manner as they may think proper, subject to such instructions and directions as I may hereafter make.' He left no instructions. It was decided that the will was ineffectual either to give the trustees a proprietary right in the residue or to impose on them a trust in regard to it. No reasons were given for the judgment, these having been apparently expressed in the course of the argument, but unfortunately they have not been reported. It is, however, a case in point, and the only case in our books definitely, so far as I know, deciding the question."

Counsel for the Trustees — W. Gray. Counsel for the Heirs *in mobilibus* — Brown. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, October 24, 1895.

OUTER HOUSE.

[Lord Moncreiff.

PARISH COUNCIL OF RUTHERGLEN *v.* PARISH COUNCIL OF GLENBUCKET AND DALZIEL.

Poor—Settlement—Imbecile—Forisfamiliation.

Held, after a proof, that permanent congenital imbecility in a girl of thirteen years of age, short of idiocy, when taken in conjunction with the fact that the girl had been certified as of unsound mind, and had been placed, with the approval of the General Board of Lunacy, as a pauper inmate in an institute for imbeciles, was sufficient to evidence her incapacity to acquire a settlement in her own right. *Cassels* v. *Somerville and Scott,* June 24, 1885, 12 R. 1155, and *Nixon* v. *Rowand,* December 20, 1887, 15 R. 191, *distinguished.*

This was an action at the instance of Allan Scott Edmiston, inspector of poor for the parish of Rutherglen, on behalf of the Parochial Board of that parish, against the inspectors of poor of the parishes of Glenbucket and Dalziel, concluding for declarator, that Joan Ralston, an inmate of the Institute for Imbeciles at Larbert, had properly become chargeable to the parish of Rutherglen on 29th September 1894, and still was so chargeable; also for declarator that she was chargeable either to the parish of Glenbucket as the parish of her mother's settlement, or to the parish of Dalziel as the parish of her own and her father's birth settlement, and further, for reimbursement from one or other of these parishes of past outlays, and relief from future advances.

The parish of Glenbucket maintained that Joan Ralston was not sufficiently imbecile to be incapable of acquiring a settlement for herself, that she had been forisfamiliated, and that consequently she was chargeable to the parish of her birth. The parish of Dalziel, on the other hand, maintained that she was an imbecile and incapable of acquiring a settlement for herself, that she had never been forisfamiliated, and that being a dependent of her mother, who was also a pauper, she was chargeable against the same parish as her mother.

The pauper's mother was admittedly chargeable to the parish of Glenbucket, the parish of her birth, as after the death of her first husband, Joan Ralston's father, she married a second husband who had no settlement in Scotland, and who had deserted her.

After a proof, the result of which sufficiently appears from his Lordship's opinion, the Lord Ordinary (MONCREIFF) on 24th October 1895 issued the following interlocutor:—"The Lord Ordinary having considered the cause, finds and declares in terms of the first and second declaratory conclusions of the summons; further, in respect the said Joan Ralston has a subsisting parochial settlement in said parish of Glenbucket, declares against the Parish Council of Glenbucket in terms of the first petitionary conclusion of the summons, assoilzies the Parish Council of Dalziel from the conclusions of the summons, and decerns: Finds the Parish Council of Glenbucket liable in expenses to the Parish Council of Dalziel, and also to the pursuers, the Parish Council of Rutherglen," &c.

Opinion.—"It is admitted by the defenders that liability for the support of the girl Joan Ralston lies on one or other of them. The Parish of Glenbucket is the birth parish of the girl's mother, while the girl herself and her father were both born in the parish of Dalziel. Her father Joseph Ralston died on 23rd April 1881. Her mother, who survived him, in 1885 married a man of the name of Palmer, who deserted her in 1891. In October 1893 Joan Ralston's mother obtained parochial relief from the parish of Rutherglen for herself and her children, and she has continued chargeable as a pauper ever since. When she thus became chargeable she had four children dependent upon her, one of whom was Joan Ralston, who was then over 12 years of age, having been born on 4th July 1881. In September 1894 Joan Ralston was, on the application of the Inspector of Poor for the parish of Rutherglen, sanctioned by the General Board of Lunacy, received as an inmate of Larbert Institution for the training of imbecile children, and there she has remained ever since. The present action has been brought for the purpose of recovering, from one or other of the defenders, advances made for her maintenance in the institution.

"When Joan Ralston's mother became a pauper in 1893 her settlement was in Glenbucket, the parish of her own birth, because on her second marriage she lost her settlement in Dalziel which she had derived from her first husband, while her second husband had no settlement in Scotland, and had deserted her. She being the pauper, the parish of her settlement was bound to relieve those at least of the children living with and dependent upon her who were in

pupilarity. The settlement which they derived from their father was not indeed destroyed by the second marriage of their mother, but while they continued to reside with her it was suspended, and they were treated simply as burdens upon their mother.

"But in October 1893 the girl Joan Ralston had attained puberty, although she still resided with and was dependent upon her mother. The main question, upon which the defenders have joined issue, is whether, having regard to the girl's mental condition, she must not be regarded as being still a pupil, and thus incapable of being a pauper in her own right. That question proceeds on the assumption that the attainment of puberty by a child of sound mind *ipso facto* operates emancipation or forisfamiliation, although the child remains dependent on and resident with the mother. If it is established that Joan Ralston is to be considered a perpetual pupil, the parish of Glenbucket is liable. If, on the other hand, it is held that her mental condition is not such as to prevent her having a settlement in her own right, it is still maintained by the Parish Council of Dalziel that she was non-forisfamiliated, being still resident with and dependent on her mother.

"As to the mental condition of the girl, I do not think that there is any serious dispute. Although she is of a tractable disposition, and not wholly devoid of intelligence, and although under constant supervision she can do some kinds of simple work, her mental condition is separated by a narrow line from that of an absolute idiot. Alexander Skene, Superintendent of the Larbert Institution, called as a witness for the Parish Council of Glenbucket, says this in cross-examination—'No. 57 is the application upon which Joan Ralston was admitted to the institution. She is there certified to be of unsound mind. (Q) She is not an absolute idiot?—(A) No. (Q) But does she come into the class which is nearest that of an idiot?—(A) I would like to put it this way, that she is very near the uneducable class so far as scholastic teaching is concerned, but she is in a higher class so far as practical matters of daily life are concerned. Her imbecility is very marked. I should think she is quite unable to earn her livelihood. In my opinion her imbecility is permanent. I don't think she will ever be able to get along in the world without supervision more or less. She would require to be an inmate of a house such as ours all her life, or to be boarded out under a suitable guardian. She cannot put two sentences together, or even articulate one coherent sentence. She does not even know the letters, yet though she has been at them every day almost since she came to the institution.' And again, 'I do not think it would be safe for Joan to go about the world alone.' And Sir Henry Littlejohn, also a witness for Glenbucket, says—'I do not think she is so intelligent as an ordinary child of three. I consider she is unfit to go about alone as regards personal safety. I have certified such cases for Larbert repeatedly, and I have always certified them as of unsound mind, according to the regulations. (Q) And you would do it here?—(A) I would, to get her into Larbert.' And Dr Yellowlees says—'She is not an absolute idiot, or she could not recognise anything. An absolute idiot is a rare phenomenon; there is almost always some kind of intelligence, of a very faint degree it may be. I regard this as a case of unquestionable and extreme imbecility, so far as concerns intelligence especially, and so far as concerns the faculty of guiding or finding for herself in any way whatsoever. I have not the least doubt it is congenital, and it will be a lifelong condition. It may be ameliorated by teaching to a certain extent, but not to any material extent. I would not have the least hesitation in certifying her as of unsound mind.'

"If, then, the test is whether this girl has any higher intelligence than that of a pupil, it is quite certain that she has not, and that she is no more fit to take care of or support herself than a child of very tender years. But I have been referred to two cases which are said to be conclusive in favour of the contention of Glenbucket, viz.—*Cassels* v. *Somerville and Scott*, 24th June 1885, 12 R. 1155, which was followed by *Nixon* v. *Rowand*, 20th December 1887, 15 R. 191. It must at once be said that the mental condition of the paupers in those cases (especially of the pauper in *Nixon* v. *Rowand*), as described in the reports, very closely resembles that of Joan Ralston, and although there are minor points of difference, I should probably have felt bound to follow those decisions but for one circumstance in the present case which, in my opinion, is sufficient to distinguish it. I read these cases as merely deciding this—that where a pauper of weak mind has not been certified as a lunatic, and where it is not proved that she is in point of fact a dangerous lunatic or an absolute idiot, the Court will not inquire too closely into the precise degree of imbecility, but if she is proved to possess a certain amount of intelligence and power of work, though under supervision, the Court will, as a general rule, hold that she is not in such a mental condition as to be incapable of having a settlement of her own. Such a rule, if applied all round, might be for the common interest of all parishes, as it would obviate the necessity for inquiry such as we have had in the present case as to the pauper's precise degree of imbecility.

"But where, as here, the pauper has been certified as a lunatic, recognised as such by the Board of Lunacy, and admitted as such to a lunatic asylum, and there treated and paid for as a pauper lunatic, and where it is admitted that she was a proper subject for that treatment, I take it that there is no necessity and no room for considering nice questions as to her precise mental state. At least these points are enough to turn the scale. Joan Ralston was lodged in the asylum because it was thought not to be safe for her to go about alone, as a man was charged with having criminally

assaulted her. This occurred, be it observed, a year after she became chargeable along with her mother. The mother was not pauperised by the expense of Joan's maintenance in an asylum. She was a pauper apart from and before that, and therefore I have not to consider how the case would have stood if the mother had not been already pauperised. Dr David Longwill, one of the medical men who certified Joan to be of unsound mind, says—'I adhere to the opinion I then formed, that she was a person of unsound mind. That is one of the definitions of "lunatic" in the Lunacy Acts. I considered her fit for certification under those Acts as a person of unsound mind. I was aware that immediately prior to her being sent to the asylum there was a charge against a man for having assaulted her. I certified her at that time as incapable of giving evidence in Court. She appeared to me to have no sense of modesty or shame. I consider her as an imbecile of a marked type. (Q) Not an absolute idiot, but the next thing to it.—(A) Yes.'

"Thus we have not merely skilled evidence as to this girl's low mental condition, but the fact that for her own protection and good she has been certified and detained in an asylum as a pauper lunatic. In the case of *Cassels* v. *Somerville and Scott*, in which the pauper was not certified as a lunatic, the Lord President Inglis, contrasting his case with that of a certified lunatic confined in an asylum, said (12 R. 1159)—'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. Mr Smith contended that the condition of this man was such that he was under the Board of Lunacy, and the officials might have visited him to see what condition he was in. I never so understood the Lunacy Acts, and a reference to them has satisfied me that he was not a lunatic within the meaning of those Acts. Under the Statute 25 and 26 Vict. c. 54, a "lunatic" is held to be "every person certified by two medical persons to be a lunatic, an insane person, an idiot, or a person of unsound mind." Now, this man was not certified to be any one of these things, and therefore he cannot be said to have been sent to Lesmahagow as a lunatic.' Now, the certification which was awanting in the case of *Cassels* exists here, and it is sufficient, in my opinion, to stamp Joan Ralston as a lunatic in the sense of the Lunacy Acts, and as such incapable of having a settlement other than that which was liable for her support when chargeability commenced, viz., her mother's birth settlement.

"In this view it is not necessary to consider whether, assuming that she was capable of having a settlement in her own right, she was forisfamiliated on attaining puberty. She certainly would not have been held to be forisfamiliated if her father had been alive, and I believe it is still an open question whether the same rule does not apply where a child who has attained puberty remains in family with, and is dependent on, the surviving mother. See the opinions of Lord Kinloch in *M'Lennan* v. *Waite*, June 29, 1872, 10 Macph. 910, and of Lords Mure, Deas, and Shand in *Beattie* v. *M'Kenna*, March 8, 1878, 5 R. 740-741, and *Mackay* v. *Munro*, January 21, 1892, 19 R. 396.

"The result is that I find the pursuer entitled to relief against the Parish of Glenbucket.

"It was suggested on behalf of the Parish Council of Glenbucket that the rights of parties may be altered on the death of Joan Ralston's mother. As to that, it is not necessary that I should express an opinion; my judgment applies to existing circumstances."

Counsel for Glenbucket—Reid. Agents—Henderson & Clark, W.S.

Counsel for Dalziel—Salvesen—Cullen. Agents—Bruce & Kerr, W.S.

Thursday, January 16, 1896.

OUTER HOUSE.

[Lord Moncreiff.

PARISH COUNCIL OF RUTHERGLEN *v.* PARISH COUNCILS OF GLENBUCKET AND DALZIEL.

(*Ante*, p. 366.)

Process—Expenses—Extract.

The successful party in an action, whether pursuer or defender, who has obtained decree with expenses in his favour, is entitled to extract at the expense of his opponent.

The facts of this case are sufficiently set forth in the opinion of the Lord Ordinary (MONCREIFF):—

Opinion—"In this case, which raised a question as to liability for the maintenance of a pauper lunatic, the Parish Council of Dalziel was assoilzied, and the Parish Council of Glenbucket (which was held liable for the pauper's maintenance) was found liable in expenses to the Parish Council of Dalziel. The expenses of the latter were taxed by the Auditor, who allowed the expenses, amounting together to 11s. 6d., for the cost of copy of interlocutor for extractor and ordering and procuring extract. He also, as usual, allowed certain charges connected with the approval of the Auditor's report by the Court. The unsuccessful defender, the Parish Council of Glenbucket, maintain that this motion for approval and decree is unnecessary, because they tendered payment of the taxed amount under deduction of the sums allowed for obtaining approval of the Auditor's report and decree for expenses and the said sum of 11s. 6d. The Parish Council of Dalziel, on the other hand, maintain that the offer should have included the full taxed expenses (less expenses of approval) and dues of extract.

"The Parish Council of Glenbucket maintain that a defender who obtains decree of