Friday, July 9.

STEUART *v.* CARDNO & DARLING.

Tradesmens' Accounts—Interest—Rendering of Accounts. In an action by a tradesman on an account for goods furnished, where the tradesman had rendered periodical accounts, *held* that he was not entitled to charge interest on these accounts from the dates ef rendering.

Question, Was he entitled to charge interest from the date of the last item of the account?

Cardno & Darling, nurserymen, seedsmen and florists in Aberdeen, brought an action in the Sheriff-court of Banffshire against Steuart of Auchlunkart, concluding for payment of "the sum of £33, 19s. 8d. sterling, being the balance of an account herewith produced, the last date of which is 20th June 1866; *Item,* interest on £25, 16s. 11d. sterling, being the balance of principal since 27th January 1865, but principal and interest together not to exceed £50 sterling." The first items of the account were dated 27th November 1863, amounted to £35, 12s. 10d. On 22d March 1864, items amounting to £7, 0s. 10d. On 17th April 1865, items amounting to £6, 10s. 8d. On 19th October items amounting to 4s. On 30th March items amounting to £1, 0s. 9d.; and on June 20th 1866, and August 24th 1867, items amounting on each date to 3s. 11d. There was an entry, of date 27th June 1865, of a payment of £25 to account, leaving a balance of . . £25 16 11 and then—

To Interest on the foregoing Account, as under:—

1863.									
Dec. 20, to Jan. 27 1865, of	£35	12	10		£1	19	3		
	7	0	10						
1864.									
June 20, to do. of	£42	13	8		1	5	10		
	25	0	0						
1865.									
Jan. 27, to Jan. 27 1869, of	£17	13	8		3	10	8		
June 20, to do. of	6	10	8		1	3	6		
1866.									
June 20, to do. of	1	8	8		0	3	6		
								8	2 9
								£33	19 8

The pursuer stated in evidence that he had rendered accounts in June 1864, December 1865, December 1866, June 1867, December 1867, and June 1868.

The pursuer pleaded—"(1) The pursuers having furnished to the defender the goods, and performed for him the work mentioned in the account sued for on the order of the defender, at the dates and for the prices specified in the account, they are entitled to decree for the amount, with interest since due till paid, as specified in the account."

The defender pleaded non-ordering of the items after October 1865, and prescription of items previous to that date; and farther, "(4) the pursuers are not entitled to charge interest on a current-account as the different items arise, but only after the date of the last item."

The Sheriff (BELL), adhering to the judgment of his Substitute (GORDON), decerned against the defender.

The defender appealed.

J. C. SMITH for appellant.

KEIR for respondents.

The Court did not ask a reply on any of the points except the point of interest.

At advising—

LORD PRESIDENT—We have disposed of all the points raised in this appeal except the question of interest on the account sued for, and as to that the pursuer pleads that—(*reads pursuer's first plea*). The way in which that is charged in the account is by charging it from each date of rendering, and there are three or four periods of rendering. On the other hand, the defender pleads—(*reads defender's 4th plea*). I am of opinion that the pursuer's plea on this point is bad, and as the defender admits by his plea that the pursuer is entitled to charge interest after the date of the last item, we need not consider any more than this question, whether the pursuer is entitled to charge interest periodically, that is, from the different points of time in the account, and not merely from the date of the last item. On that my opinion is against the pursuer, and I give no opinion whether interest would have run after the date of the last item, for that is admitted by the defender.

Agents for Appellant—Maitland & Lyon, W.S.
Agent for Respondents—W. G. Roy, S.S.C.

Saturday, July 10.

KIRKWOOD *v.* LENNOX.

Poor—Lunatic—20 and 21 Vict., c. 71—*Residential Settlement—Discovery of Funds belonging to Pauper.* A person, born in Ayr, was, in 1864, having then a residential settlement in Govan, sent to a district asylum as a pauper lunatic, under a warrant in terms of the Lunacy Act. It was then found that she had some funds, and these were expended on her maintenance. They being exhausted, *held,* in a dispute between Ayr and Govan, that her settlement was in Govan; the case coming under the 75th section of the Lunacy Act.

Opinions, as to whether, at the date of being sent to the asylum, the party was a "pauper lunatic."

Question, whether a lunatic, being incapable of acquiring a residential settlement, is capable of retaining one?

This was a special case stated for the purpose of fixing on one or other of two parishes liability for the maintenance of a lunatic pauper. The facts and the question of law were thus stated in the case as amended:—

"On 10th August 1864 application was made by Mr John M. Robertson, writer in Glasgow, the factor for the property in South Portland Street, Glasgow, in which the said Catherine Stewart then resided, and by the police authorities, to the Inspector of Poor of the parish of Govan, in which South Portland Street is situated, to take charge of the said Catherine Stewart as being insane, and requiring some one to look after her. An assistant-inspector and medical officer from Govan parish visited her on the same day, at her house at 116 South Portland Street, and she was, on the evening of the same day, removed to the Royal Lunatic Asylum at Gartnavel, near Glasgow, under a warrant of the Sheriff of Lanarkshire, after having been certified by two qualified medical practitioners as being of unsound mind.

"At the time when said application was presented, nothing was known as to the affairs of Catherine Stewart and she was treated as a pauper. But on examining the state of her affairs, it was found that the said Catherine Stewart was possessed of a sum of nearly £200; and her relations having applied to the Court of Session for the appointment

of a *curator bonis*, the Court appointed Mr J. H. Ferguson, accountant in Glasgow, to that office. The curator undertook the management of the lunatic's affairs, and at once took charge of her, and repaid the inspector of Govan the outlays which he had made connected with her case. In the exercise of his powers, Mr Ferguson continued to pay for the maintenance of said Catherine Stewart in said asylum out of her own funds, from said 10th August 1864 till 31st December 1868, or for upwards of four years and four months.

"Gartnavel Asylum, where the said Catherine Stewart is maintained, is situated within the said parish of Govan.

"On 30th November 1868 her said *curator bonis* intimated to the inspector of Govan that the whole funds of the lunatic were exhausted, and requested him to provide for her out of the poor's funds. The Parochial Board of Govan has, in consequence, become responsible to the Directors of the asylum for her board, from and after 1st January last (1869) the date when her funds had become exhausted; and she is thus chargeable to Govan as a pauper. She is still an inmate of said asylum.

"Intimation of this chargeability was sent to the Inspector of Poor of the parish of Ayr, on 5th January 1869, and a demand made that the parish of Govan should be relieved of said chargeability by the parish of Ayr.

"On 10th August 1864, when she was sent to Gartnavel Asylum, the said Catherine Stewart had acquired, and then possessed, a residential settlement in the parish of Govan.

"She was then a lunatic, and has continued so down to the present date, being a period of four years and nine months, or a period of four years and four months prior to the date when she became a pauper.

"The pauper, who is unmarried, was born in the parish of Ayr, and is lawful daughter of Archibald Stewart, shipmaster, and Mary Stewart, who both died many years before the insanity of the pauper.

"The question of law is, Whether the settlement of the said Catherine Stewart is in the parish of Govan,—being the parish in which, prior to 10th August 1864, she had a residential settlement,—or in the parish of Ayr, being the parish of her birth.

"If your Lordships shall be of opinion that the said Catherine Stewart has lost her residential settlement in the parish of Govan, your Lordships are requested to pronounce judgment finding that the said William Lennox, as Inspector of Poor of the parish of Ayr, is bound to relieve the said James Dunlop Kirkwood, as Inspector of Poor of the parish of Govan, of his advances on behalf of the pauper.

"If, on the other hand, your Lordships shall be of opinion that the said Catherine Stewart has not lost her settlement in the parish of Govan, your Lordships are requested to pronounce judgment in favour of the said William Lennox to that effect."

The petition to the Sheriff was presented under section 34 of the Lunacy Act, 20 and 21 Vict., c. 71.

GORDON, Q.C., and TRAYNER for Govan.

GIFFORD and GUTHRIE for Ayr.

At advising—

LORD PRESIDENT—The inspector of Govan having seen this woman on 10th August, and being satisfied that she was a lunatic, and being also under the impression that she was a pauper, took the usual proceedings by applying to the Sheriff for having her removed to Gartnavel Asylum, which we must assume to be a district asylum under the Lunacy Act, as a pauper lunatic. The Sheriff on that application granted a warrant dated the same day, in which, proceeding on the Lunacy Act, 20 and 21 Vict., c. 71, he authorised her transmission to the asylum as a pauper lunatic in terms of the statute. From that date to this she has been constantly an inmate in the Gartnavel Asylum, and it is admitted that she has all along been, and is now, insane.

After she had been sent to and detained in this asylum, the inspector of Govan discovered that she had some means of her own, and of course he was entitled to have these applied so far as they would go to defray the expenses to which he had been put in sending her to the asylum and in maintaining her there, and until these small means were exhausted the inspector was put to no farther expense. But the liability of the parish was only suspended for a time, that is, until the £200 were expended. The period has now arrived when these means are exhausted, and accordingly what was alleged to be true when this warrant was granted is now true in fact; she has no means, and the parish must support her.

Now, I am of opinion that it is impossible to say that at the time when she has sent to Gartnavel Asylum she had become a proper object of parochial relief within the meaning of the Act. It was a mistake on the part of the inspector to suppose that she was so. She was not a pauper at that time, although verging to that condition very rapidly, and therefore when she was sent to the asylum she was not a pauper lunatic, but only a lunatic. But during her residence there her means became exhausted, and she has become a pauper lunatic; and the question arises, what parish is to provide for her? When the warrant was granted for sending her to the asylum, she had a residential settlement in Govan. Her parish of birth is Ayr, and a competition arises between those parishes for immunity. Govan says it is entitled to be relieved by Ayr, because she has not retained her settlement under the provisions of the 71st section of the Poor-law Act. Ayr says she has done nothing to lose her settlement in Govan. That was the only question sent to us originally, and it appeared to us that the Lunacy Act, 20 & 21 Vict., c. 71, had not been attended to; and we desired information as to the circumstances in which this woman was sent to the asylum, and the terms of the warrant; and the question now comes to be, whether the case we are now dealing with is provided for by the 75th section of the Act 20 & 21 Vict., c. 71? Now that section provides—"Every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for her reception in such asylum was granted." . . I must say I cannot see how it is possible to dispute that every letter in that part of the clause I have read applies to the case. This Catherine Stewart is a pauper lunatic. There is no doubt of that, and there is as little doubt that she is detained in a district asylum. And it is not unimportant to observe that the term used is "*detained* in any district asylum," not, as in some of the other clauses, "*sent* to and detained in any district asylum." It is sufficient to let in this clause that the pauper shall, as such, be detained in a district asylum, and it is not necessary that she should, as such

pauper lunatic, be sent to a district asylum. These are the conditions, and the only conditions—(1) that she shall be a pauper lunatic, and (2) that, as such, she is detained in a district asylum—required to let in the imperative enactment that she shall be held to be chargeable to the parish of legal settlement at the date of the order for admission. And it is not immaterial to observe that the Act says, not the settlement of the pauper lunatic, but of such lunatic. That makes it clear to me that if a person is sent as a lunatic under an order for reception, and then becomes a pauper lunatic, the clause is intended to apply. That is sufficient for the case; and on that ground I am of opinion that Govan is liable.

The other question argued is more difficult and serious, but it is unnecessary to state in detail the reasons of my opinion on that point, I shall only say that I think it has been determined that a person in the position of a lunatic cannot acquire a residential settlement under the 76th section, and it has always been, and is still my opinion, that no one can retain a residential settlement who is incapable of acquiring one.

LORD DEAS—This pauper held a residential settlement in the parish of Govan, and there is no question that she became insane. The inspector of poor for Govan, proceeding under the statute, presented the application to have her put into that district asylum. A warrant was granted to that effect, and she was put into it accordingly. She is still there under the same warrant, and no other. Let us suppose, either that she had no funds, or that they had never been found out, and let us see if there is any doubt that she continues to have her settlement in Govan. No one will doubt that, for the 75th section says that every pauper lunatic—(*reads section* ut supra).

It is very clear, I think, that if she was a pauper, and had no funds, she came under the very words of the Act, and that she is to be declared to hold the settlement she had at the time when the order for her reception was granted. It is admitted that at that time she had a settlement in Govan. The same inspector who put her there on the footing that she was a pauper lunatic, and who kept her there, now says that she was not a pauper at all, because it was found out that she had some funds. It looks to me like a very extravagant proposition to say that if she is put there under that enactment, and when the Act says that the state of matters at the date of the reception shall rule the case, she can get out of the application of the statute. Beyond that, I have no doubt that these were quite regular proceedings. It would be a very perilous thing to hold that when a lunatic is taken up under the Poor Law Act, on the supposition, which every one entertains, that that lunatic has no funds, and if it is found that there are some funds,—something invested in some other country it may be, or if she has fifty or a hundred sovereigns in an old stocking, found out a year or two after she is put into the asylum,—she is not to be deemed a pauper lunatic in terms of the statute. The consequences of that would be very serious, and if I were an inspector I would admit no pauper lunatic. It does not take the person out of the category of pauper lunatics that funds are discovered. The statute provides that if there are funds the Parochial Board is to get them. It might just as well be said that if it turned out that the party had a good claim to be alimented by some relative, she is no more a pauper lunatic. I hold that she was a pauper lunatic, and that these proceedings were quite regular and unobjectionable from beginning to end. Though some funds were found out, they went, not to her, but to the Parochial Board. While I think it right to say that, the express words of the statute are sufficient.

On the other question it is unnecessary to enter, and I shall say no more than this, that I should differ from your Lordship. This question turns on a subtle distinction in retaining and losing a settlement, whether the activity is required to retain or to lose.

LORD ARDMILLAN—This pauper is evidently a pauper lunatic, as defined by the Act. She was on 10th August 1864 received on a warrant into the Gartnavel Asylum, which is a district asylum. The 75th section says [*reads section*]. That the pauper was sent there in the belief that she was a pauper lunatic, and that she was actually receiving relief is clear; and I cannot see that the subsequent discovery of funds, although it might make the proceedings in some degree irregular, will deprive her of that character which is recognised in this section, namely, the transmission to a district asylum as a pauper lunatic. She was sent there as a pauper lunatic. She is a pauper lunatic; and the Act says that that is her settlement which was legally her settlement at the date of the order.

On the other point, which it is not necessary to decide, I adhere to my opinion in the case of *Murray*. Whenever a party is attacked by insanity, the settlement of that person is imposed on him at that date, and during the continuance of the insanity that settlement is never changed.

LORD KINLOCH—The question which we are now asked to answer arises out of the fact that Catherine Stewart, having resided more than five years and acquired a residential settlement in the parish of Govan, was, on 10th August 1864, removed as a lunatic to Gartnavel asylum, in the same parish. She was supported in that asylum out of her own means for four years and four months thereafter. She then became chargeable as a pauper; and the question now raised is whether she had retained or lost her residential settlement in Govan.

It appears that the warrant by which she was removed to the asylum was granted against her as a pauper; and as such she was received into the asylum. But both parties are agreed that this was a mistake; and I do not feel authorised to regard her as in law a "pauper lunatic" at the time of her entrance to the asylum, nor to apply to her case any of the statutory provisions applicable to such a lunatic. The provision in § 75 of the Lunacy Act, 20 and 21 Vict. c. 71, soundly construed, applies, I think, only to the case of an order of reception granted as to one who was really and truly a "pauper lunatic" at the time of the order being issued.

But, on the broad general question, I am of opinion that Catherine Stewart, at the time of becoming chargeable as a pauper, had not lost her residential settlement in Govan parish. I think so on the simple ground that she had never for any portion of time removed or resided out of Govan parish. The mere fact of lunacy cannot, I apprehend, be held equivalent to removal from the parish. If it implies anything it implies, not removal, but fixture; for it infers a mental condition incapable of the volition necessary to a change.

I am of opinion that she retained her settlement in Govan, because she did not, in a sound sense, come under the provision of the 76th clause of the Poor Law Amendment Act, which declares that "no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement if, during any subsequent period of five years, he shall not have resided in such parish or combination continuously for at least one year." Catherine Stewart not only resided for much more than one year out of the five, but never was out of the parish at all; and she therefore never lost her settlement.

Residence out of the parish for the statutory period I consider an indispensable pre-requisite to the loss of a residential settlement. It is the statutory cause of that loss. The statute does not say that a man shall lose his settlement by becoming lunatic; but only by residing out of the parish for a certain time. The point has sometimes been mooted, and has in this very case been agitated, whether the residence by which a settlement is lost must be of the same character with the residence necessary to acquire one. This question, as I think, can only be answered in the negative. The two descriptions of residence are essentially different. Thus, in order to acquire a settlement, the residence must be continuous, and, generally speaking, unbroken; in order to lose a settlement the residence out of the parish may be wandering and unsettled,—in a different parish every successive week. In order to acquire a settlement, the residence must be industrial, and the person supported by his own means; in order to lose a settlement, the residence out of the parish may be that of a common beggar. In truth the residence out of the parish necessary to lose a settlement is neither more nor less than simple absence from the parish of original settlement. If this absence is prolonged for the statutory period, the settlement is lost; it matters not what the character of the foreign residence may be, whether continuous in one place or fluctuating through many; whether industrial or the reverse; whether the residence of a sane or of an insane person. The two members of the statutory clause, of which we heard so much in the discussion, do not, soundly construed, present a parallel between two residences of the same description, as was so strongly urged on us. They present a contrast between residence on the one hand and non-residence on the other. Now, residence may have various attributes; non-residence is a simple negation.

That it is immaterial to the residence by which a settlement is lost whether the party during that period was sane or insane was, I think, decided by the judgment in the case of *Crawford* v. *Beattie*, 25th Jan. 1862, 24 D. 357. In that case a settlement by industrial residence had been acquired in the parish of Barony. The party then removed from that parish, and was absent for more than four years. But for one year and ten months of that period he was insane, and confined in a lunatic asylum at the expense of his friends. It is plain that, if this period of one year and ten months was not to be reckoned in respect of the lunacy, the residence out of the parish was insufficient to discharge the settlement; for it was only for two years and two months. But, by a great majority, the settlement was found to have been lost. In other words, the whole period of residence out of the parish was to be reckoned, including that of lunacy, not less than the rest. And I think the general principle was recognised, that in any question as to loss of settlement, it is simple absence which is to be considered, without regard to the state of mind of the party, one way or other, during that period.

The practical application of this principle leads directly to a conclusion in favour of the maintenance of Catherine Stewart's settlement in Govan parish. Catherine Stewart was never absent from Govan parish during the whole nine years and four months anterior to the time of her becoming chargeable. She never therefore came within the category of a person who was in course of losing the residential settlement; and the question as to her state of mind during such a period does not, properly speaking, so much as arise. She never lost her settlement, because she never was absent from the parish; and the 76th clause of the Poor Law Amendment Act, so far as declaring the position of things in which loss of settlement arises, does not apply to her case.

Agent for Pursuers—Messrs Crawford & Guthrie, S.S.C.

Agent for Defender—Mr W. R. Thwaites, S.S.C.

Saturday, July 10.

SECOND DIVISION.

SPECIAL CASE FOR STEWART'S TRUSTEE AND STEWART AND CURATOR.

Trust-Entail—Erection of Mansion-House—Power of Trustee—Special Case. A gentleman left his property to trustees in which, after the primary purposes of the trust, he provided that they should execute an entail in favour of his son and the heirs of his body in the event of his attaining majority. The truster had prior to his death commenced the erection of a new mansion-house on the estate, but after his death it has stopped by the trustee. He had expressed a wish that his son should reside on the estate, and had given directions to his trustees to keep up the mansion-house in proper repair out of the capital during the subsistence of the trust. *Held*, on advising a special case for the trustee and the son, that there was clear evidence of the truster's intention in the matter, and that the trustee had power to proceed with the erection of the new mansion-house, and to charge the cost thereof on the capital of the estate.

The following special case was submitted for the opinion of the Court:—

"1. James Stewart, Esquire of Brugh, was proprietor of the estate of Brugh, consisting of the lands of Cleat and of various detached properties in Orkney and Shetland. He died on 25th June 1858, leaving the trust-disposition and settlement and codicil above mentioned, an extract of which is produced and held as part of this case.

"2. The said estate was the only property Mr Stewart left, and is the subject to which the purposes of the trust-deed apply. The income has been as follows:—

(1) Land rents for 1868 . . .	£952	9	2½
(2) Interest on improvement outlay payable by tenants .	59	18	2¾
(3) Peat and quarry dues, average of last four years . .	30	11	3
Carry forward,	£1,042	18	8¼