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

	Brought forward,			£1,042	18	8¼
(4)	Free revenue from kelp, on an average of last ten years .			109	14	10
(5)	Profit on home-farm of Cleat, on an average of three years			166	4	4
				£1318	17	10¼
	DEDUCTIONS.					
(1)	Public and parochial burdens for 1868 .	£241	15 11¼			
(2)	Interest on £4005:15:11½ of debt, heritably secured over the estate	157	4 8			
(3)	Annuities presently payable from income, in terms of trust-deed .	206	0 0			
				605	0	7¼
	Free income .			£713	17	3

Subject to further deductions for upkeep and repairs, and expenses of management.

"3. The said William Bruce Stewart is the party entitled to the free income of the trust-estate, and it is on the heirs of his body that the estates left by Mr Stewart fall to be entailed under said trust-deed.

"4. The family mansion-house of the said estate on Cleat in Westray had become much dilapidated, and Mr Stewart had ceased to live in it at the time of his death in the year 1858. He had arranged to occupy a house on an adjoining estate until he could erect a new mansion-house on his own property at Cleat. Mr Stewart had obtained plans and arranged with tradesmen for the erection of a new mansion-house at Cleat, which it was understood would cost the sum of £1500 sterling or thereby.

"5. The erection of this new mansion-house was begun by Mr Stewart, and was proceeding at the date of his death, the walls having been erected to the height of a few feet. As the said William Bruce Stewart was then a pupil under ten years of age, and resident in Louisiana, and as there was no prospect of a residence on the Brugh estates being required during his minority, the trustee of Mr Stewart consulted counsel as to the course he should follow in reference to the said new mansion-house. Under the advice of counsel, the trustee stopped the erection of the mansion-house, and arranged with the tradesmen to give up their contracts, and settled with them accordingly. The trustee, however, caused the walls, so far as erected, to be flagged over, so as to preserve them from decay. It is understood that the house so begun can be completed for a sum of about £1300.

"6. The said William Bruce Stewart came to Scotland in the year 1864, and has since been maintained and educated at the expense of the trust, and intends to reside at Cleat in Westray, in accordance with the wishes of the said deceased James Stewart, as expressed in his said trust-deed. He attains majority on 4th August next, and to enable him to fulfil the stipulations as to residence imposed on him by the truster, has called upon the trustee to proceed with the erection of said mansion-house commenced by Mr Stewart, and forthwith to complete the same for his occupation. The trustee is willing to do this if within his powers, but he is advised that the point is doubtful.

"The question for the opinion of the Court is—

"Whether the trustee of Mr Stewart of Brugh has power to proceed with the erection of the said new mansion-house, and to complete the same, and to charge the capital of the trust-estate with the expense thereof?"

The trust-deed contained the following clause upon which the decision of the case turned:—

"With power also to the said James Brotchie, whom failing, as aforesaid, the trustees or trustee acting under these presents for the time being, to expend from time to time, during the subsistence of this trust, such sums of money from the capital of the trust as he or they shall think proper in maintaining the mansion-house and offices, garden and grounds connected therewith, or in improving the same, or in agricultural operations upon the trust property by enclosing, planting, or draining, or for building or repairing farm-houses or other buildings or fences, or in reclaiming waste lands and enclosing the same, and building houses and offices thereon, or otherwise for the permanent improvement of the trust property: And it is my especial wish, to which I beg my trustees will have regard, that the new mansion-house which I am about to erect on my estate in Westray, and the garden and offices connected therewith, shall be kept in a thorough state of repair at the expense of the trust during the subsistence thereof."

THOMS and W. F. HUNTER for Trustee.

CRAWFORD in answer.

At advising—

LORD COWAN—The facts in relation to which the judgment of the Court is asked are set forth in the special case.

The trust disposition and settlement by Mr Stewart is dated 14th May 1857, and a codicil thereto, declaring that, except in so far as altered, that deed of settlement shall remain in full force and effect, with the whole powers, privileges, and exemptions therein conferred, is dated 11th June 1858. The death of the truster occurred on the 25th of that month.

The trustees are directed *inter alia*, after satisfying certain primary purposes, to entail the lands conveyed to them, and any other lands that they might purchase with the residue of the moveable property, if any, in manner therein provided; and, until such entail should be executed by them, and failing heirs of his own body, to pay over to William Bruce Stewart, one of the parties to this case, the free rents, interest, and annual produce of the trust estate during all the days of his life; and on his death leaving lawful issue born in this country, and subject to the condition to be immediately noticed, to hold the residue for behoof of such issue, being heirs male, and failing them heirs female, and failing them to other substitute heirs. And then it is provided that, on the heir to whom the succession shall first open under the destination attaining the years of majority, the trustees are to execute the entail in favour of such heirs. There are other provisions to which it is unnecessary to refer.

The conditions attached to the succession of the heirs of the body of Mr Bruce Stewart to the fee of the entailed estate are peculiar. He was born in the United States and resident there with his father's family at the date of the trust deed; and the fee of the trust estate was provided to his issue, in the first place, on condition that Mr

Stewart should come to this country, qualify as a British subject in manner required by law, and permanently reside at Cleat in Westray. Then only his issue male and female born in this country are to succeed to the entailed estate. Farther, the trustees were directed to allow Mr Stewart to occupy the Mansion House of Cleat during his lifetime, with the furniture and manor farm; and the heir to whom the succession shall open is declared entitled to occupy the mansion house at Cleat during minority; and the mansion house and manor farm are directed to be free for occupation of such heir on attaining majority.

Again, the deed contains power to the trustees to expend from time to time such sums of money from the capital of the trust as may be thought proper in maintaining the mansion house and others, in building farm-houses, or other buildings, or otherwise for the permanent improvement of the trust property. And there occurs this marked expression of his intention, "And it is my special wish, to which I beg my trustees will have regard, that the new mansion house which I am about to erect on my estate in Westray, and the garden and offices connected therewith, shall be kept in a thorough state of repair at the expense of the trust during the subsistence thereof."

Such being the terms of the deed, the special case explains as matter of fact that, the mansion house of Cleat having become dilapidated, the testator had ceased to live in it before his death, and had obtained plans and entered into contracts for the erection of a new mansion house at a cost of £1500 or thereby. And it is farther stated that the erection of the new mansion house was begun and was proceeding at the date of his death, the walls having actually been erected to the height of a few feet. On his death the surviving trustee, Mr Brotchie, in 1858 did not continue the erection, Mr Bruce Stewart being then only about 10 years of age, and not in a situation to comply with the condition annexed to his children's (if he has any) right to succeed.

It is in these circumstances that Mr Bruce Stewart has called upon the trustees to proceed with the erection of the mansion house, and to complete the same for his occupation, being within a few weeks of majority, and desirous to fulfil the stipulations as to residence imposed on him by the truster: and that the trustee and Mr Bruce Stewart concur in requiring the opinion and judgment of the court whether the capital of the trust estate ought to be expended in the completion of the mansion house.

I am of opinion that, having regard to the provisions of the trust deed, and to the facts set forth in the case, the question before the Court should be answered in the affirmative.

There is a plainly indicated intention on the part of the truster that the persons who were called to the succession should reside in the mansion house at Cleat, whether called as liferenters or as fiars. There is a clear indication of the truster's conviction that the old house on the property had become so delapidated as to be unfit for a family residence—shown by his acts no less than by the terms of his settlement. There is further express mention made by him of the "*new* mansion house" he was about to erect, and which his trustees are expressly directed to keep in a thorough state of repair "at the expense of the trust while it subsisted." And this direction must be held to have been repeated by him after the erection was so far proceeded with, for his codicil is dated only in June 1858. Between that date and the date of the deed of settlement the contracts for the erection had been entered into and been begun to be executed,—so that we have to deal not with intention only, but with that expressed intention carried into actual execution. The house is acually in course of building under contract when the testator dies; and had his succession fallen to be regulated not by deed but as intestacy, there would have been room for the heir asserting that so much of the executry as was required for the completion of the mansion house under the contract should be devoted for that purpose, having become heritable in succession *destinatione*. The cases of *Denny*, 23 D. 429, and of *Crighton*, 13 Feb. 1857, may be referred to in support of this proposition. I think this principle fairly applicable to the case, although the succession to be dealt with is an entailed destination,—there being in the directions of the trust-deed a plain indication of the truster's wish that the new mansion-house he had himself begun should be completed and kept in thorough repair at the expense of the trust-estate until the fiar first called become *major*, when the trust will cease. But, meanwhile, Mr Bruce Stewart is to have the house to reside in it, and it is no other than the fair import of the trust-deed, taken along with the act of the truster, that the erection should be proceeded with now, and not delayed till the entail is about to be executed.

The case of *Sprot's Trustees*, 11th March 1830, Fac. Coll., appears to me to afford strong corroboration of the views now explained. In that case, as in this, there was held to be plainly enough indicated an intention by the testator that there should be a mansion house for the residence of the heir of entail. This was inferred to be the entailer's design and purpose. Here, not by inference, but by direct declaration, not in intention only but in acts, that purpose has been very clearly expressed and indicated.

The other Judges concurred.

Agents for Trustee—Skene & Peacock, W.S.
Agent for Mr Stewart—John Walker, W.S.

Tuesday, July 13.

FIRST DIVISION.

TOSH (ANDERSON'S FACTOR), PETITIONER.

Judicial Factor—Pupils Protection Act—Cautioner—Clerk of Court—Accountant of Court. Held that the Principal Clerk of Court, in receiving caution for a judicial factor as sufficient under the "Pupils Protection Act," 12 & 13 Vict. c. 51, was entitled to require that the agent in the cause should certify the caution to be sufficient.

In 1854 Thomas Cook was appointed factor *loco absentis* to David Anderson, and found caution in common form. In May 1863 he intimated to the Accountant of Court that his cautioner was dead; and accordingly, on 12th May 1863, Cook was appointed to find new caution within one month. That order was twice renewed; and on 26th June 1863 a bond of caution by Cook and James Rodger as cautioner was lodged with the late Mr Currie, P.C.S. That bond had the usual attestation of a Justice of the Peace, but was not accompanied by a certificate by the agent in the cause as to the cautioner's sufficiency. Mr Currie therefore re-