On the argument for the respondents I am asked to assume that the Sheriff entered into an accounting, and held that the work of the fortnight for which wages are sued was really covered by the alleged previous over-payments. That would be a startling result; it makes one look at the case more closely. When attention is paid to the claim in the Sheriff Court I see that the appellant lays her claim of £1, 15s. 7½d. as for wages from 17th August to 1st September 1905, for piece-work services rendered by her to the defenders during that period. Now, I have heard nothing to suggest that the Sheriff negatived that in assoilzieing the defenders. It rather appears to me that he did not negative it, and that he assumed that the fortnight's wages were earned, but held that they were compensated by some over-payments made in respect of previous work. I am prepared to hold that the defence was really and truly a counter claim, and that there should have been notice of it by service, in order that the pursuer might have an opportunity of meeting it. That being so, I think I must proceed under section 31 and hold that there was such deviation from the statutory enactments as has prevented substantial justice from being done. I therefore sustain the appeal, recal the decree of the Sheriff-Substitute, and remit to him to decern in terms of the summons.

The Court sustained the appeal.

Counsel for Appellant—Mercer. Agent—Archibald Hamilton, Solicitor, Glasgow.

Counsel for Respondents—J. R. Christie. Agents — Middleton & Brown, Writers, Glasgow.

COURT OF SESSION.

Tuesday, June 5.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

CATHCART PARISH COUNCIL *v.* GLASGOW PARISH COUNCIL.

Poor — Settlement — Capacity to Acquire Residential Settlement—Insanity—Certification—Poor Law (Scotland) Act 1898 (61 *and* 62 *Vict. c.* 21), *sec.* 1.

The fact that a pauper is insane during the necessary period of residence is *per se* sufficient to prevent him from acquiring a settlement in a parish. It is not essential that his insanity should have been formally certified.

Facts upon which the Court *held* that a pauper was insane and incapable of acquiring a settlement.

The Poor Law (Scotland) Act 1898, sec. 1, enacts—"Section seventy-six of the principal Act (viz. 8 and 9 Vict. c. 83, sec. 76) is hereby repealed, and in lieu thereof it is enacted as follows:—'From and after the commencement of this Act no person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall, either before or after, or partly before and partly after, the commencement of this Act, have resided for three years continuously in such parish and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any such parish shall be held to have retained such settlement if during any subsequent period of four years he shall not have resided in such parish continuously for at least one year and a day: Provided always that nothing herein contained shall, until the expiration of four years from the commencement of this Act, be held to affect any persons who at the commencement of this Act are chargeable to any parish in Scotland.'"

The Parish Council of the Parish of Cathcart brought an action against the Parish Council of the Parish of Glasgow in which they sought declarator "that the Parish of Glasgow was on 29th July 1903, and still is, the parish of the legal settlement of John Nairn Baillie, presently an inmate of Riccartsbar Asylum, Paisley, and that on the said 29th day of July 1903 the said John Nairn Baillie became, and has ever since continued to be, a proper object of and entitled to parochial relief. And further, it ought and should be found and declared by decree foresaid that the defenders are liable to relieve the pursuers of the whole sums of money already advanced or incurred by pursuers on account of the said John Nairn Baillie on and since the said 29th day of July 1903, amounting, as at 15th November 1904, to the sum after specified, as well as of all further sums of money advanced or to be advanced by pursuers on account of the said John Nairn Baillie since the last-mentioned date, together with interest due and to become due thereon at the rate of 5 per centum per annum. And the defenders ought and should be decerned and ordained by decree of the Lords of our Council and Session to make payment to the pursuers of (*First*) the sum of £45, 11s. 7d., being the amount disbursed by the pursuers in relieving the said John Nairn Baillie from the said 29th day of July 1903 till the said 15th day of November 1904, conform to account which will be produced at the calling hereof, with the interest of the several advances of which said amount is composed at the rate of 5 per centum per annum from the respective dates of payment thereof till payment; and (*Second*) all other advances or disbursements that have since been, or may hereafter require to be, made by the pursuers on account of the said John Nairn Baillie during the time he continues a proper object of parochial relief, with interest thereon at the foresaid rate from the date of the respective payments of the same by the pursuers till payment."

The facts of the case are fully set forth in the opinion of the Lord Ordinary (ARDWALL), *infra*.

The pursuers pleaded, *inter alia*—"1. The legal settlement of the said John Nairn Baillie being in the parish of Glasgow, and he having been since 29th July 1903 a proper object of parochial relief, the pursuers are entitled to decree of declarator as concluded for. 2. The parish of Glasgow is liable as concluded for in respect that (1) It is the parish of the pauper's birth; (2) He has lost by absence any residential settlement he may have acquired in the parish of Govan or elsewhere; (3) During his residence in the parish of Cathcart he has all along been mentally incapable of losing his said settlement in the parish of Glasgow and of acquiring a settlement by residence in the parish of Cathcart. 3. The defenders, as representing the parish of the settlement of John Nairn Baillie, are liable for the maintenance of the said pauper, and are bound to relieve the pursuers of the advances made, or which may hereafter be made, by them on his behalf."

The defenders pleaded, *inter alia*—"2. The legal settlement of the said John Nairn Baillie not being in the parish of Glasgow, the defenders should be assoilzied."

On 12th July 1905 the Lord Ordinary pronounced the following interlocutor:—"Finds (1) that during the period from Whitsunday 1895 to July 1903 John Nairn Baillie was resident in the parish of Cathcart, but that during that time he was disqualified by insanity from acquiring a settlement by residence in that parish; (2) that he has not a residential settlement in any other parish; and (3) that he was born in the parish of Glasgow, and that that parish is the legal settlement of the said John Nairn Baillie, and liable for his maintenance: Therefore finds, declares, and decerns in terms of the whole conclusions of the summons," &c.

Opinion.—"In this case the parish of Cathcart seek to have the parish of Glasgow declared liable for the support since 29th July 1903 of a pauper lunatic, John Nairn Baillie, presently an inmate of Riccartsbar Asylum, Paisley.

"It is not denied that the parish of Glasgow is the parish of the pauper's birth, and if he has not acquired a residential settlement in the parish of Cathcart it is admitted that the parish of his birth is liable, as he has lost by absence any residential settlement he may have acquired in the parish of Govan or elsewhere. There is no doubt that he has been resident in the parish of Cathcart for a length of time necessary to acquire a residential settlement there, and the only question on which the decision of the present case depends is, whether during his residence in the parish of Cathcart the pauper has all along been mentally incapable of losing his birth or other settlement and of acquiring a settlement by residence in the parish of Cathcart.

"The facts of the case are as follows:—John Nairn Baillie, the pauper, was born in the parish of Glasgow on 19th December 1871. Some few years after his birth his father died of consumption, and it may be here added that he lost a brother and two sisters from that complaint. He himself had consumption, which began at fifteen years of age and lasted some years, and one lung still bears traces of former disease. At eighteen months old John Baillie had measles, and at the same time inflammation of the brain. At the age of fifteen years he had bleeding of the lungs and was off work eighteen months. After being engaged in various employments he finally became a druggist's assistant and served as such in various places till Christmas 1894. At that time he came home to study for a dispenser's certificate. His mother at this time was living in Govanhill where she resided for about three or four years from 1891 to Whitsunday 1895. That was in the parish of Govan. After that she removed to No. 10 Gray Street, Langside, which is in the parish of Cathcart, where she lived for nine years down to Whitsunday 1904. John Baillie resided with his mother from about Christmas 1894 till July 1903, and from Whitsunday 1895 till July 1903 he was accordingly resident in the parish of Cathcart. This then is the period during which his mental condition is important, with a view of determining the liability of the parties to this action.

"Three weeks after Christmas 1894 his mother Mrs Baillie says that a change came over him. He got excited one morning and rushed from the kitchen into his room. Then he went back into another room where his sister was lying in bed ill, and told her that the foundations were falling. His mother saw something was wrong, and said, 'Oh John, what's this?' He burst out crying. She thought that something had gone wrong with his mind, and after trying to set the toilet cover on fire with some matches, he ran out of the house only partially dressed and his brother ran after him and got him back. Two days after Mrs Baillie sent for Dr Alexander Nairne, who is now dead, but she says that he wanted to send John Baillie to an asylum. Dr Stuart Nairne was consulted by his brother Dr Alexander Nairne, and both of them continued to visit John Baillie for some time. Dr Stuart Nairne was examined on commission, and says he visited John Baillie frequently, but he speaks specially to a visit in March 1895, at which time, he says, he was of opinion that he was insane, and he repeats this distinctly upon cross-examination, and in re-examination he says that the symptoms that he observed at that time were his noise, mutterings, and violence, and also hallucinations. It may be observed that Dr Stuart Nairne is an uncle of John Baillie.

"On 27th February 1895 Dr J. V. Wallace, who is district medical officer for the parish of Govan Combination, was called in to see John Baillie on the instructions of the Parish Council. He called and examined him and says that he found him to be suffering from insanity. He was excitable and nervous in all his movements, and erratic in his behaviour. He then says—'I considered that he was in a fit state then to be certified as insane, and I would

have been prepared if necessary to certify him as insane at that time.' I consider this to be most important evidence, as Dr Wallace is a person of very large experience, having examined, as he tells us, fully two thousand cases of persons considered insane. He did not certify John Baillie to be insane at that time, because his mother was averse to his being sent to an asylum, and accordingly the application for his admission to an asylum which had been drawn out was never returned by his mother. The only other doctor who examined John Baillie at this time was Dr Barrie, but he is now dead. After this attack, however, and between April and July 1895, John Baillie had a lucid interval, and during that time he applied for and got a situation in a chemist's shop in Maryhill, Glasgow, where he remained for a short time, apparently about a fortnight, but he had to leave it, and his mother describes how one morning he got up to go to his work, tried to take his breakfast, and could not do so, and when his mother inquired what was the matter, he said, 'It's my head,' and he has not been back to work of any kind since, nor has he been fit for it, and from that time onwards, apparently, he has constantly shown symptoms of insanity, though at times he has had lucid intervals. He suspected that his food was being poisoned; he got into excited states; thought there was blood in the room; he sat and muttered to himself; he once or twice attempted violence to his mother, and once or twice to himself by gripping his throat. His excitable turns came on for three or four weeks at a time between 1895 down to 1903, till at last his mother was obliged to have him removed to an asylum. During this time, and especially during his lucid intervals, he could write well, could spell well, could speak distinctly when he did speak, although he was usually silent and melancholy. He took long walks by himself, and was inoffensive for periods of a fortnight or three weeks at a time, till another excited attack came on, and his mother's view is that the effect of the second attack he had in July 1895 continued during the succeeding years till he was taken to the asylum. Besides the evidence of his mother, it seems to me that there is some important evidence given by Dr Russell, whose house is within a hundred yards of where John Baillie lived with his mother. He noticed John Baillie as soon as he came to reside at Langside, and from the very first thought that he was a man of unsound mind, and continued of that opinion down to the time that he was sent to the asylum, although he observed a marked deterioration during that period dating more particularly from June 1900, when he became untidy and slovenly in his habits and dress. On these facts there seems a wonderful unanimity among the skilled witnesses examined to the effect that, probably from the date of the first, and certainly from the date of the second attack in 1895, John Baillie was never of sound mind, and was suffering from what has been called 'adolescent insanity,' a recognised form of brain disease. There are, of course, slight divergences of opinion about the details, but I think the weight of the evidence is to the effect that from 1895 onwards John Baillie must be considered to have been insane, and he certainly is so at present. In answer to the question, 'Would it have been possible to certify him as insane at any time during that period of eight years (*i.e.*, 1895-1903)? Dr Clouston answered, 'I would have had no difficulty in regard to that;' and he says further on, 'His ability to work for a week or so at a time is quite consistent with his being a fit patient for a lunatic asylum during the whole of the period since July 1895;' and Dr Yellowlees, who is called as a witness for the defenders, says, 'I would probably have certified him at the very first and sent him to the asylum. I agree with Dr Wallace that he was certifiable in 1895. There is no doubt about it.' Then he is asked, 'Do you agree with Dr Russell that he was certifiable in 1900?' and he answers, 'It is quite possible; he might or might not have been;' and in answer to questions put by myself he says that he could not say that from 1895 till now John Baillie has ever been perfectly free from brain disease, although he may have been so well during the best intervals that he could not have certified him at these particular times.

"On the whole evidence I have come to be of opinion that from July 1895 to July 1903 John Baillie was a lunatic or insane person, and although not certified as a fit inmate for an asylum yet he was a proper person to be so certified during the whole of that period with the exception of his lucid intervals. Further, I think that he ought to have been certified as a lunatic and sent to an asylum in 1895, and that it is proved that he would have been so sent but for his mother's strong aversion to asylums. It is further clear that, except for about a fortnight at the beginning of his residence in Cathcart, he has done nothing for his own support.

"On these facts the question now is, was John Baillie during his residence in the parish of Cathcart capable or incapable in law of acquiring a residential settlement. On the one hand it seems that no amount of imbecility short of idiocy will render a pauper incapable of acquiring a settlement for himself. See *Parish Council of Kirkintilloch* v. *Parish Council of Eastwood*, 5 F. 274; and *Parish Council of Glasgow* v. *Parish Council of Kilmalcolm*, 6 F. 457, following on the cases of *Cassells* v. *Somerville & Scott*, 12 R. 1155, and *Nixon* v. *Rowand*, 15 R. 191. On the other hand, it seems settled that if a person is insane he cannot during his or her residence in an asylum or in the house of a relative acquire a residential settlement in the parish where he has been residing in a state of insanity. (*Melville* v. *Flockhart*, 20 D. 341, and *Watt* v. *Hannah*, 20 D. 342.)

"I am conscious that it is not easy to see as a mere question of fact why the pauper in this case should be deemed incapable of

acquiring a settlement for himself, and the paupers in the cases of *Kirkintilloch* and *Glasgow* (above quoted) should have been deemed capable of acquiring such settlement. But it has been recognised by the Court that some general rules should be laid down in such matters for the guidance of parishes, even though the application of these rules to particular cases may sometimes appear to produce anomalies. The rule to be gathered from the decisions on this matter seems to be that imbecility will not disable a person from acquiring a residential settlement, but that idiocy or insanity will do so, and, holding as I do that John Baillie was insane from July 1895 till July 1903, I am of opinion that during his residence in the parish of Cathcart he was incapable of acquiring a settlement by residence in that parish, and that, not possessing any other residential settlement, the parish of Glasgow, as the parish of his birth, is liable for his maintenance. I shall therefore decern against the defenders in terms of the conclusions of the summons, with expenses."

The defenders reclaimed, and argued—The pauper had acquired a residential settlement in Cathcart, having in fact resided in the parish for a period of three years. The physical fact of residence was *per se* sufficient to give a settlement, and was the only element requisite (apart from conditions as to begging, &c.) under the regulating statute, viz., the Poor Law (Scotland) Act 1898, section 1. The fact of residence had nothing to do with *animus*—*Crawford and Petrie* v. *Beattie*, January 25, 1862, 24 D. 357, L. J.-C. Inglis at 367; the Lunacy (Scotland) Act 1857, section 75. The question therefore came to be this, had any exception to that statutory rule been established by decision? At most that a certified lunatic in confinement cannot acquire a settlement in the parish of his confinement — *Cassels* v. *Somerville and Scott*, June 24, 1885, 12 R. 1155, at 1159, 22 S.L.R. 772; *Watt* v. *Hannah*, December 19, 1857, 20 D. 342; *Melville* v. *Flockhart*, December 19, 1857, 20 D. 341; *Rutherglen Parish Council* v. *Glenbucket Parish Council*, October 24, 1895, 33 S.L.R. 366; *Edinburgh Parish Council* v. *Cramond and Whithorn Parish Council*, March 26, 1903, 11 S.L.T. 12. There was also, perhaps, the apparent exception of the congenital idiot, explained by his being incapable of forisfamiliation and retaining his father's settlement until death. But even on the assumption that mental capacity or *animus* came into the question, the pauper here had far more of both than others who had been held capable of acquiring settlements—*Nixon* v. *Rowand*, December 20, 1887, 15 R. 191, 25 S.L.R. 175; *Parish Council of Kirkintilloch* v. *Parish Council of Eastwood*, December 5, 1902, 5 F. 274, 40 S.L.R. 179; *Parish Council of Glasgow* v. *Parish Council of Kilmalcolm*, March 1, 1904, 6 F. 457, 41 S.L.R. 347, *aff.* H.L., May 29, 1906, 43 S.L.R. 639; *Parish of Haddington* v. *Parish of Dunbar*, December 19, 1837, 16 S. 268. The pauper here too was only intermittently insane—See *Greig* v. *Chisholm*, December 19, 1857, 20 D. 339.

Argued for pursuers and respondents—(1) The pauper here was in fact insane. (2) An insane person being without any legal capacity could not acquire a settlement, and no amount of residence without that capacity was of any effect. If capacity had nothing to do with the matter, it was surely strange that it was the special point on which all the reported decisions turned — See as authorities favourable to the respondents the cases cited *supra* and *Greig* v. *Ross*, February 10, 1877, 4 R. 465, L.J.-C. at 467, 14 S.L.R. 346. There was no authority for the doctrine that confinement or a medical certificate were necessary to prevent acquisition of settlement.

LORD JUSTICE-CLERK — There are two questions which must be answered before a decision can be given in this case—(1) Was the pauper in fact insane? and (2) Is it the legal effect of ascertained insanity that the sufferer cannot acquire a settlement? As regards the first question I have no difficulty. The evidence satisfies me that the pauper was in fact a lunatic, and practically, though not officially, certified as such, the certification not being followed out by restraint in an asylum. The Lord Ordinary has gone very fully into the facts, and I entirely concur with his reading of them as expressed in his note.

Upon the second question I also agree with him. It was strongly maintained in argument that it was not sufficient to prevent the acquiring of a settlement that the pauper should be proved to be insane, and that it was necessary that he should be formally certified, otherwise however insane he might be in fact, he might still acquire a settlement for himself. It was maintained that this was fixed by decisions already pronounced. I am unable to agree that any such rule has been laid down in previous judgments. Were I satisfied that such a rule was established I should bow to it, although I confess it would be difficult for me to understand the principle upon which it could be based. The fact as it appears to me to be inquired into is not whether certain proceedings have taken place, but what was the mental state of the pauper. If he was mindless in the sense either of amentia or dementia, then it cannot be said of him that he could acquire a settlement. The want of all legal capacity is the matter which in my opinion is decisive. And holding as I do that the proof is conclusive on that question, I feel bound to hold in law that the pauper could not acquire a settlement by residence. The recent decision in the House of Lords in the case of *Kilmalcolm* is quite consistent with this view. I am therefore in favour of adhering to the interlocutor of the Lord Ordinary.

LORD KYLLACHY—I am of the same opinion.

LORD STORMONTH DARLING—We were asked at the close of the discussion here to delay giving judgment till the House of

Lords had decided the appeal in the case of *Kilmalcolm*, lest their Lordships might express opinions having a bearing on this case. Judgment has now been given in that appeal, which raised the question whether residence in a charitable institution by a pauper unable from mental and bodily weakness to earn her living was enough to constitute a residential "settlement" in the parish containing the charitable institution. Plainly the question of most importance there to the parishes interested turned on the charitable character of the institution as rendering the parish which contained it possibly liable for a number of imported paupers. Accordingly I find that the noble and learned Lords dealt chiefly with this aspect of the case, and decided that the statutory condition of the pauper having "maintained himself without recourse to common begging either by himself or his family, and without having received or applied for parochial relief," in order to the acquisition of a residential settlement, was a condition entirely independent of where the means came from, so long as they did not come from common begging or the poor fund of the parish. But I also find that both Lord James of Hereford and Lord Robertson (with whom the Lord Chancellor and Lord Atkinson concurred) expressly said that the incapacity through mental weakness to earn the means of support must be short of "lunacy or idiocy," or to put the same thing in other words, must be of a kind "not involving insanity." In none of the cases has it ever been laid down that a medical certificate of lunacy was indispensable, or that insanity might not be proved as a fact in the case. On the contrary, Lord President Inglis in the case of *Cassels* v. *Somerville & Scott*, 12 R. at p. 1159, after stating it as settled by the case of *Melville* v. *Flockhart*, 20 D. 341, that a person who was boarded in an asylum could not acquire a settlement in the parish in which the asylum was situated, and by the case of *Watt* v. *Hannah*, 20 D. 342, that the same result followed if the person was sent to be boarded under a keeper in respect he was a lunatic, went on to say—"The pauper here was not sent to be boarded in Lesmahagow because he was insane, but because, his mind being weak, he was not capable of earning a livelihood like other men in his position. He was not in any sense a lunatic." And his Lordship added—"It might have been shown that though he had not been certified a lunatic he was nevertheless one in fact."

Now that is an averment which is made here, the reason which Cathcart assigns for his not being sooner confined as a lunatic being his mother's great disinclination to sanction such a step. Agreeing as I do with your Lordship and the Lord Ordinary that these averments are amply proved, I do not find it necessary to resume the passages in the evidence on which that opinion is founded. It is only because as Lord Ordinary I had something to do with both the *Kilmalcolm* case and the *Kirkintilloch* case (5 F. 274) that I have thought it right to make these few observations. I notice that in the latter of these two cases Lord Adam intimated (at p. 282) that he had come to the same conclusion as I had done as Lord Ordinary, viz., that the pauper's mind was weak but not disordered, and that he was not by any means an idiot. Here I do not think that the pauper was an absolute idiot, but I do think that his mind was so disordered as to make him a lunatic during the whole period of his residence in the parish of Cathcart outside the asylum, and that he was thereby disqualified from acquiring a residential settlement.

LORD LOW—I concur.

The Court pronounced this interlocutor—

"Refuse the reclaiming note: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor reclaimed against, and decern."

Counsel for Reclaimers—Younger, K.C.—Orr Deas. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents—Dean of Faculty (Campbell, K.C.)—Hunter, K.C.—Wark. Agents—J. & J. Galletly, S.S.C.

Saturday, June 2.

FIRST DIVISION.

[Lord Johnston, Ordinary.

LEE *v.* POLLOCK'S TRUSTEES.

Process — Abandonment — Withdrawal of Minute of Abandonment—Right to Withdraw—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 10—*Act of Sederunt* 11*th July* 1828, *sec.* 115.

The pursuer in an action, who has lodged a minute of abandonment, has an absolute right to withdraw such minute, the defender's remedy being to move for absolvitor in the action on the ground of delay, which motion the Lord Ordinary may grant if consistent with the justice of the case, or may refuse allowing the pursuer to proceed subject to conditions as to expenses.

The Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 10, after providing for the making up of a record which shall foreclose the parties in point of fact, *inter alia* enacts—"the pursuer having it in his power notwithstanding to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent." The Act of Sederunt of July 11, 1828, passed in pursuance of the Judicature Act 1825, by sec. 115 enacts—"And whereas it is enacted by section 10 of the Act that the pursuer shall have it in his power to abandon the cause on paying full expenses to the defender, and to bring a new action if otherwise competent, it is declared that this applies only to the case of the pursuer abandoning his cause before an interlocutor has been pronounced assoilzieing the defen-