Wednesday, June 24.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CASSELS (INSPECTOR OF LANARK) *v.* SCOTT (INSPECTOR OF LESMAHAGOW) AND SOMERVILLE (INSPECTOR OF CARSTAIRS).

Poor — Residential Settlement — Person of Weak Intellect—Poor Law Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 76.

A person of weak intellect, but neither an idiot nor a lunatic, was boarded by his friends for a period of more than twelve years in the parish of L. He was physically strong, could deliver messages, and do simple labourer's work under supervision. He had never earned wages, and such work as he was able to do was not taken into account in fixing his board, the expense of which was defrayed by his family. *Held* that he was capable of acquiring, and had acquired, a residential settlement in the parish of L.

This was an action raised in the Sheriff Court of Lanarkshire at Lanark by John Cassels, Inspector of Poor of Lanark, against George Scott, Inspector of Poor of Lesmahagow, and Samuel Somerville, Inspector of Poor of Carstairs, concluding alternatively against the defenders for (1) repayment of certain sums of money already paid, and (2) of all future payments for the maintenance of William Dalziel.

The following statement of facts is taken from the interlocutor and note of the Sheriff-Substitute:—William Dalziel, the pauper, was born in the parish of Carstairs in 1835. His father was a farmer and had a residential settlement there at the time of his death. The pauper continued to reside with his mother in Carstairs until 1859. She finally settled in Lesmahagow and died there in 1863. After his mother's death the pauper was boarded in various parishes, but for at least twelve years prior to June 1880 he had resided in Lesmahagow, where his board was paid by his relatives. From June 1880 to March 1884 he resided in Lanark with a brother, and on his brother's death he became chargeable to and was relieved by the parish of Lanark in March 1884. The pauper was physically strong, but had been from his infancy weak in mind. He was neither a lunatic nor an idiot. He could deliver messages and do simple labourer's work under supervision. He could read imperfectly but could neither write nor did he know anything of arithmetic. He had never earned wages, and such work as he was able to do was not taken into account in fixing his board. He had no means of his own, and his board was paid by members of his family. If the pauper was capable of acquiring a residential settlement, it would be the parish of Lesmahagow.

The parish of Lesmahagow, besides pleading that William Dalziel was able-bodied and not a proper subject for parochial relief, pleaded, *inter alia*, that as the imbecility, if any, of William Dalziel had existed from his birth or infancy, he could not acquire, and did not by being boarded in that parish acquire, a residential settlement therein.

The parish of Carstairs pleaded that no liability attached to it, since the pauper had acquired a residential settlement in another parish.

The Sheriff-Substitute found in law that the pauper was capable of acquiring and did acquire a residential settlement in Lesmahagow.

"*Note.*—[*After dealing with the evidence relating to the pauper's condition, the essential facts proved in which have been narrated above*]—In these circumstances the question arises if he was capable of acquiring a residential settlement, and it seems to me that he was.

"It has long been settled that a lunatic cannot do so, on the ground that he has not sufficient mind to fix his own residence, or capacity actively to acquire a civil right (*Melville* v. *Flockhart*, 1857, 20 D. 346, Lord Deas; *Gentles* v. *Beattie*, 1880, P.L.M., vol. viii., N.S. 478, Sheriff Guthrie; *Caldwell* v. *Dempster*, 1883, 10 R. 1263, Lord Fraser 1271), but as regards parties weak minded but not lunatics, every case depends on its own circumstances (*Watt* v. *Hannah*, 1857, 20 D. 342, Lord Deas).

"I was not referred to any cases where it was directly held that a person not a lunatic was incapable of acquiring a settlement, but there are cases which throw light on the point. In *Hopkins* v. *Ironside*, 1865, 3 Macph. 424, a congenital idiot, whose father's settlement could not be discovered, was held not entitled to her own birth settlement. In *Lawson* v. *Gunn*, 1876, 4 R. 151, a woman not a congenital idiot, but who from her early years had been imbecile and unable to do anything for her support, took her father's settlement when she became a pauper two years after his death. In *Keay* v. *Stewart*, 1858, 21 D. 89, a father's birth parish was held liable for the support of his daughter, who had been from infancy imbecile and incapable of supporting herself.

"On the other hand, in *Heritors of Haddington* v. *Heritors of Dunbar*, 1837, 16 S. 268, a woman subject to occasional fits of great violence, who could not be trusted out of sight of her friends, but was able to do outdoor work and earn wages, was held to have acquired a settlement. In *Walker* v. *Russell*, 1870, 8 Macph. 893, a woman of weak intellect, who travelled the country with her mother as a hawker, was held to have been forisfamiliated. In *Watson* v. *Caie & Macdonald*, 1878, 6 R. 202, a woman, deaf and dumb, of low intelligence and peculiar temper, who understood the deaf and dumb language, and was able to do some simple kinds of household work, was held capable of acquiring a settlement. In *Gentles* v. *Beattie*, 1880, P.L.M., vol. viii., N.S. 478, a man of weak mind who had worked for his livelihood under the care of an uncle, was held by Sheriff Guthrie to have acquired a settlement; and in *Scott* v. *Gardner*, 1881, P.L.M., vol. x., N.S. 149, a woman who had suffered from severe attacks of fever when a child, which left her much weak-minded, but who assisted her mother in washing, and was able to do some household work under the eye of her mother, was held by Lord Adam capable of acquiring a settlement. See also *Milne* v. *Ross*, Dec. 11, 1883, 11 R. 273.

"In none of these latter cases could the pauper have probably obtained an engagement or earned sufficient to maintain himself, and in the present

case it must be kept in view that the pauper's friends were in fair circumstances, and that he was not trained or required to do what he might have been capable of doing.

"The question of expenses is within the discretion of the Court, and a not uncommon result has been to find the losing parish liable in the whole expenses (*Beattie* v. *Leighton*, 1863, 1 Macph. 434; *Hay* v. *Kirkwood*, 1860, 22 D. 987; *Grant* v. *Reid*, 1860, 22 D. 1110), and I see no reason to depart from that rule. No doubt Carstairs ought not to have been called as the residential settlement of the pauper's father, for the pauper, even although he had been a lunatic, lost that settlement by absence (*Thomson* v. *Kidd*, 1881, 9 R. 37; *Boyd* v. *Beattie*, 1882, 9 R. 1091, Lord Young), but it was the birth parish of the pauper, and had he been held unable to acquire a residential settlement, the question would have arisen whether he fell back on it as his own birth parish, or on his father's or his mother's birth parishes (*Hay* v. *Waite*, 1860, 22 D. 1872, Lord Justice-Clerk; *Caldwell* v. *Dempster*, 1883, 10 R. 1263; *Carmichael* v. *Adamson*, 1863, 1 Macph. 452; *Beattie* v. *M'Kena*, 1878, 5 R. 737). Carstairs was therefore properly called, and Lesmahagow, by its denial of the pauper's residential settlement, must be held to have caused the expense."

Lesmahagow appealed to the Court of Session, and argued—The pauper being an imbecile was incapable of acquiring a residential settlement. The effect of the later decisions was to put an idiot on the same footing as a lunatic. The pauper here was undoubtedly an idiot. That was shown by the proof. Some of the witnesses went the length of saying that he did not know right from wrong. If the pauper was so weak in mind that he could not maintain himself, then on the authorities he could not acquire a settlement. The pauper here could do no work of a kind to be taken account of in estimating his board. He could pull weeds in a garden under supervision, but that was all. See *Milne* v. *Henderson and Smith*, Dec. 3, 1879, 7 R. 317, and *Milne* v. *Ross*, Dec. 11, 1883, 11 R. 273. In the cases which would be cited against these it would be seen that the pauper did some wages-earning work, as in *Haddington* v. *Dunbar*, Dec. 19, 1837, 16 Sh. 268; *Walker* v. *Russel*, June 24, 1870, 8 Macph. 893. See also *Watson* v. *Caie and Macdonald*, Nov. 19, 1878, 6 R. 202. The pauper here was supported by his relatives in a house of safe keeping. Such a one could not acquire a settlement. He was to be regarded as if he was in an asylum. There was no case where a pauper whose intelligence was of so low an order had acquired a residential settlement—25 and 26 Vict. cap. 54 (Lunatics Scotland Act 1862); 29 and 30 Vict. cap. 51.

Argued for Carstairs—The pauper was not an idiot or lunatic; he was merely weak-minded. It was true he never had supported himself, but he had been supported by his friends, and had been "maintained" in the sense of the statute. For interpretation of the statute, see *Thomson* v. *Gibson*, 13 D. 683. The pauper might not have earned money, but he gave money's worth, and to a certain limited extent he maintained himself by his work.

Authorities—*Scott* v. *Gardner*, Poor Law Mag. vol. x. p. 150; *Greig* v. *Ross*, Feb. 10, 1877, 4 R. 465; and authorities cited by Sheriff-Substitute.

At advising—

Lord President—There is no doubt that the pauper here resided in the parish of Lesmahagow for a period more than sufficient to acquire a residential settlement provided that he was in such a condition mentally as that he could acquire it. His history is a peculiar one, and accordingly his condition while he was at Lesmahagow must be examined into somewhat closely in order to see if he was not a lunatic, and so incapable of acquiring a settlement of residence. It appears that he was always of weak mind, and that he had resided with his father in the parish of Carstairs from the time of his birth in 1835 down to 1851, at which date his father died. He lived after that with his mother down to the date of her death in 1863, after which apparently he was boarded in two other parishes, but for twelve years prior to 1880 he resided in Lesmahagow, and did not become a proper object of parochial relief until 14th March 1884, at which date he had not had time to lose his residential settlement there if he had acquired it. The effect of the evidence as to the pauper's life at Lesmahagow comes to this, I think—that while he did not maintain himself in the sense of the 76th section, yet he was maintained by his friends, and that in a sense to satisfy the provisions of the statute. He did not support himself by begging nor by receiving parochial relief, but he was maintained by his friends, and so having for more than the necessary period resided in this parish of Lesmahagow he has acquired the necessary settlement of residence.

But it has been urged that the pauper is so weak mentally that he is not able to acquire a settlement of residence, and upon that point I think that the findings of the Sheriff-Substitute show very clearly how the facts upon this matter stand. He finds that "(3) he is physically strong, but has been from infancy weak in mind; that he is not a lunatic or idiot; that he can deliver messages, and do simple labourer's work under due supervision; that he can read very imperfectly, cannot write, and knows nothing of arithmetic; that he has never earned wages, and that such work as he was able to do was not taken into account in fixing his board; that he has no means of his own, and that his board has been paid by his family." Now, it seems to me that this is a very fair representation on the evidence of this man's condition, and I am willing so to take the facts of the case, and that being so, I think upon the authorities that he was capable of acquiring a residential settlement.

The points that are clear upon the authorities are (1) that a lunatic who has been placed in an asylum cannot acquire a residential settlement in the parish in which the asylum is located. That is the case of *Melville* v. *Flockhart*, 20 D. 346.

Then, again, it has been settled that if instead of being put into an asylum the person is boarded with a keeper, the place of boarding is to be held as an asylum, and that I think is a reasonable extension of the rule to which I have just referred. It was so decided by the Court upon the same day as *Melville* v. *Flockhart* in the case of *Watt* v. *Hannah*. In that case Lord Deas said—

"I am not disposed to say that all that large class of persons who are not quite sane are incapacitated from either acquiring or losing a settlement. As regards parties neither cognosced nor in a lunatic asylum, I think every case must depend upon its own circumstances. But here the following things concur:—1st, The pauper was originally removed to and placed in the parish of Inch by the act of his friends on account of his insanity. 2d, He was all along while there incapacitated by insanity from either mental or physical labour. 3d, He was so insane as to be incapable of taking care of himself. 4th, He was all along in the keeping and under the charge of third parties on account of his insanity, and latterly, without any alleged change of condition, he was treated as a lunatic under the statute. What may be the effect of the absence of all or any of these elements I do not wish to say. In a matter so novel and delicate I think it better not to go beyond the case before us."

This case differs considerably from the case of *Watt* v. *Hannah* as explained by Lord Deas, because here Dalziel was certainly not sent to Lesmahagow, nor was he boarded with a keeper as being an insane person, but he was provided for by his relatives, because he was mentally weak and unable to earn his livelihood in the manner of other persons, but he could not in any sense be called a lunatic.

Mr Smith tried to make out that he was such a person as would be under the supervision of the Board of Lunacy, and that their inspectors would have been entitled to have cognisance of him and of his actings.

I never so understood the provisions of this Act, and a glance at the statute 25 and 26 Vict. c. 54, shows that by that statute a lunatic is defined in the interpretation clause as a person certified by two medical persons to be a lunatic, an insane person, an idiot, or a person of unsound mind. Now, this man has not been certified to be any one of these things by medical men, and therefore he could not be said to have been sent to Lesmahagow as a lunatic to be boarded there. His condition, in short, is just this—he is boarded in the parish of Lesmahagow because he is not able to earn his own livelihood, and his friends think that he should be boarded there.

If it could have been established that he was insane, that would have been a very different matter, but the Sheriff-Substitute has found that his true condition is that from his infancy he has been weak in mind, and that being so, the case is not ruled by the authorities cited.

I think, therefore, that the judgment of the Sheriff-Substitute is well founded, and ought to be adhered to.

Lord Mure—I am of the same opinion. The case is a somewhat nice one, and the point to be determined novel. The pauper is said to be weak in mind, and unable to support himself, and in point of fact he never has done so; but he has not come upon the rates for support, as he has hitherto been maintained entirely by his friends.

The question therefore comes to be, whether this case falls under the rule laid down in *Watt* v. *Hannah*, or is it to be held as ruled by the decision in *Thomson*, 13 D. 683?

Now, it appears to me that the maintenance here is a maintenance by his relations, who in so supporting him prevented him from becoming a pauper.

In the case of *Thomson* the following passage occurs in the opinion of the Lord Justice-Clerk. He says—"I consider the words 'shall have maintained himself' used in the statute mean that the party shall not have been a burden on that parish, whether he may have been supported by his own funds now exhausted, or assistance from friends, or other means.' The words are added, 'without having had recourse to common begging either by himself or his family.' This was meant to exclude the worst description of pauper—the pauper of idleness—and further, 'without having received or applied for parochial relief."

Now, that is just the case we have here—a man who has not had recourse to begging or been in receipt of parochial relief, and who has been supported by his friends. He is weak in mind but not a lunatic, and is incapable of earning his livelihood. I agree with your Lordship that, looking to the authorities, such a person can acquire a residential settlement, and I think the interlocutor of the Sheriff-Substitute should be affirmed.

Lord Shand—I am of the same opinion, and I agree with your Lordship in thinking that the Sheriff-Substitute has correctly found the facts upon which this question of law arises. [*His Lordship here repeated the findings of the Sheriff-Substitute quoted above in the opinion of the Lord President.*]

I should even be willing to add to them a finding that the pauper was incapacitated from earning wages, but even in spite of all that I think that this pauper has acquired a settlement by twelve years' residence in the appellant's parish. It is true that five years is the term of residence necessary to give a settlement, with this *proviso*, that if the person be so mentally afflicted as to be unable to exercise his mind upon the matter, then mere residence will not give him a settlement, the principle being, that he is not capable and has not applied his mind to the matter so as to make a selection.

The argument addressed to us to-day for the appellant went the length of saying, that when a man is merely of weak mind he is to be incapable of acquiring a residential settlement. I cannot see the principle upon which such a proposal rests. Why should inability to earn a livelihood prevent or incapacitate a person from acquiring a residential settlement? A man may not, as in the present case, be able to maintain himself, but he may nevertheless be supported by his friends or relatives.

I desire to add that I think this case is *a fortiori* of the case of *Watson* v. *Caie*, Nov. 19, 1878, 6 R. 202. In that case I observed—"The first point raised by the defender is that the pauper was incapable of acquiring a settlement by residence, on the ground that she was insane and so in a state of perpetual pupillarity. But while the case is one near the border line, and in which it cannot be denied that the pauper is weak and peculiar in mind, I do not think that she was insane or imbecile in the full sense of the term."

The case was so narrow that I almost thought that insanity had been made out. It appeared from the evidence in that case that the woman was incapable of earning wages, but she was able to do some simple kinds of household work.

She was a person of low intelligence and peculiar temper, but she understood the deaf and dumb language. The Court decided that she was not mentally incapacitated from acquiring an industrial settlement. Had this question arisen for the first time in the present case, I should have been prepared to have adhered to the Sheriff-Substitute's interlocutor, but I consider the point settled by the case of *Ross*, which is *a fortiori* of the present.

Lord Adam was absent on circuit.

The Court refused the appeal.

Counsel for Lesmahagow — Guthrie Smith — Dundas. Agents—Melville & Lindesay, W.S.

Counsel for Carstairs — Cheyne — Gillespie. Agents—Mackenzie & Kermack, W.S.

Counsel for Lanark — Mackintosh — Low. Agents—Mackenzie, Innes, & Logan, W.S.

Monday, June 25.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

MACKIN *v.* NORTH BRITISH RAILWAY COMPANY.

Process—Jury Trial—Notice of Trial at Circuit Court—Motion to Change Place of Trial.

John Mackin, a mason, was run over by one of the North British Railway Company's trains at a level-crossing near Stirling, and seriously injured. He raised an action of damages in the Court of Session against the railway company. Issues were adjusted, and the pursuer gave notice for trial at the next Circuit Court at Stirling. The Lord Ordinary (M'Laren) reported the case to the Second Division on the motion of the defenders that the case should be tried in Edinburgh, on the grounds of convenience and saving of expense. It depended, they argued, on the duration of the criminal work at Circuit how long the witnesses might be kept waiting till the cause came on for hearing. There was, too, a danger of getting a biassed jury at Stirling, and a question of right-of-way at the place where the accident happened might arise. The pursuer opposed the motion on the ground that he was a poor man, and resident in Stirling, where also the witnesses lived and the accident happened. He argued that no ground had been shown for having the case tried in Edinburgh.

The Court refused the motion on the ground that no cause had been shown for granting it, and the pursuer was only exercising his legal right in giving notice for trial at the Circuit Court.

Counsel for Pursuer—M'Kechnie—M'Lennan. Agent—James M'Caul, S.S.C.

Counsel for Defenders—J. P. B. Robertson—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Friday, June 26.

FIRST DIVISION.

[Sheriff of Lanarkshire.

PATERSON AND ANOTHER *v.* HASSAN.

Reparation—Slander—Making Erroneous Accusation in Good Faith to Police—Privilege—Malice and Want of Probable Cause.

A lady observing on the street a man whom she believed to have defrauded her of money a few days before, charged him in presence of the persons then in his company with having done so, and in a few minutes thereafter, having procured a policeman, gave him into custody. It was proved that she was entirely mistaken as to his identity, and he was liberated. *Held*, in an action of damages by him, that the charge to the police not having been malicious, and without probable cause, was privileged, and did not infer liability in damages; (2) that the charge made before the police were procured was not to be looked on as a separate accusation, but as part of the same *res gestæ*, and therefore could not of itself infer liability. The Court therefore *assoilzied* the defender.

John Hassan, head-master of St Francis Roman Catholic School, Glasgow, was on his way to the Broomielaw, Glasgow, to catch the four o'clock steamer to Dunoon, on the afternoon of the 23rd July 1884. He was accompanied by his mother and sister, and was near the corner of Jamaica Street and Union Street when he was stopped by a lady, who accused him of being a person who had called at her house on the previous day and obtained money by false pretences. After repeating the expression the lady left Hassan, and in a very few minutes afterwards she again came to him, accompanied by two police-constables, to whom she gave him in charge, stating that he had obtained money from her on false pretences, and Hassan was taken into custody and conveyed to the Central Police-station. Here he was examined by the officer on duty, and was ultimately discharged, as the officer on duty was satisfied that the lady was mistaken.

This was an action by Hassan against Mrs Rachel Paterson (the lady who had falsely accused him), and her husband Walter Paterson as her administrator-in-law. The action was raised in the Sheriff Court of Lanarkshire at Glasgow, and concluded for payment of £200 as damages.

The pursuer averred that when he was accosted by the defender and constables in Jamaica Street he explained who he was, and warned the defender that she was mistaken, and that she should be careful of the serious charge she was making against him; that the defender most positively reiterated the charge of fraud at the police office, and that he was subjected to a close examination for two hours as to his movements on the previous day before he was liberated; that he was in Dunoon all the previous day, to which the charge applied, and that the charge made against him was false and malicious, and without any just or probable cause; that he had suffered great injury to his feelings and reputation by the charge