the affirmative he could not be held to have retained his settlement, and that it was immaterial that during the latter part of the time which elapsed after he left the Barony Parish he had been inflicted with insanity.

That case was followed by the case of *Thomson* v. *Kidd*, 9 R. 37. In that case the pauper had a residential settlement in the Barony Parish in the year 1864. He then became insane and a proper object of parochial relief. He continued to be a lunatic pauper down to the year 1873, and that parish therefore continued to be liable for his maintenance. In 1873, although he continued to be a lunatic, he ceased to be a pauper, having then been removed by his friends, with whom he resided and by whom he was supported until 1879, when he again became a pauper. During these

six years he continued to be a lunatic but was never in the Barony Parish. The Court held that he had failed to retain his settlement in the Barony Parish. It will be observed that in that case, as in this, the pauper was a lunatic during the whole period of his absence from the parish of his residence.

I cannot distinguish these cases from the present. It is true that they were decided under the 76th section of the Poor Law Act of 1845, and that this case is under the 1st section of the Poor Law Act of 1898, but the two sections are identical as regards this question.

I am therefore of opinion that the first question should be answered in the negative, and the second in the affirmative.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was absent at advising.

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for the First Party — Salvesen, K.C. — W. Brown. Agents — Alexander Morison & Company, W.S.

Counsel for the Second Party — Clyde, K.C. — Deas. Agent — Charles George, S.S.C.

Thursday, November 14.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

COOPER AND COMPANY *v.* M'GOVERN.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *secs.* 4 *and* 7 — *Railway Company's Carter Injured near Factory while Collecting Goods for Conveyance—Work Ancillary or Incidental to the Business of a Factory —On In or About a Factory.*

A carter in the employment of a railway company was injured near the entrance to a factory while he was engaged collecting goods from the factory for conveyance on his cart to the station and thence by rail to the sale premises of the occupiers in other places. The occupiers of the factory did not do their own carting but contracted with the railway company to do it, and the railway lorries called daily at the factory. The rates paid to the railway company covered the collection of the goods at the factory in Glasgow and the delivery at the warehouse in Leeds or London belonging to the firm, as well as the railway transit. At the time of the accident the carter's lorry was standing on the opposite side of the street from the factory, 32½ feet therefrom, and the carter carried goods to it, but did not enter the pend close of the factory. The accident occurred at the lorry. Upon a claim under the Workmen's Compensation Act 1897, *held* (1) that the occupiers of the factory were undertakers of the work on which the carter was employed; (2) that the cartage was part of the business carried on in the factory, and was not merely ancillary or incidental thereto; and (3) that the accident occurred "about" a factory—Lord M'Laren *dissenting* upon the first point, and *reserving* his opinion as to points (2) and (3).

In a case stated for appeal under the Workmen's Compensation Act 1897, at the instance of Cooper & Company, in a claim against them by Helen M'Groary or M'Govern, widow, as an individual and as tutrix-at-law for her pupil child, the Sheriff-Substitute (BALFOUR) stated the following facts as admitted or proved:—"(1) That on 28th November 1900 Edward M'Govern (who was employed as a carter with the Glasgow and South-Western Railway Company) was lifting goods with his lorry from the appellants' premises in James Watt Street, Glasgow, to be taken to the College Street Station, and thence carried to Leeds or London. (2) That the appellants' premises in James Watt Street are occupied as sausage works, and they are a factory within the meaning of The Workmen's Compensation Act. (3) That about half-past four o'clock on the afternoon in question M'Govern was at the appellants' premises in James Watt Street, and he loaded certain goods there on his lorry, but he was not in the pend close of the appellants' premises, but remained on the street with his lorry and transferred the goods in question from the appellants' premises to his lorry, which was standing on the opposite side of the street close to the appellants' premises, the street being 32½ feet broad from kerb to kerb. (4) That while M'Govern was engaged in this work he got jammed between his own lorry and another lorry standing close to it, and he sustained injuries from which he ultimately died, after being removed to the infirmary. (5) That the goods which M'Govern carried to the College Station belonged to the appellants, and were being conveyed from their Glasgow premises to their Leeds and London premises by the Glasgow and South-Western Railway Company. (6) That the carrying of their goods from their premises in Glasgow to their premises in Leeds and London is part of the business of the appellants. (7) That the appellants do not themselves cart their goods from their premises in Glasgow to the railway station in Glasgow, but they have an arrangement with the Glasgow and South-Western Railway Company for carting, and the railway company's servants call at the appellants' premises in James Watt Street daily and lift the goods and carry them to the railway station, and on the said 28th November 1900 M'Govern lifted goods from the appellants' premises in James Watt Street under the contract. (8) That the railway company charged the appellants with rates which included collection at their warehouse and delivery in London or Leeds.