

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

that the vacancies fell to be filled up by the town council in one or other of the two ways *ad interim* prescribed by section 36 of the Town Councils (Scotland) Act 1900, viz., either (1) by the town council themselves after certain preliminaries, or (2) by a special election to be held as early as may be under the provisions of the Act.

The Town Councils (Scotland) Act 1900 (63 and 64 Vict. c. 49), enacts:—Sec. 36—“In case of any of the following events occurring between the issue of the notice mentioned in section 42” (*i.e.*, the notice of vacancies and dates of nomination and election) “and the first day of October in the following year, viz.—. . . (e) The full number of councillors not being elected at any election, the full number failing to accept office, or any councillor being elected by more than one ward; (f) Any election being abortive in consequence of any error or irregularity in the proceedings; (g) A vacancy occurring from any cause other than those above stated, and other than retirement in ordinary rotation—the vacancy so occurring shall be filled up *ad interim* by the town council at a meeting of which the notices, stating that the matter is to be then dealt with, shall be sent out by the town clerk within three weeks of the occurrence of such event, and which shall be held not sooner than five days, and not later than ten days, from the date of such notice. In the event of the town clerk failing to call the said meeting, or in the event of the said meeting failing so to elect, it shall be in the power of the provost, or of any councillors forming among them one-third of the whole town council, at any time thereafter, to call a meeting for the same purpose and upon the same notice: Provided that any vacancy so occurring under heading (e) or under heading (f) aforesaid may, if the town council so resolve, be filled up *ad interim* as soon as may be by a special election by the electors, and such election shall be held as nearly as may be under the provisions of this Act; and the returning officer at such election shall, subject to the approval of the town council, fix the date of the election, and shall fix the dates for the issue of all necessary notices, and for lodging and withdrawing nomination papers, so that the intervals between such respective dates shall be the same as in the case of ordinary elections under this Act.”

Sec. 49—“In the event of the number of persons nominated, and not subsequently withdrawn for election as councillors of any burgh exceeding the number of vacancies, the election shall be carried out by a poll which shall be taken on the first Tuesday of November, under and in conformity with the provisions of the Ballot Act 1872 (35 and 36 Vict. c. 33), the Elections Hours of Poll Act 1884 (47 and 48 Vict. c. 34), and any Acts extending and amending the same.”

Sec. 113—“Wherever it has, from a failure to observe any of the provisions of this Act or any other Act, or from any other cause, become impossible to proceed

with the execution of this Act or any part thereof, or wherever difficulty or dubiety exists as to the procedure to be followed in any case, or where any case arises in connection with the election of councillors or magistrates not provided for by this Act, it shall be lawful for the town council, or any seven electors or householders within the burgh, or for the returning officer at any election, or the town clerk, to present a petition in manner provided by section 17 of the Burgh Police (Scotland) Act 1892, and the same procedure shall follow upon said petition, and the Court to whom the same is presented shall have the same powers as is provided by the said section in regard to applications presented thereunder.”

The Ballot Act 1872 (35 and 36 Vict. cap. 33), sec. 1, enacts—“If after the adjournment of an election by the returning officer for the purpose of taking a poll one of the candidates nominated shall die before the poll has commenced, the returning officer shall, upon being satisfied of the fact of such death, countermand notice of the poll, and all proceedings with reference to the election shall be commenced afresh in all respects as if the writ had been received by the returning officer on the day on which proof was given to him of such death. . . .”

On 4th November 1909 James Urquhart, Esquire, Lord Provost of Dundee, and as such returning officer at the municipal election in Dundee on 2nd November 1909, presented a petition under section 113 of the Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), in which he craved the Court “to determine whether Mr M’Cabe and Mr Stewart” two of the candidates “were validly elected as town councillors; and further, in the event of the elections being valid, to direct how the vacancy caused by Mr Stewart’s declining to accept office falls to be filled up, and in the event of the elections being held invalid, to direct how the two vacancies due to there having been no valid election fall to be filled up; to give directions, if necessary, for the said election or elections taking place; to find the petitioner entitled to the expenses of the petition, and to direct the same to be charged against the common good of the burgh.”

The petition stated—“4. The burgh of Dundee is a City and Royal Burgh. For municipal purposes it is divided into nine wards. From each of these wards three representatives are sent to the town council. In the ninth ward two vacancies had to be filled up by the election of two councillors by the electors in ordinary course in November 1909. For these two vacancies there were duly nominated, in terms of section 43 of the Town Councils (Scotland) Act 1900, three candidates, viz:—(1) Peter M’Cabe, 11 Laurel Bank, Dundee, baker; (2) Andrew Robertson, 334 Blackness Road, Dundee, superintendent; and (3) Robert Stewart, 19 Milnbank Road, Dundee, joiner. None of the said names was withdrawn, and after due and regular notice and procedure, arrangements were made for a poll

in the said ninth ward on Tuesday, 2nd November 1909, in accordance with section 49 of the said statute.

"5. Early on the morning of Tuesday, 2nd November 1909, before the poll was opened, the said Andrew Robertson, one of the candidates, died. The remaining candidates equalled the number of vacancies. The statute makes no provision for such an event. The petitioner on obtaining authentic information of Mr Robertson's decease, stopped the poll, which had been opened for about two hours, this step being taken on the ground that there was, in substance, no longer any competition soluble by poll. In case Mr M'Cabe and Mr Stewart, as the surviving candidates, were legally entitled to be declared elected, the petitioner, as returning officer, on 3rd November 1909, declared them elected in terms of section 52 of the statute, but subject to such order as your Lordships might make on any petition to be presented in terms of section 113 of the statute. A corresponding intimation was made to each of the two candidates in terms of section 53 of the statute. On 4th November 1909 Mr M'Cabe intimated his acceptance of the office of councillor, while Mr Stewart intimated his declination of the office, both in accordance with section 53 of the statute."

Answers were lodged for David Air, merchant, Dundee, and others, being seven electors and householders in the Ninth Ward of the city, the number specified in section 113 of the Town Councils (Scotland) Act 1906, and section 17 of the Burgh Police (Scotland) Act 1892, as entitled to present a petition to the Court in cases where it has become impossible to proceed with the execution of the said Acts. They submitted that in the circumstances the rights of the electors would be best conserved by the Court ordering a new election.

Argued for petitioner—This was a *casus improvisus*, as the provisions of the Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49) did not apply. The petitioner was therefore entitled to present this application. Reference was made to section 17 of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), to sections 36, 38, 45, 48 and 53 of the Town Councils (Scotland) Act 1900 (*cit. sup.*), to section 1 of the Ballot Act (35 and 36, Vict. cap. 33), and to the case of *Reg. v. Stewart*, [1898] 1 Q.B. 552.

Argued for respondents—There ought to be a new election. The returning officer was not justified in stopping the poll, and the proceedings were therefore irregular—*Reg. v. Stewart (supra)*; Rogers on Elections (8th ed.) vol. ii, p. 101. It was in the *nobile officium* of the Court to order a new election in such circumstances—*Burgh Police (Scotland) Act 1892 (cit. supra)*, sec. 17 (3); *Brander and Others (Petitioners)*, July 18, 1890, 17 R. 1254, 27 S.L.R. 900.

At advising—

LORD JOHNSTON—[*Read by the Lord President*].—THE TOWN COUNCILS Act 1900 provides by section 49 that where the election of councillors for any burgh or ward of

a burgh is contested, the election shall be carried out by a poll taken under the Ballot Act 1872.

The last-mentioned Act, by rule 9 of the first schedule to the Act, directs the giving of notice of the poll in a case in which the election is contested; and the Act itself, section 1, provides that if after the adjournment of an election for the purpose of taking a poll, one of the candidates nominated shall die "before the poll has commenced, the returning officer shall, upon being satisfied of the fact of such death, countermand notice of the poll, and all the proceedings with reference to the election shall be commenced afresh," &c. It is evident that this provision does not meet all the emergencies which may occur, as, for instance, that of the death occurring before the poll but the fact being unknown or not made public till it is over or the death occurring during the poll. As these very obvious possibilities are not provided for, I do not think that we are entitled to extend the statutory provision by implication or analogy, but are bound to apply it according to its terms. So doing I think that in the event of the death of a candidate before the poll has commenced all that is committed to the returning officer is that on being satisfied of the fact of the death he shall "countermand notice of the poll" and thereby stop the poll being commenced. He cannot countermand notice of the poll after it has commenced, and therefore if information of the death comes to him too late for countermand, the poll which has commenced must proceed, as the statute has not directed otherwise. What the result of such an election would be in the various circumstances which might occur we are not at present called on to determine.

In the present case the death of a candidate took place before the poll was opened, but was not known at least to the returning officer until after the poll was commenced. On being satisfied of the fact of death he stopped the poll then proceeding. For this I think that he had no warrant, and therefore that the election has become abortive in consequence of an error or irregularity in the proceedings—Town Councils Act 1900, sec. 36 (*f*). There are therefore two vacancies in the ward in question, and the last-mentioned section provides for them being filled up in one or other of two ways *ad interim*, either (1) by the Town Council themselves after certain preliminaries, or (2) by a special election to be held as nearly as may be under the provisions of the Act.

I think that all we are called upon to determine is that Mr M'Cabe and Mr Stewart were not validly elected as town councillors of the City and Royal Burgh of Dundee, and that in respect of the statutory provision to which I have referred we are not called on to direct how the vacancies thus occasioned are to be filled up, the choice between the two alternative methods being by the Act of Parliament left to the Town Council.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ARDWALL, who was sitting in the Division at the advising, gave no opinion, not having heard the case.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

“Find that Mr M'Cabe and Mr Stewart were not validly elected as town councillors, and that the two vacancies thus occurring fall under subsection (f) of section 36 of the Town Councils (Scotland) Act 1900, and fall to be filled up in one or other of the methods prescribed in said section, and decern: Find no expenses due to or by any of the parties, and decern. . . .”

Counsel for Petitioner—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Respondents—D. Anderson. Agents—M'Neill & Sime, S.S.C.

Wednesday, November 24.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

COLE (SPENCERS' TRUSTEE) v.
HANDASYDE & COMPANY.

Contract — Assignment — Assignability — Delectus Personæ — Title to Sue.

A firm of oil merchants sold to manufacturers a quantity of black grease. The contract note provided, *inter alia*, that the grease was to be of usual good merchantable quality; that the price was to be £15, 15s. per ton on basis of 95 per cent. fatty matter soluble in carbon bisulphide, any excess or deficiency of 95 per cent. to be paid or allowed for; and that the minimum fatty matter was to be 88 per cent. The “terms” stated in the note were as follows:—“Cash in 14 days from shipment, less 2½ per cent. discount: The goods to be sampled by an independent sampler prior to shipment: Analysis to be made by Dr W. Gray of Liverpool, whose decision shall be final.” In acknowledging receipt of the contract note the buyers added—“Please note, however, that all the grease is to be soft and seedy as sample in our possession.”

The sellers having thereafter granted an assignment for behoof of creditors, the trustee thereunder proposed himself to fulfil the contract and called on the buyers to accept delivery, which they declined to do on the ground that the contract was unassignable. In an action of damages at the instance of the trustee they averred that the sellers were skilled in the trade whereas the pursuer was not, and pleaded “no title to sue.”

Held—*rev.* judgment of Lord Mackenzie (Ordinary)—that the contract involved no *delectus personæ* and so was assignable, that the trustee therefore had a good title to sue, and plea *repelled*.

On 28th August 1908 Stewart Cole, C.A., London, trustee under an assignment for behoof of creditors dated 25th January 1908, granted in his favour by R. Knowles Spencer and Maurice Spencer, carrying on business there as oil and seed merchants and commission agents under the firm name of Knowles Spencer & Son, with consent and concurrence of the said R. Knowles Spencer and Maurice Spencer, brought an action against C. H. Handasyde & Company, Dean Oil Works, Dalkeith, and the said C. H. Handasyde, the only known partner thereof, in which they sought payment of (1) the sum of £83, 1s. 2d.; (2) the sum of £2500; and (3) the sum of £148, 6s. 8d., which sums he alleged to be due under certain contracts for the delivery of black grease entered into by Knowles Spencer & Son (the sellers) prior to their granting the assignment in his (the pursuer's) favour.

At the date of the assignment two of the contracts were fulfilled, the sums due thereunder being the sums first and third concluded for. No question was raised by the defenders as to the title of the pursuer to sue for payment of these sums. They objected however to his title to sue for the sum second concluded for, being £2500 damages for breach of the second contract, which was unfulfilled at the date of the assignment, and maintained that the contract was one involving *delectus personæ* and therefore unassignable.

The contract in question was as follows:—
“17th June 1907.

“We [*i.e.*, Knowles Spencer & Son] confirm having sold to you this day—

“Quantity.—Two hundred and fifty to three hundred (250/300) tons.

“Goods.—Black grease from cotton oil mucilage.

“Quality.—Usual good merchantable.

“Price.—Fifteen pounds fifteen shillings per ton, on basis of 95 per cent. fatty matter soluble in carbon bisulphide, any excess or deficiency of 95 per cent. to be paid or allowed for, minimum F.M. 88 per cent.

“Packages.—Good strong iron-bound barrels, seller's option to deliver in pipes at 7/6 per ton less.

“Delivery.—January to December 1908, as and when ready, f.o.b., London and/or Bristol, seller's option.

“Terms.—Cash in fourteen days from shipment, less 2½ per cent. discount. The goods to be sampled by an independent sampler prior to shipment. Analysis to be made by Dr Watson Gray of Liverpool, whose decision shall be final. Sampling and analysis fees to be divided between buyers and sellers.

“Each delivery to stand as a separate contract.

“Should strikes of workmen, fire, or other exceptional causes suspend or par-