your Lordship's judgment pronounced now as utterly inoperative and useless. For what reason? Simply because it was a premature judgment that ought never to have been pronounced." His Lordship goes on to point out that the fatal objection to such a premature judgment is that it will not become *res judicata* against all persons who can become interested in the matter.

Upon the same ground, viz., that any judgment we pronounced now would be premature, I think this case ought to be dismissed.

LORD JOHNSTON—I concur. I regret that we cannot save Mr Arthur Cuthbert from one of the disagreeable results of the circumstances which have placed him in his present position. I am afraid he must either execute a trust deed or go through the Bankruptcy Court, and then the question, which we are asked to decide *ab ante*, may properly be tried between his trustee and his creditors.

It is unfortunate that this should be necessary. But I do think the questions attempted to be raised can be otherwise competently and effectually raised.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court dismissed the case as incompetent.

Counsel for the First Party—Dickson, K.C.—Macmillan. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties—Chree. Agents—E. A. & F. Hunter & Company, W.S.

Friday, June 12.

FIRST DIVISION.

[Sheriff Court at Kirkcudbright.

M'INNES *v.* RIGG AND BELL.

Poor — Settlement — Lunatic — Lunatics (Scotland) Act 1857 (20 *and* 21 *Vict. cap.* 71), *sec.* 75.

The Lunatics (Scotland) Act 1857, enacts — Section 75 — "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 his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly, and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic."

A woman who had previously acquired a residential settlement in a parish was on 15th August 1895, being a pauper and a lunatic, admitted upon a warrant of the Sheriff to the district asylum, which was outwith the parish. The parish maintained her until 2nd November 1895. From that date till 1st May 1906 she was maintained in the same asylum by her brother, her name being transferred from the list of pauper patients to that of private patients. After 1st May 1906 her brother ceased to support her.

Held (*diss.* Lord Johnston) that she had not lost the residential settlement which she had on 15th August 1895, and that the parish of her residential settlement, and not the parish of her birth, was liable for her maintenance.

Kirkwood v. *Lennox*, July 10, 1869, 7 Macph. 1027, 6 S.L.R. 670, *followed*.

The Lunatics (Scotland) Act 1857, section 75, is quoted *supra* in rubric.

Miles M'Innes, inspector of poor of the Parish of Dumfries, and as such representing the Parish Council of the Parish, raised an action in the Sheriff Court at Kirkcudbright against Samuel Rigg, inspector of poor of the Parish of Kelton, and James Bell, inspector of poor of the Parish of Parton, both in the Stewartry of Kirkcudbright, and as such inspectors representing the Parish Councils of said Parishes. The pursuer prayed the Court to ordain the defender Rigg, or otherwise the defender Bell, to free and relieve him of the advances made and to be made by him to or on account of Janet Cannon, a pauper lunatic, then residing in the Crichton Royal Institution, Dumfries.

The pursuer, *inter alia*, pleaded—"(2) The pauper having a residential settlement in the parish of Kelton, the pursuer is entitled to decree as concluded for against the defender Samuel Rigg, as representing the Parish Council of that parish. (3) Alternatively, and assuming that such residential settlement has been lost by absence, the pursuer is entitled to decree against the defender James Bell, as representing the Parish Council of the parish of Parton, which is the parish of the pauper's birth settlement."

The defender Samuel Rigg (parish of Kelton), *inter alia*, pleaded — "(1) The pauper Janet Cannon having been resident outwith the parish of Kelton, and not having been in receipt of parochial relief for the period from 2nd November 1895 to 1st May 1906, and having thus lost her residential settlement in the said parish, the defender Samuel Rigg is entitled to be assoilzied. (2) The pauper Janet Cannon having lost her residential settlement in the parish of Kelton as before mentioned, and being a lunatic and incapable of acquiring a residential settlement, the parish of Parton, as her birth settlement, is bound to support her, and the defender Samuel Rigg should be assoilzied."

The defender James Bell (parish of Parton), *inter alia*, pleaded—"(1) The pauper not having a parochial settlement in the parish of Parton, said parish of Parton is not liable in relief to the pursuer for the pauper's maintenance. (2) The pauper hav-

ing a residential settlement in the parish of Kelton, that parish is alone liable to the pursuer for the sums sued for, and the defender James Bell is entitled to be assoilzied."

Minutes were lodged for the parties, in which they renounced probation, the facts of the case not being in dispute, and in which the parish of Kelton and the parish of Parton admitted that one or other of them was liable.

The facts of the case were as follows:—Janet Cannon was born in the parish of Parton. She had acquired a residential settlement in the parish of Kelton prior to 15th August 1895. On that date, being a pauper and a lunatic, she was, under a warrant obtained from the Sheriff of Dumfries and Galloway by the inspector of poor of Crossmichael parish, admitted to the Crichton Royal Institution, Dumfries, as a pauper lunatic. The Crichton Royal Institution was for the purposes of the Lunatics (Scotland) Act 1857 a district asylum. The parish of Kelton admitted liability and maintained her until 2nd November 1895. From that date until 1st May 1906 Janet Cannon was maintained by her brother as a lunatic at the Crichton Institution, and during that time her name was transferred from the list of pauper patients to the list of private patients kept at the asylum, in terms of section 96 and Schedule 1 of the Lunatics (Scotland) Act 1857. After 1st May 1906 her brother ceased to support her. At the date of this case she was still a lunatic, and was again a pauper, and was still detained in the Crichton Institution under the order granted when she was first admitted to it in 1895.

On these facts the Sheriff-Substitute (NAPIER) on 15th May 1907 pronounced this interlocutor—". . . Finds in law (1) that Janet Cannon has lost her residential settlement in the parish of Kelton by non-residence therein; (2) that the parish of Parton, being the parish of her birth settlement, is now bound to support her: Therefore sustains the pursuer's third plea-in-law, and pleas one and two of the defender Samuel Rigg, inspector of poor of the parish of Kelton: Repels the pleas stated by the defender James Bell, inspector of poor of the parish of Parton; and decerns against the said James Bell as craved."

Bell (Parton) appealed to the Sheriff (FLEMING), who on 6th August 1907 sustained the appeal, recalled the interlocutor of the Sheriff-Substitute of 15th May 1907 complained of, and found in law "that by the provision of section 75 of the Lunacy (Scotland) Act 1857 Janet Cannon has not lost her residential settlement in the parish of Kelton, and that that parish is still bound to support her; therefore sustains the pursuer's second plea-in-law, and the defender James Bell's second plea-in-law, and decerns against the defender Samuel Rigg as craved."

Rigg (Kelton) appealed, and argued—The ordinary rule was that loss of residence involved loss of settlement, and even a lunatic by non-residence lost a residential settlement—*Crawford and Petrie* v. *Beattie*, January 25, 1862, 24 D. 357; *Thomson* v. *Kidd and Beattie*, October 28, 1881, 9 R. 37, 19 S.L.R. 25; *Keith Parish Council* v. *Kirkmichael Parish Council*, November 8, 1901, 4 F. 76, 39 S.L.R. 100. Residence in another parish so as to acquire a settlement there was not necessary to losing the settlement in Kelton—*Johnston* v. *Black*, July 13, 1859, 21 D. 1293. Section 75 of the Lunatics (Scotland) Act 1857 was meant to deal with the case of a person who was throughout a pauper lunatic, but as soon as he or she ceased to be a pauper lunatic the general law applied and the application of the section ceased. "Detain" meant detain continuously, and "such lunatic" meant such pauper lunatic. This was the more reasonable construction of the section and should be preferred as being in harmony with the general law. It was also the construction put upon the section by Lord Kinloch in *Palmer* v. *Russell and Others*, December 1, 1871, 10 Macph. 185, at p. 192. In *Kirkwood* v. *Lennox*, July 10, 1869, 7 Macph. 1027, 6 S.L.R. 670, the circumstances were peculiar. There had been in that case an erroneous assumption by the Sheriff that the lunatic was at the date of the order a pauper; moreover the lunatic remained all along within the parish where she had acquired a settlement. Consequently the remarks made by Lord President Inglis about the 75th section were practically *obiter*, for the only reason for the introduction of consideration of the section into the case was because of his erroneous view that capacity was necessary for the retention of a settlement. The judgment of the other judges did not depend upon a construction of the 75th section. Though his construction of section 75 had been followed in certain cases, *e.g.*, *Drainie* v. *Speybank*, Poor Law Mag. 1900, p. 448, referred to in Graham on Poor Law, p. 86, yet practice could not construe a statute.

Argued for the defender Bell (Parton)—They admitted that apart from the operation of the Lunacy Acts a residential settlement might be lost by a lunatic by non-residence. Their case depended upon the 75th section. The only requisites of that section, that the person was a pauper lunatic and as such was retained in the asylum, were here fulfilled. The case was ruled by *Kirkwood* v. *Lennox* (*cit. sup.*).

At advising—

LORD M'LAREN—The essential facts in this poor law case are of the most simple character. The pauper when admitted to the Crichton Lunatic Asylum at Dumfries was chargeable to the parish of Kelton, which was her residential settlement. After a short interval she came to be practically maintained by her brother and was taken off the pauper roll. But latterly her brother ceased to contribute to her support, and she then became chargeable to the parish of Kelton as the parish which was liable at the date of her admission to the asylum. The parish of Kelton claims relief from the parish of Parton, the birth settlement of the pauper, on the ground that her residential settlement was lost by her residence in Dumfries, which of course

would be inconsistent with actual residence in Kelton. This would probably be a valid claim were it not for the provisions of the 75th section of the Lunacy (Scotland) Act 1857, which provides that every pauper lunatic "shall be admitted and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted."

I am unable to see that the effect of the 75th section is displaced by the circumstance that during part of the period of the ward's detention she was to a certain extent maintained by a relative. Under the statute the condition of chargeability is indefinite as to time, and, as I think, is applicable to the whole or any part of the period of the insane person's detention in an asylum. Accordingly, when the question of chargeability now arises I think it must be solved by the 75th section. If my proposition is sound, there can be no difficulty in applying the 75th section, which is perfectly explicit on this subject. It says that the lunatic shall be chargeable to the parish of her legal settlement at the time the order for her reception was granted. Now Kelton was the parish of her settlement at the time the Sheriff's order was granted, and it follows in my opinion that Kelton is liable.

If it were necessary to consider the motive of this statutory provision it is not difficult to infer that it was considered that a lunatic during the period of his or her detention had neither the volition nor the power to perform such acts as are usually necessary to the acquisition or the loss of a settlement. But, in my view, it is unnecessary to consider the motive of the framer of the clause, because even if we were to regard it as arbitrary and inconsistent with the principles that regulate settlements when these have to be worked out by legal decision, I think the enactment is clear and free from ambiguity, and that it must be followed.

I am further of opinion that the present case is governed by the opinion of Lord President Inglis in the case of *Kirkwood* v. *Lennox*—an opinion which, as I read it, is altogether independent of the special circumstances of the case considered. The Lord President's opinion, I think, must be taken to represent the opinion of the majority of the Court, though Lord Kinloch took a somewhat different view. It has often been observed that a point in the law of parochial settlement when once decided ought not to be disturbed, because it is much more important that the law should be known and acted on than that it should be theoretically perfect. In the present case, which depends on the construction of statute law, this consideration has great weight, and even if I were less clear in my own mind as to the meaning of the 75th section, I should not be disposed to reconsider the judgment in the case of *Kirkwood*, which is one of great authority. I am accordingly of opinion that the appeal should be dismissed and the interlocutor of the Sheriff affirmed.

LORD KINNEAR—I agree with Lord M'Laren. I should have thought it enough for the decision of this case to say that the question here raised is answered in the opinion of Lord President Inglis in the case of *Kirkwood* v. *Lennox*, which decision in my opinion rules the present case. I do not think that the soundness of that decision has been questioned. I am aware that there was a difference of opinion upon the Bench, but I do not think that the authority of the decision is open to challenge upon the ground that the Lord President and Lord Deas differed upon a question which, as the learned judges point out, it was unnecessary to decide, and which certainly did not determine the judgment. As I read the opinions the majority of the Court agreed with the Lord President in the construction which he put upon the 75th section of the Lunacy Act of 1857, which is the only question we have to consider here. I find it difficult to regard an Act of Parliament as requiring further interpretation which has been already judicially construed by Lord President Inglis, but reading it for myself I come to the same conclusion. I agree with Lord M'Laren that it is not necessary to consider the motive of the statutory provision, but the purpose which it had in view seems to be clear enough. The main object of this part of the Act was to establish district asylums in which the pauper lunatics from the various parishes in each district were to be received. It would have been inconvenient and inequitable to regulate the mutual liabilities of such parishes by the existing law of settlement, because that would have imposed upon the parish in which the asylum happened to be situated the burden of maintaining all the paupers which other parishes, originally liable, had sent to the asylum as lunatics, so as to determine their own liability by the cessation of residence, as soon as the lunatic had been three years in the asylum. This inconvenience is obviated by the provisions of section 75, which are perfectly simple and adequate. The section provides that "every pauper lunatic detained in any district asylum under this Act shall be deemed to belong and to become chargeable to the parish of the legal settlement of such lunatic at the time of the order for his reception in such asylum was granted, and the expense of his maintenance shall be defrayed by such parish accordingly." In applying that enactment to the present case, the first question is whether the pauper is detained in a district asylum under the Lunacy Act; and as to that, it is admitted that the pauper is detained in the Crichton Royal Institution, which for the purposes of the Act is a district asylum, on a warrant obtained from the Sheriff Clerk of Dumfriesshire at the instance of the Inspector of Poor of the Parish of Kelton. The first condition of the 75th section is therefore satisfied, and the only remaining condition to fix liability in Kelton is that Kelton shall be shown to have been the parish of the legal settlement of the lunatic at the time the order for her

reception in the Crichton Asylum was granted. But that again is settled by admission. It is not disputed that that parish was liable for her maintenance at the time of her admission. The section goes on to provide "and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic." Again, there is no dispute that the pauper has continued to reside in the district asylum ever since, and accordingly, in my opinion, Kelton is the parish that remains chargeable for her maintenance. It is said by the Sheriff-Substitute that during the time when her brother was able to give some assistance towards her maintenance she might have been removed from the Crichton Institution, with the consent of the authorities, to another asylum. What might have been the effect of such a removal upon the settlement of the pauper is a totally different question, but it is not one that we are called upon to answer in this case. But the answer is that that did not happen. If she had been removed she would not now have been detained upon the order obtained by the inspector of the poor of Kelton in 1895. I therefore agree with Lord M'Laren that the judgment of the Sheriff should be affirmed.

LORD JOHNSTON — I regret that I am unable to concur in the judgment which your Lordships propose.

Janet Cannon, whose settlement is in dispute, had admittedly her birth settlement in the parish of Parton. Prior to 15th August 1895 she had acquired a residential settlement in the parish of Kelton. On that date she was admitted as a pauper lunatic to the Crichton Royal Institution, Dumfries, a district asylum in the sense of the Lunatics (Scotland) Act 1857. At the date of her becoming chargeable she was not actually residing in Kelton but in Crossmichael, but Kelton as the parish of her then residential settlement properly admitted liability, and she was maintained down to 2nd November 1895, a period of two and a half months, at the expense of Kelton. The Crichton Institution is, either by endowment or otherwise, a wealthy corporation, and is able on a comparatively small payment to receive paying patients, who thus are supported partly at the expense of the institution and partly by contributions from their own funds or from relations, but as private and not as pauper patients. On 2nd November 1895 the lunatic's brother, Frederick S. Cannon, undertook to make the necessary contribution, which I understand was only £10, and his sister was at that date removed from the list of pauper to that of private patients of the asylum kept in terms of the Lunatics Act 1857, section 96, and Schedule I, and her name was struck off the poor roll of the parish of Kelton. The brother continued to make the necessary payment, and Janet Cannon was maintained as a private or non-pauper lunatic in the Crichton Institution for ten and a half years, or down to 1st May 1906, when her brother's contributions ceased, and she again became chargeable as a pauper lunatic. The question is whether Kelton, the parish of her former residential settlement, still remains liable, or whether she reverts to her birth settlement in Parton.

It is admitted that unless the 75th section of the Lunatics Act 1857 applied to keep alive the lunatic's residential settlement in Kelton, not only for the two and a-half months of her maintenance by Kelton but also for the ten and a-half years of her maintenance by her brother in the Crichton Institution in the parish of Dumfries, Parton, as the parish of her birth settlement, is liable. That question depends upon the construction to be put upon that 75th section. But it is maintained by Parton that the question of such construction is foreclosed so far as this Division is concerned by the decision in the case of *Kirkwood* v. *Lennox*, 7 Macph. 1027.

I find myself unable, owing to the circumstances of that case, and the divergent grounds of judgment on which the four Judges who took part in it reached their decision, to satisfy myself whether the question is foreclosed, without first considering for myself the enactment in question.

The ostensible purpose and operative result of the 75th section of the Act is, writ short, that the residence of a pauper lunatic in a district asylum is to be deemed residence in the lunatic's parish of settlement, whatever that was at the date of admission. In other words, its object and effect is to treat the district asylum as conventionally situated in the parish of each lunatic pauper's settlement, so as to obviate any result from residence in a parish, which would very seldom be the same *de facto* as the parish of settlement. Whether more was intended or is effected depends on a scrutiny of the clause in detail.

But I entirely demur to considering this 75th section by itself. I think for its sound construction a consideration of the general provisions of the Act, so far as bearing upon pauper lunatics and district asylums, is absolutely requisite.

The object, as stated in the preamble of the Act, is to make more efficient provision for the care and treatment of lunatics, and for the provision, maintenance, and regulation of lunatic asylums in Scotland; and accordingly it repeals all previous Acts regulating lunatic asylums. It bears therefore to be complete within itself. Now the first thing that strikes one is the distinction disclosed in the interpretation clause (section 3), and constantly appearing throughout the Act, between public asylums, private asylums, and district asylums. And as the section in question is concerned only with district asylums, it is necessary to ascertain with definiteness what a district asylum is.

If I were to describe shortly the main objects of the Act, I should say they were—first, the creation of a new General Board of Commissioners in Lunacy in Scotland, and to define their powers and duties; second, the placing under their supervision

all asylums and all lunatics in Scotland; third, the regulation of the admission of lunatics and their detention in asylums; and fourth, the provision for pauper lunatics. And I think that this last-mentioned purpose was more of a new departure, and bulks more largely in the Act than any of the others. It is with it only that we are here concerned.

A district asylum is defined (section 3) to "mean an asylum in terms of this Act of one of the districts described in the Schedule (H) hereunto annexed." By Schedule (H) the whole country of Scotland is divided into districts, and the Dumfries district is declared to comprise the counties of Dumfries, Kirkcudbright, and Wigtown. Kelton (and also Parton, if that were material) is in Kirkcudbright, and thus in the Dumfries district.

The enactments regarding district asylums are contained in sections 49 to 80 of the Act, and it must from a consideration of these sections be at once apparent that the sole object of the creation of district asylums was to provide for the maintenance of pauper lunatics. The country is divided—section 49 and Schedule H—into districts. District Boards are created (section 50). The Board, *i.e.*, the Commissioners in Lunacy, are (section 51) on inquiry to determine whether the existing accommodation for pauper lunatics for each district is sufficient, or whether a district asylum for pauper lunatics shall be provided. The provision and the maintenance of district asylums is to be defrayed (sections 52 to 55) out of an assessment. But to obviate the necessity of erecting new district asylums, "special arrangements" are (section 56 *et seq.*) sanctioned whereby a District Board may obtain the transfer of an existing asylum, or the appropriation of a portion of an existing public asylum, to its use for its pauper lunatics. But with regard to the Dumfries district it is exceptionally enacted (section 60) that the Crichton Institution shall be obliged to receive the pauper lunatics of the Dumfries district "upon the conditions herein provided and prescribed in respect to pauper lunatics sent to the district asylums to be established in virtue of the Act." Therefore in the Dumfries district the Crichton Institution stands for the district asylum, but, exceptionally, the District Board neither obtains the transfer of it or of appropriated accommodation in it.

There immediately follows the section to which I have referred—a series of clauses (section 73 to 79) which provide for payment of the expense of maintaining lunatic paupers. It is assumed that the District Board in respect of the previous provisions is the paymaster in the first instance. It is then provided (section 73) that "there shall be paid to the District Board for each pauper lunatic sent to and detained in any district asylum such sum," &c., and the money so to be paid to the District Board is to be applied by them in defraying the maintenance and expenses of the patients, salaries of officials, and all other necessary expenses of the district asylum. I pass over section 75 in the meantime. The provisions of sections 76 to 79 are not in any very logical order, but their gist is this—The expense of examining, removing, and maintaining any lunatic shall primarily be a charge on the estate of such lunatic, and failing such estate shall be a charge on the parish of settlement, subject to this, that if the parish of settlement cannot be ascertained the said expense shall be a charge on the parish in and from which the lunatic was taken and sent, with recourse to such parish against any other party or parish liable. Then there is a provision in section 77 which I think is not without bearing on the question at issue; it says that the expense incurred for "or in relation to the examination, removal, and maintenance of any lunatic, shall be defrayed out of the estate of such lunatic; or if such lunatic has no adequate estate, and if such expense shall not be borne by the relations of such lunatic, then the lunatic shall be treated as a pauper lunatic, and such expense shall be defrayed by the parish of settlement of such lunatic." I emphasise the words "if such expense shall not be borne by the relations of such lunatic"—if they are so borne such lunatic shall not be treated as a pauper lunatic. And I think it follows that though a lunatic has been admitted and maintained for a time properly as a pauper lunatic, if afterwards the expense of maintenance comes to be borne by the relations of such lunatic, then the lunatic must cease to be treated as a pauper lunatic. And it is quite in accordance with this that the authorities of the Crichton Institution in November 1895 transferred the lunatic Janet Cannon from the statutory list of pauper lunatics to that of private patients, and that she continued on the latter list from November 1895 to May 1906.

Now, embedded in this fasiculus of clauses relating to the payment and repayment of the expense of maintenance of pauper lunatics, is the 75th section, which the Court is now called on to interpret. It provides, in the first place, that "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 his reception in such asylum was granted." Found in the company in which it is, and expressed as it is, that provision has reference solely to those lunatics who in terms of section 77 are to be treated as pauper lunatics. I am not moved by the fact that the expression used is "detained," whereas in other sections it is "sent to and detained." Where the words "sent to" are added there is a reason, for they always have reference not merely to maintenance but to preliminary examination and removal. Further, I cannot read the expression "such lunatic" as meaning anything more or less than "such pauper lunatic," which is its proper relative. I cannot hold that where a lunatic is received and detained for a time properly as a pauper lunatic, but afterwards becomes, either by succeeding to

property or by the intervention of friends, a private patient, that the provision above quoted is intended to interfere or has the effect of interfering with the ordinary law of settlement after the lunatic has ceased to be treated as a pauper lunatic, so that his settlement at the date of his reception is necessarily to regulate his settlement during the whole period of his residence in the asylum.

I do not think that it was the intention of the Legislature to deal in this section with any but those lunatics who were under the Act to be continuously treated as pauper lunatics, and that to interpret the provision above quoted as the respondent seeks to do, and to apply it to the present case, is inadmissible. When I speak of the intention of the Legislature, I mean of course its intention as gathered from the expressions it has used, and from the surrounding circumstances, particularly including the surrounding provisions amongst which or the collocation in which the enactment in question is found. But at the same time I think that the deduction from the expressions used, interpreted as a court must interpret them, is entirely consistent with what one must infer was the legislative intention of Parliament. There is no doubt that section 75 is necessary in the matter of pauper lunatics as a supplement to sections 73 and 76-78, and that it prevents the residential settlement of a lunatic admitted as a pauper from being lost by residence as a pauper in a district asylum, and consequent absence from the parish of such residential settlement. But does it do more? It must be admitted on the authorities (*Crawford* v. *Petrie & Beattie*, 24 D. 357; *Thomson* v. *Kidd & Beattie*, 9 R. 37; *Keith* v. *Kirkmichael*, 4 F. 76) that a lunatic admitted as a private patient in course of time loses by detention any residential settlement he or she may have had on admission, and none the less that the private patient after having lost such residential settlement has become a pauper patient. The extraordinary result of the strained interpretation proposed to be put on the word "detained" would clean upset the result of these decisions, for it would send back the lunatic, who, after losing his residential settlement by residing as a private patient in an asylum, which happens to be like the Crichton Institution a pro-district asylum, has become a pauper, upon the residential settlement which he has lost, for that was the settlement he had when his order for reception was granted. Or else it must be held that the section does not apply to such case, because there is no order of the Sheriff for reception of the lunatic as a pauper in a district asylum, but only for his reception as a lunatic. Admittedly this extraordinary result cannot be reached. Was, then, the 75th section intended to distinguish, and does it distinguish, between the case of the lunatic who has been detained long enough to lose a residential settlement after ceasing to be a pauper, and that of the lunatic who has been detained long enough to lose such settlement before becoming a pauper? I humbly think not.

The following consideration materially confirms the above conclusion. The district asylum is in its conception an asylum only competent for pauper patients. The moment the patient ceases to be a pauper—though as in the Crichton Institution he may continue to reside under the same roof—the asylum ceases to be, in the conception of the Act *quoad* him, a district asylum.

I return to the terms of the 75th section. Having provided for the conventional continuance of the existing settlement, it enacts, in the second place, that "the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly." "His," just as "such" can only refer to pauper lunatic, for the parish has nothing to do with the maintenance of any lunatic not a pauper.

Then lastly, and, as I think, conclusively, to provide or explain the ratio of the above chargeability which is inconsistent with the ordinary law, the section goes on to say—"The residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic." These words aptly suit the necessity of the situation if the earlier part of the section is confined in its operation to the case of the lunatic who is a pauper when admitted and remains a pauper during his detention, to which only do I think that the section applies. But it is wholly inappropriate in its terms if it be attempted to construe it as providing that the residence of a lunatic, not only while he is a pauper but also after he ceases to be a pauper, shall, if he again becomes chargeable, be necessarily deemed to be in the parish of his legal settlement at the time he was originally admitted to the asylum.

I would therefore, if I felt myself free to form an opinion for myself, be for reverting to the Sheriff-Substitute's interlocutor. In doing so I am satisfied that I should be giving effect to every word of the section and straining none. A lunatic admitted as a pauper will retain his parish of settlement so long as he is detained as a pauper. When he ceases to be a pauper he is found to have that settlement which he has so retained. But he then becomes as capable of losing that settlement if he continues in the asylum as a private patient as he would be if he went to a different asylum or returned to his friends. This gives full effect and does no violence to the terms of the enactment.

But it is maintained that the question is foreclosed by the decision of this Division of the Court in *Kirkwood* v. *Lennox* (7 Macph. 1027). I admit that the question is foreclosed by the judgment of the late Lord President Inglis, and if I found that his ground of judgment had been adopted by the rest of the Court I should of course be bound by it, whether I agreed with it or not. The case, however, presents itself in a very exceptional light. A lunatic with a resi-

dential settlement in Govan was admitted to and detained in Gartnavel Asylum as a private patient from 10th August 1864 to 30th November 1868, when, her funds being exhausted, she became a pauper lunatic. Now, Gartnavel being in Govan, there happened in this case to be no change of residence occasioned by the committal to the asylum. Had there been, there would *de facto* have been absence from Govan for more than four years, and the residential settlement would admittedly not have been retained. The late Lord President personally held the opinion, which is not generally received, that mental capacity was requisite for the retention as well as for the acquisition of a settlement, and hence it would have followed that the pauper's residential settlement would have been lost by more than four years' residence as a lunatic in an asylum though locally situated in the parish of residential settlement. If in the late Lord President's opinion this ground of judgment was not to receive effect, resort must be had to the 75th section of the Act of 1857, and on consideration of its provisions his Lordship held it to apply; and if it properly applied in that case I admit that it must *a fortiori* apply in the present. The judgment is, I admit, not merely an *obiter dictum* of the late Lord President; it is his judgment in deciding the cause. But it is not the judgment of the Court Lord Kinloch differed from the Lord President in thinking it necessary to have recourse to the statute, which he therefore did not attempt to interpret. For he held, disagreeing with the Lord President, that mental capacity is not necessary for the retention of a residential settlement, and based his judgment in favour of the liability of Govan, on the ground that *de facto* there had been continued residence in Govan, though in an asylum. Lord Deas, again, does not adopt the interpretation put upon the 75th section by the Lord President, but bases his judgment on the view that the discovery of certain funds did not take the lunatic out of the category of a pauper lunatic, in which he thought the pauper was at the date of her confinement. And I think, though his Lordship's meaning is not very clear, that Lord Ardmillan agreed with Lord Deas. In these circumstances the interpretation of the 75th section of the statute contended for is that of the Lord President Inglis alone. The Court is therefore not precluded from consideration of the question as an open question, though bound to recognise the weight of the great authority of the late Lord President in favour of the respondent's contention. I have given the most respectful consideration to his Lordship's judgment in *Kirkwood* v. *Lennox*, but for the reasons I have stated I am unable to follow it. I think, therefore, that this appeal should be sustained.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff.

Counsel for the Pursuer and Respondent (M'Innes)—J. H. Orr. Agents—Bonar, Hunter, & Johnston, W.S.

Counsel for the Defender and Appellant (Rigg)—Dean of Faculty (Campbell, K.C.)—Chree. Agents—Purves & Simpson, W.S.

Counsel for the Defender and Respondent (Bell)—Deas—J. G. Jameson. Agents—Scott & Glover, W.S.

Tuesday, June 16.

SECOND DIVISION.

(With the Lord President, Lords M'Laren and Kinnear.)

[Sheriff Court at Dumfries.

BELL *v.* GRAHAM.

Landlord and Tenant—Lease—Improvements—Compensation—Arbitration—Statutory Arbitration—Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 5—*Agreement Providing Compensation in Lieu of Statutory Compensation—"Fair and Reasonable Compensation"—Judge—Review.*

The Agricultural Holdings (Scotland) Act 1883, section 5, enacts—"Where, in the case of a tenancy under a lease beginning after the commencement of this Act, any particular agreement in writing secures to the tenant for any improvement specified in the third part of the schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement and not under the Act."

Held (*diss.* Lords Stormonth Darling and Ardwall) that in an arbitration under the Agricultural Holdings (Scotland) Acts 1883 to 1900, between a landlord and tenant, to ascertain the amount due by the landlord to the tenant in respect of improvements, the arbiter was bound, if the fairness and reasonableness of an agreement for compensation was challenged, himself to decide whether the agreement was fair and reasonable or the contrary, and, according to his decision of that question, either to award compensation in terms of the agreement, or to disregard the agreement and fix the compensation due under the Act; subject always to the following considerations:—(1) that the fairness and reasonableness of the agreement was to be judged as at the time when it was entered into; (2) that no objections to its fairness and reasonableness could be entertained by the arbiter unless the party objecting condescended specifically on the particular provisions objected to with the reasons for his objections.