Friday, July 10.

SECOND DIVISION.

[Lord Shand, Ordinary.

DISTRICT LUNACY BOARD OF ELGIN *v.* ELDER AND BREMNER.

Pauper—Parochial Board—Liability—Arbitration—Reference—Homologation—Rei interventus.

The inspectors of the poor in two parishes having referred a question of liability for the support of a pauper-lunatic to an unincorporated Society of Inspectors of the Poor, a decision was given by this body which was so far acted on by the inspector against whom it went that he paid the arrears due to the Lunacy Board and continued for some time to pay the annual charges, but thereafter his Board "withdrew their admission or rather cancelled the admission of the inspector" as to liability, An action was thereupon raised by the Lunacy Board against the two inspectors for the amount of arrears due. *Held* (*diss.* Lord Benholme) that the Parochial Boards of the two parishes agreed to abide by the decision to be given, that the Parochial Board decided against acquiesced in that decision when given, and implemented it by admitting liability and paying arrears, and this in full knowledge of the facts—that they were not entitled now to withdraw from liability thus admitted and acted on.

This case came up by reclaiming-note against an interlocutor pronounced by Lord Shand in an action at the instance of the Lunacy Board for the Elgin district against Alexander Bremner, Inspector of Poor for the parish of Rathven, and James Elder, Inspector of Poor for the parish of Elgin.

The summons concluded for the payment of £198, 3s. 4d., with a further sum as interest, being the amount expended by the Lunacy Board in support of a pauper, Charlotte Grant, who was on 5th April 1860 admitted a patient in the asylum by virtue of an order made by the Sheriff-Substitute. Down to March 1863 the Parochial Board of Elgin regularly paid the expense incurred. The history of the lunatic, as set forth in the condescendence, is as follows:—Charlotte Grant was born about 1828 in the island of Tobago, and is said to be an illegitimate daughter of the late William Grant, who was a native of the parish of Knockando, Morayshire, and who died in Tobago in 1829. In the year 1839 or 1840 she was brought to Aberdeen by the captain of a vessel, and sent to Mrs Macpherson, who maintained her at Elgin till 1844 or 1845, when she became a domestic servant to Dr Alexander, Old Machar, Aberdeen. Then she went to the manse of Dyce, where she remained for three years. She afterwards resided in and about Aberdeen till 17th January 1854, when she returned to Elgin on a visit to Mrs Macpherson, with whom she remained for a few days. She afterwards occasionally visited Mrs Macpherson, remaining a day or two at a time. On 30th December 1857 she went to Buckie, in the parish of Rathven, and on the 1st of January 1858 was there delivered of an illegitimate child. She then applied to the inspector of poor for the parish of Rathven for parochial relief, which was afforded to her by that parish till the beginning of February 1858, when she left Buckie and went to Garmouth, in the parish of Urquhart, where on the 18th of that month she obtained parochial relief, which was continued till 16th September 1858. The inspector of Urquhart, on first giving parochial aid, intimated the case to and obtained relief from the defender Alexander Bremner of Rathven. The parish of Urquhart having on 16th September 1858 refused further parochial aid, on the ground that she was able to maintain herself and her child, she applied to the sheriff of Elgin, who, on 5th October 1858, ordained relief to be continued by this parish, which was accordingly done. About 18th December 1858 Charlotte Grant, having then returned to Elgin, was refused further relief by the parish of Urquhart, "in respect she had no settlement in Urquhart, and was not then residing in that parish." On presenting notice of such refusal to the Sheriff, he ordered her to apply to the inspector of poor for Elgin, which she did on 29th December 1858, but he refused to relieve her, in respect that she was in regular receipt of relief from the parish of Urquhart, which parish was bound to continue relief until the parish of settlement was ascertained. The Sheriff-Substitute, however, ordained the inspector of Elgin to give her parochial aid, leaving the parishes to settle which was liable. The inspector of Elgin thereupon relieved her and intimated the case to the defender Alexander Bremner, and also to the inspector of Urquhart, and claimed to be entitled to relief from one or other of them. On 5th April 1860 a petition at the instance of the inspector of poor of the parish of Elgin was presented to the Sheriff of the county of Elgin, praying for authority to transmit Charlotte Grant to the Elgin District Asylum, and to sanction her admission into the asylum. The inspector of poor of Elgin having insisted against the inspector of poor for Rathven for reimbursement of the sums disbursed by him for Charlotte Grant, and maintained that the parish of Rathven was bound to pay her board in the asylum, the parishes, it was averred, agreed to refer the question of liability to the decision of the Society of the Inspectors of Poor for Scotland, as arbiters. On 12th November 1862 this Society, upon the reference, decided that the parish of Rathven was liable to support Charlotte Grant, on the ground that as she had been a proper object of parochial relief when she first applied for it to the parish of Rathven, and had continued to be so, that parish was bound to continue the relief till her settlement could be ascertained.

The pursuers set forth that Alexander Bremner acquiesced in and acted on this decision, and that he on 15th March 1863 repaid the Parochial Board of Elgin the sum of £85, 16s. 2d., the whole amount disbursed up to that time by them on account of Charlotte Grant. This the inspector of Rathven admitted so far as the payment was concerned, but he denied the acquiescence, and explained that he did not apply for or obtain the instructions or authority of his Board to make this repayment. Bremner subsequently paid for the lunatic down to 1st December 1864. In the beginning of 1864, as alterations and additions were about to be made to the Elgin Asylum, Mr Reid, the superintendent, on 23d January 1864 wrote to the defender Bremner, requesting him to remove

the pauper. In reply to this letter, the inspector of Rathven wrote that the district asylum for his county, then in course of erection, was not ready, and begging that the lunatic might be allowed "to remain where she is for a time." He also stated in that letter that Rathven had been "*found liable for her support.*" The letter is dated 26th January 1864. On 21st December 1864 Bremner wrote to the clerk to the asylum, intimating that "at a meeting of the Parochial Board of Rathven, held here on 6th December, they *withdrew their admission, or rather cancelled the admission* of the inspector, of the case of Charlotte Grant," and declined to make payment of the account of her board for the quarter from 1st December 1864, which had been rendered to Bremner as usual. Bremner did not remove Charlotte Grant from the asylum, nor did he make any provision for her maintenance, or arrange with any person liable to relieve him, and pay the pursuers for her board. After some correspondence, his agent, on 14th June 1866, wrote to the pursuer's agents that "the asylum must look to Elgin and Urquhart." Charlotte Grant has remained in the asylum ever since. Although the pursuers were in no way bound to find out which was the parish of the lunatic's settlement, they communicated with the inspectors of Elgin and Urquhart, who denied all liability, and maintained that Bremner having referred the question of liability, and a decision having been pronounced against him, which he acquiesced in and acted on, he was not entitled to resile from that settlement. Both of the defenders refuse to pay the expense incurred by the pursuers for maintaining Charlotte Grant in the Elgin Asylum.

The defender Bremner stated that he from time to time, during the years 1858 and 1859, took the instructions of his Board on the subject, and was directed by them to resist the claim which both Elgin and Urquhart made upon Rathven. The idea of a reference of liability for the maintenance of the pauper was, however, afterwards suggested, and the Board of Rathven passed a minute in the following terms:—"3*d May* 1859.—The meeting directed the inspector to intimate to the parishes of Elgin and Urquhart that this Board is willing to submit this case to arbitration; the arbiters to be mutually chosen by all parties." A copy of this minute was on 6th May 1859 communicated by Bremner to Mr Stiven, Inspector of Poor of the parish of Elgin, and the names of certain gentlemen known to be conversant with the Poor Law were mentioned as suitable for the office of arbiters. These were declined by the Inspector of Elgin, who proposed a reference to Mr Walker, then Secretary and Chairman of the Board of Supervision; but Bremner refused to accede to this proposal, partly on the ground that the Inspector of Elgin had already been in communication with Mr Walker on the subject of the reference. Some further correspondence as to the proposed reference took place, but nothing having resulted, the Board of Rathven adopted a minute in the following terms:—"The inspector laid the case again before the meeting, when the inspector was directed to refer the case to any competent arbiter that may be agreed upon between all parties; but they object to the arbitration of the Secretary to the Board of Supervision, in respect that the case has been prejudged by him in the opinion sent to the Inspector of Poor, Elgin, in which the Inspector of Rathven was not heard as a party." A copy of this minute was on 9th April 1860 communicated by Bremner to Mr Stiven, Inspector of Elgin, and he continued to correspond with him in regard to the proposal for arbitration; but he did not after the date of the minute take the instructions of his Board with reference thereto, and no mention is made in the Board's minutes after that date of any such proceedings. The Parochial Board of Rathven, it was averred, never agreed to refer the question of liability for the maintenance of the pauper to any arbiter, and they were never called upon to do so. No joint submission or formal minute of reference was ever entered into, but Bremner and the Inspector of Elgin agreed to a reference of the question to a body known as the Society of Inspectors of Poor of Scotland, and on 12th November 1862 a discussion, took place at a meeting of the Society in Glasgow, the result of which was intimated to the Inspector of Elgin. The Inspector of Urquhart was no party to the pretended reference, and in the proceedings in connection therewith Bremner had no authority or instructions from his Parochial Board.

The Society of Inspectors of Poor of Scotland is not, it was contended, "a competent arbiter" within the meaning of the minute of the Parochial Board of Rathven of 3d January 1860, as it consists of individuals, Inspectors of Poor, who meet together partly for social purposes, and partly for the discussion of questions in the department in which as Inspectors of Poor they have a special interest. The members, who are a numerous body, hold monthly meetings, at which questions, sometimes hypothetical, are proposed for discussion, and the decision of the meeting is arrived at by counting the votes of the members present, the chairman having a casting vote.

The meeting of the Society of Inspectors decided on 12th November 1862 that the parish of Rathven was liable, and on 15th March 1863 the defender repaid the Parochial Board of Elgin the sum of £85, 16s. 2d., being the amount of disbursements on behalf of the pauper made up to that time by the said Board, and he thereafter made direct payments to the directors of the asylum for the pauper's board up to the 1st of December 1864. He averred that when the repayment and these payments were made he was in ignorance of certain facts in the history of the pauper which have since come to his knowledge, and they were made separately, in the belief by him that he was liable under the agreement into which he had entered with the inspector of the parish of Elgin, but that he did not apply for or obtain the instructions or authority of his Board, and the disbursements were made upon his own responsibility solely. A renewed dispute as to liability having arisen with the pursuers and the inspectors of Elgin and Urquhart, the Rathven Board were willing to submit the question to arbitration, and they instructed the now deceased Mr James Gordon, solicitor, Keith, to take steps with that object. This proposal was made to the pursuers, but was ultimately declined by them.

The pursuers pleaded—"(1) Charlotte Grant, the pauper, having been placed in the lunatic asylum at Elgin on the application of the inspector of poor of the parish of Elgin, that parish became liable to the directors of the asylum for her support. (2) *Separatim*, the Parochial Board of Rath-

ven having entered into a reference or agreement with the Parochial Board of Elgin relative to the support of the pauper lunatic, having been found liable under such reference or agreement on the ground above stated, and having paid for the maintenance of the pauper up to 1st December 1864, is liable to the pursuers for the amount sued for. (3) In the circumstances stated, one or other of the parishes of Rathven or Elgin is liable for the maintenance of the pauper in the Elgin District Asylum, and the pursuers are entitled to call both as defenders, that they may discuss the question of liability between themselves. (4) The pursuers are entitled to decree against the parish of Rathven or against the parish of Elgin, according as it shall be held that the one or the other of these parishes is liable for the maintenance of the pauper in the asylum."

The defender, the Inspector of Poor of the parish of Rathven, pleaded—"(1) The parish of Rathven not being the parish of the pauper's settlement, and she having ceased to be chargeable to said parish since 1st February 1858, the defender, as inspector foresaid, is not liable for any advances made on behalf of the pauper since that date. (2) The defender, as inspector foresaid, not having received instructions or authority from the Parochial Board of Rathven to refer the question of liability for the pauper's maintenance to the Society of Inspectors of Poor for Scotland, is not bound by the opinion or decision of that body. (3) *Separatim*, the Parochial Board of Rathven having entered into no submission or reference of the question of liability for the maintenance of the pauper to the Society of Inspectors of Poor for Scotland, the defender, as inspector foresaid, is not bound by the opinion or decision of that body. (4) Under the instructions received by the defender, he could not competently refer the question of liability for the pauper's maintenance to the Society of Inspectors of Poor of Scotland, so as to hold him liable, as inspector foresaid, for said maintenance. (5) *Separatim*, the reference of the liability for the maintenance of the pauper to the Society of Inspectors of Poor of Scotland was incompetent and inept, and everything that has followed thereon is null and void, and is not binding on the defender as inspector foresaid. (6) The pursuers having taken the pauper into their asylum after repudiation by the defender of liability for her maintenance, and without the defender's sanction or authority, are now barred from recovering from the defender the cost of the maintenance sued for. (7) The settlement of the pauper being in the parish of Elgin, or at any rate not being in the defender's parish, he is entitled to absolvitor from the conclusions of the action, with expenses."

The defender, the Inspector of Poor of the parish of Elgin, pleaded—"(1) All parties not called. (2) The pursuers have not set forth grounds relevant or sufficient in law to infer liability against the defenders. (3) The pursuers having accepted the parish of Rathven as their debtors for the maintenance of the pauper, and as liable for her support, and having received payment from Rathven on that footing, and never having intimated any claim against the parish of Elgin, are not now entitled to insist in the present action against the latter parish. (4) The parish of Rathven having referred to arbitration the question of liability for the support of the pauper as between it and the parish of Elgin, is bound by the decision in the arbitration, and is not entitled to defend this action to the effect of throwing the said liability on the parish of Elgin. (5) The parish of Rathven having acquiesced in the decision in the said arbitration, and acknowledged their liability under it by making payments to the pursuers in respect of the pauper, are not now entitled to repudiate the same to the effect of attaching liability to the parish of Elgin."

Thereafter the Lord Ordinary (SHAND) pronounced the following interlocutor and note:—

"*Edinburgh, 28th March* 1874.—The Lord Ordinary having considered the cause—Repels the fourth and fifth pleas in law for the parish of Elgin: Farther, finds that in December 1858 the pauper Charlotte Grant, being found destitute in the parish of Elgin, became chargeable on the poor funds of that parish, and that she has continued in a state of pauperism and entitled to parochial relief from that date down to the present time: Finds that the parish of Elgin has failed to prove any grounds in fact which render the parish of Rathven liable in the maintenance aad relief of the pauper for the period embraced in the conclusions of the action: Therefore repels the sixth plea in law for the parish of Elgin, and finds that parish liable to support the pauper, and to make the payments concluded for in the action: Reserves all questions of expenses, and appoints the cause to be enrolled, in order that the conclusions of the action, and the question of expenses, may be disposed of: Farther, grants leave to the Inspector of Poor of the said parish of Elgin to reclaim against this interlocutor, if so advised.

"*Note.*—This action relates to the maintenance of Charlotte Grant, a pauper, who has been for a number of years an inmate of the District Lunatic Asylum of Elgin. The summons concludes for payment of £198, 3s. 4d., being the charges for board and maintenance of the pauper for nine years, beginning at 1st December 1864, for interest on this sum, and for payment of any further expense which the pursuers, the District Board of Lunacy for Elginshire, may incur in continuing to support the pauper.

"After the record had been closed, and a proof ordered, the Joint Minute, No. 15 of process, was lodged, by which it was agreed that as the question to be determined under the proof was one between the Inspector of Poor of Elgin and the Inspector of Poor of Rathven, it was unnecessary for the pursuers to make farther appearance in the action until a final judgment had been pronounced as between these two parishes. The question accordingly to be determined is, whether the parish of Elgin or the parish of Rathven is liable for the support of the pauper since 1st December 1864, and in time coming.

"The pauper became chargeable on the parish of Elgin from being found within that parish in a state of destitution in December 1858, since which date she has continued to be an object of parochial relief. The inspector of Elgin, from the time when he began to make disbursements for the pauper, claimed relief and repayment from the parish of Rathven, and after a lengthened correspondence, and the proceedings by way of reference to be immediately noticed, the inspector of Rathven in 1863 made payment to the parish of Elgin of the amount which that parish had disbursed down to

that time, and thereafter continued to pay the pursuers for the maintenance of the pauper to 1st December 1864, when he intimated to the pursuers, and to the parish of Elgin, that liability for the further maintenance of the pauper was disputed. Since that date, accordingly, the amount becoming due to the Lunacy Board has not been paid by either of the parishes.

"On the record and proof two questions arise for decision, the first being, whether, as maintained by the parish of Elgin, the parish of Rathven is bound to maintain the pauper in respect of certain proceedings which took place in an alleged reference of the question of liability prior to 1863, and of the payments which the parish of Rathven made after that date in consequence of the alleged decision in the reference; and secondly, whether, even assuming that the parish of Rathven is not bound by the reference and what followed on it, that parish, or the parish of Elgin, is in law liable for the support of the pauper?

"In regard to the reference, the Lord Ordinary is clearly of opinion that the parish of Rathven was not bound by the alleged decision or award as to the question of liability for the pauper's maintenance. It is a point not so clear whether what occurred after the decision did not amount to an adoption or homologation of the award, but on this question also the Lord Ordinary is of opinion that the payments made by the parish of Rathven have not made the alleged award binding, to the effect of imposing the burden of the maintenance of the pauper on that parish in all time coming, and do not preclude them from now raising for decision of the Court the legal question of liability.

"From the correspondence between the inspectors, and the minutes of the respective Boards put in evidence, it appears that after an action had been threatened by the parish of Elgin it was agreed that the question of liability for repayment of the advances by that parish should be referred. The only authority given to the Inspector of Poor of the parish of Rathven is to be found in two minutes of the Board, dated 3d May 1859 and 3d January 1860. In the former of these the inspector was directed to intimate to the parish of Elgin 'that this Board is willing to submit this cause to arbitration—the arbiter to be mutually chosen by all parties;' and in the latter the inspector was directed 'to refer the case to any competent arbiter that may be agreed upon between all parties.' Without the authority of the Board, the Inspector of Rathven, in correspondence with the Inspector of Elgin, agreed to refer the question to the 'Society of Inspectors of Poor of Scotland.' This letter is alluded to in a minute of meeting of the Parochial Board of Elgin of 1st May 1861, in which the inspector of that parish was instructed to prepare a joint minute along with the inspector of Rathven. The inspectors thereafter endeavoured to adjust a joint-minute containing a statement of the facts, and a reference to the question between them. They were, however, unable to agree on the facts, and each transmitted a separate statement to an official of the Society of Inspectors. The witness Alexander Lemon has explained the nature of this society, and its usual course of proceedings, and from his evidence and the excerpts from the minute-books of the Society produced, it appears that the Society consists of a number of Inspectors of Poor of parishes in Scotland, and was instituted 'for the purpose of distributing knowledge amongst its members on parochial matters.' At periodical meetings those of the members who happen to be present are in use to take up and discuss questions which come before them for opinion, and also it is said for judgment; and the question as to the liability of the parish of Rathven is said to have been discussed and determined at a meeting of this Society on the 12th of November 1862.

"It is quite obvious that nothing short of express authority by the Parochial Board of Rathven could have warranted the Inspector to submit the question between the two parishes to such a tribunal, and that any judgment of the Society proceeding on a reference made by the Inspector at his own hand could not bind the Board. But apart from this objection, the proceedings of the Society were such as plainly made any award or decision by them of no effect; for it appears that after much delay and repeated discussions, the Society laid aside the statements which had been put before them by the two Inspectors respectively, remitted to a small committee of their own number to prepare what they conceived to be a right statement of the case, and without communicating this new statement to either of the parishes after it was adjusted, proceeded to decide the question on the case so prepared. The only evidence of the alleged decision which has been produced is an extract from an unauthenticated minute of meeting, which bears a narrative of the revised case prepared by the committee already mentioned, and concludes with a statement that the meeting was of opinion that Rathven, 'as the first relieving parish, was bound to continue the relief till another parish was found liable.' No one who was present at this meeting was examined to confirm what the minute bears, and there is no other evidence in process to set up the alleged award or judgment. It seems clear that such an alleged award by itself can receive no effect, for several reasons—(1) because the reference was unauthorised; (2) because the proceedings of the Society were irregular and unwarranted; and (3) because the alleged award is not proved.

"It is said, however, that the alleged award has been adopted and acted on by the parish of Rathven, so as to preclude that parish from raising the present question, because in 1863, in consequence of the alleged award, that parish reimbursed Elgin for outlays which had been made up to that time, amounting to £85, besides interest, and continued to support the pauper till December 1864. The Lord Ordinary is of opinion that this plea is not well founded. If the parish of Rathven were here seeking repayment of the monies which they paid to the parish of Elgin, or even laid out on behalf of the pauper after February 1863, the facts in regard to the alleged reference would probably be held sufficient to exclude the claim. But he does not think that the facts of the case warrant the conclusion that there was adoption or homologation of any judgment or award declaring the parish of Rathven liable for the maintenance of the pauper in all time coming. The proposed joint-minute of reference was never adjusted, and without such an adjusted deed it is impossible to say whether the subject of the reference, besides including the claim for past disbursments, embraced also the question of chargeability of the pauper in all time coming. The alleged judgment itself seems never to have been officially communicated to the parties,

at least to the parish of Rathven, and it was never brought before a meeting of that Board. Again, the very irregular proceedings which preceded the alleged award were certainly never under the notice of the Board. What appears to have occurred was, the Inspector of Rathven at first became aware in an indirect way that a conclusion unfavourable to him had been arrived at by the Society, on which he remonstrated in a letter of 8th December 1862, addressed by him to Mr Kirkwood, one of the members of the Society, and that this having produced no affect, he yielded to the demand of the Inspector of Elgin, and made the payments above referred to. From the evidence of the Inspector of Rathven it appears that the members of the Board, or most of them, must have been aware, not by a communication made at any meeting of the Board, but at casual conversations, and by the entries of payments laid before the Board from time to time, that the reference had resulted unfavourably. It appears, however, to the Lord Ordinary that such knowledge is not sufficient to entitle the parish of Elgin to succeed in the plea of homologation and bar which is now maintained. There is, in the first place, no award or judgment proved by sufficient evidence as to the subject of homologation. In the next place, it has not been established that a reference was made embracing liability for the pauper in all time coming and finally, it was not within the knowledge of the members of the Board when the payments relied on were made; that the alleged award was arrived at on a consideration of an unauthorised statement of the case, and after the statements by the parties themselves had been laid aside.

"It is to be regretted that an honest attempt to refer such a question as the liability to maintain a pauper, and so to save expensive litigation, should have failed; but when parties mean to settle such questions in this way, it is essential that some care should be taken in the proceedings adopted for that purpose.

"Holding thus that the award, and proceedings following on it, do not preclude the parish of Rathven from now maintaining that that parish is not liable for the maintenance of the pauper, the Lord Ordinary is further of opinion that the defence on its merits is well founded. He thinks the case is directly within the principle settled in the case *Taylor* v. *Strachan and Brown*, November 8, 1864, 3 Macph. 34. The pauper appears to have led a wandering, vagrant life, living almost exclusively on charity for a considerable time before she became a permanent object of relief in Elgin, in December 1858. She had no doubt obtained parochial relief in the parish of Rathven throughout January 1858, and on 1st February 1858 for the succeeding week, and afterwards, on the 23d of February, to have again received relief from the neighbouring parish of Urquhart, to which, in the meantime, she had gone, where she remained in receipt of relief till shortly before her appearance in Elgin. But the relief given in the parish of Rathven, and again in the parish of Urquhart, was casual or temporary. The pauper voluntarily, *in bona fide*, and in the ordinary course of her wandering life, without interference or suggestion by the parochial officers, or authorities of either of these parishes, and without any purpose on her part to transfer the burden of her maintenance from one parish to another, moved on to the parish of Elgin, on which parish she again became chargeable, and where she has continued to be an object of relief without any interval ever since. In these circumstances, liability for her maintenance attaches to the parish of Elgin until that parish shall make out a case of settlement against some other parish *permanently* liable for the support of the pauper, if any such parish exist."

The Inspector of Elgin reclaimed, and argued—A "competent arbiter" means any person not legally disqualified (*Buchanan*). All that has been reached in the Law of Arbitration is that parties may resile if the arbiter is unnamed; but this does not by any means imply that the reference is unavailing after it has been made. There is nothing in the choice by the Inspector of this body of gentlemen that was beyond the Inspector's power (*MacIlhose*). A person may accede by facts and deeds without ever signing a submission (*Brown*).

Authorities—*Buchanan*, M. 14,593; *MacIlhose* v. *Gardiner*, 5 Br. Suppl. 204; *Brown* v. *Gardiner*, M. 5659; *Telfer* v. *Hamilton*, M. 5658; Bell on Arbitr., p. 322; Guthrie Smith, p. 199.

Argued for the respondent—There are three questions here—(1) Was there a valid reference? (2) Was there homologation, supposing the first question answered in the negative? (3) Assuming that there was no homologation, which Board is liable? It is only to the first two points that we direct our argument. (1) As to the question of validity of reference, it is important to note the terms of the minutes granting authority to refer the case to arbitration. They are the minutes of the meetings of 3d May 1859:—"*Charlotte Grant.*—The meeting directed the Inspector to intimate to the parishes of Elgin and Urquhart that the Board is willing to submit this case to arbitration, the arbiter to be mutually chosen by all parties." And of 3d January 1860:—"*Charlotte Grant, Elgin.*—The Inspector laid this case again before the meeting, when the Inspector was directed to refer the case to any competent arbiter that may be agreed upon between all the parties, but they object to the arbitration of the Secretary to the Board of Supervision, in respect that the case has been prejudged by him in the opinion sent to the Inspector of Poor, Elgin, in which the Inspector of Rathven was not heard as a party." They authorise a reference if all the parties agree, that is, if Elgin Rathven and Urquhart agree; but Urquhart declined to refer. Was the Inspector of Rathven under these circumstances entitled to refer? We maintain that he was not. Again, the reference, such as it was, when made was objectionable on two grounds—(*a*) it was a reference to a party not named; and (*b*) it was a reference to a fluctuating body (Bell on Arbitr.). The expression used is "competent arbiter." [Lord Benholme.—The question now comes to be how was this reference made?] (Menzies on Conveyancing; *Crawford.*) (2) As to homologation, it would at the very outside only be a good defence against repetition and that we do not seek (*Haswell*; *Donald*; *Beattie*).

Authorities—Bell on Arbitr., p. 82; *Crawford* v. *Beattie*, 22 D. 1064; *Haswell* v. *Fortune*, June 26, 1852, 24 Jur. 555; *Donald* v. *Taylor & Craig*, 9 Poor Law Mag. 348; *Beattie* v. *Greig*, 4 Poor Law Mag. 238.

At advising—

Lord Ormidale—My Lords, the practical question which we have here to determine is whether

the parish of Rathven or the parish of Elgin is liable to support this pauper lunatic Charlotte Grant. She was, it appears, born in the West Indies, and came across to this country when about 20 years of age; subsequently, until removed to the lunatic asylum in which she still remains, she obtained a livelihood in service, and thereafter was wandering about the country, chiefly in Aberdeenshire and Morayshire. It is not said that the pauper had any settlement here; she did not marry, and so acquired none in that manner; she was not born in this country, and consequently had no birth settlement: she never got any industrial settlement. But in the end of 1857 she came to the parish of Rathven, and there obtained parochial relief, and it was there that on January 1, 1858, her illegitimate child was born. Early in February she passed on to the parish of Urquhart, and subsequently to Elgin, where she obtained relief as being in a state of destitution. After a time, during which a correspondence as to liability went on between the parishes of Elgin and Rathven, Charlotte Grant became insane, and upon the 5th of April 1860 was removed to the asylum.

In these circumstances, the District Lunacy Board of Elgin have brought the present action, calling the Inspectors of Poor in the two parishes between whom the discussion has gone on. Elgin claims to be free from liability (1) in respect of certain proceedings of the nature of a reference entered into between the parishes, and of the conclusions arrived at as the result of that reference; (2) on the merits of the case. The determination, however, of the point as to whether there was a reference or not is the question upon which, in reality, the case turns, and with regard to these proceedings I think that there was not a regular arbitration, because in the first place there was not a proper submission entered into, and, in the next, there was no proper decree arbitral pronounced. But there was a reference by the two Inspectors of Elgin and of Rathven, to the effect of leaving it to the Society of Inspectors of the Poor to decide which of the two parishes was liable, and of abiding by the result thus obtained. I do not mean to say that the fact of the two Inspectors having entered into such a reference as this necessarily binds the two parishes in question, but the acts and conduct of the two parochial boards subsequently may have the effect of binding them. Now, if your Lordships consider the circumstances of the present case, it may be asked whether the Inspector of Rathven had the requisite authority and power to refer as he did, or whether, at any rate, it was subsequently given to him. As to that matter, however, I did not understand that any point was made, as it appeared to me to be conceded that if there was a reference in a proper sense at all it was a binding reference. With regard to Mr Bremner, the Inspector of Rathven, there is proof sufficient to show that he at least entered into a reference, that he carried it out, and that he implemented the decision.—[*His Lordship here referred to the answers to Cond.* 5, 6, *and* 7, *and to the statements in answer* 5 *and* 6.] Thus there was, it appears, really a reference to the Society of Inspectors, rightly or wrongly, competently or incompetently fixing the liability on Rathven. It is not said anywhere on the record or in the proof that the Parochial Board of the parish of Rathven were ignorant of what Mr Bremner, their inspector, did, or that they had been mislead into acting as they did by anything said or done by the parish of Elgin. The next question, and perhaps the most important question at issue, is how far the parish of Rathven or its Parochial Board, by their knowledge and sanction, are bound by the action of the Inspector. On this point we have a considerable amount of evidence by Mr Bremner himself.—[*His Lordship quoted this evidence, p.* 8 *of the proof.*] What may be here meant by *competent arbiter* is best known by what subsequently occurred. That there was a reference is to my mind beyond all doubt; that the parties have not been able to recover the minute of reference is another matter absolutely certain; but it must be recollected that a considerable time has elapsed since these transactions occurred.

Under the Poor Law Amendment Act, sec. 30, the Parochial Board have power to appoint a committee of management, who are to enjoy full powers where they may have been constituted by the Board as such.—[*His Lordship referred further to evidence, and to letters by the Inspector, pp.* 50 *and* 51 *Appendix, and Appendix C. p.* 10. These, then, are the circumstances which show the knowledge of the Parochial Board of Rathven of these transactions, and it seems to be clear that they did know of them all along. It is said that there is no evidence even of a signed minute of the Society of Inspectors embodying the result arrived at, but the case of a regular arbiter issuing notes of his decision, as is most frequently done, may be taken as an example. The proceedings may be in themselves very informal and very irregular, but there are very few informalities or irregularities in arbitrations which may not be cured by homologation and *rei interventus*. There was not here a proper reference, but as to such a position of matters I may call attention to the case of *Fraser* v. *Lord Lovat*, 7 Bell App. 171, July 29, 1850, the rubric of which is as follows:—"*Arbitration—Res Judicata*—Terms of reference by mutual memorial of parties, and of opinion expressed upon it by the referee, held to be sufficient whereon to support a plea of *res judicata*, in respect of matters made the subject of a subsequent action." I cannot think it indispensable that the knowledge of the Parochial Board (which is clear) required to be minuted, and I am unable to find any authority for such a view. Here every individual member knew of it, and there is no averment that they were misled. On the point of irregularities being barred by homologation or adoption, we may compare Bell on Arbitration, pp. 315, 116, and 44, and there was quite enough in this instance of the nature of homologation on the part of the parish of Rathven to bar them from disputing their liability under the award. I only can add that no one member of the Parochial Board or of the Committee of Management has been called by the inspector of the parish of Rathven.

On these grounds, I am of opinion that the objection by the Parochial Board of Elgin contained in their fifth plea should be sustained.

Lord Benholme—I have the misfortune to differ, and as I am aware that I am likewise differing from the majority of your Lordships, I shall take the opportunity of considering at some length the reasons which lead me to the conclusion at which I have arrived, and induce me to be of opinion that the interlocutor of the Lord Ordinary should be sustained.

We have here only to ascertain distinctly a certain fact of a rather delicate nature, and the law

which is to govern follows. Such as it was, this question of fact has, in the case your Lordships have now before you, been made the subject of an elaborate proof. The Lord Ordinary, who thereafter considered this matter of fact, has decided in favour of the parish of Rathven. [*His Lordship then proceeded to read from the interlocutor of the Lord Ordinary above quoted.*] I cannot help thinking that we are not here precluded from considering the question of fact, and I am perfectly ready to admit that if the Lord Ordinary were so precluded he had not any grounds for arriving at the result he has attained. His Lordship has repelled the fourth and fifth pleas as stated for the parish of Elgin, and this judgment is said to be counter to the decision of another tribunal. The question, then, of course comes to be what was that decision so given? I cannot make out what it was. If there was a reference anywhere to anyone, it was to the "Society of Inspectors of the Poor" itself. Now, what does that reference mean? What does it turn out to be? Merely that it is a reference to those members of this Society (a society consisting of a large number of persons), who may happen to be present at the particular meeting at which the matter is discussed. There may be many present or there may be few. This is the whole reference; we have nothing clearer or more definite. My Lords, a reference to the executive body of this Society would have been more satisfactory to my mind, as in such an event it would have been a reference to a definite set of persons, and it would have been ascertainable who those persons were, but in this case, as we have it laid before us, it would have been absolutely impossible to predict who might be present and who might be absent on the occasion on which the reference fell to be considered. No doubt there is produced a minute of the Society's meeting which tells who were actually present on the day on which this question came up, but none of this list of names given in the minute could have been known to the inspectors of Rathven and of Elgin when they are said to have agreed to the reference as being about to be present at the meeting that was to follow on that reference. The important question of fact was not decided at all by this court of reference, such as it was. The two gentlemen, the inspectors of these two parishes who were to form the parties to and to enter upon the arbitration, could not agree upon the facts to be submitted to the arbitrers, and they never did agree. They tried to arrange a joint minute, but could not come to terms; this is clear from the evidence of Mr Bremner, who says:—"A statement was sent to me by the Inspector of Elgin to be submitted to the Society of Inspectors, but I did not agree to it. I sent it back with corrections, and it came back to me from the Inspector of Elgin with my alterations deleted and another alteration put on it by himself. The statement was transmitted and retransmitted between us once or twice, as the correspondence I think will show. We never agreed upon a joint statement." No doubt this was an unpleasant and unfortunate situation in which the Society found themselves. The reference was placed before them, and the parties to it were unable to agree upon the facts. But what course of action did the Society adopt? They proceeded, in the absence of a joint minute agreeing as to the facts, to make up a statement of facts for themselves; a device moreover which had the advantage that they were thus enabled to assume facts which would, and necessarily must, lead to a conclusion in law. Where the evidence was upon which this Society of Inspectors proceeded in arriving at this decision, I am at this moment entirely ignorant. This is the first thing that strikes me as a radical and vital objection to the decision given, if I were able to satisfy my mind that there ever was a decision at all. There is a certain minute to be found in the books of this Society, a minute which has never been signed or received the proper authority even of a subsequent meeting, and this is the only warrant the parish of Elgin has for saying that the Society of Inspectors pronounced a decision. But what does this unsigned minute say? It is merely a statement made up by Mr Greig and Mr Craig, who took it into their own hands to concoct a statement of facts such as could leave no possible doubt of what the decision must be. That statement, as I find it, is as follows:—

"*Revised statement by Messrs Greig and Craig.*—'That Charlotte Grant, aged thirty-three, burdened with one child, a foreigner, and having no settlement in Scotland, became chargeable to the parish of Rathven on 1st January 1858, and continued chargeable to that parish till 1st February 1858, when she received her last payment of 2s. 6d., which, though the amount of aliment is not stated, would likely be a week's allowance in advance, or down to 8th February. On 13th February 1858 she applied to the inspector of Urquhart for relief, but did not receive any till 23d February, when she was allowed 1s. 6d. a week, which was continued till 16th September 1858, when the inspector of Urquhart, finding she was residing in the parish of Elgin, stopped the allowance, and the inspector of Elgin was compelled to grant relief, and she is accordingly now chargeable to that parish. She was admittedly an object of relief during the whole period from the time she first received relief from Rathven. When she left Rathven she begged from town to town, and did not work for her support.

"*Which parish is now liable for her support?*

"The meeting were unanimously of opinion that the woman had been a proper object of relief when she first applied to Rathven, and having continued to be so, Rathven, as the first relieving parish, was bound to continue the relief till another parish was found liable."

Where these two gentlemen got their facts I cannot tell, but they had a way of their own for removing all difficulties by the device of making up a statement, and after having set forth facts which could leave no doubt on the matter at all, they leave this learned Society to decide which parish is liable for the support of this pauper. Can we wonder at the result? Can we be astonished at the unanimous decision arrived at?

Sometimes I have speculated in my own mind as to how it would have been possible for the parish of Rathven to have framed a reduction of this. Had they consented to the anomalous board of arbitration, and not complained of the result of its decision or of the way in which the facts were concocted, yet the question remains how did it all come to their knowledge? This I cannot see. How did Mr Bremner, then, come to implement the decision arrived at? Did he go to his board and tell them all that had occurred? Not at all. The cause of the whole of his action is to be found in his evidence:—"(Q) Have you any doubt that this payment of £80 odds was made known to the

members of the board at the time when you made it, or shortly afterwards?—(A) I have no doubt they knew about it afterwards, but I am quite sure that they did not know about it at the time when it was made. I cannot condescend upon the time when they knew it. (Q) You began to support the pauper yourself directly immediately after that?—(A) Yes. (Q) Have you any doubt that the members of the board knew about that?—(A) I have no doubt they knew, because the monthly audit would show it. (Q) In the monthly audit I suppose the names are read over, and the vouchers are noticed in passing?—(A) Yes. (Q) So that the members must have seen that that pauper was entered upon the roll?—(A) I should say so. (Q) And they were also aware that the case was one which you had instructions to refer?—(A) Yes they knew that. (Q) Have you any doubt that they must have known that there was a decision against them?—(A) They may have known that. (Q) Is it possible that they could not have known that, when you were going on to pay the aliment for the pauper in the future? Can you explain that in any other way except that they knew of the decision?—(A) It was not reported to them officially. (Q) But have you any doubt that the various members of the board must have known of the decision, seeing that they knew of the reference, and that they knew also that you were going on to support the pauper?—(A) My answer is simply this, that the case was referred, and I thought I was in honour bound to obtemper the decision after it was given against us. I suppose I had stated to one or other members of the board that the case had been decided against us, but I took no notice of it."

I do not think that Mr Bremner did his duty entirely, but I have no doubt that he acted in a perfectly honest way, and that as an honest man having entered into this reference, and having learned its decision through the pages of a magazine, he thought he was "in honour bound to obtemper the decision." The next step in these transactions we find enacted at an adjourned meeting of the Parochial Board of Elgin, held at Buckie on 6th December 1864, when in the case of Charlotte Grant, Elgin Asylum, "the meeting withdrew the admission of liability made by the inspector in this case, and directed the inspector to intimate such to Elgin." I do not wonder at the course they adopted, and the question is, were they bound by what their inspector had done under a sense of honour, and by what he had continued to do under a reference of no avail whatever? So far as the past went, they did not attempt to recover the money they had paid, all they did was to withdraw any admission of liability for the future.

I am humbly of opinion that the Lord Ordinary is right, and on the grounds on which he has arrived at, his judgment is perfectly correct. In support of the doctrine that a defective decree-arbitral might be remedied, Lord Ormidale quoted a case from the House of Lords, but I may observe, that in that instance, in place of an unsigned minute, as we have here, there was a case submitted to counsel under an agreement to sign a joint memorial which was addressed to an individual. Can there be a greater difference? In the place of an individual we have here the vague Society; in place of a joint memorial there is a statement of facts made up by two of the arbiters, parties not being themselves agreed about their facts; in place of an opinion given duly by counsel, there is a notice in a magazine announcing the result arrived at. Indeed, when I recal the case of *Fraser* v. *Lord Lovat*, I do not think I could have cited it for any other purpose than to contrast it with the present.

As regards the question of homologation, it is new to me to hear it stated that parties are not to bring forward persons to say that *they knew* certain things, but that rather their opponents must bring forward witnesses to say that *they did not know*.

I do not wish to differ from your Lordships on a slight cause, or upon grounds that seem to me in any way doubtful, but this point appears to me to be so flagrant, and to contain an element so destructive to legal principles, that I cannot help dissenting.

Lord Neaves—I have had considerable difficulty in this case, and have reached the same result as Lord Ormidale, but I must add that I concur in almost everything I have heard from Lord Benholme, except the conclusion. I do not think this was a proper reference. A reference to an arbiter must be to a judge, a known individual, or to a court likewise composed of known individuals. I do not know of any instance in which a reference such as this has been sustained. I am therefore, my Lords, forced to the conclusion that if the Parochial Board of Rathven had, upon the issuing of this alleged deliverance, resisted payment, they would have been supported and successful in such a course. Here, however, there was homologation, and not that alone; they agreed to an anomalous reference, they contracted and they carried out their contract; there was not only homologation but implement. Upon hearing that the deliverance was against Rathven, Mr Bremner, with the co-operation of his parochial board (for it appears to me they must have known of it) raised the large sum of £80 odd out of the rates and paid it over, the result being that this pauper became a pauper chargeable on the parish of Rathven. The question then resolves itself into the point adverted to by Lord Benholme—Is that settlement one *quoad* bygones only, or is it to determine the status of the pauper always? I have had some difficulty, but I have come to the conclusion that the latter is the result. I think that, looking at the payment made of a long list of arrears, and at the assessment of the parish subsequently for the support of Charlotte Grant, the arrangement was a final one, and I deem it important that the settlements made thus between the two boards should not be disturbed. Neither the reference nor the award is worth the paper it is written on, but it was followed out and implemented. In the case of *Fraser* v. *Lord Lovat*, alluded to by your Lordships, the memorial was a joint one and signed by the parties themselves, that was in itself a complete proceeding, and does not, I think, throw much light upon this case, nor would such a decision support the validity of an unsigned submission and an unsigned award by an unknown body and an unincorporated society. But where arrears were raised and paid, and assessments, as here, laid on subsequently, I think the arrangement cannot be disturbed.

Lord Justice-Clerk—My Lords, I have come to the same conclusion as Lord Neaves, and very

much on the same grounds. Accordingly, I shall only shortly state the views that have occurred to me in connection with the opinion delivered by Lord Benholme.

We have a letter withdrawing the admission of liability, and that letter shows that the board had admitted their liability. The other side reply—"You cannot withdraw, since by contract with us you admitted you were liable." I am of opinion that the following facts are certainly to be deduced from the case:—(1) That the two inspectors of Rathven and Elgin signed a minute of reference. (2) That the subject-matter of that reference was the liability of either parish for the support of the pauper Charlotte Grant. (3) That the parties chosen as arbiters were the Association of Inspectors, a body acting according to the ordinary practice in such cases. (4) That the decision given by the arbiters was against the parish of Rathven. Behind these facts there come several points, of these the chief are—(1) Was there authority given to the inspector of Rathven to refer? (2) Was there a valid reference? (3) Did they implement the award?

On the first of these points, I think that Bremner informed the board of the whole matter from first to last, and that they knew it as well as he did. On the second point, I am of opinion that the board, acting in full knowledge, not only homologated but obeyed the decision, and that afterwards it is too late to open it up. Lastly, I think that the board being quite cognisant, and having authorised the inspector, proceeded to implement the contract they had made with the parish of Elgin. This was not in a legal sense a valid reference or a reference at all, and if that parochial board had at any time refused to go on farther with it, they were quite entitled to stop. The same observation will apply to the award, but there is nothing in either case which can prevent them saying that they will act on it, and having done so, they are bound by the action.

The Court pronounced the following interlocutor:—

"Recal the interlocutor complained of: Find that the Parochial Board of Rathven agreed with the Parochial Board of Elgin to abide by the opinion of the Society of Inspectors referred to in the record as to the settlement of support of the pauper lunatic in question; find that an opinion of the said Society on that matter having been expressed and intimated to the parties, the Board of Rathven acquiesced in that opinion, and proceeded to implement their agreement by admitting their liability to pay and by paying to the Board of Elgin the amount of bygone board which had been paid by the said Parochial Board of Elgin to the pursuers, amounting to £85, 16s. 2d.; and further, find to the pursuers the board of the said pauper from March 1863 to December 1864; find that implement and payment were thus made by the Parochial Board of Rathven in the full knowledge of the material facts of the case, and find that in this way the Board of Rathven took fully and finally upon themselves the support of the said pauper, and that they cannot now, in a question with the Parish of Elgin, withdraw from the liability thus admitted and acted upon; and with these findings, remit to the Lord Ordinary to proceed with the cause; find the Parish of Rathven liable to the Parish of Elgin in expenses since the date of the Lord Ordinary's interlocutor, &c.

Counsel for Inspector of Rathven—Dean of Faculty (Clark) Q.C., and Brown. Agent—Alex. Morrison, S.S.C.

Counsel for Inspector of Elgin—Lancaster and Moncreiff. Agents—H. & J. Inglis, W.S.

Counsel for Lunacy Board—J. A. Crichton. Agents—Philip, Laing, & Munro, W.S.

I., Clerk.

Monday, July 14.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HAY *v.* CITY OF GLASGOW UNION RAILWAY COMPANY.

Railway—Special Power—Road—Substitute Road—Railway Clauses Consolidation Act, 1845, *secs.* 46 *and* 49.

A railway company was by Special Act of Parliament empowered "to divert and stop up in the manner shown on the deposited plans" a turnpike road. This provision followed upon an agreement between the Railway Company and the trustees of the said turnpike road, whereby the railway company bound themselves to form a new line of road which was equally convenient to the general public. By this alteration of the road the proprietor of a rope-work, who before had access to the turnpike road, was deprived of all access in that direction. *Held* that the 46th and 49th sections of the Railway Clauses Consolidation Act applied, and that the railway company were bound to give an access to the rope-work equally convenient with that which they had removed.

This was a petition to the Sheriff of Lanarkshire by Mr James Hay, one of the partners, manager, and trustee for the Edinburgh Roperie and Sailcloth Company. The City of Glasgow Union Railway Company were respondents in the petition. The following were the circumstances of the case:—The Edinburgh Roperie Company were proprietors of a large rope-work, situated on the east side of the turnpike road leading from Glasgow to Cumbernauld, within the Barony parish of Glasgow. The Roperie Company had uninterrupted access by the said Cumbernauld Road from and to Duke Street and northward. By the City of Glasgow Union Railway Act, 1873, section 12, the respondents were authorized to make certain alterations on the Cumbernauld Road in these terms: "The Company may divert and stop up in the manner shown on the deposited plans, the turnpike road . . . . numbered twenty-seven in the parish of Barony." This provision in section 12 followed upon an agreement entered into between the Cumbernauld Road Trustees and the respondents, the Railway Company, dated 25th and 27th September 1871, under which the Company, the second parties, undertook to form a new line of road, with a footpath 7 feet wide, the width to be not less than that of the present road, and by the second article of the said agreement "the second parties