interlocutor until he has the issue in its final form before him. In such cases it is not unusual for the judge to suggest to the pursuer that he had better try another form, because if he does not, then the form of issue first proposed will be disallowed. I was at first disposed to think that all that the judge meant in this case by his interlocutor of 21st January disallowing an issue was to disallow an issue in that particular form, reserving to the pursuer to lodge an amended issue. But on looking again at the Lord Ordinary's note I observe that his Lordship in dealing with the issue considered the innuendo of the proposed issue inadmissible, and he says, "No other innuendo was proposed or discussed, and I am therefore not in a position to say whether the pursuer could frame any other issue which could be allowed." I think it is plain that on 21st January, when the Lord Ordinary came to consider the question of issues, his opinion was that an inadmissible issue had been tendered, and that the pursuer declined to amend it or to propose any other issue. In these circumstances I think it would be useless for the judge to adjust an issue, because the pursuer would not go to trial on any other issue than that proposed by himself. One can quite understand that in such a case the judge's course is simply to disallow the issue altogether. I think it would have been better if the Lord Ordinary had gone on to say, "dismisses the action," but that was left open perhaps, because this was an interlocutor which was not necessarily final. But I agree with your Lordship that this is an interlocutor necessarily leading to the dismissal of the action, and that it is too late now to propose another issue.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer—Jameson, Q.C.—M'Lennan. Agent—T. M. Pole, Solicitor.

Counsel for the Defenders—Ure, Q.C.—Hunter. Agent—Peter Morison, S.S.C.

Friday, December 9.

SECOND DIVISION.

[Sheriff of Forfarshire.

FORFAR PARISH COUNCIL *v.* DAVIDSON.

Poor — Relief — Maintenance of Lunatic — Relief against Lunatic's Estate.

At the time of the committal to an asylum of a lunatic he had money on deposit-receipt, but the parish of his settlement were unaware of the fact, although they became aware of it prior to the lunatic's liberation. The asylum in which the lunatic was confined being in another parish, the parish of his settlement admitted liability for the lunatic's maintenance and paid therefor.

After the lunatic had been liberated as recovered, *held* (*diss.* Lord Young) that the parish of his settlement was entitled to recover from him the sums which they had spent on his maintenance.

By section 75 of the Lunatics (Scotland) Act 1857 (20 and 21 Vict. c. 71) it is enacted —"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."

By section 77 of the same Act it is enacted —"The expense incurred by any superintendent of any asylum, or by any other party, 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 relatives of such lunatic, then the lunatic shall be treated as a pauper lunatic, and such expense shall be defrayed by the parish of the settlement of such lunatic, and the superintendent or other party disbursing such expense shall be entitled to recover the same from or out of the parties or estate liable to defray the same as aforesaid."

By section 15 of the Lunacy (Scotland) Act 1862 (25 and 26 Vict. cap. 54) it is provided that it shall be lawful for the Sheriff of the county in which a lunatic charged with assault or other offence inferring danger to the lieges, or found in a state threatening danger to the lieges, or in a state offensive to public decency may have been apprehended or found, upon application by the procurator-fiscal or inspector of poor or other person, accompanied by a certificate from a medical person bearing that the lunatic is in a state threatening such danger, or in a state offensive or threatening to be offensive to public decency, forthwith to commit such lunatic to a place of safe custody. It further provides that the Sheriff, at the time of granting the warrant to commit the lunatic to an asylum, shall grant decree against the parish within which the lunatic shall have been apprehended or found at large for the expenses of the application and for such sum as may be necessary for the maintenance of the lunatic, and "the parish so decerned against and paying such expenses and cost of maintenance shall have relief and recourse therefor against the lunatic and his estate and any of his relatives legally liable for his maintenance, and also against the parish of settlement of such lunatic in the event of the parish in which the lunatic was apprehended or found at large not

being the parish of settlement as accords of law."

By section 8 of the Lunatics (Scotland) Act 1871 (34 and 35 Vict. c. 55) it is enacted that for the removal of doubts the above provisions concerning the removal of dangerous lunatics, &c., "shall not be limited to pauper lunatics, but shall apply to any person so charged or found, although he may not, by receiving parochial relief or in any other form, come within the definition of a pauper."

On 23rd March 1897 the Inspector of Poor of Dundee received intimation from the police that a man, David Davidson, who resided in Dundee, but whose residential settlement was in the parish of Forfar, was insane. An officer was sent to Davidson's house, and as the result of the visit a private watchman was sent to watch him. The two district medical officers also visited Davidson, and they certified him to be insane. The Dundee Inspector on the same day presented a petition to the Sheriff-Substitute at Dundee to get a warrant to confine the lunatic. The same afternoon Davidson escaped from his house and went to Lunanhead, Forfarshire. He remained at large till 26th March, when he was secured by the Forfarshire County Police in his brother's house at Lunanhead and taken to Forfar. The Inspector of Forfar caused him to be examined by two doctors, but they declined to certify him to be insane, as they did not know the circumstances under which he had been certified at Dundee. He was forwarded by the Inspector of Forfar, on the warrant already granted in Dundee, to the Inspector of Dundee, and by him placed in Dundee Asylum. On 30th March the Inspector of Forfar received from Davidson's brother Davidson's pocketbook, containing deposit-receipts for £45, 17s. 8d. in Davidson's name in the Union Bank. Up to that date both the inspectors had acted on the understanding that Davidson was a pauper. Davidson was detained in Dundee Asylum till 23rd October, when he was transferred to Montrose Asylum, where he was detained until 9th December 1897, when he was liberated as recovered. On 13th April of that year Forfar had admitted liability to Dundee. The sum expended in the defender's maintenance in Dundee and Montrose Asylums amounted in all to £26, 0s. 11d., this sum including charges of 2s. 7d. for a lunacy warrant, 1s. 10d. for telegrams, &c., £2, 2s. for medical and £1, 1s. for chief-constable's account. On 13th January 1898 Davidson demanded the deposit-receipts from the Inspector of Forfar, and refused to pay the sum expended on his maintenance in the asylums. The Inspector of Forfar deposited in bank the amount claimed for maintenance, and gave Davidson the balance.

Thereafter the Parish Council of the parish of Forfar sued Davidson for £26, 0s. 11d. in the Sheriff Court at Dundee, under the Debts Recovery (Scotland) Act 1867.

The defender pleaded, *inter alia*—"(1) No title to sue. (2) The defender is not liable to pursuers in the sum sued for."

On 6th July 1898 the Sheriff-Substitute (Campbell Smith) pronounced the following interlocutor:—"Finds that on 23rd March 1897 the Inspector of Poor of the Parish of Dundee obtained from the Sheriff Court in Dundee, in respect of two medical certificates, a warrant authorising the detention of the defender as a lunatic in the Royal Asylum of Dundee; that on or about 26th March he was removed to said asylum, and detained therein till 23rd October 1897; that on 23rd October, at his wife's request and his own, he was removed to Montrose Asylum, and on 9th December he was liberated therefrom as 'recovered:' Finds that the sums sued for were in whole or in part advanced by the Inspector of Poor of Dundee on the footing that the defender was a pauper: Finds that when the defender was apprehended by the county police in his brother's house at Lunanhead he had in his pocket-book deposit-receipts containing £45, 17s. 8d., of which the pursuer obtained possession on 30th March; also that when taken to Forfar the pursuers caused him to be examined by Dr Murray and Dr Alexander, and that they declined to certify that he was insane: Finds that the pursuer, having thus brought within his knowledge cause for doubting both as to whether the defender was a pauper and as to whether he was a lunatic requiring confinement in the public interest and that there were possible questions of liability likely to arise between the defender, and the Inspector of Poor of Dundee, ought to have avoided attempting to put himself in the position of the said Inspector: Finds in law that the pursuer has failed to set forth and establish any valid title to sue the present action: Therefore dismisses said action," &c.

The pursuer appealed to the Sheriff (Johnston), who on 8th October pronounced the following interlocutor:—"Finds (1) that on 23rd March 1897 the defender was reported to the Inspector of Dundee, where he was then living, as insane; (2) that on medical certificates in due form, an order was granted by the Sheriff-Substitute of Forfarshire at Dundee for the defender's detention in Dundee Asylum; (3) that at the date of his being certified insane the defender's settlement was in the parish of Forfar; (4) that the defender remained at large until 26th March 1897, when he was secured by the Forfarshire County Police at Lunanhead and taken to Forfar; (5) that defender was forwarded by the Inspector of Forfar on the warrant already granted in Dundee to the Inspector of Dundee, and by him placed in Dundee Asylum, and that he was detained there until 23rd October, when he was transferred to Montrose Asylum, where he was detained until 9th December 1897, when he was liberated as 'recovered'; (6) that on 30th March the defender's pocket-book containing deposit-receipts in his name for £45, 17s. 8d. was handed to the Inspector of Forfar; (7) that on 13th April Forfar admitted liability to Dundee; (8) that the sum expended in the defender's maintenance in Dundee and Montrose Asylums during the above period amounted in all to

£26, 0s. 11d., for which, and two guineas of modified expenses, decerns against defender in favour of pursuer.

Note.—"A very astute argument was submitted to me on behalf of the defender, to the effect that as the defender was not and never had been a pauper, the Inspector of Forfar had no call to meddle in the matter, and no right to act upon the Dundee warrant; that whether the Dundee Inspector would have had the right to recover outlays, the Forfar Inspector had none, either derivatively as the assignee of the Dundee Inspector or directly. I do not, however, think this sound. The defender was *de jure* a pauper, though he may have been *de facto* possessed of some means, and I think that the Inspector of Forfar was not only entitled but bound to act as he did, and was not entitled nor bound, in a question either with Dundee, the asylum authorities, or the defender, to disclaim primary liability and throw the question of recovering expenses of maintenance upon the asylum authorities, because four days after the defender was remitted to the asylum, evidence of his having some means was placed in his, the Inspector of Forfar's, hands. These means might not have been the defender's own, or might have been already attached, and at anyrate were not in a shape immediately available for his maintenance.

"I think the Inspector of Forfar was wrong in applying for new medical certificates, but I cannot deduce the same conclusion as the Sheriff-Substitute does from their refusal. They were properly refused, because the Forfar doctors were not going to interfere without information with a warrant recently granted on the certificate of their Dundee brethren, presumably granted upon information."

The defender appealed, and argued—The pursuers had no title to sue him for the money expended on his maintenance in Dundee Asylum. When they acknowledged liability to Dundee they knew that the defender had means. Notwithstanding they had proceeded as if he were a pauper. The pursuers had no right to pay money on the defender's behalf. If the defender were held to be a pauper at the time at which the money was paid there was no ground of relief against him. If he were not a pauper, then the proper procedure under the statute had not been adopted. It had not been suggested that he was a dangerous lunatic, and unless he was such the parish of Forfar had no title to sue in terms of the Lunacy Acts. In the case of *Inspector of Poor of Kilmartin* v. *Macfarlane*, March 6, 1885, 12 R. 713, it had been recognised by all the judges that where a lunatic has been given relief, any ground for suing him must be contained in the statute.

Argued for the pursuers—At the time of his committal the defender was to all appearance a pauper lunatic, and the defenders were entitled to treat him as one, and to be recompensed for the sums expended on his maintenance—*Dinwoodie* v. *Graham*, January 27, 1870, 8 R. 436, ruled the present case. The arguments of the Sheriff were sound.

At advising—

Lord Justice-Clerk—The facts in this case are that the defender was found in Dundee in a state of insanity, and that the Procurator-Fiscal there in the course of his duty for maintaining the public safety called upon the Inspector of Poor to take the usual and necessary steps to have him confined. On inquiry it was thought necessary to send a watchman to watch him. His relatives expressed fear of him. The confinement took place on regular medical certificates. It appeared that the parish responsible, if the expense was to fall upon a poor rate, was the parish of Forfar, and liability was duly admitted by that parish to the inspector at Dundee. All these proceedings were regular and according to the respective duties of the officials of both parishes. Shortly after his removal to an asylum it came to the knowledge of the parochial authority that he possessed a deposit-receipt for a sum of over £45. But no one came forward to undertake his support, and of course he being a certified lunatic, money owned by him which was lying on deposit-receipt could not be made available for his maintenance and treatment. In these circumstances the expense incurred was necessarily incurred by the parish. The authorities could not liberate him, and the asylum could not be compelled to keep him unless the parish undertook to reimburse the owners of the asylum according to the pauper rate.

The question has now arisen, whether on the defender's recovery, he is liable, if he had the means necessary at the time the outlay was made, to reimburse the parish authority for their outlay. I am of opinion that the Sheriff is right in holding that he is. He was treated as a pauper in circumstances in which that course was the only one that could be followed, and expenditure made on his maintenance. Having in fact means, I hold that the parish has a good claim for reimbursement of their outlays, which I think they were legally bound to make in the circumstances, they being under obligation to take the responsibility of ensuring his safe custody and treatment, when called upon by the procurator-fiscal, and when the person handed over to them was certified, as required by law, as a proper subject for confinement.

If the fund from which the compensation is demanded had been acquired by the defender after he was restored to society, the case would have been different. But the fund having been his at the time of the proceedings, I can see no answer to the demand that he shall relieve the parish which became liable for his custody and maintenance when he unfortunately became insane.

I therefore think that the conclusion at which the Sheriff arrived was the right one, and that we should find accordingly.

Lord Young — I shall indicate very shortly the doubts which occur to me, and

which I entertain with considerable misgivings. My doubts are expressed, not entirely as I could wish, by the Sheriff-Substitute. They are founded on the fact that the pursuer here, who was treated as a pauper, was not in fact a pauper, and was treated by the parochial authorities in a manner which he would not and could not justifiably have been treated except in the view that he was a pauper. They acted under a mistake, which was I do not say culpable on their part, but was not induced by any fault on the part of the defender, and for the consequences of which he ought not to be held liable. They acted with a view to the discharge of their duty towards the ratepayers. If he had been a pauper, then the best thing in the discharge of their duty towards the ratepayers was to apply to the Sheriff to have him confined in the pauper department of the asylum. But they had no occasion, in the interest of the public, to make any such application, for he was not a pauper, and he was not a dangerous lunatic. If he had been a dangerous lunatic, pauper or not, then it would have been the duty of the procurator-fiscal, failing the man's relatives, to apply to the Sheriff for a warrant to have him confined as such in an asylum. But it is not suggested that there was any danger to the public in allowing him to go about at large, and the poor law authorities had, in my opinion, no more right to shut him up than they had to shut up any other person of weak mind. That is my view of the law. Nothing in the case is more certain than that he was not a pauper, and that they acted in the view that he was. If that view had been produced by any mistake on the part of the pursuer, he might have been liable for the consequences of that mistake. But it was their mistake, and their mistake alone, and it has had the effect of expending this poor man's whole money. Just look at the account. There is a lunacy warrant. What right had they to charge him with the cost of that? Then there are medical certificates, and the chief-constable's account, and so on. All that would have been legitimate if he had been a pauper, but as he is not, it seems to me that it is not the pursuer, but the public authorities, in whose interest professedly these proceedings were taken, who ought to bear the expenses. I am therefore inclined to revert to the opinion of the Sheriff-Substitute.

Lord Trayner—I have no hesitation in agreeing with the Sheriff. When the appellant was sent to the asylum in Dundee, on the application of the Inspector of Poor, he was apparently a pauper, and was dealt with as such. But he was not chargeable to Dundee, for his settlement was in Forfar. Anything, therefore, expended or disbursed by Dundee was expended or disbursed on account of the parish of Forfar, and that parish has in my opinion the right and title to receive such disbursements from the appellant, if such a right exists in anyone. It is said, however, that the respondents are not entitled to decree, because if the appellant was a pauper, the expenses incurred on his account are expenses which he is not bound to repay, and that if he was not a pauper, the Inspector of Dundee should not have interfered as he did. Now, as I have said, the appellant was apparently a pauper, and the Inspector of Dundee, in the circumstances, only did his duty in applying for the committal of the appellant to an asylum. It turned out, however, after the committal, that the appellant was possessed of funds, which could be applied towards his maintenance —not funds which the Inspectors of Dundee or of Forfar could make immediately available, and indeed funds of the existence of which at the date of committal the appellant had no knowledge. I think these funds must now be charged as the respondent proposes. A pauper who receives parochial relief is not bound to pay for such relief out of funds subsequently acquired by him, But if anyone obtains parochial relief who is possessed of means at the time such relief is obtained, and is therefore not a pauper nor entitled to relief, he must repay the relief so obtained. Suppose the case of a man found lying on the road in a state of physical debility and apparently destitute, removed to the poorhouse, and there attended to and maintained for days or weeks, at the end of which time it was discovered that he had money concealed on his clothes, I entertain no doubt that that man could be charged for his maintenance, and that the money so discovered could be applied in extinction of the charge. That was practically the case here, and in my opinion it affords no answer to the present pursuer's demand to say that the Inspector of Dundee acted ultroneously, and that having removed the defender to an asylum against his wish, he or the pursuer should pay for the expenses so incurred. The Inspector of Dundee did not act ultroneously. He was bound to act as he did in the circumstances whether the defender wished to go to an asylum or did not. The expense of the defender's maintenance in an asylum or out of an asylum must fall on himself, if he has means to defray these expenses at the time they are incurred.

Lord Justice-Clerk — Lord Moncreiff (who was absent at advising) desired me to say that he was of opinion that the judgment of the Sheriff should be affirmed.

The Court pronounced the following interlocutor:—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against: Remit to the Sheriff-Substitute to decern accordingly."

Counsel for Pursuers—Kennedy. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for Defender—Christie. Agents—Curror, Cowper, & Buchanan, W.S.