LORD SALVESEN—The sole question in this case is whether the word "resided" in section 5 of the Poor Law (Scotland) Act 1898 falls to be read in its ordinary sense as being equivalent to "lived," or, as the Lord Ordinary has held, as qualified by the word "intelligently." In my opinion the answer to this question depends on whether the section is applicable to poor lunatics as well as to other poor persons who have sufficient intelligence to acquire a settlement by residence. Had this question depended entirely upon the terms of section 5, there is much to support the view that it did not have in contemplation persons who were insane, for it is difficult to understand why provision should be made for granting a lunatic a right of appeal against the warrant for his removal to England or Ireland. There is no other instance, so far as I know, in which a lunatic is permitted to embark upon legal proceedings in his own person, and it is difficult to understand what guidance is to be derived by the Local Government Board in determining the matters submitted to them from the views or wishes of an insane person. It would have been more reasonable if the two appeals which are allowed by the section had been alternative, so that while a sane pauper should be given a right of appeal against a warrant for his removal, the interests of a lunatic should be entrusted to the guardians of the union to which it was proposed to remove him. As the section is framed, however, the appeals appear to be cumulative, and we were told that in practice the Local Government Board have received and considered appeals by persons who had been certified insane. It is, however, unnecessary to dwell on this and similar anomalies of what appears to be an ill-considered statute, for section 6 makes it quite plain by implication that the previous section is applicable to lunatic poor persons, since it provides that "in the case of a lunatic poor person proposed to be removed to Ireland the warrant shall order his delivery at the district asylum of the place to which he is to be removed." Unless, then, the application of section 5 is to be limited to the case of a lunatic who has had a continuous residence for a year while sane in a particular parish, for which limitation there appears to be no good reason, it seems to me that the word "resided" must connote such a residence as both sane and insane persons are capable of having, and which in the case of the latter involves only their bodily presence in a particular locality. *Prima facie*, however, such residence must not be compulsory, as by detention in prison or confinement in an asylum, otherwise undue burdens would be placed on the particular parishes in which prisons and asylums happen to be situated. Here, however, no question of that kind arises, as the lunatic pauper to whom this action relates was supported by relatives in a Scotch parish for a period of three years. Her bodily presence in that parish, in my opinion, satisfied the condition as to residence expressed in section 5, and gave the Local Government Board jurisdiction to entertain the appeal which was presented against the warrant for her removal. I accordingly agree with your Lordship that the judgment of the Lord Ordinary cannot stand, and that the defenders are entitled to be assoilzied.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred in the opinion of Lord Dundas.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Reclaimers (Defenders)—Solicitor-General (Morison, K.C.)—Pitman. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Respondents (Pursuers)—Dean of Faculty (Scott Dickson, K.C.)—J. R. Christie. Agents—R. Addison Smith & Co., W.S.

Friday, December 19, 1913.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

MACKAY *v.* MACKAY.

Process — Title to Sue — Confirmation — Assignation by Executors Prior to Confirmation—Action Raised by Assignee.

Testamentary trustees and executors, before confirmation, assigned the copyright of certain works, and their assignee, also before their confirmation, raised an action of count and reckoning in respect of alleged infringement of this copyright. The defender pleaded no title to sue.

Held (*rev.* the Lord Ordinary Ormidale) that although confirmation would require to be expede before decree could be extracted, the pursuer had a title to sue.

Eneas Mackay, bookseller and publisher, Stirling, *pursuer*, raised an action against Mrs Annie Sharp or Mackay, *defender*, in which he sought to have the defender decerned and ordained to exhibit and produce "a full and complete account of the profits made by the defender from the insertion in the *Celtic Monthly* for September 1911, published by the defender, under the heading of 'John Mackenzie on the Beauties of Gaelic Poetry,' of a part of a memoir or biography of John Mackenzie, editor of the Beauties of Gaelic Poetry, printed in the *Celtic Magazine* for April 1877, the copyright of which biography belongs to the pursuer, and to make payment to the pursuer of the sum of £100 sterling, or such other sum as shall be ascertained to be the amount of said profits."

The pursuer averred, *inter alia*—"(Cond. 2) There was written for and printed in the *Celtic Magazine* for April 1877 a biography or memoir of the said John Mackenzie. The author of said biography was Alexander Mackenzie, printer and publisher in Inverness. Said magazine was printed and published by the said Alexander Mackenzie,

who carried on his business of printer and publisher in Inverness under the firm name of A. & W. Mackenzie, of which firm he was the sole partner, and the copyright of said magazine and of said biography or memoir belonged to him. (Cond. 3) By assignation, dated 3rd, 4th, and 5th March 1903, the pursuer acquired from the trustees of the said Alexander Mackenzie the absolute copyright in and for the United Kingdom of Great Britain and Ireland, and in and for His Majesty's Colonies and Dominions abroad, of and in certain works of the said Alexander Mackenzie, including, *inter alia*, the *Celtic Magazine*, and all the right and interest of said trustees to and in the same and all future impressions of the said works. He thus acquired right by assignation to the whole copyright of said biography or memoir, and he is registered as proprietor of the copyright thereof. . . ."

The defender averred, *inter alia*—"It is believed and averred that the said trustees never confirmed to the copyright of said article, and that they were not *in titulo* to grant said assignation."

It was admitted at the bar that this averment was true in fact.

The defender pleaded, *inter alia*—"No title to sue."

On 16th November 1912 the Lord Ordinary (ORMIDALE) sustained the first plea-in-law for the defender and dismissed the action.

Opinion.—"The first plea-in-law for the defender is 'no title to sue.'

"The averment on which that plea is based is that the trustees who granted the assignation on which the pursuer founds his right to insist in the action never confirmed to the copyright of the article in question.

"It was admitted at the bar that this averment was true in fact.

"The pursuer, however, maintained that confirmation was not necessary to support his title to raise the action, although it would require to be expede before any decree for payment could be extracted.

"Now I do not think that it can be disputed that actual confirmation of a sum sued for, though necessary as a title to uplift and discharge, is not a requisite to instruct a title to sue, or that a general disposition unconfirmed is a good legal title to sue for a sum of money—M'Laren, Wills and Succession, sec. 1616, and cases there cited. Accordingly if the present had been an action at the instance of Mr Mackenzie's trustees for a sum of money alleged to be due to the defunct, their title to sue would have been undoubted, although they could not have obtained final decree without expeding confirmation. But the pursuer here is not Mr Mackenzie's trustees, and he is not suing for a debt due to the defunct. He is in effect seeking to recover damages for an alleged infringement of a copyright to which he maintains an exclusive right in virtue of an assignation by the trustees of the deceased owner of the copyright.

"In my opinion the trustees were not *in titulo* to grant an effective assignation of the copyright prior to taking out confirmation. The general disposition gives them, no doubt, a *jus ad rem* to the copyright, but before intromitting with it and disposing of it they were bound to complete their title to it; just as in the case of a debt due to their author they would have required to have completed their title to it in order to vest them with the *plenum jus* and to enable them effectively to intromit with the sum recovered.

"Assuming that if the trustees were to expede confirmation now, the confirmation would—I do not require to decide that it would—retroact so as to cure the defect in the assignation, the pursuer is not himself in a position to expede confirmation, and that consideration of itself in a question between him and the defender appears to me to warrant my sustaining the plea of 'no title to sue.'

"The precise ground on which the Lords decided the case of *Smith* v. *Grieve*, M. *sub. voce* Substitute and Conditional Institute, App. No. 1, does not appear from the interlocutor, but both in it and in the later case of *Robertson* v. *Gilchrist*, 6 S. 446, the disposition was not to trustees but direct to the disponee, who was found entitled to transmit without confirmation.

"I shall accordingly sustain the first plea-in-law for the defender and dismiss the action."

The pursuer reclaimed, and argued—The trustees and executors of Alexander Mackenzie had, as such, validly transmitted the copyright to the pursuer. It was true that before pursuer could obtain extract it was necessary for him that the executors should confirm (as matter of fact they had confirmed since the date of the Lord Ordinary's interlocutor), but the assignation entitled him to force the trustees to confirm. Accordingly he was in the same position as the trustees and executors would have been. Actual confirmation was not required to vest the right of a general disponee under a testamentary settlement, to give trustees and executors a title to sue, nor to enable them to transmit property—*Smith* v. *Grieve*, May 27, 1801, M. App. 1, *sub. voce* Subst. and Cond. Inst.; *Robertson* v. *Gilchrist*, January 25, 1828, 6 S. 446; *Chalmers' Trustees* v. *Watson*, May 12, 1860, 22 D. 1060, Lord Ivory at 1064—and thus the Act of Geo. IV, cap. 98, sec. 1, was applied in terms only to the succession of next-of-kin *ab intestato*, implying that in a general disposition the property transmitted without confirmation—M'Laren on Wills, sec. 1604; Bell's Lectures on Conveyancing, vol.ii, p. 1132. Reference was also made to Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), sec. 127, and Schedule KK., and the section substituted therefor by the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 64.

Argued for the defender (respondent)—The trustees and executors had only a *jus ad rem* at the time they granted the assignation to the pursuer, whereas a *jus in re* was required to entitle them to transmit; confirmation was necessary. The assignation was accordingly bad, and confirmation

could not have the retroactive effect of validating it. Reference was made to the Act anent the Confirmation of Testaments, 1690, cap. 26, to M'Laren, sec. 1602, and to Ersk. iii, 9, 30.

LORD PRESIDENT—I think this interlocutor cannot be supported. The Lord Ordinary, it appears to me, has proceeded too fast in sustaining the plea of no title to sue. The law of the case is completely covered by authority.

The pursuer seeks here decree of count and reckoning in respect of the infringement of an alleged copyright, or alternatively for damages, and the title on which he founds is an assignation, dated in March 1903, granted by the testamentary trustees of a certain Alexander Mackenzie who was the proprietor of the copyright.

Now the defenders meet that case by an averment in the following terms—"It is believed and averred that the said trustees never confirmed the copyright of the article, and that they were not *in titulo* to grant the said assignation," and on that averment their first plea is founded. It is true that the testamentary trustees of Alexander Mackenzie were not confirmed at the date when they granted the assignation in favour of the pursuer, but I think it clear that, by virtue of the general conveyance contained in his trust-disposition and settlement, dated the 8th of January 1898, the trustees had a beneficial interest in the copyright vested in them and transmissible by them. No doubt confirmation was required in order that they might secure an active title to intromit with and administer the estate, but it seems to me to be perfectly clear that if they subsequently obtained confirmation the defect in their title could be effectively cured, and the cure would draw back to the date of the assignation.

So much seems to have been conceded by the pursuer before the Lord Ordinary, for I find from his note that he says that the pursuer maintained that confirmation was not necessary to support his title to raise the action, although it would require to be expede before any decree for payment could be extracted. Now the contention on the part of the pursuer is, I think, well founded in law, for by virtue of the assignation which he had received from the testamentary trustees I consider that he was vested with the right to demand that the trustees should complete their title by expeding confirmation. That was his right, and he was in a position to exercise that right, and he stood before the Lord Ordinary bound to exercise that right before seeking decree in this action.

The Lord Ordinary appears to me, in the reasoning contained in his note, to have stated with perfect accuracy the whole law of the case. He says distinctly that actual confirmation is not a requisite to instruct a title to sue, and that it cannot be contended that a general disposition unconfirmed is not a good title to sue. But he goes on to make this observation—I read the Lord Ordinary's note as corrected—"Assuming that if the trustees were to expede confirmation now, the confirmation would . . . retroact so as to cure the defect in the assignation, the pursuer is not himself in a position to expede confirmation, and that consideration of itself in a question between him and the defender appears to me to warrant my sustaining the plea of 'no title to sue.'"

I am of opinion that that did not warrant the Lord Ordinary in sustaining the plea of no title to sue, and that although no doubt the pursuer himself was not in a position to expede confirmation, he was by virtue of the assignation (which I assume was granted for valuable consideration) entitled to demand that the trustees should complete their title by expeding confirmation. In these circumstances I think the pursuer was well entitled to maintain that his title was a good one to sue this action, although no doubt before he obtained extract he would be bound to have the title of his authors completed so as to make it effective in any question with the defender.

I am therefore for recalling the Lord Ordinary's interlocutor and remitting to him to proceed with the case.

LORD JOHNSTON—Since this case was opened to us I have never been able to understand how an assignation granted by executors unconfirmed cannot be validated by the retroactive effect of confirmation subsequently obtained, but must be treated as an entirely invalid and null deed which would necessitate the execution of a new assignation after confirmation. On these grounds I think the Lord Ordinary should have proceeded with the case.

LORD MACKENZIE and LORD SKERRINGTON concurred.

The Court recalled the interlocutor reclaimed against, repelled the first plea-in-law for the defender, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Pursuer—Chree, K.C.—Wark. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defender—Mitchell. Agents—Fyfe, Ireland, & Company, W.S.

Saturday, January 10, 1914.

SECOND DIVISION.

[Lord Dewar, Ordinary.

GRANT *v.* CHISHOLM.

Reparation—Slander—Issue—Innuendo—"Quack"—Medical Qualification.

The superintendent of a lunatic asylum brought an action of damages for slander in which he averred that the defender had said of him, "What does that mannie (the pursuer) know about treating lunatics? He is just a quack. We will sack him yet"—thereby representing "that the pursuer was unfit for his duties as superintendent of the asylum, that he did not know his work, and was not properly qualified for the work in