reserve my opinion on this part until the scheme is before us.

There is only one thing more to which I wish to refer. The persons who are favoured in the deed are said to be poor children. We all know that a most important change has been made in the education of poor children by the recent Education Act. Children are now to be all educated at the public expense. I do not think the testator intended to provide for children whose education was to be provided at the public expense; and I would like to have had that also in view in deciding upon a scheme.

Lord Mure—I concur with your Lordship and Lord Deas on those branches of the case upon which you are agreed. And with reference to the admission of paying-pupils, if that should involve the exclusion of children who are the proper objects of the charity, I concur with your Lordship in the chair, because, as matters now stand, I do not see how a scheme can be put into proper shape unless some such finding as that proposed by your Lordship is pronounced. But I should certainly not wish to pronounce any finding which would seem to imply that the trustees had intentionally deviated from the directions of the founder, because I am satisfied that they had no such intention. On one point, however, viz., the introduction of paying-pupils to the exclusion of day-scholars, I am disposed to think that they have gone beyond their powers. And if the scheme as proposed points to the admission of scholars not on the foundation—to the competition for bursaries provided out of the funds of the institution—that would, I think, also be beyond the power of the trustees.

As regards the construction of the deed, it appears to me to be pretty clear that the intention of the founder, as explained by the terms of the deed, was to provide an institution for "poor children;" and that, while he contemplated as part of that institution an hospital for inmates who were to be maintained and clothed as well as educated, that was to be subordinate to the day-school. In these circumstances, I concur in thinking that it was within the discretion of the trustees to give up the part of the institution which consisted of resident inmates, provided the funds thereby set free were otherwise applied towards the education of proper objects of the charity; and I did not understand it to be contended on the part of the pursuers that such a change, subject always to the above qualification, or that the institution of a higher and lower school, was beyond the powers of the trustees. But I agree with your Lordship that if the effect of taking in paying-pupils is to lead to the exclusion, either directly or indirectly, of children who are proper objects of the charity, that is beyond the power of the trustees. And as the scheme as proposed may, in the view I take of it, operate in such a way as to lead to this result, I am of opinion, with your Lordship in the chair, that a finding or instruction to meet this state of matters should be embodied in the interlocutor to be pronounced. And I think it should also be made clear that the bursaries provided out of the funds of the institution are not open to paying-pupils, who were not, as it appears to me, within the contemplation of the founder.

The following interlocutor was pronounced:—

"Find that the defenders, as Trustees and Governors of Stiell's Hospital, in framing, publishing, and acting on the prospectus and new regulations for the administration of the charity in the year 1871, and subsequently, have not exceeded the powers conferred on them by the trust-disposition and settlement of the founder, or otherwise belonging to them as Trustees and Governors, except so far as by the operation of the said new regulations pupils attending the school and paying for their education, as not being proper objects of the charity, receive benefit from the funds, property, and revenue of the charity: Find that no part of the funds, property, and revenue of the said charity can be legally employed for the education of persons who, being able to pay for their education, are not poor children within the meaning of the founder's trust-disposition and settlement: Find that the said Trustees and Governors are not entitled to admit pupils who are not proper objects of the charity as pupils, to the effect of excluding from the school other pupils who are proper objects of the charity, or otherwise than on the footing of the persons, who are not proper objects of the charity, paying fees which shall fully meet the expense of their education at the said school: With these findings, remit the cause back to Mr Kinnear to alter the said new regulations and adjust a scheme for the administration of the charity in accordance with the said findings and with the trust-disposition and settlement of the founder, and to report the same to the Court."

Counsel for Pursuers—Lord Advocate (Watson) —Balfour. Agents—Dalmahoy & Cowan, W.S.

Counsel for Defenders—Lee—J. P. B. Robertson. Agents—J. & F. Anderson, W.S.

Wednesday, November 22.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

LAWSON (INSPECTOR OF ANNAN) *v.* GUNN (INSPECTOR OF CRAMOND).

Poor—Settlement—Lunatic.

Held that a parish which had afforded relief to an adult pauper who had been imbecile from her birth was entitled to claim repayment from the birth parish of her father, who had died without acquiring a residential settlement.

This was an action raised by the Inspector of Poor of the parish of Annan against the Inspector of Poor of the parish of Cramond. The summons concluded for payment of £48, 7s. 2d., being the disbursements by the Parochial Board of Annan for the maintenance of Maria Farie, a pauper, during her confinement in the Southern Counties Lunatic Asylum, from 19th February 1874 to 16th February 1876, and thereafter for all the time that she should continue a lunatic and require parochial relief.

The circumstances of the case were as follows:

—The pauper was born in 1853 in the parish of Selkirk, and ever since her birth had been an imbecile, and unable to do anything for her own support. Her father, Alexander Farie, was born in Cramond parish, was married at Dumfries, and after a residence of about five years at Annan died there on 19th December 1872. Farie acquired no residential settlement in Annan, as before going there he had applied for and obtained relief from Cramond Parochial Board, which relief was continued during his residence in Annan, and until his death. The pauper, after her father's death, lived with her mother in Annan till 19th February 1874, when she was removed to the said asylum. She was then twenty-one years of age. Due notice was given to the defender of her removal, and of his parish being held liable for her maintenance. The defender denied liability.

The pursuer pleaded—"(1) The parish of Cramond, as the parish of her father's birth, is liable for the pauper's support. (2) The parish of Cramond is bound to repay, as concluded for, the advances made by the parish of Annan on behalf of the pauper, and to relieve the parish of Annan of her future maintenance."

The defender pleaded—"(1) The pauper having first become chargeable as a pauper at the age of twenty-one, and more than a year after her father's death, her parochial settlement is in the parish of her own birth, and not in that of her father's birth. (2) The pauper not having been born in Cramond, and not having any settlement in that parish, the defender should be assoilzied, with expenses."

The Lord Ordinary pronounced, on 1st July 1876, the following interlocutor:—"Having considered the cause, decerns against the defender in terms of the conclusions of the libel: Finds the pursuer entitled to expenses.

"*Note.*—The pauper when she became chargeable was twenty-one years of age. She was then in a state of extreme imbecility, and incapable of doing anything for her support. This has been her condition during all her life, for though it has not been proved that she is a congenital idiot, it is plain enough that her mental infirmity has existed from her earliest infancy.

"Her father died in December 1872. At his death he had no residential settlement, and hence his settlement was in the parish of Cramond, where he was born.

"The pursuer maintains that the pauper's settlement is in Cramond, inasmuch as that was the settlement of her father at the time of his death. The defender admits that he would have been bound to support the pauper if at her father's death she had been in pupillarity. But he contends that, inasmuch as she was in majority at the time when she became chargeable, her settlement is in the parish of her own birth. His argument is, that in the absence of any residential settlement, original or derivative, every adult must have recourse to his own birth settlement; that the rule by which children retain their father's birth settlement was introduced in order to keep the family together, and can have no place as regards adult lunatics; and that though a lunatic may be looked upon as no more than a child when anything depends on choice, the law, by assigning every adult pauper to his own settlement, excludes all exercise of will, and therefore all analogy between a pupil and an adult lunatic.

"The Lord Ordinary has not been able to adopt the argument of the defender. He thinks that the reasoning on which the Court proceeded in the case of *Craig*, 8 Macph. 1172, applies equally to a pupil and a person in the position of this pauper. She has always remained *in statu pupillari*. She has never been *sui juris*, or in a condition to exercise any civil rights. On the contrary, she has been under a constant legal incapacity. The Lord Ordinary, therefore, is of opinion that the judgment of the Court in the case above mentioned rules the present. This appears to be in accordance with the view of the law taken by Lord Neaves as well as by the Court in *Walker*, 1 Macph. 893."

The defender reclaimed.

Authorities cited—*Craig* v. *Greig & M'Donald*, July 18, 1863, 1 Macph. 1172; *M'Crorie* v. *Cowan*, March 7, 1862, 24 D. 723; *Barbour* v. *Adamson*, May 30, 1853, 1 Macq. App. 376 (and the Lord Chancellor there); *Hopkins* v. *Ironside*, Jan. 27, 1865, 3 Macph. 424; *Walker* v. *Russell*, June 24, 1870, 8 Macph. 893; *Hay* v. *Paterson*, July 29, 1857, 19 D. 332.

At advising—

Lord Justice-Clerk—I see no reason to differ from the Lord Ordinary. The important consideration in such cases is to lay down and follow intelligible rules for the regulation of the liability of parishes. Now, it has been conceded that it has been conclusively settled that a pupil follows the settlement of his father even although the father be dead. It has been held in the cases of *Hopkins* and of *Walker*, to which we have been referred, that an imbecile child, although past the years of pupillarity, is still to be considered a pupil in such questions while the father is alive. I think it follows that the same rule is to be applied after the father's death, on the same analogy. Here the pauper is wholly incapable of earning her own subsistence, and has always been so. I am satisfied with the views the Lord Ordinary has expressed.

Lord Neaves—In such circumstances as the present there is no change in the position of the pupil on attaining puberty; that cannot be, as there is no will—no mental power whatever. The only difference between this case and those which have already been decided is that here the pauper's father is dead. I cannot see that this really makes any difference.

The authorities appear to me to be in entire accordance with this view—that where a person receiving parochial relief in this way is from the state of his mind in such a condition as to be utterly unable to better himself, the settlement is never changed, but remains as it was originally. The imbecile is unable to enter into any contract, or to do anything which may mark the legal distinction between puberty and pupillarity, and that being so the pupillarity must continue.

Lord Ormidale—I am of the same opinion. It is very desirable that in such cases decisions already pronounced should be adhered to, and I think that the authorities referred to have already decided the point in question as nearly as possible. There can of course be no doubt that in

ordinary circumstances the pauper until puberty would have followed the birth settlement of her father, and the question comes to be, whether, if when she is after the age of puberty still an idiot, the birth settlement of her father continues to govern? All the authorities tend to show that the effects, or rather the disabilities, of pupillarity in the case of an idiot extend to beyond the age of twelve or fourteen, as the case may be. In *Hopkins* v. *Ironside* the Judges use the expression "perpetual pupillarity," and I feel here bound to hold similarly that the pauper is still in pupillarity.

LORD GIFFORD—I concur, and it appears to me that the ground upon which the Lord Ordinary has based his judgment is entirely satisfactory.

In addition to that, however, I go upon this further, ground that the pauper must be held actually to have become chargeable during her father's lifetime, because it is admitted that the father became a pauper before his death, and died when in receipt of parochial relief. This, indeed, is just the case of a father with a helpless imbecile daughter getting parochial relief, and accordingly the parish of his birth cannot rid themselves of liability. I am therefore for adhering, on this as well as the ground taken by the Lord Ordinary.

The Court adhered.

Counsel for Pursuer—Fraser—Burnet. Agent —J. Knox Crawford, S.S.C.

Counsel for Defender—Balfour—Young. Agents —W. & J. Burness, W.S.

Friday, November 24.

FIRST DIVISION.

BURRELL *v.* SIMPSON & CO. AND OTHERS.

Ship—Marine Insurance—Total Loss—Underwriters.

In the case of the total loss of an insured ship, the rights which as incidents pass to the underwriters are retrospective, and take effect from the time when the casualty occurred.

Merchant Shipping Act 1854, *sec.* 514—*Merchant Shipping Act Amendment Act* 1862, *sec.* 54—*Collision—Reparation.*

Two steam-ships belonging to the same owner came into collision. One was sunk, the fault being solely attributable to the other. There was no loss of life; and in a petition brought under the 514th section of the Merchant Shipping Act 1854, and 54th section of the Merchant Shipping Act Amendment Act 1862, for a limitation of the liability of the petitioner *qua* owner of the offending vessel, and for a ranking of claimants upon the ascertained fund—*held* (1) that the claims of the owners of the cargo, of the crew, and of the underwriters of the lost vessel, were good as against the petitioner; and (2) that, *inter se*, the owners of cargo, the crew, and the underwriters, fell to be ranked *pari passu* upon the fund.

Merchant Shipping Act Amendment Act 1862, *sec.* 54—*Freight—Interest—Expenses.*

The 54th section of the Merchant Shipping Act Amendment Act 1862 provides for a limitation of the liability of the offending vessel, *inter alia*, where "loss or damage is . . . caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat."—*Held* (1) that claims for damages for loss of the freight of the sunk ship, and for a sum of expenses incurred by her crew after the collision, were not under the statute good claims upon the fund; and (2) that a claim for freight would pass as an incident of the ship to the underwriters.

Held that the owner of a ship—though his liability to damages in respect of loss inflicted by collision is restricted in amount by the Merchant Shipping Act Amendment Act 1862, sec. 54—is liable to pay interest on that amount from the date of the collision; and (2) that when he applies to the Court to have the damages assessed and claimants ranked in terms of the Act, he must pay the expenses.

Merchant Shipping Act Amendment Act 1862, *sec.* 54—*Construction—Steam-Ship—Gross Tonnage.*

In estimating the amount of liability for damages by a steam-ship, under the 54th section of the Merchant Shipping Act Amendment Act 1862, it is provided that the tonnage upon which the amount is to be calculated shall be "the gross tonnage, without deduction on account of engine-room."—*Held*, upon a construction of the clause by reference to sections 21 and 23 of the Merchant Shipping Act 1854, that "'gross tonnage' implies a deduction of the space appropriated to the berthing of the crew."

This was a petition at the instance of William Burrell, shipowner in Glasgow, sole registered owner of the steam-ships "Fitzmaurice" and "Dunluce Castle," of Glasgow. On 4th February 1876 the two vessels, while on their passage between London and Leith—the "Fitzmaurice" being bound to London, and the "Dunluce Castle" to Leith—came into collision near Lowestoft, and the "Dunluce Castle" was sunk. Those in charge of the "Fitzmaurice" were admittedly to blame. Both ships had cargoes, but neither had passengers, and no lives were lost. The owner was therefore, under the provisions of section 54 of the Act 25 and 26 Vict. cap. 63 (the Merchant Shipping Act Amendment Act 1862), not answerable "in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage." This petition was accordingly presented by Burrell, under section 1 of the above mentioned Act, and section 514 of the Merchant Shipping Act 1854 (17 and 18 Vict. cap. 104), praying the Court, *inter alia*, to limit the petitioner's liability as owner of the "Fitzmaurice" to a sum of £8 per ton upon 448·80 tons, and to rank claimants according to their respective rights upon that fund.

Claims were lodged (1) by Simpson & Co., engineers, London, as owners of cargo on board the "Dunluce Castle," and a number of others in a similar position; (2) by the seamen of the "Dunluce Castle;" (3) by the underwriters of the "Dunluce Castle," to whom Burrell had granted an assignation of all right and interest he had in